

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 14 of 18

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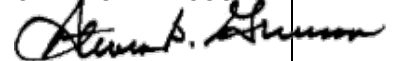
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DISTRICT COURT

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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
MONDAY, APRIL 4, 2022

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RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 12

17

18

APPEARANCES

19

For the Plaintiffs:

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

20

21

For the Defendants:

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

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RECORDED BY: MELISSA BURGNER, COURT RECORDER

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FOR THE PLAINTIFFS

MARKED

RECEIVED

None

FOR THE DEFENDANTS

MARKED

RECEIVED

None

1 Las Vegas, Nevada, Monday, April 4, 2022

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3 [Case called at 9:10 a.m.]

4 THE COURT: Good morning, everyone.

5 ATTORNEYS COLLECTIVELY: Good morning, Your Honor.

6 THE COURT: Please be seated. It's so nice to be able to see
7 everyone. This is amazing. It's the first time in almost two years I can
8 see people.

9 Do we have all of our IT issues fixed?

10 THE CLERK: Yes, we are good to go.

11 THE COURT: All right. Are the parties ready for the jury?

12 MR. TERRY: Yes, Your Honor.

13 THE COURT: Thank you.

14 MR. ROBERTS: Yes, Your Honor.

15 THE COURT: Just how long, Mr. Sharp, do you anticipate
16 roughly your closing to be.

17 MR. SHARP: Probably about the same as my opening. Right
18 around an hour and 15.

19 THE COURT: Mr. Roberts?

20 MR. ROBERTS: Somewhere between an hour and 15 and an
21 hour-and-a-half, Your Honor.

22 THE COURT: Thank you.

23 MR. ROBERTS: Thank you.

24 THE COURT: All right. We're ready.

25 THE MARSHAL: All rise for the jury.

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

2 THE MARSHAL: All jurors present.

3 THE COURT: Thank you. Do the parties stipulate to the
4 presence of the jury?

5 MR. TERRY: Yes, Your Honor.

6 MR. ROBERTS: Yes, Your Honor.

7 THE COURT: Thank you. Please be seated.

8 Ladies and gentlemen of the jury, the Court will now instruct
9 you on the law as it applies to this case. Each of you should have your
10 own copy of the jury instructions that were in your chair. You can follow
11 along, and you can take notes on these documents. You will be taking
12 these to the jury deliberation room with you. At the end of the packet,
13 there is the verdict form. So the last two pages should be the verdict
14 form that you will have. The Court will now read the instructions.

15 Jury instruction number 1. Members of the jury, it is my
16 duty as Judge to instruct you in the law that applies to this case. It is
17 your duty as jurors to follow these instructions and to apply the rules of
18 law to the facts as you find them from the evidence. You must not be
19 concerned with the wisdom of any rule of law stated in these
20 instructions. Regardless of any opinion you may have as to what the law
21 ought to be, it would be a violation of your oath to base a verdict upon
22 any other view of the law than that given in the instructions of the court.

23 2. The purpose of the trial is to ascertain the truth. Your
24 purpose as jurors is to find and determine the facts. Under our system
25 of civil procedure, you are the sole judge of the facts. You determine the

1 facts from the testimony you hear and the other evidence including
2 exhibits introduced in court. It is up to you determine the inferences
3 which you feel may be properly drawn from the evidence. It is especially
4 important that you perform your duty of determining the facts diligently
5 and conscientiously. For ordinarily, there is no means of correcting an
6 erroneous determination of facts by a jury.

7 3. If in these instructions any rule, direction, or idea is
8 repeated or stated in different ways, no emphasis thereon is intended by
9 me, and none may be inferred by you. For that reason, you are not to
10 single out any certain sentence or any individual point or instruction and
11 ignore the others. But you are to consider all the instructions as a whole
12 and regard each in the light of all the others. The order in which these
13 instructions are given has no significance as to their relative importance.

14 4. Although you consider only the evidence in the case in
15 reaching a verdict, you must bring to the consideration of the evidence
16 your everyday common sense and judgment as reasonable men and
17 women. Thus, you are not limited solely by what you see and hear as
18 the witnesses testify. You may draw reasonable inferences from the
19 evidence which you feel are justified in the light of common experience
20 keeping in mind that such inferences should not be based on speculation
21 or guess.

22 A verdict may never be influenced by sympathy, prejudice, or
23 public opinion. Your decision should be the part of sincere judgment
24 and sound discretion in accordance with these rules of law.

25 5. If during trial I have said or done anything which has

1 suggested to you that I am inclined to favor the claims or position of any
2 party, you will not be influenced by any such suggestion. I have not
3 expressed, nor intended to express, nor have I intended to intimate any
4 opinion as to which witnesses are or are not worthy of belief, what facts
5 are or are not established, or what inference should be drawn from the
6 evidence. If any expression of mine has seemed to indicate an opinion
7 relating to these matters, I instruct you to disregard it.

8 6. The Defendant in this case is a corporation. A corporation
9 is entitled to the same fair and unprejudiced treatment as an individual
10 would be under like circumstances, and you should decide the case with
11 the same impartiality you would use in deciding a case between
12 individuals.

13 7. Throughout the following instructions, I instructed a party
14 must prove certain claims or allegations either by a preponderance of
15 the of the evidence or by clear and convincing evidence. The meanings
16 of these terms is as follows. Preponderance of the evidence means such
17 evidence as when considered and weighed against that opposed to it has
18 more convincing force and produces in your mind a belief that was
19 ought to be proved is more probably true than not true.

20 Clear and convincing evidence means such evidence that will
21 produce in your mind a firm belief or conviction as to the allegations
22 sought to be established. It is an immediate degree of proof. Being
23 more than a preponderance of the evidence, but not the extent of such
24 certainty as required to prove beyond a reasonable doubt. Proof by clear
25 and convincing evidence is proof which persuades you that the truth of

1 the contentions is highly likely.

2 In determining whether a party has met either burden, you
3 must consider all the evidence whether introduced by the Plaintiff or
4 Defendant.

5 8. The evidence which you are to consider in this case
6 consists of the testimony of the witnesses, the exhibits, and any facts
7 admitted or agreed to by counsel. There are two types of evidence,
8 direct and circumstantial.

9 Direct evidence is direct proof of a fact such as testimony by
10 a witness about what the witness personally saw or heard or did.
11 Circumstantial evidence is the proof of one or more facts from which you
12 could draw another fact.

13 The law makes no distinction between the weight to be given
14 either direct or circumstantial evidence. Therefore, all of the evidence in
15 this case, including the circumstantial evidence, should be considered by
16 you in arriving at your verdict. Statements, arguments, and opinions of
17 counsel are not evidence in the case. However, if the attorneys stipulate,
18 meaning to agree to the existence of a fact, you must accept the
19 stipulation of evidence and regard that fact as proved. Questions are not
20 evidence. Only the answer is evidence. You should consider a question
21 only if helps you understand the witness's answer. Do not assume that
22 something is true just because a question suggests that it is.

23 You must also disregard any evidence to which an objection
24 was sustained by the Court and any evidence ordered stricken by the
25 Court. Anything you may have seen or heard outside of the courtroom is

1 not evidence and must also be disregarded.

2 9. You must decide all questions of fact from the evidence
3 received in this trial and not from any other authority. You must not
4 make any independent investigation of the facts or the law or consider or
5 discuss facts as to which there is no evidence. This means, for example,
6 that you must not on your own visit the scene, conduct experiments, or
7 consult reference works for additional information.

8 10. The credibility or believability of a witness should be
9 determined by his or her manner upon the stand, his or her relationship
10 to the parties, his or her fears, motives, interests, or feelings, his or her
11 opportunity to have observed the matter to which he or she testified, the
12 reasonableness of his or her statements, and the strength or weaknesses
13 of his or her recollections.

14 If you believe that a witness has lied about any material fact
15 in the case, you may disregard the entire testimony of that witness or
16 any portion of this testimony which was not proved by other evidence.

17 11. Discrepancies in a witness' testimony or between his
18 testimony and that of others, if there were any discrepancies, do not
19 necessarily mean that the witness should be discredited. Failure of
20 recollection is a common experience. An innocent misrecollection is not
21 uncommon. It is also a fact also that two persons witnessing an incident
22 or transaction often will see or hear it differently. Whether a discrepancy
23 pertains to a fact of importance or only to a trivial detail should be
24 considered and weighed with significance.

25 12. During the trial, deposition testimony was provided to

1 you. A deposition is the testimony of a person taken before trial. At a
2 deposition, the person took the same oath to tell the truth that would be
3 taken in court and is questioned by the attorneys. You must consider the
4 deposition testimony that was presented to you in the same way as you
5 consider testimony given in court.

6 13. Certain evidence was admitted for a limited purpose. At
7 the time this evidence was admitted, it was explained to you that it could
8 not be considered by you for any other purpose than the limited purpose
9 for which it was admitted. You may only consider that evidence for the
10 limited purpose that I described and not for any other purpose.

11 14. The parties may have shown you charts and summaries
12 to help explain the facts. The charts and summaries themselves,
13 however, are not evidence or proof of any facts. Charts and summaries
14 are only good as the underlying evidence that supports them. You
15 should, therefore, give them only such weight as you think the
16 underlying evidence deserves.

17 15. An attorney has a right to interview a witness for the
18 purpose of learning the testimony the witness will give. The fact that the
19 witness has talked to an attorney and told the attorney what he or she
20 would testify to does not reflect adversely on the truth of the testimony
21 of the witness.

22 16. A witness who has special knowledge, skill, experience,
23 training, or education in a particular science, profession, or occupation is
24 an expert witness. An expert witness may give his or her testimony as
25 to any matter in which he or she is skilled. You should consider such

1 expert opinion and weigh the reasons, if any, given for it. You are not
2 bound, however, by such opinion. Give it the weight to which you deem
3 it entitled whether that be great or slight, and you may reject it if in your
4 judgment the reasons for it are unsound.

5 17. An expert witness has testified about his or her reliance
6 upon information that may not have been admitted into evidence.
7 Reference by the expert witness to this material is allowed so that the
8 expert witness may tell you what he or she relied upon to form his or her
9 opinions. You may not consider the material as evidence in this case.
10 Rather, you may only consider the material to determine what weight, if
11 any, you will give to the expert's opinions.

12 18. A hypothetical question has been asked of an expert
13 witness. In a hypothetical question, the expert witness is told to assume
14 the facts, the truth of certain facts, and the expert witness is asked to
15 give an opinion based upon those assumed facts. You must decide if all
16 the facts assumed in the hypothetical question have been established by
17 the evidence. You can determine the effect of that assumption upon the
18 value of the opinion.

19 19. In this action, Plaintiff, Sandra L. Eskew, as special
20 administrator of the Estate of William G. Eskew, seeks to establish
21 liability for breach of the implied covenant of good faith and fair dealing,
22 otherwise known as bad faith, against Sierra Health and Life Insurance
23 Company, Incorporated. I will now instruct you on the law pertaining to
24 this claim.

25 20. In every insurance contract, there is an implied covenant

1 of good faith and fair dealing, that neither the insurance company nor
2 the insured will do anything to injure the rights of the other party to
3 receive the benefits of the agreement. The relationship of the insured to
4 an insurer is one of special confidence and akin to that of fiduciary.

5 A fiduciary relationship exists when one has the right to
6 expect trust and confidence in the integrity and fidelity of another. This
7 special relationship exists in part because as insurance companies are
8 well aware, consumers contract for insurance to gain protection, piece of
9 mind, and security against calamity.

10 To fulfill its implied covenant of good faith and fair dealing,
11 an insurance company must give at least as much consideration to the
12 interests of the insured as it gives to its own interests.

13 21. In order to establish a breach of the implied covenant of
14 good faith and fair dealing, Plaintiff, Sandra Eskew as a special
15 administrator of the Estate of William George Eskew, must prove the
16 following by a preponderance of the evidence.

17 1) The proton beam therapy was a covered service under the
18 terms of the agreement of coverage.

19 2) Sierra Health and Life had no reasonable basis for its
20 February 5th, 2016 denial of the prior authorization claim.

21 3) Sierra Health and Life knew or recklessly disregarded the
22 fact that there was no reasonable basis for the February 5th, 2016 denial
23 of the prior authorization claim.

24 And 4) Sierra Health and Life's denial was a legal cause of
25 harm to William Eskew.

1 22. The agreement of coverage is an insurance contract. The
2 interpretation of an insurance contract is subject to legal standards.

3 1) The terms of the insurance contract are construed in their
4 plain, ordinary, and popular meaning.

5 2) Any clause within the insurance contract that provides
6 coverage is interpreted broadly to -- for the greatest possible coverage to
7 the insured.

8 3) An exclusion or a restriction to coverage in the insurance
9 contract must be interpreted narrowly against the insurer.

10 4) If it is unambiguous, the insurance contract is construed
11 as written and you may not increase the obligations of the parties if the
12 contract intentionally and unambiguously limited such obligations.

13 5) If the insurance contract is ambiguous, any ambiguity
14 must be construed in favor of the insured and to effectuate the insured's
15 reasonable expectations if the insurance contract is ambiguous, if a
16 provision at issue as drafted is subject to more than one reasonable
17 interpretation.

18 23. An insurer has a duty to investigate a claim filed by its
19 insureds. When investigating a claim, an insurer has a duty to diligently
20 search for and to consider evidence that supports an insured's claimed
21 loss. And insurer may not reasonably and in good faith deny a prior
22 authorization claim without thoroughly investigating the claim.

23 24. The insurer is not liable for bad faith for being incorrect
24 about a policy coverage as long as the insurer had a reasonable basis to
25 take the position that it did. Fact faith requires an awareness that no

1 reasonable basis exists to deny insured's claims.

2 25. There is a law in the State of Nevada called the Nevada
3 Unfair Insurance Practice Act which prohibited Sierra Health and Life
4 from doing any one of the following.

5 1) Misrepresenting to an insured pertinent facts or insurance
6 policy provisions related to any coverage at issue.

7 2) Failure to provide promptly to an insured a reasonable
8 explanation of the basis in the insurance policy with respect to the facts
9 of an insurance claim and the applicable law of the denial of the claim.

10 The violations of any provision of the Nevada Unfair
11 Insurance Practice Act may be evidence of a breach of the implied
12 covenant of good faith and fair dealing. The presence or absence of any
13 of these factors alone is not enough to determine whether the
14 Defendant's conduct was or was not in bad faith. You must consider the
15 Defendant's conduct as a whole in making this determination.

16 26. At all relevant times, there existed insurance regulations
17 in Nevada that provided as follows.

18 1) Each insurer shall fully disclose to a first-party claimant all
19 pertinent benefits, coverages, or other provisions under which a claim is
20 presented. A first-party claimant includes a person asserting a right to
21 payment under an insurance contract.

22 2) Within 30 working days after receipt by the insurer of a
23 properly executed proof of loss, the first-party claimant must be advised
24 of the acceptance or denial of the claim by the insurer. No insurer may
25 deny a claim on the grounds of the specific policy provision, condition,

1 or exclusion unless reference to that provision, condition, or provision is
2 included in the denial. Denial must be given to the first-party claimant in
3 writing and filed and retained in the insurer's claim file. If the claim of
4 the first-party claimant is accepted, the insurer shall pay the claim within
5 30 days after accepted.

6 The failure to comply with a regulation may be evidence of a
7 breach of the implied covenant of good faith and fair dealing.

8 27. A legal cause of injury, damage, loss, or harm is a cause
9 which is a substantial factor in bringing about the injury, damage, loss,
10 or harm.

11 28. A substantial factor is a factor that a reasonable person
12 would consider to have contributed to harm. It must be more than a
13 remote or trivial factor. It does not have to be the only cause of harm.
14 Conduct is not a substantial factor in causing harm if the same harm
15 would have occurred without that conduct.

16 29. In determining the amount of losses, if any, suffered by
17 William Eskew as a legal result of the breach of the implied covenant of
18 good faith and fair dealing, you will take into consideration the nature,
19 extent, and duration of the damage Mr. Eskew sustained, and you will
20 decide upon a sum of money sufficient to reasonably and fairly
21 compensate for the physical pain, mental suffering, anguish, disability,
22 loss of enjoyment of life, and emotional distress to Mr. Eskew. Plaintiff
23 does not claim Sierra Health and Life caused or contributed to Mr.
24 Eskew's death.

25 30. No definite standard is prescribed by law by which to fix

1 reasonable compensation for physical pain, mental suffering, anguish,
2 disability, loss of enjoyment of life, and emotional distress. Nor is the
3 opinion of any witness required as to the amount of such reasonable
4 compensation. You must use your judgment to decide upon a
5 reasonable amount based on the evidence and your common sense.

6 21 [sic]. A party cannot recover damages for losses it could
7 have avoided by reasonable efforts. The burden is on the party whose
8 wrongful acts resulted in the damages to prove that the damages might
9 have been lessened by reasonable diligence and expenditures on the
10 party -- on the part of the party seeking damages. Reasonable diligence
11 does not require that the party seeking damages ask the party who's
12 wrongful conduct resulted in the damages to remedy the injury,
13 detriment, harm, or loss resulting from the alleged wrongful conduct.

14 32. If you find that Plaintiff, Sandra Eskew as the special
15 administrator for the Estate of William Eskew, has proved that Sierra
16 Health and Life has breached the implied covenant of good faith and fair
17 dealing, you have -- you may then consider whether you should award
18 punitive damages against the Defendant for the sake of example and by
19 way of punishment. You may in your discretion order such damages if,
20 but only if, you find by clear and convincing evidence that either
21 Defendant acted with fraud, malice, or oppression in the conduct upon
22 which you base your finding of liability.

23 Malice means conduct which is carried on by Sierra Health
24 and Life with a conscious disregard of the rights of William Eskew.

25 Oppression means subjecting William Eskew to cruel and

1 unjust hardship in conscious disregard of his rights.

2 Conscious disregard means knowledge of the probable
3 harmful consequences of a wrongful act and a willful and deliberate
4 failure to act to avoid those consequences.

5 The purposes of punitive damages are to punish a
6 wrongdoer that acts with fraud, oppression, and/or malice in harming a
7 plaintiff and deter similar conduct in the future, not to make a plaintiff
8 whole for her injuries. Consequently, a plaintiff is never entitled to
9 punitive damages as a matter of right and whether to award punitive
10 damages against a defendant is entirely within your discretion.

11 At this time, you are to decide only whether the Defendant
12 engaged in wrongful conduct causing actual harm to the Plaintiff with
13 the requisite state of mind to permit an award of punitive damages
14 against the Defendant; and if so, whether an award of punitive damages
15 against the Defendant is justified by the punishment and deterrent
16 purposes of punitive damages under the circumstances of this case.

17 If you decide an award of punitive damages is justified, you
18 will later decide the amount of punitive damages to be awarded after
19 you have heard additional evidence and instruction.

20 33. A breach of the implied covenant of good faith and fair
21 dealing by itself does not mean that a defendant acted with malice or
22 oppression.

23 34. I have given you instructions embodying various rules of
24 law to help guide you to a just a lawful verdict. Whether some of these
25 instructions will apply will depend on what you find to be the facts. The

1 fact that I have instructed you on various subjects in this case including
2 that of damages must not be taken as indicating an opinion of the Court
3 as to what you should find to be the facts or as to which party is entitled
4 to your verdict.

5 35. It is your duty as jurors to consult with one another and
6 to deliberate with a view toward reaching an agreement if you can do so
7 without violence to your individual judgment. Each of you must decide
8 the case for yourself, but you do so only after consideration of the case
9 with your fellow jurors, and you should not hesitate to change an
10 opinion when convinced that it is erroneous.

11 However, you should not be influenced to vote in any way on
12 any questions submitted to you by the single fact that a majority of the
13 jurors, or any of them, favor such a decision. In other words, you should
14 not surrender your honest convictions concerning the effect or weight of
15 evidence for the mere purpose of returning a verdict or solely because of
16 the opinion of the other jurors.

17 Whatever your verdict is, it must be the product of a careful
18 and impartial consideration of all of the evidence in the case under the
19 rules of law as given to you by the Court.

20 36. If during your deliberations you desire to be further
21 informed on any point of law or hear again portions of the testimony,
22 you must reduce your request to writing, signed by the foreperson. The
23 officer will then return you to the court where the information sought will
24 be given to you in the presence of the parties or their attorneys.
25 Remember, the Court is not at liberty to supplement the evidence.

1 37. When you retire to consider your verdict, you must select
2 one of your number to act as foreperson who will preside over your
3 deliberation and who will be your spokesman here in court. During your
4 deliberation, you will have all the exhibits which were admitted into
5 evidence, these written instructions, and a special verdict form which has
6 been prepared for your convenience.

7 In a civil action, three-fourths of the total number of the
8 jurors may find and return a verdict. This is a civil action. As soon as six
9 or more of you have agreed upon each answer required by the directions
10 in the special verdict form, you must have the verdict signed and dated
11 by your foreperson and then return it to the Marshal who will then return
12 it to this room.

13 38. You will now listen to the arguments of counsel who will
14 endeavor to aid you to reach a proper verdict by refreshing in your
15 minds the evidence and by showing the application thereof to the law.
16 But whatever counsel may say, you will bear in mind that it is your duty
17 to be governed in your deliberation by the evidence as you understand it
18 and remember it to be and by the laws given to you in these instructions
19 and return a verdict which, according to your reason and candid
20 judgment, is just and proper.

21 Thank you. Mr. Sharp.

22 PLAINTIFFS' CLOSING ARGUMENT

23 MR. SHARP: Good morning. Excuse me. Allergies.

24 Good morning, ladies and gentlemen, for this closing
25 argument. And I'm going to tell you a little bit about what's going to

1 happen today just so you know. I'm going to give closing argument on
2 behalf of William Eskew, and then the Defense is going to give their
3 closing argument, and then Mr. Terry is going to give what's called a
4 rebuttal. And then after that, you're going to go back into the jury room
5 and begin deliberations. And when six of eight of you reach a verdict,
6 that's the verdict.

7 So what I thought about over this weekend is, you know,
8 kind of how to approach this. And first, I want to point out to you what
9 we talked about a little bit three weeks ago and that was the institution
10 which you're a part of. And that, of course, is the American jury system.
11 And it's an institution that's important for this community, our state, and
12 our country. And it's the one place that people are equal among the
13 court of law.

14 You just heard jury instruction 6. It says a corporation is a
15 person. So just like a person, they're responsible and accountable for
16 their conduct.

17 And in this system, it's the only place where the people that
18 made the decision to take an oath, to follow the law, to follow the facts to
19 make a decision. And what I'm here to help you with is that I think when
20 you follow the law and you follow the facts, the only judgment that can
21 be rendered in this case is for the Estate of William Eskew.

22 So what I'm going to do -- Jason, if we could pull up the jury
23 instruction number 20.

24 You have the jury instructions in front of you. I know we've
25 been having technological problems, so I know that some of this is hard

1 to see, so whatever is easiest. I'm going to point out certain parts of
2 these instructions to guide you. And so this is the jury instruction
3 number 20, and it's really one of the first things you've heard in this case
4 when the Judge pre-instructed you on the law, and we've talked about
5 this instruction. What I want to point out to you -- Jason, if you could
6 just highlight where it says, "this special relationship exists in part
7 because insurance companies are well aware consumers contract for
8 insurance to gain protection, peace of mind, and security against
9 calamity."

10 This is legal words, but it's common to our beliefs, common
11 to our experiences. Of course, insurance companies are in the business
12 of providing protection, peace of mind, and security against calamity.
13 And of course, an event of calamity would be being diagnosed with
14 stage 4 lung cancer.

15 So that's the stage that we present you with. Now the
16 instruction continues. "To fulfill its implied covenant of good faith and
17 fair dealing, an insurance company must give at least as much
18 consideration to the interests of the insured as it gives to its own
19 interest." Remember that was when Mr. Prater was talking about the
20 equal consideration, and he was using his hand gestures. This is the
21 hallmark of an insurance company's obligation. But when the claim --
22 come time to pay a claim or authorize a claim, you have to consider the
23 interests of your insured at least equal to your own. That makes sense.

24 So, let me go -- Jason, if we can go to the PowerPoint
25 quickly.

1 Now, in the beginning of opening statement, I -- we had this
2 PowerPoint slide as to what we were going to prove to you. And the first
3 thing we said to you we were going to prove what the insurance industry
4 standards or if they were client handlings, what their prior authorizations
5 are.

6 And we brought to you Mr. Prater, a professor of many years
7 at Santa Clara Law School teaching insurance law, dedicated his
8 professional career to fair claims handling and making sure that
9 insurance companies act fairly and fulfill their promise. And he spoke to
10 you about these various standards. And I will show you today that most
11 if not all of the things he was talking about are reflected in the law.

12 Then we presented to you, primarily through Mr. Prater, how
13 in this particular case those standards were knowingly violated.
14 Beginning in 2011 when the claim standards were changed at Sierra
15 Health and Life through February 5, 2016 when the prior authorization
16 was wrongfully denied. And there has been other evidence of violations.

17 And then we said to you the third thing we're going to prove
18 to you with the evidence is the harm to Mr. Eskew. And we presented
19 that harm in two fashions. In anxiety, distress, despair that the denial
20 itself caused. And then the second aspect is the injury to the
21 esophagitis. And as you go through the evidence in the jury deliberation
22 room, you're told a jury instruction says that you bring your life
23 experience to this table and your common sense.

24 And so we didn't just say this is what we're going to prove. I
25 mean, we proved it. We didn't -- but we brought through deposition

1 testimony Dr. Liao who is by everybody's account, even the -- even
2 UnitedHealthcare, she is the foremost expert in this courtroom on
3 radiation oncology for lung cancer and the use of that therapy for proton
4 beam -- or the use of proton beam therapy to treat lung cancer. And she
5 explained to you that because of the IMRT, Mr. Eskew suffered grade 3
6 esophagitis. And then Dr. Chang explained that to you how it extended
7 into the rest of his life. And then the family came to you and delivered
8 their own experiences living with their father or husband to explain to
9 you that the two harms followed Mr. Eskew through the rest of his life.

10 And I point these things out because I want to contrast
11 something for you. What did the Defense do? They bring in Dr. Owens
12 who literally says, well, we made up our own standard. Remember he
13 had the whole NCQA stuff and all that flashy stuff; but at the end of the
14 day when we asked him the question are we here about Nevada law, he
15 said yes, and had never reviewed Nevada law. That's remarkable.

16 Then the harm. First, it's we're going to go after Dr. Chang.
17 Well, they couldn't do that. Dr. Chang knows his business. So then they
18 couldn't do that. They tried to kind of go after Mr. Prater because they
19 didn't like what he said. They couldn't do that. So then we bring the
20 family. And I got to say in a million years, things happen in a courtroom.
21 I never thought that an insurance company like Sierra Health and Life,
22 the most powerful company in this community, in our state, would stoop
23 to that, what happened in front of you. To call honest people liars.

24 MR. ROBERTS: Objection, Your Honor. Inconsistent with
25 what happened in the courtroom and inappropriate under *Lioce*.

1 THE COURT: Sustained.

2 MR. SHARP: Called him embellishing. That was the
3 question. Embellishing. Because they didn't have the guts to say the
4 other word. In our community, in our state, you don't do that to honest
5 people.

6 So then they even got worse. They said we're going to prove
7 to you that proton beam therapy is unproven and medically necessary.
8 They made a whole thing about oh, we brought this -- we had this
9 doctor, qualified doctor, look at the situation. He decided proton beam
10 therapy wasn't reasonable. And this Texas doctor -- remember that in
11 opening statement, this Texas doctor treated Mr. Eskew.

12 Well, let's just look at the evidence. Proton beam therapy is
13 proven and medically necessary. Who did you hear the evidence from
14 on that point? Who's that listed? MD Anderson? Dr. Liao? Dr. Chang?
15 Remember Dr. Cohen, the local radiation oncologist? He said yeah, I
16 refer people to Loma Linda California Proton Center for protons.
17 California Proton Center, if you recall, is the same place Dr. Chang
18 operates.

19 So then we have the Mayo Clinic. We have, as I said,
20 California Proton Center Loma Linda, University of Kansas where Dr.
21 Kumar used to be in charge of or something like that, New York Proton
22 Center, the proton center operated by the affiliate of Sierra Health and
23 Life, Pro Health Proton, an affiliate to Sierra Health and Life, United
24 Healthcare. And why I say that is you heard from Dr. Flood -- Mr. Flood
25 about how United Healthcare operates the medical arm and the

1 insurance arm. Well, they're investing in the -- on the medical arm into
2 the New York Proton Center. And on top of that, in 2019 without any
3 additional evidence at the same time the New York Proton Center is
4 opening up, conveniently the medical policy changes and says well, if
5 the right circumstances exist, we're going to pay for proton beam
6 therapy.

7 Now, Medicare, FDA, I mean, the list could go on and on and
8 on. And who did they bring. Dr. Chandra, an economist. An economist.
9 I'm sure he's a fine economist. He's a smart guy. But he's not a doctor,
10 and he admitted that on the stand.

11 And then they brought Dr. Owens, the manage care
12 consultant, whose made his living off of defending this system that
13 you're in front of. And he's a family practitioner. I'm not here to insult
14 family practitioners, but let's be reasonable. And he hasn't treated
15 anybody for decades.

16 Then we bring in Dr. Kumar. And I'll tell you I've seen a lot in
17 a courtroom. I've never seen a witness implode like Dr. Kumar. I don't
18 know what Dr. Kumar thought when he agreed to be an expert for \$800
19 an hour and talk to you about proton beam therapy knowing that he had
20 never treated anybody with proton beam therapy, when he got up on the
21 stand and actually told you, I think, I don't have the exact words, but that
22 he was more qualified than Dr. Liao. I mean, never treated somebody
23 with proton beam therapy, and he's going to tell you I know more than a
24 world-renowned radiation oncologist who specializes in lung cancer.
25 That's not credible. But then when he was pushed, he started to

1 implode. And then when we asked him well, did you know about the
2 Proton Beam Center, then he really imploded because he couldn't
3 uphold the opinions he gave.

4 And so what you're faced with in this case is really a simple
5 calculation, a simple issue. You have the largest health insurer in this
6 state, Sierra Health and Life, who thinks they're above the law. It's that
7 simple. That simple.

8 Now, Jason, can you go to Exhibit 5 and 13?

9 We're going to point this out because this is what happens
10 when insurance companies like Sierra Health and Life think they're
11 above the law. If you remember, at the start of opening statement,
12 Sierra Health and Life actually in their opening statement substituted
13 Sierra Health and Life and replaced it with Dr. Ahmad when they were
14 talking about the elements of this case. So they basically said this is a
15 case between Dr. Ahmad and Dr. Liao. Well, I think we know who won
16 that.

17 But more importantly, look at the credibility that they came
18 up before you, and this was the thing -- this highlighted thing.
19 Remember on the examination by Mr. Roberts of Dr. Ahmad where he
20 was trying to prove to you that he knew something about radiation
21 oncology, and he cited to that highlighted provision that had nothing to
22 do with the amount of radiation and any of the issues in this case.
23 Remember Dr. Chang said anybody who would think this is a perfect
24 issue doesn't know anything about radiation oncology. He literally said,
25 Dr. Chang literally said, if an intern doing his rounds just seeing if he

1 wants to be a radiation oncologist after a month couldn't interpret the
2 highlighted phrase, I'd be questioning him. Yet they, Sierra Health and
3 Life, thought oh, that's okay. We'll just bring that forward to throw
4 confusion into the mix.

5 Now, let's go to the elements.

6 Jason, if you go to the next slide. I'm sorry, that -- we need
7 to go to -- well, yes.

8 I want to -- I want to kind of give you a guide as to where I'm
9 going. So what I want to know talk about are the insurance industry
10 standards, and I'm going to reference the legal issues. So the first thing
11 we're going to do is we're going to go to instruction 20.

12 Twenty-one I think it is, Jason. There it is.

13 And so one of the things you've been asked to do, I have the
14 verdict form because I'm just holding it, and there's three questions.
15 We're going to go through each part of this verdict form for you. And
16 the first question that we're going to deal with is did Sierra Health and
17 Life breach the duty of good faith and fair dealing? And there's four
18 elements. Whether the proton beam therapy was a covered service.
19 We've proven that, and I will demonstrate to you why it was a covered
20 service. Sierra Health and Life had no reasonable basis for its February
21 5, 2016 denial of the prior authorization claim. And the third one is kind
22 of convoluted. It says Sierra Health and Life knew or recklessly
23 disregarded the fact that there was no reasonable basis for the February
24 5, 2016 denial.

25 So I want to combine two and three together, is the concept

1 of reasonable basis is industry standard. That's why Mr. Prater was
2 explaining all of these industry standards, because the insurance
3 company, remember he said Sierra Health and Life knows all of these
4 industries standards.

5 So when you deny a claim in this regard of the industry
6 standards, that's acting with no reasonable basis, with knowledge that
7 there's no reasonable basis. So two and three are really tied into Mr.
8 Prater's testimony.

9 Now the fourth element is Sierra Health and Life 's denial
10 was a legal cause of harm to Mr. Eskew, and the only thing I want to
11 point out now, because I've talked about the harm, is that legal cause
12 means substantial factor, and we'll get in, and we'll show you what
13 substantial factor means.

14 So then next, Jason, could you go to the next jury instruction
15 that we had, jury instruction number 29.

16 I'm just trying to -- I'm just orienting you to where we are,
17 and what you're being asked to consider. So the one thing we really
18 haven't talked about much, certainly not in this trial, we talked a little bit
19 about it in jury selection, is what is it that you're being asked to assess
20 for the injury to William Eskew?

21 And if you go down to the bottom, Jason.

22 And it just says, you will decide upon a sum of money,
23 sufficient to reasonably and fairly compensate for the physical pain,
24 mental suffering, anguish, disability, loss of enjoyment of life and
25 emotional distress to Mr. Eskew; those are the elements. And what you

1 can't consider is whether or not Sierra Health and Life caused the death.
2 I mean, that was the cancer.

3 I don't know why Sierra Health and Life repeatedly, over and
4 over again said, "But we didn't kill Mr. Eskew," like that's some kind of
5 get out jail free pass card. I don't know if that was -- the purpose was
6 confusion, because we knew that you would be instructed on that issue.
7 You're being asked to assess the damages from February 5, 2016 to
8 March 12, 2017.

9 So let's go to the slide, next jury instruction 30.

10 This instruction just tells you, and we'll get more into this
11 because I know that the concept of evaluating physical pain, mental
12 suffering, it's not something that you're, you know, that's -- it's an
13 esoteric kind of thing; we'll get into that.

14 But I just want to point out that when it comes to the pain,
15 physical suffering, and distress, there's no witnesses required to come to
16 link that together, you use your common sense, that's what the second
17 sentence is. You must use your judgment to decide upon a reasonable
18 amount. Yeah. You must use your judgment to decide upon a
19 reasonable amount based on the evidence and your common sense.
20 And we'll get into that. I mean, that's your common sense? So we'll get
21 into how you utilize that, you know, I'm orienting you to where we're
22 going.

23 So, Jason, we go to the next -- to instruction 30 -- the next
24 one. Thirty, I think it's 30, it's the punitive damage instruction. It's 32,
25 sorry about that.

1 So this is another thing we haven't talked about much. The
2 law recognizes what's called punitive damages and it's a damage that's
3 used to punish and deter wrongful conduct when it raises to a level. So
4 when somebody decides they knowingly are above law, that's the kind of
5 case that you have punitive damages for. And so what we're going to
6 talk about -- Jason, can you go to the next paragraph.

7 There's two -- three terms you're going to hear about, to my
8 argument; the first is malice. That's just -- you have to find malice to
9 award punitive damages, or you have to find oppression. And malice is
10 basically conduct carried on by Sierra Health and Life, with a conscious
11 disregard of the rights of Mr. Eskew. And when you talk about Mr.
12 Eskew's rights, you go right back to the duty of good faith and fair
13 dealing, and the industry standard is reflected in jury instructions in the
14 testimony of Mr. Prater.

15 Then conscious disregard, means knowledge of the probable
16 harmful consequences of a wrongful act, and a willful and deliberate
17 failure to act to avoid those consequences. So let me talk to you a little
18 bit about that point, because there's been some suggestion in the
19 courtroom that because Sierra Health and Life is in the business of
20 providing managed care, that it can just disregard the normal rules of an
21 insurance company. They're not -- never going to say it that directly, but
22 that's what the message is. And so when you think about that for a
23 moment, when you're an individual, when you as an individual accept,
24 voluntarily, more responsibility, you deliver with that more care.

25 And what I -- you know, maybe an example would be -- it

1 would be one thing if you're driving a Pinto -- or a Pinto don't exist
2 anymore, but it's one thing if you're driving a small car and, you know,
3 that's not smart to violate the rules of the road, but if you're driving a big
4 truck that can inflict harm, you've accepted a higher responsibility for
5 safety, and that's what's happened here.

6 Nobody told Sierra Health and Life, you have to get into the
7 business of the utilization management, that was their choice. So as an
8 individual, when they made that choice, they accepted a higher
9 responsibility than like say State Farm, or people processing auto loans.
10 So they knew they knew, they knew the rules.

11 They knew they were violating the rules, and they knew that
12 the probable consequence of that was people wouldn't get treatment
13 recommended by their physicians, even when it was somebody as
14 accomplished as Dr. Liao. And they knew and willfully and deliberately
15 failed, ignored those consequences; that's what we're talking about with
16 conscious disregard.

