Case No. 85369

In the Supreme Court of Nevada

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 17 of 18

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiffs, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4

NOTICE OF ENTRY OF JUDGMENT UPON JURY VERDICT

PLEASE TAKE NOTICE that the Judgment Upon Jury Verdict was filed herein on April 18, 2022, in the above-captioned matter.

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A copy of the Judgment Upon Jury Verdict is attached hereto as Exhibit 1.

DATED this 18th day of April 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and that on this date, a true and correct copy of the foregoing was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and NEFCR 9, via the electronic mail address noted below:

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/s/ Cristin B. Sharp
An employee of Matthew L. Sharp, Ltd.

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4

JUDGMENT UPON THE JURY VERDICT

THIS MATTER came for trial by jury from March 14, 2022 through April 5, 2022. Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, appeared in person and by and through her counsel Matthew L Sharp, Esq. and Douglas Terry, Esq. Defendant Sierra Health and Life Insurance Company appeared in person and by and through its counsel, Lee Roberts, Esq., Ryan Gormley, Esq., and Phillip Smith, Esq., of the law firm of Weinberg, Wheeler, Hudgins, Gunn, & Dial, LLC. Testimony was taken. Evidence was admitted. Counsel argued the merits of the case. Pursuant to NRS 42.005(3), the trial was held in two phases.

On April 4, 2022, in phase one, the jury unanimously rendered a verdict for Plaintiff Sandra L. Eskew as Special Administrator of the Estate of William George Eskew and against Defendant Sierra Health and Life Insurance Company and awarded compensatory damages in the amount of $40,000,000. The jury unanimously found grounds to award punitive damages.

Phase two for punitive damages was held on April 5, 2022. The jury unanimously rendered a verdict for Plaintiff Sandra L. Eskew as Special Administrator of the Estate of William George Eskew and against Defendant Sierra Health and Life Insurance Company and awarded punitive damages in the amount of $160,000,000.

Pursuant to NRS 17.130, Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, is entitled prejudgment interest of $6,363,287.67 for past compensatory damages awarded of $40,000,000, from April 9, 2019 through entry of judgment of April 18, 2022, based upon a pre-judgment interest rate of 5.25 percent.[1]

IT IS SO ORDERED AND ADJUDGED that Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William Georg Eskew, be given and granted judgment against Defendant Sierra Health and Life Insurance Company in the total amount of $206,363,287.67, plus taxable costs as determined by this Court, all to bear interest as provided by NRS 17.130(2) from the date of entry of judgment until paid in full.

DATED this __ day of April 2022.

Dated this 18th day of April, 2022

DISTRICT COURT JUDGE

53A 8A7 E0AC A706
Nadia Krall
District Court Judge

[1] https://www.washoecourts.com/toprequests/interestrates. The pre-judgment interest rate is 5.25 percent. $40,000,000 times 5.25 percent and divided by 365 days equals a daily rate of interest of $5,753.42. April 9, 2019 through April 18, 2022 is 1106 days for $6,363,287.67.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Sandra Eskew, Plaintiff(s)	CASE NO: A-19-788630-C
vs.	DEPT. NO. Department 4
Sierra Health and Life Insurance Company Inc, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Judgment Upon Jury Verdict was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA L. ESKEW, as special administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No.: A-19-788630-C Dept. No.: 4 **Hearing Requested** **DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW**

Defendant Sierra Health and Life Insurance Company, Inc. ("SHL") moves for judgment as a matter of law pursuant to Nevada Rule of Civil Procedure ("NRCP") 50(b), the following Memorandum of Points and Authorities, and any argument allowed on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

This is a dispute over insurance coverage that turns on whether proton beam therapy was "medically necessary"—and therefore a covered treatment—in the case of William Eskew, who was afflicted with Stage IV lung cancer. SHL reasonably concluded that it was not a covered treatment. This was not a bad-faith determination, let alone one that would warrant the extraordinary sanction of punitive damages.

The jury's shocking verdict—finding that SHL made a bad-faith coverage denial, and awarding $40 million in compensatory damages and an additional $160 million in punitive damages—cannot stand. The record does not contain legally sufficient evidence that SHL acted in bad faith or with the malicious intent necessary for an award of punitive damages under Nevada law. This Court should therefore grant SHL judgment as a matter of law on Plaintiff's claims for insurance bad faith and punitive damages.

To prove insurance bad faith, Plaintiff needed to introduce sufficient evidence establishing four separate elements: (1) the requested proton beam therapy was a covered service under the terms of Plaintiff's insurance plan; (2) SHL had no reasonable basis for denying coverage; (3) SHL knew, or recklessly disregarded, that it lacked a reasonable basis for the denial; and (4) the denial was a legal cause of harm to Mr. Eskew. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998).

Plaintiff did not prove *any* of these elements. First, the insurance plan covers only those therapies that SHL deems "medically necessary," and SHL reasonably and correctly applied its policies and guidelines in determining that proton beam therapy was not medically necessary in this case. Second, SHL had a reasonable basis for denying coverage: its judgment conformed to the judgments of the nation's leading medical and radiological organizations and was consistent with the policy followed by the 12 largest insurers in the United States. Third, SHL plainly did not know (or recklessly disregard) that it lacked a reasonable basis for the denial; to the contrary,

SHL believed, based on the views of the medical community and other insurers, that it had very good and legitimate reasons for the denial. And fourth, the denial was not the proximate cause of the alleged noneconomic harm to Mr. Eskew because there was no evidence of economic loss, and because there was insufficient evidence linking the denial to the pain-and-suffering Mr. Eskew endured.

Even if the evidence could be deemed sufficient to support the bad-faith finding, this is not a case for punitive damages. Nevada law imposes a heightened and demanding standard on plaintiffs who seek punitive damages. They must prove, by clear and convincing evidence, that the defendant acted with fraud, malice, or oppression in committing the underlying tort. *See* NRS 42.005(1).

Plaintiff did not come close to proving an entitlement to punitive damages. Although Plaintiff argued that SHL acted with malice and oppression, the record does not contain clear-and-convincing evidence supporting such a finding. To the contrary, the evidence at trial demonstrated that SHL followed its usual and customary procedures in denying the request for coverage. SHL based its decision on the United HealthCare ("UHC") Proton Policy, which itself rested on studies and data presented in peer-reviewed journals, as well as on the conclusion reached by leading medical and radiology associations, including the American Society for Radiation Oncology and the Agency for Healthcare Research and Quality, that current data do "not provide sufficient evidence to recommend proton beam therapy [(PBT)] outside of clinical trials in lung cancer" and "the evidence is insufficient to draw any definitive conclusions as to whether [PBT] has any advantages over traditional therap[ies]." App. Vol. 3 (3/21 Tr.) at 663-64 (quotation marks omitted). It should go without saying that an insurer that assesses medical necessity based on the views of the nation's top doctors and scientists is not acting with malice or oppression. Indeed, the undisputed fact that SHL's approach is the same approach followed by the nation's largest insurers negates any suggestion that SHL acted with malice or oppression, or otherwise disregarded the rights of its insureds. To be sure, Plaintiff's experts disagreed with SHL's coverage decision, but even if they were correct that SHL should have approved proton beam therapy for Mr. Eskew, that would mean at most that SHL's actions were mistaken, not malicious.

Because there was not legally sufficient evidence that SHL acted in bad faith or with malice or oppression, this Court should grant judgment in favor of SHL on Plaintiff's claims for bad faith and punitive damages.

BACKGROUND

This dispute arises out of a prior authorization request for insurance coverage. Mr. Eskew's treating physician sought preauthorization from SHL for proton beam therapy, an alternative treatment for Mr. Eskew's Stage IV lung cancer. The request was reviewed by Dr. Shamoon Ahmad, a board-certified medical oncologist. SHL denied the request on February 5, 2016, concluding that proton beam therapy did not constitute a "covered service" under Mr. Eskew's insurance plan because the treatment was "unproven" and not "medically necessary" in Mr. Eskew's case. Neither Mr. Eskew nor his treating physician appealed the denial.

Mr. Eskew received a different treatment known as Intensity-Modulated Radiation Therapy ("IMRT"). His cancer continued to progress and he passed away on March 12, 2017. There is no allegation that the use of IMRT rather than proton beam therapy hastened his death. *See* App. Vol. 3 (3/21 Tr.) at 616-17.

The undisputed evidence showed that there is no randomized clinical trial supporting the use of proton beam therapy over IMRT for lung cancer. And the denial of coverage was consistent with guidance from two of the nation's leading organizations for radiation oncology and medical research—the American Society for Radiation Oncology ("ASTRO") and the Agency for Healthcare Research and Quality ("AHRQ").

Plaintiff Sandra Eskew, as special administrator of the Estate of William Eskew, sued SHL for insurance bad faith. She sought noneconomic compensatory damages for Mr. Eskew's emotional distress caused by the denial of coverage, as well as for pain-and-suffering from alleged Grade III esophagitis, which she claimed was caused by the IMRT treatment. She also sought punitive damages.

The jury found SHL liable for insurance bad faith. It awarded Plaintiff $40 million in noneconomic compensatory damages for emotional distress and pain-and-suffering, and imposed $160 million in punitive damages.

LEGAL STANDARD

This Court must grant judgment as a matter of law when it "finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." NRCP 50(a)(1). Judgment as a matter of law is warranted when, viewing all evidence and inferences in favor of the nonmoving party, it "has failed to prove a sufficient issue for the jury, so that [its] claim cannot be maintained under the controlling law." *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424 (2007) (quotation marks omitted).

ARGUMENT

I. The Court Should Grant Judgment On The Bad Faith Claim.

Bad-faith insurance actions are limited to "rare and exceptional cases" where the insurer has engaged in "grievous and perfidious misconduct." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997) (quotation marks omitted). Bad faith is established only "where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct." *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996).

Under Nevada law, Plaintiff needed to prove four elements: (1) the requested proton beam therapy was a covered service under the terms of Plaintiff's insurance plan; (2) SHL had no reasonable basis for denying coverage; (3) SHL knew, or recklessly disregarded, that it lacked a reasonable basis for the denial; and (4) the denial was a legal cause of harm to Mr. Eskew. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998). Because Plaintiff failed to introduce legally sufficient evidence to establish any of the necessary four elements, the Court should grant judgment as a matter of law in favor of SHL.

A. Plaintiff Did Not Prove That Proton Beam Therapy Was A Covered Service.

Plaintiff did not introduce sufficient evidence that proton beam therapy was "medically necessary" and thus a covered service under the insurance plan. Like all contracts, an insurance plan must be interpreted "according to the plain and ordinary meaning of its terms." *Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 965, 339 P.3d 1281, 1285 (2014) (quotation marks omitted). Courts may not "rewrite contract provisions that are otherwise unambiguous . . . [or]

increase an obligation to the insured where such was intentionally and unambiguously limited by the parties." *Id.* (quotation marks omitted). And "[t]he insured . . . bears the burden of proving that its alleged loss falls within the terms of the various provisions under which it seeks coverage." *Cty. of Clark v. Factory Mut. Ins. Co.*, No. CV-S-02-1258-KJD-RJJ, 2005 WL 6720917, at *2 (D. Nev. Mar. 28, 2005) (citing *Lucini-Par. Ins., Inc. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)).

Plaintiff did not carry this burden. Plaintiff's plan limits coverage to procedures deemed "medically necessary." It provides: "Covered Services are available only if and to the extent that they are . . . Medically Necessary as defined in this [Agreement of Coverage]." App. Vol. 1 at 39 [Section 4.1]; *see also id.* at 40 [Section 5] ("Only Medically Necessary services are considered to be Covered Services."); *id.* at 47 [Section 6.1] (excluding coverage for any "services which are not Medically Necessary, whether or not recommended or provided by a Provider"). The plan defines "Medically Necessary" as a service, that, "as determined by SHL," is:

- consistent with the diagnosis and treatment of the Insured's Illness or Injury;
- the most appropriate level of service which can be safely provided to the Insured; and
- not solely for the convenience of the Insured, the Provider(s) or Hospital.

Id. at 64 [Section 13.66]; *see also* App. Vol. 2 (03/21) at 361. In making its medical-necessity determination, "SHL may give consideration to any or all of the following" factors:

- The likelihood of a certain service or supply producing a significant positive outcome;
- Reports in peer-review literature;
- Evidence based reports and guidelines published by nationally recognized professional organizations that include supporting scientific data;
- Professional standards of safety and effectiveness that are generally recognized in the United States for diagnosis, care or treatment;
- The opinions of independent expert Physicians in the health specialty involved when such opinions are based on broad professional consensus; or
- Other relevant information obtained by SHL.

App. Vol. 1 at 64 [Section 13.66]. The plan underscores that "Services and accommodations will not automatically be considered Medically Necessary simply because they were prescribed by a Physician." *Id.* The plan expressly excludes coverage for any "[e]xperimental, investigational or unproven treatment or devices as determined by SHL." *Id.* at 49 [Section 6.34].

Thus, under the plain and ordinary meaning of the terms of the plan, a particular treatment is covered only if SHL determines it is "Medically Necessary." Even Plaintiff recognized this limitation, App. Vol. 6 (3/24 Tr.) at 1484, and she admitted that she would have been aware of this limitation when she bought the plan, *id.* at 1439. It is undisputed that the plan specifically provides that SHL may determine that a service is not "medically necessary" based on peer-reviewed studies and reports of expert organizations, and that SHL may also deny coverage if it determines that the requested treatment is "experimental, investigational or unproven."

The evidence at trial shows that this is exactly what SHL did. Dr. Ahmad concluded that the requested proton beam therapy was not "medically necessary" based on "reports in peer-review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations that include supporting scientific data." App. Vol. 1 at 64 [Section 13.66]. Dr. Ahmad relied on the UnitedHealthcare Proton Policy in making his decision, *see* App. Vol. 2 (3/16 Tr.) at 372-73, and Plaintiff's expert, Dr. Andrew Chang, agreed that the proton policy contained comprehensive references to "peer review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations," App. Vol. 3 (3/21 Tr.) at 659-60. Indeed, Dr. Chang was not able to identify *any* published peer review article or study that the proton policy should have cited, but did not. *Id.* at 660. Dr. Ahmad further concluded that the therapy was not medically necessary because it was unproven. App. Vol. 2 (3/16 Tr.) at 332-33, 372-73.

In denying SHL's initial motion for judgment, the Court noted that "the insurance policy states that therapeutic radiation was a covered service, and proton therapy is a form of therapeutic radiation." App. Vol. 8 (3/25 Tr.) at 1881. But the plan states that it does not cover *all* "therapeutic radiology … services," but only those services that are "authorized by the managed care program," App. Vol. 2 (3/16 Tr.) at 362-63 (quoting [Section 5.18])—and the managed care program is "the

process that determines medical necessity," *id.* at 363-64 (quoting [Section 13.63]); *see also id.* at 360 ("SHL's managed care program … determines whether services … are medically necessary") (quotation marks omitted). In short, the plan is clear that it covers therapeutic radiology services *only* when SHL determines that they are medically necessary.

Plaintiff has not carried her burden of proving that the plan covered proton beam therapy. To the contrary, the evidence demonstrated that proton beam therapy was *not* a "Covered Service" under the plain and ordinary meaning of the terms of the plan.

B. Plaintiff Did Not Prove That SHL Lacked A Reasonable Basis For Denying Coverage.

Plaintiff did not introduce legally sufficient evidence establishing that SHL lacked a reasonable basis for denying coverage. If the insurer's "interpretation of the [insurance] contract was reasonable, there is no basis for concluding that [it] acted in bad faith." *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d 1352, 1355 (1986). An insurer's "honest mistake, bad judgment or negligence" is not enough. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 317, 212 P.3d 318, 330 (2009) (quotation marks omitted).

The undisputed evidence permits only one conclusion: SHL's interpretation of the plan, even if it could be deemed mistaken, was reasonable. As Plaintiff's expert Dr. Chang testified, the United HealthCare Proton Policy—on which Dr. Ahmad relied to conclude that proton beam therapy was not medically necessary in these circumstances—was based on "peer review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations," and did not overlook any important literature or clinical evidence. App. Vol. 3 (3/21 Tr.) at 659-60.

The proton policy rested on the findings of some of the nation's leading medical and radiology organizations in concluding that "[c]urrent published evidence does not allow for any definitive conclusions about the safety and efficacy of proton beam therapy to treat" lung cancer "as proven and medically necessary." App. Vol. 9 (3/28 Tr.) at 2016 (quotation marks omitted). For example, the proton policy looked to the conclusions of the American Society for Radiation Oncology ("ASTRO"), whose Emerging Technology Committee "concluded that [current data do]

not provide sufficient evidence to recommend proton beam therapy [PBT] outside of clinical trials in lung cancer." App. Vol. 3 (3/21 Tr.) at 662 (quotation marks omitted). The proton policy also relied on the judgment of the Agency for Healthcare Research and Quality ("AHRQ"), a federally-supervised agency specifically recognized by the Nevada Legislature as an expert research institute. *See* NRS 695G.053(5)(a). AHRQ determined that "the evidence is insufficient to draw any definitive conclusions as to whether [PBT] has any advantages over traditional therap[ies]." App. Vol. 3 (3/21 Tr.) at 663-64 (quotation marks omitted). These expert determinations reflect the fact that there is no randomized clinical trial supporting its use over IMRT for lung cancer. SHL's expert, Dr. Owens, reviewed the proton policy and concluded that the "evidence cited in th[e] policy supported" its conclusion. App. Vol. 9 (3/28 Tr.) at 2017. Dr. Owens even identified additional studies, such as the 2015 Blue Cross Blue Shield technology assessment, which found insufficient evidence supporting proton beam therapy for non-small cell lung cancer. *Id.* at 2026. The proton policy, and the scientific evidence underlying it, establish an objectively reasonable basis for SHL's conclusion that "[p]roton beam radiation therapy is unproven and not medically necessary for . . . lung cancer." *Id.* at 2016 (quotation marks omitted).

In assessing the reasonableness of an insurer's conduct, courts look to whether its "handling of the claim was in accord with insurance industry practice." *Hanson v. Prudential Ins. Co. of Am.*, 783 F.2d 762, 767 (9th Cir. 1985); *see also Schultz v. GEICO Cas. Co.*, 429 P.3d 844, 847 (Colo. 2018) ("The reasonableness of the insurer's conduct . . . is based on proof of industry standards.") (quotation marks omitted). Here, the undisputed evidence showed that SHL's determination matched that of the nation's 12 largest insurers. Dr. Owens testified that *none* of those insurers considers proton beam therapy to be medically necessary. *See, e.g.*, App. Vol. 9 (3/28 Tr.) at 2039 (Aetna's policy is "that proton beam therapy was not medically necessary"); *id.* at 2040 (Anthem, the largest Blue Cross plan, deems the therapy "as not medically necessary"); *id.* at 2040-41 (Blue Shield of California does not list proton beam therapy for lung cancer among its covered services); *id.* at 2041 (CIGNA believes the therapy is "not medically necessary"); *id.* at 2042 (Florida Blue considers the therapy "[n]ot medically necessary when the disease gets metastatic"); *id.* at 2042-43 (Highmark Group finds the therapy "[n]ot medically necessary"); *id.*

at 2043 (Humana classifies the therapy as "[n]ot medically necessary"). Indeed, Dr. Owens could not find a single policy that covered proton beam therapy for non-small cell lung cancer, and considered it "highly unlikely" that Plaintiff could even have obtained a policy that would have covered it. *Id.* at 2045.

An insurer "is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did." *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1237, 1242 (D. Nev. 1994) (citing *MGM Grand Hotels, Inc.*, 102 Nev. 605, 729 P.2d at 1355). The undisputed evidence at trial established that SHL had a reasonable basis to take the position that it did.

C. Plaintiff Did Not Prove That SHL Knew, Or Recklessly Disregarded, That It Lacked A Reasonable Basis For Denying Coverage.

There was no evidence that SHL knew or recklessly disregarded that it lacked a reasonable basis for denying coverage. Under Nevada law, "[i]t is not enough to show that, in hindsight, an insurer acted unreasonably." *Fernandez v. State Farm Mut. Auto. Ins. Co.*, 338 F. Supp. 3d 1193, 1200 (D. Nev. 2018) (citing *Potter*, 112 Nev. 199, 912 P.2d at 272). Rather, the plaintiff must prove that the insurer had "'actual or implied awareness' that no reasonable basis exist[s] to deny the claim." *Pioneer Chlor Alkali*, 863 F. Supp. at 1242 (quoting *MGM Grand Hotels, Inc.*, 102 Nev. 601, 729 P.2d at 1354).

Plaintiff did not produce legally sufficient evidence demonstrating knowledge or reckless disregard on the part of SHL. Shelean Sweet testified that the way Mr. Eskew's file was handled "was consistent with the policies and procedures at Sierra Health and Life." App. Vol. 4 (3/22 Tr.) at 876. There was no evidence that anyone at SHL believed the proton policy was unreasonable. To the contrary, as discussed above, the proton policy relied on the judgments of some of the nation's leading medical and oncology groups in determining that proton beam therapy was not medically necessary for persons with Stage IV lung cancer. Moreover, the policy matched the policy followed by the 12 largest insurers in the United States.

It would be one thing to conclude that a medical-necessity judgment that tracks the views of leading medical organizations and the nation's largest insurers lacks a reasonable basis. It would

be quite another to conclude that SHL *knew* that it lacked a reasonable basis when it looked to the judgments of the medical community and insurance industry in formulating its proton policy. That SHL's coverage determination reflects a widely-held view endorsed by so many of the nation's leading medical experts and insurers is overwhelming proof that even if SHL's conclusion could somehow be deemed unreasonable, SHL cannot possibly be found to have *known* or *recklessly disregarded* that it was unreasonable.

D. Plaintiff Did Not Prove Causation.

Plaintiff failed to demonstrate that the denial of the claim was a legal cause of harm to Mr. Eskew with respect to emotional distress or pain-and-suffering damages.

1. Plaintiff Cannot Recover Noneconomic Damages Where There Was No Proof Of Economic Loss.

A plaintiff in a bad-faith insurance action cannot recover noneconomic damages—such as damages for emotional distress or pain-and-suffering—without proving economic loss. That is the rule in California, and the Nevada Supreme Court traditionally looks to California in defining the parameters of bad-faith insurance claims. *See Avila v. Century Nat'l. Ins. Co.*, 473 F. App'x 554, 556 (9th Cir. 2012) ("We presume that Nevada would look to California law in determining whether the bad faith claim would be viable"); s*ee also U.S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975) (deriving Nevada's bad-faith law from California law). Here, Plaintiff did not attempt to prove economic loss, and sought and obtained only noneconomic damages. *See* App. Vol. 1 (3/16 Tr.) at 186 (Plaintiff's counsel: "So harms and losses, I've gone through them all. They're now pain and suffering, mental suffering, emotional distress and loss of enjoyment of life.").

California courts have long held that the insured must have suffered economic loss to recover noneconomic damages in a bad-faith insurance case. *See Cont'l Ins. Co. v. Superior Court*, 37 Cal. App. 4th 69, 86–87, 43 Cal. Rptr. 2d 374, 384 (Cal. App. 1995) ("In the absence of any economic loss there is no invasion of [the insureds'] *property rights* to which their alleged emotional distress over [the insurer's] denial and delay could be incidentally attached. In short, there would be no legal basis for an action for bad faith."). Noneconomic damages are recoverable

on a bad-faith claim *only* if they are linked to a proven financial loss. *Id.* at 85-86, 43 Cal. Rptr. 2d at 383-84 ("a claim for emotional distress in a bad faith action cannot stand alone, but must be accompanied by some showing of economic loss") (citing *Gruenberg v. Aetna Ins. Co.* 9 Cal.3d 566, 108 Rptr. 48, 510 (Cal. 1973)). The noneconomic harm "must be tied to actual, not merely potential, economic loss." *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1214, 87 Cal. Rptr. 3d 556, 571 (Cal. App. 2009).

Other states follow the California rule. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 833–34 (Wyo. 1994) ("We agree with the court in *Gruenberg*, that to recover damages for emotional distress, the insured must allege that as a result of the breach of the duty of good faith and fair dealing, the insured has suffered substantial other damages, such as economic loss, in addition to the emotional distress."); *Anderson v. Cont'l Ins. Co.*, 271 N.W.2d 368, 378 (Wis. 1978) ("[S]ubstantial other damages in addition to the emotional distress are required if there is to be recovery for damages resulting from the infliction of emotional distress." (citing *Gruenberg*)).

In denying SHL's initial motion for judgment, this Court distinguished the California cases on the grounds that this case involves "physical injury and related emotional injury." App. Vol. 8 (3/25 Tr.) at 1881. But California's rule applies equally to bad-faith insurance cases involving physical injury. Indeed, this was precisely the situation in *Maxwell v. Fire Insurance Exchange*, 60 Cal. App. 4th 1446 (1998), where the court held that "the award of damages in bad faith cases for personal injury, including emotional distress, is incidental to the award of economic damages. This is so because bad faith actions seek recovery of a property interest, not personal injury." *Id.* at 1451 (emphasis added). Even though bad-faith insurance cases sometimes involve personal injury, California and Nevada law both recognize that a bad faith action is "not a suit for personal injury, but rather [is one relating] to financial damage." *Gourley v. State Farm Mut. Auto. Ins. Co.*, 53 Cal. 3d 121, 128, 822 P.2d 37 (1991) (quotation marks omitted). Thus, in bad faith actions, both California and Nevada apply the longer statute of limitations for breach of contract claims rather than the shorter statute of limitations for personal injury claims. *See id.* at 129, 822 P.2d at 374; *Davis v. State Farm Fire & Cas. Co.*, 545 F. Supp. 370, 372 (D. Nev. 1982).

This Court should follow the California rule and enter judgment in SHL's favor because Plaintiff failed to prove economic loss.

2. Plaintiff Did Not Prove That SHL Proximately Caused Harm To Mr. Eskew.

Plaintiff did not introduce sufficient evidence establishing that SHL was the proximate cause of Mr. Eskew's pain-and-suffering. "For an act to be the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981) (quotation marks omitted). Proximate cause means "any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred." *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980). "[M]ere correlation . . . is insufficient as a matter of law to establish causation." *Wilson v. Circus Hotels, Inc.*, 101 Nev. 751, 754, 710 P.2d 77, 79 (1985).

Plaintiff's claim for pain-and-suffering damages is based solely on the difference between Grade II esophagitis (which Plaintiff conceded was not attributable to IMRT rather than proton beam therapy) and Grade III esophagitis (which Plaintiff alleges would not have resulted from proton beam therapy). Plaintiff's expert Dr. Chang admitted that the Grade I or Grade II esophagitis that was diagnosed at MD Anderson was not attributable to the use of the IMRT instead of proton beam therapy. App. Vol. 3 (3/21 Tr.) at 634. Dr. Chang further described the difference between Grade II and Grade III esophagitis as "subjective." *Id.* at 604.

Dr. Chang conceded that the use of IMRT instead of proton beam therapy increased the likelihood of Mr. Eskew developing Grade III esophagitis only marginally—from 3% to 15%. *Id.* at 593. When this Court denied SHL's initial motion for judgment, it relied on Dr. Chang's reference to "a 95 percent degree of medical probability," App. Vol. 8 (3/25 Tr.) at 1881, but that percentage referred to Dr. Chang's assertion that the likelihood of an event occurring qualifies as a "medical probability" if it occurs at least "95 percent of the time." App. Vol. 3 (3/21 Tr.) at 637. Dr. Chang asserted that the likelihood of Mr. Eskew developing Grade III esophagitis from proton

beam therapy was 3%—and therefore it qualified as a "medical probability" that it would not occur—but the likelihood of Grade III esophagitis resulting from IMRT was only 15%. *Id.* That 12% difference is not enough to equate to a "natural and probable consequence," particularly where there were many intervening acts, including the decision not to appeal, the decision not to pay for proton beam therapy directly, and the decision to proceed with IMRT instead.