17 So let's go, Jason, I'm talking now about the industry
18 standard, so let's go to three instruction 22.

19 This is an insurance -- this is the instruction that tells you
20 how insurance companies are supposed to interpret their insurance
21 contracts. And you'll read this -- you'll read this in the deliberations, and
22 you will know this is almost verbatim what Mr. Prater told you, the exact
23 words, but this was the exact thing Mr. Prater was talking about when he
24 said, you've got to put your good faith eyeglasses on.

25 So the first step is, the terms of the insurance contract are

1 construed in their plain ordinary and popular meaning. That means you
2 don't bring in medicalese language into your interpretation, it's the plain
3 ordinary and popular meaning.

4 Then the second thing is, any clause within the insurance
5 contract that provides coverage is interpreted broadly, to afford the
6 greatest possible coverage to the insured. This is the good faith
7 eyeglasses. And what you remember is that whether something is a
8 medically necessary service, is a coverage provision, it's medically
9 necessary covered services. So this is a coverage provision that Sierra
10 Health and Life was faced with. So they had to, under the law, look at
11 the terms of the insurance policy as broadly as possible to find the
12 proton beam therapy was covered for Mr. Eskew.

13 Now, the next thing is, an exclusion or restriction to coverage
14 in the insurance contract must be interpreted narrowly and against the
15 insurer. And what that just basically means, if you're going to put in
16 limits to what you're supposed to do, or what you have to look at, and
17 we'll get into that, you have to interpret that provision against yourself,
18 coverage provisions, broadly as possible for the insured, any restriction
19 to coverage, as narrowly as possible against you with the insurance
20 company; remember they write these contracts.

21 Now the next provision is if the contract is unambiguous. If
22 the contract is unambiguous, it is construed as written, and you may not
23 increase the obligations of the parties if the contract intentionally and
24 unambiguously limited such obligations, it is worded in a weird way, but
25 it's basically common sense.

1 And let me give you a distinct example, because we heard
2 this for a while until Dr. Owens conceded it had nothing to do with the
3 case, this whole thing about the appeal, remember that, he didn't appeal,
4 should have appealed, but there was no obligation under the contract to
5 appeal.

6 So what that tells you is they can't use that argument at all.
7 They can't increase obligations to the parties that aren't in the contract.
8 So they can't say, Dr. Liao, you didn't believe in this, you should have
9 appealed. Mr. Eskew, you didn't believe in it, you should have appealed;
10 it is legally irrelevant, and that's exactly what Dr. Owens told you when I
11 finally got him to conceive it.

12 So now the next point, if the insurance contract is
13 ambiguous, the ambiguity must be construed in favor of the insured and
14 to effectuate the insured's reasonable expectations. The insurance
15 contract is ambiguous, if the provision at issue, as drafted, is subject to
16 more than one reasonable interpretation. So this is kind of like the gut-
17 check point where you -- if you look at a provision, you go, huh? Huh?
18 That's ambiguity?

19 Now the example I have for you is, remember this whole
20 issue about level of service, and to remember Mr. Roberts was
21 questioning Dr. Ahmad, because, I mean, they didn't look at the
22 insurance policy, the insurance contract, when they denied this claim,
23 that just doesn't look. So then they came in and said, well, Dr. Ahmad,
24 remember, that was right over here. You've looked at different
25 insurance policies. Oh, yeah. I looked at one that was substantially

1 similar. Well, let's look at this policy, and then literally made up this idea
2 that this claim should be denied based upon this level of service.

3 It's not in any denial letters, not anywhere in the file, they
4 clearly made it up six years after they denied the claim. And then when
5 we press Dr. Owens about this level of service, he just said, yeah, there
6 are a lot of interpretations for that. One of which is found in Exhibit 13,
7 UnitedHealthcare's own documents, it says: "Level of service is just
8 simply place of service, outpatient/inpatient." So that's an example of an
9 ambiguity. They can't rely upon that provision to deny a claim.

10 So let's go to the next jury instruction, Jason,

11 And this is the instruction -- this is a very important
12 instruction, it's instruction number 23, and it ties in really to the
13 interpretation of the insurance policy, and the implementation of equal
14 consideration. And you remember Mr. Prater talked extensively about
15 the concept of an investigation. And so this jury instruction says: "An
16 insurer has a duty to investigate a claim filed by its insured."

17 When investigating a claim, an insurer has a duty to
18 diligently search for and consider evidence that supports an insured's
19 claim off; that's exactly what Mr. Prater told you. And what it boils down
20 to, and Mr. Prater gave the example, it's like, look, you're the insurance
21 company, you control the checkbook. If you want to approve a claim,
22 approve it. But if you're going to suggest or consider, maybe this claim
23 should be denied, then you've got to go follow all of these rules.

24 So it's not enough to even look at the policy broadly to find a
25 way to pay the client, you actually, as the insurer, have an affirmative

1 obligation to diligently search for, and to consider evidence that supports
2 the client. So this whole nonsense, I even remember in the opening
3 statement of UnitedHealthcare, or Sierra Health and Life was deprived of
4 the ability of the opportunity to review the comparative studies; that
5 literally is no defense.

6 It literally, this instruction tells you you've got to do your due
7 diligence to look for reasons that pay the claim. Now it continues. An
8 insurer may not reasonably and in good faith, deny a prior authorization
9 claim without thoroughly investigating the claim. That's it. If you find
10 that the insurance company, Sierra Health and Life breached its duty to
11 investigate, question 1 is answered.

12 That's why, if you remember, Mr. Roberts was up
13 questioning Mr. Prater, and one of the things that he basically said, well,
14 hey, yeah, we didn't do any of this stuff, but we got to the right place, it
15 wasn't covered. And Mr. Prater says, "I totally disagree with you." The
16 law doesn't. Now, let me just pause for this moment, this idea that, hey,
17 we got to the right place, we should have denied this claim, we didn't do
18 it right, okay, hey, what the heck.

19 Remember that whole testimony about Dr. Ahmad, he gets
20 up and says, Well, Dr. Ahmad, you know, you take a limousine to the
21 airport, but you can get to the airport another way. I mean, that's a level
22 of corporate out there, against -- is beyond pale, when you think of
23 instruction number 23, and the terms of the insurance contract. Imagine
24 for a moment that's slogan, buy the platinum policy, we'll get you to the
25 airport, but you won't get a limo, we care about your health.

1 I mean, think about that for a moment. Of course, it's
2 absurd. The platinum policy, that's what he -- that's what Mr. Eskew got.
3 There's no limousine, a Maserati, a Lamborghini, whatever you want to
4 call it, the policy covered proton beam therapy, and they chose to
5 consciously disregard the contract and the rules of the road.

6 So let me go to the unfair claims practice, jury instruction,
7 number 25. This is based -- I had shown this law, if you remember, to
8 Dr. Owens, and it's a law, as the instruction says, the insurers must
9 comply with the Nevada unfair insurance practices act. There's two
10 provisions, it says misrepresenting to an insured pertinent facts or
11 insurance policy provisions relating to any coverage at issue.

12 If you remember, this was a specific standard that Mr. Prater
13 referenced in his testimony. And so again, this is a highly regulated
14 business that derives most -- a lot of its standards from the law. Now,
15 the concept of misrepresenting pertinent facts or insurance policy
16 provisions is the denial letter, and we'll go off of that. I mean, the denial
17 letter is an absolute misrepresentation. The first proton beam therapy is
18 unproven, that's what it says, maybe that would be the case; and then it
19 doesn't even reference anything within the insurance contract.

20 The implication of that denial under is the policy -- the
21 medical corporate policy is part of your [indiscernible]. We know it's not.

22 So the second part, failing to provide promptly, to an
23 insured, a reasonable explanation of the basis in the insurance policy,
24 with respect to the facts of an insured's claim, and the applicable law for
25 the denial of the claim. That's the same thing. I mean, we talked about,

1 Mr. Prater talked about that, and this is the denial letter, we'll go through
2 that briefly.

3 Jason, can you go to the next instruction, 26.

4 These are two provisions of the Nevada insurance
5 regulations. Again, we had talked a little bit of those provisions with
6 Dr. Owens, and the first provision just basically reaffirms that what's
7 going on here when a claim or prior authorization request was made, is
8 this is a non-adversarial process.

9 And so what the insurer has to do when they receive the
10 claim is they say, we shall fully disclose to a first party claimant, that's
11 Mr. Eskew, all pertinent benefits, coverages, or other provisions under
12 which a claim is presented.

13 So what that means is they have to go and basically walk,
14 Mr. Eskew, in a simple way, through the terms of this policy, this
15 insurance contract. Now the next provision, it talks about how, you
16 know within 30 working days after receipt or properly executed proof of
17 loss, that's basically the beginning of the prior authorization, you must
18 be advised of the acceptance or denial of the claim.

19 But then it continues, and this is the part that's important.
20 No insurer may deny a claim on the grounds of a specific policy
21 provision, condition or exclusion, unless reference to the provision
22 condition or provision is included in the denial.

23 And that comes back to this whole level of service thing.
24 When you review that denial letter, it's not there, and this provision from
25 a jury instruction, number 26, says you can't change the game six years

1 later, you're stuck with the denial you wrote.

2 So let's go to NRS 695G-150.

3 And as I'm going through these laws, I think it's self-evident
4 that if you're going to be an insurance company doing business in the
5 State of Nevada, you better have sophisticated people, highly trained,
6 so they can go through these standards and apply them correctly.

7 And this is from the managed care law. And it says --
8 basically what the first part says is, "Each managed care organization,
9 that's basically like Sierra Health and Life, or an insurance company
10 engaging in managed care, shall authorize coverage of healthcare
11 service that has been recommended for the insured by a provider of
12 healthcare, acting within the scope of his or her practice, if that service is
13 covered by the healthcare appointment."

14 Well, we know from -- there's no dispute from Sandra Eskew,
15 Steven Prater to Dr. Owens, proton beam therapy is a covered service.
16 So in order to deny that preauthorization claim, Sierra Health and Life
17 had to follow this law, in addition to all the other laws I've shown. So
18 now the next thing is the decision not to authorize coverage is made by a
19 physician who is licensed to practice medicine in the State of Nevada.

20 Okay. Nobody's saying Dr. Ahmad wasn't licensed to
21 practice. Then it continues, "possesses the education, training and
22 expertise to evaluate the medical condition of the insurer." And I think
23 what Dr. Armand's testimony demonstrated, unequivocally, is that he did
24 not have the training to evaluate the question of the type of radiation
25 oncology modality that a radiation oncologist used, he just didn't have it.

1 And I don't think he cared, but it's clear he did not have it.

2 Now the next issue, "and has reviewed the available medical
3 documentation notes of the attending physician, test results and other
4 relevant medical records of the insured." This provision is tying in
5 directly into the instruction that you've been given on the duty to
6 investigate. You can't just sit there and pretend there's not more
7 information. You can't do it, and it -- you have to review the records.

8 And remember Dr. Owens when we are examining him and
9 we finally said, we started talking about the claim file, and I was leading
10 him through that timeline, and it was clear that Dr. Ahmad never
11 reviewed the medical records. And finally, Dr. Owens said, if it's not in
12 the file, it did not occur. Remember what the peer review literature
13 Dr. Ahmad claimed to review, it's not in the file, so it did not occur. The
14 review of the medical records, not in the file, it did not occur.

15 Now it's common sense because we looked at that file 12
16 minutes, he's not going to spend time reviewing records, but what that
17 tells you is that the process that Sierra Health and Life adopted to never
18 have the doctor like Ahmad, ever document any review of medical
19 records, remember that? I asked Mrs. Sweet, "Is there anything in this
20 file that's inconsistent with Sierra Health and Life's program," and she
21 said, it wasn't, "This is business as usual." Business as usual for this
22 insurance company is to violate the law. They're above the law, that's
23 business as usual.

24 So let's go to the next jury instruction, 24.

25 And this is an instruction and is for this particular case is

1 remarkable to me, because you've seen, I just ran you through, you
2 know, a lot of rules and regulations, Mr. Prater, ran them through you,
3 and all the law is telling an insurance company is try to follow it. It says
4 right here, "An insurer is not liable for bad faith for being incorrect about
5 policy coverage, as long as the insured had a reasonable basis to take
6 the position that it did. Bad faith requires an awareness that no
7 reasonable basis exists to deny the insurance claim."

8 And all that's saying is, if you follow all the rules that we just
9 sent out, eyeglass tests, diligent investigation, looking carefully at the
10 medical records, and you provide an analytical thought process applied
11 to the actual terms of the policy, and you got it wrong; okay, that's not
12 bad faith. The core -- the reverse to that is if you don't do any of those
13 things, if you consciously decide I'm above the law, then that's bad faith,
14 and that's what this instruction's is telling you.

15 So it's remarkable to me that this insurance company, Sierra
16 Health and Life would adopt policies and programs to violate the duty of
17 good faith, when they know if they give their best effort, we wouldn't be
18 here; that's a statement of arrogance, on their part.

19 Now let's go to the next part. Let's go back to the
20 PowerPoint.

21 So I just want to briefly go through the violations of the
22 insurance industry standards that we presented, that some of which I've
23 already talked about, but remember in 2011 Sierra Health and Life
24 secretly creates the hidden exclusions called the "corporate medical
25 policies." We know this in 2011, because the denial letter is a generic

1 letter created in 2011.

2 We know that hidden exclusions will be used without regard
3 to the terms of the insurance contract, it's demonstrated that to you, and
4 the duty of good faith and fair dealing. This is a deliberate failure to
5 avoid the willful -- I mean, it's a willful one effort to avoid to deliberately
6 fail to avoid harm to your insured. And they know the hidden exclusions
7 will be used to defeat legitimate claims at a time when the insured is
8 most vulnerable.

9 I hope it did not go without -- you know, I hope that, and I
10 think you would recognize what Sandra Eskew did for her husband. I
11 mean, it was a partnership and part of their partnership was Sandy was
12 the one who dotted the I's and the crossed the T's. She went to the
13 insurance agent, asked specifically, Bill's got lung cancer, we are going
14 want to go -- we're going to go to MD Anderson, and we want to know if
15 proton beam therapy is covered. She asked the three germane
16 questions, and she still didn't know about these hidden descriptions.

17 On top of that, think conceptually. Janice Holland-Williams
18 delivered the insurance contract, the form of contract, it's Exhibit 2, and
19 Sierra Health and Life hadn't told her about the part in her medical
20 policy. So think for a moment when -- I don't remember which witness,
21 it's -- all these witnesses come over, well, how would you know about
22 these corporate medical policies? You just Google it. You just Google it,
23 your insurance agent professional didn't know that. I mean, that's the
24 type of mentality you are faced with.

25 So they also knew that the people that were going to be

1 subject to these medical policies, some of them were going to be at their
2 most vulnerable state. So you heard about that whole thing about, well,
3 they went into the business of providing Obamacare, and under
4 Obamacare you can't use preexisting conditions. I don't remember
5 which witness, I remember them asking Mr. Prater about that, and I think
6 Dr. Owens testified about that.

7 So think for a moment, think for a moment, Sierra Health and
8 Life made the conscious decision to go into a business where it was
9 going to ensure people like William Eskew, with preexisting conditions,
10 Stage 4 cancer, at a time when they were most vulnerable, and they
11 knew, right. They knew right behind the policy that they were going to
12 use a hidden exclusion to say denied; 356 of these policies automatically
13 denied, and that's in Exhibit 6.

14 THE COURT: Counsel, we're going to take a 15 minute
15 recess.

16 Ladies and gentlemen, even though it is now closing
17 arguments, you still cannot discuss the case until you go back to the jury
18 deliberation room. You are instructed not to talk with each other, or with
19 anyone else about any subject or issue connected with this trial. You're
20 not to read, watch, listen to any report of or commentary on the trial with
21 any person connected with the case, or by any medium of information
22 including of limitation, newspaper, television, radio.

23 You're not to do any research on your own in this case, such
24 as consulting dictionaries, using the internet or using reference
25 materials. You are not to conduct any investigation, test any theory of

1 the case, recreate any aspect of the case, or in any other way, investigate
2 or learn about the case on your own. You are still not to talk with others,
3 text others, Tweet others, Google issues, or conduct any other kind of
4 book or computer research with regard to any issue, witness, party, or
5 attorney involved in this case. You are not to form or express any
6 opinion on any subject connected with this trial until the case is finally
7 submitted to you.

8 So we'll return at 10:45.

9 THE MARSHAL: All rise for the jury.

10 [Jury out at 10:30 a.m.]

11 [Outside the presence of the jury]

12 THE COURT: Any issues outside the presence, counsel?

13 MR. SHARP: No, Your Honor,

14 THE COURT: Mr. Roberts?

15 MR. ROBERTS: Yes. One question. Your Honor, one
16 request, is that we would request a supplemental instruction to cure an
17 inaccurate argument of the law made by Mr. Sharp. He told the jury that
18 -- the first question was whether or not we performed a reasonable
19 investigation, and then he argued that Mr. Prater was correct, and that it
20 doesn't matter if the services were covered. It doesn't matter if we reach
21 the right decision, if we failed to reasonably investigate, they had to find
22 for him; and frankly, Your Honor, that's simply not the law.

23 We've already got instruction number 1, that sets forth the
24 elements of their claim. That instruction has as the first factor that the
25 services were covered. So he made an incorrect statement of the law,

1 and is somehow saying that the failure to investigate, based on the
2 Court's instructions, somehow creates a different avenue.

3 But under the standard *Casey* instruction for failure to
4 investigate California, the first element of a failure to investigate claim is
5 also that the claim was covered.

6 THE COURT: Mr. Roberts, can you repeat what
7 Mr. Sharp allegedly said again?

8 MR. ROBERTS: He said that the first question they had to
9 answer was that -- was whether the investigation was reasonable and if
10 it wasn't, they win, and it doesn't --

11 THE COURT: Hold on, hold on.

12 MR. ROBERTS: -- matter if the claim was covered.

13 THE COURT: Let's, slow it down. Slow it down.

14 MR. ROBERTS: Okay.

15 THE COURT: Whether the investigation was reasonable?

16 MR. ROBERTS: Yes. And if it was not reasonable, then they
17 win. And that Mr. Prater was correct when he said it doesn't matter if the
18 claim is covered, if we fail to reasonably investigate and go through
19 these regulations.

20 THE COURT: Can you repeat that again? Mr. Prater said,
21 what?

22 MR. ROBERTS: You remember when I asked Mr. Prater, I
23 said, "This is going to be tough for you, but I want you to assume
24 hypothetically, that the claim for proton beam therapy is not covered.

25 UNIDENTIFIED SPEAKER: Yes.

1 MR. ROBERTS: And it is not medically necessary. Then --

2 THE COURT: The Court recalls that.

3 MR. ROBERTS: -- none of the rest of this matters does it?

4 And he says, "I don't agree with you, of course it matters." Well, I mean,

5 that's just a witness, he can say what he wants, but Mr. Sharp just

6 argued that was correct, and went to the instructions and pointed to

7 failure to investigate and said, it doesn't matter if we arrived at the right

8 decision, it doesn't matter if the claim is covered, if we failed to

9 investigate, and that's an incorrect argument of the law.

10 THE COURT: Okay. So you're saying that Mr. Sharp argued

11 that if they failed to investigate, it was irrelevant if it wasn't covered?

12 MR. ROBERTS: Correct.

13 [Pause]

14 THE COURT: Go ahead, Mr. Roberts.

15 MR. ROBERTS: Thank you, Your Honor. I was just

16 confirming, trying to confirm the *Casey* instruction. I believe it's 2123.

17 MR. SHARP: Your Honor, may I respond?

18 THE COURT: Is Mr. Roberts finished?

19 MR. ROBERTS: Your Honor, if the -- I just need to provide a

20 citation, and I have no objection to Mr. Sharp going forward. I had it up,

21 but unfortunately I seem to have closed it.

22 THE COURT: Thank you. Marshal Mark, would you let the

23 jury know that the Court is addressing some unforeseen issues outside

24 the presence? And so the break will probably last a little bit longer?

25 THE MARSHAL: Yes.

1 MR. ROBERTS: Your Honor, actually I didn't. I found it, it's
2 *Casey*, number 2332, "bad faith first party properly -- failure to properly
3 investigate claim, essential factual elements, and the first element to
4 established this claim, Plaintiff must prove all of the following: Number
5 one, that Plaintiff suffered a loss covered under an insurance policy."

6 So rather than the argument Mr. Sharp made, having a
7 covered loss is still an element of failure to investigate.

8 THE COURT: The Court understands. Thank you.

9 MR. ROBERTS: Thank you, Your Honor.

10 MR. SHARP: May I proceed?

11 THE COURT: Of course.

12 MR. SHARP: I mean, one, I would say this is the reason why
13 you do contemporaneous objections, but the jury instruction says the
14 first element is a covered loss, which I said we had met. So it was not
15 my intent, or I believe my argument that I said, you can't -- you know,
16 you just get past the first element, and I'm happy to tell the jury that, but
17 what my point is, and I think the critical aspect of the case is, if it's
18 covered and you didn't do all these other things, that's bad faith.

19 So it was certainly not my intent, or do I believe I did so, that
20 I tried to mislead or suggest that the jury that there was -- we didn't have
21 to meet the first element. I mean, it's set forth in the agreement, and if I
22 did do that the jury's going to punish me. I mean, I don't know what to
23 say, but I mean a curative instruction, by instructing people on a law we
24 haven't presented is over the top.

25 And I'm happy to tell the jury when we get back, Your Honor,

1 that I just want to make sure when I was arguing about jury instruction,
2 acts that you understand, I was talking about the second and third
3 elements; I'm happy to do that,

4 THE COURT: Mr. Roberts?

5 MR. ROBERTS: I believe that would satisfy me, Your Honor.

6 THE COURT: I agree.

7 MR. ROBERTS: Thank you.

8 THE COURT: Let's take a quick break. Come right back.

9 MR. ROBERTS: Thank you, Your Honor.

10 [Recess taken from 10:37: a.m. to 10:48 a.m.]

11 THE CLERK: -- come to order, back on the record.

12 THE COURT: Thank you, counsel. Please be seated.

13 Are the parties ready for the jury?

14 MR. ROBERTS: Yes, Your Honor.

15 MR. SHARP: Yes.

16 THE COURT: Thank you

17 THE MARSHAL: All rise for the jury.

18 [Jury in at 10:49 a.m.]

19 THE MARSHAL: All jurors are present.

20 THE COURT: Thank you. Do the parties stipulate to the
21 presence of the jury?

22 MR. SHARP: Yes, Your Honor.

23 MR. ROBERTS: Yes, Your Honor.

24 THE COURT: Thank you. Mr. Sharp, please proceed.
25 Please be seated.

1 PLAINTIFFS' CLOSING ARGUMENT CONTINUED

2 MR. SHARP: Before I get back to the slide, it's come to my
3 attention, this was delayed, but I just want to clarify something. I just
4 want you to understand, you know, our credibility, Mr. Terry and I's
5 credibility to you is very important. So I had been talking about the jury
6 instruction, you need to investigate. What I want to make it clear there
7 is no issue [indiscernible].

8 The first element is you have to find a covered service. I
9 demonstrated to you through the good faith eyeglasses how that would
10 be, and I'm going to demonstrate it for you. And then I said, if you don't
11 view an investigation, you know, the whole, it doesn't matter if we got
12 there correctly. And my point is you can't come in with excuses after the
13 fact and say, I didn't get this, I didn't get that. If you didn't do an
14 investigation, it's not in good faith.

15 If the Defense has proved to you that this thing was never a
16 covered service, then, yeah, they're right, they win. So I just want to
17 make sure you knew that, that there's been some indication, but the
18 point being is, for elements two and three, if they don't investigate that's
19 elements, two and three, it's been -- it's been proven.

20 So let me go back to where we were at. And this is the part
21 that hidden exclusions will be used at a time when the insured is most
22 vulnerable, we went over that. And in addition to using the hidden
23 exclusions, I think this is kind of a core part of this whole scheme, is that
24 the employees implementing the system are not trained to understand
25 the duty of good faith and fair dealings; and Mr. Prater talked to you

1 about that.

2 They know they have to go to Mrs. Sweet. She testified. I
3 asked her, nobody ever trained you on the duty of good faith and fair
4 dealing, she never even heard of it before I took her deposition; and I
5 think that's tragic. I mean, we're not here -- I just want you to
6 understand this. We're not here pointing the fingers at people like
7 Mrs. Sweet, she seems like very nice person.

8 We're not here to point the fingers at Lou Ann Amogawin,
9 she seemed, as you heard in her deposition, like a nice person. What
10 we're here to say is that somebody at a corporate elite level made a
11 decision to violate the law and then keep that violation from their own
12 records. What I mean by that is, if you come in and train people on the
13 duty of good faith and fair dealing, as Mr. Prater talked to you about,
14 these kind of things don't happen, because people will have the tools to
15 do what they need to do.

16 And what I find remarkable, and really in many ways -- well,
17 it's remarkable. The last witness here [indiscernible] is Mrs. Sweet, and I
18 asked her three questions, remember? The position of Sierra Health and
19 Life is these kind of things that happened in this [indiscernible] are going
20 to continue.

21 But what I think is remarkable is that the person at Sierra
22 Health and Life operated to the UnitedHealthcare, the people who
23 developed these programs did not have the guts get on that witness
24 stand and explain to you under oath why and what they did, and what
25 they implemented was fair to his insurers; that's all you need to really

1 know about this company.

2 So the plan also requires the Dr. Ahmads of the world,
3 because they're used to perfect the claim denial. They just -- it's a
4 rubber stamp to pretend that the insurance at Sierra Health and Life is
5 complying with 695GE 150. They need the Dr. Ahmads of the world. I'm
6 going to here to cast aspersions against the man. Mr. Prater said he's
7 even part of the victim of this system, but I'm just here to look at the
8 circumstances of what was presented.

9 But we know that doctors are well defended, they're doctors,
10 you know, they trained -- they deserve it. They are important in our
11 society. You saw three doctors testify before you with hourly rates of
12 525 to \$800. So just stop right there and use your common sense.
13 Dr. Ahmad's getting paid \$200 an hour, which he testified to was the
14 negotiated rate. I can only imagine where UnitedHealth -- or where
15 Sierra Health and Life started. But when you pay somebody \$200 an
16 hour, you're buying something.

17 And then on top of that, nobody looks at anything he does,
18 imagine that. Nobody looks at anything he does, unless he says I'm
19 going to override the medical policy, for \$200 bucks an hour, I think we
20 know the answer to that issue; he's not going to overlook the medical
21 policy. He spends 12 minutes, claims he spend 30 to 60 minutes. I
22 mean, bill says 12 minutes, but I mean, when you average it out, but
23 amazingly to me is nobody verifies what time he's spending per claim,
24 and nobody verifies if in fact, he's even reviewing records.

25 Now what's remarkable is if Dr. Ahmad really was doing this

1 review and really studying, there's a footprint within Sierra Health and
2 Life system, that's what I was asking Dr. Owens about, you know, you
3 get the records through the system, you log into the system, you log out
4 that's, what's called a "footprint."

5 So they wanted to say he spent 30 to 60 minutes, he could
6 have proven it to you. I think 12 minutes was being generous. But the
7 point is you have to have that in order to perfect the system. And here's
8 the thing that's remarkable, Sierra Health and Life knows its program will
9 resolve in the denial of legitimate claims, and cause harm to insurers.
10 You know, because they're not reviewing, claims, they're just
11 automatically denying them.

12 So a claim like this that maybe needed a little extra
13 investigation, actually, somebody to analyze this and say, yes, Dr. Liao
14 knows a lot about this therapy. She says, it's the best fit for Mr. Eskew,
15 let's find out why, or let's just say she's the expert. As Dr. Ahmad said,
16 he had no basis to question her medical judgment to prove the claim,
17 but the system doesn't allow him to do that.

18 So it's kind of like the system, the systematic issue when you
19 can talk about whatever you like, you know, there's corporate
20 misconduct; the one I remember is Ford Pinto. Ford sold a car then knew
21 if it was rear-ended it would blow up, not every time, but they knew
22 there was going to be that percentage of people, and they said, well, it's
23 cheaper to keep the system in place and to recall them. So that's the
24 kind of state of mind you're talking about here, it's deliberate.

25 Now this is the investigation, we've gone over this. I'm not

1 going to spend much time, the point being, the underlying just confirms
2 the only thing that Dr. Ahmad cited to was the medical policy, and it took
3 him three times to cite to the right one.

4 I mean, that's just showing a deliberate indifference, not the
5 mistake, it's the lack of care, right in the middle of the work day. So you
6 can use your judgment as to whether Dr. Ahmad was really paying any
7 attention to this claim. The same thing on February 10th.

8 Now what I want to kind of go back to, is what would a
9 reasonable investigation have uncovered? I mean, I think you have two
10 lines, two ways you can go on this case, you can look at the letter that
11 was sent by MD Anderson, where Dr. Liao verifies that Mr. Eskew met
12 the proton protocol at MD Anderson, and you can say, man, that's a
13 reputable institution. Dr. Ahmad can say, I don't have the medical
14 judgment to overrule her, can you approve the claim. Now the other
15 avenue is, you say, well, I can't approve it, so I need more information.

16 So what could they have learned, reasonably. I mean, the
17 same thing you all learned? And the first thing is we base -- the doctors
18 base decisions on radiation oncology, based upon the therapeutic ratio
19 and [indiscernible]. And it kind of seems like complex, but if you think
20 about what's what they're saying is basically a principle of medicine, and
21 the concept of do no harm. Well, of course, when you're going under
22 surgery, there's a level of harm.

23 So what the surgeon's doing, is we need to do something to
24 remove a tumor, and we're going to do it with the lowest amount of risk
25 to you the Chase Morgans [phonetic], those sorts of things. So this is a

1 hallmark of medicine, and you would have learned that the therapeutic
2 ratio says the higher than the therapeutic ratio, the better it is to deliver
3 radiation to the cancerous tumor with the lower risk of damage to
4 adjacent organs; as low as reasonably achievable.

5 So the other thing they would have learned, is where these
6 tumors were located in Mr. Eskew, and we have -- I don't know if you can
7 blow this up a little bit?

8 JASON: It's on your PowerPoint.

9 MR. SHARP: Oh. It's on my PowerPoint. Can you pull that
10 up on -- why don't you just go over to -- right here. Just pull it up top.

11 And this, right where I'm pointing, that's where the lung
12 cancer tumor is, and here's the mediastinal tumor, right here, right next
13 to the trachea and the esophagus. And that tumor, you'll see in the
14 evidence, was showing on the CT scan. You'll see that in Dr. Jean's
15 records, as well as MD Anderson, that that tumor was showing if it was
16 growing on or about February.

17 I don't remember when the CT scan was, but when Dr. Liao
18 was making her analysis, she knows this is an important issue; showing
19 signs of progression. You remember how Dr. Chang said, we were
20 talking about very small areas that we're working with? So that's
21 another thing, was it reasonably available to Sierra Health and Life, the
22 critical location of these tumors.

23 So let's go to the -- Jason, I'm just going to -- so instead of
24 going back to the PowerPoint -- well, let's go back to the PowerPoint
25 quickly.

1 Okay. So this is just the cap, the, numbers that were being
2 referenced by Dr. Liao and her testimony, the difference of rays going to
3 adjacent organs, the esophagus, the lung, and the heart, and you can
4 just see on both -- in both columns, that in order to achieve the optimal
5 therapeutic ratio, in order to meet the standard of care, you would want
6 to use protons, because it's a lower grade.

7 And I don't remember, I think it was like 10,000 per x-rays for
8 each grade, and I didn't do the math, but that's a lot of unnecessary
9 radiation using IMRT. So then what does that mean?

10 MR. SHARP: Jason, if we go back to the demonstrative, and
11 I'm going to come over here. Melissa, can you hear me fine when I'm
12 over here?

13 THE COURT RECORDER: [Indiscernible]. Go ahead.

14 MR. SHARP: Okay. I'm going to come over here this screen,
15 because we've been using -- we've been pointing this out on the other
16 screen.

17 So what you're seeing here is we're taking a comparative
18 studies that Dr. Chang showed, that were in the MD Anderson file, and
19 on the hand over here we're showing the protons, and on the other hand
20 we're showing the proton. This is the demonstrative exhibit based upon
21 the actual images. And you'll see this white circle is the esophagus, and
22 you see all the radiation traveling through the esophagus.

23 And if you remember Dr. Chang, explained to you, the darker
24 the color towards red, the more radiation that's being delivered, the
25 higher the dose. Now you go to the proton, and you'll see part of the

1 esophagus is totally protected. Now the portions of the esophagus are
2 getting hit, but with a much lower dose of radiation, and then just a
3 small portion of the esophagus is getting hit with the higher radiation.

4 So what that means, as Dr. Chang explained to you, was
5 there's a higher risk of injury by using the IMRT, and it's visible on this
6 demonstrative. And what that means is you need then look, like what's
7 the best thing we're going to do, proton beam therapy. So let me go to
8 the next slide, Exhibit 161 and 160 with two comparisons we're going to
9 get. Now I'm showing you here, 161 is the proton, 162 is the comparison
10 with the IMRT, so just remember these numbers, and so I'm going to pull
11 these up.

12 Now, the green line, that I got my hand running to, that's the
13 amount of radiation using IMRT. The higher dose radiation is being
14 delivered to the esophagus. Where I'm pointing now on the left side is
15 the amount of radiation that's being -- high dose radiation that's being
16 delivered to the esophagus using proton beam therapy.

17 And what Dr. Chang demonstrated to you is, remember he
18 took these two images, and he calculated the difference. He did a, a
19 mathematical calculation for radiation oncologist, and he found that
20 using the proton beam therapy reduced the risk of damage to the
21 esophagus by five times, five times. And that calculation was never
22 rebutted, or never addressed by Dr. Ahmad.

23 So again, hadn't this investigation been conducted, these are
24 things that the insurance company should have known. And remember,
25 I mean, you know, we are dealing with complicated issues, that's why

1 you've got the company with doctors. Sierra Health and Life has a lot of
2 doctors.

3 The statute said you can consult with other doctors. The
4 policy even says you can do -- the insurance contract says you can even
5 do an independent medical plan. So they had the tools to address these
6 very issues. And certainly they could have called Dr. Liao to explain this.

7 Now, the next thing -- so let's pull this and go back -- let's go
8 to Exhibit 533.

9 So let me just conclude this point. I think if any -- I think if
10 you look at this claim from the good faith eyeglass, it should have been
11 paid based upon the initial submission. I mean, this is MD Anderson,
12 proton beam therapy is their business. Dr. Ahmad had no basis to
13 overturn the clinical call by Dr. Liao.

14 But if you're not going to pay that claim and you conduct an
15 investigation and somebody tells you you're insured, is at a five times
16 lower risk if we do the therapy I'm promoting. I mean, it's -- this
17 becomes a no-brainer, you do it.

18 And remember, as we get into this, Dr. Chang described to
19 you how sensitive the esophagus is, and also how important it is. We've
20 learned that through this case, it is the vehicle that we deliver nutrients
21 to our body so we can thrive. And if the more you injure, the higher, the
22 risk that you're creating problems, and the less you injure, the muscle,
23 the other parts of the muscle compensate.

24 And it's -- you know, it's kind of like common sense. If I, I
25 was sitting here and Mr. Terry whacked out one knee, I could go to here,

1 wax out, both knees, I'm going to be down. It's the same kind of
2 concept, the body adjusts to what's being affected. And so this claim
3 should have been paid, but then there's the denial letter. And I just want
4 to go through it briefly. We've seen this denial letter a lot in the case.

5 So if you just pull up Jason, the last bullet point here, and it's
6 in black and white.

7 "The reason for our determination is based upon
8 UnitedHealthcare, Inc. medical policy for proton beam radiation therapy,
9 coverage is denied." Now I suspect the Defense will try and come in and
10 say, well, the medical policy gets you to the same result, it considers
11 things, that are same with the insurance contract. But I provided you the
12 law on 680, and I think it's the insurance regulation law; you can't do
13 that.

14 They have an obligation, Sierra Health and Life, to explain
15 under the terms of the insurance contract in layman's language, so
16 Mr. Eskew could understand, this is why we're not paying your client.
17 And you have to ask yourself, why would an insurance company create a
18 form letter that doesn't quote its own insurance contract? Because they
19 can't defend these medical policies and the use of these medical policies
20 in lieu of the terms of the contract? No. So they created a form that is
21 deliberately misleading.

22 Now let's go to -- go back to the PowerPoint.

23 Now, I want to talk for a moment, it's just this one thing to
24 have a system in place to wrongfully deny a claim, and it's an entirely
25 heightened arrogance when you use that system to your practical

1 advantage. And what I mean by that is this whole thing about the
2 appeal, but is bigger than that, because remember Mr. Prater told you,
3 it's common sense, doctors, practice medicine, they're not experts in
4 insurance.

5 And what is going to happen when you automatically deny a
6 claim, particularly on a repeated basis? Now, if you think of Dr. Liao's
7 position, when she says -- let me just give you an example, okay, it might
8 be easier. Let's say we had a surgery. We had the surgeon, he's got to
9 remove a tumor on your liver, and he's got a device, a surgical device
10 that's been approved for many years by the FDA, centers of excellence
11 all around the country, use this device.

12 Peer review literature says, yeah, this is the device that's
13 effective. And he takes a look at his patient, and he says, we have two
14 ways of going about this. I've got this surgical device, it's really good,
15 I'm good at it, and I can get into that liver, and I can get that tumor out
16 and mitigate all the damage around your liver and mitigate the risk of
17 nicking your liver.

18 And he said, or we can do the alternative. I'd have to open
19 you up, and I'm good at that, but it creates a heightened risk that I'm
20 going to hit something that I shouldn't hit. And even if I'm doing it
21 perfectly, or I can't get all that tumor out, or if I nick, your liver, it's just
22 creates a higher risk. I'm really good at what I do, though, but there's
23 risks.

24 And the patient says, well, I want to go, it seems like a
25 no-brainer, let's go with the ability to use your device. The claim goes

1 into the insurance company, denied. Device, not proven, see corporate
2 medical policy. The claim comes back to the surgeon, and he says, what,
3 it's crazy. Who is the insurance company? Oh, UnitedHealthcare, Sierra
4 Health and Life, and they always deny their appeals, nothing we're going
5 to do.

6 And now that surgeon in is faced with the decision. He sees
7 that tumor, he's got to do something, he's the doctor, he's got to help
8 that patient. And he says, look, here's your problem, and it's not going
9 to change, and that tumor needs to go. I'm good at what I do. I wish I
10 had this one tool in my hand. The patient says, well, I trust your doctor.
11 You're a good doctor.

12 The doctor goes in, does a perfect job, but because of the risk
13 inherent in the other surgery, he nicks, the liver, and the liver spills bile
14 all over, infections develop. Now, first point I want to make, is that's not
15 efficient medical care. They call that cost effective care and efficient
16 medical care, my example, that's not efficient care. Efficient care is
17 finding the highest quality care in the best setting to maximize results;
18 that's efficient care. So they they've done that.

19 Now they created an injury that shouldn't have occurred, and
20 sure enough, you know, I mean, it didn't kill him, but they've taken away
21 that tool, and now what they're saying, what this insurance company,
22 Sierra Health and Life is telling you, is that's okay. That's okay. And so
23 what Dr. Liao did, I mean, she's not -- she's not like some -- I mean, they
24 kind of suggested, I don't know if they will in closing, they kind of
25 suggested throughout this case that she's some kind of charlatan. You

1 know, she works for this prior protein, proton beam therapy center.

2 Well, that's not supported by any evidence. She's a
3 dedicated doctor, who's employed by the State of Texas. And she
4 knows, she knows from experience what Sierra Health and Life and
5 UnitedHealthcare are about. And if she was wrong they would have
6 brought in the corporate representative who would've said, no, here's
7 ten appeals that we approved for MD Anderson, and Dr. Liao, didn't do
8 that.

9 So Dr. Liao makes a medical call, because that's her job. She
10 said let's stop appealing and using the IMRT. I don't want this to drag on
11 too long. She's looking out for the interest of Bill, and Bill, Mr. Eskew is
12 now put in this position by their insurance company, who decided we're
13 going to favor our financial interest over the interest of you, Mr. Eskew,
14 and now they have the audacity to suggest in court that something was
15 wrong with Dr. Liao, Mr. Eskew made the wrong call, Sandra Eskew
16 made the wrong call, and it's just not credible.

17 Now let's also look at the practical realities of the appeal.
18 Dr. Chandra testified that less than one percent of claim denials are
19 overturned on the appeal, the pays to deny, that's the system that Sierra
20 Health and Life is defending before you. Dr. Owens, I went through this,
21 Dr. Owens testified the appeals aren't even relevant to your analysis.

22 And what Sierra Health and Life, at the end of the day, is they
23 used the RIG system to dictate IMRT to Mr. Eskew, because it was the
24 cheaper procedure, and they did it in conscious disregard of
25 Mr. Eskew's rights and safety.

1 Remember, in the opening statement, they acted like, oh,
2 they did a favor, and they kind of acted like that through the course of
3 the trial. I don't know if in closing they'll make that same suggestion like,
4 hey Mr. Eskew, we did you a favor by giving you IMRT. And I want you
5 to just pause for a moment, because there's -- well, Jason, let's go back
6 to that provision in there, Exhibit 24, page 13. It's in the next page, 14,
7 this is the corporate medical policy.

8 Remember we spent -- Sierra Health and Life has spent time
9 over and over again, selectively quoting from their corporate medical
10 policy to suggest that this policy is, you know, this is what everybody
11 should look to, to deny a claim.

12 But there are a few things in analyzing their equal
13 consideration, there's one study that they didn't want to talk about, and
14 this is by -- I'm probably pronouncing the doctor's name wrong, Sejpal.
15 And in 2011 he compared the toxicity of proton therapy, plus concurrent
16 chemotherapy in patients with non-cell lung cancer, with similar
17 diseases, given three dimensional, informal radiation, plus
18 chemotherapy, or intensity modulated, radiation therapy, IMRT, plus
19 chemotherapy.

20 So the medical question right in -- that Dr. Liao posed, is
21 right in their medical policy. This issue, you'll remember, Mr. Eskew was
22 getting concurrent radiation. So now let's see what Dr. Sejpal now.
23 Right here, Jason, rates of severe -- rates of severe grade 3 or more
24 lungunitis [phonetic] and esophagitis in the proton group was two
25 percent and five percent.

1 Now think of Dr. Chang and his calculation. Were lower
2 despite the radiation dose, the higher radiation dose versus 3DCRT and
3 IMRT. So again, think of Dr. Liao and Dr. Chang, the therapeutic ratio,
4 maximizing dosage to the tumor, mitigating dosage to adjoining
5 structures. Two percent IMRT, in one group, nine percent, the second
6 group, 44 percent. So had Dr. Ahmad actually read the medical policy,
7 there's no way this claim is denied. They knew what they were
8 subjecting. They knew the risks that they were subjecting, Mr. Eskew to,
9 and they did it anyway, and they did it without analyzing the insurance
10 policy or doing an investigation.

11 Now -- so take that down, Jason, please.

12 So on the verdict form, I'm kind of -- I'm going to go back to
13 punitive damages, but just quickly, that I've answered the first two things
14 on your verdict form, which is have -- did we go through the medical
15 necessity provision? Let's do that quickly, I'm sorry about that, this is
16 important. I'm sorry, I forgot about this, I did want to walk you through
17 the insurance policy.

18 JASON: Which one do you want?

19 MR. SHARP: The definition of medically necessary. I think
20 that's 136(a).

21 JASON: Which one?

22 MR. SHARP: It's Exhibit 2.

23 JASON: Okay.

24 MR. SHARP: I think it's § 1366, I don't remember the page
25 number, if you can find it.

1 [Counsel confer]

2 MR. SHARP: I really feel like I've got to go through this
3 briefly, for Mrs. Eskew, because I think it's important, is what you have to
4 decide for covered service. I apologize, I didn't do this earlier. And so
5 basically when you're applying the good faith eyeglasses, you say, is this
6 a service or supply needed to improve a specific health condition, or to
7 preserve the insured's health? And clearly the answer is, yes, and that's
8 Dr. Liao, that's Dr. Chang, consistent with the diagnosis and treatment of
9 the insured's illness or injury; that's clearly, yes, Sierra Health and Life
10 doesn't even contest that.

11 The second bullet point. The most appropriate level of
12 service which can safely be provided to the insured. Okay. We talked
13 about their definition of level of service. I don't think -- I suggest is
14 absurd and creates an ambiguity. What they don't ever want to focus
15 upon is the most appropriate, not the cheapest, the most appropriate
16 service, which can be safely provided to the insured.

17 Dr. Chang, Dr. Liao, demonstrated unequivocally that the
18 safest, most appropriate level, the most appropriate that can safely be
19 provided to Bill Eskew was proton beam therapy. Now the third bullet
20 point. Not solely for the convenience of the insured provider, or
21 hospital, that's not an issue, nobody's saying that they did this solely for
22 convenience.

23 Now let's go to the next paragraph, let's pull this up.

24 It says, "In determining whether a service or supply is
25 medically necessary, SHL may give consideration to any or all

1 [indiscernible]. So they want -- SHL wants to tell you, well, that means
2 they can basically do whatever they want. Now we know that's not the
3 case when we apply the good faith eyeglass test, and the duty to
4 investigate; you have to consider all relevant factors.

5 But let's just go through their factors, the likelihood of a
6 certain service or supply producing a significant positive outcome.
7 There's no dispute here. Dr. Liao was hopeful that it could even be
8 curative, but she certainly knew that proton beam therapy would give a
9 better quality of life. Reports in peer review literature, I just showed you
10 one, but let's just stop there for a moment. Doesn't it seem odd to you,
11 that the doctor who creates the peer review literature, Dr. Liao, MD
12 Anderson, for Sierra Health and Life through Dr. Kumar, Dr. Chandra and
13 Dr. Owens, to suggest to you that they know more about the peer review
14 literature than Dr. Liao and MD Anderson is simply not credible.

15 Now the evidence-based reports and guidelines published by
16 nationally recognized professional organizations, that include in
17 supporting scientific data, remember the NCCN that's in Exhibit 24, that
18 said, proton beam therapy is great. Now the other one was ICER. I
19 asked Owens about ICER and it's like, oh yeah, that's a reputable
20 organization, and they said that proton beam therapy is great.

21 Now professional standards of safety and effectiveness that
22 are generally recognized in the United States, for diagnosis, care or
23 treatment. And I guess on this issue, they brought Dr. Cohen, talked
24 about what was available in Las Vegas, Nevada. I mean, unfortunately,
25 as we know in Nevada, we're a small State. Sometimes the best medical

1 technology is not available here, and we go to California, MD Anderson,
2 et cetera.

3 But the person that's going to be most knowledgeable on
4 this issue is Dr. Liao, she creates the standard. And then the other two
5 things, the opinions they didn't consider. So the question is, is when the
6 Defense gets up and point to all these other articles, really the question
7 before you is equal consideration. Do you remember, if you're going to
8 make a big deal that Dr. Chang agreed that all -- that we went and cited
9 to all the correct literature, but they forget that Dr. Chang said, yeah, that
10 same literature can be construed to say proton beam therapy is
11 medically necessary.

12 So now go back to your equal consideration test. If you're
13 equally considering the interest of your insured, this is a no brainer, you
14 approve proton being therapy.

15 So, okay, Jason, now I'm going to go to -- and so we've --
16 I've addressed the elements of the breach of the duty of good faith.
17 Question 1, yes.

18 Now I'm going to go to the damages, and what I want to
19 focus on. Let, let's start -- can you pull up jury instruction 27? Yeah. So
20 I want to focus on this, because you're going to need to understand this,
21 and this is what I talked about, legal cause of injury, which is a
22 substantial factor in bringing about harm. Instruction 27.

23 So if we go now to the next instruction, 28.

24 And you'll see that substantial factor is pretty -- is a simple
25 thing to prove. "A substantial factor is a factor that a reasonable person

1 would consider it to have contributed to harm." So if the Defense gets
2 up and suggests to you, we have to prove sole cause to any injury, that's
3 not what the laws is, instruction number 28.

4 Now it must be more than a remote or trivial factor, it does
5 not have to be the only cause of harm. Now, the conduct is not a
6 substantial factor in causing harm if the same harm would have occurred
7 without that conduct. And that's basically comes back to the example
8 here, is -- I mean, the same harm would've occurred in the sense of he
9 had -- Mr. Eskew had metastatic lung cancer, that's why we're not asking
10 you to consider whether or not death was caused by the [indiscernible],
11 that's the example here.

12 So let's go to, let's go to Exhibit 16959.

13 I want to take you a little bit through a journey that
14 Mr. Eskew experienced, and I'm going to talk about some of the medical
15 records, remember you saw all those medical records in front of Mrs.
16 Eskew, but there are a few that Sierra Health and Life didn't show.

17 And so the first one I want to focus on is Exhibit 16959, and
18 it's a visit on February 4, 2016, with Dr. Jean, he's the local oncologist.
19 The local -- do you remember the local medical doctor who supposedly
20 support Mr. Eskew. Well, here's another example of the oncologist
21 supporting Mr. Eskew.

22 But the point is I want to orient you to is Mr. William Eskew is
23 here today for follow-up. He was seen at MD Anderson. He is receiving
24 care at their facility. He is awaiting treatment with proton beam therapy
25 to his lung as well as concurrent chemotherapy. And we can -- we can

1 sense -- I mean, Mr. Eskew is in that room, there is a sense of hope. He's
2 going to get the treatment he wants and needs. And hope is what you
3 got. Now, it's not false hope. It's hope. And think about how we should
4 admire somebody like Mr. Eskew. I mean, we are taught in this society,
5 you fight back. You live strong. You defeat that cancer. You have the
6 positive attitude. Too many have often says the key to your life is your
7 health, you family, and your home.

8 When you lose your health, the key is dignity, your family,
9 and your home. And he was fighting. And he's got that sense that it's
10 going to change. He's got a hope from a doctor that says I can help you.
11 In the meantime, he doesn't know that his claims have been processed
12 and being automatically denied.

13 Now, let's go to the next -- let's go to the slides, I believe. Let
14 me make sure. Yeah, let's go to the slides, go back to the PowerPoint.

15 I had already we're talking about harms and losses. And let's
16 go through the journey that Mr. Eskew faced when he finds out about the
17 denial. And he's faced with the decision Sierra Health and Life put him
18 in. And he makes the call. Can we go through the IMRT. Dr. Liao is a
19 good doctor. And from February -- it's like February 10 through about
20 March 16, 2017 -- he goes through the chemotherapy and the IMRT. And
21 at the tail end, he starts developing that injury to his esophagus.

22 And you can -- and one can sense -- common sense -- can
23 sense in that room as he's going through these treatments, and he's
24 feeling that pain and not know what's the uncertainty that I'm facing
25 because Sierra Health and Life overlooked my own doctor. And the

1 sense -- and one's common sense senses that fear. And he continues.
2 And then he gets home, and he gets -- he gets off the plane. Remember,
3 Mrs. Eskew said he looked -- he looked like a different person. And that
4 sense that I'm losing the fight. And you have to think also about the
5 sense he had when he sees Sandra. The anxiety, the despair that
6 knowing that his partner did everything that she could. And then the
7 days continue, and he gets worse and worse and worse. And the fear,
8 the pain, the anger, common sense can tell one that it's right there.
9 Common sense can tell one.

10 Now, what happens? We know that Dr. Liao testified that she
11 diagnosed William Eskew with grade 3 esophagitis caused by an IMRT.
12 And she testified that she said -- an IMRT injured William Eskew's
13 esophagus in a manner that would not have occurred had she been able
14 to administer proton beam therapy. That's a substantial factor. That's
15 the injury.

16 After Mr. Eskew returned to Reno, she testified that the IMRT
17 caused injury progressed to grade 3 esophagitis. And she said in her
18 deposition he could not eat. He lost a significant amount of weight, and
19 he went to the hospital. So that information comes from one record,
20 Sierra Health and Life, never asked Mrs. Eskew to address. And that
21 record is Exhibit 108, page 6. It's an email and I'm going to show you
22 where it is so -- because it's hard to find and you'll see it.

23 And Mrs. Eskew writes an email to Dr. Liao. He is down to
24 159 pounds and cannot eat. He said it feels like something is stuck
25 halfway down in his esophagus, and he throws up. Sound familiar? Is

1 there something he can do? And what Dr. Liao does -- this is Exhibit 108.
2 I've just highlighted way down at the bottom. If you want to pull it up,
3 108, page 6. And what Dr. Liao told you -- the expert in this case on
4 radiation oncology for lung cancer -- she told you the grade 3
5 esophagitis can affect a patient's life span. Then she said grade 3
6 esophagitis will negatively impact on patient survival. Then she testified,
7 William Eskew would have enjoyed a better quality of life. Now, you
8 don't just need to take -- -- well, let's go back because I want to go,
9 Jason, to Exhibit 134, I think 119 and 20 because I want to show the jury
10 what happened. We're going to pull those two together.

11 Okay, so this just shows you what Dr. Liao was doing in
12 response that -- you know, what do doctors do is she got her patient's
13 complaint and it just -- it's funny, this guy, Mr. Eskew, is so tough, he's
14 so hopeful that somebody had given him a pain medication and he's like
15 -- I can do it. I'm going to grunt it through. I mean, he's kind of like --
16 kind of like the man. And then -- but then Dr. Liao says, okay, I'm going
17 to send you a pain medication.

18 And so that's going to go from April 3rd to May 3rd. I just
19 want you to keep oriented to time. Now, the next document, 154-52, this
20 is another record Dr. Kumar and [indiscernible] did not refer to. This is a
21 visit -- pull up that portion, Jason. Yeah, right there. This is a visit on
22 May -- I think it was May 4th. Yeah, May 4 at MD Anderson and this is
23 Dr. Liao's nurse. He has had a 30-pound weight loss after completing
24 treatment and going home. He was in the hospital at home post-
25 treatment. He continues to have trouble swallowing but has seen -- has

1 been seeing improvement. He's on pain medication. So he's fighting
2 back. He's not giving up.

3 Now, let's go to Exhibit 169, page 51. And this is from Dr.
4 Jean, a week later. Remember he stopped -- the pain medication had
5 lapsed on May 3rd, but what the point being here is William Eskew is
6 here today for a follow-up. Overall he notes fatigue. We go down here.
7 HE does have episodes of vomiting. He denies any nausea. He states he
8 has a desire to eat but does not eat a lot. He has continued to lose
9 weight. He denies any diarrhea, denies any constipation.

10 Now, his weight -- go to his weight, Jason. Next page. I
11 think it's the next page. I think it's the next page. There it is.

12 So this is black and white. Mr. Eskew's weight had gone to
13 153 pounds. So the acute grade 3 esophagitis that Dr. Liao testified
14 about had resulted in nearly a 40-pound loss of weight. Now, Dr. Chang
15 then comes back to you and says, now, I'm going to link the chronic
16 aspect of the esophagitis. Remember, there's an acute phase and a
17 chronic phase. And Dr. Liao wasn't really involved in day-to-day after
18 this -- I think there was a July visit or a June visit. She may not even
19 have seen him again.

20 But it doesn't matter. What point I want to make is here's a
21 man that is being beaten down by his insurance company to the point of
22 starvation. And he's the type of man who fights back. And we should be
23 admiring that. You know, his family is like you've got to eat, you've got
24 to eat, you've got to eat. And I'm sure you know; common sense would
25 tell you that gets annoying. But here's a man who fights back from the --

1 from the depths -- the lowest depths, he keeps fighting back and what
2 you'll see is that in -- from June to October, he kind of gets his weight
3 back to 162 to 175. And remember the family was saying there was a
4 period of time he was doing better because he's a fighter. He's a fighter.
5 That's admirable.

6 Now, let's go to the -- to Exhibit 169-22. This is the visit that
7 Tyler went to. It was right there in the records. Mr. William Eskew is
8 here today for a follow-up accompanied by his daughter and complains
9 of fatigue. He states that his antibiotic was recently changed. He
10 complains of nausea, loss of appetite, and he has had over a 20-pound
11 weight loss. So miraculously -- and I'm not really clear why, he went
12 from 172 almost to his -- for like a blip, almost to his pre-IMRT weight,
13 and it's not clear whether it was the medication or whatever. It doesn't
14 really matter.

15 But here he is November, he's losing 20 pounds. And
16 remember a substantial factor is a cause. Certainly this man has an
17 infection. He's got other things going on, but he's got this chronic injury
18 to his esophagus that's affecting what he does. And he's losing weight.
19 And one can sense the anxiety and despair that continues throughout his
20 life. Because he's lonely; he's desperate; he's angry but he's still trying
21 to fight back.

22 Now, the next day, December 13th -- page 169-18. I felt
23 compelled to just show you these records, so you didn't get the sense
24 that we were afraid of these medical records. Mr. William Eskew is here
25 today for a follow-up. He was hospitalized at Mountain View in

1 November. Now remember when the weight loss had occurred the
2 previous visit, that's where Dr. Chang said he needed TPN. That's -- you
3 know, the -- you give it through the vein. That's the evidence of chronic
4 esophagitis, the effects of that.

5 So now he's back and he says -- he says his appetite is
6 markedly improved. Now, I just want to point this out when the family -
7 you know, they were kind of dismissed when they said their father was a
8 tough guy and didn't always tell the doctor the truth; he downplayed his
9 symptoms. Here he is -- his appetite is markedly improved. He's gained
10 four pounds from losing 20. I mean, it's not markedly improved. But
11 he's trying to give the best that he can. And one can think about that
12 because it's common sense as you're facing a chronic illness and you're
13 fighting back, every step you lose is a step in independence. You're
14 fighting. He's not going to go in and talk to the doctor and whine and
15 moan about his chronic esophagitis. What are they going to do?

16 So now let's go to Exhibit -- the next page, Exhibit 169-12.
17 Oh, overall he feels well. And at this point, his weight is back down to
18 156 so he's lost 13 pounds in a month. This sound familiar? From B.J.
19 Eskew saying yeah, he's going to go in and just deny oh, yeah,
20 everything is good, Doctor. But the evidence shows differently. And
21 he's fighting. And that fight continues, and you'll see in the records that
22 that fight in this man's mind, it continued. It continued. And that doesn't
23 mean he didn't have the anxiety, the despair. If one can think of a
24 moment where you're alone anytime from March 12th to the day he
25 died, anytime where that man was alone thinking, imagine that thought.

1 This insurance company. One can sense what common sense this
2 insurance company -- this insurance company did this to him. That's
3 what emotional distress is about. It's what pain and suffering and
4 anxiety is about. Loss of enjoyment of life.

5 The Defense really does not like the fact that I suggested in
6 opening -- in voir dire, 15 to 50 million. They hate that. They hated it.
7 And you know, I used to be concerned about asking money from jurors.
8 It seems odd, right, trying to do a business transaction over somebody's
9 suffering? But the only way in which you show people are equal above
10 the law -- equal under the law is through compensating. Compensation.
11 Fixing what you hurt and imagining that fix. The most -- the most
12 precious moments in life should be those last moments. Not in the
13 sense your health is what the health is, but that moment that you
14 prepare to leave your journey.

15 That you can reflect back on your accomplishments and the
16 life you lived, married to a woman for 30 years, two kids, hard worker.
17 Did what he did. All of those accomplishments, all that -- that's what
18 common sense tells us we want -- one wants. Common sense tells us
19 that. Your job is to apply these damages in a common sense figure.
20 This is what common sense tells one. And that moment was taken
21 away. That period of time was taken away. And the time that -- Mr.
22 Eskew can't have back. It's that moment in life that's gone forever.

23 And the only reasonable way to do this is by money. I say 30
24 -- \$30 million. Thirty million dollars. Just if you want an example, just
25 think about what this insurance -- what United Health Group was willing

1 to invest to help people like Mr. Eskew on the medical arm. That was 15
2 to 250 million. If you use that as a context, 50 million isn't that bad.
3 Thirty million is my suggestion. It's your call. You're the ones that get to
4 decide that number. But I would say to you if the insurance company
5 thinks my number is unreasonable, then they should come up with
6 [indiscernible] number.

7 Now, I want to talk about punitive damages. I'm just going
8 to talk about it because we don't have much time before lunch. Punitive
9 damages is what ultimately, this case has to be about because you --
10 because this community, this state has to hold large insurance company
11 -- large companies, who say we're above the law -- they have to be held
12 to [indiscernible] and asking them to write a check for the harm that Mr.
13 Eskew suffered is not enough. And I'll -- I mean, the law is one
14 instrument. It's a damage that the law creates. It's weird because the
15 damage is to Mrs. -- the estate of William Eskew, but they didn't suffer
16 that damage, that the laws are for an insurer. And when a community is
17 faced with this conduct the only way to make a statement, to make -- say
18 this needs to be punished and deterred is to find punitive damages.

19 So with that, Jason, can we go up to the verdict form? I hope
20 -- I hope -- it's always when you're finishing close, and you hope you
21 didn't forget something. But I've been going for a while, and it's been
22 going for a while. And I apologize. This has gone too long.

23 So what I'm going to ask you to do -- and on behalf of Mr.
24 Terry and I, is we want to say yes to question 1. And so when you say
25 yes to question 1, did you find that Sierra Health and Life breached the

1 implied covenant of good faith and fair dealing, you answer yes. And it
2 says, if you answered yes, please proceed to question 2. What amount
3 of money do you find for the damage to William Eskew caused by the
4 breach of the implied covenant of good faith and fair dealing? And I
5 would put in \$30 million. That's what Mr. Terry and I would put in.

6 Now, the next paragraph. So then the third question, and
7 once you find a number in response to question 2, you go to question 3.
8 Do you find by clear and convincing evidence -- that's just more than a
9 preponderance -- we've done that plus -- that Sierra Health and Life
10 acted with malice and/or oppression to justify an award of punitive
11 damages? We ask you to mark yes.

12 And as we prepare for lunch, I'm going to leave you all with a
13 thought. When Mr. Roberts gets up and gives what I'm sure will be a
14 fine presentation, ask the question you deliver us Mr. Roberts, why
15 Sierra Health and Life did what they did, why they thought it was okay
16 not to teach people about the duty of good faith, why they created a
17 system where they thought it was okay that we don't even have to look
18 at the insurance contract before we deny a claim.

19 You ask Mr. Roberts to say to you, why is it that it's okay to
20 have the Dr. Ahmad's of the world being paid 200 bucks an hour,
21 conduct 12-minute reviews involving stage 4 lung cancer. You ask Mr.
22 Roberts to tell you why it's okay for an insurance company denying a
23 stage 4 cancer treatment to not investigate. You ask Mr. Roberts when
24 he talks about the appeal and everything Mr. Eskew could or could not
25 have done, why is it that your company and no other company in the

1 world thinks we get a free denial, and you've got to appeal, and you've
2 got to fight us. And the answer is there is no answer to those questions.
3 You're faced with a choice. And that choice is are you going to let a
4 large insurance company tell you, tell this community, tell this state
5 they're above the law?

6 And with that, thank you very much.

7 THE COURT: Thank you.

8 Ladies and Gentlemen, to keep us on track with time, we're
9 going to have a short lunch today. So we'll only take lunch till 12:30.

10 During the interim, you are still instructed not to talk with
11 each other or anyone else about any subject or issue connected with this
12 trial. You are not to read, watch, listen to any report of or commentary
13 on the trial by any person with the case, or by any medium of
14 information including, without limitation, newspapers, television,
15 internet, or radio. You're not to conduct any research on your own
16 relating to this case such as consulting dictionaries, using the internet, or
17 using reference materials.

18 Do not conduct any investigation, test any theory of the case,
19 recreate any aspect of the case or in any other way investigate or learn
20 about the case on your own. You're not to talk with others, text others,
21 tweet others, Google issues, or conduct any other kind of book or
22 computer research with regard to any issue, party, witness, or attorney
23 involved in this case. You are not to form or express any opinion on any
24 subject connected with this trial till the case is finally submitted to you.

25 So we'll return at 12:30.

1 THE MARSHAL: All rise for the jury.
2 [Jury out at 12:02 p.m.]
3 THE COURT: Counsel, any issues outside the presence of the
4 jury?
5 UNIDENTIFIED SPEAKER: No, Your Honor.
6 MR. SHARP: No, Your Honor.
7 THE COURT: Thank you.
8 [Recess taken from 12:02 p.m. to 12:31 p.m.]
9 THE MARSHAL: -- come to order. Back on the record.
10 THE COURT: Thank you. Please be seated. Are the parties
11 ready for the jury?
12 MR. ROBERTS: Yes, Your Honor.
13 MR. SHARP: Yes, Your Honor.
14 THE COURT: Thank you.
15 [Pause]
16 THE MARSHAL: All rise for the jury.
17 [Jury in at 12:32 p.m.]
18 THE MARSHAL: All the jurors are present.
19 THE COURT: Thank you. Do the parties stipulate to the
20 presence of the jury?
21 MR. SHARP: Yes, Your Honor.
22 MR. ROBERTS: Yes, Your Honor.
23 THE COURT: Thank you. Please proceed, Mr. Roberts.
24 MR. ROBERTS: Thank you, Your Honor.
25 DEFENDANTS' CLOSING ARGUMENT

1 MR. ROBERTS: Good afternoon, jury. First, I'd like to start
2 out just by thanking all of you for paying attention, taking notes, being
3 here giving so much of your time and your life. This is how we decide
4 disputes in Nevada, and we can't do it without you. And we really
5 appreciate you being here with us.

6 I want to start with you by pointing out the nature of the
7 arguments that were made over and over this morning. How many
8 times did you hear Sierra Health and Life, United Healthcare, they think
9 they're above the law? There's no evidence to support that. They're
10 arrogant. There's no evidence to support that. They're a big insurance
11 company. They're the biggest insurance company in the state. You can
12 look at the instructions all day long, you won't see where the Court has
13 told you that the size of a corporation is relevant to its duties or to
14 whether it breached them. I would suggest these are all things that are
15 being said because they created emotional appeal and a bias against the
16 big insurance company I represent.

17 But one of the things we talked about in voir dire was that
18 companies can only act through people. And you saw the people who
19 were in charge of this preauthorization program. You saw Shelean
20 Sweet. You heard from Lou Ann Amogawin. You heard from Dr.
21 Ahmad. I would suggest to you none of those people came across as
22 arrogant. None of those people suggested in any way that this was a
23 rigged system designed to deny coverage so they could provide cheap
24 care. That hasn't been proven.

25 So what I am going to ask you to do is hold Sierra Health and

1 Life to the law. And the Judge has given you the law. We are not above
2 it; we need to be held to it. But the other side of that coin is that the
3 plaintiff needs to also be held to the law. You can't give millions of
4 dollars by someone big and arrogant. You have to prove your case. And
5 there are lot of instructions that were focused on this morning that
6 you're never going to need, and I don't think you're ever going to reach
7 because the guide to the case, the guide to what the plaintiff has to
8 prove has been given to you by the Court in instruction 21.

9 In order to establish a breach of the implied covenant of
10 good faith and fair dealing, plaintiff Sandra Eskew, a special
11 administrator of the estate of William George Eskew, must prove the
12 following by a preponderance of the evidence. And then there are four
13 factors. And here's the -- one of the more important words in the
14 instruction, and. What that means is it's conjunctive. You have to prove
15 all four of them. Just proving one doesn't prove your claim. Just
16 proving two, proving three doesn't prove your claim. And plaintiff must
17 prove all of these elements.

18 Now, I hope you're going to forgive me for this just you
19 know, a little kitschy but you know, we talked a lot about apple pie and
20 cherry pie in voir dire. And plaintiffs are trying to make an apple pie
21 here and the point of this is that it takes four apples to make an apple
22 pie, and if they're missing any of these four apples, they cannot win.
23 You cannot give them a verdict. You cannot award them money if they
24 don't prove. They need all four apples to make that pie. And the first
25 apple is that the services they sought are covered.

1 So if the services they sought are not covered, you can't
2 make an apple pie and you don't need to breach the other three factors.
3 You don't reach reasonable basis. You don't reach investigation. You
4 don't reach the issue of whether it caused damages because they can't
5 make the apple pie unless they prove proton beam for non-small cell
6 lung cancer, stage 4 was covered. So here's that number one from the
7 instruction. The proton beam therapy was a covered service under the
8 terms of the AOC, the agreement of coverage. The Court has told you
9 they have to prove that. If they don't prove that, you don't reach the
10 other factors. And why is this? It makes sense if you look at instruction
11 number 20.

12 In every insurance contract, there is an implied covenant of
13 good faith and fair dealing that neither the insurance company nor the
14 insured will do anything to injure the rights of the other party to receive
15 the benefits the agreement. In order for an insurance company like
16 Sierra Health and Life to breach the covenant and frustrate the right of
17 the insured to receive the benefit, the benefit has to be provided for the
18 in the contract. There has to be coverage for what they're seeking
19 because if not, they haven't lost the benefits of the agreement. I think
20 Mr. Sharp said we got to the right result. Well, that's what the law is. If
21 you get to the right result when it comes to coverage, the rest doesn't
22 cause damage to the plaintiff.

23 Now, one thing that you need to understand, and I agree
24 with Mr. Sharp here, the experts' opinions should be totally disregarded
25 if they are inconsistent with Nevada law. And what did Mr. Prater say?

1 Now, Mr. Prater talked a lot about teaching classes on the duty of good
2 faith and fair dealing. So Mr. Prater would say an insurance company
3 should hire him to teach these classes or else they can't act fairly without
4 him. But he was advocating for these procedures over substance. This
5 is what I asked him. I said, Mr. Prater, I know this may be difficult for you
6 to understand, or rather difficult for you to do, but I want you to assume
7 hypothetically proton beam therapy for lung cancer was not covered and
8 it was not medically necessary. Does any of the rest of this stuff matter
9 that you've told the jury about? And he refused to agree. He said, yes, it
10 still matters. Of course, it still matters. I'm not going to agree to that.

11 But his views are contrary to Nevada law. Nevada law says it
12 does matter whether proton beam therapy was actually covered. And
13 Plaintiff had the burden to prove it and they didn't. A witness like Prater
14 and some of the other ones that you can consider -- instruction number
15 16 says that you should consider such opinion and weigh the reasons
16 given for it, but you're not bound by the opinion. Give it only the weight
17 to which you deem it entitled based on the way they answered
18 questions, the reasons they gave for the conclusions they reached.

19 So let's go back. Was it a covered service? The first place
20 we go is the agreement of coverage, and this is at Exhibit 4, page 40.
21 This section tells you what services are covered under the plan. Only
22 medically necessary services are considered to be covered services.
23 Clear and unambiguous. It is not medically necessary. It is not a
24 covered a service.

25 Now, you heard argument made that well, wait a minute,

1 look at this grant of coverage in 5.18 where it says that therapeutic
2 radiation services are in the covered section. But you've got to read the
3 whole thing. It's therapeutic radiology services that are authorized by
4 the managed care program. You heard an argument from some of the
5 witnesses that oh, wait a minute, because this service did not require
6 preauthorization the managed care program could not apply. But this
7 says nothing about preauthorization. Every single service has to be
8 medically necessary and therapeutic radiology is only covered if it's
9 authorized by the managed care program.

10 So go to section 3.1 of the agreement of coverage. The
11 managed care program determines whether services are medically
12 necessary. So we're right back to that requirement. Only medically
13 necessary therapeutic radiation is covered. And what else does the
14 agreement of coverage say? It says that our managed care program can
15 use the services of professional medical peer-review committees,
16 utilization review committees, and the medical director to help don't
17 whether services are medically necessary. And the managed care
18 program helps direct care to the most appropriate setting to provide
19 healthcare in a cost-effective manner.

20 And that's the difference, you know, you heard a little of the
21 history from Dr. Owens. Long time ago, back in the 70s and 80s, there
22 were indemnity insurance contracts. You got to pick your doctor, you
23 submit your bill, you got paid a percentage of the bill. There was no
24 managed care in those contracts. But the cost of healthcare was
25 skyrocketing.

1 So a lot of states including Nevada passed statutes
2 implementing this managed care concept where an insurance company
3 could get involved in determining if services were medically necessary.
4 It's the very point of the statute, to involve insurance companies in
5 utilization review. You don't get whatever you want or whatever your
6 physician recommends. It's got to be medically necessary and go
7 through the managed care program.

8 Section 6, exclusions. What is excluded from coverage? Any
9 services which are not medically necessary whether or not
10 recommended or provided by a provider. The concept is over and over
11 again. I would submit there's no way you could find that the contract is
12 ambiguous as to whether it excluded services that were not considered
13 medically necessary.

14 So then we go to 13.66. We'll go through some of these in
15 more detail. But you've got to remember the instruction Mr. Sharp read
16 to you. You know, the Court said you construe contracts by their plain
17 meaning. It's not whether some lawyer technicality is applied and trying
18 to figure out ways around the language. But I would submit to you that
19 we're going to -- we have established through the evidence that proton
20 beam for stage 4 lung cancer was not proven to be effective or safe and
21 that's why we denied the coverage.

22 And if something isn't proven safe and effective, how can it
23 be consistent with diagnosis improvement? If something is not safe and
24 effective, how could it be the most appropriate level of service which can
25 be safely provided? And this is not based on the opinion of Dr. Ahmad, a

1 random radiologist from here in Nevada who is a medical oncologist.
2 This is the result of annual study by Sierra Health and Life and its
3 affiliates to review the literature, to review the guidelines, and make
4 decisions that can be applied consistently across all their insureds.

5 I would submit to you you don't want individual doctors
6 starting at ground zero and researching it, trying to come up with this
7 decision as to whether something is medically necessary and that it's
8 efficient and better to have committees come up with these policies that
9 medical directors can apply not only efficiently, but consistently to
10 everyone who is requesting that service for that treatment. It's not
11 evidence that United doesn't care. It's evidence that United is trying to
12 treat everyone the same and everyone fairly and provide efficiency of
13 review and consistent results.

14 So let's look at the denial. This is what United said when it
15 made its decision. Your provider asked for a proton beam radiation
16 therapy, therapy that used a beam of protons that carry a positive charge
17 to destroy cancer cells for you because you have lung cancer. This type
18 of radiation therapy is considered unproven and not medically necessary
19 for treating lung cancer. So this is citing the provisions of the contract
20 we just reviewed. You got no coverage unless it's medically necessary.
21 It's not being approved because it's unproven and not medically
22 necessary for treating lung cancer. And it goes on to state there's limited
23 clinical evidence that directly compares proton beam therapy with other
24 types of radiation therapy.