Any link between the denial of coverage and the pain-and-suffering does not rise above a "[m]ere correlation," *Wilson*, 101 Nev. at 754, 710 P.2d at 79, and is insufficient to sustain a finding of proximate cause.

3. Plaintiff Did Not Prove That Mr. Eskew's Emotional Distress Led To Any Physical Injuries.

Plaintiff's claim for emotional distress fails for the additional reason that she did not produce substantial evidence showing that the emotional distress led to physical injuries. Under Nevada law, "[i]n cases where emotional distress damages are not secondary to physical injuries, but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness must be presented." *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433, 436 (2010) (quoting *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1387 (1988)). Here, there was no evidence of a physical injury of illness flowing from the emotional distress. Although there was testimony that the denial caused Mr. Eskew to feel "hopeless," App. Vol. 5 (3/23 Tr.) at 1199, "angry," "frustrated," *id.* at 1200, 1201, 1260; and "devastated," App. Vol. 6 (3/24 Tr.) at 1397, the record is devoid of substantial evidence that Mr. Eskew suffered such extreme emotional distress from learning that the request for insurance preauthorization was denied that could justify this award. Plaintiff's claim for emotional distress thus necessarily fails.

II. The Court Should Grant Judgment On Punitive Damages.

The evidence was insufficient to support an award of punitive damages. Under Nevada law, a plaintiff seeking punitive damages must prove, under the heightened clear-and-convincing-evidence standard, that the defendant acted with "malice" or "oppression" toward the plaintiff. NRS 42.005(1). Plaintiff did not make that showing here. SHL's coverage denial—even if it

could be deemed erroneous—faithfully followed its claim-review policies, and was reasonably based on the judgments of the nation's leading medical organizations and was consistent with the practices of the 12 largest insurers in the United States.

A. Nevada Imposes A Demanding Standard For Punitive Damages.

In insurance cases, "[t]he standard for punitive damages is much more stringent than that for bad faith." *Polymer Plastics Corp. v. Hartford Cas. Ins. Co.*, 389 F. App'x 703, 707 (9th Cir. 2010) (applying Nevada law). Proof of bad faith does not establish liability for punitive damages. *See Peterson*, 91 Nev. at 620, 540 P.2d at 1072. Otherwise, plaintiffs would collect punitive damages in *every* successful bad-faith case.

To obtain punitive damages under Nevada law, a plaintiff must prove by "clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice." NRS 42.005(1). The "clear and convincing evidence" standard is a high bar, requiring "satisfactory proof that is so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." *Ricks v. Dabney*, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008) (quotation marks omitted). Here, Plaintiff did not bring a claim for fraud, App. Vol. 10 (3/30 Tr.) at 2445, and based her punitive damages claim on a theory of implied malice or oppression.

The Nevada punitive damages statute defines implied malice as conduct engaged in "with a conscious disregard of the rights of" the plaintiff. *Id.* at 2499-2500; NRS 42.001(3). Oppression is defined as despicable conduct that subjects a person to "cruel and unjust hardship" in "conscious disregard" of the rights of the person. App. Vol. 10 (3/30 Tr.) at 2500; NRS 42.001(4). However, in bad-faith actions against an insurer, the statutory definition is "not applicable;" rather, "the corresponding provisions of the common law apply." NRS 42.005(5). The common law has a much stricter definition of both malice and oppression. "Common law malice focuses on ill will and hatred harbored by the defendant against the plaintiff." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046 n.2, 881 P.2d 638, 641, n.2 (1994). As the Nevada Supreme Court has explained, *see Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243, 253-54 (2008),

prior to Section 42.001's enactment in 1995, Nevada looked to California law, which required plaintiffs "to prove the actual existence of [defendant's] hatred and ill will," *Craigo v. Circus-Circus Enters., Inc.*, 106 Nev. 1, 786 P.2d 22, 23 (1990) (plurality) (quoting *Davis v. Hearst*, 160 Cal. 143, 162, 116 P. 530, 538 (1911)); *see also Phillips v. Clark Cnty. Sch. Dist.*, 903 F. Supp. 2d 1094, 1105 (D. Nev. 2012) ("'Malice' requires a showing of 'hatred and ill-will' or of Defendant's motive to 'vex, harass, annoy, or injure.'") (alternation omitted). Similarly, to demonstrate oppression at common law, "there must be made to appear to the satisfaction of the jury the evil motive—the animus malus." *Davis*, 160 Cal. at 162, 116 P. at 538. Thus, to obtain punitive damages in a bad-faith insurance case in Nevada, the insured must prove, by clear and convincing evidence, that the insurer acted with hatred and ill will, or manifested an intent to injure them.

Over SHL's objection, this Court instructed the jury that malice and oppression required merely a showing of "conscious disregard" of Plaintiff's rights and "cruel and unjust hardship in conscious disregard" of the plaintiff, respectively, rather than a showing of "hatred and ill will" or intent to injure. App. Vol. 10 (3/30 Tr.) at 2499-2500. SHL respectfully maintains that this was not the correct standard for the reasons discussed above. Regardless, the evidence was insufficient to support an award of punitive damages under *either* standard.

B. The Evidence Does Not Support A Finding That SHL Acted With Malice Or Oppression.

There is *no* evidence—let alone the requisite clear-and-convincing evidence—that SHL acted with malice or oppression under either a "conscious disregard" or a "hatred and intent to injure" standard. Even if it upholds the bad faith liability finding, the Court should enter judgment in SHL's favor on the punitive damages claim. As the United States Supreme Court has instructed, "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (emphasis added). That standard was not met here.

1. SHL Denied The Claim In Accordance With Its Standard Procedures And Did Not Display Any Malice or Oppression Toward Mr. Eskew.

The decision to deny the pre-authorization claim was made by Dr. Ahmad, a Board-certified medical oncologist with two decades of experience practicing in Nevada. App. Vol. 1 (3/16 Tr.) at 222; App. Vol. 2 (3/16 Tr.) at 351. Dr. Ahmad reviewed the claim and relied on the contents of the UHC Proton Policy to conclude that proton beam therapy was not medically necessary in Mr. Eskew's case. Dr. Ahmad testified that his coverage decision was based on medical necessity, not cost. *See* App. Vol. 2 (3/21 Tr.) at 470-71. As Dr. Owens concluded after reviewing the details of the case, Dr. Ahmad's review of the claim and his decision to deny it were entirely reasonable. App. Vol. 9 (3/28 Tr.) at 2047, 2059. And Shelean Sweet testified that the way the claim was handled "was consistent with the policies and procedures at Sierra Health and Life." App. Vol. 4 (3/22 Tr.) at 876.

Dr. Ahmad's denial of the prior-authorization request was based on the plain language of the plan, SHL's guidelines and practices, and guidance from major medical organizations and peer-reviewed literature. The plan provided that "[o]nly Medically Necessary services are" covered, App. Vol. 1 at 40 [Section 5], and that, in determining whether a service is "Medically Necessary," SHL may consider a wide array of factors, including "peer-review literature" and "[e]vidence based reports and guidelines published by nationally recognized professional organizations that include supporting scientific data," *id.* at 64 [Section 13.66]. The plan expressly excluded coverage for any "unproven treatment … as determined by SHL." *Id.* at 49 [Section 6.34]. Dr. Ahmad followed the terms of the plan to the letter in determining, based on the proton policy that encompassed peer-review literature and evidence-based reports from nationally recognized professional organizations, that proton beam therapy was not medically necessary in Mr. Eskew's case. This was a straightforward application of SHL's normal procedures.

As the Nevada Supreme Court has held, "the necessary requisites to support punitive damages are not present" when an insurer denies benefits in accordance with its normal procedures without any malice or oppression toward the insured. *Peterson*, 91 Nev. at 620, 540 P.2d at 1072. In *Peterson*, an insured made numerous claims to its insurer under a liability policy, but the insurer delayed and refused to pay the claims despite its awareness of the insured's "increasingly

precarious financial condition." *Id.* at 619, 540 P.2d at 1071. The court held that even the insurer's "knowledge of the effect of its refusal to pay on [the insured's] financial condition" and its continued "refus[al] to negotiate or pay the sums known to be due" to the insured were not enough to warrant punitive damages. *Id.* at 620, 540 P.2d at 1071.

Punitive damages are even less warranted here. Plaintiff did not present evidence that SHL refused to pay benefits that it "kn[ew]" were due to Mr. Eskew, nor was there any "knowledge" of (and therefore no callous disregard of) Mr. Eskew's financial condition. The simple denial in this case—which focused on particular facts of the claimant's case and on peer-reviewed literature and guidance by expert organizations—does not amount to malice or oppression. Indeed, even when an insurer "displays a tendency to look for ways of avoiding coverage rather than looking for coverage," it does not "rise to the level of 'oppression' or 'malice'" that would warrant punitive damages under Nevada law. *Phillips*, 903 F. Supp. 2d at 1106 (quotation marks omitted).

2. SHL Did Not Act With Malice Or Oppression In Adopting A Policy That Matched The Judgments Of The Nation's Leading Medical And Radiology Organizations, And Was Consistent With Industry Practice.

The UHC Proton Policy—which Dr. Ahmad relied on in denying coverage—does not provide a basis for imposing punitive damages either. The policy tracked the determinations of some of the leading medical and radiology associations in the United States. And it was consistent with the policies followed by all of the nation's largest insurers.

Plaintiff's expert, Dr. Andrew Chang, confirmed that the UHC Proton Policy was based on "peer review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations." App. Vol. 3 (3/21 Tr.) at 659-60. In particular, the proton policy explained that "[the American Society for Radiation Oncology's] Emerging Technology Committee concluded that [current data do] not provide sufficient evidence to recommend proton beam therapy [(PBT)] outside of clinical trials in lung cancer." *Id.* at 662 (quotation marks omitted). It also recognized that a report by the federal Agency for Healthcare Research and Quality "states that the evidence is insufficient to draw any definitive conclusions as to whether PBT has any advantages over traditional therap[ies]." *Id.* at 663-64 (quotation marks omitted).

Indeed, there is not a single randomized clinical trial supporting the use of proton beam therapy over IMRT for lung cancer.

SHL's policy regarding proton beam therapy for lung cancer also aligns with widespread industry practice. As Dr. Owens testified, the health plans of the twelve largest insurers—encompassing 75%-80% of the covered insureds in the United States—consider "proton beam therapy for lung cancer [to be] unproven and/or not medically necessary." App. Vol. 9 (3/28 Tr.) at 2037-44. SHL's medical policy regarding proton beam therapy for lung cancer is thus "very consistent" with the vast majority of insurers across the country. *Id.* at 2044. In fact, Dr. Owens was not able to find a single plan that covered the service, and concluded that it would be "highly unlikely" for Mr. Eskew to have found such a policy because "the consensus in the industry [is] that proton beam therapy is not medically necessary for non-small lung cancer." *Id.* at 2045.

Conformance with industry standards is strong proof that an insurer acted reasonably. *See Schultz*, 429 P.3d at 847 ("The reasonableness of the insurer's conduct . . . is based on proof of industry standards.") (quotation marks omitted); *Hanson*, 783 F.2d at 767 (assessing reasonableness by looking to whether the insurer's "handling of the claim was in accord with insurance industry practice"). If an insurer that conforms to industry standards generally cannot be held liable for *compensatory* damages, it follows *a fortiori* that it cannot be held liable for the extraordinary remedy of *punitive* damages. Conformance with industry standards is objective evidence of reasonableness, and defeats any claim of malicious intent. For this reason, many courts hold that "[c]ompliance with industry standard and custom serves to negate [any suggestion of] conscious disregard." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993). In fact, the decision in *Peterson* denying punitive damages relied on *Silberg v. California Life Insurance Co.*, which held that punitive damages were unwarranted because the "practice in the insurance industry" was consistent with the defendant insurer's actions. 11 Cal. 3d 452, 463 (1974). So too here.

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CONCLUSION

The Court should enter judgment in SHL's favor on Plaintiff's claims for insurance bad faith and punitive damages.

DATED: May 16, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022 a true and correct copy of the foregoing **DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA L. ESKEW, as special administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No.: A-19-788630-C Dept. No.: 4 **Hearing Requested** **DEFENDANT'S MOTION FOR A NEW TRIAL OR REMITTITUR**

Defendant Sierra Health and Life Insurance Company, Inc. ("SHL") moves for a new trial or remittitur pursuant to Nevada Rule of Civil Procedure ("NRCP") 59(a), 59(e), and 60(b), the following Memorandum of Points and Authorities, and any argument allowed on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

The stunning $200 million verdict in this case is excessive, unconstitutional, and the result of a jury that was swayed by passion and prejudice. It cannot stand. In the event the Court does not grant judgment as a matter of law to SHL, it should order a new trial or at a minimum a drastic remittitur.

This is a case about insurance coverage. SHL made a coverage determination that proton beam therapy was not a "medically necessary" treatment for William Eskew, who was afflicted with Stage IV lung cancer and passed away in 2017. Plaintiff Sandra Eskew, the administrator of Mr. Eskew's estate, alleged that the denial of coverage violated the implied covenant of good faith and fair dealing. SHL responded with evidence that its medical-necessity determination was supported by guidance from some of the nation's leading organizations for radiation oncology and medical research.

But Plaintiff's counsel had little interest in a trial focused on science and peer-reviewed medical studies. Instead, counsel set out to inflame and incite the jury by attacking SHL, its witnesses, and its counsel, hammering at every opportunity the false claim that SHL ran a "rigged system." Counsel exhorted the jury to punish SHL with a massive damages award and to use its verdict as a way to regulate the insurance industry, arguing that "juries regulate insurance companies more than anyone, including the government" and that "jury verdicts can be a good thing to regulate conduct."

Counsel went further. Even though this Court repeatedly sustained SHL's objections, counsel again and again improperly injected their personal opinions into the case, instructing the jurors on how "Mr. Terry and I would" complete the verdict form, and reassuring them that "[w]e wouldn't ask you to do it if we weren't convinced it was the right thing to do." Counsel attacked SHL's counsel by falsely telling the jury that SHL's counsel had called Ms. Eskew a liar during cross-examination. And despite this Court's pretrial order that "[t]he parties may not comment on

the litigation conduct of the lawyers," Plaintiff's counsel did exactly that in closing argument when he said that Ms. Eskew was "a 69-year-old woman" and that SHL's counsel "haven't been able to beat her down no matter what they do to her and her kids on the stand."

Counsel took the misconduct to a new level in Phase 2. Over SHL's objections, counsel ordered Shelean Sweet, SHL's claims manager, "to turn to the jury and say, on behalf of the utilization review manager for Sierra Health and Life, that you agree with their verdict." Counsel then repeated the tactic twice more, commanding SHL's witness to turn in her chair, face the jury, and publicly affirm the company's guilt—a blatant and shocking violation of one of the most fundamental norms of American law, that lawyers *question* witnesses, rather than command them to confess guilt or accept liability.

All of these tactics and arguments were grossly improper—but they worked. The jury deliberated for approximately an hour and awarded Plaintiff $40 million in noneconomic damages for emotional distress and pain-and-suffering. Then, after hearing more evidence in a second phase, it again deliberated for approximately an hour before awarding $160 million in punitive damages.

Both awards are stunning outliers and confirm beyond any doubt that the jury was influenced by passion and prejudice. A rational jury would never have awarded $200 million on the facts of this case. The $40 million award for emotional distress and pain-and-suffering—which exceeds even the overinflated amount Plaintiff's counsel requested—dwarfs all other such awards ever upheld in Nevada history. Attached as Exhibits 14 and 15 are charts showing all emotional distress and pain-and-suffering awards that have been upheld in reported Nevada cases since 1950. Appendix ("App.") Vol. 12 at 2844-47; *id.* at 2848-52. The award in this case exceeds all of them. In fact, it is more than five times the largest affirmed noneconomic damage award. Attached as Exhibit 16 is a chart showing all punitive damage awards that have been upheld in reported Nevada cases since 1950. App. Vol. 12 at 2853-57. The $160 million award in this case exceeds all of those too. It is more than eight times the largest affirmed punitive damage award.

This Court should grant a new trial based on attorney misconduct under NRCP 59(a)(1)(B) and the Nevada Supreme Court's decision in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

Plaintiff's counsel infused their trial presentation, from beginning to end, with impermissible arguments designed to inflame and incite the jury. Even though this Court sustained many of SHL's objections, the harm was done and the prejudice could not be cured—as demonstrated by the shocking and irrational damage awards the jury imposed after just an hour of deliberations.

A new trial is also warranted under NRCP 59(a)(1)(F), which requires a new trial when there are "excessive damages appearing to have been given under the influence of passion or prejudice." As the Nevada Supreme Court has emphasized, a district court has the duty to "grant[ ] a new trial on the grounds of excessive damages" where "the verdict is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993) (quotation marks omitted), *overruled in part on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999). There can be no doubt that *this* verdict—consisting of two damage awards, each of which exceeds by many times the highest such award ever upheld in Nevada history, in a case where Plaintiff's counsel injected their personal opinions and urged the jury to inflict a massive punishment on SHL as a way of regulating the insurance industry—has at least the *"appear[ance]"* of having been given under the influence of passion or prejudice. NRCP 59(a)(1)(F) (emphasis added).

In the alternative, the Court should order a new trial unless Plaintiff consents to a drastic remittitur. The $40 million compensatory award is plainly excessive and is not supported by substantial evidence. Nothing in the record comes remotely close to supporting an award of this magnitude for noneconomic harm. Likewise, the $160 million punitive damage award is grossly excessive and unconstitutional. SHL did not act with a high degree of blameworthiness, and both the United States and Nevada Supreme Courts have recognized that where, as here, the compensatory award is substantial and intended to compensate for noneconomic harm, the Constitution does not permit a punitive award that exceeds the amount of the compensatory award. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425-27 (2003); *Bongiovi v. Sullivan*, 122 Nev. 556, 579, 138 P.3d 433, 449 (2006).

BACKGROUND

This case arises from a request for insurance coverage. Plaintiff Sandra Eskew is the administrator of the estate of her late husband, William Eskew, who was diagnosed with Stage IV lung cancer in 2015. Mr. Eskew was insured under a policy, effective January 1, 2016, issued by Defendant SHL.

On February 3, 2016, Mr. Eskew's treating physician submitted a prior authorization request to SHL for proton beam therapy—an alternative treatment for certain types of cancer. The request was reviewed by Dr. Shamoon Ahmad, a board-certified medical oncologist. On February 5, 2016, SHL denied the request. The denial letter explained that the requested proton beam therapy treatment was not covered under the policy because the treatment was both "unproven" and not "Medically Necessary." Neither Mr. Eskew nor his treating physician appealed the denial. Instead, Mr. Eskew received a different treatment, Intensity-Modulated Radiation Therapy ("IMRT"). Mr. Eskew's cancer continued to progress and he passed away on March 12, 2017. There is no allegation that the use of IMRT rather than proton beam therapy hastened his death.

Plaintiff sued SHL for insurance bad faith. She sought noneconomic compensatory damages for Mr. Eskew's emotional distress caused by the denial of coverage, as well as for pain and suffering from his alleged Grade III esophagitis, which she claimed was caused by the IMRT treatment. She also sought punitive damages.

The undisputed evidence showed that there is no randomized clinical trial supporting the use of proton beam therapy over IMRT for lung cancer. And the denial of coverage was consistent with guidance from two of the nation's leading organizations for radiation oncology and medical research—the American Society for Radiation Oncology ("ASTRO") and the Agency for Healthcare Research and Quality ("AHRQ").

The jury deliberated for just over an hour before finding SHL liable for insurance bad faith. The jury awarded $40 million in noneconomic compensatory damages. The jury also found that an award of punitive damages was warranted. Then, after hearing more evidence and deliberating for less than an hour, it awarded $160 million in punitive damages.

LEGAL STANDARD

This Court may grant a new trial or remittitur under NRCP 59(a) based on "abuse[s] of discretion by which either party was prevented from having a fair trial"; "misconduct of the . . . prevailing party"; "accident or surprise that ordinary prudence could not have guarded against"; "manifest disregard by the jury of the instructions of the court"; "excessive damages appearing to have been given under the influence of passion or prejudice"; or "error[s] in law occurring at the trial and objected to by the party making the motion."

ARGUMENT

The Court should grant a new trial on all issues. In the alternative, the Court should enter a drastic remittitur of both the compensatory and punitive damage awards to bring them within the bounds permitted by Nevada law and the United States Constitution.

I. The Court Should Grant A New Trial Based On The Improper Arguments And Misconduct Of Plaintiff's Counsel.

NRCP 59(a)(1)(B) provides that a new trial may be granted due to "misconduct of the . . . prevailing party." In *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), the Nevada Supreme Court established "the standards that the district courts are to apply when deciding a motion for a new trial based on attorney misconduct." *Id.* at 14, 174 P.3d at 978. The court held that "[w]hen a party successfully objects to the misconduct, the district court may grant a subsequent motion for a new trial if the moving party demonstrates that the misconduct's harmful effect could not be removed through any sustained objection and admonishment." 124 Nev. at 6-7, 174 P.3d at 973-74. When a party does not object to the misconduct, "the district court may grant a motion for a new trial only if the misconduct amounted to plain error, so that absent the misconduct, the verdict would have been different." 124 Nev. at 7, 174 P.3d at 974.

The trial presentation and tactics of Plaintiff's counsel went well beyond the bounds of permissible argument. Counsel set out to inflame and incite the jury, running roughshod over this Court's pretrial orders in limine and mid-trial admonitions by deploying lines of attack that were designed to whip up the jury's prejudices and impose a massive, punitive verdict on SHL. *See, e.g.*, App. Vol. 10 (3/29 Tr.) at 2315 (statement of the Court: "Mr. Terry, your behavior is

inappropriate. You need to stop this."). These tactics were completely improper—but they worked. Counsel succeeded in exactly what they set out to do. The jury was inflamed and returned astonishing and unprecedented verdicts.

The following is just a sampling of the improper arguments counsel presented to the jury. A new trial would be warranted under *Lioce* on the basis of any single one. Taken together, they leave no doubt that the misconduct harmed and prejudiced SHL to an extent that could not be cured by SHL's sustained objections and this Court's repeated admonitions. *See Barrett v. Baird*, 111 Nev. 1496, 1515, 908 P.2d 689, 702 (1995) (weighing "cumulative effect" of different instances of attorney misconduct in ordering new trial). Even under a plain error standard, a new trial would be required because the misconduct undeniably led to the stunning and unprecedented damage awards. The verdict—either as to liability or to the amount of damages awarded—would have been different absent the misconduct.

First, counsel repeatedly and improperly injected their personal beliefs into the proceedings. As the Nevada Supreme Court held in *Lioce*, "an attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases and may amount to prejudicial misconduct necessitating a new trial." 124 Nev. at 21-22, 174 P.3d at 983. The Nevada Rules of Professional Conduct contain the same prohibition: an attorney shall not state to the jury "a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant." RPC 3.4(e). *See also DeJesus v. Flick*, 116 Nev. 812, 817-18, 7 P.3d 459, 463 (2000) (ordering new trial where counsel "improperly interjected his personal opinions about the defendant" and "improperly gave his personal opinion as to the justness of [the plaintiff's] cause") (overruled in part by *Lioce*, which clarified the contours of the plain error review that applies to unobjected-to misconduct).

Here, counsel did exactly that. They forced their personal opinions on the jury in closing argument—not once, but many times:

- Counsel told the jury that "I will tell you, I have seen a lot in a courtroom. I have never seen a witness implode like Dr. Kumar." App. Vol. 11 (4/4 Tr.) at 2511. He commented that a jury instruction was "remarkable to me," *id.* at 2531, added a minute

later that SHL's conduct was also "remarkable to me," *id.* at 2532, again commented on "[w]hat I find remarkable," *id.* at 2543, and then shared his personal views on "what I think is remarkable" about this case, *id.* at 2544. He volunteered what was "amazing[ ] to me" about the case. *Id.* at 2545. He also offered his opinion on SHL's conduct: "I think that's tragic." *Id.* at 2543. And he told the jury that "Mr. Terry and I . . . want you" to hold SHL liable, and that "Mr. Terry and I would put in" an award of $30 million in compensatory damages when completing the verdict form. *Id.* at 2578.

- Counsel offered the jury his personal belief of SHL's alleged "hypocrisy" concerning proton beam therapy: "[I]t's breathtaking to me. The hypocrisy of that just knocks the wind out of me. Sometimes I can't believe it. And the funny thing is, the part I'm just God smacked by—" *Id.* at 2655. At this point the Court sustained SHL's objection. *Id.*
- Less than a minute after SHL's objection was sustained, counsel again offered his personal beliefs, and commented directly on the credibility of witnesses, when he accused SHL of "speaking out of both sides of [its] mouth" about proton beam therapy, and told the jury "I think it renders everything they say about that topic unbelievable." *Id.* at 2655-56. SHL again objected, and the Court again sustained the objection. *Id.* at 2656.
- Then, in an egregious closing summation, counsel exhorted the jurors: "So here's what we ask you to do. Check yes on No. 1 on the verdict form. Write in $30 million and do it with your chest stuck out and proudly. Don't hesitate. It's the right thing to do. We wouldn't ask you to do it if we weren't convinced it was the right thing to do." *Id.* at 2692 (emphasis added). Once again, SHL objected, and once again the Court sustained the objection. *Id.*

The Nevada Supreme Court in *Lioce* specifically directed trial courts to "give great weight" to instances of continued misconduct—i.e., cases where, as here, an objection is sustained but counsel persists in the prohibited line of argument:

> [W]hen the district court decides a motion for a new trial based on repeated or persisted objected-to misconduct, the district court shall factor into its analysis the notion that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. Therefore, the district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent.

124 Nev. at 18-19, 174 P.3d at 981 (emphasis added). *Lioce* itself involved continuous misconduct where counsel repeatedly injected his personal views into the case. 124 Nev. at 21-22, 174 P.3d at 983-84. And in *DeJesus*, the court found that counsel's offering "commentary on the virtues of [the plaintiff's] cause . . . blatantly violated" the rules of professional conduct, and collected prior Supreme Court authorities holding it grossly improper for a lawyer to tell the jury their personal opinion of the righteousness of their cause—*exactly* what Plaintiff's counsel did here. 116 Nev. at 819, 7 P.3d at 464; *Lioce*, 124 Nev. at 21-22, 174 P.3d at 983-84 (same).

There can be no doubt this was a deliberate tactic. Even if counsel had been unaware of *Lioce* despite this Court's pretrial order to read it, *see* Order Regarding Defendants' Motions in Limine at 7-8 (MIL Nos. 20 & 21), counsel would have known that injecting his personal beliefs into the trial was impermissible the moment the Court sustained the first objection. But he did it again—and again and again. Because the repeated objections and the repeated admonishments could not cure the prejudice, a new trial is required.

Second, counsel repeatedly attacked SHL's counsel before the jury, falsely accusing SHL's counsel of calling Ms. Eskew a liar. *See* App. Vol. 7 (3/24 Tr.) at 1543 ("Well, he called her a liar"); *id.* ("So, Sandy, that guy just said that you have an incentive to get on that stand and lie. How does that make you feel?"); *id.* at 1547 ("So this incentive, this money incentive that these people are accusing you of having to come here, do you think they have an incentive to come in here and call the widow of Bill Eskew and his children liars[?]"). SHL counsel objected to all three questions, but was overruled every time. *See id.* at 1543, 1547. When Plaintiff's counsel continued this improper line of attack—"Did that incentive call you and BJ . . . and Tyler liars? . . . . Right here in the courthouse in front of people that you don't know?"—SHL counsel asked for a bench conference, and the assault stopped, at least for the time being. *See id.* at 1547.