25 Current published evidence does not allow for any definitive

1 conclusions about the safety and efficacy -- whether it's effective,
2 whether it works -- of proton beam therapy to treat your condition.
3 Simple denial letter citing medical necessity which is clearly set out as
4 an exclusion in the contract and is even part of the grant of coverage as
5 a limitation in the grant of coverage.

6 You heard about this being a hidden policy. Well, the
7 contract contemplates that SHL may adopt reasonable policies and
8 procedures, rules and interpretations to promote the orderly and efficient
9 administration of the plan. These policies and procedures are
10 maintained by SHL in its offices. Such policies and procedures may have
11 bearing on whether a medical service or supply is necessary. The
12 contract contemplates the use of policies like the proton beam policy.

13 And if you go to the policy, what does it say? It says proton
14 beams are unproven and not medically necessary for treating all other
15 indications including but not limited to lung cancer. And the reason is
16 the exact same one that was set forth in the letter, because of the limited
17 clinical evidence and the published evidence doesn't allow for any
18 conclusions of safety and efficacy, other than the ones noted above.

19 So they don't stop there. They don't just give a conclusion.
20 We'll talk about Dr. Liao later and he says, oh, it's supported in the peer-
21 review literature. But does it get any peer-reviewed literature? On the
22 other hand, the United proton beam medical policy talked about the
23 literature and the evidence on which they relied. And the first thing they
24 relied on, the most important thing they relied on I would submit, is the
25 AHRQ. And the AHRQ is completely consistent with our determination.

1 And it says comparative effectiveness studies including randomized
2 controlled trials are needed to document the theoretical advantages of
3 charged particle radio therapy to specific clinical situations. Everyone
4 agrees that based on the physics, they're theoretical benefits of proton
5 beam over photons. That's not disputed by anyone.

6 What we don't know is whether the theoretical advantages,
7 the calculations that a computer can make about exposure of tissue to
8 radiation during an actual treatment are actually realized in clinical
9 situations. Or whether there's some aspect of protons for certain
10 conditions that could actually cause harm. And this is what everyone
11 does in science, they look when implementing an emerging technology
12 to randomize controlled studies to see if that's effective. And until it's
13 shown to be safe and effective through a randomized phase 3 study,
14 then the use of the technology is restricted to clinical trials and research,
15 until it's proven.

16 And this is not something an insurance company drafted.
17 This is not something designed to go to a cheaper use of photons. This
18 is the AHRQ. And you may remember, you know, when I was asking one
19 of their experts, he didn't even know what the AHRQ was. I asked him if
20 it was a government entity. He said, I don't know. But he was happy to
21 tell you that it did not support the United policy.

22 Right at the end of my case, I said I'm going to ask the Court
23 to take judicial notice of a few Nevada statutes. You may remember that.
24 I'm not doing it in front of the jury. One of the ones that I asked for and
25 the Court granted is this definition from 695G053. This is the managed

1 care statute. And it actually defines for managed care programs in
2 Nevada, the type of medical and scientific evidence that can be used.
3 And number 5 is bonding studies or research conducted by or under the
4 auspices of the federal government and nationally recognized federal
5 research institutes including A, the Agency for Healthcare Research and
6 Quality.

7 The number one source in the Nevada statute for studies and
8 research under the auspices of the federal government is the AHRQ.
9 And of course, we also head Dr. Kumar talk about the National Cancer
10 Institute, the National Institutes of Health. This is important because this
11 AHRQ study by the federal government was not someone arguing for
12 one point or another. But it was a comprehensive review of all of the
13 studies and all of the peer-reviewed literature related to proton beam for
14 lung cancer and the AHRQ found that it is not possible to draw
15 conclusions about comparative safety and effectiveness of proton beam
16 radiation therapy at this time.

17 The federal government said the same thing we did in our
18 medical policy. You also heard Dr. Owens talked about the Blue Cross
19 Blue Shield technology assessment which is another comprehensive
20 meta-analysis of all of the studies around here. And what Blue Cross
21 Blue Shield found after reviewing all of the studies and all of the
22 evidence said here at the conclusion, in the absence of randomized
23 controlled trials, the comparative effectiveness of proton beam therapy
24 and SBRT is uncertain. Another systematic review in 2012 concluded
25 there is insufficient evidence to recommend proton beam therapy

1 outside of clinical trials for lung cancer. And what I'd like you to do now
2 is -- Audra, can you play a clip from Dr. Chang? We're videoing all this,
3 and we can capture a few clips and I captured a few of them to remind
4 you of exactly what was said.

5 [Whereupon, a video recording was played in open court at 12:55
6 p.m. and concluded at 12:56 p.m., not transcribed]

7 MR. ROBERTS: So Dr. Chang, their expert, reviewed our
8 medical policy and says, yes, it contains the factors the contract says we
9 can look at in determining medical necessity and no, you didn't leave
10 anything out. It was a fair and complete summary of the literature. And
11 here was a really good point because Dr. Chang, as Mr. Sharp just
12 reminded you, said, well, no, I don't claim anything was left out. I don't
13 claim anything is wrong. I just disagree with the conclusion that United
14 reached. I think that proton beam therapy is correct for non-small cell
15 lung cancer, stage 4. That's my opinion, and I think they reached the
16 wrong conclusion.

17 But he told you he was a member of the American Society
18 for Radiation Oncology, the leading professional society for radiation
19 oncologists. Well, he not only disagreed with our conclusion based on
20 the literature, he disagreed with the conclusion reached by his own
21 professional society. ASTRO's emerging technology committee
22 concluded that current data do not provide sufficient evidence to
23 recommend proton beam therapy outside of clinical trials in lung cancer.
24 And they -- more robust prospective clinical trials are needed to
25 determine the appropriate clinical setting. So his own organization

1 disagrees with him. His own organization confirms the same conclusion
2 that Sierra Health and Life reached based on its policy.

3 If it's not consistent with the diagnosis and the treatment, we
4 can stop there. And then the second paragraph of that same policy says
5 what we can consider. The likelihood of a certain service producing a
6 significant positive outcome, the professional literature that we've cited
7 to in our policy says no conclusion can be brought about that. So that
8 factor weighs against approval. Reports in peer-reviewed literature.

9 We've already talked about that. Evidence-based reports and
10 guidelines published by nationally recognized professional
11 organizations. Professional organizations, that's a key word. Because
12 now here's the one that got pointed out to you by Mr. Prater. Well, yeah,
13 I read all of the you know, the federal government says it's not proven.
14 ASTRO says it's not proven. Everyone agrees that there are no
15 randomized comparisons to prove it, but the NCCN states that the use of
16 more advanced technology such as proton is appropriate when needed
17 with non-small cell lung cancer.

18 Number one, non-randomized comparisons. It's based on a
19 non-randomized comparison. So it's not the gold standard. It doesn't
20 prove it through a randomized trial. But more importantly, you
21 remember when Dr. Owens told you what the NCCN is? National and
22 Comprehensive Cancer Network or something like that. But the key
23 thing is that is an association of cancer treatment centers including MD
24 Anderson.

25 So the centers that own the proton therapy machines are

1 saying yeah, it's good. But it's based on non-randomized studies, and
2 it's based on the view of an organization of companies, not a
3 professional organization of doctors. And the duty to give equal
4 consideration to the request of the patient doesn't require you to give
5 more weight to what the proton beam centers think they should be used
6 for versus the professional organizations and the federal government. If
7 it's clearly out weighted, you don't have to approve it. It's only if you're
8 giving equal consideration and it's a tie that you've got to give the
9 benefit of doubt to the insured.

10 The medical scientists still want control, and this was
11 something -- my Sharpie was too fat. I got trouble down here but if you
12 remember, I talked to Dr. Owens about the hierarchy of clinical evidence.
13 Meta analysis outweighs other things, randomized clinical trials is the
14 gold standard. A non-randomized trial can't outweigh random -- the lack
15 of a randomized trial. And the opinion of the individual doctor like Dr.
16 Liao or Dr. Chang falls way down on the hierarchy of evidence. The
17 opinions of independent expert physicians of the health specialty
18 involved -- and this Dr. Chang, Dr. Liao -- are only considered under the
19 contract when such opinions are based on a broad professional
20 consensus.

21 And I would submit to you they didn't prove that Dr. Liao's
22 opinions and Dr. Chang's opinions were consistent with a broad
23 professional consensus. You can just look at the ASTRO to tell that. If
24 there was a broad, professional consensus among radiation oncologists
25 that treatment with protons was appropriate for non-small lung cancer,

1 stage 4, it would be in the ASTRO guidelines, not evidence that it's
2 inappropriate outside of clinical trials.

3 Broad, professional consensus. What did we offer to rebut
4 that? Dr. Kumar mentioned that's not the professional consensus, and
5 that yes, he is not personally preformed proton beam but neither have
6 99.5 percent of the radiation oncologists in the country. And Dr. Cohen,
7 Comprehensive Cancer Center here in Las Vegas, the treating physician
8 who treated Mr. Eskew first for the metastasis to one arm and then later,
9 his metastasis to the other arm. He told you that treating non-small cell
10 lung cancer, stage 4, was not the standard of care in 2016. There is not
11 broad professional consensus, and they did not prove it. And we have a
12 very short clip from Dr. Liao just to remind you of what she said about
13 this. Now, remember, they have the burden of proving --

14 [Whereupon, a video recording was played in open court at 1:03
15 p.m. and concluded at 1:04 p.m., not transcribed]

16 MR. ROBERTS: All she said was yes and yes. They never
17 introduced the ones that she's talking about. They never asked her that
18 question and they have the burden of proof. Thank God someone over
19 there said, well, why didn't United ask them? Why didn't Sierra ask
20 them? Well, they had the burden of proof. You can ask that question
21 back there in the process, but here in trial, if there was some randomized
22 clinical study that proves safety and efficacy for lung cancer, they had
23 the burden to come in here and show it to you, and it's not in evidence.

24 And I'm going to date myself a little bit, but I took Latin in
25 high school. I don't even know if they teach that anymore, but we had to

1 read Cicero, and I thought I'll never use this. So in some of the orations
2 of Cicero and the nature of the Gods, you know, he uses this term ipse
3 dixit to refer to a flaw and a rhetorical argument, which basically says
4 because I said so is a literal translation. So if an expert is relying on their
5 expertise and authority to say something is true instead of the evidence,
6 it's called an ipse dixit argument.

7 Now I used this in the law because the courts have
8 recognized this. A case can't be based on an ipse dixit of the plaintiff's
9 experts. And that's what we've got. Dr. Liao, I'm world renowned and
10 he needed it because I said so. Dr. Chang, because I said so.

11 And going back to the very last paragraph which we haven't
12 spent a lot of time on, of 13.66, medical necessity. In bold face, services
13 and accommodations will not automatically be considered medically
14 necessary simply because they were prescribed by a physician. Clearly
15 and unambiguous restriction on coverage. And I think it's at least worth
16 considering that this is not something that a doctor here recommended,
17 proton beam therapy.

18 Dr. Cohen says yeah, I've sent people out of state for proton
19 beam therapy for certain conditions. Dr. Kumar said yeah, I've sent
20 people you know, to refer people to proton beam even though I don't do
21 it. And he pointed out at St. Jude's, and that the science fully supports
22 using it for certain pediatric conditions. But what you heard was that
23 Mrs. Eskew got on the computer and she decided what treatment that
24 she thought Mr. Eskew should receive and she found a place that did it
25 and they went to Texas. This was not -- this was something they went all

1 the way to Texas to ask for before Dr. Liao recommended it based on
2 internet research. But the internet research is inconsistent with the
3 science.

4 Instruction Number 22 -- and you heard Mr. Sharp talk about the
5 terms in the insurance contract are construed in plain, ordinary and
6 popular meaning. But I'd like to draw your attention to the fourth
7 element of Instruction Number 22. And that says the contract is
8 unambiguous. The insurance contract is construed as written. And you
9 may not increase the obligations of the parties if the contract
10 intentionally and unambiguously limited such obligations.

11 Through all of the provisions you've seen in this contract,
12 intentionally and unambiguously excludes treatment that is not
13 medically necessary. And I think Mr. Sharp argued, and I found a clip --
14 Mr. Sharp said, oh, but Dr. Owens admitted proton beam therapy was a
15 covered service. I agree that he said yes to some of Mr. Sharp's
16 questions, and he was using potentially covered and covered a little
17 loosely. And I asked him when I got back up, you know, you said
18 covered; you said potentially covered; which one did you mean? And he
19 said, oh, I meant potentially covered if it was medically necessary.
20 That's the clarification. And then there was a question from the jury
21 which I'd like to play for you.

22 [Whereupon, a video recording was played in open court at 1:09
23 p.m. and concluded at 1:10 p.m., not transcribed]

24 MR. ROBERTS: But based on the evidence that they
25 reviewed, the evidence cited in the medical policy, approval was not

1 appropriate. That was his final conclusion.

2 And let's clear up the appeal. The contract says that you may
3 appeal, and it gives procedures for doing it. We do not contend that we
4 win because they didn't appeal. In fact, it is our position, and we think
5 that we've shown through the testimony of Owens and Kumar and
6 others, that the decision was absolutely correct. That the weight of the
7 scientific evidence at the time we made the decision is that this was not
8 an appropriate treatment.

9 Now, we didn't get the comparative studies, but we don't
10 contend the comparative studies if provided to us would have changed
11 the decision. Because what do we know -- and I'll talk to you in a little bit
12 more detail about this -- but Dr. Kumar explained it. The studies that we
13 just read explained it. No one argues that a computer program can
14 come up with theoretical benefits for proton beam treatment. And that's
15 what the comparative study that Mr. Sharp showed you again today did.
16 Those aren't actual doses. Those are the theoretical doses based on the
17 physics and based on the computer.

18 Before you can find that a treatment is medically necessary,
19 you've got to have more than that. You've got to have clinical trials that
20 prove that in a clinical setting, those theoretical benefits are actually
21 achieved. The reason that we bring this up is you know, the Court has
22 told you there's direct and indirect evidence. And we do know that there
23 was no appeal which I think goes to the state of mind of Dr. Liao. And
24 she tries to single out Sierra or United as not granting appeals, I guess,
25 when it comes to proton beam therapy. But Dr. Owens showed you the

1 survey of the policies that he did on the internet.

2 This is not unique to us. The same literature was considered
3 by other insurance companies done by the same type of regulations and
4 all of the insurance companies Dr. Owens looked at, insuring the
5 majority of covered lives in the United States all reached the same
6 conclusion that we did, that it's not covered. And you can look at the fact
7 that Dr. Liao just said fine, let's do IMRT is that you know, one, maybe
8 she knew that it would be denied, and it goes to her state of mind,
9 whether she really believed it should be covered. Because the reason
10 she gave is we don't have time for the appeal.

11 But the law requires us, and the contract requires us to turn
12 around an expedited appeal in 72 hours. The first request was also
13 required to be turned around in 72 hours and it's undisputed that we did
14 it in 48. There's nothing in the record from which you can determine that
15 it would be reasonable to think we wouldn't comply with the contract of
16 the law. And she says, we need to get started. We don't have 72 hours.
17 But the denial of the proton beam therapy was on February 5th. The
18 approval of that IMRT was on February 5th, and treatment didn't start
19 until February 11th. There was time to do three-day appeal if she
20 believed in the science. But I would submit to you that the -- that this
21 and other evidence you can infer that she did not believe the science
22 supported her request.

23 Mr. Sharp just told you that proof of medical necessity is the
24 existence of other proton beam centers. No one's testimony that we've
25 offered has been that proton beam therapy is never appropriate. Our

1 own medical policies say that it's proven and medically necessary for
2 intracranial malformations, ocular tumors, skull-based tumors. So if this
3 was a rigged system set up to deny expensive care, why are we
4 recognizing that it has been clinically proven in certain areas? And if it's
5 been proven in certain areas, you've got to have proton beam centers to
6 supply that treatment.

7 The existence of proton beam centers all over the country
8 doesn't prove that they're medically necessary for lung cancer. It was
9 argued that the existence of the New York Proton Beam Center and an
10 affiliate of United's investment in it, is also evidence it's medically
11 necessary and that we're running some kind of scam. But I'd ask you to
12 look at the actual document, Exhibit 8 starting at page 150, to what this
13 document actually says. The need analysis for this New York Center said
14 proton beam therapy is a technology with demonstrated efficacy, there's
15 that word again, for a limited number of relatively rare cancers and
16 tumors providing high rates of tumor control and survival while reducing
17 radiation side effects. Despite encouraging results, there is a lack of
18 randomized studies demonstrating proton beam therapy's effectiveness
19 in comparison with conventional theories.

20 So, the very background, this affiliate recognized the same
21 thing that our policy did, that it's only been demonstrated for the
22 relatively rare cancers that we included as covered in our medical
23 necessity document. And then, it says, here is the potential base for the
24 Center, potential eligibility for proton beam therapy, and here are the
25 type of cancers -- if I can get my stick, so I don't have to walk in front of

1 the TV.

2 And here are the different cancers that are potentially eligible
3 for treatment. Pediatric cancer is one of them. I point out that the United
4 policy has that section at the beginning. This says that proton beam
5 therapy is considered medically necessary for anyone under the age of
6 19, which is consistent with pediatric cancer being covered.

7 You add up all of the cases, and that's 688 cases. So, they
8 say there's a need for one proton beam center for the capacity that
9 access -- provide access to approximately 700 patients. That doesn't
10 include any lung cancer patients. Research is required to document the
11 effectiveness of proton beam therapy in treating more common cancers,
12 for example, lung. This is, I think, consistent with anything that our
13 witnesses have told you in this courtroom.

14 In addition to the 700 patients who qualified, we would note
15 that this Center will serve 1500 patients a year, meaning has capacity to
16 treat 800 patients for cancers for which the effectiveness of proton beam
17 therapy has not been demonstrated. And one of those is lung cancer.

18 And then there's detailed in the document about the research
19 that is proposed. Thoracic cancer. And that includes lung cancer, small
20 cell lung cancer. Phase three, phase two, the protocol for limited space
21 small cell lung cancer.

22 So, the Center is being proposed for research on lung cancer,
23 not because it's medically necessary for lung cancer. There is nothing
24 inconsistent here about that. And I would also point out that the
25 research that is being proposed is early stage lunch non-small cell lung

1 cancer. Not stage four, metastatic, non-small cell lung cancer, early
2 stage. And that's consistent with the evidence you saw about Dr. Liao's
3 own study, which is currently going on. Remember, you saw that in the
4 medical records. Dr. Kumar told you about it. Her study, you're only
5 eligible if you have stage two or stage three. That's why Mr. Eskew
6 wasn't even eligible for a clinical study with stage four.

7 And then, just to -- go back to the slide, which was shown to
8 you, oh, look, adult lung cancer, 13 percent. United admits that lung
9 cancer's appropriate. But I'm going to go back again, 688 does include
10 lung, 800 is for research, you get to 1500. This is the percentage of the
11 1500. And we know that it's not included in the ones that have been
12 proven, so it's clear that the 13 percent was research and clinical trials,
13 not medically necessary treatment.

14 UHG, Sierra, New York Proton. You've heard some evidence
15 from Mr. Flood that there was some common employees in the provider
16 branch. He didn't tell you there were any common employees between
17 the provider branch and the health insurance branch.

18 And there's no evidence anyone at Sierra Health and Life
19 ever even knew about this website that they're going to show you -- that
20 they showed you. No one, no one there was asked to approve it. And
21 it's nothing but an advertisement, like an MD Anderson advertisement.
22 It's not a peer-reviewed clinical study. It doesn't provide a basis for
23 overriding the medical literature. And I will also point out, if you look at
24 it, I think it's a twenty, '22 printout of the website. It's not even relevant
25 to this time period.

1 So, I would submit to you based on the evidence, they did
2 not prove that proton beam therapy was a covered service for
3 Mr. Eskew's stage four lung cancer. And because of that, you get to stop
4 here. If that's what you find, you can go to the verdict form and put
5 nothing. Sierra didn't breach the implied covenant of good faith and fair
6 dealing, because they didn't frustrate Mr. Eskew's ability to pay the
7 covered service. If proton beam therapy for lung cancer isn't covered,
8 you stop. But if you find that it is covered, you can't put a yes, yet,
9 because you've got more work to do.

10 And instruction number 2, or pardon me, paragraph two of
11 instruction number 21, Sierra Health and Life had no reasonable basis
12 for its February 5th, 2016 denial. So, it's you've got to find this on top of
13 the fact that it's a covered service, right? If there's, if United had a
14 reasonable basis, you can't blame them, bye.

15 And why is this? And is it consistent with the contract and
16 what you've been hearing? Well, you heard Mr. Prater criticize this,
17 medically necessary as determined by Sierra Health and Life. That's part
18 of the agreement of coverage. He says, oh, well, that makes the entire
19 document illusory if they can decide whatever they want. But that's not
20 the law. The Court hasn't told you to disregard it because Sierra Health
21 and Life has discretion. But, rather, you say, did they exercise their
22 discretion reasonably.

23 So, the question here is not whether Sierra was right, the
24 question is whether they had a reasonable basis for denying the
25 coverage, even if you don't think it was the correct decision. And there's

1 no hindsight for this factor, right?

2 So, we can't bring in Dr. Kumar to argue effectiveness if
3 Dr. Ahmad didn't know about that in some policy at the time. But at the
4 same time, the Plaintiffs can't bring in hindsight to talk about a website
5 from 2022 or a 2018 study, or some other thing that Dr. Ahmad did not
6 know about wasn't in the literature in front of him, and that he could not
7 have found with a reasonable investigation. So, there are few ways that
8 they could argue our decision was unreasonable. And I'd like to go
9 through those with you.

10 One, the use of a guideline of hidden policy. Well, I showed
11 you one provision of the agreement that covers that referred to the use
12 of these internal policies. The formal appeal provision also is consistent
13 if you read this contract as a whole. And that says that you're entitled to
14 a statement and any internal rule, guideline, protocol, or similar criteria,
15 that was relied on in making the determination is available free of
16 charge.

17 Well, we did that in the denial letter. And it doesn't make
18 sense that you can't rely on internal rules and guidelines in making it a
19 determination when the contract says, we'll give that to you free of
20 charge if we use it, if the contract contemplates it. And it contemplates
21 adverse determinations being based on medical necessity, experimental,
22 investigational, or unproven treatment or similar exclusion. And that
23 you're entitled to an explanation of the scientific or clinical judgment or
24 statement, and it will be provided free of charge. And, again, that's in
25 the denial letter.

1 The determination that Dr. Ahmad didn't act reasonably
2 because he didn't review the agreement of coverage in this case. And
3 they showed you the instructions for use in the medical policy,
4 Exhibit 24.

5 And if you read on beyond the parts that were read by
6 Mr. Sharp, it says that the terms of an enrollee's document may differ
7 greatly from the standard benefit plans upon which this medical policy is
8 based. And it's only in the event of a conflict that you don't apply the
9 policy.

10 And that's exactly what Dr. Ahmad said, is I know what the
11 standard medical necessity clauses look like. I've seen lots of them.
12 I don't need to look at this specific document. And he also said, I relied
13 on the nurse, the intake nurse, Nurse Amogawin, in this case, to tell me if
14 this is not a standard clause. If it's not a standard contract, I rely on the
15 nurse to tell me.

16 And then you heard Nurse Amogawin's testimony. And she
17 said she did look at the agreement of coverage, and I think she was
18 asked three times, remember, Mr. Gormley was reading the Plaintiff's
19 questions. And they asked her three times, are you sure you reviewed
20 the medical necessity clause in the agreement of coverage, and every
21 time, she said, yes.

22 And why did she do that? So, she could tell Mr. Ahmad if it
23 was different. But here's the thing, I showed it to Dr. Ahmad, and I said,
24 here's the clause, is it different? And he said, no. Here's the clause, is
25 there anything in here which would cause you to change your position?

1 And he said, no.

2 And if the agreement of coverage had differed from standard
3 language, you would have seen it. They talked about how it differed
4 from a definition in an internal policy, but that's not the same thing as
5 being different from standard plan language, because it wasn't. There's
6 no evidence of it.

7 695(g)-150. Remember the part about Dr. Ahmad's
8 qualifications. He's not a radiation oncologist, he doesn't understand
9 enough. Well, you never get to the part about Dr. Ahmad's
10 qualifications, if the service is not covered. You only get to that part, if
11 that service is covered by the health plan.

12 So, it's covered by the health plan. A treating doctor
13 recommends it. And then the doctor in utilization management says,
14 I don't care, I'm not going to give it to you. That's when he has to have
15 the expert qualifications. Dr. Ahmad did not need those expert
16 qualifications to read the medical records, read the policy, and determine
17 that the policy applied.

18 And I think Dr. Kumar is a perfect example. He's been the
19 Director of Radiation Oncology in five different universities, eminently
20 qualified, one of the leading people in grant funding doing research for
21 those scientific organizations that are listed in the state guidelines for
22 scientific evidence. And Dr. Kumar said, I've reviewed everything, and I
23 will agree it was appropriate. He would have made the same decision,
24 an incredibly qualified guy, who moved down here when he was at
25 UNLV. Dr. Ahmad's qualifications, or lack of qualifications, didn't cause

1 any damage.

2 Investigation. This was as Mr. Sharp told you and made
3 clear to you, you never get to the reasonableness of the investigation
4 unless the service was covered. This is only if you deny the covered
5 treatment and you're trying to get out and say, well, even though we
6 were wrong, our decision was reasonable. And in order to do that,
7 you've got to make a reasonable investigation. I've got no problem with
8 that. But what is thoroughly investigated? I would argue that
9 thoroughly investigated is looking at it enough until you are confident
10 that you're making the right decision and there's nothing further that
11 could change your mind.

12 But I have to address the argument that Dr. Ahmad did not
13 review the medical records. I think there is evidence for you, he had to
14 have reviewed the medical records. This is from Dr. Ahmad to Lou Ann
15 Amogawin. You can look through Exhibit 5. This is a thread that's
16 contained in page five and six. But we start with page six because we're
17 going backwards in an email thread. But this summary came from
18 Dr. Ahmad and not the nurse. Metastatic cancer to lung unknown prog
19 note. Proton therapy and all associated codes are not covered and are
20 denied.

21 So, regardless of the fact that this was a typo, it should have
22 been ONC 004, he didn't think he was [indiscernible] all the people
23 testing the protocol. He knew it was proton therapy. He knew it wasn't
24 covered for non-small cell lung cancer. He knew it was metastatic
25 cancer.

1 And if you look at the fax transmittal sheet from
2 MD Anderson, if you look at the letter from MD Anderson, the word
3 metastatic doesn't occur until you get about seven pages in to the
4 medical records. I would submit to you that it's proof more likely than
5 not, he looked at the medical records. Because that word is not in
6 anything from Lou Ann Amogawin. It's not in the cover letter. That had
7 to have been gotten from the medical records.

8 And then on page five, we see another update from
9 Dr. Ahmad, and he cites to the mediastinal tumor. Again, there's nothing
10 in the facts, nothing in the cover letter that uses the words mediastinal
11 tumor. That's only in the medical records. And there were some
12 mistakes. And this is a little exhibit I did with Miss Sweet. But the thing
13 about the process is, the process is designed to find those mistakes, to
14 find those clerical errors before the letter goes out.

15 And in this case, the quality control team saw a problem.
16 They sent it back. It was fixed, and there were no errors in the letter.
17 The letter correctly referred to the correct policy, the letter correctly
18 noted that there was non-small cell lung cancer, and that proton beam
19 therapy was not medically necessary for it based on HPN policy, the
20 correct policy. So, the system worked the way it was designed.

21 I would submit to you that when you're considering whether
22 or not Sierra Health and Life had a reasonable basis for the denial, you
23 could almost stop at AHRQ. Because this is a meta-analysis, it's the top
24 of the food chain when it comes to literature. And the federal
25 government, in studying all of the articles, says the same thing that our

1 denial letter says. It says the same thing the policy said.

2 So, even if you think it's covered, we had a reasonable basis
3 because we relied on the federal government publications, and what
4 they found and what their conclusions were. I think you can also look,
5 when you're considering whether we acted reasonably in finding that it's
6 not covered in our policy, I think that the evidence that Dr. Owens
7 tracked down as to what all of the other companies looking at the same
8 evidence found, the same lack of medical necessity. Not just
9 UnitedHealthcare, but every other major company Dr. Owens looked at
10 found that proton beam therapy was not medically necessary for non-
11 small cell lung cancer.

12 So, how can you say that we had no reasonable basis to rely
13 on these studies when every other major insurer relied on the same
14 evidence and found the same thing we did. Aetna and the BlueShield in
15 California, Cigna, Centene, which operates here in Nevada, Florida Blue,
16 Humana, Independence, the company that Dr. Owens worked with is
17 down there.

18 So, let's say you disagree. I don't think you had a reasonable
19 basis. I don't think you did a thorough enough investigation. And, so,
20 let me just get sidetracked a little bit on the thoroughness of the
21 investigation. What is it that we've claimed that we should have done?
22 That in the medical records, there is a reference to a Pinnacle planning
23 study. It doesn't say or explain in detail what the findings are, it doesn't
24 explain what the differences of theoretical doses to the esophagus are,
25 nothing is in there. But because Dr. Ahmad should have seen that a

1 Pinnacle planning study was done, he should have asked for it.

2 The problem with that is a Pinnacle planning study is a tool
3 that evaluates theoretical evidence. Nothing about this study could
4 prove that those theoretical benefits were proven to be effective in a
5 clinical study for -- lung cancer. They couldn't do it. So, there's no
6 reason to ask for something you don't need. But let's say you disagree.
7 You still have to go to the 3, the fact that we knew the decision had no
8 reasonable basis or recklessly disregarded the fact that there was no
9 reasonable basis. Again, you need this to make your apple pie. If you
10 don't find that, you can't award any money for the Plaintiffs.

11 And I don't think there's any evidence that we knew that the
12 proton beam policy was wrong, and we knew that the federal
13 government was wrong, and that we knew that all of these peer-
14 reviewed journals didn't know what they were talking about when they
15 said, it's not proven of safe and effective. There's no evidence of that.

16 And then, finally, the last apple you need is that it caused
17 damage. And that was the main thing Dr. Kumar was here to address.
18 Pardon, my lips have been chapped and my throat's been dry for
19 20 years. That's better.

20 So, it has to be a substantial factor in bringing about the
21 injury. And instruction 28, conduct is not a substantial factor in causing
22 harm, if the same harm would have occurred without that conduct. And
23 that's what we're relying on here for Dr. Kumar. Dr. Kumar pointed out
24 the benefits of proton beam therapy are still theoretical. He mentioned
25 an article in 2008 that said the use of proton beam in non-small cell lung

1 cancer is mainly based on the theoretical advantages and dose
2 distribution. That's the Pinnacle planning step. But there's little clinical
3 data to see if that actually happens in real life. And that's what makes it
4 impossible to draw conclusions about its efficacy.

5 And then we go all the way to 2008. And this was something
6 that the Judge said you could use just for the purposes of medical
7 causation. Because it -- and it goes to Dr. Liao's statement that the use
8 of proton beam, he wouldn't have had esophagitis. But in a letter to the
9 editor to a peer-reviewed journal, she says her closing remarks shed
10 light on the prospects for future randomized studies. It says, when they
11 measure the clinical advantages of proton therapy, which have remained
12 largely theoretical, although progress has been made.

13 So, Dr. Liao, who told you that, oh, more likely than not, he
14 wouldn't have gotten the esophagitis, recognized two years later that the
15 benefits were largely theoretical. And she hoped future randomized
16 study would one day prove her hypothesis. But there is evidence that
17 she did do a study.

18 And Dr. Chang tried to explain it away. But in the -- only
19 randomized clinical trial that she did, the only phase three randomized
20 trial that she did to try to prove this hypothesis of lowered toxicity, her
21 article reached the conclusion that the study failed to support my
22 hypothesis. The randomized trial failed to support what I was trying to
23 prove.

24 Now, that doesn't prove that it's not safe and effective.
25 Those are different things. And Dr. Chang tried to explain away, you

1 know, the limitations of the study and why it might have failed to prove
2 her hypothesis. But the point of it is, is in 2018, she had not proven her
3 hypothesis, which is why she's still doing a randomized clinical trial now,
4 to hope to prove her hypothesis. And you know something, if that
5 randomized clinical trial proves her hypothesis, then United has shown
6 you that they'll update their policies, and they'll provide coverage for
7 things that are proven in randomized clinical trials.

8 You don't have to punish United to make us approve proton
9 beam. We already approved it where it's been proven for limited
10 conditions. And we have procedures in place where if it's proven for
11 small cell lung cancer in the future, then we will approve it. There's
12 nothing that needs to be done here to punish United to make us provide
13 a treatment that hasn't been proven to be medically necessary.

14 Now, I've pointed this out, Dr. Liao didn't tell us what study
15 she relied on. And if the lawyers show you something, it's not what
16 Dr. Liao says that she relied on, because she didn't say anything. She
17 acknowledged in her article that the benefits are largely theoretical, and
18 the benefits are the dosages from that Pinnacle planning study. And
19 she's still trying to prove it. She wouldn't be still trying to prove it, if it
20 was already proven.

21 I've talked about that. Mr. Eskew wasn't even eligible for her
22 clinical trial that is currently ongoing because of his stage, his stage four
23 disease.

24 Mr. Sharp mentioned to you, again, that Dr. Chang had
25 evidence which he claimed was unrebutted, that a study showed five

1 times higher chance of esophagitis. And it was three percent versus
2 15 percent. Still a really low number, if you remember, when he said,
3 five times was three versus fifteen. But I would submit to you that he's
4 still relying on theoretical evidence and he's using the wrong studies.
5 Now, Mr. Sharp showed you one of the summaries from the actual
6 United policy that he claimed involved concurrent chemo and proved the
7 hypothesis. But that was not a randomized clinical trial, and it doesn't
8 outweigh the higher levels of evidence cited in the report.

9 But the other thing that Dr. Chang never addressed, and no
10 one addressed after Dr. Kumar put it out, is that the proton beam would
11 have delivered a higher maximum dose to the esophagus. Those lines
12 that you were shown from the planned study that Dr. Chang relied upon
13 for his five times higher, those were mean doses. And everyone agrees
14 that the mean dose for proton is theoretically smaller.

15 So, the mean dose for proton beam, 27 rays, IMRT 32. So,
16 this is slightly smaller. Well, what clinical significance does that have?
17 There's no randomized trial that proves it. But, Dr. Kumar pointed out
18 that Dr. Liao's constraint that she came up with, 34, that both IMRT and
19 proton beam are deemed safe under the number that she chose.

20 But what no one addressed on their side was the fact that the
21 proton beam max dose to certain points in the esophagus was higher
22 than IMRT, 72 grains versus 68 grains to certain areas of the esophagus.
23 And the constraint was from Dr. Liao. They're both deemed safe under
24 that constraint. But no one ever explained to you why it didn't matter,
25 that the point dose to the esophagus was higher with proton beam.

1 And if you -- remember the danger that Dr. Kumar talked
2 about from the higher maximum dose is that the esophagus is tender,
3 and it matters what the maximum dose is. The average dose is 27 for
4 proton beam, but there's certain areas getting 72, and the constraint for
5 average is 34. You're talking about almost twice above the constraint for
6 the mean. And he told you about the fact that this ruptured the
7 esophagus of the Governor down in Texas because of this higher point
8 dose, and it was a real danger. And no one had ever explained this
9 away. And this is why you need the clinical studies to see if things like
10 this happen when you control randomized clinical trials, and really
11 determine if something's safe.

12 And this is, and, aside, I don't know if you caught it, but one
13 of the interesting things Dr. Kumar found is that the literature showed
14 that the constraint of 34 from Dr. Liao was significantly lower than most
15 of the studies had shown was needed. The esophagus could tolerate a
16 higher mean dose. But because IMRT is higher than proton beam,
17 lowering the constraint makes the constraint move closer to dangerous
18 IMRT. But when it comes to maximum dose where proton beam is more
19 dangerous, the industry consensus is 74, but she used eight. And
20 I would submit to you that's evidence she's trying to make proton look
21 good and trying to minimize the effect of the max dose. But these are
22 Dr. Liao's notes.

23 And what it comes down to is this, is you can't just look at
24 that one study that was pointed to. You've got to look at clinical
25 evidence. Because there's another study Dr. Kumar told you about,

1 which compared toxicity using concurrent chemotherapy of IMRT and
2 proton -- proton, grade two, 47 percent, got grade two esophagitis, and
3 43 percent on IMRT.

4 So, when you add, when you do it concurrently with
5 chemoradiation, this study actually showed that more people got
6 esophagitis grade two with proton than IMRT.

7 Then if you look at grade three, 10 percent getting IMRT,
8 17.6 percent getting proton. Again, more people got the higher levels of
9 esophagitis with proton than IMRT, in this recognized study of a peer-
10 reviewed journal. They haven't proven that the use of proton beam
11 would have resulted in any different side effects than Mr. Eskew actually
12 suffered. And it's not a substantial factor if the same harm would have
13 occurred. So, he -- yes, he got esophagitis. He had concurrent -- chemo,
14 but Dr. Kumar's study that he pointed out to you shows he actually had
15 the same statistical chance of getting his symptoms with either one,
16 because it's so hard on the esophagus to do this concurrent treatment.

17 And he explained the science to you and kind of held it up of,
18 they had to state it all on the computer, why is this? And what would
19 explain this higher maximum dose? What would explain the fact that
20 you get esophagitis even though theoretically the -- organ is getting less
21 radiation under a beam dose.

22 And he says it has to do with the Bragg peak. The proton
23 beam therapy that was being administered was done during this 3-D
24 approach of IMRT where you've got radiation going in from different
25 angles, and it's intercepting the tumor. So, even the compare study that

1 they showed you with the colors, showed you that proton was getting
2 large doses to at least half the -- esophagus.

3 But the problem with these Bragg peaks is once you start
4 coming in from a bunch of different angles, you're stacking those on top
5 of each other. And that's why there's certain points in the esophagus
6 next to the tumors that are getting a higher maximum dose at the places
7 where these Bragg peaks intersect. It makes sense.

8 Here's the study from our policy, which Mr. Sharp reviewed
9 with you. And again, this is a non-randomized study. We're not trying to
10 hide anything. We included it in our documentation. But the important
11 part's here at the end, that it talks about some lower tox -- toxicity. But
12 tumor control and survival were not evaluated. And then it says a
13 randomized comparison of IMRT versus proton therapy has been
14 initiated.

15 So this study recognized that this is just some anecdotal
16 evidence. And that they're trying to actually prove it with a randomized
17 study, but they haven't yet. Giving equal consideration doesn't require
18 you to pretend that certain articles are based on better scientific
19 evidence than they are.

20 I want to address Mrs. Eskew. Remember, the big brouhaha
21 where we were accused of saying that she, she is a liar. And that is not
22 what we have said and would not say that. But, we think instruction 11
23 is helpful in understanding what we were trying to show. And that is
24 that discrepancy between a witness' testimony and that of others do not
25 necessarily mean the witness should be discredited.

1 Failure of recollection is a common experience. An innocent
2 mis-recollection is not uncommon. This was a stressful time in her life,
3 of that, no doubt, based on the medical records that she witnessed the
4 things that she told us about. The point in pointing out the medical
5 records is when those things occurred and when they got better. The
6 medical records are the best evidence of that. Not the recollection at this
7 point. And, you know, she chose to take the stand, not to talk about the
8 -- what her husband went through, but also to the point of trying to
9 increase her damages by providing testimony inconsistent with the
10 medical records.

11 So, we need to cross-examine. That's part of our job, it's not
12 the fun job. But that's still, that's part our job at that point. 108-6,
13 Mr. Sharp just showed me that. He's down to 159 and cannot eat. He
14 says it feels like something's stuck halfway down his esophagus. The
15 only thing I wanted to show you is this email's from April 30, 2016. So
16 this is right after the end of his treatment at MD Anderson. And we've
17 never disputed that the MD Anderson records show he has grade two
18 esophagitis in that time. It's the sunburn. No one's disputing that.

19 What we are saying is, yeah, you would have gotten that
20 from whatever treatment you got. Maybe even a higher point maximum
21 dose, if you had gotten proton. But then it got better. And he regained
22 his weight. This is not inconsistent at all with the cross-examination that
23 we did on this subject.

24 And this is something that if you want to spend a couple
25 days, you can probably go through and look at the medical records that

1 are in evidence, and you'll see that a lot of those have weights. And
2 we've charted the weights in evidence. And April of 2016 when that
3 email was, no one has denied that he suffered effects from concurrent
4 radiation and chemotherapy during this time. And the acute phase was
5 tough. But we do say is that the records show that the acute phase
6 ended shortly after radiation treatments stopped. And that he started
7 getting better. And there was no chronic phase. And he got all the way
8 back up to what his weight was at the beginning of this treatment.

9 Now, he did start to decline again. But the decline was in
10 November of 2016 when he had that hospitalization. And Dr. Kumar told
11 you about all the reasons in the records why he was losing weight and
12 why he needed nutrition. His sepsis, his advancing cancer. All of those,
13 the weight loss from this date forward can be explained from his
14 advancing condition.

15 And, yes, his condition did advance, but it wasn't
16 esophagitis. Once we get into this period, the November hospitalization
17 and he started declining, there's not a single reference in any medical
18 record to esophagitis or trouble swallowing. And what did Dr. Kumar tell
19 you? That you can get this chronic esophagitis later when the scar tissue
20 formed just like Dr. Chang. But if you get it stage -- if you get it grade 3,
21 if you get it to the point where it's interfering with your ability to take
22 nutrition, they've got a procedure to fix that where they put a balloon
23 down and expand it. They've got a procedure.

24 I submit to you that if this weight loss was caused by
25 esophagitis, they would have done something about it, because there's a

1 way to fix that. It wasn't. There's no reference in the medical records.
2 And you can't speculate something that the doctors did not diagnose at
3 the time. Dr. Chang told you that he believed this decline was due to
4 esophagitis, but it wasn't based on the medical records. He said it was
5 based on reading the deposition of the family members.

6 So after going through all four factors, I'd ask you to find
7 they don't have all four apples. They didn't prove every element of their
8 case. And I would ask you, again, to put no, for you to find Sierra Health
9 and Life breached the implied covenant of good faith and fair dealing.

10 If you check yes, you've got to reach damages. Mr. Sharp
11 talked to you about those. When you're talking about numbers this big, I
12 need to draw your attention to this jury instruction, which says what you
13 base the amount on. It's the amount to fairly compensate for the
14 physical pain, mental suffering, and anguish, disability, loss of
15 enjoyment of life, and emotional distress. These are compensatory
16 damages. This is not punishing United for something that we did wrong.
17 This is not punishing us because we're a big insurance company and we
18 can afford it. It's setting a reasonable compensation for the extra
19 suffering.

20 And it's really going to be hard to determine what that is
21 based on the records. The family members say, yeah, after a certain
22 point, he, he lost a lot of enjoyment of life. Of that, no doubt. But how
23 do you tease out what loss of enjoyment of life, pain and suffering he
24 would have had from having terminal stage four cancer that's spreading
25 throughout your whole body, you know, from any marginal increase of

1 pain due to the side effects of IMRT. Did they even prove that he
2 suffered more because of IMRT versus proton beam therapy? But I
3 would submit to you that there is no way you could look at what is
4 reasonable and fair compensation and come up with \$30 million.

5 Money is still real in this courtroom. And that's not a
6 reasonable request. And he pointed over and said, I hit them with,
7 he'd mentioned fifteen to fifty million in voir dire. Well, actually, I was
8 glad he did it. Because as soon as he said that, everyone in this
9 courtroom knew what this case is about. And they can talk all they want
10 to about trying to get people to change. But guess what, that happens in
11 a punitive phase, if you find punitive damages are appropriate. This is
12 compensation, right? Fifteen to fifty million. We know what this case is
13 about.

14 So, in addition to reasonable compensation for his pain and
15 suffering, whatever extra there may have been as his disease
16 progressed. The other damages, proton, he didn't pay for proton. He
17 got IMRT instead. You heard from our witness based on the question
18 you guys asked, say that, well, 60,000 for IMRT full course, 115,000
19 based on the article someone at MD Anderson did. So, that's 55,000
20 bucks that was not spent by United for not approving this coverage.

21 So, I think you'd start with that, if you find that we should
22 have approved it, and we breached the covenant of good faith and fair
23 dealing. And I'm not going to suggest a number, because I think it's too
24 complicated and the evidence is too intertwined. But I will suggest to
25 you that whatever marginal difference for 12 months the use IMRT made

1 in his life, the evidence doesn't support an award of millions, it supports
2 an award in the hundreds of thousands.

3 Punitive damages. I'm winding down. It's a good thing. I'm
4 about to lose my voice, and then I'm done. So, you can cross your
5 fingers.

6 Instruction number 32. If you find by clear and convincing
7 evidence that the Defendant Sierra Health and Life acted with fraud,
8 malice, or obstruction -- and they're pointing them out as what they
9 believe they've proven with clear and convincing evidence.

10 And I want you to ponder on malice. I mean, you know, my
11 kids love Disney and remember that Disney character, Maleficent, right?
12 That it's coming from the same word. Maleficent, evil intention. And
13 actual malice means you intend to hurt someone. But, though, this is
14 implied malice. And that means conscious disregard.

15 But it means knowing that harm was going to result to
16 Mr. Eskew, and you willfully and deliberately failed to act to avoid the
17 consequence, which is -- which is really almost like intending to hurt
18 someone, right? That the intent can be implied. You knew they were
19 going to get hurt, and you didn't do anything to stop it. So, you could be
20 subject to punitive damages.

21 And clear and convincing evidence means such evidence that
22 will produce in your mind a firm belief or conviction that this is true. Not
23 just more likely true than not, but a firm belief and a conviction that
24 United acted with a state of mind that needs to be punished.

25 THE COURT: Mr. Roberts, it's time for our break.

1 MR. ROBERTS: Okay.

2 THE COURT: All right.

3 MR. ROBERTS: But you --

4 THE COURT: Ladies and Gentlemen, you are instructed not
5 to talk with each other or with anyone else about any subject or issue
6 connected with this trial.

7 You are not to read, watch, listen to a report or commentary
8 on the trial by any person connected with this case, or by any medium of
9 information, including without limitation, newspapers, television or
10 radio.

11 You are not to conduct any research on your own in this case
12 such as consulting dictionaries, using the internet, or using reference
13 materials. You are not to conduct any investigation, test any theory of
14 the case, recreate any aspect of the case, or in any other way investigate
15 or learn about the case on your own. You are not to talk with others, text
16 others, tweet others, Google issues, or conduct any other kind of book or
17 computer research with regard to any issue, party, witness, or attorney
18 involved in this case. You are not form or express any opinion on any
19 subject connected with this trial until the case is finally submitted to you.

20 So, we will return at 2:15.

21 THE MARSHAL: Y'all rise for the jury.

22 [Jury out at 2:02 p.m.]

23 THE COURT: Counsel, are there any issues outside the
24 presence of the Jury?

25 MR. SHARP: No, Your Honor.

1 THE COURT: Thank you, Mr. Sharp.
2 MR. ROBERTS: No, Your Honor.
3 THE COURT: Thanks, Mr. Roberts. We'll come back at 2:15.
4 MR. ROBERTS: Thank you, Your Honor.
5 THE COURT: Thank you.
6 [Recess taken from 2:03 p.m. to 2:15 p.m.]
7 THE MARSHAL: Okay, Department 4 come to order.
8 THE COURT: Thank you, counsel, please be seated.
9 Everybody ready for the jury?
10 MR. SHARP: Yes, Your Honor.
11 MR. ROBERTS: Yes.
12 THE COURT: Thank you.
13 THE MARSHAL: Please rise for the jury.
14 [Jury in at 2:15 p.m.]
15 THE MARSHAL: Jurors are all present, Judge.
16 THE COURT: Thank you. The parties stipulate to the
17 presence of the jury.
18 MR. SHARP: Yes, Your Honor.
19 MR. ROBERTS: Yes, Your Honor.
20 THE COURT: Thank you. Please be seated.
21 Mr. Roberts please proceed.
22 MR. ROBERTS: Thank you, Your Honor.
23 DEFENDANTS' CLOSING ARGUMENT CONTINUED
24 MR. ROBERTS: I'm winding down. Almost done. So I was
25 here at the instruction on the punitive damages which tells you what the

1 purpose of punitive damages are.

2 That you should choose to award them if you think that it's
3 necessary to punish a wrong doer that acts with fraud, oppression and
4 malice in harming a Plaintiff. So we not only have to act inappropriate
5 with malice, but you have to find that what we did actually caused harm
6 to Mr. Eskew. And you can also award punitive damages if you want to
7 deter similar conduct in the future.

8 The purpose of punitive damages is not to make the Plaintiff
9 whole. Therefore Plaintiff is never entitled to punitive damages as a
10 matter of right. And whether to award punitive damages is entirely
11 within your discretion, even if you find all of the factors are met, you get
12 to decide. This is not a common thing in a case. You get to decide
13 whether this rises to that extreme level that was defined by the punitive
14 instructions.

15 And as you're thinking about punitive damages and whether
16 you think you would want to award them, if you get to that, think about
17 the basis. The Plaintiffs have said this a couple of times. Said it in
18 opening, said it in closing, is that they were going to prove this is a
19 rigged system set up to provide cheaper care. And they want you to
20 deter us from doing that. I would submit that the evidence just isn't
21 there that Ms. Sweet said it rules over a rigged system.

22 If this were a rigged system set up to deny claims, why even
23 send it up to a medical director. Why have medical policies. Why not
24 just deny all the claims, if they're expensive. The evidence is that we
25 approved proton beam, even though it costs twice as much for cancers

1 where it's been proven effective. This is not a rigged system. It's a
2 rigged system that put in a lot of work on research and the creation of
3 this policy. And there are lots of policies like this.

4 Think how much time and effort it takes to create all of these
5 policies. Do this research every year. Come up with guidelines so that
6 people are treated consistently and fairly and based on science and not
7 the whim of the particular medical director they happen to be assigned
8 to.

9 Plaintiffs haven't proved this. And what is it that we're trying
10 to deter? A rigged system set up for cheaper care. And the cost has
11 come up a couple of times. Look you've seen the medical policy; you've
12 seen the denial letter. We're not saying that we considered cost. That's
13 not what we're saying. But if the Plaintiff is right, and you believe that
14 we made this decision because it was cheaper, cheaper, less costly, the
15 whole utilization review set up by the State of Nevada as part of a
16 managed care, to make healthcare more affordable.

17 Do you really want to deter insurance companies from
18 making decisions about -- based on cost, based on approving things that
19 are more costly that haven't proven to be more effective. They want to
20 deter people from using policies for efficiency and consistency. I would
21 submit to you, that even if you think we've made the wrong decision,
22 even if you think that Plaintiffs have proved the science and that this was
23 a covered treatment, that there's nothing to punish you. Because the
24 intent was to comply with the whole purpose of a managed care
25 program. And perform utilization review.

1 If someone wanted a policy where you got whatever your
2 physician recommended, they could go find one. The Eskews didn't
3 choose that type of policy. They chose for a managed care policy where
4 the insurer is given not only the ability but the duty to review requests
5 for care to determine if those requests are consistent with the science
6 proven to be safe and effective. And if they're not, to not approve them.
7 Even if we're wrong, what we're doing is what managed care programs
8 are supposed to be doing.

9 695(G) you've seen that a couple of times. Managed care
10 defined. That's Section 040. Managed care means a system for
11 delivering healthcare services that encourages the efficient use of
12 healthcare services. Using various techniques, including managing the --
13 excuse me, including utilization review here at number two. This is the
14 State statute. This is what managed care companies are supposed to do.
15 You don't want to deter someone and punish someone for using their
16 best efforts to do what a managed care company is supposed to do. So
17 this is where I'll close.

18 I'll go back to the elements, Instruction number 21. Apply the
19 law to us. And apply the law to the Plaintiff. Have they proven every
20 element of their claim. Have they proven proton beam is a covered
21 service for lung cancer, based on the scientific evidence. And the
22 definitions of medical necessity in the contract. Have they proven the
23 Sierra had no reasonable basis for its decision. Even if they were wrong,
24 and we had no reasonable basis to rely on the federal government
25 agency, charged with reviewing the literature, who said that it's not

1 appropriate outside of the clinical setting.

2 Did we know that we had no reasonable basis or reckless
3 disregarded it. Did they really prove our state of mind here. And finally,
4 did they prove that damages were actually caused, that there were side
5 effects that would not have also been suffered by Mr. Eskew, even if he
6 received proton beam, because he got -- whatever radiation therapy Mr.
7 Eskew got was concurrently with chemo, which made it highly likely that
8 he would get some form of esophagitis in that early stage of treatment,
9 regardless of the modality that his doctor used.

10 Apply the law, do your duty. We don't want special
11 treatment. We just want you to treat us fairly under the law. Not as a
12 big insurance company, not as someone arrogant. Just someone who is
13 here before you, asking for you to do your duty and hold the Plaintiffs to
14 their burden of proof.

15 And when you go back and you talk about reasonable basis, I
16 would submit to you, you know, maybe there's going to be a
17 disagreement, just like there's been a disagreement about doctors. And
18 if someone disagrees and they have a reasonable basis for disagreeing,
19 isn't that evidence that there was a reasonable basis.

20 Plaintiffs haven't proven their case. And now I've got to go
21 sit down and listen to Mr. Terry get up here. I don't get another chance
22 as Mr. Sharp said. And that's probably the hardest thing for a lawyer to
23 do is sit at a table and listen to another lawyer knowing they don't get to
24 stand up and argue with them again.

25 But I think that the evidence is in front of you. And I would

1 ask as you're listening to whatever argument Mr. Terry makes, how does
2 it fit into the four factors. And can he really convince you that they've
3 met all four factors required by instruction number 21. And I don't know
4 how many times people have looked out over the wall here and noticed
5 all the inscriptions, legal writing, chiseled into the stone. One of my
6 favorites and gives me comfort as a Defense lawyer who doesn't get
7 to go last is learned hand. And it says jurors are not leaves swayed by
8 every breath.

9 I trust that you've heard the evidence. I trust that you'll think
10 about what I said as you listen to Mr. Terry. And I appreciate your
11 service. Thank you.

12 MR. TERRY: May I proceed, Your Honor?

13 THE COURT: Yes, you may.

14 MR. TERRY: Thank you.

15 PLAINTIFFS' REBUTTAL CLOSING ARGUMENT

16 MR. TERRY: Hello, everybody. This is my first chance to talk
17 to you directly in this whole trial. My co-counsel and friend, Matt Sharp
18 got to talk to you in opening and this is my first time to talk to you
19 directly. You probably heard more of me than you want to here, but you
20 got to listen to me a little bit longer, I guess. I promise I won't be as long
21 as either one of these guys have been. Because my job is to sort of sum
22 things up, bring things to a head, to get you on your business.

23 So when you're a lawyer, and you're trying to listen to what
24 another lawyer is saying and try to sort of form what you need to say in
25 response, it's not always real clean and in a nice order, so I'm going to

1 try to do the best I can, just to sort of speak to you from the heart.

2 I don't have any real fancy stuff to show you, I don't think,
3 that you haven't seen already. But I just want to start with this. Because
4 you know, I was standing right here when Sandy Eskew was sitting right
5 over there. And I remember what happened right here in this courtroom.
6 And it meant something to me. Because Sandy has come a long way.
7 She's walked a long dark lonely road to come sit right there.

8 And the L word didn't come out of anybody's mouth, that no
9 one said you're a liar. Nobody said that. And I'm not saying that they
10 did. But I did hear what they did say. And what they said was, Ms.
11 Eskew, isn't it true that sometimes people do embellish the truth for
12 incentives. So what does that mean? What does that mean?

13 They say that to that lady and then they say we never called
14 her a liar. Them people over here, they're saying we called her a liar. We
15 never did that. We wouldn't do that. Well, if they want to stand up here,
16 right here, in front of the 10 of you, stand right here and say it, if they
17 won't own it. If they want to say Sandy's lying, then you shouldn't
18 believe it. Because if they're big enough to infer it and imply it right here
19 in this open courtroom to this nice lady, then they ought to be big
20 enough to stand right here and just say it, but they're not.

21 So I think we can take that, and we can put it to the side.
22 Because if it was true, then come up here and say it. And they won't.
23 Now I'm going to try not to get mad anymore.

24 I now want to talk about another topic that was a big part of
25 what Mr. Roberts had to say. it's about this whole medical necessity

1 thing. I am sick of hearing about medical necessity, I am sure just like
2 you guys are. But I've got to talk about it a little bit. There's really two
3 aspects of this talk about medical necessity. There's medical necessity in
4 general as we argue about with proton therapy. Medically necessary
5 generally or not. And then there's a specific thing. Is it wasn't medically
6 necessary for Bill Eskew as an individual human being.

7 So I want to talk quickly about both of those things. First I
8 want to talk about was proton therapy medically necessary generally.
9 And so I want to talk about something that I just don't think that the
10 defendant can really feign this. I really don't. I think it's a big deal. it's
11 been talked about quite a bit in the trial, but I want to revisit it now.

12 So let me kind of set this up because I think to put it into
13 context of what I heard here today, too. Lee Roberts -- Mr. Roberts says
14 -- he gave us a little Latin from his younger days. They didn't teach Latin
15 where I come from. I grew up in a little crummy town in Oklahoma, and
16 we didn't know what Latin was. But I learned a little bit of it in law
17 school. And he said ipse dixit means because I said so.

18 And what he's talking about is Dr. Liao says that proton
19 therapy is medically necessary for lung cancer because I say so. That's
20 Dr. Liao is the one and only one saying so.

21 And then he also said that Sandy Eskew decided what
22 treatment Bill was going to get. I don't think that's true. I think that's far
23 from it. I think Sandy Eskew figured out that that was a possibility, that
24 she might get her husband treated with proton therapy for lung cancer
25 and she went to MD Anderson, and she worked her tail off to make that

1 happen.

2 And so she gets out there to MD Anderson and she doesn't
3 dictate to Zhongxing Liao what kind of medical treatment her husband is
4 going to get. Dr. Liao is the one who is the doctor, and Sandy trusts her.
5 She listens to her. And Dr. Liao says proton therapy is correct for Bill's
6 lung cancer. So I'm getting a little ahead of myself. Sandy didn't
7 decide, Dr. Liao decided that that was the best treatment for Bill.

8 Dr. Liao also said -- Jason, can we pull up Dr. Liao's
9 deposition testimony at page 45, line 10. I'll just show it to you. We've
10 got her testimony and you can look at it carefully. 10 through 20, Jason.
11 Okay. This is me asking her questions. Matt read -- or Mr. Sharp read
12 her deposition.

13 Q Did radiation oncologists at other cancer centers of
14 excellence, like MD Anderson treat lung cancer patients with protons?

15 A Yes.

16 Q Is that true? All over the United States and all over the
17 world?

18 A Yes.

19 Q Is it true that treating lung cancer with proton therapy is a
20 standard of care in the medical profession?

21 Now I haven't heard a single person in this case, not one, say
22 that Dr. Liao doesn't know what she's talking about. In fact, to the
23 contrary. Everybody who knows anything about Dr. Liao, whether we
24 called them to the stand, or they called them to the stand has said that
25 Liao was the preeminent expert in this area in the whole world. So that's

1 what she says.

2 So we also talked about, you know, there's a list of Cancer
3 Centers of Excellence all of the world, as long as your arm that have
4 proton machines. That doesn't mean nothing. It means that there's
5 hundreds of thousands of people that have been treated with proton
6 therapy in this world over the years. And proton standards are growing
7 as fast as the insurance companies will let them grow and they do
8 people good.

9 And so that matters. So I want to point out one other thing
10 on this topic. Jason pull up Exhibit 24, please. This is a proton therapy
11 policy that we've talked about so much. It's their policy.

12 Let's go, Jason, to page 4. Now this is United Healthcare
13 talking about proton therapy. And let's go, Jason, to -- let's just pick
14 something here. Let's go to the first paragraph.

15 Unlike other types of radiation therapy. Now this is United
16 Healthcare talking about the therapy that these lawyers have come here
17 to say is not medically necessary and unproven. "Unlike other types of
18 radiation therapy, that use x-rays or photons to destroy cancer cells,
19 proton beam therapy uses a beam of special particles or protons, that
20 carry a positive charge. There's no significant difference. The biological
21 effects of protons versus photons. In other words, they both kill cancer,
22 but protons do it differently. However, protons can deliver a dose of
23 radiation in a more confined way to the tumor tissue than photons.

24 They release most of their energy at the tumor region and
25 they deliver only a minimal dose beyond the tumor boundaries. Then

1 just listen -- there's more of this, but let's skip down to the third
2 paragraph. Again, this is United Healthcare talking about this treatment
3 that these lawyers act like is unproven. Because of these physical
4 properties, proton beam therapy may be useful when -- when the target
5 volume is in close proximity to one or more critical structures. Let's
6 stop right there. Bill Eskew's tumor was close to one or more critical
7 structures in the middle of his chest in the mediastinum. Right next to
8 his trachea and his esophagus and his lungs and his heart.

9 So that part describes Bill Eskew. And sparing the
10 surrounding normal tissue cannot adequately be achieved with photon-
11 based radiation therapy or IMRT. According to Zhongxing Liao, who
12 everybody says is the top-notch doctor on this topic in the whole world,
13 she said that was true of Bill Eskew. So they know in their own proton
14 policy that that is true and that is true of Bill Eskew.

15 So there's just such a disconnect. I'm having a hard time
16 getting my mind around it. And now I want to talk about this. Jason pull
17 up, well, not yet. Let me talk about something before you pull it up.

18 We've talked about this New York Proton Center issue. It's
19 been talked about quite a bit here. And you know, the fact of the matter
20 is the parent company, the ultimate parent company of Sierra Health and
21 Life owns a company that owns the -- or owns a significant piece of the
22 Proton Center in New York City. And the sister company of Sierra Health
23 and Life operates the Proton Center in New York City. Mr. Flood proved
24 that in his testimony. There's no serious disagreement about that facts,
25 so let's just talk about what that means. Jason, pull up Exhibit 71,

1 please. Page 17 and 18, I think is what we'll start with here.

2 So this is the website from the New York Proton Center,
3 operated by a sister company of Sierra Health and Life. This says what
4 they treat. The conditions they treat, proton therapy for lung cancer.
5 Lung and thoracic tumors. Right.

6 All right let's go to the next page, Jason. Thank you. This is
7 the website that's for a business that the sister company of this Defendant
8 operates. You can find it on the internet. And it's up right now and by
9 way of it, the sister company of this Defendant is soliciting people to
10 come to their proton center and get their lung cancer treated with proton
11 therapy. This very same therapy that these lawyers are in here saying
12 it's unproven and not medically necessary. The very same therapy that
13 Parvesh Kumar, our friend from Missouri, I guess that's where he is now,
14 Parvesh Kumar, he started hearing about this and he didn't know about
15 it, what did he do? He said don't put me in the same mouth as that
16 insurance company.

17 Remember when he said that? I guess maybe -- and he
18 didn't know this was true before he came here to testify. Why would they
19 not tell him that? If they are going to put him up here on behalf of a
20 sister company to say that proton therapy is unproven and not medically
21 necessary, right here you all trying to convince you of that, why wouldn't
22 they tell him?

23 That a sister company of theirs has this up here on the -- let's
24 pull this up, or highlight that first part, Jason When lung cancer is
25 treated with conventional radiation.

1 It is difficult to deliver a high enough radiation, though to
2 control the cancer without also damaging the esophagus, heart and
3 spinal cord. I asked him about that, and he tried to kind of skitter away
4 from that. Then we looked at the second field here. Proton therapy can
5 more effectively treat these tumors, particularly larger ones while better
6 protecting critical structures for radiation. As a result, protons can
7 minimize side effects such as difficulty swallowing.

8 What have we heard with Bill Eskew? Difficulty swallowing.
9 So the sister company of this Defendant, owned by the same parent
10 company says these things about proton therapy, while these lawyers
11 come here, and their experts come here and say that proton therapy is
12 no good for lung cancer. I mean but it's breathtaking to me. The
13 hypocrisy of that just knocks the wind out of me sometimes. I can't
14 believe it. And the funny thing is, the part I'm just god-smacked by --

15 MR. ROBERTS: Objection, Your Honor. Based on personal
16 belief of counsel.

17 THE COURT: Sustained.

18 MR. TERRY: What is just unbelievable to somebody
19 listening, it seems -- it seems it would be, is that they don't tell these
20 experts that this is true. They didn't tell the economist guy from
21 Harvard, Dr. Chandra. They didn't tell Dr. Kumar. They didn't tell Dr.
22 Owens. Why did they not tell them, at least, so they could get
23 themselves ready to be cross-examined about it, without throwing a fit.

24 Maybe the reason is because they knew that if they told
25 them, that they were going to have them speaking out of both sides of

1 UHC's mouth, maybe they wouldn't have come here and testified.
2 Maybe they would have said, no thanks. Maybe. But to say that proton
3 therapy is not medically necessary for the treatment of lung cancer out
4 of one side of your mouth in the courtroom and sending people who
5 were looking for treatment of lung cancer treatment out of the other side
6 of your mouth. I think it renders everything they say about that topic --

7 MR. ROBERTS: Same objection, Your Honor.

8 MR. TERRY: -- unbelievable.

9 THE COURT: Sustained.

10 MR. TERRY: All right. So -- by the way, just on the top of Dr.
11 Kumar, I'm sure you guys all remember him. Mr. Roberts said that he
12 was eminently qualified and like Dr. Kumar, he was quick to mention that
13 he's a good grant writer and gets a lot of grants from the government
14 for whatever medical school he's working at.

15 I don't recall Dr. Kumar expelling his own virtues about how
16 great he is at treating patients, but he talked a lot about raising money.
17 But the thing -- the thing that should carry the most weight is that Sierra
18 Health and Life, one of the biggest health insurance companies around,
19 all the resources they have, the bring a radiation oncologist to court in a
20 proton therapy case, who's never treated a single person with proton
21 therapy. Not one. Not ever. Why is that? Why is that? I think the -- well,
22 you can draw your own conclusions. Proton doctors believe in protons.
23 Proton doctors who have access to proton machines believe in protons.
24 Doctors who don't, don't. That's the truth.

25 All right. So Mr. Roberts tells us that you know, there's a

1 controlled clinical trial at MD Anderson, which is a big deal to them.
2 Controlled clinical trials, and adult standards and utilization management
3 and all that kind of stuff. We'll get into that in a second. But I guess the
4 message is Bill should have waited to get lung cancer and need proton
5 therapy until after Sierra Health and Life had decided that the stack of
6 medical papers and literature and all that stuff was tall enough to justify
7 him getting it.

8 Unfortunately, Bill had no control over that. So let's talk
9 about proton therapy and its medical necessity for Bill. And I don't want
10 to rehash this much because you've seen it, but I think that it is critically
11 important for you guys to think about one aspect of the medicine and the
12 medical analysis of this issue as you get ready to deliberate.

13 And Jason, could we pull up Dr. Chang's demonstrative
14 exhibit. Go to the last slide.

15 Yeah, this is something that Mr. Sharp showed you earlier.
16 Interestingly Dr. Kumar never pulled that up until [indiscernible] about
17 that. I think the answer is because he couldn't. Okay. So let's just think
18 carefully about what this shows. Okay. Remember that these different
19 colors here show different levels of radiation. Different doses of
20 radiation. So like this over here is a lower dose than this over here.
21 Okay. And on the left is the IMRT plan. And on the right is a proton
22 plan. That white oval or peanut looking shape there, that's the
23 esophagus.

24 Right here. The same in both. Esophagus. You see this
25 green line here and this greenish yellowish line here. And this yellowish

1 orangish line here. And this yellowish orangish line here. And more of
2 a reddish orangish line over there. On the IMRT plan, you see how those
3 higher doses of radiation completely cover up that esophagus? And
4 then you see how the higher doses of radiation in the proton plan, see
5 how the green line comes up, circles around. Leaves out that part of the
6 esophagus. So lower doses of radiation are being given to a significant
7 part of the esophagus than in the IMRT plan, which has higher doses all
8 across the esophagus.

9 Now remember, we talked about ALARA and therapeutic
10 ratio. Those things are the foundational principles of all radiation
11 oncology. Dr. Chang said so, Dr. Liao said so. Those concepts govern
12 everything that radiation oncologists do. Everything. And when the
13 radiation oncologist is treating somebody with radiation like this reflects,
14 Bill Eskew was getting treated, ALARA and therapeutic ratio are the most
15 important things that they consider. The most important.

16 Why? Because ALARA means as low as reasonably
17 achievable. Meaning you don't want this plan that covers the whole
18 esophagus with lower doses, if you have access to this plan where it
19 doesn't. Because one delivers more radiation than the other. So which
20 one is better? The one with lower doses to healthy tissues. The one that
21 spares the esophagus more.

22 It couldn't be more simple and straight-forward, even though
23 the science behind it is complicated, that concept couldn't be more
24 simple. So how does Sierra Health and Life deal with that? They know
25 that's true. How do they deal with it?

1 They put Parvesh Kumar on the stand to say unbelievably,
2 ALARA and therapeutic ratio don't apply in therapeutic radiation
3 situations. He said that. He said ALARA and therapeutic ratio apply in
4 situations like dental x-rays, or you break your foot and you got to get an
5 x-ray. Those situations those apply. But not this situation. He would be
6 laughed out of any conference or seminar that he ever went to with
7 radiation oncologists and said that in front of any of them. It's
8 ridiculous.

9 This kind of situation where you're shooting high doses of
10 radiation into somebody's body to kill this tumor, that situation like this
11 is the time when ALARA and therapeutic radiation apply the most
12 because there's the most to be lost. Parvesh Kumar says well this
13 amount of radiation to Bill's esophagus that was saved, that's not --
14 that's insignificant. And he has to say first that ALARA doesn't matter in
15 order to say that. But insignificant. Every grain of energy that's spared is
16 equal to thousands. Something like 10,000 dental x-rays. When you go
17 to the dentist -- Sandy knows this, she's a dental hygienist, when you go
18 to the dentist, and you go to get a dental x-ray, remember how they put
19 that big lead thing on you and you know, right up to your neck and then
20 the nurse, or the hygienist leaves the room, pushes a button and then
21 comes back in.

22 You don't want to get any radiation that you don't need.
23 You're not supposed to ever get radiation in any dose, if you can avoid it.
24 Ever. That's why we do that in those kind of situations. So why in the
25 world would somebody say that that concept doesn't apply in the most

1 important situation. It takes 800 bucks an hour to get somebody to say
2 that I guess. So Dr. Kumar sits on the stand and says if I would have
3 been -- if Mr. Eskew would have been my patient, I would have taken a
4 very different course with him. Okay. I guess that means that if only Dr.
5 Kumar had been in the room at MD Anderson when Dr. Liao, the
6 radiation oncology group there was trying to make a decision on how to
7 treat Mr. Eskew's cancer.

8 If only he had been there, he would have said wait a minute.
9 Wait a minute. Listen, let's not use protons. Let's do something else.
10 And if he had said that, then I'm sure all of the MD Anderson radiation
11 oncologists could have said, what's your name. He could have said
12 Parvesh Kumar. And they could have said who. And then he could have
13 said, I don't think we should use protons. They could have said why not,
14 Dr. Kumar. What proton center do you work at. And his response if he
15 was honest would be I've never treated anybody with protons before.
16 So would they listen to that at MD Anderson, for goodness sake. Don't
17 think so.

18 So what it boils down to is Dr. Liao testified -- I'll show you
19 this. Jason, Dr. Liao page 156. Line 13 through 24, please, Jason.
20 Thanks.

21 Question to Dr. Liao.

22 Q So it was in your belief that Mr. Eskew could have received
23 better treatment with proton therapy?

24 A Yes.

25 Q Dr. Liao, do you think that Bill Eskew deserved that?

1 She said what do you mean by deserve.

2 I said,

3 Q Do you believe that Bill Eskew deserved to get the best
4 treatment he could.

5 The lawyer for UHC objects.

6 The answer is all patients deserve the best treatment they
7 can have. That's what Dr. Liao thinks.

8 And we would submit that you ought to agree with that.

9 While we're on the topic of Dr. Liao, I want to mention that I'm
10 somewhat surprised today to learn that Mr. Roberts is a mind reader. He
11 said that -- and the reason I bring that up, is because of this whole appeal
12 issue. Which I had thought once Dr. Owens said that if the jury
13 concludes that the original denial was inappropriate, we can dispense
14 with all this talk about the appeal. I thought we were over that. I thought
15 it was a red herring from the beginning. But I guess we aren't.

16 So let's talk about that for a minute. Mr. Roberts here says
17 that the fact that there was no appeal submitted indicates to him that Dr.
18 Liao's state of mind was that she didn't really believe that proton therapy
19 was right for Bill Eskew. So I guess maybe she's embellishing. Maybe
20 embellishing was she really -- I mean does it take it to its original -- or to
21 its logical conclusion. If Dr. Liao didn't really believe in proton therapy,
22 then wasn't she committing some kind of fraud by asking for an
23 insurance company to approve treatment that she thought was unproven
24 and not medically necessary? This proton therapy.

25 I didn't hear him say that. I didn't hear him say that, but I

1 heard him imply it. This appeal, you know, whether the appeal was
2 made or not, dispense with that. The original denial is what we need to
3 be looking at. And we all know what that looked like.

4 By the way, while we're -- I need to say one more thing about
5 the appeal. Shamooun Ahmad. Shamooun Ahmad, the first witness in the
6 case, so I'm sure you guys remember, the guy with the black mask on.
7 He said that now adays he works as an appeal's medical director for
8 UHC. And he gets a bonus every year. And that he gives the same care
9 and consideration, the same careful, thoughtful analysis to the appeals,
10 the oncology, the cancer treatment appeals, that he's looking at now for
11 UHC, as he did the claim for proton therapy for Bill Eskew. So, I mean, I
12 guess maybe a -- that will tell us a little something about what the appeal
13 would have looked like if that had actually happened.

14 So Mr. Roberts has attempted to talk about SHL. To weigh in
15 on SHL. He says SHL is Ms. Sweet, nice lady, or Amogawin. That's who
16 we're really talking about. That's not who we're really talking about.
17 Those are the people down here at the street level. Down where the
18 rubber meets the road. They're the tip of the spear so to speak.