Counsel then doubled down on the theme in closing argument, stating that "I never thought that an insurance company . . . would stoop to that, what happened in front of you, to call honest people liars." App. Vol. 11 (4/4 Tr.) at 2509. SHL counsel's objection was sustained. *Id.* But Plaintiff's counsel was undeterred. Later in his closing, he launched a direct personal attack on SHL's counsel, telling the jury that Ms. Eskew was "a 69-year-old woman" and SHL's counsel "haven't been able to beat her down no matter what they do to her and her kids on the stand." *Id.* at 2690 (emphasis added). SHL counsel again objected, and once again the objection was sustained. *Id.*

This inflammatory and ad hominem line of attack—hammered home again and again before the jury—was totally false. SHL's counsel never called Ms. Eskew a liar. These attacks, which were based on SHL's cross-examination of Ms. Eskew, blatantly violated the Court's order in limine providing that "[t]he parties may not comment on the litigation conduct of the lawyers." Order Regarding Defendants' Motions in Limine at 6 (MIL No. 17). Courts strictly prohibit lawyers from launching personal attacks against opposing counsel before the jury precisely because such attacks are unfair, prejudicial, and have no place in a court of law.

In *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227 (1998), the Nevada Supreme Court explained that "improper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses is clearly misconduct by an attorney." 114 Nev. at 862, 962 P.2d at 1232. The court emphasized that "[c]ases that have dealt with similar situations have uniformly condemned such statements as fundamentally prejudicial." *Id.* And it concluded that "[w]here an attorney attacks opposing counsel in the presence of the jury, it constitutes grounds for a new trial if it appears that prejudice may have resulted." *Id.* (quotation marks omitted). "The test in a matter of this sort is not necessarily that the misconduct complained of had a prejudicial effect upon the jury, but that it *might* have done so." *Id.* (emphasis added and quotation marks omitted).

That test is easily satisfied here. There can be no serious dispute that counsel's improper comments "*might*" have had "a prejudicial effect upon the jury." *Born*, 114 Nev. at 862, 962 P.2d at 1232 (emphasis added and quotation marks omitted). Indeed, they plainly *did* have a prejudicial

effect, as evidenced by the shocking damage awards. And here too, *Lioce*'s mandate to district courts—to "give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent" (124 Nev. at 18-19, 174 P.3d at 981)—applies with full force. This was not an isolated incident. This was deliberate, repeated misconduct. It was a strategy—to win sympathy for Plaintiff by demonizing opposing counsel based on the "litigation conduct of the lawyers." Order Regarding Defendants' Motions in Limine at 6 (MIL No. 17). Because the prejudice could not be cured, this Court should order a new trial.

Third, in the punitive damages phase, counsel directed Shelean Sweet, SHL's claims manager, "to turn to the jury and say, on behalf of the utilization review manager for Sierra Health and Life, that you agree with their verdict." App. Vol. 12 (4/5 Tr.) at 2778. The court overruled SHL's objections, *id.*, at which point counsel instructed the witness to make additional public acceptances of guilt before the jury, again over SHL's objections. *See id.* at 2778-79 ("[T]urn to the jury and tell them that on behalf of Sierra Health and Life, as a utilization management director, whether or not you accept that amount?"); *id.* at 2779 ("There was an amount of money that was awarded by this jury in the amount of $40 million to Mr. Eskew for his compensatory damages . . . . [T]urn to that jury and tell them whether you accept that finding.").

Ordering a witness to perform in this way—through direct commands as to what to say, rather than by asking questions—was grossly improper, as a matter of both form and substance. Lawyers *question* witnesses at trial; they do not *command* them to make specific statements. The law does not permit forcing a witness to choose between (1) publicly admitting they accept the finding that they violated the law or (2) telling the jury they reject the jury's verdict—at a time the jury is hearing evidence and about to begin deliberations over damages in a second phase. It was plain error to allow counsel to publicly humiliate, degrade, and demean SHL's witness by repeatedly directing her to turn in her chair, face the jury, and state that she agreed with their $40 million verdict.

II. The Court Should Order A New Trial Because The Verdict Was Tainted By Passion And Prejudice.

NRCP 59(a)(1)(F) empowers this Court to order a new trial when there are "excessive damages appearing to have been given under the influence of passion or prejudice." In the words of the Nevada Supreme Court, a district court is "justified in granting a new trial on the grounds of excessive damages" where "the verdict is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192 (quotation marks omitted) (affirming district court's grant of new trial when $425,000 verdict was influenced by passion and prejudice). The verdict in this case easily meets that standard.

The "power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 433 (1996) (quotation marks and brackets omitted). Thus, "'[i]f it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.'" *Id.* (quoting *Blunt v. Little*, 3 F. Cas. 760, 761-62 (C.C. Mass. 1822) (Story, J.)).

If the jury was influenced by passion or prejudice, a new trial *must* be granted. As the United States Supreme Court has held, "no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Minneapolis St. P. & S.S. M. Ry. Co. v. Moquin*, 283 U.S. 501, 521 (1931); *see also Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 683-84 (5th Cir. 1986) ("[W]hen an award is so exaggerated as to indicate bias, passion [or] prejudice . . . remittitur is inadequate and the only proper remedy is a new trial.") (citation and quotation marks omitted). Under the Nevada standard, a court need not determine that the awards *were in fact given* under the influence of passion or prejudice. Rather, the standard is far lower—a new trial is warranted if excessive damages merely "*appear*[ ]" to have been so given. *See* NRCP 59(a)(1)(F) (emphasis added).

A. The Stunning And Excessive Damage Awards Are Indisputable Indicators Of A Verdict Given Under The Influence Of Passion And Prejudice.

The size of a damages award is the strongest indicator of a verdict given under the influence of passion or prejudice. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 (1994) (explaining that early common law cases, "while generally deferring to the jury's determination of damages, steadfastly upheld the court's power to order new trials solely on the basis that the damages were too high"). Trial courts "infer passion, prejudice, or partiality from the size of the award," and damages "'may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury.'" *Oberg*, 512 U.S. at 422, 425 (quoting *Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1773)). To be sure, "the mere fact [that] a verdict is large is not *conclusive* that it is the result of passion or prejudice." *Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 828 (1962) (emphasis added), *abrogated in part on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987). But it is very strong evidence. And it is *indisputable* evidence where, as here, each award would exceed by multiples the largest awards ever upheld in Nevada history. The awards in this case are not connected to the evidence and are utterly irrational.

The $40 million compensatory award and $160 million punitive award are stunning outliers. They dwarf all such awards that have ever been upheld in Nevada history. The lists of prior emotional distress, pain-and-suffering, and punitive damage awards, *see* Exs. 15-17, confirm what is obvious from the face of the verdict: the shocking amounts of these awards are powerful, smoking-gun evidence that the jury was influenced by passion and prejudice. In *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983), for example, the Nevada Supreme Court looked to awards in other cases in determining whether a noneconomic damage award was influenced by passion and prejudice—and concluded, in light of the other cases, that a $675,000 award was "simply beyond the range of reason," was "not supported by the evidence," and "therefore must have been given under the influence of passion or prejudice." 99 Nev. at 419, 664 P.2d at 347.

The $40 million compensatory damage award would be—by a vast margin—the largest noneconomic damage award upheld in Nevada history. As shown in Exhibits 14 and 15, the largest such awards are the approximately $7.7 million (per plaintiff) award in *Wyeth v. Rowatt*, 126 Nev.

446, 244 P.3d 765 (2010), followed by the $7.5 million award in *First Transit, Inc. v. Chernikoff*, 476 P.3d 860, 2020 WL 6887972 (Nev. Nov. 23, 2020) (unpublished). App. Vol. 12 at 2844-52. The award in this case is more than five times the record-setting amount upheld in *Wyeth*.

The compensatory damage award even exceeded the unjustified and inflated amounts Plaintiff's counsel requested. He asked for $30 million and the jury awarded $40 million. *See* App. Vol. 11 (4/4 Tr.) at 2578. In *DeJesus*, the Nevada Supreme Court recognized that where a damages "award far exceeds what counsel requested," that is evidence of "a jury verdict that was the product of passion and prejudice." 116 Nev. at 820, 7 P.3d at 464-65; *see also Bongiovi v. Sullivan*, 122 Nev. 556, 579, 138 P.3d 433, 449 (2006) ("[Plaintiff] asked for $1 million in compensatory damages, but the jury only awarded one-fourth of that amount. Thus, we conclude that the compensatory damages award was not excessive."); *Jutzi-Johnson v. United States*, 263 F.3d 753, 761 (7th Cir. 2001) (non-economic damage award that exceeded the amount plaintiff requested indicates passion and prejudice). Tellingly, in an implicit acknowledgment that the jury had gone too far in awarding compensatory damages—and that the verdict would be in serious jeopardy under passion-and-prejudice review—Plaintiff's counsel desperately attempted to salvage the verdict in his Phase 2 closing by urging the jury, for unspecified "legal reasons," not to go too far in imposing punitive damages. App. Vol. 12 (4/5 Tr.) at 2801; *id.* at 2823 ("You won't be helping us if you" award more than $160 million).

But the jury *did* go too far: its punitive damage award is another stunning outlier. On the facts of this case, a $160 million punitive damage award is clear and indisputable evidence of passion and prejudice. As shown in Exhibit 16, the largest punitive damage award ever affirmed in Nevada history is the approximately $19 million (per plaintiff) punitive damage award in *Wyeth*, followed by the $6 million award in *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043 (2000), and the $5.9 million award in *Ainsworth v. Combined Ins. Co.*, 763 P.2d 673 (1988). App. Vol. 12 at 2853-57. The $160 million punitive damage award in this case is more than eight times the largest punitive award ever upheld in Nevada.

If these awards—more than five times the largest affirmed compensatory award and more than eight times the largest affirmed punitive award—do not even "appear[ ]" to have resulted from passion and prejudice, it is hard to imagine how the Rule 59 standard could ever be met.

B. Counsel's Improper Arguments And Misconduct Fueled The Prejudice And Directly Led To The Irrational Awards.

In addition to examining the size of the verdict, Nevada courts also look to the arguments that led to the verdict in determining whether the jury was swayed by passion and prejudice. If counsel presented the jury with improper arguments—for example, arguments laced with counsel's personal views or arguments intended to incite and inflame—that is powerful evidence that the jury was influenced by improper considerations and its verdict must be set aside. In *DeJesus*, for example, the Nevada Supreme Court held that not only did counsel's "inappropriate remarks violate well-established standards of professional conduct," his "improper arguments so thoroughly permeated the proceeding that we are convinced they tainted the entire trial and resulted in a jury verdict that was the product of passion and prejudice." 116 Nev. at 820, 7 P.3d at 464. The court explained that the excessive damage award—there, a mere $1.47 million—"plainly reflects the influence of counsel's improper arguments." *Id.*

Here, the stunning verdict is the direct result of counsel's improper arguments. As discussed above, Plaintiff's counsel repeatedly injected their personal beliefs into the case; they attacked and demonized SHL counsel before the jury; and they commanded SHL's witness to turn to the jury and repeatedly state that she accepted their verdict. These acts of misconduct warrant a new trial. They also demonstrate, just as in *DeJesus*, that the jury was incited and inflamed—indeed, they explain how the jury could have rendered such a shocking and otherwise inexplicable verdict.

In addition to the blatant acts of misconduct described above, Plaintiff's counsel fueled the fires of prejudice in other ways. Counsel incited the jury by telling them, over and over, that SHL ran a "rigged system." App. Vol. 11 (4/4 Tr.) at 2558, 2664, 2665, 2668, 2669, 2670, 2671, 2679. Counsel accused SHL witnesses of talking out of both sides of their mouth. *Id.* at 2655-56. Counsel portrayed SHL as a remorseless corporate behemoth that deserved the harshest of

punishments and asserted, falsely, that no company representative attended Phase 2 of the trial because they "don't want to face the music." App. Vol. 12 (4/5 Tr.) at 2819, 2824-25. He told the jury that "juries regulate insurance companies more than anyone, including the government" and that "jury verdicts can be a good thing to regulate conduct." App. Vol. 11 (4/4 Tr.) at 2685. Counsel told the jury to act as the conscience of the community, *id.* at 2687-88, and overtly framed the case as an "us versus them" dispute by emphasizing that SHL was a large corporation at odds with "this community." *See id.* at 2579 ("[A]re you going to let a large insurance company tell you, tell this community, tell this state they're above the law?"); *see Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192 (verdict tainted by passion and prejudice where the individual plaintiff faced "a large corporation" and "incited feelings of passion and prejudice in the jury"). And counsel violated the prohibition on Golden Rule arguments, *see Lioce*, 124 Nev. 1 at 22-23, asking jurors to imagine themselves in the place of Mr. Eskew. *See* App. Vol. 11 (4/4 Tr.) at 2576 ("[Y]our health is what the health is, but that moment that you prepare to leave your journey that you can reflect back on your accomplishments, on the life you lived.").

In Phase 2, counsel exhorted the jury to "send a message" through a massive award of punitive damages. *See* App. Vol. 12 (4/5 Tr.) at 2799 (claiming there is only "one way" to get a "message through to an insurance company . . . . What's the language they understand? Money."). Counsel even went so far as to suggest that if the jury didn't "really punish" SHL, it would be "sending the opposite message," i.e., that it was "okay if you do wrong." *Id.* at 2820. The damages awards followed immediately on the heels of these egregious closing arguments.

The jury's deliberations were shockingly brief. This was a 13-day trial that involved extensive witness testimony, much of it highly technical, and dozens of exhibits spanning thousands of pages. Plaintiff's Phase 1 closing argument alone lasted nearly four hours. Yet the jury deliberated for little more than an hour before awarding $40 million in compensatory damages. And it deliberated for *less* than an hour before awarding $160 million in punitive damages. All of this is yet further confirmation that the jury did not carefully sift, examine, and discuss the evidence, but rather decided this case in an impassioned state.

In sum, the amounts of the awards, particularly when viewed in light of the arguments that led to those awards, compel the conclusion that the Rule 59 standard—"excessive damages appearing to have been given under the influence of passion or prejudice"—is satisfied. The verdict cannot stand.

III. At A Minimum, The Court Should Drastically Remit The Compensatory And Punitive Damage Awards.

In the alternative, and at a bare minimum, the Court should enter a drastic remittitur to reduce the compensatory and punitive damage awards to amounts that are permissible under Nevada law and the United States Constitution. The compensatory damage award should be reduced to no more than $2 million, and the punitive damage award should be reduced to an amount that does not exceed the compensatory damage award.

A. The Compensatory Damage Award Is Not Supported By Substantial Evidence, And Amounts To An Excessive And Irrational Punishment.

A compensatory damage award must be remitted when it is not supported by "substantial evidence" in the record. *Wyeth v. Rowatt*, 126 Nev. at 470, 244 P.3d at 782. Plaintiff sought compensatory damages for two types of noneconomic harm to Mr. Eskew: pain-and-suffering (from the esophagitis that allegedly resulted from IMRT therapy in lieu of proton beam therapy); and emotional distress (from the denial of coverage). The evidence in this case does not come close to supporting a $40 million award of noneconomic compensatory damages.

1. As to pain-and-suffering, the evidence cannot support anything remotely approaching a $40 million award. Plaintiff's radiation oncology expert, Dr. Chang, testified that the use of IMRT rather than proton beam therapy did not affect the progression of Mr. Eskew's cancer. App. Vol. 3 (3/21 Tr.) at 617. Moreover, Plaintiff conceded that proton beam therapy would have caused Grade I and II esophagitis, so the amount of compensable pain-and-suffering would be limited to the difference between a Grade II case and a Grade III case in any event. And even assuming the evidence supported a finding that Mr. Eskew actually had a Grade III case—a condition that was never diagnosed by medical records—his condition lasted less than one year.

Finally, much of Mr. Eskew's pain-and-suffering during his final year was caused by his Stage IV lung cancer rather than by esophagitis.

As to emotional distress, there was no evidence warranting an award of this magnitude, or anything close to it. Although there was testimony that the denial caused Mr. Eskew to feel "hopeless," App. Vol. 5 (3/23 Tr.) at 1199, "angry," "frustrated," *id.* at 1200, 1201, 1260; and "devastated," App. Vol. 6 (3/24 Tr.) at 1397, the record is devoid of substantial evidence that Mr. Eskew suffered such extreme emotional distress from learning that the request for insurance preauthorization was denied that could justify this award. In fact, *any* award of emotional distress damages was precluded because Plaintiff did not present substantial evidence of a physical manifestation of the emotional distress. *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 232 P.3d 433, 436 (2010). In short, even assuming a denial of insurance coverage could cause legally compensable emotional distress, there is simply nothing in the record that could support a $40 million award.

Nevada courts have reduced noneconomic damage awards in cases involving far more serious emotional harm than presented here. For example, in *Rowatt v. Wyeth*, 2008 WL 876652 (Nev. 2d Jud. Dist. Ct. Feb. 19, 2008), the court substantially remitted excessive pain-and-suffering and emotional distress awards. The jury had awarded approximately $35 million for pain-and-suffering and emotional distress to the three plaintiffs, an average of approximately $11.7 million each. The court found that the women—who had gotten breast cancer after taking Defendant Wyeth's hormone therapy—had suffered devastating emotional harm and undergone extreme pain-and-suffering. The court recognized that "the jury found that Defendant's conduct was the legal cause of Plaintiffs having gotten cancer and that cancer is a terrifying and devastating illness." *Id.* at *2. Moreover, the court explained, the plaintiffs would suffer "serious and lifelong physical and emotional consequences" from surgery and the mental toll from "the possible re-occurrence of cancer." *Id.* The court asked rhetorically, "Who would volunteer to suffer these consequences for any sum of money?" *Id.* at *3. Nonetheless, the court concluded, the awards of approximately $11.7 million were excessive despite the lifetime of physical and emotional suffering the plaintiffs would endure. "The Court is compelled to find that these amounts are obviously so

disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." *Id.* at *2 (quotation marks omitted). The court remitted the $35 million total award to $23 million, or approximately $7.7 million per plaintiff. *Id.* at *3. The Nevada Supreme Court affirmed "the compensatory damage awards after remittitur." *See* 126 Nev. at 472, 244 P.3d at 783.

Likewise, in *Hazelwood v. Harrah's*, 109 Nev. 1005, 862 P.2d 1189 (1993), the Nevada Supreme Court affirmed the district court's grant of a new trial if the plaintiff did not agree to a remittitur. Although the jury had awarded the plaintiff $425,000 in noneconomic damages, the district court held that a remittitur to $200,000 was warranted. *See* 109 Nev. at 1009, 862 P.2d at 1191. The Supreme Court held that "[a]lthough a judge may not invade the province of the jury, it is not an abuse of discretion for a judge to order a new trial on the issue of damages or, in the alternative, remittitur, when the jury verdict was the result of passion and prejudice." 109 Nev. at 1010-11, 862 P.2d at 1192. Accordingly, the court held, "the district court did not err in ordering a remittitur in this case." 109 Nev. at 1011, 862 P.2d at 1192.

There are many similar examples of courts remitting excessive noneconomic damage awards. *See, e.g.*, *Bravo v. United States*, 532 F.3d 1154, 1161-62 (11th Cir. 2008) ($20 million in noneconomic damages "shock[ed] the judicial conscience" even though medical malpractice resulted in severe brain injuries to child); *Tretola v. Cnty. of Nassau*, 14 F. Supp.3d 58, 85 (E.D.N.Y. 2014) ($3 million award for emotional injuries remitted to $175,000); *Advocat, Inc. v. Sauer*, 353 Ark. 29, 48 (2003) ($15 million pain-and-suffering award "shock[ed] the conscience of this court"); *Hughes v. Ford Motor Co.*, 204 F. Supp. 2d 958, 965-66 (N.D. Miss. 2002) ($4 million award—most of which was for pain-and-suffering—remitted to $2.5 million even though plaintiff suffered burns, intense pain, and a "lifetime of disfigurement").

2. Comparing the noneconomic damage award to awards in other Nevada cases confirms that a $40 million award is grossly excessive and cannot be sustained. In *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983), the Nevada Supreme Court looked to awards in other comparable cases in agreeing with the defendant that the plaintiff "was entitled, as a matter of law, to less than [the plaintiffs in the other cases] received."

The court then remitted the $675,000 noneconomic damage award to $50,000 as "the maximum amount that could be reasonably awarded under these circumstances." 99 Nev. at 419, 664 P.2d at 347. That approach tracks the approach at common law, where courts have long considered prior awards as an important objective measure in evaluating whether a particular verdict is excessive. *See, e.g.*, Cal. Jur. 3d Damages § 209 (2022) ("The amount of an average award allowed for a particular injury in the past, as determined by jury verdicts which have been approved in previous actions, . . . has its place in ascertaining the damages to be allowed . . . ."); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 765 (2004) ("[W]hen a verdict is . . . entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict exceeds the amount required to compensate the injured party."). Prior awards demonstrate what judges and juries applying Nevada law consider to be reasonable amounts in cases involving pain-and-suffering or emotional distress. In particular, the relevant comparison is awards that have been upheld upon review. Only then is there a judicial determination that the award is permissible under Nevada law.

To be sure, Nevada courts do not deem prior awards *conclusive* as to whether a particular verdict is excessive, and in some cases they have declined to take a comparative approach, at least when reviewing a remittitur decision on appeal. *See Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10 (affirming district court's remittitur but declining comparative approach to compensatory damages); *Wells, Inc. v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947) (stating that "the fact that juries in other similar cases have fixed a much lower amount as damages" is not "controlling on the question of excessiveness"). But even if prior awards are not "controlling," they are plainly *relevant* in that they are objective yardsticks in assessing excessiveness—as illustrated by the Nevada Supreme Court's decision in *Allen*, where the court compared the jury's award against prior verdicts.

The attached Exhibits 14 and 15 show that a $40 million award for pain-and-suffering and emotional distress would exceed all such other awards ever upheld in Nevada history. App. Vol. 12 at 2844-47. In fact, Nevada juries and courts have awarded and upheld far lesser amounts even in cases involving harms that were far more severe. *See, e.g.*, *State v. Eaton*, 101 Nev. 705, 710

P.2d 1370 (1985) (some part of $82,352 in damages for wrongful death of infant daughter in car accident), *overruled in part on other grounds by State ex rel. Dep't of Transp. v. Hill*, 114 Nev. 810, 963 P.2d 480 (1998); *Jacobson v. Manfredi*, 100 Nev. 226, 679 P.2d 251 (1984) (some part of $900,000 for permanent and severe injury to two-year-old child from consumption of toxic liquid).

In light of the evidence in this case and prior awards, an award of no more than $2 million in compensatory damages is the maximum permitted under Nevada law. *Cf. State Farm*, 538 U.S. at 426 (describing a $1 million noneconomic damage award as "substantial" in a bad-faith case against an insurer, and noting that the plaintiffs "were awarded $1 million for a year and a half of emotional distress").

3. Absent a drastic remittitur, the noneconomic damage award would violate due process. *See Gilbert*, 470 Mich. at 765 n.22 ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if . . . not labeled 'punitive.'"). The award bears the hallmarks of an unconstitutional punitive sanction. The jury was not given meaningful guidance as to how to determine the amount of the award—it was essentially told to do whatever it thought was right—and the resulting award vastly exceeds the amount necessary to fully compensate Plaintiff. "[W]ithout rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" the Supreme Court established constitutional limits. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 VA. L. REV. 1401, 1417, 1420 (2004) ("the constitutional infirmities of punitive damages found by the Supreme Court can be applied with even greater force to awards for pain and suffering").

B. The Punitive Damage Award Is Grossly Excessive And Unconstitutional.

The punitive damage award is grossly excessive and cannot be sustained under the Due Process Clause of the United States Constitution. It should be reduced to an amount no greater than the remitted award of compensatory damages.

1. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416.

Excessive punitive damage awards are "tantamount to a severe criminal penalty" where the defendant lacked "fair notice" of the severity of the punishment that could be imposed. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 585 (1996).

In *Gore*, the United States Supreme Court identified three "guideposts" for determining when a punitive damage award violates due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the punitive and compensatory damage awards; and (3) the difference between the punitive damages award and the civil penalties that have been imposed or are available for comparable conduct. *Gore*, 517 U.S. at 574-75. The Court has since strengthened these guideposts, in light of its "concerns over the imprecise manner in which punitive damages systems are administered" and the danger that juries' "wide discretion in choosing amounts," especially in cases involving large corporate defendants, "creates the potential that juries will use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417. Due process requires that reviewing courts apply "[e]xacting" de novo review to punitive damage awards and their underlying facts, *id.* at 418, and afford no deference to findings implied from the jury's award, *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1173 (2005).

In *Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006), the Nevada Supreme Court held that "the proper standard for reviewing excessiveness of a punitive damages award in Nevada is the federal standard's three guideposts."

2. Applying the federal guideposts in this case compels the conclusion that any punitive damage award against SHL cannot exceed an amount equal to the final award of compensatory damages. If the compensatory award is not drastically remitted, than a ratio far *lower* than 1:1 would be constitutionally required.

First, SHL's conduct was not reprehensible. This Court instructed the jury, in assessing reprehensibility, to consider three factors: SHL's "culpability and blameworthiness"; whether SHL's conduct "was part of a pattern of similar conduct by the defendants"; and "any mitigating conduct by the defendants." All three factors cut in SHL's favor.

SHL did not act with a high degree of culpability or blameworthiness. In denying preauthorization for proton beam therapy, SHL acted pursuant to the terms of the policy at issue,

which conditioned coverage on a treatment being "medically necessary." SHL's proton policy, under which proton beam therapy was not deemed medically necessary in cases of Stage IV lung cancer, was consistent with the views of some of the nation's leading medical and scientific authorities, including the American Society for Radiation Oncology's Emerging Technology Committee, and the Federal Agency for Healthcare Research and Quality. SHL's policy was also consistent with the policies of many other insurers. There was no evidence that SHL had any intent or desire to injure Mr. Eskew. Even if the coverage decision could be deemed incorrect, or even if SHL could be faulted for reaching the conclusion it did concerning proton beam therapy, any such errors do not reflect a high level of moral culpability or blameworthiness. Nor was there evidence that SHL's conduct was part of a pattern of conduct. To the contrary, each medical necessity decision turned on the facts of the individual's case and the exercise of clinical discretion. App. Vol. 4 (3/22 Tr.) at 820-21. This case concerned a single denial of coverage, and a single type of therapy. Finally, there was substantial evidence of mitigating conduct by SHL, including evidence that SHL now sends preauthorization requests for radiation oncology treatment to an external review organization, where they are reviewed by a radiation oncologist. App. Vol. 12 (4/5 Tr.) at 2774. SHL also instituted annual internal training on Nevada's duty of good faith and fair dealing. *Id.* at 2774-75. And of course, SHL changed the underlying policy itself, to allow for proton beam therapy for an individual in Mr. Eskew's situation. *Id.* at 2813-14.

In *Rowatt v. Wyeth*, the district court remitted the jury's $99 million punitive damage award to $58 million under the due process guideposts, awarding approximately $19 million to each of the three plaintiffs. The court recognized that "[t]he jury could justifiably find a significant degree of reprehensibility in Defendant's decision to misrepresent the risks and benefits of a product which the jury determined caused Plaintiffs' cancers, in order to increase its bottom line." 2008 WL 876652 at *4-5. Nonetheless, in light of the Due Process Clause's prohibition of "grossly excessive or arbitrary punitive damage awards," the court held "the amount of punitive damages to be excessive." *Id.* (quotation marks omitted). The Nevada Supreme Court approved the reduced awards, concluding that "the remitted punitive damages awards do not violate Wyeth's due process rights." 126 Nev. at 475, 244 P.3d at 785. If the facts of *Rowatt v. Wyeth*—far more egregious

and harmful conduct, with multiple victims who faced a lifetime of severe pain-and-suffering—would support at most a $19 million punitive damage award, the facts of *this* case cannot support a $160 million punitive award.