19 This system that we call a rigged system for good reason.
20 The rigged system wasn't put in place by Shelean Sweet or Amogawin,
21 the nurse, or Gustavo Guerrero, the guy who cut and pasted the
22 thermometer. Or even Shamooun Ahmad. He's a willing participant.
23 And I'll say he deserves his share of the blame. He's wearing a black hat
24 in this case for sure. But he didn't create the rigged system. He operates
25 in it. Why did they do it? Did they do it because it doesn't work to make

1 them money? Did they do it because they lose money with the
2 utilization management, managed care. It always sounded kind of
3 sinister, managed care, utilization management. And you know, it's
4 there to control costs and it's good for everyone.

5 Well, since the institution of managed care and utilization
6 management, I haven't noticed premiums going down. Cost of
7 healthcare hasn't dropped off. The opposite.

8 So do you remember during Sandy's testimony, she said Bill
9 became a changed position after he underwent IORT. They denied his
10 proton therapy. He became withdrawn and depressed, and his
11 personality changed, and he became angry. He was mad because his
12 own insurance company had denied the treatment that he needed. And
13 remember Sandy would always -- or Sandy said that Bill would always
14 ask her a question.

15 Can we put in the slid?

16 Bill always asked this question. A lot of times when he was
17 sitting in his easy chair in pain, with his puke bucket by him, mad. He'd
18 says this to Sandy. "How can my insurance company know better than
19 my treating doctor what's the best treatment for me?" That was Bill's
20 question. This entire lawsuit really, when you get down to it, is about
21 that. And the undeniable answer to it.

22 So through this lawsuit, Sandy acts as the Plaintiff. She's the
23 representative of the Estate of Bill Eskew. So she's here for him. She's
24 his representative. And she's asking you the same question that Bill
25 asked her. And if you think about it, Bill is asking you that question.

1 "How can my insurance company know better than my treating Doctor,
2 what's the best treatment for me."

3 We'll come back to the answer to the question in a minute.
4 But I want to point something out about the way the evidence has come
5 out in this case. Our entire case, all of it, all of our evidence is based on
6 individual rights and individual freedoms and humanity. That's what our
7 case is about.

8 We showed you what Bill's individual rights and fair
9 expectations were under this insurance policy that he bought from them.
10 Exhibit 4. That's where the rights and responsibilities of these parties live
11 in this document. Right here. We brought you evidence that proved
12 conclusively that Bill needed proton therapy. We just looked at some of
13 it. He needed it for his individual condition. His individual situation. His
14 tumor next to his esophagus and his trachea.

15 We showed you exactly why those doctors of his, and Dr.
16 Chang backed them up, said that protons were the best. We've also
17 presented you the evidence of the human toll that Sierra's conduct took
18 on Bill, after they denied his claim. How his life was impacted. What has
19 Sierra said in response?

20 Well, the truth is, the humanity of Bill Eskew, the humanness
21 of Bill Eskew has no place in the case that Sierra has presented to you
22 all. Good doctors treat patients not papers. Remember we've heard that
23 and that's a true statement. Did you hear anybody on their side,
24 anybody take into account at any point from the time that Dr. Ahmad did
25 what he did on that claim until Parvesh Kumar was up here testifying,

1 did anybody take into account what was best for Bill as a person, as a
2 human?

3 We heard a whole lot about clinical trials and medical
4 research and published literature and peer review journals and gold
5 standards and hierarchies of coverage and medical whatever. We heard
6 a lot. But the only person they brought here to say that protons weren't
7 right for Bill, Dr. Kumar, had never once treated a person with a proton
8 therapy. They spent a lot of time talking with him about papers and
9 statistics and grant writing and all that stuff, but why didn't Dr. Kumar
10 pull up those images we just looked at and show us why Dr. Liao was
11 wrong. He couldn't. That's why.

12 So this case really comes together about a normal person,
13 Bill Eskew and his widow Sandy, against this rigged system, this
14 insurance company. We submit to you ladies and gentlemen that
15 somebody has to do something about this. Somebody has to stand up
16 for what's right. Sandy never thought it would be here. Not in a million
17 years. And she never would have chosen this road for herself. Never.
18 She's just a regular person. She's a -- was a wife. She's a mother. She
19 loves those kids of hers. She's a proud grandma to her two grandkids.

20 She's one of the hardest working people you could ever
21 meet. And the evil of cancer reached into her life and tapped her
22 husband on the shoulder. Like too many people have that happen to
23 them. And she's now left without her partner of over 35 years. And that
24 was hard enough. It was hard enough. She's 69 years old. But Sierra
25 piled on. They kicked Bill while he was down. That's the truth. And

1 Sandy watched it happen every single day.

2 Remember what she said. I lived with that man every day. I
3 know what he went through. remember she said that, with tears running
4 down her face. I do. This insurance company decided that they could
5 run over Bill, and they thought they could get away with it. They decided
6 that they were going to do this to him and everybody like him for a long
7 time before he ever even got sick and bought this insurance policy.

8 They decided they were going to do this when they
9 implemented this system, this utilization management or managed care
10 or whatever you call it. The rigged system, years ago. With the medical
11 policy and the money motivation and the unqualified and untrained
12 doctors spending no time on your claim. And the conscious disregard of
13 people's individual rights.

14 Whoever has the power to manage people's healthcare,
15 despite what their doctors say, whoever has that power has a
16 tremendous responsibility to do it right. They can't abuse that power.
17 And that's especially true if there's a profit motive for the person or the
18 company that does it. And there is. So Bill found himself on the
19 receiving end, the business end of this rigged system, when he got
20 himself to MD Anderson. And he found himself there at his lowest point.

21 The most vulnerable point in his life. He's never been laid so
22 low or been so weak as when he had this Stage 4 lung cancer and he's
23 doing everything he can to get treated. Apparently this insurance
24 company thinks it's okay to deprive people in that situation, cancer
25 treatment, that their world-renowned treating doctors recommend.

1 The strange thing to me is that they -- they act like they're
2 doing everybody a favor by doing it. The evidence that they put on here
3 through the economist from Harvard is that insurance companies are the
4 best positioned in our society to control healthcare costs.

5 They act like they're the stewards of the healthcare economy.
6 So that's the evidence they put on. So what do we say about that? Let's
7 resolve. Let's resolve together as a society, to fix the problems in our
8 healthcare system. There's a bunch of them. But let's not turn over the
9 power to profit driven insurance companies to deny people treatment so
10 that they can make more money.

11 Let's find a different better way to do that. Let's not follow
12 the lead of the Sierra's and the Chandra's and the Owen's and the
13 Kumar's of the world. Let's not do that. Let's not try to reduce costs in
14 healthcare system on the backs of people like Bill Eskew who are sick.
15 Let's not do that. Let's not stoop to causing unnecessary pain and
16 anguish and distress in cancer patients for money. Let's not do that,
17 either. Their evidence is that we ought to be thankful that they're out
18 there making sure everybody gets the cheapest care possible.

19 Regardless of what's best for the individual person.

20 The problems in the healthcare system weren't caused by Bill
21 Eskew and people like him. The problems are insurance companies and
22 profit-based attitudes in the UM system, overruling doctors based on
23 everything but the contractual obligations they owed to policy holders
24 and the big shots of corporate offices constructing these rigged systems
25 with no regard to their policyholders' interests.

1 Equal consideration of the policyholder's interest is required
2 by good faith. Did you hear anybody in their whole case, in their whole
3 system, that take Bill's individual best interest into account? People like
4 Chandra and Owens and Kumar. Those people are part of the problem,
5 not the solution. They're the embodiment of the mindset where it's okay
6 to put cost and value over what's best for people. They can talk about
7 talk efficiency by the hour. Just ask them. And this system that they
8 implemented harmed Bill Eskew. What did it take away from it? We
9 heard about that. It took away his quality of life. They made him suffer.

10 Nobody's here to say that Bill was going to have a walk in
11 the park with his lung cancer. Nobody's here to say that. But we are
12 here to say this. He was entitled to live the life he had left as best as he
13 could live it. He was entitled to that much. He had enough to deal with
14 fighting his cancer. The last thing he needed was to suffer unnecessarily
15 on top of that, in addition to the problems that he already had.

16 So let's not forget that Dr. Liao said that her intent in treating
17 Bill was curative. She said there was hope. Bill believed it. Let's also
18 not forget that even Dr. Kumar's statistics, there's a big red circle around
19 the 5 percent number and it said 5 percent of people with Bill's kind of
20 cancer, advanced as far as his, live five years or more. The median is
21 five years. That's not nothing. And that's especially not nothing when
22 you're the person that's hanging onto that 5 percent like with all you got,
23 like Bill was. It's clear from the evidence that Bill had a lot to live for. He
24 had hope and that was the most valuable thing he had. He had hope.

25 So when you -- we're going to ask you to put a value on what

1 Sierra took away from him, but you're going to have the unenviable task
2 of placing a value on that. Mr. Sharp has talked to you about that
3 already. But to determine what his quality of life was worth; you have to
4 look at what it was before this happened. Life's a lot more than just
5 breathing in and out, right. Especially true as you start to get a little
6 older. I feel it every day. But it's about the things that bring you joy and
7 meaning and belonging and family. And a sense of togetherness with
8 the people that you love. That's what the quality of life is all about.

9 When you put something -- you get down to it and you get a
10 little older and you realize material things don't matter as much as what
11 you maybe thought when you were younger. And you think about what
12 really brings meaning. It's your family and how you love them and how
13 they love you. And the things that you do together and the experiences
14 that you have.

15 Bill wasn't a wealthy man. He didn't accumulate a lot of
16 material things. He didn't travel the world in private jets or get big profit-
17 based bonus or run big companies or that kind of thing. That didn't give
18 his life quality, but what did? You heard that he was a family man. So
19 we'll talk about that in a second. But everybody knows that you've got to
20 have your health or else you got not much, right. So Bill had been
21 through some health issues before in his life before he got cancer. He
22 had some heart issues, other things.

23 So he knew that when he got diagnosed with cancer there
24 wasn't going to be some magic cure. Like, hey, magic wand everything
25 is okay. He knew he was in for a fight. When he swung that golfclub and

1 felt his arm break, and then they tell him he's got lung cancer. How
2 weird. My arm broke and now they tell me I've got lung cancer. He
3 knew he was in for a fight for his health. Which meant he was in a fight
4 for his life as he knew it. He knew he was going to be called on to fight
5 harder than he ever fought before. And the fight he was fighting was so
6 that he could live as long and as well as he could. And he was lucky. He
7 was lucky because -- and he knew he was lucky to have Sandy in his
8 corner.

9 Sandy Eskew. He knew he could count on her because she
10 always took care of him, just like she takes care of everybody. But he
11 knew that he was going to need even more than Sandy's help. He knew
12 he was going to need his health insurance company by his side because
13 we all know what it looks like if you don't have health insurance in this
14 company. It ain't easy.

15 So Bill and Sandy did the right and the responsible thing.
16 They did the best thing they knew to do. They found the best treatment
17 they could find, and they found the best cancer center they could find.
18 Protons and MD Anderson. And then they went to this insurance agent
19 and told him the whole truth about what was going on and said we want
20 the best policy we could get.

21 Mr. Prater says they bought the Cadillac policy. Remember
22 that. The platinum policy I think they call it. The Cadillac, not the Yugo.
23 And so this is what comes out of that. This insurance policy. We've
24 looked at it. Don't need to look at it again. Therapeutic radiation is
25 covered under here. It says so in black and white. You've seen it a bunch

1 of times. Therapeutic radiation, proton therapy not excluded.

2 Now Sierra is quick to say, but medical necessity has to be
3 met or nothing's covered. To a person like Sandy what does medical
4 necessity mean if it doesn't mean my world-renowned doctor of MD
5 Anderson says that I need it. Sounds an awful lot like medical necessity
6 to a lay person. But this is the proton policy. The medical policy. This
7 over here. That's the insurance policy. That's the proton policy. That's
8 where the legal obligations of the company resides, that's where the
9 definitions and the terms and conditions and all the legalese right here in
10 this policy. That's what you paid your money for.

11 This up here is something else. This is what they create to
12 interpret this. They don't tell you about this. In fact, you say I'd like to
13 buy some health insurance and they say okay, here's a document full of
14 promises. Right here. And then when the rubber meets the road and it's
15 time to live up to those promises, out comes this. They've got their
16 fingers crossed behind their back.

17 This says that exactly what Sandy asked them about is not
18 covered under this policy that they gave her. It says proton therapy is
19 not medically necessary for lung cancer. They didn't tell her that.
20 There's this. Didn't tell her about this. What an awful thing. Little did
21 Bill and Sandy know what they were really facing when they decided to
22 buy that policy. But they sure find out when they get to MD Anderson
23 and it's time to get this treatment. Little did they know that the
24 Ahmad's and the Chandra's and the Kumar's of the world were waiting
25 in the wings.

1 Little did they know that the architects, the nameless,
2 faceless people who hadn't seen come in here, who designed this
3 managed care system were waiting. Little did they know that cost
4 effectiveness and value and clinical trial evidence and utilization
5 management and managed care rode supreme over what this doctor
6 said and what their doctor said.

7 They didn't know that their doctor would be ignored, and
8 they didn't know that Shamoon Ahmad would treat their claim the way
9 he treated it. I want to say something about that.

10 Jason, pull up Exhibit 7, please. Remember this? This is a
11 long time ago we talked about this, but this is Shamoon Ahmad's bill for
12 the time -- for the week when the claim was denied.

13 Remember how it has the number of cases that he decided
14 every day. 11 on one day, 12, 22, 15, 19. We did the math. You add
15 them all up. There's 79 claims in that week. Testified in his deposition
16 20 to 25 a week. This week just happened to be 79, I guess. Sixteen and
17 a half hours is the amount of time he spent on all of them. You run the
18 math, that's 12 minutes a piece. He tried to tell us that he spent 30 to 60
19 minutes, but that doesn't add up. Does anybody believe that he spent 12
20 minutes in the middle of the day between patients in an oncology
21 practice. Does anybody believe he even spent 12 seconds. We know
22 that if you run the numbers, let's say he spent -- let's give him the credit
23 for 12 minutes, that's 2/10's of an hour. 2/10's of an hour. Six minutes
24 is 1/10, 2/10 is 12. Times his hourly rate of 200, it's 205. \$5.00 is the
25 service charge. So $200 \times .2$. His company spent 40 bucks for Shamoon

1 Ahmad to turn Bill Eskew's life inside out. Forty bucks.

2 They spent over \$70,000 on Parvesh Kumar, though. And
3 God knows what they spent on everything else they've got going on
4 here. Little did Bill and Sandy know when they bought that policy, that
5 the unqualified doctor, because he was unqualified, he didn't know -- he
6 could have -- he had a better chance of sprouting wings and flying out of
7 this courtroom than understanding those comparative studies from MD
8 Anderson. He was unqualified.

9 Little did they know that this unqualified doctor wouldn't
10 even read the insurance policy. That he wouldn't even understand the
11 medical records. That he wouldn't even take the time to actually write
12 the denial letter. What's obvious now that Bill and Sandy didn't know
13 back then is that this rigged system worked exactly the way it's
14 supposed to work on Bill. And Sierra is here now in this courtroom to
15 ask you all to give it -- give this system that we're talking about your seal
16 of approval. That's what they're here asking.

17 So Mr. Sharp has made a suggestion to you about dollars.
18 And I want to add a little to that, if I can. You're calling on to ask what
19 Bill's physical and mental pain and suffering are worth in terms of
20 dollars. His quality of life. What's it worth. How's a jury to place a dollar
21 figure on such a thing? You're probably asking yourself that question.
22 Juries often think that this is difficult. Juries feel more comfortable with
23 things like, you know, stuff you can add up. You know, like how much in
24 lost wages, or how much does it cost to fix a water leak, and things like
25 that. But these kind of damages are the ones where juries are needed

1 the most. This is the place where juries can really help place value on
2 things. And I'm going to tell you why.

3 Only a human knows what it feels like to have a piece of
4 food stuck in your throat and be choking on it. Only a human knows
5 what it's like to feel searing pain in your throat and esophagus. What it
6 feels like to be unable to eat, even if you want to. Only a human knows
7 what it feels like to have your wife make you a plate of scrambled eggs
8 in the morning. And you sit down at the table and all you can do is push
9 them around with your fork, because you can't bring yourself to eat.
10 And you know she's looking at you like I wish you would eat.

11 Only a human knows what that kind of thing feels like. Only
12 a human knows what it would feel like to have your son, who you're
13 proud of and you love. He looks up to you. You hope he does. Look at
14 you and say to himself, gosh, my dad can't even -- can't even stand up
15 for himself and get what he's entitled to from that insurance company.

16 And only a human knows what it would feel like to have your
17 daughter, your little girl, look at you with tears in her eyes when she
18 knows that you're not eating and drinking like you're supposed to be
19 eating and drinking. And she's disappointed and she's sad, and she's
20 worried. Only a human knows what that feels like. Only a human knows
21 what it feels like to have the joy sucked out of the sweetest relationship
22 you ever had in your life with your little 4-year-old granddaughter who
23 calls up papa and likes to sit on your lap in your easy chair.

24 Only a human knows what it would feel like to be unable and
25 not feel like getting up out of bed and moving around and going --

1 playing in the backyard with her and pick her up from school. Only a
2 human knows what it feels like to have the thing, the event that your
3 entire family is built around, your whole family culture, the thing that
4 makes you guys, you guys. Your Sunday get togethers. Your Sunday
5 meals where you get together and watch some football, and somebody
6 brings some potluck and some -- mom's cooking and dad's giving her a
7 hard time in the kitchen. And the dogs are running around, and the kids
8 are squawking. The thing that makes your life your life.

9 Only a human knows what it takes -- what it's like to have
10 that taken from you. And only a human knows what it feels like to be
11 isolated and alone in your bedroom during Thanksgiving when your
12 family is in the other room and everybody's having a good time and
13 you're stuck in your bedroom because you can't eat, and you don't want
14 to be there. You feel bad. And what it feels like to be unable to get up
15 and out and get yourself together to make it to your little grandson's first
16 birthday party. To miss out on that. And what it feels like to feel that
17 pain and frustration and resentment of the insurance company that
18 caused so much of what made you, you. What made your life your life,
19 to be taken from you.

20 Every time Bill tried to swallow a bite of food and he couldn't
21 get it done, a ham sandwich or tried to drink one of those stupid Ensure
22 protein drinks that I'm sure he came to hate with a passion, every time
23 he did that, every time he couldn't get it done, every time he felt the pain
24 of his food getting stuck in his throat or every time he was choking on
25 something, threw up, or dry heaving over the puke bucket that his family

1 had to put by his chair. Every time he felt those things, he had to think to
2 himself, how could they do this to me.

3 I'll bet whoever denied my proton therapy didn't even know
4 what they were talking about. I bet they just did it to save money. How
5 could my insurance company know better than my treating doctor what
6 the best treatment is for me. Only a human knows the anger and
7 resentment and feeling of hopelessness and helplessness that would
8 come from such a thing.

9 Only a human knows what it feels like to feel hope sleeping
10 away. With every day that goes by you can't do the most basic things to
11 take care of yourself. I can't drink. I can't eat. The weight is falling off
12 my body. My family is distraught. I can't do it.

13 The Defense in this case did not address the human
14 suffering of Bill Eskew. They didn't do it because they can't. That lady
15 did. She told us. I lived with that man every day and I saw what he went
16 through. You know who else did is her daughter, the pre-K special needs
17 teacher here in Las Vegas. It's Tyler Eskew. Nice young woman. You
18 heard what she said about how hard it was for her dad.

19 You heard B.J. his son, Bill, Jr. come in and say the very
20 same kinds of things. Maybe they were embellishing, too. Maybe
21 there's a conspiracy. You also heard Christina Armington, remember
22 her. Last lady. Lovely young person. Smart. Just intelligent and sweet.
23 She's not --she used to be engaged to B.J. Eskew and she's not anymore.
24 But she came in here and talked about how nice his family is and how
25 much Bill enjoyed his family and what got taken from him. Maybe she's

1 embellishing, too. But I can't imagine why that would be. I didn't hear
2 them say that.

3 So I'm going to get down to it now. You've heard everybody
4 say -- I say everybody. The very beginning of this case during jury
5 selection, the Court, you may recall, said that jurors are the most
6 powerful people in the justice system. More powerful than lawyers.
7 More powerful than judges. More powerful than anybody else. And
8 some of you may also recall that Mr. Prater testified that juries regulate
9 insurance companies more than anyone, including the government. And
10 you even heard Chandra the Harvard economist guy say that jury
11 verdicts can be a good thing to regulate conduct. And I agree with all of
12 those statements as true.

13 And I want to add something else. There's only one place on
14 the face of this earth, anywhere on this planet that a person -- a normal
15 person like Sandy Eskew can come on behalf of her deceased husband,
16 Bill, and have a chance of getting justice against a great big insurance
17 company. There's only one place. Only one place where the playing
18 field is level. Only one. And that place is right here in this courthouse.
19 And right here in these four walls in this courtroom. Right here, right
20 now at 3:30 in the afternoon. Right now is the only time and the only
21 place in our society, where that lady can get a fair shake against a power
22 interest like this.

23 Why is that? Why is the playing field level? There's only one
24 reason. It's because each of you are sitting in the chairs that you're
25 sitting in right now. And you're invested in the power that our system

1 gives you. Our founding fathers. It sounds a little corny, but I'm going
2 to say it because I mean it and I believe it. Our founding fathers of this
3 country had the foresight and wisdom to create our system of
4 government in such a way that a jury of regular people like you get to
5 pass judgment on the conduct of people in our society, including big
6 corporations. You get to decide what justice prevails in this community.
7 Nobody else can do it.

8 The jury system is designed so that jurors like you speak as
9 the voice of this community. It's a heavy responsibility. Our system isn't
10 perfect. Nobody would say it was. I certainly wouldn't. But it's the best
11 system anybody's ever designed in the history of humankind for the
12 administration of justice.

13 This courthouse that you're sitting in right now, it's more
14 than just brick and stone and steel and wood and glass and carpet. It's
15 more than that. A lot more. It's more than a place where you go to pay
16 parking tickets and get a marriage license and pay your taxes. It's more
17 than that. It's a sacred place. It's a sacred place. This place, this
18 courthouse, this courtroom, right now is where a system that was
19 devised by the founding fathers of this country is being implemented.
20 It's being put into action today. Just like it has been for generations.
21 And your work here today carries tremendous weight.

22 If you're like most people, you got your jury summons in the
23 mail it's like, oh, boy. Got to go down to the courthouse and see what I
24 got to do about getting through this deal. What a waste of time some of
25 you may have thought. I hope not. Some of you may have thought that.

1 Nothing could be further from the truth than that. That's certainly true
2 for Sandy Eskew. And Bill. It's also true for this community and our
3 society as a whole. This is where people come to find out what this
4 community believes is what is right and what is wrong. And the answer
5 to that in this case is going to be revealed when you give them your
6 verdict.

7 Mr. Sharp and I would submit to you that this is an important
8 case. It's not a run of the mill everyday case. It's an important case.
9 This case means a lot. People are watching this case. If you think they
10 aren't, you're wrong about that. What happens in this case at the end of
11 the day will carry weight far beyond the walls of this courtroom and the
12 walls of this courthouse. This community will be listening to what you
13 have to say when you speak on this community's behalf, they'll hear it.

14 So Jason, let's go back to Bill's question.

15 The one he always asked Sandy when he was feeling awful
16 and angry. How can my insurance company know better than my
17 treating doctor what's the best treatment for me? That's what he would
18 ask. That's what Sandy's asking for Bill and what Bill is asking of you.

19 So you're going to answer that question with your verdict.
20 Jason go to the next slide. You've got a couple of different options.
21 Your answer to Bill's question is either, Bill, the insurance company does
22 know better than your doctor. You weren't entitled to proton therapy,
23 and they were reasonable to deny your claim. They can say that.

24 Let's go to the next slide.

25 Or you can say we see what happened to you, Bill. They

1 treated you with bad faith. It was wrong. And we're going to say so
2 loudly in our verdict. Those are your two choices. Sandy and her family
3 are going to go on living their lives as best they can without Bill, just
4 fine. Regardless of what happens here. Their futures don't depend on
5 this outcome. Let's get that out there.

6 The real question for this family is what will the way that Bill
7 was treated by Sierra end up meaning in the bigger picture. Will Bill's
8 passing be marked down in the book of life as just another oh, well,
9 that's too bad kind of situation, or will it end up meaning something.
10 Will Bill's needless physical and mental pain and distress just fall by the
11 wayside to be forgotten by everybody except his loved ones, who were
12 unfortunate enough to have to watch it happen to him, or will it mean
13 more? Will it mean more? Will it result in a verdict here that sees justice
14 done? Will it make a difference? Will it help somebody else somewhere,
15 sometime?

16 That's why Sandy says she's here. That's why she's chosen
17 to go through all this. To stand up for her husband. To make the end of
18 his life mean something more than just a sad ending. And she'd one her
19 part. It's been over six years since this denial happened. Right before
20 the trial was the anniversary of Bill's death. March 11th. Right before
21 we started. Six years, or five years I guess it is. And it hasn't been an
22 easy road. It's tough to do what Sandy's done. She's still standing.
23 Here she sits. 69-year-old woman. She's come all the way. All the way
24 to the bitter end with this insurance company. They haven't been able to
25 run her off, they haven't been able to beat her down. No matter what

1 they do to her and her kids on the stand. Here she sits.

2 MR. ROBERTS: Objection, Your Honor. There's no evidence
3 of that.

4 THE COURT: Sustained.

5 MR. TERRY: Instead she's sitting here standing by her
6 husband and standing up for her husband, even today. Bill was too
7 weak, too frail and too vulnerable to stand up for himself. That's what
8 can happen to even the strongest among us.

9 But this jury has the power to make Sandy's mission to see
10 justice down and make a positive change worth it. Here's what we
11 suggest. If you believe what happened here, what this company did to
12 that man and his family, if you believe it's okay, if you want the voice of
13 your community to speak and say we're okay with what Sierra does with
14 its system then say it loud with your verdict and send Sandy out of here
15 with nothing. That's what you ought to do if that's what you think.

16 But on the other hand, if you don't --if you don't believe that
17 Sierra acted reasonably and in good faith and if instead you think Sierra
18 committed bad faith with malice and oppression, then let your verdict
19 speak loudly to that effect, too. Partial justice or compromised justice is
20 no justice at all. The only thing we have to make these kind of wrongs
21 right in our society is money. That's the language that juries like you use
22 to speak as the voice of this community.

23 And remember, people are listening far beyond this
24 courtroom. Somebody said in jury selection in this case something I
25 remembered, and I figured I'd be talking about it right now. Somebody

1 said it's not about what they say. It's about what they do. So they've
2 said a lot. But what did they do? So it comes down to you. It's your
3 time. You've been a diligent jury. You've paid attention. You've taken
4 notes. We know this. We watch you guys. I don't know if it makes you
5 feel weird, that we're watching you so much. But we're very, very
6 thankful and grateful for the way in which you guys have paid attention.
7 It's not easy to do.

8 Okay. We get bored half the time. But you guys have done a
9 great job, and we appreciate it very, very much. So here's what we ask
10 you to do. Check yes on number one on the verdict form. Write in \$30
11 million and do it with your chest stuck out and proud. And don't
12 hesitate. It's the right thing to do. We wouldn't ask you to do it if we
13 weren't convinced it was the right thing to do. And then check yes on
14 number 3 on the verdict --

15 MR. ROBERTS: Objection. It's a personal opinion again,
16 Your Honor.

17 THE COURT: Sustained.

18 MR. TERRY: It's the right thing to do. It's the answer to Bill
19 and Sandy's question, and it's the answer that Bill deserves. So bring
20 justice for him. Thank you.

21 THE COURT: Madam Clerk, will you swear in the marshal to
22 take charge of the deliberating jury and swear in the law clerk for the
23 alternate jurors?

24 [The Clerk swore in the Marshal and Law Clerk to take charge of
25 the jury]

1 THE COURT: Thank you. Ladies and gentlemen of the jury
2 as was indicated to you during the question-and-answer portion when
3 we were selecting the jury, two of you are alternates, but you do not
4 know who you are. We could not have done the trial without you, so we
5 appreciate your service.

6 The two alternates are Ms. Patrick and Mr. Yang. So Mr.
7 Yang and Ms. Patrick you will follow the Court's law clerk. He should be
8 coming over here. He will take you separately. If I don't see you again,
9 the Court greatly appreciates your service to the community. Thank you.
10 Everyone else, you will follow the Marshal to a separate room.

11 THE MARSHAL: Okay. All rise for the jury please.
12 Everybody grab all of your belongings and note pads at this time. All
13 your note pads, all your belongings. All right. Just follow me.

14 [Jury retires to deliberate at 3:41 p.m.]

15 THE COURT: Do we have counsel's cellphones?

16 THE CLERK: I believe so. Did we get your cellphones first
17 day?

18 MR. TERRY: Yes.

19 THE COURT: All right. Well, they can only deliberate until
20 5:00 pursuant to the Chief's order. So if they're not done by 5:00, we'll
21 bring them back in shortly before 5:00 and then have them return
22 tomorrow at 9:00 a.m.

23 MR. ROBERTS: So we need to be here shortly before 5:00
24 one way or the other?

25 THE COURT: One way or the other, or however long it takes

1 them to deliberate.

2 MR. ROBERTS: Okay.

3 THE COURT: It's 20 minutes before 4:00, so don't go far.

4 MR. TERRY: Thank you, Your Honor. Your Honor, is
5 tomorrow a half day of work?

6 THE COURT: Well, the jury can deliberate. So if the jury
7 need to deliberate tomorrow the Court has matters at 9:00 all through
8 noon. So we can bring the jury in at 8:45.

9 MR. ROBERTS: So they can deliberate in the morning.

10 THE COURT: So they can deliberate in the morning.

11 MR. ROBERTS: Okay.

12 THE COURT: And then if they return a verdict, Court can take
13 a break from the hearings and just bring the jury in, so.

14 MR. ROBERTS: Okay, thanks, Judge.

15 THE COURT: Any other questions counsel?

16 MR. TERRY: Do we need to review any exhibits before they
17 go back?

18 THE COURT: No.

19 MR. TERRY: Okay. Any other issues?

20 MR. ROBERTS: Nothing for us, Your Honor.

21 THE COURT: All right, thank you, counsel.

22 MR. TERRY: Yes, Judge.

23 MR. ROBERTS: Thank you, Your Honor.

24 THE COURT: Thank you, Jason.

25 [Recess at 3:43 p.m., recommencing at 4:52 p.m.]

1 THE MARSHAL: Honorable Judge Nadia Krall presiding.

2 THE COURT: Thank you, counsel. Please be seated. We
3 have a verdict.

4 THE MARSHAL: Ready for the jurors, Judge?

5 THE COURT: We are ready for the jury.

6 THE MARSHAL: All right. All rise for the jurors.

7 [Jury in at 4:53 p.m.]

8 THE MARSHAL: Okay. Judge, all jurors present.

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

11 MR. SHARP: Yes, Your Honor.

12 MR. ROBERTS: Yes, Your Honor.

13 THE COURT: Thank you. Please be seated.

14 Has the jury selected a foreperson? Mr. Jackson you are the
15 foreperson?

16 THE FOREPERSON: Yes, ma'am.

17 THE COURT: Thank you. Mr. Foreperson, have at least six of
18 the eight jurors agreed on a verdict?

19 THE FOREPERSON: Yes, ma'am.

20 THE COURT: All right. Thank you. Will you please give the
21 verdict to Marshal Moore?

22 The Clerk will now read the verdict out loud into the record.

23 THE CLERK: In the Eighth Judicial District Court of the State
24 of Nevada, in and for the County of Clark, Sandra L. Eskew, as Special
25 Administrator of the Estate of William George Eskew, Plaintiff vs. Sierra

1 Health and Life Insurance Company, Incorporated, Defendant. Case
2 Number A-19-788630-C, Department 4.

3 Verdict.

4 We the empaneled jury in the above-entitled case return the
5 following special verdict on the question submitted to us.

6 1) Do you find Sierra Health and Life breached the implied
7 covenant of good faith and fair dealing?

8 Yes.

9 2) What amount of money do you find for damages to
10 William Eskew caused by the breach of -- the breach of implied covenant
11 and good faith and fair dealing?

12 And it says \$40 million.

13 3) Do you find by clear and convincing evidence that Sierra
14 Health and Life acted with malice and/or oppression to justify an award
15 of punitive damages?

16 Yes.

17 Dated this 4th day of April 2020. Signed by foreperson,
18 Donald Jackson.

19 Ladies and gentlemen of the jury, is this your verdict, as
20 read?

21 THE JURORS: Yes.

22 THE COURT: Thank you. Does either party wish to have the
23 jury polled?

24 MR. SHARP: No, Your Honor.

25 MR. ROBERTS: Yes, Your Honor.

1 THE COURT: Thank you. Juror Number 1, is this your
2 verdict?

3 JUROR NO. 1: Yes.

4 THE COURT: Juror Number 2, is this your verdict?

5 JUROR NO. 2: Yes.

6 THE COURT: Juror Number 3, is this your verdict?

7 JUROR NO. 3: Yes.

8 THE COURT: Juror Number 4, is this your verdict?

9 JUROR NO. 4: Yes.

10 THE COURT: Juror Number 5, is this your verdict?

11 JUROR NO. 5: Yes.

12 THE COURT: Juror Number 6, is this your verdict?

13 JUROR NO. 6: Yes.

14 THE COURT: Juror Number 7, is this your verdict?

15 JUROR NO. 7: Yes.

16 THE COURT: Juror Number 8, is this your verdict?

17 JUROR NO. 8: Yes.

18 THE COURT: Thank you. The Clerk will now record the
19 verdict in the minutes of the Court.

20 Because you have decided there's going to be a punitive
21 phase of this trial, we will resume at 1:00 p.m., to go over the punitive
22 damages phase. So we will likely end Thursday. If not Thursday then
23 Friday. Thank you.

24 So in the interim, you are still instructed not to talk with each
25 other or anyone else about any subject or issue connected with this trial.

1 You are not to read, watch or see any report of or commentary on the
2 trial by any person connected with the case or by any medium of
3 information including without limitation newspapers, television, the
4 internet or radio. You are not to conduct any research on your own
5 relating this case such as consulting dictionaries, using the internet or
6 using reference materials. You are not to conduct any investigation, test
7 any theory of the case, recreate any aspect of the case or in any other
8 way investigate or learn about the case on your own.

9 You're not to talk with others, text others, tweet others,
10 Google issues or conduct any other kind of book or computer research
11 with regard to any issue, party, witness or attorney involved in this case.
12 You are not to form or express any opinion on any subject connected
13 with the trial until the case is finally submitted to you.

14 So we're only part way done, so you still cannot talk with
15 anyone outside the jury deliberation room; is that understood?

16 See you tomorrow at 1:00 p.m.

17 THE MARSHAL: Okay, all rise for the jury.

18 [Jury out at 4:59 p.m.]

19 [Outside the presence of the jury]

20 THE COURT: Do the parties have any issues outside of the
21 presence of the jury?

22 MR. SHARP: Sorry, Your Honor, are we arguing punitive
23 tomorrow or Thursday?

24 THE COURT: Tomorrow.

25 MR. SHARP: Tomorrow. Okay.

1 THE COURT: 1:00 p.m.

2 MR. SHARP: I'm sorry, I didn't -- tomorrow at 1:00?

3 THE COURT: Yes.

4 MR. SHARP: Okay.

5 THE COURT: So there's going to be evidence presented?

6 MR. SHARP: Well, I think Mr. Roberts and I can work out the
7 financial. I think the only thing we'll have to deal with is jury
8 instructions. And there probably will be issues that we need to deal
9 with. Again, Mr. Roberts and I, we've worked closely on jury
10 instructions, so we'll be, you know, 8:00 in the morning, and we'll let you
11 know if we have issues you need to decide.

12 THE COURT: I'll be here all morning, so --

13 MR. SHARP: Okay.

14 THE COURT: -- I have a bench hearing, and calendar call,
15 and other hearings, so I'll be here.

16 MR. SHARP: Okay.

17 THE COURT: If you need me, I'll be here.

18 MR. SHARP: Okay, thank you, very much.

19 THE COURT: I won't take a lunch if we have to. All right. So
20 it's just going to be jury instructions and then argument.

21 MR. SHARP: I believe that will be the case and we'll talk
22 about it actually right now, but I can't imagine there being anything else.

23 MR. ROBERTS: Are you going to have Mr. Flood testify?

24 MR. SHARP: No. I was just going to suggest that we
25 stipulate that the Sierra Health and Life, whatever that number is, the 6.9

1 million.

2 MR. ROBERT: Okay.

3 THE COURT: Any other issues, Mr. Roberts?

4 MR. ROBERT: Not at this time, Your Honor.

5 THE COURT: All right.

6 MR. SHARP: Thank you.

7 THE COURT: Thank you.

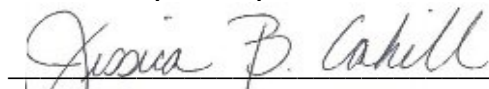
8 MR. ROBERT: Thank you, Your Honor.

9 THE COURT: See you tomorrow.

10 MR. ROBERT: See you tomorrow.

11 [Off the record at 5:01 p.m.]

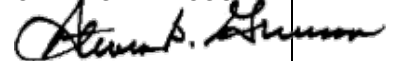
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19 ATTEST: I do hereby certify that I have truly and correctly transcribed the
20 audio-visual recording of the proceeding in the above entitled case to the
21 best of my ability.

22 

23 Maukele Transcribers, LLC

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

25



1 RTRAN

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DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

SANDRA ESKEW, ET AL.,

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Plaintiff,

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vs.

10

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

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12

Defendants.

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BEFORE THE HONORABLE NADIA KRALL
DISTRICT COURT JUDGE
TUESDAY, APRIL 5, 2022

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RECORDER'S TRANSCRIPT OF JURY TRIAL - DAY 13

17

18

APPEARANCES

19

For the Plaintiffs:

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

20

21

For the Defendants:

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

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RECORDED BY: MELISSA BURGNER, COURT RECORDER

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FOR THE PLAINTIFFS

MARKED

RECEIVED

None

FOR THE DEFENDANTS

MARKED

RECEIVED

None

1 Las Vegas, Nevada, Tuesday, April 5, 2022

2

3 [Case called at 1:02 p.m.]

4 THE MARSHAL: Department 4 now in session. The
5 Honorable Judge Nadia Krall presiding.

6 THE COURT: Thank you. Please be seated, counsel. Are the
7 parties ready to discuss the jury instructions?

8 MR. SHARP: Yes, Your Honor. I don't know if you want to
9 address first the stipulation we've reached on the net worth for punitive
10 damages.

11 THE COURT: Yeah, we can do that first Mr. Sharp.

12 MR. SHARP: So the parties have reached a stipulation that
13 Sierra Health and Life Insurance Company's net worth is
14 \$2,696,446,805.00.

15 THE COURT: Is that your understanding, Mr. Roberts?

16 MR. ROBERTS: That is correct, Your Honor.

17 MR. SHARP: And then, Your Honor, may I approach?

18 THE COURT: Of course.

19 MR. SHARP: So we have agreed to a verdict form that's
20 quite easy. We have reached an agreement on the first four jury
21 instructions and then Mr. Roberts is going to propose the fifth jury
22 instruction. I'll let him do that.

23 THE COURT: Just so the record is clear, so Mr. Roberts, do
24 you agree on the verdict form that -- for punitive damages that Mr. Sharp
25 handed the Court?

1 MR. ROBERTS: Defendant agrees, Your Honor.

2 THE COURT: Thank you. So the Defendant agrees to jury
3 instructions for phase 2, 1, which is two pages 2, 3, and 4; is that correct?

4 MR. ROBERTS: That is correct, Your Honor.

5 THE COURT: And then Defense is proposing jury instruction
6 number 5?

7 MR. ROBERTS: Correct. And just for the record, I don't know
8 that it matters, but instruction number 1 was proposed by Plaintiff, and
9 we agreed. Instructions 2, 3 and 4 were proposed by us in our disputed
10 set. And Mr. Sharp and I were able to reach agreement on some
11 modifications to make those acceptable to Plaintiff, and now we're both
12 in agreement on those.

13 THE COURT: Go ahead.

14 MR. ROBERTS: So number 5, Your Honor, is something that,
15 you know, obviously Mr. Sharp didn't agree to, and there's no Nevada
16 case law to support it. This is actually a proposed instruction and
17 authority that I've pilfered from Dan Polsenberg, who I've worked with
18 on many matters. And he's been trying to get this issue in front of the
19 Supreme Court for many years. And the fundamental theory behind the
20 instruction is that because punitive damages are quasi-criminal in
21 nature, they require a heightened burden in order to get them.

22 And that's why our Supreme Court has said preponderance
23 doesn't apply. It has to be clear and convincing. That's because the
24 nature of punitive damages requires a higher level of due process
25 protection than other elements of the case.

1 And for that same reason, because so many states across the
2 country have viewed punitive damages as quasi-criminal, we are
3 requesting that the Court instruct the jury that they have to be
4 unanimous in order to award it, because it is clear in Nevada, that for a
5 criminal trial to impose a verdict of guilty on someone, it has to be
6 unanimous. And therefore because punitive damages are quasi-
7 criminal, that same heightened safeguard the Supreme Court has
8 imposed on criminal trials, should also be imposed in a civil punitive
9 damages case.

10 Now we recognize, you know, there is a flaw in that
11 argument. And that is, well, wait a minute, the Supreme Court said clear
12 and convincing, not --

13 THE COURT: Not reasonable doubt.

14 MR. ROBERTS: -- no reasonable doubt. So they didn't
15 choose to impose the exact same criminal thing, but they did impose a
16 higher safeguard. And I think the problem is, is that six and two,
17 unanimous, what's really a higher safeguard. I mean, at least maybe it
18 should be seven to one.

19 That would be taking the standard in the middle, just like the
20 Supreme Court did on the burden of proof. And we think that's
21 something the Court should consider. But for the record, we're asking
22 the Court to find that for an award of punitive damages to be assessed
23 against the Defendant a unanimous verdict should be required.

24 Thank you, Your Honor.

25 THE COURT: Welcome Mr. -- welcome back Mr. Gormley.

1 Good to see you.

2 MR. GORMLEY: Thank you, Your Honor.

3 MR. ROBERTS: For the record, Mr. Gormley has tested
4 negative, so he is fully authorized to be with us

5 MR. GORMLEY: This morning.

6 MR. ROBERTS: Conveniently as soon as the trial is over.

7 MR. GORMLEY: I don't know how convenient today is, but --

8 MR. SHARP: So Your Honor, I would point to a couple of
9 things. Nevada Constitution Article I, Section III, trial by jury in civil case,
10 it requires a three-fourth. So I would also point to NRS 16-190, that
11 stands for the same. And the cases that I guess Mr. Polsenberg cites to,
12 do not stand for the proposition that's being put forth.

13 So if you need any additional information, I'm happy to
14 answer that.

15 THE COURT: Not right now. Thank you.

16 Mr. Roberts, can you just address Mr. Sharp's last point,
17 where he says the cases cited don't stand for the proposition that you're
18 putting forth?

19 MR. ROBERTS: I would admit that they don't stand for the
20 proposition that an unanimous verdict is required to assess punitive
21 damages. But the reason that we're citing them is for the proposition
22 that punitive damages are quasi-criminal in nature. And I do believe
23 they accurately stand for that proposition. And therefore, by extension,
24 if you're quasi-criminal, then they ultimately support our argument by
25 extension.

1 THE COURT: Thank you, Mr. Roberts.

2 MR. ROBERTS: Thank you.

3 THE COURT: The Court appreciates both counsel's argument
4 on this issue. The Court is going to approve the instruction number 5
5 based upon the citation that due process clause of the 14th Amendment
6 of the United States Constitution because punitive damages are quasi-
7 criminal in nature.

8 The Court is going to base its ruling based upon the due
9 process clause and require a unanimous verdict for punitive damages.
10 The Court does understand Plaintiff's argument. If the Supreme Court
11 disagrees, they can provide that insight later on. But with the
12 information provided, the Court is going to grant instruction number 5,
13 over the objection of Plaintiffs.

14 Are there any other issues outside the presence?

15 MR. ROBERTS: Yes, Your Honor, we've got a motion and/or
16 request to make. And is the -- I'm sure the Court's aware there are --you
17 know, there's a Nevada Supreme Court case that says if there's any issue
18 that could have been clarified if you'd asked the jury to clarify, you have
19 to make that request before the jury is dismissed, or you waive it.

20 And you know, after -- you know, contemplating the
21 arguments that were made and the \$40 million that was awarded as
22 compensatory damage for the esophagitis, I believe that there is at least
23 a significant possibility that the jury has misapprehended the
24 instructions.

25 The verdict form doesn't say you're going to come back, and

1 you'll be able to award punitive damages later. Even though the Court
2 did instruct the jury on that, and the standard punitive instruction, the
3 verdict form wasn't there, and I believe the jury reached the decision so
4 quickly, they may not have looked at anything but the verdict form.

5 And the \$40 million is just so high to constitute award of
6 compensatory damage for the injury that was claimed and the proof that
7 was submitted, I would request that the jury be asked -- be instructed
8 that this award that you put 40 million in for is supposed to just be for
9 compensatory damage. You will have an opportunity today to award
10 punitive damages. I'm going to give you a new verdict form and ask you
11 to adjourn to the back room and if this includes punitive damages,
12 please deliberate and come up with an amount that's just compensatory
13 and you'll have an opportunity to do punitive damages again.

14 If this is your award for compensatory damages, then you
15 can do nothing except bring back the form and confirm that that is your
16 award.

17 THE COURT: Thank you.

18 MR. ROBERTS: Thank you, Your Honor.

19 THE COURT: Mr. Sharp.

20 MR. SHARP: I mean the standard is the jury is presumed to
21 have followed the law and the instruction. I'm coming to it. Is jury
22 instruction -- I mean jury instruction 32 can't be any clearer. If you
23 decide an award of punitive damages is justified, you will later decide
24 the amount of punitive damages to be awarded after you have heard
25 additional evidence and instruction. And there was no indication in any

1 verdict form that I recall being proposed that would have made any of
2 that instruction ambiguous.

3 Let me talk a little bit about where this whole argument
4 stems from. And it's the case of *Wyeth v. Rowatt*. Don't have the exact
5 supreme court cite, but I can provide it to you. In that case, that
6 particular instruction was not provided. And what happened was once
7 the jury began deliberating on the punitive damages, they came back
8 and said, we thought we already gave that award. And then that created
9 a whole series of problems in that particular case, which the Supreme
10 Court said was, under that case was cured.

11 So that's why you now have in these pattern instructions,
12 exactly what that says. If you decide an award of punitive damages is
13 justified, you will later decide the amount of punitive damages to be
14 awarded.

15 There's no authority to instruct a jury to go back and
16 redeliberate. I mean there's a process that this Court is aware of.
17 Motion for new trial, remittitur, that this Court can then assess, in your
18 role, the reasonableness of the jury's finding.

19 But what Mr. Roberts is proposing is -- I mean he's trying to
20 create an error in the record to question the jury's verdict. And I think it's
21 pretty clear, based upon your polling, there was nobody hesitant about
22 the 8-0 verdict. There's no rule that they have to deliberate 5 hours, 2
23 hours or 1 hour. If we were here and it was a Defense verdict, it would
24 be the same rule.

25 So if there's further clarification you'd like, I'm happy to

1 address that.

2 THE COURT: No. Thank you, Mr. Sharp. Mr. Roberts, any
3 rebuttal?

4 MR. ROBERTS: Yes, Your Honor. There were problems with
5 the *Wyeth* case, and it's happened after the *Wyeth* case where juries
6 have been confused. And I'm not trying to create error. I'm actually
7 trying to eliminate grounds of error, by asking the jury to clarify.

8 And if you -- the Supreme Court has approved asking the jury
9 to clarify their verdict. I think it's fully within the discretion of the Court
10 to do that and eliminate this as a ground.

11 And as Mr. Sharp said, there are other things that we could
12 ask for, and frankly if this is their award or if this is not clarified, I do plan
13 to move for a new trial and a mistrial because the amount is so high as
14 to indicate it's the result of passion and prejudice, as the supreme court
15 has found before. It's an appropriate measure for awarding a new trial.

16 And the fact -- and I can fully argue this later, but I think
17 there's also sufficient evidence in the record that *Grosjean* was violated
18 numerous times, despite the Court sustaining my objections. He kept
19 going back there, repeatedly to offering his personal opinion on the
20 merits of the case and the witnesses and the conduct of Defense counsel.

21 And so I think this might also be a way to avoid that issue. If
22 this is not passion and prejudice, maybe it's just a mistake.

23 THE COURT: Thank you, Mr. Roberts.

24 MR. ROBERTS: Thank you.

25 THE COURT: The Court is going to order that the parties

1 meet and come up with a proposed jury instruction that essentially
2 states that if you have already awarded punitive damages within your
3 \$40 million awards, then no additional damages should be awarded.

4 MR. SHARP: That jury instruction as you read it is fine with
5 us.

6 THE COURT: Okay. So the parties and Audra -- and Ms.
7 Audra, will work on that instruction to type it up in a form that is
8 agreeable to both parties.

9 Mr. Roberts, would you like to say something?

10 MR. ROBERTS: No. I was just going to agree, Your Honor
11 and thank you.

12 THE COURT: You agree with that?

13 MR. ROBERTS: I agree with that instruction, as you read it.

14 THE COURT: Okay. That is the simplest solution. Because
15 then the jury will know, very point blank. If you've already awarded
16 punitive damages, there's nothing more to award.

17 If you have not awarded punitive damages the now is the
18 time. And the Court is basing that on two facts. Fact number one, when
19 Mr. Sharp got up in front of the panel during voir dire, he intimated that
20 he would be seeking damages award between 15 million and 50 million.
21 The 40 million is within that range.

22 Additionally, when Mr. Terry got up in front of the jury, he
23 asked for an award of 30 million. So 40 million is not that far off from 40
24 million, when they asked for upward of 50 million during voir dire. So
25 based upon the facts that have happened in this particular case and with

1 a curative instruction from the Court, the Court believes that would cure
2 any issues the Defendants may have.

3 Any objection, Mr. Roberts?

4 MR. ROBERTS: No objection to the Court's instruction, Your
5 Honor.

6 THE COURT: Okay. Thank you. Mr. Sharp, anything you'd
7 like to put on the record?

8 MR. SHARP: No, I have no objection to the instruction.

9 THE COURT: Okay. So we'll take a recess. Will the parties
10 work on the instruction and then we'll come back once it's finalized.
11 We'll put it on the record and then once -- that will be six new jury
12 instructions. Once that's done, then we will have them printed. The
13 Court will sign it. And then we'll have copies made and then bring the
14 jury in once they arrive.

15 The Court told the jury to come back at 2:00 instead of 1:00,
16 because the Court thought there might be time the Court needed with
17 the parties, which the Court was correct.

18 So it's 1:20 now. So the latest we'll start is 2:00 with the jury.
19 But this gives you time.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: Thank you.

22 [Recess from 1:19 p.m. to 1:54 p.m.]

23 [Outside the presence of the jury]

24 THE CLERK: Court come to order. The Honorable Judge
25 Nadia Krall presiding.

1 THE COURT: Thank you. Please be seated, counsel.

2 Any issues outside the presence?

3 MR. ROBERTS: Just one, Your Honor. Just so I didn't spring
4 a surprise on you, I do have two witnesses for my punitive case;
5 Ms. Sweet and Dr. Ahmad. I anticipate their direct is only going to take
6 maybe a couple of minutes each, but I did want to alert the Court that I
7 do have two witnesses here.

8 THE COURT: Thank you.

9 MR. SHARP: So just one point, Your Honor. Do you want
10 me to first put onto the record the amount of the net worth or Sierra
11 Health and Life, or do you want to provide that; I'd prefer if you did, but
12 I'll do whatever you'd like.

13 THE COURT: Whatever you want, Mr. Sharp.

14 MR. SHARP: So I'd ask for you to say that, Judge, just as --

15 THE COURT: Prior to the jury instructions, or actually prior to
16 Mr. Roberts' witnesses --

17 MR. SHARP: Yeah. I think Mister --

18 THE COURT: -- witnesses?

19 MR. SHARP: -- and then I can rest our case.

20 THE COURT: Okay. So then the Court, when the jury comes
21 in, say this is the punitive damage phase the parties have stipulated?
22 No, that's too legal.

23 MR. SHARP: The parties have agreed -- well, it's stipulated,
24 because that's in their jury instructions, and they're bound to it. I guess
25 we can tell them what a stipulation is.

1 MR. ROBERTS: As stipulated or agreed to.
2 MR. SHARP: Yeah.
3 MR. ROBERTS: Right.
4 THE COURT: That the net worth of Sierra Health and Life is
5 \$2,696,466,805.
6 MR. ROBERTS: 446.
7 THE COURT: 446. So, \$2,696,446,805?
8 MR. ROBERTS: That is correct.
9 THE COURT: All right. So the Court will do that first, then
10 Plaintiff will rest?
11 MR. SHARP: Yes.
12 THE COURT: And then the Defense will put on his two
13 witnesses?
14 MR. ROBERTS: Yes, Your Honor.
15 MR. TERRY: Your Honor, one further question, and we'll do
16 close after that, I assume? Will we have a close, and a response and
17 then a brief rebuttal?
18 THE COURT: Yes.
19 MR. TERRY: All right. Thank you, Your Honor.
20 MR. ROBERTS: Note to the record, he said "brief" Your
21 Honor.
22 THE COURT: Brief, yes. The Court -- just like the ending at
23 3:00 p.m.
24 [Pause]
25 THE COURT: So now we need, Mr. Moore. So the parties

1 have agreed on jury instruction number 5, just so that we have that on
2 the record?

3 MR. SHARP: That is correct, Your Honor.

4 THE COURT: Or rather --

5 MR. SHARP: I mean, I agree jury instruction 5 is your ruling,
6 we did not agree to the instruction, so we're clear on that one. The
7 instruction that we agreed to was jury instruction number 3, that you
8 created. So 5 we objected to; 3, we agree to it.

9 THE COURT: Okay. So you renumbered it. Okay, great.

10 MR. SHARP: Yeah.

11 THE COURT: So jury instruction number 3 was the jury
12 instruction, quote: "If you have already awarded punitive damages
13 within your \$40 million award, no further award should be made; both
14 parties agree to that?"

15 MR. ROBERTS: Yes, Your Honor.

16 MR. SHARP: Yes.

17 THE COURT: Great. 5 and 7, okay. So we're still missing
18 two jurors. So we'll take a brief recess, and once we have the jurors
19 back, we'll come back.

20 So are Ms. Sweet and Dr. Ahmad here?

21 MR. ROBERTS: Yes, they are. They're both out in the hall.
22 Actually, I think Ms. Sweet is in the witness room, and then Dr. Ahmad is
23 in the hall.

24 THE COURT: Okay.

25 MR. ROBERTS: And I'll be calling Ms. Sweet first, so she can

1 pick her kids up from school.

2 THE COURT: Okay. All right. So we'll come back as soon as
3 we have the jurors.

4 [Recess taken from 1:58 p.m. to 2:05 p.m.]

5 THE CLERK: Okay. Department IV, back on the record, come
6 to order.

7 THE COURT: Thank you. Please be seated, counsel. Are the
8 parties ready for the jury?

9 MR. SHARP: Yes, Your Honor.

10 MR. ROBERTS: Yes, Your Honor.

11 THE COURT: Thank you.

12 [Pause]

13 THE MARSHAL: All rise for the jury.

14 [Jury in at 2:06 p.m.]

15 THE MARSHAL: Okay. All jurors are present.

16 THE COURT: Thank you. Do the parties stipulate to the
17 presence of the jury?

18 MR. SHARP: Yes, Your Honor.

19 MR. ROBERTS: Yes, Your Honor.

20 THE COURT: Thank you, please be seated.

21 Ladies and gentlemen, this is the date and time set for the
22 punitive damage phase of the trial. You are now going to hear testimony
23 from witnesses regarding the punitive damages' phase. The parties
24 have stipulated, which means to agree that the net worth of Sierra Health
25 and Life is \$2,696,446,805.

1 Mr. Sharp, will you call your first witness.

2 MR. SHARP: Your Honor, in light of the stipulation you just

3 read, the Estate of William Eskew has no witnesses, so we rest our case.

4 THE COURT: Thank you, Mr. Sharp.

5 Mr. Roberts, will you call your first witness?

6 MR. ROBERTS: Yes, Your Honor, we would call, or recall

7 Ms. Shelean Sweet to the stand.

8 THE COURT: Thank you.

9 [Pause]

10 THE CLERK: Please raise your right hand.

11 SHELEAN SWEET, DEFENDANT'S WITNESS, SWORN

12 THE CLERK: Can you please state and spell your first and

13 last name for the record?

14 THE WITNESS: Sure. Shelean Sweet, S-H-E-L-E-A-N, Sweet,

15 S-W-E-E-T.

16 THE COURT: Thank you. Mr. Roberts, please proceed.

17 MR. ROBERTS: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. ROBERTS:

20 Q No plexiglass today, Ms. Sweet.

21 A Oh, that's right.

22 Q So sorry to call you back for a third time, but this will be

23 much, much briefer than the other times that we've called you to the

24 stand. The first thing I'd like you to do is just remind the jury, what's the

25 name of your department?

1 A It is the prior authorization department.

2 Q And you're the manager of that department?

3 A Yes. I oversee that department.

4 Q So the jury heard evidence during this trial, that at the time
5 of this decision about William Eskew's preauthorization request, his
6 claim for medical -- excuse me, for radiation oncology treatment was
7 reviewed by a medical oncologist, Dr. Ahmad; do you recall that?

8 A Yes.

9 Q Today, as you know, as of right now, do medical oncologists
10 still review preauthorization requests for radiation oncology treatment?

11 A They do not.

12 Q Tell me what you do now with those requests?

13 A Those requests are sent to an external review organization,
14 and they are reviewed by a radiation oncologist.

15 Q When did Sierra Health and Life implement that change?

16 A In the middle of 2019.

17 Q Did you hear about the verdict yesterday?

18 A Yes.

19 Q Has your department been authorized to make any changes
20 in the way you do things, based upon that verdict?

21 A Yes. We will receive annual training on good faith and fair
22 dealing.

23 Q Okay. And is that something that's you're going to ask for, or
24 has that already been authorized?

25 A It has been authorized.

1 Q That's all the questions I have Ms. Sweet.

2 MR. ROBERTS: Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Roberts.

4 Mr. Sharp?

5 CROSS-EXAMINATION

6 BY MR. SHARP:

7 Q A few questions, Mrs. Sweet. How is it that you came to
8 learn about the verdict?

9 A The counsel advised me of the verdict.

10 Q And is it your testimony that on your own behalf, or your
11 own initiation, you are now going to have this class on the duty of good
12 faith and fair dealing?

13 A It's a good idea. I did not come up with it on my own, no,
14 but I will arrange for it.

15 Q Who came up with the idea?

16 A Our counsel.

17 Q Okay. And, you know, we took your deposition back I believe
18 in July of last year; do you remember that?

19 A Yes.

20 Q So did you think it was a good idea then, when you informed
21 me that you'd never heard of the duty of good faith and fair dealing, to
22 conduct a class?

23 A I hadn't thought of the idea at the time.

24 Q Now you testified about this procedure that has changed
25 with radiation oncology claims, right?

1 A Yes.

2 Q And can you tell me then why it is that Sierra Health and Life
3 brought two separate experts to say to this jury, that Dr. Ahmad was
4 qualified to conduct a utilization review?

5 A I could not tell you why they brought the experts in; the
6 process changed upon his departure.

7 Q So can you tell me why it is you just didn't tell the jury. You
8 remember we went over prior authorization review claim in some detail?

9 A Uh-huh.

10 Q Remember that testimony?

11 A I do remember. Yes.

12 Q So why didn't you just tell the jury then, you know, we
13 changed our practices, we now no longer have radiation or oncologists
14 evaluating radiation oncology questions?

15 A You were asking about the case as opposed to what we're
16 doing now.

17 Q So are you hear now to say that the manner in which
18 Mr. Eskew's prior authorization request was handled, was improper?

19 A I am not saying that.

20 Q And you're aware that the jury has found that Sierra Health
21 and Life has breached its implied covenant of good faith and fair
22 dealing?

23 A Yes. Per their verdict, yes.

24 Q Are you here on behalf of Sierra Health and Life to say, we
25 agree with your verdict, and we accept it?

1 A I don't know how -- what else to do but to accept their
2 verdict. I apologize, I don't know how to answer that question.

3 Q I'd like you to just turn over to the jury and say, we agree
4 with your verdict.

5 A Okay. I

6 MR. ROBERTS: Objection to the scope of the question, Your
7 Honor. We? She can say "I".

8 THE COURT: You're free to rephrase the question.

9 MR. SHARP: Sure.

10 BY MR. SHARP:

11 Q You're here testifying as the manager of the utilization
12 review department for Sierra Health and Life, right?

13 A Correct.

14 Q Okay. I'd like you to turn to the jury and say on behalf of the
15 Utilization Review Manager for Sierra Health and Life that you agree with
16 their verdict.

17 MR. ROBERTS: Objection to form it's not a question.

18 THE COURT: The objection is overruled; answer only if you
19 can.

20 THE WITNESS: I accept the verdict.

21 BY MR. SHARP:

22 Q Now, were you aware that the jury has awarded
23 compensatory damages for the harm they found, that was incurred by
24 Mr. Eskew?

25 A Yes.

1 Q And I'd like you to turn to the jury and tell them that on
2 behalf of Sierra Health and Life, as a Utilization Management Director,
3 whether or not you accept that amount?

4 MR. ROBERTS: Objection to form, too broad.

5 THE COURT: Overruled. You can answer if you can?

6 THE WITNESS: I accept the verdict, and I'm so sorry, I don't
7 quite understand the rules about whether I can accept an amount that
8 was issued.

9 BY MR. SHARP:

10 Q That's fair. There was an amount of money that was
11 awarded by this jury, in the amount of \$40 million to Mr. Eskew for his
12 compensatory damages. And I want to ask you, on behalf of Sierra
13 Health and Life as the Utilization Management Director, you turn to that
14 jury and tell them whether you accept that finding?

15 MR. ROBERTS: Objection to form. The same objection.

16 THE COURT: Overruled.

17 THE WITNESS: The finding has been made. I trust that you
18 all made the best decision that you could have made, and I accept the
19 decision that you made.

20 MR. SHARP: Thank you. I have no further questions.

21 THE COURT: Thank you. Mr. Roberts, any follow-up?

22 MR. ROBERTS: No follow up, Your Honor,

23 THE COURT: Ms. Sweet, you're excused. Thank you for your
24 time.

25 THE WITNESS: Thank you.

1 THE COURT: Mr. Roberts, will you call your next witness.

2 MR. ROBERTS: Your Honor, the Defense will recall

3 Dr. Ahmad to the stand.

4 [Pause]

5 THE CLERK: Please raise your right hand.

6 SHAMOOM AHMAD, DEFENDANT'S WITNESS, SWORN

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

9 THE WITNESS: Shamoom Ahmad, S-H-A-M-O-O-M
10 A-H-M-A-D

11 THE COURT: Thank you. Please be seated.

12 Mr. Roberts, go ahead.

13 MR. ROBERTS: Thank Your Honor.

14 DIRECT EXAMINATION

15 BY MR. ROBERTS:

16 Q Dr. Ahmad, this is going to be brief. I just have a few
17 follow-up questions for you, to follow-up on some of the testimony you
18 gave last time you were with us. And I'd ask you since you had the mask
19 on to lean forward and speak into the microphone. So there was
20 testimony, before, that you're currently handling appeals for a
21 UnitedHealthcare; is that correct?

22 A Yes.

23 Q And those are preauthorization appeals; that's included in
24 what you do?

25 A Yes.

1 Q Do you currently handle preauthorization appeals for Sierra
2 Health and Life?

3 A No, I do not.

4 Q So at the time you made the decision in Mr. Eskew's case,
5 back on February 5th, 2016, you were handling radiation oncology,
6 preauthorization requests as a medical director, correct?

7 A For Sierra Health? Yes.

8 Q Yes. Do you currently handle radiation oncology appeals?

9 A I do not.

10 Q What type of appeals do you handle?

11 A Generally, general medical oncology chemotherapy cases.
12 Some blood test related to that.

13 Q And is that the field you're board certified in?

14 A I'm sorry.

15 Q Is that the field that you specialize in?

16 A Yes.

17 Q Okay. Thank you Doctor.

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

19 THE COURT: Thank you, Mr. Roberts,
20 Mr. Sharp?

21 CROSS-EXAMINATION

22 BY MR. SHARP:

23 Q Dr. Ahmad, has anybody reprimanded you for the manner in
24 which you handled Mr. Eskew's prior authorization review?

25 A No.

1 Q Has anyone criticized you?

2 A No.

3 Q Are you still, whether it's an appeal for a medical oncology
4 claim, or radiation and oncology claim, are you still using the same
5 fairness and impartiality that you showed Mr. Askew?

6 MR. ROBERTS: Objection, Your Honor. He's not currently
7 employed by Sierra Health and Life or handling their appeals; so the
8 question's irrelevant.

9 THE COURT: Sustained.

10 BY MR. SHARP:

11 Q Well, let's put it this way. Do you remember when your
12 deposition was taken? How about this? Do you remember -- do you
13 now remember your bonus plan?

14 MR. ROBERTS: Objection irrelevance, since he's not
15 handling appeals for the Defendant.

16 THE COURT: Sustained.

17 MR. SHARP: All right. No further questions.

18 THE COURT: Thank you. Mr. Roberts?

19 MR. ROBERTS: The Defendant rests its punitive case, Your
20 Honor.

21 THE COURT: Thank you, Doctor, you're excused. Thank you.

22 Ladies and gentlemen, the Court will now instruct you as to
23 the law that applies to this phase of the trial. You should have a copy of
24 the jury instructions in front of you.

25 Instruction Number 1. The law provides no fixed standards

1 as to the amount of a punitive damage award, but leaves the amount to
2 the jury's sound discretion, exercise without passion or prejudice, and in
3 accordance with the following governing principles:

4 The amount of a punitive damage award is not to
5 compensate William Eskew for harm suffered, but what is reasonably
6 necessary in light of the Defendant's financial condition and fairly
7 deserved in light of the blame, worthiness, and harmfulness inherent in
8 the Defendant's conduct to punish and deter the Defendants and others
9 from engaging in conduct, such as that warranting punitive damages in
10 this case.

11 Your award cannot be more than otherwise warranted by the
12 evidence in this case, merely because of the wealth of the Defendants.
13 Your award cannot either punish Defendants for conduct injuring others
14 who are not parties to this litigation, or financially annihilate or destroy
15 the Defendant's in light of the Defendant's financial condition.

16 In determining the amount of your punitive damage award,
17 you should consider the following guideposts:

18 Number 1: The degree of reprehensibility of the Defendant's
19 conduct in light of;

20 a) the culpability and blame worthiness of the Defendant's
21 fraudulent, oppressive and a malicious misconduct, under the
22 circumstances of this case;

23 b) whether the conduct injuring William Eskew, that warrants
24 punitive damages in this case was a part of a pattern of similar conduct
25 by the Defendants; and

1 c) any mitigating conduct by the Defendants.

2 2. The ratio of your punitive damage award to the actual
3 harm inflicted on William Eskew by the conduct warranting punitive
4 damages in this case, since the measure of punishment must be both
5 reasonable and proportionate to the amount of harm to William Eskew,
6 and to the compensatory damages recovered by William Eskew, in this
7 case.

8 3. How your punitive damages' award compares to other
9 civil criminal penalties that could be imposed for comparable
10 misconduct, since punitive damages are to provide a means by which
11 the community can express its outrage, or distaste for the misconduct of
12 a fraudulent, oppressive or malicious Defendant, and deter and warn
13 others that such conduct will not be tolerated.

14 Evidence has been presented concerning a Defendant's
15 conduct outside Nevada and/or conduct injuring others who are not
16 parties to this litigation. You cannot use such evidence to award punitive
17 damages for conduct outside Nevada or conduct injuring others who are
18 not parties to this litigation or conduct that does not bear a reasonable
19 relationship to the conduct injuring Plaintiffs that warrants punitive
20 damages in this case.

21 You may consider such evidence only with respect to the
22 reprehensibility of the Defendant's conduct, and only to the extent that
23 conduct is similar, and bears a reasonable relationship to the
24 Defendant's conduct, injuring William Eskew, that warrants punitive
25 damages, in this case.

1 Number 2. There is no right to punitive damages.
2 Accordingly, you need not award punitive damages, even though you
3 have found that the standard for imposing punitive damages has been
4 satisfied.

5 3. Your award of punitive damages must be based on the
6 conduct that by clear and convincing evidence was shown to constitute
7 oppression or malice.

8 4. A Defendant's conduct in litigation during trial may not be
9 used to impose punitive damages.

10 THE COURT: Actually --

11 MR. ROBERTS: Should we --

12 THE COURT: Counsel, will you approach?

13 MR. ROBERTS: -- Your Honor?

14 [Sidebar at 2:24 p.m., ending at 2:25 p.m., not recorded]

15 THE COURT: Ladies and gentlemen, it appears that there
16 was an error in the set provided to the Court.

17 Jury instruction number 3 should read: If you have already
18 awarded punitive damages within your \$40 million award, no further
19 award should be made.

20 4. Your award of punitive damages must be based on the
21 conduct that by clear and convincing evidence was shown to constitute
22 pressure or malice.

23 5. The Defendant's conduct and litigation during trial may
24 not be used to impose punitive damages.

25 6. In contrast to compensatory damages, punitive damages

1 rests on justification similar to those for criminal punishment. Because
2 exemplary damages resemble criminal punishment they require
3 appropriate, substantive and procedural safeguards to minimize the risk
4 of unjust punishment.

5 One of these safeguards is that in contrast to your verdict on
6 compensatory damages, your verdict as to the amount of punitive
7 damages must be unanimous.

8 Thank you. Is the Plaintiff, ready to argue?

9 MR. TERRY: Yes, Your Honor.

10 THE COURT: Thank you, Mr. Terry. Go ahead.

11 MR. TERRY: Thank Your Honor.

12 PLAINTIFFS' CLOSING ARGUMENT

13 Things are moving faster today, as you can see, which is a
14 good thing, and I'll do the same.

15 So on behalf of Sandy, Mr. Sharp and our whole team, I
16 want to thank you for finding' SHL's conduct was in bad faith. And I
17 want to thank you for making your finding that SHL's bad faith was
18 malicious and oppressive in such a way that we are having this
19 argument here today.

20 I want to thank you on behalf of our team for awarding the
21 damages that you awarded yesterday to Bill's estate. We firmly believe
22 that you did absolutely the right thing.

23 The compensatory phase, compensatory compensate,
24 compensatory phase, the phase where you compensated Bill's Estate is
25 now over; that's behind us. Now we're here to talk about punitive

1 damages in this second phase of the trial, that's a separate issue, a
2 separate issue from compensatory damages.

3 So I want to try to use this PowerPoint presentation. I'm not
4 the best at it, so bear with me. So remember, Sandy Eskew testified, she
5 had two goals. The first one was to stand up for Bill; she's done it, and
6 that part was yesterday. She stood up for Bill and got his estate
7 compensated in an amount the jury of her peers believe to be fair.

8 Her second goal was to make sure what happened to Bill
9 never happens to anyone else, and that's what we're here about today;
10 the second part. So you hear the "term punitive damages," lawyers talk
11 about it. We learned about it at school and all that, and you probably
12 heard about it here and there in the media, had some exposure to the
13 concept at some point in time in your life.

14 But a lot of times folks don't know what they are; so what are
15 punitive damages? First, let's be clear, this is not, what we're here to talk
16 about today, the money we're going to ask you to give is not to
17 compensate Bill's Estate for what he went through; you've done that
18 already.

19 We're here today about something entirely different about
20 something else. We're here to punish Sierra Health and Life for its
21 conduct. We're here to deter Sierra Health and Life from engaging in
22 this same kind of conduct in the future. We're here to deter other
23 insurance companies for engaging in the same kind of conduct. That's
24 also a purpose of punitive damages under the law, you can read it in the
25 jury instructions.

1 The Court's instructions are here, and I don't have them on
2 the computer because I'm not slick enough to get that done, but I want
3 kind of talk to you about instruction number 1, for a minute. If you'd like
4 to refer to it while I'm talking about it, you might find that helpful. So
5 let's just kind of go through this, I don't want to belabor that it's worth
6 thinking about, because we're asking you to do something really
7 important here today. So instruction 1 says:

8 "The law provides no fixed standards as to the amount of
9 punitive damage award, but the law leaves the amount to the jury's
10 sound discretion, exercise without passion or prejudice, and in
11 accordance with the following governing principles."

12 So that's sort of the introduction as to what your job is. And
13 I've said this already, but let's look at it, the amount of a punitive damage
14 award is not to compensate William Eskew for harm or suffering, but
15 what is reasonably necessary in a light of the Defendant's financial
16 condition, and I'll talk to you about that more in a minute. you heard that
17 there's been a stipulation or agreement between the parties as to the net
18 worth of the Sierra Health and Life, and it's a number that the Judge
19 mentioned to you, and I'll talk to you about it more, in more detail here
20 in a moment.

21 And fairly deserved, in light of the blame worthiness and
22 harmfulness inherent in the Defendant's, SHL's conduct, to punish and
23 deter the defendants and others, that's the part where we're talking
24 about the others, from engaging in conduct, such as that warranting
25 punitive damages in this case. So you've got to take into account their

1 financial condition, and the blame-worthiness and harmfulness inherent
2 in their conduct.

3 Your award cannot be more than otherwise warranted by the
4 evidence, merely because they have a lot of money, merely because of
5 the wealth of the Defendants. Your award cannot either punish
6 Defendants for conduct injuring others. We're not here about any injury
7 to anybody else, but Bill Eskew, who are not parties to this litigation, or
8 to financially annihilate or destroy SHL, in light of their financial
9 condition.

10 We're not here to ask you to put them out of business. We're
11 not here to ask you to give us every nickel they've got; that's not what
12 punitive is. So now there's a list of things that says: "In determining the
13 amount of your punitive damage award you should consider the
14 following things, the following guide lists.

15 The degree of reprehensibility of the Defendant's conduct.
16 So you found yesterday, in your verdict, by clear and convincing
17 evidence that SHL acted with malice and/or oppression to justify an
18 award of punitive damages; you've done that work.

19 The degree of reprehensibility of their conduct in light of the
20 culpability and blame-worthiness of the Defendant's fraudulent
21 oppressive, and/or malicious misconduct under the circumstances.