Similarly, in *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998), the Nevada Supreme Court reduced an $8 million punitive award to $3.9 million. The court "conclude[d] that the jury's punitive damage assessments . . . are excessive and disproportionate to [the defendants'] degree of blameworthiness." 114 Nev. at 1268, 969 P.2d at 962. Accordingly, the "punitive damage awards assessed by the jury in this case exceed the punishment and deterrent effect intended by an award of punitive damages." *Id.* And in *Guaranty National Insurance Co. v. Potter*, 112 Nev. 199, 912 P.2d 267 (1996), a bad faith insurance case, the court held that a $1 million punitive damage award was excessive and reduced it to $250,000. The court found the award "unreasonable and disproportionate to the behavior" at issue, and "excessive in light of [the insurer's] overall conduct." 112 Nev. at 208-09, 912 P.2d at 274. So too here.

Second, a 1:1 ratio is the constitutional maximum in this case (again assuming drastic remittitur of the compensatory award). A "central feature" of the due process analysis, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008), is the ratio between punitive and compensatory damages. The United States Supreme Court has held that a ratio of no more than 1:1 may be the "outermost" constitutional limit in cases where the compensatory award is "substantial." *State Farm*, 538 U.S. at 425. Here, the compensatory award of $40 million is obviously "substantial"; indeed, in *State Farm* itself, the Supreme Court held that a $1 million compensatory award was "substantial." *Id.* at 429. Because "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," *id.* at 426, there is no basis in this case for a punitive damage award that exceeds the compensatory damage award, let alone one that exceeds it by millions of dollars. Indeed, absent a drastic remittitur of the compensatory award, a ratio far *lower* than 1:1 would be required.

Even in cases involving far smaller compensatory damage awards than the award in this case, a 1:1 ratio is the constitutional maximum. For example, in *Bongiovi*, the Nevada Supreme Court approved a 1:1 ratio in a case involving a $250,000 compensatory award, even though it

deemed the defendant's conduct "reprehensible." *See* 122 Nev. at 583, 138 P.3d at 452. Similarly, in *Roby*, the California Supreme Court reduced a punitive damage award to achieve a 1:1 ratio in a case involving a $1.9 million compensatory damage award. The court explained that "punitive damages in an amount equal to compensatory damages marks the constitutional limit in this case and still provides the appropriate deterrence." *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 719 (2010); *see also id.* at 717-18 (holding that a 1:1 ratio was the constitutional maximum even though the defendants "acted wrongfully and in a manner warranting civil penalties" and even though the plaintiff suffered "serious[ ] … emotional injury" when the defendant failed to respond to prior reports of harassment). And in *Grassilli v. Barr*, 142 Cal. App. 4th 1260, 1290 (Cal. App. 2006), the court reduced a $4 million punitive damage award to $55,000—representing an 0.1:1 ratio—noting that, although defendants' conduct was "highly reprehensible," plaintiff "was fully compensated for his economic damages and received a substantial recovery for his claimed emotional injuries." Many other courts have done the same. *See, e.g.*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (1:1 ratio was outer limit of due process where $600,000 compensatory damages award was "substantial"); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007) (1:1 ratio appropriate where $400,000 compensatory damages awarded); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233-37 (3d Cir. 2005) (approving 1:1 ratio where $150,000 in compensatory damages awarded).

A 1:1 ratio is especially warranted in this case because the compensatory damage award consisted entirely of noneconomic damages. *See Roby*, 47 Cal. 4th at 719 (emphasizing that 1:1 ratio was the constitutional maximum where there was "a substantial award of noneconomic damages"); *Noyes v. Kelly Servs., Inc.*, 2008 WL 2915113, at *13-14 (E.D. Cal. 2008), *aff'd.* 349 F. App'x 185 (9th Cir. 2009) (in light of $500,000 award for emotional distress, "a ratio of 1 to 1 is the constitutional limit in this case"); *see also Simon*, 35 Cal. 4th at 1182 ("Especially when the compensatory damages are substantial or already contain a punitive element," lower constitutional limits apply). The requirement of a low ratio in noneconomic-damage cases arises from the fact that an emotional distress award serves punitive purposes, and is therefore "duplicated in the punitive award." *State Farm*, 538 U.S. at 426 ("Much of the distress was caused by the outrage

and humiliation the [insured plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element."). Here too, a low ratio is required because the jury's award of $40 million in emotional distress and pain-and-suffering damages necessarily includes a significant punitive element.

The United States Supreme Court's *State Farm* decision—which involved a bad-faith claim against an insurer resulting in a $1 million award of compensatory damages—is instructive. The Court concluded: "An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. Here too, a ratio of 1:1 or lower is warranted.

Third, the final due process guidepost—"the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases"—further compels a reduction of the punitive damage award to an amount no greater than the compensatory damage award. *State Farm*, 538 U.S. at 418. Two analogous civil penalties are far less than the punishment imposed here. Nevada's Deceptive Trade Practices Act provides for a civil penalty "not to exceed $5,000 for each violation . . . if the court finds that a person has willfully engaged in a deceptive trade practice." NRS 598.0999. And NRS 678B.185 allows for a fine of up to $10,000 if a person "willfully engages in the unauthorized transaction of insurance." The award here is, respectively, 32,000 and 16,000 times larger than those legislatively specified civil penalties.

Punitive damage awards in other cases further underscore the excessiveness of the award in this case. As Exhibit 16 demonstrates, the punitive damage award in this case exceeds all other such awards upheld in Nevada history. App. Vol. 12 at 2853-57. Even if SHL's conduct could somehow be deemed comparable to Wyeth's in *Wyeth v. Rowatt*—and it plainly cannot—that would *still* only authorize a punitive damage award of $19 million. There is no case in the history of Nevada that provides the constitutionally mandated "fair notice" that a punitive damage award of $160 million could be imposed on these facts.

CONCLUSION

The Court should grant a new trial on all issues. In the alternative, the Court should reduce the compensatory damage award to no more than $2 million, and reduce the punitive damage award to an amount that does not exceed the remitted compensatory damage award.

DATED: May 16, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022 a true and correct copy of the foregoing **DEFENDANT'S MOTION FOR A NEW TRIAL OR REMITTITUR** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT 14

EXHIBIT 14

Emotional Distress Awards Affirmed On Appeal Since 1950[1]

Case	Award	Description
First Transit, Inc. v. Chernikoff, 476 P.3d 860, 2020 WL 6887972 (Nov. 23, 2020)	Some part of $7.5 million	Death of individual on public bus
Urbanski v. National Football League, 131 Nev. 1358, 2015 WL 134795 (Jan. 8, 2015)	Some part of $1,000,500	Shooting during altercation at strip club
Sorci v. Venetian Casino Resort, LLC, 131 Nev. 1349, 2015 WL 1423165 (Nev. Ct. App. Mar. 23, 2015)	Supreme Court affirmed district court's award and left jury's verdict undisturbed but did not discuss amount or propriety of damages	Assault, false imprisonment, invasion of privacy, negligence
Crowley v. Burke, 131 Nev. 1268, 2015 WL 5735119 (Sept. 28, 2015)	Supreme Court held district court did not err in denying motion for judgment as a matter of law with regard to the emotional distress damages (amount of damages not stated)	Legal malpractice
Land Baron Invs., Inc. v. Bonnie Springs Family LP, 131 Nev. 686, 356 P.3d 511 (2015)	$350,000	Nuisance claim arising from failed land sale contract
Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 235 P.3d 592 (2010)	Some part of $3 million per plaintiff	Wrongful death and tort claims
Wyeth v. Rowatt, 126 Nev. 446, 244 P.3d 765 (2010)	Some part of $7.6 million per plaintiff	Breast cancer caused by hormone replacement therapy drugs
Grosjean v. Imperial Palace, Inc., 125 Nev. 349, 212 P.3d 1068 (2009)	Some part of $99,000	45-minute detention by casino personnel
Webb v. Clark Cty. School Dist., 125 Nev. 611, 218 P.3d 1239 (2009)	Supreme Court left undisturbed, but did not review propriety of an award of $15,000 in general damages for pain and suffering and emotional distress	Personal Injury
State, Univ. & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 103 P.3d 8 (2004)	Upheld verdict in plaintiffs' favor amount of damages not included	Breach of the implied covenant of good faith and fair dealing
Canterino v. Mirage Casino-Hotel, 117 Nev. 19, 16 P.3d 415 (2001)	Supreme Court held $2 million award for mental anguish not excessive but remanded for new trial on damages issue nonetheless	Plaintiff beaten and robbed in hotel hallway

[1] This list was generated through a Westlaw search using the terms emotional and distress, or "emotional impact," or "mental suffering," or "mental anguish," or "grief and sorrow." District court cases and criminal cases were filtered out.

	because of improper instruction on jury participation	
Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000)	$10,000	Assault, battery, and IIED
Dillard Dept. Stores, Inc. v. Beckwith, 115 Nev. 372, 989 P.2d 882 (1999)	Some part of $424,028	Tortious constructive discharge and IIED
Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 969 P.2d 949 (1998)	$275,000	Bad faith insurance claim
Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 962 P.2d 596 (1998)	Upheld special, compensatory, and punitive damages, but amount and composition of damages not detailed	Bad faith insurance
Maduike v. Agency Rent-A-Car, 114 Nev. 1, 953 P.2d 24 (1998)	Some part of $10,000	Car accident
Smith's Food & Drug Ctrs., Inc. v. Bellegarde, 114 Nev. 602, 958 P.2d 1208 (1998), *overruled on other grounds by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	Court did not pass upon, but left intact the $500 in compensatory damages against each defendant based on intentional misconduct	False accusations of shoplifting
State ex rel. Dept. of Transp. v. Hill, 114 Nev. 810, 963 P.2d 480 (1998), *abrogated by Grotts v. Zahner*, 115 Nev. 339, 989P.2d 415 (1999)	$10,000 to Plaintiff 1 $35,000 to Plaintiff 2	Personal injury from car accident and negligent infliction of emotional distress from witnessing companions' injuries
Pombo v. Nevada Apartment Ass'n, 113 Nev. 559, 938 P.2d 725 (1997)	Some part of $12,000	Abuse of process, defamation, civil conspiracy
State, Dep't of Human Res. v. Jimenez, 113 Nev. 356, 935 P.2d 274 (1997), *withdrawn upon filing of voluntary dismissal of case*, 113 Nev. 735, 941 P.2d 969	Some part of $450,000	Nine counts of sexual assault by state employees against children in their care
Casino Props., Inc. v. Andrews, 112 Nev. 132, 911 P.2d 1181 (1996)	Supreme Court affirmed district court's denial of a new trial but did not directly pass on $15,000 in damages	Negligent and IIED
Hazelwood v. Harrah's, 109 Nev. 1005, 862 P.2d 1189 (1993), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999)	Supreme Court affirmed district court's decision ordering either a new trial or remitter of damages from $425,000 to $200,000, some part of which was for emotional distress	False imprisonment, defamation, negligence, negligent misrepresentation
K-Mart Corp. v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993)	Some part of $206,656	Assault and battery, malicious prosecution, defamation, and false imprisonment

Stapp v. Hilton Hotels Corp., 108 Nev. 209, 826 P.2d 954 (1992)	$20,000	Car accident
D'Angelo v. Gardner, 107 Nev. 704, 819 P.2d 206 (1991)	Some part of $161,150	Wrongful termination of employment
Herbst v. Humana Health Ins. Of Nevada, Inc., 105 Nev. 586, 781 P.2d 762 (1989)	Some part of $22,400	Failure to reimburse medical expenses
United Fire Ins. Co. v. McClelland, 105 Nev. 504, 780 P.2d 193 (1989)	$143,000	Bad faith insurance claim
Cerminara v. Cal. Hotel & Casino, 104 Nev. 372, 760 P.2d 108 (1988)	Some part of $5,000	Assault and battery, false arrest and false imprisonment, IIED, and negligence
M & R Inv. Co., Inc. v. Mandarino, 103 Nev. 711, 748 P.2d 488 (1987)	Jury award reinstated but Supreme Court did not pass directly on propriety of amount of jury award or detail amount	IIED, outrage, defamation, malicious prosecution, assault, battery, false arrest, false imprisonment, conversion, invasion of privacy
Farmers Home Mut. Ins. v. Fiscus, 102 Nev. 371, 725 P.2d 234 (1986)	$20,000	Unfair settlement practices against insurer
Ramada Inns, Inc. v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985)	Some part of $15,000	Battery and IIED from plaintiff being pushed down a flight of stairs
State v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985), *overruled in part by State ex rel. Dept. of Transp. v. Hill*, 114 Nev. 810, 963 P.2d 480 (1998)	Some part of $82,352	Damages flowing from wrongful death of infant daughter in car accident
Hale v. Riverboat Casino, Inc., 100 Nev. 299, 682 P.2d 190 (1984), *abrogated on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	Some part of $2,100	Assault and battery, false imprisonment, malicious prosecution, defamation, negligent and/or IIED
Jacobson v. Manfredi, 100 Nev. 226, 679 P.2d 251 (1984)	Some part of $900,000	Permanent and severe injury to two-year old child from consumption of toxic liquid soldering flux
Stackiewicz v. Nissan Motor Corp. in USA, 100 Nev. 443, 686 P.2d 925 (1984)	Some part of $3,100,000	Injuries sustained in car crash resulting in paralysis
Nevada Indep. Broad. Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983)	$50,000	Defamation
Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980), *abrogated on other grounds by Ace Truck &*	Some part of $35,000	Medical malpractice

Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987)		
Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966)	Some part of $2,500	Strict tort liability for physical and mental distress resulting from consumption of "Squirt" bottle containing decomposed mouse

EXHIBIT 15

EXHIBIT 15

Pain and Suffering Awards Affirmed On Appeal Since 1950[2]

Case	Award	Description
Evans-Waiau v. Tate, 487 P.3d 28, 2021 WL 2137601 (Nev. Ct. App. May 25, 2021)	Award upheld but damages amount and composition not detailed	Car accident
Nieto v. Chandler, 460 P.3d 30, 2020 WL 1531765 (Nev. Ct. App. Mar. 26, 2020)	$5,000	Car accident
Complete Care Med. Ctr. v. Beckstead, 466 P.3d 538, 2020 WL 3603881 (July 1, 2020)	Some part of $50,000	Title VII violations
Estate of Rosales v. K&N Investing Grp., 472 P.3d 190 (Table), 2020 WL 5637078 (Sept. 18, 2020)	$40,000 (award amount detailed in Appellants' Opening Brief, *see* 2020 WL 3402319)	Sudden cardiac arrest caused by consumption of body building supplement
Harrah's Las Vegas, LLC v. Muckridge, 473 P.3d 1020, 2020 WL 5888032 (Oct. 1, 2020)	$40,000 (Court left this award in place but did not review it)	Slip and fall
Gallardo-Recendez v. Ely, 472 P.3d 1207 (Table), 2020 WL 5888031 (Oct. 1, 2020)	Some part of $430,000	Injuries sustained in car accident
First Transit, Inc. v. Chernikoff, 476 P.3d 860, 2020 WL 6887972 (Nov. 23, 2020)	$7.5 million	Death of individual on public bus
Didier v. Sotolongo, 441 P.3d 1091 (Table), 2019 WL 2339970 (May 31, 2019)	$10,000	Injuries sustained in car accident
Wynn Las Vegas, LLC v. O'Connell, 134 Nev. 1034, 2018 WL 4405474 (Nev. Ct. App. Aug. 30, 2018)	$240,000	Slip and fall
Bato v. Pileggi, 133 Nev. 984, 2017 WL 1397327 (Apr. 14, 2017)	$800,000	Injuries sustained in car accident
Firefly Partners, LLC v. Reimann, 133 Nev. 1008, 404 P.3d 413 (Table) (Oct. 30, 2017)	$742,141	Slip and fall
Peterson v. Corona, 133 Nev. 1060, 2017 WL 6806087 (Nev. Ct. App. Dec. 28, 2017)	Some part of $76,000	Car accident
Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. 261, 396 P.3d 783 (2017)	Some part of $436,000	Injuries sustained in car accident
France v. Brakke, 132 Nev. 969, 2016 WL 1335588 (Apr. 4, 2016)	$90,000	Injuries resulting from car accident
Zhang v. Barnes, 132 Nev. 1049, 2016 WL 4926325 (Sept. 12, 2016)	$350,000	Medical malpractice, negligent hiring and training

[2] This list was generated through a Westlaw search using the terms "pain and suffering." District court and criminal cases were filtered out.

		after surgery left plaintiff with severe burns
Khoury v. Seastrand, 132 Nev. 520, 377 P.3d 81 (2016)	Some part of $719,776	Injuries sustained in car accident
Kirt v. Smith, 131 Nev. 1308, 2015 WL 6442302 (Nev. Ct. App. Oct. 16, 2015)	$5,000	Injuries sustained in car accident
Behr v. Diamond, 131 Nev. 1252, 2015 WL 6830921 (Nev. Ct. App. Nov. 4, 2015)	$120,000 (Court left this award in place but did not review it)	Car accident
Land Baron Invs., Inc., v. Bonnie Springs Family LP, 131 Nev. 686, 356 P.3d 511 (2015)	Some part of $350,000	Nuisance
Urbanski v. National Football League, 131 Nev. 1358, 2015 WL 134795 (Table) (2015)	$3,000,000 per plaintiff	Shooting during altercation at strip club
Bugay v. Clark Cty. Sch. Dist., 130 Nev. 1159, 2014 WL 6609508 (Nov. 20, 2014)	Some part of $75,000 (Court left this award in place but did not review it)	Negligence
FCH1, LLC v. Rodriguez, 130 Nev. 425, 335 P.3d 183 (2014)	$3,108,375 (Court left this award in place but did not review it)	Negligence
Fallini v. Estate of Adams, 129 Nev. 1113, 2013 WL 1305503 (Table) (Mar. 29, 2013)	Some part of $1 million	Death of child in car crash
Wagasky ex rel. Mitchell v. Miller, 129 Nev. 1160, 2013 WL 1305495 (Mar. 29, 2013)	$15,000 (Court left this award in place but did not review it)	Negligence resulting in car accident
Hall v. Ortiz, 129 Nev. 1120, 2013 WL 7155073 (Oct. 31, 2013)	$50,000	Injuries from a car accident
Harrah's Laughlin, Inc. v. Swanson, 129 Nev. 1121, 2013 WL 3936509 (July 24, 2013)	$775,000	Plaintiff tripped on speed bump on casino property and injured her shoulder
Boonsong Jitnan v. Oliver, 127 Nev. 424, 254 P.3d 623 (2011)	Some part of $47,472	Injuries sustained in car accident
Manor Health Care Ctr., Inc. v. Monsour, 126 Nev. 735, 2010 WL 3341726 (June 23, 2010)	Some part of $754,431	Negligence and wrongful death
York v. Smith, 126 Nev. 757, 2010 WL 3270228 (July 6, 2010)	$30,000	Car accident
Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 235 P.3d 592 (2010)	Some part of $3 million per plaintiff	Wrongful death and tort claims
Wyeth v. Rowatt, 126 Nev. 446, 244 P.3d 765 (2010)	Some part of $7.6 million per plaintiff	Breast cancer caused by hormone replacement therapy drugs
Madruga v. Aguilar, 125 Nev. 1058, 2009 WL 1470069 (Feb. 26, 2009)	Some part of $6 million award (Court left this award in place but did not review it)	Car accident
Webb v. Clark Cty. Sch. Dist., 125 Nev. 611, 218 P.3d 1239 (2009)	$15,000 (Court left this award in place but did not review it)	Injuries sustained by student after physical altercation at school

Lee v. Ball, 121 Nev. 391, 116 P.3d 64 (2005)	Held additur of $8,200 to $1,300 award appropriate but concluded district court erred in failing to present new trial on damages as an alternative to additur	Injuries sustained in car accident
Banks ex rel. Banks v. Sunrise Hosp., 120 Nev. 822, 102 P.3d 52 (2004)	Some part of $4,825,450	Hospital equipment malfunction leading to patient's persistent vegetative state
State, Univ. & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 103 P.3d 8 (2004)	Supreme Court upheld verdict in plaintiffs' favor but did not discuss amount of damages or composition	Breach of the implied covenant of good faith and fair dealing, violation of substantive and procedural due process
Ringle v. Bruton, 120 Nev. 82, 86 P.3d 1032 (2004)	Some part of $131,814	Employment termination dispute
Canterino v. Mirage Casino-Hotel, 117 Nev. 19, 16 P.3d 415 (2001)	Supreme Court held $2 million award for mental anguish not excessive but remanded for new trial on damages issue nonetheless because of improper instruction on jury participation	Plaintiff beaten and robbed in hotel hallway
Krause Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001)	Some part of $100,000	Injuries resulting from fall
Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000)	$10,000	Assault, battery, and IIED
Palace Station Hotel & Casino, Inc. v. Jones, 115 Nev. 162, 978 P.2d 323 (1999)	$2,811 (Court left this award in place but did not review it)	Injury caused by valet employee
Dow Chem. Co. v. Mahlum, 114 Nev. 1468, 970 P.2d 98 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001)	Some part of $4,153,654	Negligent performance of an undertaking
Yamaha Motor Co., USA v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998)	$1,800,000	Strict products liability and negligence
Hogle v. Hall By & Through Evans, 112 Nev. 599, 916 P.2d 814 (1996)	Some part of $2,930,000	Injuries to unborn child from mother's use of Accutane
Prabhu v. Levine, 112 Nev. 1538, 930 P.2d 103 (1996)	Some part of $798,600	Doctor's breach of standard of care
Paul v. Imperial Palace, Inc., 111 Nev. 1544, 908 P.2d 226 (1995)	Some part of $51,000	Slip and fall
Donaldson v. Anderson, 109 Nev. 1039, 862 P.2d 1204 (1993)	Reversed jury decision that awarded $0 for suffering, remanded for new trial or additur of $200,000	Death of child in car accident
K-Mart Corp. v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993)	Some part of $206,656	Assault battery, malicious prosecution, defamation, and false imprisonment

DuBois v. Grant, 108 Nev. 478, 835 P.2d 14 (1992)	Award upheld but damages amount and composition not detailed	Injuries incurred from kick by horse
Lublin v. Weber, 108 Nev. 452, 833 P.2d 1139 (1992)	Held additur or new trial warranted for judgment of $7,200	Injuries sustained in car accident
Craigo v. Circus-Circus Enters., Inc., 106 Nev. 1, 786 P.2d 22 (1990), *superseded on other grounds by statute as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	Some part of $45,000	Assault and robbery
Ellison v. Cal. State Auto. Ass'n, 106 Nev. 601, 797 P.2d 975 (1990)	$7,000 (Court left this award in place but did not review it)	Injuries sustained in car accident
Arnold v. Mt. Wheeler Power Co., 101 Nev. 612, 707 P.2d 1137 (1985)	Some part of $1,350,000	Loss of limb
Mid-Century Ins. Co. v. Daniel, 101 Nev. 433, 705 P.2d 156 (1985)	Some part of $628	Car accident
Otis Elevator Co. v. Reid, 101 Nev. 515, 706 P.2d 1378 (1985)	Some part of $317,500 (Court left this award in place but did not review it)	Elevator accident
State v. Eaton, 101 Nev. 705, 710 P.2d 1370 (1985), *overruled in part by State ex rel. Dept. of Transp. v. Hill*, 114 Nev. 810, 963 P.2d 480 (1998)	Some part of $82,352	Personal injury and wrongful death of infant in car accident
Stackiewicz v. Nissan Motor Corp. in USA, 100 Nev. 443, 686 P.2d 925 (1984)	Some part of $3,100,000	Injuries sustained in car crash resulting in paralysis
Stickler v. Quilici, 98 Nev. 595, 655 P.2d 527 (1982)	Some part of $118,106 (Court left this award in place but did not review it)	Injuries caused by car accident
S. Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 577 P.2d 1234 (1978)	Some part of $493,569	Injuries sustained by freight car employee during course of employment
Leslie v. Jones Chem. Co., Inc., 92 Nev. 391, 551 P.2d 234 (1976), *superseded on other grounds by statute as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	Some part of $35,000 (Court left this award in place but did not review it)	Injury from inhalation of chlorine gas
Drummond v. Mid-West Growers Co-op. Corp., 91 Nev. 698, 542 P.2d 198 (1975)	Held award of $9,640 inadequate and remanded for either a new trial or additur of $30,359 to reflect pain and suffering	Injuries sustained during car accident in course of employment
Harris v. Zee, 87 Nev. 309, 486 P.2d 490 (1971)	$9,470	Injuries sustained from ingesting metal shard
Southern Pac. Co. v. Watkins, 83 Nev. 471, 435 P.2d 498 (1967)	Some part of $134,737	Personal injury
Wilson v. Perkins, 82 Nev. 42, 409 P.2d 976 (1966)	Some part of $62,000	Car accident

Gutierrez v. Sutton Vending Serv., Inc., 80 Nev. 562, 397 P.2d 3 (1964)	Some part of $200	Injuries sustained from vending machine falling on child
Meagher v. Garvin, 80 Nev. 211, 391 P.2d 507 (1964)	Some part of $143,255	Injuries sustained in car accident
Porter v. Funkhouser, 79 Nev. 273, 382 P.2d 216 (1963)	Some part of $35,000	Wrongful death from car accident
Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962), *abrogated on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	Some part of $30,000	Malicious prosecution
Sierra Pac. Power Co. v. Anderson, 77 Nev. 68, 358 P.2d 892 (1961)	$19,136	Injuries to fireman on duty
Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959)	Supreme Court upheld award but did not note what amount of award or its composition	Injuries sustained from car accident
Brownfield v. F.W. Woolworth Co., 69 Nev. 294, 248 P.2d 1078 (1952)	Some part of $1,233	Injuries resulting from negligence

EXHIBIT 16

EXHIBIT 16

Punitive Damages Awards Affirmed On Appeal Since 1950[3]

Case	Award	Description
Yasol v. Greenhill, 480 P.3d 881 (Table), 2021 WL 653163 (Nev. Ct. App. Feb. 18, 2021)	Some part of $2,750	Nuisance, trespass, intentional interference with contractual relations
Lee v. Soon Yi Lee, 2019 WL 851994 (Nev. Ct. App. Feb. 19, 2019)	$25,500 (Court did not review award but left it in place)	Defamation per se, assault, battery, IIED
ABD Holdings, Inc. v. JMR Inv. Props., LLC, 441 P.3d 548 (Table), 2019 WL 2305164 (May 29, 2019)	$450,000	Fraud by intentional misrepresentation
Barraco v. Robinson, 2019 WL 1932068 (Nev. Ct. App. Apr. 26, 2019)	$100,000 (Court did not review award but left it in place)	Defamation per se
Minturn Trust v. Morawska, 2019 WL 2714827 (Nev. Ct. App. June 20, 2019)	$100,000	Breach of implied covenant of good faith and fair dealing, fraud, conversion
TMX, Inc. v. Volk, 448 P.3d 574 (Table), 2019 WL 4619524 (Sept. 20, 2019)	$1 million	Fraud and abuse of process
Gillespie Office & Sys. Furniture, LLC v. Council, 134 Nev. 942, 2018 WL 6721356 (Dec. 7, 2018)	$1.5 million	Defamation per se
Golden Rd. Motor Inn, Inc. v. Islam, 132 Nev. 476, 376 P.3d 151 (2016)	Affirmed award that included some punitive damages, but amount not stated	Violation of Nevada Uniform Trade Secrets Act
Urbanski v. Nat'l Football League, 131 Nev. 1358, 2015 WL 134795 (Table) (Jan. 8, 2015)	$300,000 (Court did not review award but left it in place)	IIED, battery, assault
Land Baron Invs., Inc. v. Bonnie Springs Family LP, 131 Nev. 686, 356 P.3d 511 (2015)	$762,500	Abuse of process
LaSalle Bank Nat. Ass'n v. Hammer Family 1994 Trust, 131 Nev. 1310, 2015 WL 1423421 (Table) (Mar. 26, 2015)	$410,000 (damages amount set forth in *Hammer Family 1994 Trus v. Van Damme*, 2012 WL 12265741 (May 11, 2012))	Trespass, quiet title, slander of title, and battery
Prestige of Beverly Hills, Inc. v. Weber, 128 Nev. 927, 2012 WL 991696 (Mar. 21, 2012)	$100,000	Property damage
Exposure Graphics v. Rapid Mountain Display, 128 Nev. 895, 2012 WL 1080596 (Mar. 29, 2012)	$125,000 (reduced from $252,198)	Conversion
Roussos v. Gilmore, 128 Nev. 931, 2012 WL 5851204 (Nov. 16, 2012)	Some part of $95,000 (amount detailed in Appellant's Opening Brief, *see* 2010 WL 10933918)	Fraud

[3] This list was generated through a Westlaw search using the terms "punitive damag!" District court and criminal cases were filtered out.