22 B. Whether the conduct injuring Ms. Eskew, that warrants
23 punitive damages in this case was part of a pattern of similar conduct by
24 the Defendants. We heard a whole lot of testimony and evidence in this
25 case, that this was a systemic thing that goes on at that company, maybe

1 until yesterday evening, maybe. We'll talk about that some more in a
2 minute too. And see any mitigating conduct by the Defendants, we can
3 talk about that a little later, as well.

4 So number 2. And this is under the list, determining the
5 amount of your punitive damage award you should consider the
6 following guide posts, of the ratio of your punitive damage award to the
7 actual harm inflicted on Mr. Eskew, by the conduct awarding punitive
8 damages. And the measure of punishment must be reasonable and
9 proportionate to the amount of the harm to Mr. Eskew.

10 Now you've placed a value in your verdict form yesterday,
11 signed unanimously, or reached unanimously and signed by your jury
12 foreman, \$40 million, It's written right there, that is the amount of harm
13 to Mr. Eskew, that you've determined.

14 Number 3 on your list. Guide posts. How your punitive
15 damage award compares to other civil or criminal penalties that can be
16 imposed for comparable misconduct. Since punitive damages are to
17 provide a means by which, we talked about this a good deal yesterday,
18 by which the community can express its outrage or distaste for the
19 misconduct of a fraudulent, oppressive, or malicious Defendant, and
20 deter and warn others that such conduct will not be tolerated.

21 Now, we're not asking you to punish SHL for anything that
22 happened outside of Nevada, we can see that in that last paragraph, and
23 you can read that, and we'd ask you to follow the laws that the Judge
24 has provided to you here. So that's sort of the -- you know, that's sort of
25 the rules of game. Just like where the yard lines are painted and the

1 goal posts are set, you look there to see what we're about here today.

2 Let's go on punishment. We've got to talk about
3 punishment, in general, because it ties in with what I want to talk to you
4 about with regard SHL. Punishment must meet the -- or must fit the
5 infraction. What we know here is that SHL denied Bill's claim in bad
6 faith, you found that, and you found that they did so with malice and
7 oppression, conscious disregard with Bill's rights. So that's the
8 infraction, that's the bad act.

9 In effect they denied a cancer patient the treatment he's
10 entitled, to cause him to suffer unnecessarily for a year before he died,
11 for which you compensated him now. What SHL did here is horrible,
12 harming a cancer patient to save money. This wasn't jaywalking, rolling
13 a stop sign, it's more than that. So it has to fit the infraction, and it also
14 has to fit the person, or the company being punished.

15 Punishment only works if it acts as a deterrent, if it's
16 memorable to the offender. Punishing a three year old kid is different
17 from punishing a 17 year old kid, but put a 17 year old kid in time out for
18 five minutes and they laugh at you. Put a three year old on time out for
19 five minutes, and then, you know, you might as well peel the hide off
20 their body, they're so upset.

21 So you got to tailor the punishment to the person, or
22 company, punishing a small business is different from punishing a huge
23 one. If you want to punish a company for acting the way SHL did here,
24 you have to come up with a number that will get the attention, not of low
25 level people, but of people who run the company.

1 You've got to get the people who runs SHL to know that this
2 community has spoken loudly. to tell them this rigged system isn't going
3 to be tolerated. The rigged system needs to change, not in the form of
4 some overnight excuse-making, shuffling things around; promises that
5 were made only after they're held to account to something that matters.

6 What we want to accomplish is to make SHL start taking real
7 people's interests into account, when they decide their claims, not
8 statistics, not controlled clinical trials and gold standard journal articles,
9 and all that stuff, real people. We want to make it where the Shamoon
10 Ahmads of the world need to stop it, stop what they're doing. By the
11 way, how come Dr. Ahmad testified for so many hours in this case and
12 never made clear the things that he attempted to make clear today,
13 about what he does at that company?

14 You heard Ms. Sweet say that this new class on good faith,
15 where's that man by way? Whose idea was it? It wasn't anybody at the
16 company. This punishment needs to be such that they know they need
17 to start living up to their promises and not breaking them in bad faith.
18 Don't forget, Dr. Ahmad testified, he's still doing the same things the
19 same way.

20 Nobody at SHL ever told him he did anything wrong. He
21 never got called on the carpet or slapped on the wrist or had a demotion
22 or a bad negative review in his personnel file nothing. And he said, he's
23 going to keep doing the same thing until somebody, somebody tells him
24 to stop; that's where you come in. You're the people that get to tell SHL
25 to stop. You get to tell SHL to stop, and when you do that you get to use

1 the authority and the power of the voice of this community, that's what
2 you speak with; it's not a whisper, it's a shout.

3 So what amount of money taken away from the company
4 will accomplish the goal of getting the attention of the upper
5 management people, the people who run the place; that's the question
6 that you'll be faced with. If you attempt to punish this company by
7 awarding too little money, the purpose of punishment will not be
8 accomplished. The people at the top, the ones with the authority change
9 the way the company really does things, they'll either not know about
10 this verdict, because nobody will bother to tell them, because it won't
11 move the needle, or they'll just blow it off as insignificant; that's just the
12 cost of doing business. Sometimes we get -- you know, sometimes we
13 have lawsuits.

14 Sierra Health and Life, you can't put them in a timeout, take
15 away their car keys. You can't put them in jail, but you can fine them for
16 what their bad faith conduct -- or for their bad faith conduct, you can fine
17 them. And you can only get a stop doing things this way, message
18 through to an insurance company one way; there's only one way.
19 What's the language they understand? Money. Now -- well, I'll come
20 back to that.

21 So here's the number, the Court read the number earlier, I'm
22 going to leave it up there for four minutes, in case you want to write it
23 down, because there's a lot of digits there. I'll say it out loud, it might
24 help. SHL's net worth -- "net worth" means assets minus liabilities,
25 what's the difference, that's your net worth. Two billion, billion with a

1 "B", 696 million -- \$446,805.

2 Now I'd submit to you that that amount of money is hard to
3 even comprehend. So that that's another way of writing it down. You
4 may have seen it written like this in the newspaper or something. They
5 have assets of over 2.696 billion. Okay. That means 2.696 billion is the
6 same as 2,696 million, it's the same number it's just expressed
7 differently.

8 So somebody who has \$2.696 billion has \$2696 million, if
9 that makes sense. I'm trying to sort of put some frame on what that
10 number really means. So there it is 2.696 billion equals 2,696 million,
11 the same thing. So with that in mind, what I want to do is ask you to
12 drop the million part. Just take the, take the million part off. Then just
13 talk about it, like it's \$2,696. So that's something that real people can
14 actually comprehend, what \$2,696 looks like or feels like in your bank
15 account, \$2,696.

16 So then the question becomes, what would it take to
17 properly punish somebody with \$2,696, if they had done something as
18 bad as what you found SHL did in this case? If somebody asks \$2,696,
19 will it deter him to punish them by taking away the "dollar" for
20 something like this? How about \$50? How about a \$100? Now, we have
21 a suggestion, \$160.

22 If you apply that same level of punishment to SHL, \$160 to
23 the person with \$2696, add that in the million part, \$160 million, a \$160
24 million. Take away \$160 million from SHL. It's the same as if they had
25 \$2696 and you took away 160. This is four times the amount of

1 compensatory damages that you've awarded, four times. It'll bring the
2 total amount of your verdict, including the verdicts you entered
3 yesterday, to \$200 million.

4 Now I'll say this, this is the most we want you to reward, we
5 have legal reasons for that. We don't want you to go above that, but we
6 do want you to do that. We believe, Sandy believes, that you will have
7 accomplished your purpose by awarding \$160 million in punitive
8 damages. We believe that your voice will be heard all over this
9 community, if you do it, and the State, country, the industry will hear
10 you.

11 Now I want talk about this, the phone call. While you're back
12 in the jury room deliberating on how much money you're going to give
13 in punitive damages, the executives at SHL got their cell phones in their
14 hand, got their ringers turned up on high. Then about 30 seconds of
15 your verdict being read right here in this courtroom those executives'
16 phones are going to be ringing. Somebody in this courtroom probably
17 has the number already punched in.

18 The people in the boardroom at SHL will know within about
19 30 seconds of your verdict being read what you decided. They'll hear it,
20 your voice will travel to the boardroom with SHL, just like that. The top
21 people in the company are going to be listening.

22 MR. ROBERTS: Objection, Your Honor. He's talking about
23 people out of state. Talk about people in the country.

24 MR. TERRY: Okay. Just to be clear, I'm talking about the
25 people at SHL. They bragged about being a Nevada company, right here

1 in Las Vegas, Nevada. The phone's going to ring, and the cell phone is
2 going to ring in the hand of somebody SHL, right here in town, and
3 they're going to hear it.

4 When they get the call one of two things is going to happen,
5 either they'll be happy that your punitive damage award was smaller
6 than what they were fearing. They'll feel like, whew, got away with that
7 one, it could have been a lot worse, or the number you write on that
8 verdict form is going to be strong and meaningful, to them, it'll be
9 something where they're going to say, can you repeat that, did I hear
10 you right? How much?

11 When you bring back your punitive verdict of \$160 million,
12 you can walk out of this courthouse and feel proud of what you've done,
13 with your head held high, the business is going to change, it hadn't
14 changed. Mr. Robert is getting ready to get up here and tell you that it
15 has, but you saw that, business will change when you guys do what
16 we're talking about. You will have changed the future when you do what
17 we're talking about here.

18 So ladies and gentlemen, that's a lot of money, nobody's
19 saying that it isn't, and Mr. Roberts, my guess is probably going to get
20 up and say, see, it is really all about money all along, but remember
21 what Sandra said, she did it for Bill, she did it to make change. How do
22 you make change? How do you make change? Is it by way of some
23 good faith class they're going to teach now since they got the verdict
24 back from yesterday?

25 Is that what we're really talking about? What's the language

1 they hear? It's money? It's the only thing we've got in this society to
2 change these kinds of things, and you all have the power to do it right
3 here, today. We'll ask you to do that, bring back the punitive damage
4 verdict of \$160 million. Thank you.

5 THE COURT: Thank you, Mr. Terry.

6 Mr. Roberts?

7 MR. ROBERTS: Thank you, Your Honor.

8 DEFENDANTS' CLOSING ARGUMENT

9 Good afternoon. It's always tough to get up here at this time
10 of the trial, if it takes it this far and talk to you, because I understand that
11 you disagree with everything I had to say, yesterday. And I need to talk
12 to you again, and I hope you'll listen to what I have to say with an open
13 mind.

14 Audra, could we have instruction number 3?

15 And this is one of the instructions that was read to you by the
16 Court.

17 And if you could blow that up Audra, so it can be seen.

18 And that says that, "If you have already awarded punitive
19 damages within your \$40 million award, no further award should be
20 made when you get this new form." And your punitive damage
21 instruction that you received yesterday talked about coming back for a
22 new phase to determine the amount of punitive damage, but juries have
23 been known to include punitive damages in that first form, and this
24 instruction is to clarify that if you included anything in there, to send a
25 message to United or to cause United to change, or to accomplish the

1 first -- the purposes that Mr. Terry just talked to you about, that shouldn't
2 add more to it, because you've already done it.

3 And we heard argument today from Mr. Terry about why he
4 needed to make a big verdict here, in this phase. But remember
5 yesterday, Mr. Terry told you that people are listening beyond this
6 courtroom, and that if you believe that Sierra acted with bad faith,
7 malice, and oppression, then let your verdict speak loudly to that effect
8 too.

9 Now maybe you took that to just meaning the part where
10 you said, I want to award punitive damages, but if Mr. Terry told you, let
11 your verdict speak loudly, make it \$30 million, so they'll listen, and they
12 should change this conduct, then you've already done your job; and
13 that's why that instruction is there.

14 But if you haven't done that yet, then I'd like to talk about the
15 instructions with you, and I'm just going to go through this, I know
16 Mr. Terry has gone through them with you, but I also want you to
17 understand, you know, what we think these instructions mean to you
18 today, when you get your deliberations again.

19 Audra, could you go to instruction number 1, and blow up
20 the first paragraph.

21 And, you know, there was an emotional argument made
22 yesterday, and I understand that hearing that, many of you may have
23 been angry at my client and may have been angry with me. And as you
24 sit down and consider your reward today, you need to do it, not out of
25 anger, but without passion, and without any prejudice toward the

1 company and what it's done, just your fair and reasonable judgment;
2 and the Court's given you some guidelines to help you do that.

3 And, Audra, can you go to the next paragraph, beginning
4 with your award. And we heard a lot about the amount that needs to be
5 awarded in order to get Sierra's attention, and to deter this conduct in
6 the future. But I'd like to point out this sentence, your award cannot
7 look -- the one above that Audra, I didn't realize the to your award.

8 Your award cannot be more that otherwise warranted by the
9 evidence in this case, merely because of the wealth of the Defendants.
10 And I know 2 billion is a big number, and an insurance company that
11 insures this many lives has to have money in the bank to pay claims, it's
12 a big number. But you can't decide what that number should be, like the
13 160 that Mr. Terry has told you about, solely because of the 2.6 billion, it
14 has to be also the amount warranted by the evidence, and it also has to
15 be in accordance with the other guidelines.

16 And here's the key-- go down to two.

17 That despite the wealth of the Defendant, the amount still
18 has to be subject to the consideration of the ratio of your punitive
19 damage award, to the actual harm inflicted on Mr. Eskew, by the conduct
20 awarding punitive damages in this case, since the measure of
21 punishment must be both reasonable and proportionate to the amount
22 of harm, and to the compensatory damages recovered by William Eskew.

23 So regardless of how much money Sierra Health and Life has
24 in assets, you can't award more than is reasonable and proportionate to
25 the harm in this case, only to Mr. Eskew; no one else just to Mr. Eskew.

1 And it also needs to be no more than the amount you find would be
2 sufficient to deter conduct.

3 And you heard Mr. Terry's argument that the amount
4 necessary to deter conduct for someone with this many assets has got to
5 be 160 million bucks, but I would suggest that you got to think about it a
6 little differently than he suggested.

7 It's simply not credible that your \$40 million award from
8 yesterday hasn't been noticed. There aren't that many \$40 million
9 awards to this capitol, in this country; \$40 million bucks is a lot of
10 money. And their whole theory of the case is that we acted oppressively
11 and knowingly did something which we knew would injure, or should
12 have known would injure Mr. Eskew, to save 55,000 bucks as part of this
13 policy. And that now he's arguing, we tried to save 55,000 bucks at his
14 expense, but we won't notice 40 just for this case,

15 What kind of company that is in the business of trying to
16 operate for a profit, based upon your verdict, would continue denying
17 55 million in coverage in a case like Mr. Eskew's, when they've been hit
18 by 40 million bucks, and multiply that by many people in his position
19 who were covered; why would any reasonable company risk that? Isn't
20 it enough, when you think about it, if you think that your original verdict
21 of 40 million bucks is enough to keep this company from doing the same
22 thing again, to save 55,000, then you don't have to award more, you
23 shouldn't award more.

24 One of the cases Mr. Sharp mentioned to you when he was
25 talking about punitive damages, and he threw out the *Ford Pinto* case, is,

1 you know, one of the reasons why punitive damages are awarded and
2 the good things they can do. And that was the case from a long time
3 ago, some of you may not remember that, but the Ford Pinto gas tanks
4 had a tendency to leak, if they were in a collision, and cars would catch
5 on fire.

6 And Ford did an internal analysis that the jury saw, and it
7 said, okay, if we don't fix this thing there are going to be 180 deaths.
8 And the average cost of a death back then that Ford would have to pay
9 was 200,000 bucks. So they multiplied the number of deaths times the
10 200,000 average cost per death that they could get sued for, and they
11 came up with 49 million bucks.

12 And then they did another analysis that said, okay, it's going
13 to cost us 137 million bucks to fix all these gas tanks, so the deaths don't
14 occur. So it's cheaper for us to pay the death claims than it is to fix the
15 problem. So we're going to save that money by not fixing it, and we'll
16 just budget out the wrongful deaths, awful stuff. And in that case you
17 had to have a big punitive award, because just paying for the damage
18 wasn't enough to stop the conduct, because the financial incentive was
19 still there.

20 In this case, if that 40 million bucks is your number that's
21 enough to stop the conduct. The cost of paying for the conduct times
22 the number of people who might sue is so much greater than anything
23 that we could save on the policy, if that's what the motivation was, that
24 is enough to deter. And if it's enough to deter, and you can't pay -- you
25 can't charge us more than necessary to deter, us just because we got a

1 lot of assets; and that's your duty as juror.

2 And, yeah, you know, I understand that, you know, you've
3 got a huge ability to exercise discretion here, but with that power comes
4 responsibility to exercise that discretion fairly, and reasonably, and not
5 to award all this money out of anger, and not to award any more than
6 logically and rationally and reasonably is necessary to deter conduct;
7 and 40 million bucks does that.

8 But the higher the damage award on the compensatory, I
9 would suggest the lower, proportionate the amount that's kind of vague,
10 but certainly it shouldn't be more than the \$40 billion. If that was
11 intended solely compensatory damages for Mr. Eskew, it should be more
12 than that, but I would suggest that if what you're really doing is trying to
13 award enough to stop the conduct you've already done that. You've
14 awarded enough to stop any rational company from doing things the
15 same way that you found to be in bad faith.

16 So, Audra, if you could go to paragraph 1(c).

17 This is why I put on some additional evidence today, that I
18 didn't put on in the first part of the case. In the first part of the case it
19 was my job to try to defend the conduct, the rules that were
20 implemented in the process, that existed at the time this claim was
21 denied.

22 But at this point in the proceedings, when it comes to an
23 award of punitive damages, one of the things that you're supposed to
24 consider, according to the Court, is any mitigating conduct by the
25 Defendants. What that means is, what have the Defendants done after

1 February 5th, 2016, that shows they don't need to be deterred as much
2 as they would, if they had made no changes.

3 And that's why I put on that additional evidence too, to show
4 that there have been changes made. And the biggest one I think is the
5 idea here is that complainant, Mrs. Eskew, more or less could change the
6 change the way we did things, and this blanket denial of proton beam
7 therapy, for everyone with the lung cancer, that you heard about.

8 And, and that was the way Dr. Ahmad did it. And I was trying to defend
9 it, and you've rejected it.

10 But Audra, could you go to Exhibit 31?

11 But this is the document that was previously admitted.

12 And if you could go to page 1, Audra and this -- blow up the
13 effective date up the top.

14 This was an update to the proton beam radiation policy,
15 effective January 1st of 2019. And now go to the sentence, let's see,
16 beginning "the following or proven and medically necessary". All let's
17 see. Yeah. All the way down, perfect.

18 So if you remember the policy I showed you yesterday,
19 during closing said, you guys got a few things that are medically
20 necessary. There were three rare cancers and pediatric cancers. And
21 then one cancer was unproven and not medically necessary, and was
22 supported by evidence, which we discussed.

23 But now look at their new policy. First it says, "proton beam
24 therapy for a defendant in therapy and the following indications," and
25 there's now a new one in here, but that's not really what I want to focus

1 on. I want to focus on the second bullet point, which is entirely new.

2 "PBT may be covered. PBT may be covered for a diagnosis
3 that is not listed above as proven, including recurrences or metastases in
4 selected cases. Request for exceptions will be evaluated on a case by
5 case basis, when both of the following criteria are met."

6 The first bullet point:

7 "Documentation is provided if sparing of the surrounding
8 normal tissue, such as the esophagus, cannot be achieved with standard
9 radiation therapy techniques, and evaluation includes a comparison of
10 treatment plans for proton beam therapy, IMRT and SBRT."

11 I would suggest to you that if Mr. Eskew's case was reviewed
12 under this current policy, it would be approved, because there was a
13 comparison treatment plan; that's the pinnacle treatment plan. And even
14 though there's medical literature indicating that these benefits are still
15 theoretical, Sierra Health and Life, and UnitedHealthcare have changed
16 their policy to say, "If you can show this theoretical benefit, we will
17 approve it.

18 If you can show that surrounding tissue cannot be spared
19 with IMRT, and you show us a comparative plan, that show it will be
20 spared with the proton beam, we'll approve it. So if this lawsuit was
21 about making us change, so what happened to Bill doesn't happen to
22 someone like Bill that's already been accomplished. You don't have to
23 make us do it, it's already been done.

24 Yeah. I argued the way we did it in 2016, was reasonable,
25 and in good faith. You rejected that, I get it, but you don't have to make

1 this change because we changed three years ago. It's right here, and
2 there no evidence to rebut this change, and no one's proven that we
3 don't follow this.

4 The other thing that you heard from, is I understand that
5 there was evidence that Dr. Ahmad, as a medical oncologist, didn't
6 understand the treatment plan, and didn't understand the dosages and
7 was not competent to do it.

8 Now you heard from Dr. Kumar, he's a medical oncologist,
9 he obviously understood radiation. And I think that they should, but you
10 know, we also heard Dr. Kumar and he didn't understand some things,
11 he was crossing Dr. Ahmad, and he was confused about some things,
12 clearly. But if one of their goals is to stop having preauthorization
13 requests for radiation therapy reviewed by a medical oncologist, done.

14 In 2019 Ms. Sweet told you, they now send it out to an
15 independent review company that has these requests looked at by
16 radiation oncologists, done. Don't need to punish us. Don't need to
17 make us do it. It's done. And Dr. Ahmad doesn't even do reviews for
18 Sierra Health and Life. You heard him say so.

19 The class on good faith and fair dealing, I don't know what
20 you decided was the overriding factors in coming to your verdict, but
21 there was a lot of evidence for Mr. Prater that the classes they were
22 teaching, which Ms. Sweet told you, yeah, we teach people they have to
23 be fair, but we don't use those words.

24 Well, now they're going to teach a class using those words
25 and what they mean under Nevada law, and she told you she was

1 already authorized to implement that. So one of the things that you
2 wanted to do with your verdict, and that they wanted to accomplish by
3 bringing this case, was to make sure people reviewing those claims
4 knew about the good faith and fair dealing obligation under Nevada law,
5 done.

6 The company has already heard yesterday's verdict, it isn't
7 ignoring it, people have noticed, or they wouldn't be making changes.
8 And regardless of who suggested it was a good idea, and it's been
9 authorized.

10 So I'm not going to take up any more of your time. I hope
11 that you'll consider my evidence with an open mind and consider
12 whether any more money is actually needed to make the changes, which
13 the Plaintiffs have told you are the only reason that they brought this
14 lawsuit, that it's not about money, they just want to change and there is
15 change that has been made

16 And actually, I should say one more thing, Your Honor, sorry
17 for misleading you on that. One of the instructions -- Audra, if you put
18 up instruction number 5.

19 That I want to explain to you why I'd like to mention this.
20 And I understand in a case like this, that when we cross-examine the
21 family, that's no fun for us, and I understand that we were criticized for
22 the method that we chose, the gentleman I chose to cross-examine some
23 of the family members, and I know now that -- agree with them, that
24 probably made you angry, the way we did that. But what this instruction
25 means is that, you know, the way the lawyers try to case during trial, you

1 can't punish our clients for a decisions we make.

2 And I'm sorry, if that offended anyone. I'm sorry if that was
3 hard Mrs. Eskew. Put that on me, know that that's not on my client. So
4 if you were angry about that like Mr. Terry was, well, that's -- I'd ask you
5 not to punish my client for what we chose to do, to try to defend them as
6 best we can.

7 Thanks for coming back today. I appreciate you paying such
8 close attention to me, and you know, I hope that you do the right thing.
9 It should not be hard. Thank you.

10 THE COURT: Thank you, Mr. Roberts.

11 Mr. Terry?

12 PLAINTIFFS' REBUTTAL CLOSING ARGUMENT

13 MR. TERRY: Okay. This is the last time anybody's going to
14 talk to you in this case, these lawyers anyway. And so let me just get
15 some thoughts out here to you, so you can take them back with you.

16 Mr. Roberts says this company's heard you, I know they've
17 heard you. Where's the company representative from the SHL, all
18 lawyers, no company representative. They've been here other times in
19 the case, a lot of the case, where are they today?

20 MR. ROBERTS: I object Your Honor. There's reasons, and
21 it's not in evidence. It's not relevant to the jury's consideration.

22 MR. TERRY: We can open our eyes and look, Judge, there's
23 nobody here.

24 THE COURT: It's overruled.

25 MR. TERRY: Thank you.

1 So where are they? I guess they're listening from afar. They
2 don't want to face the music. They send poor Ms. Sweet in here, again,
3 to say whatever she needs to say, but where are they? And let's be clear
4 about what we're doing today, because I think there's been a little bit of a
5 mashup that's happened here.

6 There has been no punishment of SHL for what they did in
7 this case, there has been no punishment of this company. You all's
8 verdict has compensated the Estate of Bill Eskew, those two things are
9 completely different. So compensating, the Estate of Bill Eskew is not
10 the same as punishing SHL. I mean, let's keep that straight.

11 So if you don't punish SHL, and if you don't really punish
12 them, you'll be sending the opposite message of what you want to send.
13 The message that you send, if you don't really punish them is, it's okay if
14 you do wrong. But when you get caught, all you have to do is cry and
15 whine a little bit, and then everything's going to be okay. All you have to
16 do is ask for forgiveness, everything's okay; that's not the message that
17 the voice of this community needs to send.

18 Now I want to point out, I can't help it.

19 Jason, would you put up Exhibit 31, please. And would you
20 pull up Jason, this part right here, starting with that right there, and
21 down to the bottom.

22 So this is the, this is the medical policy that SHL is now here
23 to tell you everything's better now. First of all, where's the evidence that
24 any change to their proton beam policy had anything at all to do with Bill
25 Eskew, there's nothing. But here's what it says:

1 Jason, right here, this second open sentence that you got
2 pulled up, PBT is unproven.

3 "PBT is unproven and not medical mathematically necessary
4 due to insufficient evidence of efficacy for treating all other indications,
5 not listed as proven, including, but not limited to," does that all sound
6 familiar by the way? Right here, Judge, lung cancer. They've really got
7 it, don't they? They've got now.

8 Mr. Roberts just told you if Bill Eskew's claim came up today
9 under this policy, it would be paid. where's the evidence of that? That's
10 what it says. Lung cancer's not medically necessary. Proton therapy,
11 unproven, the same song, different verse. So their whole case has been
12 that proton beam therapy is still unproven as we sit here today. How
13 many people got up there and said that? And so then when it comes
14 time for you all to get a chance to do the right thing and punish them for
15 real, they come up with this.

16 Another thing, jury instruction number 3 is the one that
17 Mr. Roberts pointed out to you.

18 Jason, could you pull that up please, jury instruction
19 number 3. Oh, you don't have it do you.

20 Jury instruction number 3 says -- it's the one --

21 [Counsel confer]

22 MR. TERRY: Here it is. Sorry about that. I made it through
23 almost the whole trial without losing something like that. It says: "If
24 you've already awarded punitive damages within your 40 million award,
25 no further award should be made." And Mr. Roberts is encouraging you

1 to go back there and think about, maybe you've already punished SHL,
2 but you all are not -- are able understand jury instructions.

3 And remember what the one yesterday said, that there's
4 going to be another phase, if you find that what they did was wrong and
5 that you're going to punish here today; do you remember that? So don't
6 let them have the little do-over there. They'd sure like one.

7 So also another thing I want to mention to you, is that
8 Mr. Roberts has talked a lot about how the compensation that you
9 awarded Bill is enough to deter this insurance company from doing the
10 same kind of things in the future. And that's good enough. Hey, we're,
11 we're deterred now, but I got to make this point, we're not just here to
12 deter that sanction, which they need; I mean, let's be honest, that's what
13 they need. But we're also here to punish them for what they did to Bill
14 Eskew, we're here to punish them for what they did to Bill Eskew.

15 And so to say, well, hey, we won't do it anymore, we're
16 deterred, no need to punish us. I mean, you know, when you get onto a
17 kid and you're getting ready to punish them, in whatever way, ground
18 them or whatever, "I won't do it anymore." Have you heard that before?

19 So Mr. Roberts said, "Hey, if you're going to punish this no
20 more than 40 million, well, that tells you it's not enough to accomplish
21 the goal. So bring back \$160 million in punitive damages, no more, you
22 won't be helping us if you do, and then your work here is done, and full
23 justice will have been delivered.

24 Two points. The last two points of the case.

25 Number 1. Where's the apology to Sandy Eskew? Has

1 anybody got up there and said, gosh, we're sorry, what we did? Have
2 they have they shown any remorse? There's not even anybody over
3 here to show it, if they wanted to. And if they wanted to don't you take
4 there to be somebody over here showing it.

5 And here's the last thing I want to say. I'm going to close the
6 book, so I can't say anything else. I want, we want, Sandy Eskew wants
7 this company, by your verdict, to never forget the name of Bill Eskew;
8 make your verdict say that.

9 Thank you.

10 THE COURT: Thank you, Mr. Terry.

11 MR. ROBERTS: Your Honor?

12 THE COURT: Yes.

13 MR. ROBERTS: I would just ask the Court in closing to take
14 judicial notice of Administrative Order 21-4, as modified by the general
15 order 422.04, recognizing that parties are allowed to attend proceedings
16 by alternate means. And that Mr. Crump, our company representative is
17 currently on BlueJeans and has been here the whole time.

18 MR. TERRY: No objection, Your Honor.

19 THE COURT: The Court will take judicial notice that the
20 company representative has been listening to this proceeding, audibly,
21 so even though the jury can't see it, he has been present according to the
22 representations of the parties, because there is a video feed here. So
23 someone who has that video link can listen and can see what's going on
24 here today. So pursuant to what the parties have said, the corporate
25 representative has been watching what has been going on.

1 Madam Clerk, will you swear in?
2 [The Clerk swore in the Marshal and Law Clerk to take charge of
3 the jury]
4 THE COURT: Thank you. Ladies and gentlemen, the main
5 eight jurors will follow Marshall Moore, the two alternates will follow
6 Ms. Everett. Thank you.
7 THE MARSHAL: All rise for the jury, please.
8 [Jury retires to deliberate at 3:25 p.m.]
9 THE COURT: Any issues outside the presence, Counsel?
10 MR. SHARP: No, Your Honor.
11 MR. TERRY: No, Your Honor.
12 MR. ROBERTS: No, Your Honor.
13 THE COURT: Thank you. Don't go far.
14 MR. SHARP: We won't, thank you.
15 THE COURT: Okay.
16 [Recess taken from 3:24 p.m. to 3:52 p.m.]
17 THE COURT: Thank you. Please be seated. Do we have
18 Mr. Roberts?
19 MR. GORMLEY: He was in his other hearing, it started, Your
20 Honor. We can handle it, unless you want me to try to go grab him?
21 THE COURT: There's no verdict, there's a juror question.
22 MR. GORMLEY: Right. For the juror question, yeah.
23 THE COURT: It's up to you.
24 MR. GORMLEY: We'll check. I think we're okay proceeding
25 without him, if need be.

1 MR. TERRY: Should we approach, Your Honor, or does it
2 matter?

3 THE COURT: It doesn't matter. Whatever you want.

4 MR. SHARP: You don't need to approach.

5 THE COURT: You can approach, Mr. Terry.

6 MR. SHARP: There's so many people that come up here at
7 once, I feel like we just stopped coming.

8 [Pause]

9 THE COURT: Sorry. There's a question from Juror
10 Number 10, which is Mr. Jackson. If there are punitive damages
11 awarded -- oh, here he is, right, perfect timing.

12 So this is a question from Juror Number 10, Mr. Jackson. If
13 there are punitive damages awarded, where does it go.

14 MR. SHARP: Tell them to go back to the jury instructions.

15 MR. ROBERTS: I've always thought people should be told
16 that. I mean, 42.905, says it goes to the Plaintiff.

17 MR. SHARP: That's fine.

18 THE COURT: All right. So we'll bring the jury back in and tell
19 them to go -- no. We'll just type up and answer, and mark it as a Court's
20 exhibit, and we'll send it back with the Marshal. I'll type the answer, and
21 I'll show it to you guys before I send it.

22 MR. SHARP: To the rest, I say verdict form. I mean, it's --

23 THE COURT: All right.

24 THE COURT: Off the record.

25 [Recess from 3:53 p.m. to 4:03 p.m.]

1 THE MARSHAL: All rise. Department 4 come to order. The
2 Honorable Judge Nadia Krall presiding.

3 THE COURT: Thank you. Please be seated, counsel. We
4 have another verdict. Is Mr. Roberts available?

5 MR. GORMLEY: He's in the middle of a hearing right now,
6 Your Honor.

7 THE COURT: Okay. We'll proceed then. You want to sit in
8 the first chair, Mr. Gormley?

9 MR. GORMLEY: Sure.

10 MR. SMITH: Not David Phillips, Your Honor.

11 THE COURT: It's Philip Smith, though.

12 MR. SMITH: That's correct.

13 THE MARSHAL: Are you ready, Judge?

14 THE COURT: Yes. I apologize, Mr. Smith.

15 MR. SMITH: That's okay, Your Honor. That happened all the
16 time when I was the D.A.

17 THE COURT: Calling you Mr. Phillips?

18 MR. SMITH: People would always call me Mr. Phillips.

19 THE COURT: I want to call Mr. Roberts Mr. Lee for some
20 reason. I have no idea why. It makes no sense to me.

21 THE MARSHAL: All rise for the jury.

22 [Jury in at 4:05 p.m.]

23 THE MARSHAL: All jurors present.

24 THE COURT: Thank you. Please be seated. Do the parties
25 stipulate to the presence of the jury?

1 MR. SHARP: Yes, Your Honor.

2 MR. GORMLEY: Yes, Your Honor.

3 THE COURT: Mr. Foreperson, has the jury reached a
4 unanimous verdict?

5 THE FOREPERSON: Yes, ma'am.

6 THE COURT: Thank you. Will you please submit the verdict
7 to the Marshal?

8 The Clerk will now read the verdict out loud.

9 VERDICT

10 THE CLERK: In the 8th Judicial District Court of the State of
11 Nevada, in and for the County of Clark, Sandra L. Eskew, as Special
12 Administrator of the Estate of William George Eskew, Plaintiff vs. Sierra
13 Health and Life Insurance Company, Incorporated, Defendant. Case
14 number A-19-788630-C, Department 4.

15 Verdict. We the empaneled jury in the above-entitled case
16 return the following special verdict on the question submitted to us.

17 1. What amount of money do you find for punitive damage?
18 \$160 million.

19 Dated this 5th day of April 2022. Signed by Donald Jackson,
20 Foreperson. Ladies and gentlemen of the jury is this your verdict?

21 THE JURORS: Yes.

22 THE COURT: Do either party wish to have the jury polled?

23 MR. GORMLEY: For the Defense, yes, Your Honor.

24 THE COURT: Thank you. Juror Number 1, is this your
25 verdict?

1 JUROR NUMBER 1: Yes.

2 THE COURT: Juror Number 2, is this your verdict?

3 JUROR NUMBER 2: Yes.

4 THE COURT: Juror Number 3, is this your verdict?

5 JUROR NUMBER 3: Yes.

6 THE COURT: Juror Number 4, is this your verdict?

7 JUROR NUMBER 4: Yes.

8 THE COURT: Juror Number 5, is this your verdict?

9 JUROR NUMBER 5: Yes.

10 THE COURT: Juror Number 6, is this your verdict?

11 JUROR NUMBER 6: Yes.

12 THE COURT: Juror Number 7, is this your verdict?

13 JUROR NUMBER 7: Yes.

14 THE COURT: Juror Number 8, is this your verdict?

15 JUROR NUMBER 8: Yes.

16 THE COURT: Thank you. The Clerk will now record the

17 verdict in the minutes of the Court.

18 Ladies and gentlemen of the jury, the Court cannot thank you

19 enough for your time and sacrifice you have made during this trial. We

20 could not be here today during this past month without you. Our system

21 of government does not work without you.

22 It's not the Judge, it's you, the jury who decide the outcome

23 of the case, and the Court really appreciates what you have done for the

24 parties today.

25 The attorneys really appreciate your time as well. I will be

1 able to speak to you, if you'd like. The attorneys might want to speak to
2 you if you'd like. You're not under any obligations with anyone. The
3 admonishment that was given to you now has been lifted. You can
4 speak to anyone about anything that has transpired in this courtroom
5 from here on out.

6 Thank you.

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

8 [Jury excused at 4:08 p.m.]

9 THE COURT: I want to thank the parties for the
10 professionalism in this case. I really appreciate it.

11 MR. SHARP: Thank you, Your Honor.

12 MR. GORMLEY: We thank you.

13 MR. SHARP: And thank the staff as well.

14 MR. GORMLEY: Absolutely.

15 MR. SHARP: They've been great to deal with.

16 Tell Marshal Moore we all appreciate him a lot, too.

17 THE COURT: You guys will see him if you wait to speak to
18 the jury outside. They'll bring the jurors outside if you wish to speak to
19 them.

20 MR. GORMLEY: Do they bring them into the hallway or bring
21 them back here?

22 THE COURT: No. He'll bring them out in the hallway for you.

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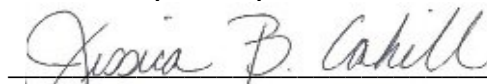
MR. SHARP: Thank you.

MR. GORMLEY: Thanks.

THE COURT: Sure.

[Proceedings concluded at 4:09 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.



Maukele Transcribers, LLC

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