Davis v. Beling, 128 Nev. 301, 278 P.3d 501 (2012)	$100,000	Fraud-by-concealment
Dynamic Transit v. Trans Pac. Ventures, Inc., 128 Nev. 755, 291 P.3d 114 (2012)	$300,000	Conversion and fraud
Webb v. Shull, 128 Nev. 85, 270 P.3d 1266 (2012)	Affirmed award but does not state amount of award	Seller's delayed disclosure of property defects
Amaral v. Shull, 127 Nev. 1114, 2011 WL 1022863 (Mar. 21, 2011)	$40,000	Fraud
Lopez v. Javier Corral, D.C., 126 Nev. 690, 2010 WL 5541115 (Dec. 20, 2010)	$25,000	Breach of fiduciary duty, conversion, negligence, misrepresentation
Wyeth v. Rowatt, 126 Nev. 446, 244 P.3d 765 (2010)	$19.3 million per plaintiff	Breast cancer following use of hormone replacement therapy drugs
ETT, Inc. v. Delegado, 126 Nev. 709, 2010 WL 3246334 (Apr. 29, 2010)	$4,183,250 (upheld district court's remitter from $10 million)	Car accident
Adams v. Quilici, 126 Nev. 688, 2010 WL 4278417 (Oct. 25, 2010)	$240,921	Real property action
Countrywide Home Loans, Inc. *v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	$968,070 (remitted down from $2.5 million by district court because of statutory cap)	Trespass, conversion, negligence
Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006)	$250,000	Defamation
Nittinger v. Holman, 119 Nev. 192, 69 P.3d 688 (2003)	$2,700	Battery and false imprisonment
Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000)	$6,050,000	Conspiracy to commit conversion of securities
Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000)	$45,000	Assault, battery, IIED
Dillard Dept. Stores, Inc. v. Beckwith, 115 Nev. 372, 989 P.2d 882 (1999)	$1,872,084	Tortious constructive discharge and IIED
Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 969 P.2d 949 (1998)	$3,750,000 (held larger award was excessive as a matter of state law)	Bad faith and fraud
Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 962 P.2d 596 (1998)	$5 million	Breach of fiduciary relationship
Smith's Food & Drug Ctrs., Inc. v. Bellegarde, 114 Nev. 602, 958 P.2d 1208 (1998), *overruled in part by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	$65,000	Assault, battery, false imprisonment, unlawful detention
Adm'r of Real Estate Educ., Research, & Recovery Fund v. Buhecker, 113 Nev. 1147, 945 P.2d 954 (1997)	Some part of $20,000	Fraud

Clark v. Lubritz, 113 Nev. 1089, 944 P.2d 861 (1997)	$200,000	Breach of fiduciary duty
Guaranty Nat'l Ins. Co. v. Potter, 112 Nev. 199, 912 P.2d 267 (1996)	$250,000 (remitted from $1 million)	Bad faith delay in paying insurance
Bigelow v. Bullard, 111 Nev. 1178, 901 P.2d 630 (1995)	$25,000	Assault and battery
K-Mart Corp. v. Washington, 109 Nev. 1180, 866 P.2d 274 (1993)	$135,154	False imprisonment, battery, assault, malicious prosecution, defamation
Kahn v. Orme, 108 Nev. 510, 835 P.2d 790 (1992), *overruled on other grounds by Johnson v. Brooks*, 462 P.3d 1232 (Table), 2020 WL 2529035 (May 15, 2020)	$50,000	Battery, defamation, malicious prosecution
Topaz Mut. Co., Inc. v. Marsh, 108 Nev. 845, 839 P.2d 606 (1992)	Some part of $35,000	Fraud
D'Angelo v. Gardner, 107 Nev. 704, 819 P.2d 206 (1991)	$100,000	Tortious discharge of employee
Granite Constr. Co. v. Rhyne, 107 Nev. 651, 817 P.2d 711 (1991), *overruled by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	Affirmed judgment for punitive damages but amount not listed	Car accident
S.J. Amoroso Constr. Co. v. Lazovich & Lazovich, 107 Nev. 294, 810 P.2d 775 (1991)	$500,000 (Supreme Court reduced award from $1 million)	Fraud
Republic Ins. Co. v. Hires, 107 Nev. 317, 810 P.2d 790 (1991)	$5 million (Reduced from $22.5 million)	Misrepresentation, bad faith, negligence, invasion of privacy
Nev-Tex Oil & Gas v. Precision Rolled Prods., 105 Nev. 685, 782 P.2d 1311 (1989)	$5,000	Breach of a gas well exploration agreement, misrepresentation, and unjust enrichment
Sands Regent v. Valgardson, 105 Nev. 436, 777 P.2d 898 (1989)	Some part of $97,285	ADEA, public policy wrongful discharge and bad faith discharge
United Fire Ins. Co. v. McClelland, 105 Nev. 504, 780 P.2d 193 (1989)	$500,000	Bad faith in handling insured's claim
Cerminara v. California Hotel & Casino, 104 Nev. 372, 760 P.2d 108 (1988)	$100,000	Assault, battery, false imprisonment/false arrest, IIED, negligence
Ainsworth v. Combined Ins. Co. of Am., 104 Nev. 587, 763 P.2d 673 (1988)	$5,939,500	Insurance denial
Ace Truck & Equip. Rentals, Inc. v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987), *abrogated by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006)	Reduced punitive damages to $250,000	Fraud
K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987)	$50,000	Breach of duty of good faith and fair dealing
Kellar v. Brown, 101 Nev. 273, 701 P.2d 359 (1985)	$7,500	Breach of warranty and fraud

Phillips v. Lynch, 101 Nev. 311, 704 P.2d 1083 (1985), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$125,000	Fraudulent violation of fiduciary duties
Ramada Inns, Inc. v. Sharp, 101 Nev. 824, 711 P.2d 1 (1985)	$10,000	Altercation between individual and security guards employed at hotel
Hale v. Riverboat Casino, Inc., 100 Nev. 299, 682 P.2d 190 (1984), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$97,900	Assault and battery, false imprisonment, malicious prosecution, defamation, negligent and/or IIED
Wilson v. Pacific Maxon, Inc., 100 Nev. 479, 686 P.2d 235 (1984), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$10,000	Willful and malicious removal of property and damage to property
Summa Corp. v. Greenspun, 98 Nev. 528, 655 P.2d 513 (1982)	$1 million	Slander of title
Star v. Rabello, 97 Nev. 124, 625 P.2d 90 (1981)	Affirmed award of punitive damages but amount not detailed	Assault and battery
Bull v. McCuskey, 96 Nev. 706, 615 P.2d 957 (1980), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$50,000	Medical malpractice
Rae v. All Am. Life & Cas. Co., 95 Nev. 920, 605 P.2d 196 (1979)	Some part of $92,000	Fraud
Tahoe Village Realty v. DeSmet, 95 Nev. 131, 590 P.2d 1158 (1979), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$15,000	Fraud and deceit in sale of real estate
Nevada Nat'l Bank v. Huff, 94 Nev. 506, 582 P.2d 364 (1978)	Some part of $10,082	Wrongful repossession of truck
Sanguinetti v. Strecker, 94 Nev. 200, 577 P.2d 404 (1978), *superseded by statute as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	$25,000	Fraud
Leslie v. Jones Chem. Co., Inc., 92 Nev. 391, 551 P.2d 234 (1976), *superseded on other grounds by statute as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	$170,000 (Affirmed remitter from $250,000 or grant of new trial)	Injury from inhalation of chlorine gas
Bill Stremmel Motors, Inc. v. Kerns, 91 Nev. 110, 531 P.2d 1357 (1975)	Affirmed award of actual and punitive damages, but amount of award not stated	Fraud

Caple v. Raynel Campers, Inc., 90 Nev. 341, 526 P.2d 334 (1974), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$5,000	Improper repossession of property
Midwest Supply, Inc. v. Waters, 89 Nev. 210, 510 P.2d 876 (1973)	$100,000	False and fraudulent representations of tax expertise
Nevada Credit Rating Bureau, Inc. v. Williams, 88 Nev. 601, 503 P.2d 9 (1972), *superseded by statute as stated in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008)	$1,750	Abuse of process
Britz v. Consol. Casinos Corp., 87 Nev. 441, 488 P.2d 911 (1971)	$30,000	Conspiracy
Am. Fed'n of Musicians v. Reno's Riverside Hotel, Inc., 86 Nev. 695, 475 P.2d 220 (1970)	$10	Labor dispute/suit to enforce arbitral award
Randono v. Turk, 86 Nev. 123, 466 P.2d 218 (1970)	$10,000	Fraud
Steen v. Gass, 85 Nev. 249, 454 P.2d 94 (1969)	$15,000	Assault and battery
Alper v. Western Motels, Inc., 84 Nev. 472, 443 P.2d 557 (1968)	$1,500	Quiet title and trespass
Hotel Riviera, Inc. v. Short, 80 Nev. 505, 396 P.2d 855 (1964)	$20,000	Conspiracy
Porter v. Funkhouser, 79 Nev. 273, 382 P.2d 216 (1963)	$5,000	Wrongful death from car accident
Miller v. Schnitzer, 78 Nev. 301, 371 P.2d 824 (1962), *abrogated by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987)	$5,000 (Reduced by Supreme Court from $50,000)	Malicious prosecution
Blakeney v. Fremont Hotel, Inc., 77 Nev. 191, 360 P.2d 1039 (1961)	Some part of $7,911	Injuries caused by negligence of hotel employees
True v. Bosch, 73 Nev. 270, 317 P.2d 1089 (1957)	$250	Trespass upon real property and quieting title
Fick v. Parman, 71 Nev. 201, 284 P.2d 380 (1955)	$250	Wrongful and malicious driving of cattle
Building Trades Council of Reno v. Thompson, 68 Nev. 384, 234 P.2d 581 (1951)	Some part of $6,750	Damage caused by strike, picketing and boycott

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4

NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO RETAX

PLEASE TAKE NOTICE that an Order Granting in Part and Denying in Part Defendant's Motion to Retax was filed on June 8, 2022, in the above-captioned matter.

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A copy of the Order is attached hereto.

DATED this 9th day of June 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp
MATTHEW L. SHARP, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and that on this date, a true and correct copy of the foregoing was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and NEFCR 9, via the electronic mail address noted below:

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DATED this 9th day of June 2022.

/s/ Suzy Thompson
An employee of Matthew L. Sharp, Ltd.

ORDR
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO RETAX

On April 22, 2022, Defendant filed its Motion to Retax Costs. This Court has reviewed Plaintiff's Memorandum of Costs, Defendant's Motion to Retax Costs, and Plaintiff's Opposition to Defendant's Motion to Retax Costs with a Declaration of Matthew L. Sharp in Support of Plaintiff's Memorandum of Costs. This Court grants Defendant's Motion to Retax Costs in part and denies the motion in part consistent with the modification to Plaintiff's Memorandum of Costs as set forth in Plaintiff's Opposition to Motion to Retax Costs.

I. LEGAL STANDARDS FOR MOTION TO RETAX COSTS

1. NRS 18.020(3) provides costs must be allowed to "the prevailing party against any adverse party against whom judgment is rendered…[i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500."

2. The prevailing party is "entitled to recover all costs as a matter of right." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 431, 132 P.3d 1022, 1036-37 (2006). NRS 18.005 defines the costs that are recoverable.

3. NRS 18.110(1) provides that the party seeking costs must provide a memorandum of costs setting forth the recoverable costs that have been necessarily incurred. The requirements of NRS 18.110(1) are not jurisdictional. *Eberle v. State ex rel. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

4. This Court has the discretion to determine the allowable costs under NRS 18.020. *Motor Coach Indus., Inc. v. Khiabani by & through Rigaud*, 137 Nev. Adv. Op. 42, 493 P.3d 1007, 1017 (2021).

5. NRS 18.005(5) governs the recovery of expert witness fees. It provides, "Reasonable fees of not more than five expert witnesses of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." In evaluating a request for expert fees over $1,500 per witness, this Court should "carefully evaluate a request for excess fees." *Motor Coach Indus. v. Khiabani*, 492 P.3d at 1017. This Court should recognize the importance of expert witnesses and consider the factors set forth in *Frazier v. Drake*, 131 Nev. 632, 650-51, 357 P.3d 365, 377-78 (Ct. App. 2015). Those factors include: (1) the importance of the expert's testimony to the case; (2) the degree that the expert aided the jury in deciding the case; (3) whether the expert's testimony was repetitive of other experts; (4) the extent and nature of the work performed by the expert; (5) the amount of time the expert spent in court, preparing a report, and testifying at trial; (6) the expert's area of expertise; (7) the expert's education and training; (8) the fees charged by the expert; (9) the fees traditionally charged by the expert on related matters; (10) comparable expert fees charged in similar cases; and (11) the fees that

would have been charged to hire a comparable expert in Las Vegas, Nevada. *Id.* Whether a particular factor is applicable depends upon the facts of the case.

II. FINDINGS OF FACT

1. This case proceeded to trial on March 14, 2022.

2. On April 4, 2022, a verdict in phase one was rendered in favor of Plaintiff.

3. On April 5, 2022, a verdict on phase two was rendered in favor of Plaintiff.

4. On April 18, 2022, this Court filed a judgment in favor of Plaintiff.

5. On April 18, 2022, Plaintiff filed a Notice of Entry of Judgment.

6. On April 19, 2022, Plaintiff filed a Memorandum of Costs with supporting documentation to support each item of costs requested.

7. On April 22, 2022, Defendant filed its Motion to Retax Costs ("Motion").

8. On May 6, 2022, Plaintiff filed its Opposition to Motion to Retax Costs ("Opposition") with the Declaration of Matthew L. Sharp in Support to Plaintiff's Opposition to Motion to Retax Costs ("Declaration").

9. Defendant challenged the Memorandum of Costs on the basis that the attorneys for Plaintiff did not include a sworn declaration to verify the costs. Memorandum of Costs, which was signed by counsel as an officer of the Court, included the bills showing each item of costs requested were incurred, and Declaration verified the Memorandum of Costs as well as addressing each item of cost that Defendant sought to retax. The Memorandum of Costs, Opposition, and Declaration provided the information sufficient for this Court to evaluate the reasonableness of Plaintiff's costs.

10. Pursuant to NRS 18.005(1), Plaintiff submitted filings fees of $560. The Defendants did not contest the filing fees. Filing fees of $560 were necessarily incurred in this action.

11. Pursuant to NRS 18.005(2), Plaintiff submitted $24,162 for court reporter fees for depositions. In its Motion, Defendant asked to re-tax costs by $8,187.40 on basis that: (1) jury trial transcripts of $2,798.50 are not taxable; (2) $3,230.16 for duplicate charges; and (3) video deposition charges of $1,092.20. In the Opposition, Plaintiff omitted the duplicate charges of $3,230, and jury trial transcripts charges of $2,798.50.

12. Based upon Plaintiff's Opposition and Declaration, it is common practice generally in a case to videotape the deposition of a witness, and it is the common practice specifically in this case to videotape the deposition of a witness as evidenced, in part, that Defendant videotaped each of the seven depositions it took.

13. Reporter fees for depositions of $16,840.20, represented as reporter fees of $15,748 and video depositions of $1,092.20, were necessarily incurred in this action

14. Pursuant to NRS 18.005(4), Plaintiff submitted jury fees and expenses of $5,079.09. The fees were not contested by Defendant. The Defendants did not contest the jury fees and expenses. The jury fees and expenses of $5,079.09 were necessarily incurred in this action.

15. Plaintiff submitted witness fees of $48. The witness fees were not contested by Defendant. Witness fees of $48 were necessarily incurred in this action.

16. Pursuant to NRS 18.005(5), Plaintiff submitted expert witness fees of $229,490.49. Those fees were allocated as follows: (1) Dr. Andrew Chang for $115,184.38; (2) Stephen Prater for $105,355.06; (3) Elliot Flood for $6,888.55; and (4) Dr. Clark Jean for $2,062.50. In its motion, Defendant asked to re-tax costs for each expert as follows: (1) Dr. Andrew Chang from $115,184.38 to between $30,000 to $58,184.38; (2) Stephen Prater from $105,355.06 to $64,104; (3) Elliott Flood from $6,888.55 to $5,473.55; and (4) Dr. Clark Jean from $2,062.50 to zero. In the Opposition, Plaintiff withdrew the charges for Dr. Jean of $2,062.50 and agreed to reduce the recovery of Mr. Flood's fee to $5,473.55.

17. With respect to Dr. Chang, he is a well-qualified radiation oncologist who specializes in proton beam therapy ("PBT"). Without Dr. Chang's testimony, Plaintiff could not have prevailed in this case. His testimony involved a complicated subject matter and was necessary for Plaintiff to prevail on liability, causation, and damages. Dr. Chang explained radiation oncology generally. Dr. Chang testified about PBT. Dr. Chang testified about Mr. Eskew's condition, including the location of the tumors that needed to be radiated. Dr. Chang explained why PBT was the best radiation treatment available to Mr. Eskew and why IMRT posed a significant risk of injury to Mr. Eskew's esophagus. Dr. Chang testified about how IMRT injured Mr. Eskew's esophagus, the development of chronic esophagitis, and how that impacted Mr. Eskew.

18. In applying the relevant factors in *Frazier*, Dr. Chang's testimony was very important. There is a high degree of certainty his testimony assisted the jury. While Dr. Liao also testified, Dr. Chang's testimony was not repetitive of her testimony and dealt with different aspects of why PBT was necessary for Mr. Eskew and the injuries he sustained from IMRT including the development of the chronic esophagitis. The charges of $115,184.38 were consistent with the work Dr. Chang performed. Dr. Chang hourly rate $750 per hour was consistent with Dr. Chang's standard rate and consistent with what a doctor with his expertise would charge. Dr. Chang's fees were consistent with the amount of work he did preparing his report, preparing for trial, and testifying at trial. PBT is not a therapy offered in Las Vegas, so it was not practical to find an expert on PBT from Las Vegas. Dr. Kumar, SHL's radiation oncologist and who, at one-time lived in Las Vegas, charged more than Dr. Chang at $800 per hour. Dr. Chang's total fee of $115,184.38 was consistent with a case of this complexity and consistent with Dr. Chang's qualifications, the complexity of his testimony, and the importance of his testimony.

19. Pursuant to the relevant *Frazier* factors, Dr. Chang's expert witness fees of $115,184.38 were necessarily incurred in this action.

20. With respect to Mr. Prater, he was used as an expert in insurance claims handling practices. Mr. Prater's testimony was necessary on the issue of liability for breach of the implied covenant of good faith and fair dealing and implied malice and oppression for purposes of punitive damages.

21. In applying the *Frazier* factors, Mr. Prater's testimony was very important. Given the verdict, the degree to which Mr. Prater assisted the jury was high. Mr. Prater has a high degree of expertise with over 35 years of experience studying insurance claims practices, training insurance companies on complying with industry standards and the duty of good faith and fair dealing, and years of testifying experience. For 30 years, Mr. Prater taught insurance law as a professor of law at Santa Clara University. Mr. Prater utilized his vast experience to explain insurance industry principals and standards for fair claims handling. He utilized the facts of the case to assist in explaining Plaintiff's theory of the case including how SHL violated industry standards and consciously disregarded Mr. Eskew's rights. Mr. Prater explained complex concepts to the jury, including: (1) how a reasonable insurer would interpret the insurance policy generally; (2) how SHL should have interpreted the policy

with respect to Mr. Eskew's claim; (3) how an insurer investigates and evaluates a claim generally; (4) how SHL investigated and evaluated Mr. Eskew's claim; and (5) how SHL should have investigated and evaluated Mr. Eskew's claim. Mr. Prater charged his customary fee of $750 per hour which was consistent with his background and expertise.

22. While Defendant seeks to reduce Mr. Prater's fees by 55 hours, Mr. Prater spent the time billed, and the tasks for which he billed were necessary to the case. The charges reflect the time spent to provide an extensive report, review of discovery materials, preparation for deposition, extensive preparation for trial, and trial testimony.

23. Pursuant to the relevant *Frazier* factors, Mr. Prater's expert witness fee of $105,355.06 were necessarily incurred in this action.

24. With respect to Mr. Flood, he was retained as an insurance expert to testify about two aspects: (1) the corporate relationship between United Health Group, Sierra Heath, Optum, ProHealth Proton Center Management, New York Proton Management LLC, and UHG's management of the New York Proton Center and the investment into the New York Proton Center; and (2) the Defendant's value for purposes of punitive damages. At trial, Mr. Flood's testimony established the foundation to put into evidence that, as early as 2015, United Health Group, through ProHealth Proton, invested into a proton center in New York City, in part, to use PBT to treat lung cancer. In applying the *Frazier* factors, Mr. Flood's testimony was important. He aided the jury in understanding the corporate structure of United Health Group. New York Proton Center was an important part of Plaintiff's theory in challenging the Defendant's position and credibility of its position that PBT for lung cancer was unproven and not medically necessary.

25. In applying the relevant *Frazier* factors, Mr. Flood's charges to $5,473.55 were necessarily incurred in this action.

26. Pursuant to NRS 18.005(7), Plaintiff submitted process service fees of $95. The process service fees were not contested by Defendant. The process service fees of $95 were necessarily incurred in this action.

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27. Pursuant to NRS 18.005(8), Plaintiff submitted $8,071 in costs for compensation for the official reporter. Defendant does not contest those costs. The $8,071 for compensation for the official reporter were necessarily incurred in this action.

28. Pursuant to NRS 18.005(12), Plaintiff submitted photocopy costs of $5,013.85 split out as follows: (1) medical record copies of $3,193.92; (2) in-house photocopies $1,626 for 6,504 copies at $.25 per copy; (3) FedEx copy costs of $193.93 for trial. Defendant asked to re-tax costs for the in-house copy costs of $1,626.

29. This case was extensively litigated, involved thousands of pages of documents, many expert witnesses, many pretrial motions, hundreds of trial exhibits, and a 13-day trial. Plaintiff charged copy costs only for those charges necessary to the preparation of the case. $1,626 for 6,504 copies at $.25 per copy is reasonable for a case of this size. In-house copying costs of $1,626 were necessarily incurred in this action.

30. The photocopy costs of $5,013.85 were necessarily incurred in this action.

31. Pursuant to NRS 18.005(14), Plaintiff submitted postage charges of $420.21 as: (1) United States postage of $49.84 and (2) Federal Express charge of $370.34. The Defendant moved to re-tax Federal Express charges of $370.34.

32. Plaintiff utilized Federal Express charges for establishing the Estate of William Eskew and charges for providing binders to this Court for the pre-trial hearings. Those charges were necessarily incurred as postage or other reasonable expenses under NRS 18.005(17).

33. Postage expense of $420.21 were necessarily incurred in this action.

34. Pursuant to NRS 18.005(17), Plaintiff sought miscellaneous expenses as follows: (1) legal research of $2,475.83; (2) runner services fees of $211; (3) Tyler Technologies e-filing service fees of $170.80; (4) Focus Graphics for medical illustrations of $7,510; (5) E-deposition trial technician fees of $25,614.80; (6) Empirical Jury for focus groups of $20,000; (7) HOLO Discovery for trial copying and Bates-stamping exhibits of $2,970.29; (8) Nikki McCabe to read deposition designations of Dr. Liao of $831.36; and (3) pro hac vice fees of $1,550. In its Motion, the Defendant contested the legal research fees, the runner service fees, Focus Graphic charges, E-deposition trial technician fees, the Empirical Jury's fee, and Ms. McCabe's charges.

35. The charges of $170.80 for Tyler Technologies e-filing service fees, $2,970.29 for HOLO Discovery and $1,550 for pro hac vice fees were charges necessarily incurred in this action.

36. With respect to the legal research expenses, this was an insurance bad faith case that involved many legal issues including research to respond to the various pre-trial motions, prepare and review of jury instructions and address legal issues raised in trial. Plaintiff utilized the internal practices to assure the charges were for research were appropriately allocated to this case. The legal research charges of $2,475.83 were necessarily incurred in this action.

37. With respect to the Focus Graphic charges, Focus Graphics, with the Plaintiff's attorneys and Dr. Chang, prepared demonstrative exhibits to assist in explaining why PBT was the best treatment for Mr. Eskew. Those demonstrative exhibits were used in Dr. Chang's testimony as well as in closing arguments. The demonstrative exhibits assisted the jury to understand Plaintiff's position that PBT was the best treatment for Mr. Eskew. Focus Graphic charges of $4,335 to prepare the demonstrative exhibits were necessarily incurred in this action.

38. With respect to E-depositions' charges, E-depositions provided the courtroom technology to the Plaintiff during trial. Defendant asserts courtroom technology services is not a necessary expense. This case involved many trial exhibits. Courtroom technology services during trial are necessary as evidenced, in part, by the fact Defendant had its own person providing courtroom technology. The services of E-depositions were important to assist Plaintiff in presenting evidence to the jury and to assist the jury in understanding the evidence. The E-depositions charges of $25,614.80 were necessarily incurred in this action.

39. With respect Empirical Jury, Plaintiff retained Empirical Jury to conduct focus groups. Defendant contests the charge on the basis that jury consulting services were not necessary. Based upon Plaintiff's Opposition, jury consulting services in a case of this nature were necessary, and Empirical Jury's charges of $20,000 were necessarily incurred in this action.

40. With respect Nikki McCabe, she was retained to read deposition designations of Dr. Liao. Defendant asserts that her charges were not necessary. Dr. Liao was a critical witness for the Plaintiff. Ms. McCabe performed a necessary role in the case. Ms. McCabe's fee of $831.36 was an amount necessarily incurred in this action.

III. CONCLUSIONS OF LAW

1. Pursuant to NRS 18.0202(3), the Plaintiff is the prevailing party.

2. Through the Memorandum of Costs, the Oppositions and Declaration, Plaintiff complied with NRS 18.110(1) and provided the information necessary for this Court to determine the costs that were necessarily incurred in this action.

3. Defendant's Motion was timely filed.

4. This Court grants Defendant's Motion as follows: (1) court reporter fees are reduced by $2,798.50 for jury trial transcripts and $3,230.16 for duplicate court reporter charges; (2) expert charges for Elliot Flood are reduced from $6,888.55 to $5,473.55; (3) charges for Dr. Clark Jean are not allowed. In all other respects, Defendant's Motion is denied as the remaining costs challenged by the Defendant were necessarily incurred in this action.

5. Pursuant to NRS 18.020, this Court awards Plaintiff's taxable costs of $313,634.62 and itemized as follows:

1) Clerks' Fees

Filing Fees and Charges Pursuant to NRS 19.0335 ..... $560.00

2) Reporters' Fees for Depositions, including videography $16,840.20

3) Juror fees and expenses $5,079.09

4) Witness Fees $48.00

5) Expert Witness Fees $226,012.99

6) Process Service $95.00

7) Compensation for the Official Reporter $8,071.00

8) Photocopies $5,013.85

(1) Medical records copies ($3,193.92)

(2) In-house photocopies 6,504 copies at $.25 per copy ($1,626)

(3) FedEx copy costs from trial ($193.93)

9) Postage/Federal Express $420.21

(1) Postage ($49.87)

(2) Federal Express shipping charges ($370.34)

10) Other Necessary and Reasonable Expenses

Legal Research $2,475.83

Runner services $211.00

Tyler Technologies (e-filing service fees) $170.80

Trial Related, Jury Fees, and Support Services..... $47,086.65

- Focus Graphics – medical illustrations ($4,335)
- E-Depositions – trial technician ($25,614.80)
- Empirical Jury – focus groups ($20,100)
- HOLO Discovery – trial exhibits & bates stamping ($2,970.29)
- Nikki McCabe – voice actress to read depo designation ($831.36)
- Out-of-State Association and Pro Hac Vice Fees..... $1,550.00

TOTAL COSTS $313,634.62

DATED this _____ day of _____2022.

Dated this 8th day of June, 2022

DISTRICT JUDGE

939 71A 6FB3 9590
Nadia Krall
District Court Judge

Approved as to form:

WEINBERG WHEELER HUDGINS
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/s/ Ryan T. Gormley

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RE: Eskew v. Sierra

1 message

Gormley, Ryan <RGormley@wwhgd.com> Mon, Jun 6, 2022 at 3:07 PM
To: Matt Sharp <matt@mattsharplaw.com>, "Roberts, Lee" <LRoberts@wwhgd.com>
Cc: Doug Terry <doug@dougterrylaw.com>

That is fine, you can add my e-signature on the approval as to form.

Thank you,

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Sent: Monday, June 6, 2022 2:57 PM
To: Gormley, Ryan <RGormley@wwhgd.com>; Roberts, Lee <LRoberts@wwhgd.com>
Cc: Doug Terry <doug@dougterrylaw.com>
Subject: Eskew v. Sierra

This Message originated outside your organization.

Ryan,

I accepted all changes but the first change. Let me know if I have your authority to submit the order.

Thanks.

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Board of Governors American Association for Justice
Leaders Forum American Association for Justice

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Sandra Eskew, Plaintiff(s) vs. Sierra Health and Life Insurance Company Inc, Defendant(s)	CASE NO: A-19-788630-C DEPT. NO. Department 4

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4 Hearing Date: August 17, 2022 Hearing Time: 9:00 a.m.

OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL OR REMITTITUR

Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, opposes the Defendant's Motion for New Trial or Remittitur.

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INTRODUCTION

After a thorough evaluation with a team of leading experts, a world-renowned radiation oncologist concluded that Bill Eskew needed proton beam therapy to treat his lung cancer. Unlike other treatment options, proton therapy would target his cancer, while sparing the critical organs that surrounded it. But Bill couldn't get the treatment he needed because Sierra Health and Life denied coverage. The jury in this case was presented with overwhelming evidence that in doing so, SHL breached its duty of good faith and fair dealing. And following eleven days of trial, the jury agreed, awarding Bill's wife Sandy substantial compensatory and punitive damages.

SHL nevertheless contends that it is entitled to a do-over. It gives two reasons why. *First*, it cobbles together a hodgepodge of statements from the Eskews' counsel, taken out of context over the course of the 11-day trial, and claims that they constitute misconduct that was so egregious that it undermines the reliability of the jury's verdict—even though, during trial, SHL never objected to the lion's share of that supposed misconduct. SHL's failure to object means that it must show that those statements constitute "plain error"—that is, that "it is plain and clear that no other reasonable explanation for the verdict exists." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 75, 319 P.3d 606, 612 (2014). *Second*, SHL argues that the jury's verdict is simply too high—so high it must reflect passion and prejudice. But "[t]he mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993). Instead, the court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 258, 235 P.3d 592, 602 (2010).

Both of SHL's arguments fail, and for the same reason: The verdict is easily explained by the evidence. The overwhelming evidence at trial showed that SHL sold Bill a platinum insurance plan that expressly covered therapeutic radiation, but—unbeknownst to Bill—the company had a secret internal policy of automatically denying coverage for proton beam therapy, the kind of therapeutic radiation he needed. Although SHL claimed this corporate

policy was based on science, there was ample evidence that it was actually based on cost. In fact, SHL's sister corporation itself operated a proton beam therapy center. There was also ample evidence that the treatment Bill had to settle for because he wasn't able to get the proton therapy he needed caused Grade III esophagitis, leading him to spend the last months of his life in pain, isolated, ill, unable to eat or drink, and vomiting daily.

Thus, even if statements made by the Eskews' lawyers at trial constituted misconduct—and they did not—SHL cannot show that the jury would have reached a different conclusion in their absence. Nor can it show that the jury was motivated by passion and prejudice.

For similar reasons, SHL is not entitled to a remittitur. Substantial evidence supports the jury's compensatory and punitive awards, and due process does not require a different result. The punitive award that the jury approved—of just four times its compensatory award—is well within constitutional and statutory bounds. That is especially so because Nevada's legislature specifically gave insurers notice that they may face awards of a similar ratio when they commit bad faith.

LEGAL STANDARDS

A district court may grant a new trial based on the prevailing party's misconduct or an award of "excessive" damages only if the movant can demonstrate that its "substantial rights" have been "materially affect[ed]." NRCP 59(a)(1)(B) & (F). The court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena*, 126 Nev. at 258, 235 P.3d at 602 (here, and unless otherwise mentioned, throughout, all quotations cleaned up). A district court draws the same presumptions and inferences in evaluating a motion for a remittitur. *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010). So long as "substantial evidence" supports the jury's verdict, it may not be subject to judicial revision. *Id.*

ARGUMENT

SHL seeks a new trial on the grounds that the only possible explanation for the jury's verdict are remarks made by the Eskews' counsel or the jury's own passion and prejudice. Failing that, SHL asks the Court for a "drastic" judicial revision of the jury's damages awards.

It is wrong on all counts. As this Court well knows from observing every stage of this trial, Sandy introduced ample evidence from which the jury could have reached its result. SHL, therefore, falls far short of showing that the jury's award was based on any unfair prejudice.

I. The Eskews' counsel did not engage in misconduct warranting a new trial.

A. Nevada law places a heavy burden on objecting parties to establish that misconduct warrants a new trial.

Nevada law permits a district court to grant a new trial based on a prevailing party's misconduct only if the movant can show misconduct affecting its "substantial rights." *Gunderson*, 130 Nev. at 74, 319 P.3d at 611. This requires showing misconduct in the first place. *See id.* But even misconduct isn't enough. "To justify a new trial, as opposed to some other sanction, unfair prejudice affecting the reliability of the verdict must be shown." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 132–33, 252 P.3d 649, 656 (2011); *see also Gunderson*, 130 Nev. at 74, 319 P.3d at 611. Together, these elements pose a high bar.

Counsel "enjoy[] wide latitude in arguing facts and drawing inferences from the evidence." *Grosjean v. Imperial Palace*, 125 Nev. 349, 364 212 P.3d 1068, 1078 (2009). What they may not do is "make improper or inflammatory arguments that appeal solely to the emotions of the jury." *Id.* Thus, the Nevada Supreme Court has generally instructed that statements "cross[] the line between advocacy and misconduct" when they "ask[] the jury to step outside the relevant facts" and reach a verdict based on its "emotions" rather than the evidence. *Cox v. Copperfield*, 138 Nev. Adv. Op. 27, 507 P.3d 1216, 1227 (2022); *see also Grosjean*, 125 Nev. at 365, 212 P.3d at 1079. Argument thus may urge the jury to "send a message"—but it cannot ask the jury to "ignore the evidence." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017).

Even when misconduct occurs, whether it amounts to "unfair prejudice" warranting a new trial depends on context. *Roth*, 127 Nev. at 132–33, 252 P.3d at 656. Most importantly, it depends on whether the moving party "competently and timely" stated its objections and sought to correct "any potential prejudice." *Lioce v. Cohen*, 124 Nev. 1, 16, 174 P.3d 970, 980 (2008).

That is because "the failure to object to allegedly prejudicial remarks at the time an argument is made . . . strongly indicates that the party moving for a new trial did not consider the arguments objectionable at the time they were delivered, but made that claim as an afterthought." *Ringle v. Bruton*, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004). Nor is simply objecting enough. Parties must also "promptly" request that the court admonish the offending counsel and the jury. *Gunderson*, 130 Nev. at 77, 319 P.3d at 613.

The Supreme Court thus has adopted a sliding scale for assessing prejudice. When the moving party fails to object, it bears a particularly high burden: It must show "plain error"—that is, that the misconduct "amounted to irreparable and fundamental error" resulting "in a substantial impairment of justice or denial of fundamental right," such that "it is plain and clear that no other reasonable explanation for the verdict exists." *Id.*, 130 Nev. at 75, 319 P.3d at 612. When, by contrast, the moving party *does* object, the question becomes what steps the party took to cure any prejudice. If the court sustained an objection and admonished counsel and the jury, the moving party must show that the misconduct was "so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 124 Nev. at 17, 174 P.3d at 981. If the moving party never sought an admonishment, it must instead show that the misconduct was "so extreme" that what did occur—objection and sustainment—"could not have removed the misconduct's effect." *Gunderson*, 130 Nev. at 77, 319 P.3d at 613. Meanwhile, if the moving party objected but its objection was overruled, it bears the burden of showing that it was error to overrule the objection and that an admonition would have affected the verdict in its favor. *Lioce*, 124 Nev. at 18, 174 P.3d at 981.

B. SHL has not carried its burden of showing that any attorney conduct here meets the high standards for misconduct warranting a new trial.

SHL cannot meet these standards. It points to three types of statements that supposedly warrant a new trial here: (1) injection of "personal beliefs into the proceedings," (2) leveling personal "attack[s]" at SHL's counsel, and (3) urging SHL's witness to make certain commitments. But none of the statements it points to constitutes misconduct. Indeed, at trial,

most of them didn't trouble SHL at all. That means that especially stringent standards for ordering a new trial apply. And SHL has not met them.

1. Counsel's supposed statements of personal belief were not misconduct warranting a new trial.

SHL first argues that various counsel statements violated RPC 3.4(e), which bars attorneys from "stat[ing] to the jury a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant." *Lioce*, 124 Nev. at 21, 174 P.3d at 983. But most of the statements SHL complains about are far outside this rule's ambit. And even the statements that touched on the subject matter RPC 3.4(e) prohibits didn't rise to the level of misconduct. And even if they were misconduct, under the applicable standards of review, they do not warrant a new trial.

a. Descriptions of facts as "remarkable" or "tragic." Start with counsel's occasional statements about what was "remarkable" or "tragic." Even if these were personal opinions, they weren't opinions about the justness of a cause, credibility of a witness, or culpability of a litigant. *See, e.g.*, App-2531 (a particular jury instruction was "remarkable"); App-2543–44 ("remarkable" which witnesses SHL put on); App-2543 ("tragic" that a witness hadn't heard of the duty of good faith). Indeed, the statements are so banal that SHL didn't bother to object to a single one—failing not only to object contemporaneously, but also when the Court explicitly asked if the parties had any issues to raise outside the presence of the jury. *See* App-2535–41.

That means that even if these stray remarks were misconduct, they are reviewed for plain error—which SHL can't show. Errant comments cannot provide the only possible explanation for the verdict because "other reasonable explanation[s]" exist. *Gunderson*, 130 Nev. at 75, 319 P.3d at 612. The evidence, viewed in the light most favorable to Bill's estate, was overwhelming. As we explain in more detail in our opposition to SHL's motion for judgment as a matter of law, the jury heard evidence that SHL sold Bill a platinum health insurance policy—one that expressly covered therapeutic radiation services like PBT. App-1035–40, 1057. It heard evidence that Bill's doctor—a leading expert in radiation oncology at the leading cancer center in the world—determined that PBT was medically necessary to treat

his lung cancer, while sparing the critical organs nearby. Liao Dep. 48–49, 69–75, 84–88; App-531–33, 539–40, 1067–68, 1106.

But, the jury learned, SHL refused to approve PBT. That's because SHL had a corporate medical policy of refusing to approve PBT for lung cancer at all. App-331–33, 813–18, 837–45. So when SHL sent Bill's claim through PBT's standard prior approval process, the jury heard that its reviewer—who SHL held out as a medical expert, but who had no expertise in radiation oncology and couldn't even answer basic questions about Bill's tumors or radiation treatment—didn't bother to investigate the claim. App-247–48. 250, 337–41, 463, 1083–84, 1114. Instead, he took all of 12 minutes to deny the claim. App–319–21. SHL contends it did this because PBT is not medically necessary, but overwhelming evidence showed otherwise, *see* App-106, 116–17, 331–41 (SHL policy acknowledging benefits of PBT); App-660–61 (studies cited in SHL policies support use of PBT)—indeed, its own sister company operated a PBT center, App-720–22, 901–11. In other words, the evidence showed that SHL denied coverage for PBT not because of science but because of cost.

Meanwhile, the jury heard that the IMRT treatment Bill had to get instead devastated his physical and emotional health. It learned that the intensive radiation generated by IMRT caused "Grade III esophagitis"—meaning Bill spent the last months of his life weak, unable to eat or drink, vomiting daily, and losing weight or unable to keep it on. App-594–606, 680–83, 709–11, 719–20, 1203–08, 1256–58, 1324, 1401–13; Liao Dep. 76–77, 81–83, 155. And it learned that Bill became withdrawn, isolated, and unhappy, unable to enjoy the company of his family or the activities he once loved. App-1200–02, 1256, 1259–60, 1416–18, 1610.

Faced with this evidence, the verdict here is no surprise: SHL did not, and could not, show that a few words by the Eskews' counsel constituted an "irreparable and fundamental error" without which the jury would have reached a different conclusion. *Lioce*, 124 Nev. at 19, 174 P.3d at 982. SHL's argument to the contrary (at 3) is that the short length of the jury's deliberation and the damages awards it settled on somehow show that the purported misconduct "worked." Exactly the opposite is true. The jury didn't need long to deliberate, and reached its awards, because the evidence was overwhelming—not because of a "few sentences" counsel

uttered over the course of a "lengthy" trial. *Cox*, 507 P.3d at 1228. SHL thus falls far short of showing that this is the "rare" circumstance in which misconduct amounts to plain error. *Lioce*, 124 Nev. at 19, 174 P.3d at 982.

b. Suggestions of hypocrisy. Counsel's statements concerning SHL's contradictory behavior don't warrant a new trial either. *See* Mot. at 8. They, too, aren't prohibited personal opinions. The suggestion that it was "hypocrisy" for SHL's sister company to offer the very treatment the company refused for Bill, for instance, was a summary of the evidence—which showed that SHL put on witnesses insisting that PBT was medically unnecessary while another part of its corporate umbrella was investing in a PBT treatment center. *Compare* App-1817–20, 2037–44, 2302–14, *with* App-720–22, 901–11. Pointing out this sort of contradiction isn't misconduct. As the Nevada Supreme Court has explained, statements "invit[ing] the jury to consider the contradiction" between statements made in court and other evidence in the record "amount[] to advocacy, not misconduct, and do not establish grounds for a new trial." *Cox*, 507 P.3d at 1227.

And even if the statements were misconduct, they wouldn't warrant a new trial. SHL did level a successful objection to the comments. But because it failed to request an admonishment, the statements are reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect.[1] *See Gunderson*, 130 Nev. at 77, 319 P.3d at 613. SHL falls far short of this showing. It doesn't even bother to explain why sustainment was insufficient—let alone how a jury that was concerned about SHL's hypocrisy would put more weight on counsel's opinion to this effect than on the strong underlying evidence on that point. And sustainment easily removed any prejudicial effect. The jury was explicitly instructed not only that counsel's statements, arguments, and opinions were not evidence, but also that it should disregard evidence to which an objection was sustained. Instruction 8. Juries presumptively follow such instructions. *Summers v. State*, 122 Nev. 1326,

[1] The one admonishment SHL did obtain—this Court's informing counsel at one point that his behavior was "inappropriate," App-2315—had nothing to do with any of the purported misconduct SHL highlights here, but rather with one witness's questioning, *see* App-2299–314. SHL has not suggested that this had anything to do with the jury verdict.

1333, 148 P.3d 778, 783 (2006). A sustained objection under these circumstances thus generally precludes a finding of prejudice. *See Walker v. State*, 78 Nev. 463, 467–68, 376 P.2d 137, 139 (1962). So too here.

c. Statements describing witness conduct. SHL also complains (at 8) about counsel's description of Dr. Kumar's testimony. *See* App-2511. These statements are no closer to actionable misconduct, but even if they were, SHL again cannot show prejudice.

Nevada courts have not turned every arguable statement of personal belief into an instance of misconduct. Rather, they have instructed that what matters is what the statements ask the jurors to do—to "step outside the relevant facts" and reach a verdict based on their emotions instead. *Cox*, 507 P.3d at 1227 (statements were improper "because they asked the jury to step outside the relevant facts" and hold a party not liable because of its bad motivations; while statements that simply invited the jury to consider the contradiction between different statements were not improper personal opinions); *Grosjean*, 125 Nev. at 368–69, 212 P.3d at 1081–82 (attorney committed misconduct by appealing to jury's emotions rather than facts in evidence); *Lioce*, 124 Nev. at 21–22, 174 P.3d at 983–84 (attorney committed misconduct by calling a plaintiff's case frivolous and worthless). Counsel's statements here did none of these things. They were closely tied to and about the evidence the jury did see—that Dr. Kumar couldn't "uphold the opinions he gave." App-2512.

And even if these statements could amount to misconduct, they wouldn't warrant a new trial. Because SHL failed to object to them, they are reviewed for plain error. And it is not "plain and clear that no other reasonable explanation for the verdict exists." *Gunderson*, 130 Nev. at 75, 319 P.3d at 612. As above, the strong evidence supporting the plaintiff's case easily supplies that explanation, and SHL gives no reason to think counsel's characterization of one witness's testimony made a difference.

d. Instructing the jury how to fill out the verdict form. Counsel's statements concerning the verdict form are no more objectionable. These statements simply explained how the jury should complete the verdict form if it agreed with the plaintiff. *See* App-2578, 2692. They were offered as part of counsel's ordinary function of assisting the jury in supplying the evidence to

the law. *See* Instruction 38. SHL's counsel made similar statements. *See, e.g.*, App-2634–35 ("So I think you'd start with that if you find that we should have approved it."). And that's because these are ordinary ways of expressing what a party seeks—not means of injecting an improper personal opinion into the proceedings. Presumably that's why SHL didn't object to the comments at the time.

Nor can SHL meet the plain error standard that thus applies. The Eskews' strong evidence again far outweighs any possible prejudicial effect from the way counsel described the verdict form.

2. Counsel did not level improper personal attacks, and even if they had, a new trial wouldn't be warranted.

SHL next argues (at 9–11) that it deserves a new trial because its counsel faced improper personal attacks "falsely accusing" them "of calling Ms. Eskew a liar." This wasn't misconduct either, let alone misconduct warranting a new trial.

For starters, the statements SHL complains about weren't false. SHL's objective at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony. When Tyler Eskew took the stand, for instance, SHL began suggesting that the family was exaggerating Bill's complaints. *See* App-1221–24, 1239–43. The same tactic continued with BJ. *See* App-1342, 1346–52. And SHL doubled down with Sandy. *See, e.g.*, App-1448–49, 1484–1526, 1529–41. It repeatedly suggested that Sandy's testimony was driven by what was "helpful for your case," rather than the truth. App-1448–49; *see also* App-1489–90 (asking for agreement that "memories can sometimes fade" or be "influenced" because people can have "an intent to say certain things, a reason, a motive").

At the time, there was no doubt about SHL's intentions: to suggest to the jury that Sandy was lying. That's how Sandy understood them. *See* App-1549–50 (Q: "And would you agree that [the monetary recovery in this case provides] an incentive for you to say what you're saying; correct?" A: "No. I did not lie."). And it's what SHL's counsel thought too. At a break, when plaintiff's counsel noted that SHL was suggesting that Sandy was "lying or magnifying her problems," counsel for SHL agreed: "And yes, obviously it's my client's position that it

shouldn't be a surprise to anyone in this room that Mrs. Eskew is embellishing on her husband's condition." App-1458–59; *see also* App-1460 (claiming the "right" to cross-examine and challenge whether or not she is being accurate and truthful"). SHL thus at the very least implied that the Eskews were lying—and it wasn't misconduct to point that out.

All the more so because it's not an "attack," let alone one amounting to attorney misconduct, to suggest that a party or counsel for one party called another a liar. Nevada courts have never hinted otherwise. The only remotely relevant case SHL can identify concerns wildly different comments than this one—comments falsely insisting it was "outrageous" for opposing counsel to request a sidebar and comments referring to opposing counsel, co-counsel, and witnesses with shocking, profane terms. *Born v. Eisenman*, 114 Nev. 854, 861–62, 962 P.2d 1227, 1231–32 (1998). It doesn't stand for the proposition that any comment that could somehow reflect poorly on opposing counsel amounts to misconduct.

And in any event, even if the conduct were misconduct, it wasn't prejudicial. Most of it should be reviewed for plain error, as SHL doesn't seem to have thought it was a problem during trial. Although it objected to one line of questioning, it did so on relevance grounds—and the Court overruled those objections, as the comments were obviously relevant given the line of questioning SHL had just embarked on. *See* App-1543–45. Only at closing did SHL make the objection it now raises. But viewed in context, that objection and its sustainment were more than sufficient to cure any possible prejudice. Counsel immediately and plainly clarified his meaning—that SHL had at minimum suggested that Sandy was "embellishing" what happened to her. App-2509. Especially once clarified, counsel's comments do not provide the only possible explanation for the verdict.

3. Asking a witness for their position on their employer's conduct is not misconduct warranting a new trial.

Finally, SHL insists that the Eskews' counsel committed misconduct in questioning SHL's director of pre-service reviews, Shelean Sweet. During the trial's liability phase, Ms. Sweet had testified that no one at SHL had informed her about the duty of good faith and fair dealing. App-779–80. By the damages phase, though, she said that would change: Because of

the jury's liability decision, the company was now going to offer annual training on that duty. App-2774–75. To probe whether the company took the jury's verdict seriously as she claimed, counsel asked her to tell the jury the company's view of that verdict. App-2778–79. SHL takes issue with that question because, it says (at 3, 11), it was given as a "command," and therefore was a "blatant and shocking violation" of the "norms" of American law. But it's not misconduct to phase a question as a statement rather than a question, and SHL cites no authority to the contrary. Nor does SHL explain why it was improper for Sandy's counsel to examine whether SHL was as contrite as it claimed.

And again, SHL failed to object on these grounds at trial. All it said at the time was that the "form" of the question was "too broad"—not that it was improper or somehow violating American legal norms. App-2778–79. But in any event, whether reviewed for plain error or for whether an admonishment could somehow have changed the verdict, SHL hasn't shown that this line of questioning had any impact, let alone that it warrants a new trial.

4. Cumulative review makes no difference.

Perhaps recognizing that none of this conduct can, standing alone, demonstrate the need for a new trial, SHL urges the Court to weigh its assorted misconduct claims together and conclude that they are prejudicial as a whole. That is neither warranted nor helpful to SHL. Nevada courts have held that persistent misconduct should be evaluated differently when it is repeatedly objected to. *See, e.g.*, *Lioce*, 124 Nev. at 18, 174 P.3d at 981. That rule is designed to avoid requiring counsel to repeat objections that have already been made and sustained and failed to change counsel behavior. But it provides no guidance when, as here, most of the conduct SHL complains of was never objected to at all. And in any event, SHL's arguments fare no better when plaintiff's counsel's supposed misconduct is aggregated. However it is viewed, the handful of assorted statements SHL complains about fall far short of explaining the jury's verdict. As this Court noted when it observed the parties' professionalism throughout trial, *see* App–2832, this trial was an ordinary one not marred by persistent misconduct.

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II. A new trial is not warranted on the grounds that the verdict was tainted by passion and prejudice.

Nevada law also permits a new trial on the ground that the verdict included "excessive damages." NRCP 59(a)(1)(F). Here, too, the standard is high. The Supreme Court has "long held that 'in actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed.'" *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443, 454–55, 686 P.2d 925, 932 (1984) (citation omitted). A court thus "is not justified" in "granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Id.* In this inquiry, as above, the court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena*, 126 Nev. at 258, 235 P.3d at 602.

SHL offers two reasons (at 12–17) why the verdict here supposedly reflects improper passion and prejudice: The damages were too large, and counsel's purported misconduct "so thoroughly permeated the proceeding" that it "tainted the entire trial." Both fail.

1. The size of the verdict does not demonstrate that it was flagrantly improper.

SHL argues that the size of the jury's verdict is somehow on its own "indisputable evidence" that the jury here acted on passion and prejudice. But this argument misapprehends Nevada law. Applying the proper standard, the record here easily supports the jury's verdict.

The Nevada Supreme Court has been clear: "The mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192, *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999); *see also Guaranty Nat. Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 273 (1996) ("size of award" is not "conclusive evidence" of passion or prejudice); *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 285, 646 P.2d 553, 555 (1982) (despite being "unusually high," jury's award was not so "flagrantly improper" as to suggest passion, prejudice, or corruption).

That rule makes sense. Successful plaintiffs, the Supreme Court has emphasized, are "entitled to compensation for all the natural and probable consequences" of a wrong, including "injury to the feelings from humiliation, indignity and disgrace to the person," and both "physical" and "mental suffering." *Hernandez v. City of Salt Lake*, 100 Nev. 504, 507, 686 P.2d 251, 253 (1984). What that pain and suffering is worth is a "wholly subjective" question, one that by its "very nature . . . falls peculiarly within the province of the jury." *Stackiewicz*, 100 Nev. at 454–55, 686 P.2d at 932. Only where an award is unsupported by substantial evidence such that it "shock[s]" the "judicial conscience," *Guaranty*, 112 Nev. at 207, 912 P.2d at 272–73, can a court consider "substitut[ing its] judgment for that of the jury," *Hernandez*, 100 Nev. at 507–08, 686 P.2d at 253.

The record here easily supports the jury's judgment. As discussed above, Sandy introduced evidence supporting each element of her claim. When it came to compensatory damages, the jury heard detailed evidence of the devastating consequences Bill suffered as a result of being denied PBT. It heard that he led a happy, family-oriented life prior to his diagnosis and treatment, App-1185–86, 1318, 1357, 1365, 1371–72, 1607, including that he was a lover of food who eagerly visited restaurants and proudly hosted and cooked a weekly family dinner, App-1186–88, 1249, 1259, 1357, 1365–67, 1608–09. But, the jury learned, the treatment for Bill's cancer changed all that. It learned that when SHL denied him access to PBT, he had to get IMRT instead. Liao Dep. 92–93, 155–157; App-341, 606–07. And that treatment, experts explained, scorched Bill's esophagus, causing acute and then chronic Grade III esophagitis—a debilitating condition that prevented Bill from eating and caused weight loss, vomiting, and isolation up until his death. App-593–99606, 676, 681–83, 709–11, 718–20; Liao Dep. 76–77, 81–83, 155. Bill's family testified that the condition made Bill's last months on earth miserable. He could barely walk and was in a lot of pain, App-1400–01; was unable to eat or swallow, feeling that something was constantly stuck in his throat, App-1203–04, 1256, 1611–12; vomited (or dry heaved) constantly, App-1204–06, 1257–58, 1324, 1412–13; became physically weak, App-1256, 1319, 1324–25; and lost much of his dignity, App-1256–59. His personality and enjoyment of life suffered too. He became withdrawn and angry, dodging once-beloved

mealtimes, holidays, family gatherings, and friends. App-1200–04, 1259–60, 1416, 1610. It was well within the jury's discretion to value Bill's excruciating pain from a scorched and scarred esophagus, his inability to eat, his loss of the enjoyment of life and family relationships, his mental anguish and loneliness, and his loss of his personality at $40 million.

Meanwhile, as discussed further below, the jury heard extensive evidence supporting a punitive damages award several times the size of this compensatory award. For instance, the jury heard that Bill's suffering was part of a pattern or practice—specifically, that it was the result of a corporate policy motivated by profit rather than a high standard of care. When it was responsible for *paying* for treatment, SHL deliberately set up a procedure to automatically deny PBT claims, without regard to the recommendations of the treating physician, the needs of the individual patient, or its duty of good faith and fair dealing. App-287, 339–41, 779–80, 822–23, 837–46, 860–63, 876–80, 1082–87. But when it came to *selling* that treatment, SHL had no such concerns. Despite SHL's automatically denying claims like Bill's, its sister corporation invested in a proton center that employs the exact same treatment the company denied Bill to treat cancers just like his. App-720–22, 901–11. The jury could have concluded that this behavior warranted a meaningful punishment. And it could have placed similar weight on other evidence—like the evidence that SHL could have, but chose not to, inform patients about its hidden corporate policy to automatically deny PBT claims before they obtained coverage. *See* App-1061–62.

These circumstances stand in stark contrast to the cases relied on by SHL, where there was "no objective basis in the record" to support the jury's verdict and ample "conflicting testimony" regarding the extent of the plaintiffs' injuries. *See DeJesus v. Flick*, 116 Nev. 812, 820, 7 P.3d 459, 464–65 (2000), *overruled by Lioce*, 124 Nev. at 1, 174 P.3d at 970.

SHL's arguments that this Court should nevertheless reject the jury's result fail. *First*, SHL puts excess weight on outcomes in other cases. Nevada courts have counseled against exactly this approach, instructing that courts should look to whether an award is reasonable "under the facts and circumstances of the particular case" and disapproving treating "the fact that juries in other similar cases have fixed a much lower amount as damages as controlling on

the question of excessiveness." *Wells, Inc., v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947); *see Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10 (citing *Wells* and describing as an "abuse of discretion" considering whether damages awards are "excessive as compared to damages awards rendered in similar cases"); *see also Morga v. FedEx Ground Package Sys., Inc.*, -- P.3d --, 2022 WL 1594784, at *6–7 (N.M. 2022) ("[W]e remain skeptical" of the "usefulness of comparing awards" across cases given that "the amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and in the final analysis, each case must be decided on its own facts and circumstances.").

And in any event, SHL is mistaken. The verdict here is not an outlier. SHL can only argue otherwise by artificially restricting its comparison to cases available through a limited Westlaw keyword search in which Nevada appellate courts have upheld verdicts. But Bill Eskew's suffering was not different because he happened to live in the state of Nevada, and the range of reasonable verdicts are not limited to those that have been the subject of appellate review. And looking to cases around the country, juries routinely reach verdicts comparable to what this jury reached here. For instance, when it comes to compensatory damages, contemporary juries have valued the pain and suffering a child suffered in a boating accident at $75 million. *See Batchelder v. Malibu Boats, LLC*, No. 2016-cv-0114 (Ga. Super. Ct. Aug. 28, 2021).[2] They have awarded the estate of the victim of a semiautomatic gun attack over $100 million.[3] They have valued one worksite accident victim's pain and suffering to date at $55 million, *see Cruz v. Allied Aviation*, No. 2019-81830 (Tex. Dist. Ct. Oct. 25, 2021),[4] and awarded another $38 million, *see Ford v. Ford Motor Co.*, 585 S.W.3d 317, 323–27 (Mo. Ct. App. 209); *cf., e.g.*, *Morga*, 2022 WL 1594784, at *2 (compensatory damages of $61 million, $32 million, and $40 million); *Latham v. Time Ins. Co.*, No. 2006cv1040 (Colo. Dist. Ct. Jan.

[2] Verdict viewable at https://perma.cc/6ENY-KM8E.

[3] *See* Kristen Fiscus and Mariah Timms, *Jury awards over $200 million to mother of Waffle House shooting victim,* Tennessean (May 12, 2022), https://perma.cc/K58M-82Q5.

[4] Verdict viewable at https://perma.cc/ECD8-MSRH.

2010) (compensatory damages of $37 million); *Lennig v. CRST*, No. MC025288, 2018 WL 1730708 (Sup. Ct. Cal. Feb. 21, 2018) (compensatory damages of $53.6 million).

And punitives are no different: Juries routinely reach multimillion-dollar verdicts and give punitive damages awards that are orders of magnitude larger than their compensatory equivalents. *See, e.g.*, *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-cv-1087 (N.D. Tex., Feb. 14, 2001) (punitive award of $310 million, with ratio over 100:1); *Indus. Recovery Capital Holdings Co. v. Simmons*, No. 08-2589 (Tex. Dist. Ct. July 17, 2009) (punitive damages award of $140 million, with ratio over 4:1); Erik Eckholm, *$85 Million Awarded Family Who Sued HMO* (N.Y. Times Dec. 30, 1993), https://perma.cc/DHM9-T7UC (punitive damages award of $77 million, with 6:1 ratio); *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d 1168, 1191 (D. Nev. 2008) (punitive award of $24 million and 9:1 ratio not excessive).

Second, the jury's award did not, as SHL suggests (at 14), "far exceed[]" what the Eskews sought. The jury was qualified for a broad range, and $30 million was offered as a mere "suggestion," not an upper bound. App-2575–77; *see also id.* (noting that $50 million would also be reasonable); App-2766 (Sandy asked for "upwards of $50 million in voir dire"). Nevada courts have weighed this concern heavily only where the verdict has been *three to four times* what was requested, *see, e.g.*, *DeJesus*, 116 Nev. at 820, 7 P.3d at 465, while describing as "permissibl[e]" deviations far greater than what occurred here, *see Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006) (50 percent larger than plaintiffs' request).

Third, counsel was not somehow "desperately attempt[ing] to salvage" a flawed compensatory award when they suggested a punitive range. There's nothing wrong with the compensatory award (or the punitive damages award). *Fourth*, the fact that SHL is a corporation does not suggest that the jury was motivated by passion or prejudice. The jury was explicitly admonished not to be influenced by that fact, *see* Instruction No. 6, an obligation SHL's counsel made sure they were aware of, *see* App-2582–83. And *finally*, the reduction in *Nevada Independent Broadcasting Corporation v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983), is of no moment here. As the Nevada Supreme Court has subsequently emphasized, that award was reduced "because of the specific circumstances of that case," including the fact that the

involvement of a media defendant placed "First Amendment concerns" at the "forefront" in any evaluation of the damages award. *Bongiovi*, 122 Nev. at 578, 138 P.3d at 449.

2. SHL's hodgepodge of counsel statements does not demonstrate that the verdict was flagrantly improper.

SHL next urges the court to conclude that the jury was "swayed by passion and prejudice" because counsel's supposed misconduct "so thoroughly permeated the proceeding" that it "tainted the entire jury trial." Br. at 14 (quoting *DeJesus*, 116 Nev. at 820, 7 P.3d at 464.) The insurer's only argument on this point is to assert that the statements discussed above, together with "other ways" that counsel "fuel[ed] the fires of prejudice," are the only possible explanations for the jury's verdict. But we explained above why that's not true of counsel's statements. And the smattering of other conduct SHL complains of doesn't explain the verdict either.

SHL cites no authority suggesting that the arguments employed here would so "inflame" a jury as to require depriving it of its customary role evaluating how to compensate or punish harm. And that is because there is none. It was an ordinary argument that SHL's claims system was rigged to favor a cheaper procedure, and ordinary advocacy to point out the contradictions in SHL's position—all well-supported by the evidence. *See Cox*, 507 P.3d at 1227 ("invit[ing] the jury to consider" a contradiction amounts to "advocacy" and does "not establish grounds for a new trial"). Meanwhile, SHL's *own witnesses* agreed that jury verdicts play a role in regulating conduct. *See* App-1786–88, 2685.

The cases SHL can find don't say otherwise. In *Hazelwood*, for instance, there was no evidence that the plaintiff had even suffered a physical injury—let alone experienced the sort of suffering Bill did. 109 Nev. at 1010, 862 P.2d at 1192. And that case, in any event, concerned a different question than this one—whether a district court had abused its discretion in reducing an award, not whether it should grant a new trial or reduce the award in the first place. Meanwhile, although *Lioce* reiterated the common rule that counsel may not make golden-rule arguments, counsel here did not do so. Viewed in context, counsel's statements about "your health" were descriptions of Bill's experience—what it was like to be "married to a woman for

30 years" and to have "two kids." App-2576. They weren't invitations for the jury to make a decision based on an improper hypothetical. *See Lioce*, 124 Nev. at 22, 174 P.3d at 984.

And, finally, each instance of misconduct documented in *DeJesus* was dramatically worse than anything in this case. 116 Nev. at 817–20, 7 P.3d at 463–65. That included a lawyer's personal guarantee that he could have gotten a defense witness to offer contradictory testimony for enough money; the statement that certain lines of questioning weren't needed because they would merely have made the witness "look a little more stupid" than he already did; the instruction to take a witness's testimony and "tear it up and throw it in the garbage"; the statement that the lawyer personally did not like the defendant because the defendant had "nearly killed a couple people"; and impermissible golden-rule arguments. *Id.* And these were just illustrative examples of the lawyer's statements in *DeJesus*—the lawyer's improper conduct had "permeated" the proceedings. *Id.* Nothing similar happened here.[5]

III. The Court should not remit the damages awards.

"A jury is permitted wide latitude in awarding tort damages." *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). Thus, just as a court is constrained in ordering a new trial based on a jury's damages award, so it "may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." *Stackiewicz*, 100 Nev. at 455, 686 P.2d at 932; *see also Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192. When faced with a request for a remittitur, Nevada courts "presume that the jury believed" the prevailing party's evidence and "any inferences" derived therefrom and ask whether substantial evidence supports the verdict. *Wyeth*, 126 Nev. at 470, 244 P.3d at 782. In general, they will only reduce a damages award that was "given under the influence of passion or prejudice or "shocks" the conscience. *Id.* Or, in rare cases, an award may be so large as to violate due process. SHL can't show either circumstance here.

[5] And in any event, the Nevada Supreme Court in *Lioce* disapproved the tests employed in *DeJesus*, describing the "permeation rule" as "incomplete" and the "inflammatory quality and sheer quantity" test as "unworkable," and explaining the importance of developing a plain error standard that incentivizes attorney objection. *Lioce*, 124 Nev. at 17, 174 P.3d at 980.

A. The compensatory damage award wasn't given under the influence of passion or prejudice and is supported by substantial evidence.

We have already explained why substantial evidence supports the jury's compensatory damages award. SHL's arguments to the contrary (at 17–18) fail.

It first argues that one of the plaintiff's experts conceded that the use of IMRT did not affect the progression of Bill's cancer. But the Eskews' pain-and-suffering arguments weren't about the progression of Bill's cancer—they were about the excruciating pain and suffering caused by the only treatment SHL allowed Bill to access. Relatedly, SHL claims that much of Bill's pain and suffering could be attributed to his cancer rather than its treatment. But it doesn't say what evidence the jury was obligated to treat as definitive on this point—nor does it explain why the jury was required to disregard the ample contrary testimony, including multiple experts' assessments that that suffering was caused by IMRT. *See* Liao Dep. 76–78; 81–83, 155; App-598–99, 602–06, 676, 680–81, 710–11, 718–20.

SHL also contends that the suffering involved in an esophagus so scorched and scarred by radiation that it could barely function is minimized by the fact that it lasted less than a year. But the jury heard ample evidence of how SHL took from Bill the biggest joys in his life and left him with months upon months of excruciating suffering and anguish—and it was in the best position to evaluate how to measure that pain in damages.

Then, SHL insists that the jury's damages award had to be limited to the difference between the Grade III esophagitis Bill suffered and the Grade I or II esophagitis he would have experienced had he been treated for PBT anyway. But the jury was instructed how to evaluate causation in this case. Jury Instructions 27 and 28. And it was entitled to believe the evidence that SHL's decisions caused Bill's pain and suffering, including the witnesses who attributed that suffering to Grade III esophagitis and testified that he would not have experienced those symptoms if he had received PBT. *See, e.g.*, Liao Dep. at 69–70, 73–75, 80–83; App-598–99, 605–08.

Further, SHL argues that the jury couldn't award any emotional damages because the plaintiffs didn't present evidence of a "physical manifestation of emotional distress." But that is not the law. The physical manifestation requirement applies only to cases "where emotional

damages are not secondary to physical injuries, but rather, precipitate physical symptoms." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998). Here, emotional damages *are* secondary to physical injuries, as there was ample evidence that SHL's conduct caused debilitating esophagitis—a physical injury to the esophagus. The emotional damages documented here thus are exactly the sort of harms Nevada courts have accepted as evidence supporting compensatory damages. *See Guaranty*, 112 Nev. at 207, 912 P.2d at 272; *see also* Restatement (Second) of Torts § 924(a) (1979) ("One whose interest of personality have been tortuously invaded is entitled to recover damages for past or prospective bodily harm and emotional distress.").

SHL's caselaw doesn't say otherwise. The fact that scattered courts have occasionally remitted large awards in cases presenting entirely different facts than this one provides no guidance as to whether the evidence in this case was sufficient, *see Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783—especially when, as we explained above, there are plenty of verdicts similar to the one here. And most of SHL's cases are simply inapposite. We have already explained why that is true of *Hazelwood* and *Nevada Independent Broadcasting*. In *State v. Eaton*, 101 Nev. 705, 710, P.2d 1370 (1985), meanwhile, the district court ordered reductions because of a statutory requirement—not because it deemed it proper to invade the province of the jury. And *Jacobson v. Manfredi*, 100 Nev. 226, 679 P.2d 251 (1984), involved a district court's *additur* because a jury's verdict was manifestly insufficient. It provides no guidance on whether this jury's verdict was excessive.

B. Due process does not require judicial revision of the jury's damages award.

SHL finally contends that, if nothing else, the award in this case must be reduced in order to comport with the standards of due process. It is wrong. "Only when an award can fairly be categorized as 'grossly excessive,'" *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 582 (1996), such that it "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm Mut. Aut. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), does the due process clause authorize—let alone require—reducing that award. Neither award in this case meets that standard.

1. The punitive award is not grossly excessive.

Due process constraints on punitive damages exist to ensure that every party has "fair notice" of what sorts of penalties it may face. *State Farm*, 538 U.S. at 417. The United States Supreme Court has identified three "guideposts" for whether this has occurred: (1) "the degree of reprehensibility" in the defendant's conduct; (2) "the disparity between the actual or potential harm suffered . . . and the punitive damages award"; and (3) "the difference between" the remedy awarded "and the civil penalties authorized or imposed in comparable cases." *Id.* at 418; *see also Bongiovi*, 122 Nev. at 583, 138 P.3d at 452 (adopting the same standard for Nevada). All three factors support the jury's award here.

a. SHL's conduct was reprehensible. The first factor is the "most important"—the "degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. This factor takes into consideration whether the harm the jury's award punished was "physical as opposed to economic"; whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"; whether "the conduct involved repeated actions or was an isolated incident"; and whether "the target of the conduct had financial vulnerability." *Id.*

SHL's conduct checks all the boxes. *First*, the evidence showed that SHL's conduct caused physical harm to Bill. *Second*, the evidence showed that SHL's conduct evinced an indifference to or reckless disregard for the safety of others. To award punitive damages, the jury had to conclude that SHL's conduct was oppressive and in conscious disregard of Bill's rights, and that it subjected him to a cruel and unjust hardship. *See* Instruction 32. And the evidence easily allowed it to do so. Patients like Bill relied on SHL to make good-faith decisions about some of the most important questions in their lives. Yet SHL designed its policies to prioritize its own profits over their individual medical needs. *See, e.g.*, App-335–41 (PBT's usefulness); App-660–61 (studies cited in SHL policies support PBT); App-720–22, 901–11 (SHL's investments in its own proton center); App-837–45 (prior authorization policy automatically denied PBT without regard to patient circumstances, the terms of the insurance

policy, or SHL's duty of good faith and fair dealing). *Third*, the harm Bill suffered was not a mere "accident." To award punitive damages, the jury had to conclude that there was "clear and convincing evidence" that SHL acted with "malice," or "oppression"—where malice and oppression were both defined as requiring conscious disregard of his rights. Instruction 32. Here too, the evidence clearly supported the jury's finding. *See* App-335–41, 660–61, 720–22, 837–45. *Fourth*, as SHL itself argued, the insurer's denial of treatment was the result of an intentional policy of denying PBT claims automatically and in conscious disregard for its duty of good faith and fair dealing—a policy that applied not just to Bill, but to all its policyholders in Nevada and 150 million people nationwide. And the evidence showed that SHL employed that policy not because PBT didn't work—the plaintiffs introduced substantial evidence that SHL knew it did, *see, e.g.*, App-115–17, App-660–61, and SHL's own sister company eagerly invested in the procedure—but because it deemed PBT too expensive. *Finally*, SHL's policy affected particularly vulnerable people—cancer patients who did not have time to shop around for new insurance or conduct futile appeals. That included patients like Bill, who purchased SHL's policy specifically because they thought it covered treatments like PBT. *See* App-1035–40, 1387–91.

SHL's counterarguments on these points fall flat. The insurer emphasizes that it was acting pursuant to a policy, but as we have just explained, that fact cuts against it. It's precisely because the company established a corporate policy of automatically denying coverage for PBT that its conduct was reprehensible. What's more, SHL's own conduct undercuts the very premise of that policy. It claimed that PBT for lung cancer in 2016 and as of time of trial in March 2022 was unproven and not medically necessary. Yet the studies it depended on refuted that point. App-115–17, App-660–61. As it well knew. After all, its sister company actively invested in and operated a PBT center to treat lung cancer. Once that center was up and running, SHL, without any change in the literature, decided it would approve PBT for patients in Bill's situation after all. *See* App-1818–25, 2813–14. These facts amounted to an implied admission that PBT either *is* proven and necessary, or that the company only found it so when it was in the company's interest. SHL next tries to argue that in fact it made medical necessity

determinations that carefully weighed the circumstances of each case. But there was overwhelming evidence that SHL conducted no investigations at all. *See, e.g.*, App-247–48, 319–21, 326–41, 813–18, 837–45,1084–85, 1114.

And the mitigating factors SHL tries to emphasize—that it now sends requests for review to a radiation oncologist, requires new training, and eventually decided to cover PBT for lung cancer—don't help it either. The jury easily could have concluded that these steps were cosmetic, ineffective, and contrived. As to training, for instance, SHL spent the liability phase insisting that all its practices were reasonable, App-1958, 1968–2000, 2011–15, 2379, and admitted the idea for training only came from its counsel following developments in this case, App-2775. By contrast, in *Guaranty*, on which SHL relies, there was evidence of the defendant's mitigating conduct *during* the commission of the tort and prior to trial. 112 Nev. at 209, 912 P.2d at 274. The insurer's new review practices fare no better. The jury could have found that SHL lacked credibility in undertaking this mitigation, too, because the jury wasn't told about it until the damages phase—and heard numerous liability-phase witnesses vehemently claim that medical oncologists were perfectly qualified to conduct reviews. *See* App-1968–70, 1972–76, 1987. All the more so because SHL refused to consider other meaningful changes, like changing its practice of denying claims without regard to an insured's contract—and it continued to insist that it had done nothing wrong in this case, despite now offering PBT for patients like Bill. *See* App-2777.

The few cases it can muster don't say otherwise. One is an unpublished and minimally explained decision to reduce an award, *see Rowatt v. Wyeth*, No. CV04-1699, 2008 WL 876652 (D. Nev. Feb. 19, 2008), while another does not even concern the due process clause, but rather a reduction that occurred because an award was nearly a quarter of the defendant's net worth and exceeded the compensatory award by a factor of 30, *Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1266–67, 969 P.2d 949, 961 (1998).

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2. The ratio between the compensatory and punitive awards comports with Supreme Court caselaw and Nevada statutory law.

There is likewise a "reasonable" relationship between the punitive and compensatory damages awards given here. *State Farm*, 538 U.S. at 426.

First, the U.S. Supreme Court has instructed that it is appropriate to weigh the magnitude not only of the *actual* harm a defendant caused, but also of any *potential* harm that it would have caused if its wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). The Court has thus "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *Id.* For example, if "a man wildly fires a gun into a crowd" and "no one is injured and the only damage is to a $10 pair of glasses," a jury could reasonably award "only $10 in compensatory damages" but far more in punitive damages. *Id.* at 459. Under this approach, a $10 million punitive-damages award may be permissible even if the value of the potential harm "is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million." *Id.* at 462. And here, compensatory damages reflect only the pain and suffering and concomitant emotional harms Bill suffered. But in another case, the same conduct could have led to additional suffering—enduring Grade III esophagitis for a longer period, for instance, or even experiencing heart problems or premature death. *See* Liao Dep. at 71–74.

Even taken at face value, the ratio between the compensatory and punitive awards given here is within reason. The Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *Gore*, 517 U.S. at 582, establishing a "bright-line ratio which a punitive damages award cannot exceed," *State Farm*, 538 U.S. at 424–25. A 4-to-1 ratio, however, is well within the ordinary. *See id.* ("Single-digit multipliers are more likely to comport with due process" than "awards with ratios in the range of 500 to one"; there is a "long legislative history . . . providing for sanctions of double, treble, or quadruple damages to deter and punish."). That's true not just in general, but in insurance bad-faith cases in particular. *See Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp.2d 1168 (Nev. Dis. 2008) (upholding 9:1 ratio); *cf. Wohlers*, 114 Nev. at 1268–69, 969 P.2d at 962

(reducing award to 13:1). Thus, contrary to SHL's arguments, the Court has never suggested that a 1:1 ratio is an "outermost" constitutional limit.

That is especially true here, where Nevada law expressly provides clear notice that exactly this sort of ratio could apply. Nevada law provides, as a general matter, that actions for breach of a noncontractual obligation are subject to a 3:1 ratio. NRS 42.005. But when it comes to insurance bad faith claims, the law contains an express exemption: No insurer "who acts in bad faith regarding its obligations to provide insurance coverage" is entitled to the law's statutory limits. *Id.* This statutory scheme puts insurers on notice that the legislature considered whether to apply a ratio of 3:1 to bad-faith insurance cases and expressly decided not to. That means insurers should expect to face higher ratios in bad-faith insurance cases. And that notice is meaningful: "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583.

To justify its contrary rule, SHL says (at 24) that a 1:1 ratio—or an even lower one—is required whenever a jury's award consists of noneconomic damages, is "substantial," or contains a punitive element. That has never been the law. SHL gives no reason, other than the fact that the compensatory damages award was "large" and "noneconomic," to infer that the compensatory award here necessarily contained a punitive element. The jury was clearly instructed not to include punitive damages in its compensatory award, including being instructed that the whole point of a Phase 2 would be to ascertain the proper amount of punitive damages—*if* the jury thought they were warranted. Instruction 3; *see also* App-2804–05. And, unlike in *State Farm*, the injuries here included profound physical harm. The bulk of distress Bill suffered thus was not "caused by [] outrage and humiliation," but rather by dealing with those physical injuries. And even applying *State Farm*'s rule, the Court there said nothing about some required 1:1 ratio—it just held there was a "presumption against" a 145:1 ratio. On remand, the Utah Supreme Court approved a 9:1 ratio for punitive damages, *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004)—a ratio far above what the jury awarded here.

3. SHL has not identified any meaningful differences between the jury award and the penalties authorized in comparable cases.

Turning to the third factor, neither of the analogies SHL tries to draw—to mere "deceptive trade practice[s]" or to "unauthorized transaction[s] of insurance"—bears any resemblance to the claim here. The law provides four more meaningful guideposts. *First*, as just explained, Nevada statutory law places insurers like SHL on notice of the sorts of penalties they may face for bad-faith claims. The law provides an upper bound on both the total recovery and the sorts of ratios permissible in other sorts of cases—and pointedly declines to extend those limits to the bad-faith insurance context. That informs insurers that they can expect penalties far larger than $100,000 and punitive-to-compensatory ratios in excess of 3:1. *Second*, Nevada law authorizes the state to revoke an insurer's certificate of authority if it adopts practices in conscious disregard of its duties. *See* NRS 680A.200(1)(c). That could mean an insurer's entire book of Nevada business—a cost in the hundreds of millions to billions. *Third*, state enforcement actions routinely hold insurers responsible for mismanaging the prior authorization process and other violations of consumers' reasonable expectations. These awards routinely reach into the tens and hundreds of millions. *See, e.g.*, Cal. Dep't of Managed Healthcare, *State Fines L.A. Care Health Plan $55 Million in Enforcement Action to Protect Consumers*, https://perma.cc/GTP3-JWU2; *cf.* Office of Okla. Attorney General, *Attorney General Hunter, Insurance Commissioner Mulready Announce $25 Million Settlement with Farmers Insurance*, https://perma.cc/H3GK-R36U. *Fourth* and finally, as discussed above, jury awards place insurers on notice of these sorts of damages too. Juries routinely award tens of millions of dollars for pain and suffering, and they regularly reach award punitives at ratios exceeding the 4:1 ratio the jury settled on here.

Taken together, these varied sources supplied SHL with ample notice that it could face substantial sanctions for conduct like the policies it subjected Bill to. They show that Nevada, along with other states and juries, views damages awards of this magnitude as "reasonably necessary" to vindicate its "legitimate interests in punishment and deterrence." *Gore*, 517 U.S. at 568. They thus demonstrate that the award given here was well within constitutional bounds.

4. There is nothing unconstitutionally punitive about the compensatory award.

Finally, SHL briefly suggests that the jury's compensatory award, too, is somehow constitutionally suspect. Its only argument on this score (at 21) is that the jury wasn't given "meaningful guidance." But that is false. The jury was instructed to take into consideration "the nature, extent, and duration of the damage Bill sustained," and to "decide upon a sum of money sufficient to reasonably and fairly compensate for the physical pain, mental suffering, anguish, disability, loss of enjoyment of life, and emotional distress" he suffered. Instruction 29. It likewise received instructions cautioning that there was "no definite standard . . . by which to fix reasonable compensation" for those injuries and that no witness opinion was required. Instruction 30. This is all that exists in most cases, and because juries are presumed to follow instructions they are given, it is typically sufficient. *See Summers*, 122 Nev. at 1333, 148 P.2d at 783. SHL's only argument otherwise is that this feature of the jury system is somehow a bug. But the only support it can find for this claim is in scholarship and out-of-state caselaw. Nevada courts have never approved intervening in the province of the jury on this basis. This Court should not be the first to do so.

CONCLUSION

The Court should deny SHL's motion on all issues. It should not grant a new trial or remit the jury's award.

DATED this 29th day of June 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and that on this date, a true and correct copy of the foregoing was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and NEFCR 9, via the electronic mail address noted below:

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC., Defendant.	Case No. A-19-788630-C Dept. No. 4 Hearing Date: August 17, 2022 Hearing Time: 9:00 a.m.

OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, opposes the Defendant's Motion for Judgement as a Matter of Law.

INTRODUCTION

Sierra Health and Life Insurance's renewed motion for judgment as a matter of law asks this Court to throw out the jury's verdict based on arguments that SHL has repeatedly made before, and that have repeatedly been rejected by this Court. SHL identifies no new authority, changed facts, or intervening legal development—nothing—to warrant a 180-degree turn.

Nor can SHL overcome the even higher burden it now faces after trial. This Court "must view the evidence and all inferences most favorably" to the Eskews, *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008), and may grant a directed verdict only if the "the evidence is so overwhelming" *in SHL's favor* "that any other verdict would be contrary to the law." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009).

Here, just the opposite is true: The evidence that the jury heard was overwhelmingly in the Eskews' favor. SHL's lead argument is that there was not enough evidence for any rational jury to conclude that SHL acted in bad faith. But this case exemplifies bad faith. SHL sold Bill and Sandy Eskew an insurance policy that, on its face, covered the proton-radiation therapy that Bill sought. And SHL denied coverage for that very treatment based on a secret corporate policy, without so much as looking at Bill's contract or conducting any investigation. SHL also argues that the Court should not have allowed the jury to award punitive damages. But, as this Court has already ruled, there was abundant evidence from which a reasonable jury could conclude that SHL acted with conscious disregard for the Eskews' rights, and with a shocking disregard for Bill's health, safety, and well-being. SHL's motion should be denied.

BACKGROUND

In 2015, Bill Eskew was diagnosed with lung cancer. App-1226. Although it was Stage IV cancer, he had a "good chance to have a disease free life." Liao Dep. 127. So, in an effort to maximize his chances of survival, Bill decided to seek treatment at the MD Anderson Cancer Center at the University of Texas—the highest-ranked cancer-treatment center in the world. Liao Dep. 27; App-1373–77. MD Anderson treats patients with a wide variety of therapies including proton-beam therapy, which enables doctors to target radiation at a tumor more

precisely than other methods, decreasing the amount of radiation that passes through healthy tissue. *See* Liao Dep. 30–32, 34–36.

Around the same time that he was diagnosed, Bill's health-insurance company canceled his policy. App-1374. So he sought a new policy that would cover his treatment. App-1386–87. Bill's wife, Sandy, contacted SHL's authorized agent and explained that Bill was seeking treatment for lung cancer at MD Anderson and, specifically, that he was going to be evaluated for proton-beam therapy. App-1387–88. She asked whether SHL had a policy that would cover this treatment. *Id.* In response, the agent offered Bill and Sandy a platinum health-insurance policy that explicitly stated that it covers therapeutic-radiation services. App-1039–40, 1390–91; Trial Ex. 2, at 13, 48. Proton-beam therapy is a form of therapeutic radiation. App-264, 1392. It is therefore covered by the policy. App-2058–59. So Bill bought the policy—the most expensive policy that SHL offered. App-1039, 1390–92.

Unbeknownst to Bill, at the same time that SHL sold him insurance coverage, the company had a hidden corporate policy of denying all claims for proton-beam therapy for lung cancer. App-104, 331–33, 813–18. This internal policy was not mentioned anywhere in the insurance policy documents that SHL provided the Eskews, nor did SHL tell Bill that it had a corporate policy of denying the very treatment for which it knew they sought insurance. App-1392–94. SHL knew that this corporate policy was not noted in the insurance policy that it sold to Bill. *See* App-326–27, 857, 2086.

Unaware that SHL would refuse to pay for proton-beam therapy, Bill went to MD Anderson, where he was treated by Dr. Zhongxing Liao. *See* Liao Dep. 47–48. Dr. Liao is a world-renowned radiation oncologist who specializes in researching and treating lung cancer through various methods of radiation—including proton-beam therapy. Liao Dep. 11–15, 21–27, 30–32; App-541. Dr. Liao's team found that Bill had two tumors—a lung tumor and a tumor in "one of the lymph nodes . . . [b]etween his lungs." App-543; Liao Dep. 48; Trial Ex. 5, at 15. Bill's cancerous cells were "adjacent" to "a lot of critical structures," including the heart, trachea, and esophagus. App-543; Liao Dep. 50–51. Because radiation injures healthy tissue as well as cancer cells, Dr. Liao sought to ensure that enough radiation would reach the tumors to

destroy them, while minimizing the amount of radiation that passed through these critical organs. Liao Dep. 39–43, 45–46, 50–51.

Dr. Liao considered two potential methods of administering radiation to meet this goal: intensity-modulated radiation therapy (IMRT) and proton-beam radiation therapy. Liao Dep. 49–51, 69–75. Both would have delivered enough radiation to Bill's tumor. *See* App-579–80. The difference was the amount of radiation that would pass through adjacent healthy organs, like Bill's heart or esophagus. App-579–593.

Using sophisticated imaging and simulation techniques, Dr. Liao and her team compared the radiation dosages that would pass through Bill's healthy tissue in the two therapies. Liao Dep. 48–50, 52–53, App-549–62. They found that proton therapy would result in less radiation hitting healthy organs—particularly the heart, lungs, and esophagus. Liao Dep. 50–51, 53–55–, 57–60, 61–65, 68–75; App-562–93; Trial Ex. 160, at 8; Trial Ex. 161, at 70. That difference, Dr. Liao testified, was significant: The risk of "severe esophagitis"—scarring of the esophagus that can make it difficult or impossible to eat and drink—"is highly correlated" with radiation dosage. Liao Dep. 71–75.

Because proton therapy would lead to a significantly smaller dosage of radiation hitting "critical organs," Dr. Liao concluded it was a "better plan" for Bill than IMRT. Liao Dep. 75. And, at trial, another eminent radiation oncologist, Dr. Andrew Chang, agreed that she had made the correct decision. App-593, 608.

Having decided that proton therapy was necessary to treat Bill's cancer while sparing his organs, MD Anderson submitted a request to SHL to proceed with the treatment. Liao Dep. 51; Trial Ex. 5, at 9–27. In that request, Dr. Liao explained that using proton therapy instead of IMRT would "provide the optimum dose" to the tumors "without causing potentially serious normal tissue complications, especially to the heart, esophagus, spinal cord, and normal lungs." Trial Ex. 146, at 1. The accompanying records noted that Dr. Liao had compared IMRT with proton therapy. Trial Ex. 5, at 13; App-305.

SHL flatly refused to approve Bill's request for coverage for proton-beam therapy—or even to conduct a reasonable investigation of the merits of the request. Instead, the company

implemented its hidden corporate policy of refusing to approve proton-beam therapy. App-316–42, 813–18, 837–45, 860–63, 876–80, 1082–85, 1092–93, 1114.

Bill's coverage request was handled by Dr. Shamoon Ahmad, who at the time was working as a contractor for SHL. App-218, 229, 272; Ex. 78. Dr. Ahmad was not a radiation oncologist. App-223. He had no training in radiation oncology and was not qualified to make treatment decisions about radiation. App-247–50. Dr. Ahmad admitted that he did not have the expertise to evaluate the benefits of proton therapy or to determine whether proton therapy or IMRT would be better for Bill. App-250, 463. In fact, he had no knowledge of proton therapy. App-258–61, App-297–307.

Dr. Ahmad admitted that he was not qualified to overrule the medical judgment of Dr. Liao. App-346. Indeed, Dr. Ahmad lacked even a basic understanding of radiation oncology: At trial, he was unable to interpret Dr. Liao's records at the level of even a first-year resident. App-338–40, 563–65. And he conceded that he did not attempt to speak with Dr. Liao before denying coverage. App-287. He also admitted that he didn't review Bill's insurance policy before deciding that it did not cover proton therapy, App-274, 1083–84. SHL's own records revealed that Dr. Ahmad conducted no investigation of Bill's claim at all and that he likely spent all of 12 minutes (or less) before rejecting the claim. *See* Trial Ex. 7; App-316–20. There's no evidence that Dr. Ahmad even read Bill's medical records. App-1092–93.[1]

Instead, Dr. Ahmad denied coverage based on SHL's corporate policy on the issue, which categorically asserts that proton therapy for lung cancer is never "medically necessary." App-104, App-1092. He did so even though that internal policy is based on a definition of "medically necessary" that considers the cost of treatment—a consideration that Bill's policy does not permit. App-857, 1052, 1071–74; *see also* Trial Ex. 13.

Both Dr. Liao and Dr. Chang, the other radiation oncology expert, testified that the assertion in SHL's policy that proton therapy is not "medically necessary" is incorrect. Liao

[1] In this and other key respects, Dr. Ahmad's trial testimony contrasted sharply with his deposition testimony in which he claimed that he spent much more time evaluating the prior-authorization claim. SHL-App-311-312; Instruction 10. The jury could have concluded these contradictions undermined his credibility.

Dep. 43–44, 90–91; App-659. To the contrary, they testified, proton therapy is widely recognized as a safe and effective treatment for lung cancer—used in many of the foremost cancer-treatment centers in the United States. Liao Dep. 38, 43–45, 85; App-532–33, 540, 543–44, 639. And there was substantial evidence in the record that SHL knew that. Dr. Chang testified that the studies that SHL itself relied upon in the lung-cancer section of its proton-therapy policy "show that [the therapy] is proven and medically necessary." App-660. The policy itself even recognizes that because "protons can deliver a dose of radiation in a more confined way to the tumor" than IMRT, it "may be useful when" a tumor "is in close proximity to one or more critical structures." App-106. And SHL's sister company operates its own proton-therapy center, which explains the benefits of proton therapy for lung cancer on its website— including its ability to avoid negative side effects such as "difficulty swallowing," the very side effect that Bill suffered. App-721–22, 1858–59. Proton therapy is, however, more expensive than IMRT. App-345, 369, 1076.

Dr. Liao knew that an appeal within SHL would be futile. Liao Tr. 92–93.[2] And because Bill's tumors were active and growing, it was essential that his treatment begin as soon as possible. *See* Trial Ex. 5, at 15–16. So although IMRT posed a greater threat to Bill's healthy organs, Dr. Liao decided that instead of wasting time fighting a losing battle with SHL while Bill's cancer progressed, she would have to use the only tool that remained to fight Bill's cancer. Liao Dep. 92–93. Dr. Liao therefore requested that SHL approve coverage for IMRT instead. Even though—as with proton therapy—there are not randomized clinical trials of the use of IMRT for lung cancer, SHL approved the request for the cheaper therapy. Trial Exs. 73, 74, App-464–69.

Following his treatment with IMRT, Bill developed Grade III esophagitis. His esophagus was scorched. During the acute phase, the esophagitis nearly killed Bill, but he fought back. As the chronic phase developed, scar tissue developed in his esophagus that left him unable to eat or drink, led to severe weight loss, and ultimately left him isolated and in pain

[2] SHL's own expert, Dr. Amitabh Chandra, confirmed that the appeals process is futile. He testified that only 0.14% of denied claims are overturned on appeal. App-1807–08.

for the rest of his life. App-573–74, 594–606, 676, 681–83, 709–11, 719–20, 1203–08, 1256–58, 1324, 1401–13; Liao Dep. 76–77, 81, 83; Trial Ex. 108, at 6; Trial Ex. 154, at 43, 52; Trial Ex. 169, at 51–54.

When he got home from the hospital, Bill's family explained, he was unrecognizable. App-1400. He had lost huge amounts of weight, could barely walk, and was in a lot of pain. App-1400–01. And over the course of the next year, he couldn't eat or swallow, complaining of things being stuck in his throat and of being unable to eat meals. App-1203–04, 1256, 1611–12. He had to live with a "puke bucket" by his side at all times—but was often left dry heaving because there was nothing to throw up. App-1204–06, 1257–58, 1324, 1412–13. He became physically weak, unable to walk across the house or get himself to the doctor's office. App-1256, 1319, 1324–25. And he lost much of his dignity, depending on his family to assist him around the home and even out of the bathroom. App-1256–59. His personality and enjoyment of life suffered too. He became withdrawn, dodging mealtimes, holidays, trips, family gatherings, and friends. App-1200–04, 1259–60, 1416, 1610. And he became angry—at family members for pressuring him to eat when he couldn't, and at SHL for denying him treatment he had sorely needed. App-1200, 1204, 1257, 1260–61.

Both Dr. Liao and Dr. Chang testified "to a reasonable degree of medical probability" that had Bill received proton therapy rather than IMRT, he would not have developed Grade III esophagitis. Liao Dep. 155:11–15; App-184–85. Indeed, Dr. Chang testified that he was "above 95 percent" certain that Bill would not have developed Grade III esophagitis had he been treated with proton therapy. App-637–38.

LEGAL STANDARD

A renewed motion for judgment as a matter of law may be granted only when "the evidence is so overwhelming for one party that any other verdict would be contrary to the law." *M.C. Multi-Fam. Dev.*, 124 Nev. 901 at 910, 193 P.3d at 542. In other words, so long as a plaintiff "presented sufficient evidence such that the jury could grant relief," a defendant's request for judgment notwithstanding the verdict must be denied. *Harrah's Las Vegas, LLC v. Muckridge*, 473 P.3d 1020 (Nev. 2020). In making this determination, "the trial court must view

the evidence and all inferences most favorably to the party against whom the motion is made." *M.C. Multi-Fam. Dev.*, 124 Nev. at 910, 193 P.3d at 542. "If there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question" remains "one of fact for the jury and not one of law for the court"—and the court, therefore, may not substitute its judgment for that of the jury. *Broussard v. Hill*, 100 Nev. 325, 327, 682 9.2d 1376, 1377 (1984).

ARGUMENT

I. There is no basis to override the jury's verdict that SHL violated its duty of good faith and fair dealing.

A. As this court has already held, there is sufficient evidence from which a reasonable juror could conclude that SHL acted in bad faith.

1. "The relationship of an insured to an insurer is one of special confidence." *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988). People depend on their insurance company "for security, protection, and peace of mind." *Id.*; *see also* App-2493. And insurance claims often arise when policy holders are at their most vulnerable—after an accident, for example, or a cancer diagnosis. *See, e.g.*, *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1262, 969 P.2d 949, 958 (1998), *as amended* (Feb. 19, 1999); App-996–99. The insurer, therefore, has a fiduciary-like obligation "to negotiate with its insureds in good faith and to deal with them fairly." *Ainsworth*, 104 Nev. at 592, 763 P.2d at 676. This obligation is imposed by law, not merely by the insurance contract itself. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009).

A "violation of" that legal obligation "gives rise to a bad-faith tort claim." *Id.* Although the tort often arises when an insurance company unreasonably denies or delays payment of a valid claim, the tort of bad faith is not "limited to such cases." *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 205–06, 912 P.2d 267, 272 (1996). Rather, "[b]ad faith is established" whenever an insurer (1) "acts unreasonably and" (2) "with knowledge" or reckless disregard "that there is no reasonable basis for its conduct." *Albert H. Wohlers & Co.*, 114 Nev. at 1258, 969 P.2d at 956; *see Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998), *opinion*

modified on denial of reh'g, 115 Nev. 38, 979 P.2d 1286 (1999) (stating reckless disregard is sufficient).

The parties agree that there are several well-established standards that set the bounds of reasonable insurer conduct. *See* App-977–1180 (plaintiff's expert testifying about these standards); App-2056 (SHL's expert testifying that he has "no reason to disagree"); *see also* App-2495–97 (jury instructions setting forth obligations of insurers). Among other things, insurance companies must give equal consideration to their policyholders' interests as they do to their own. App-1006–08, 2054–55; *see Miller*, 125 Nev. at 305, 212 P.3d at 322. They may not misrepresent the scope of their insurance plans—either affirmatively or by omission. App-1022–23, 2496; *see Albert H. Wohlers & Co.*, 114 Nev. at 1259–60, 969 P.2d at 957. Nor may they rely on internal corporate policies to automatically deny certain categories of claims. App-1117–21, 2086–87. Instead, they must conduct a prompt, fair, and thorough investigation of each claim they receive. App-1012–14, 2495; *see Ainsworth*, 104 Nev. at 591, 763 P.2d at 675. And "[w]hen investigating a claim, an insurer has a duty to diligently search for, and to consider, evidence that supports the insured's" claim. App-2495.

More specifically, health insurers may not deny claims unless there is a proper basis in the insurance contract for doing so; they have diligently searched for and considered evidence that supports the requested treatment; they have given due weight to the treating physician's opinion; and the decision to refuse coverage is made by a doctor with sufficient expertise to evaluate the proposed treatment, who has reviewed the patient's medical records and other relevant documentation. App-1010–11, 1015–18, 2082, 2495; NRS 695G.150.

And when an insurance company does deny a claim, it is required to promptly provide a reasonable explanation of the basis in the insurance policy for its denial. App-1121, 2126–27, 2496; NRS 686A.310(1)(n). "No insurer may deny a claim on the grounds of a specific policy, provision, condition or exclusion unless reference to that provision, condition, or exclusion is included in the denial." Nev. Admin. Code § 686A.675; App-2497; *see* App-2083, 2134–36.

2. This case is a paradigmatic example of bad faith. Indeed, the evidence at trial demonstrated that bad faith infected SHL's relationship with Bill from the very beginning: A

reasonable juror could have found that the company knew Bill sought coverage for proton therapy to treat lung cancer, sold him an expensive insurance policy that, on its face, covered this treatment, yet failed to mention that the company had a hidden internal policy of automatically denying coverage for this very treatment.[3] That alone is sufficient for a reasonable juror to conclude that SHL acted unreasonably—and that it knew of, or at the very least recklessly disregarded, the lack of a reasonable basis for its conduct. No reasonable insurer would believe it could mislead its policyholders about the scope of their coverage: It's well-established it may not. *See* App-1022-23; *see also Albert H. Wohlers & Co.*, 114 Nev. at 1259–60, 969 P.2d at 957 (insurer acted in bad faith in part by failing to notify insured of limited scope of coverage); *Powers*, 114 Nev. at 701, 962 P.2d at 603 ("Misconduct, such as misrepresenting or concealing facts to gain an advantage over the insured, is a breach of this kind of fiduciary responsibility.").

There was also substantial evidence that SHL continued to act in bad faith when it denied Bill coverage for proton therapy. The company assigned the coverage determination to a doctor who, by his own admission, lacked the expertise to evaluate Bill's treatment. App-250, 463. That doctor then denied coverage based solely on SHL's internal proton-therapy policy—without even reviewing Bill's insurance contract, let alone investigating his claim. App-274, 287, 1083–84. SHL's own records reflect that the only thing Dr. Ahmad knew about Bill's claim before denying it was that he sought proton therapy to treat a mediastinal tumor. Trial Ex. 5, at 5. A reasonable juror could conclude that Dr. Ahmad never even read Bill's medical records. App-1092–93. This automatic denial of coverage violates virtually every standard the parties agree governs insurance companies' conduct—in many ways, it violates the law. *See supra* page 9. The jury was certainly entitled to conclude that automatic denial is unreasonable and that SHL knew it.

[3] *See, e.g.*, App-1387–88, 1392–94 (Sandy Eskew's testimony that she told SHL that she sought coverage for proton therapy, and that SHL did not mention its corporate proton policy); Trial Ex. 2, at 12, 47 (insurance policy stating therapeutic radiation is covered); App-264, 1392 (proton beam therapy is a form of therapeutic radiation).

Not to mention that SHL's denial letter itself violated insurance industry standards: It misrepresented the facts, falsely stating that SHL's determination was based on Bill's insurance contract, when it never even reviewed the contract. Trial Ex. 147, at 1. The letter provided no "explanation of the basis" for the denial in Bill's insurance policy—let alone a "reasonable explanation . . . with respect to the facts of [his] claim and the applicable law." App-2496; *see also* Trial Ex. 147, at 1. And it certainly did not identify the specific provision in Bill's contract on which the denial was based. *See* Nev. Admin. Code § 686A.675(1); App-2496. It couldn't. SHL's policy of categorically denying proton-therapy claims wasn't part of Bill's insurance contract.

Put simply: SHL sold Bill and Sandy an insurance policy that, on its face, covered the treatment that Bill sought, denied coverage for that very treatment based on a secret internal policy without so much as looking at Bill's contract or conducting any investigation, and then provided virtually no information about the reasons for its denial, making it impossible for Bill to meaningfully respond. As this Court concluded in denying SHL's motion for directed verdict the first time around, that's more than enough for a reasonable juror to conclude that SHL acted unreasonably and knew (or, at least, recklessly disregarded the fact that) it was doing so.

3. SHL doesn't seriously contest—or even address—any of this. Instead, the company asserts that a single fact renders its wholesale violation of the fundamental standards governing the insurance industry reasonable: its reliance on the corporate proton-therapy policy. But that doesn't absolve the company of bad faith; it *is* bad faith. As SHL's own expert testified, an insurance company cannot rely solely on an internal policy to deny a claim. App-1117–21, 2086–87. That alone is sufficient to support the jury's verdict.

SHL emphasizes that the policy cited scientific studies and the guidelines of professional organizations. But even if those studies irrefutably demonstrated that proton therapy was, as a general matter, not medically necessary to treat lung cancer—a premise Dr. Chang refuted at trial—that wouldn't change the facts: SHL sold Bill an insurance policy that said it covered radiation therapy, knowing it had a secret corporate policy of denying coverage for exactly the treatment Bill planned to seek; denied Bill's claim without even investigating it to determine if

an exception to that secret policy was warranted here—given that a world-renowned oncologist told the company proton therapy was necessary to spare Bill's critical organs and had a comparative plan to prove it; and then issued him a cursory denial that misrepresented its investigation and failed to identify what provision in his contract allowed the company to deny the claim. Even assuming the proton policy itself was unimpeachable and nobody at SHL believed otherwise, a reasonable juror could easily have held that these facts alone constitute bad faith.

And the jury was not required to believe SHL's self-serving assertions about the validity of the corporate proton-beam policy in the first place. There was more than sufficient evidence for the jury to conclude that SHL's real reason for creating the policy—and applying it here—was not medical necessity, but cost. Dr. Chang testified that, contrary to SHL's assertion, the studies SHL referenced in the proton policy's section on lung cancer "show that [proton therapy] *is* proven and medically necessary." App-660–61 (emphasis added). And although SHL claimed—and continues to claim, *see* JMOL 9—that it was troubled by the lack of randomized clinical trials comparing proton therapy with IMRT, the company approved treating Bill with IMRT, which lacks the same randomized clinical trials.[4] App-467–69, 645–47. Both Dr. Liao and Dr. Chang—leading experts in radiation oncology—testified that proton therapy is safe, effective, and widely accepted for the treatment of lung cancer. *See, e.g.*, App-540; Liao Dep. 43–45, 85. And, a reasonable juror could conclude that SHL agreed: SHL's sister corporation operates a proton-therapy center, the website of which explains the method's benefits for the treatment of lung cancer. App-720–22, 901–11. In short, there was substantial evidence that the real reason SHL denied Bill's claim was not that it believed proton therapy was medically unnecessary for him, but that proton therapy cost more than SHL wanted to pay. SHL does not dispute that a reasonable juror could conclude that it's unreasonable for an insurer to deny medically necessary treatment to save money, and that SHL knew that.

[4] As Dr. Chang testified, the reason both therapies lack randomized clinical trials is because those trials are used to tease out small differences between treatments. App-645–47. And the differences between IMRT and the prior widely used therapy, and proton therapy and IMRT, are so large that randomized clinical trials are unnecessary—oncologists simply adopt the better treatment. *Id.*

The company contends (at 8) that even if its interpretation of Bill's insurance contract was mistaken, it was at least reasonable. This argument is perplexing. SHL concedes that its denial of Bill's claim had nothing to do with his insurance contract; Dr. Ahmad didn't even look at it. SHL didn't misinterpret the contract; it ignored it entirely. And even if it hadn't, the Supreme Court has rejected the contention that an insurance company's "interpretation of its own contract as excluding coverage" entitles the insurer to judgment as a matter of law. *See, e.g.*, *Albert H. Wohlers & Co.*, 114 Nev. at 1258–59, 969 P.2d at 958 (quoting *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 539 (1982)).

SHL argues (at 10) that summarily denying Bill's claim based on its proton policy—regardless of what his insurance contract actually said—was "consistent with the policies and procedures at Sierra Health and Life." But that's exactly the point. A reasonable juror could certainly conclude that a sophisticated insurer like SHL has "actual or implied awareness" that it is unreasonable to deny a claim in violation of basic claim-handling standards like the duty to investigate or the obligation to assign a claim to someone competent to review it.

Finally, SHL complains (at 9–10) that other insurance companies have corporate policies similar to its proton policy. Assuming this claim is even accurate, SHL presented no evidence that these other companies rely on their policies to deny coverage automatically, regardless of what a policyholder's contract says, without so much as a reasonable investigation. Nor does it cite any authority for the proposition that the law authorizes an insurance company to act in bad faith, so long as enough other insurers do so too. The jury heard SHL's other-insurer evidence, weighed it against the overwhelming evidence that SHL repeatedly violated basic insurance industry standards, and concluded that the company acted in bad faith. The law does not permit—let alone require—this Court to overturn its decision.

B. The jury was not required to accept SHL's belated assertion that Bill Eskew's insurance plan didn't cover proton therapy.

SHL tries (at 5) to render its bad faith irrelevant by arguing that Bill's insurance policy didn't cover proton therapy for lung cancer in the first place. Of course, the policy itself doesn't

say that. To the contrary, it explicitly states that therapeutic radiation services—which include proton therapy—*are* covered. That's why Bill bought it.

Searching for a provision that could justify reading into the contract an unwritten categorical exclusion, SHL seizes—as it did at trial—on the contract's requirement that treatment be "medically necessary." Because the company's proton policy references scientific studies, SHL argues, no reasonable juror could conclude that proton therapy for lung cancer satisfied the insurance contract's definition of medical necessity. The company never explains this argument. It doesn't even identify which requirement of the contract's three-pronged definition it contends proton therapy does not satisfy, let alone point to any contractual provision that says the company may ignore that definition entirely so long as it cites scientific studies in doing so.

There was more than sufficient evidence from which the jury could conclude that treating Bill's lung cancer with proton therapy was "medically necessary" as defined by his insurance contract. SHL's assertion that its secret policy to deny all such treatment relied on studies is far from sufficient for this Court to overrule the jury's conclusion.

1. As the jury was instructed, because of the unique relationship between insurance companies and policyholders, there are special rules governing the interpretation of insurance contracts. "Clauses providing coverage are broadly interpreted so as to afford the greatest possible coverage to the insured," while "clauses excluding coverage are interpreted narrowly against the insurer." *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014). "To preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the exclusion in obvious and unambiguous language, (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court." *Id.* at 398–99, 329 P.3d at 616.

In addition, like all contracts, an unambiguous insurance agreement should be enforced according to the "plain and ordinary meaning of its terms." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 673 (2011). But if an insurance contract is ambiguous—that

is, if it "leads to multiple reasonable interpretations"—it must be interpreted against the insurance company. *Century Sur. Co.*, 130 Nev. at 398, 329 P.3d at 616. "Ultimately," insurance policies must be interpreted to "effectuate the reasonable expectations of the insured." *Powell*, 127 Nev. at 162, 252 P.3d at 673; *see also* App-2495.

2. Applying these standards here, there is more than enough evidence to support the jury's verdict that proton therapy was "medically necessary" under Bill's contract. The contract's definition of "medically necessary" has three prongs.[5] The treatment must be: (1) "consistent with the diagnosis and treatment of the Insured's Illness or Injury"; (2) "the most appropriate level of service which can safely be provided to the Insured"; and (3) "not solely for the convenience of the Insured, the Provider(s) or Hospital."

As to the first prong, Dr. Liao—again, a world-renowned radiation oncologist who works at the highest-ranked oncology center in the country—testified that proton therapy is "consistent with" the treatment of lung cancer. Liao Dep. 84; *accord* App-1068–69 (Mr. Prater testifying to the same effect). She explained that it is "a widely accepted position in the radiation oncology community around the world" that "proton therapy to treat lung cancer has been proven to be safe and effective." *Id.* 45–46. Indeed, Dr. Liao testified, it is a "standard of care in the medical profession." Liao Dep. 45. That's because it enables oncologists to irradiate tumors that, like Bill's, are dangerously close to critical organs, while minimizing the radiation—and therefore the damage caused—to those organs. Liao Dep. 35–36. Dr. Liao's testimony, standing alone, is sufficient for a reasonable juror to conclude that proton therapy is consistent with the diagnosis and treatment of lung cancer.

And Dr. Liao's testimony did not stand alone. Dr. Chang—another radiation oncologist and expert in proton therapy—agreed. He also testified that proton therapy is "widely accepted" for the treatment of lung cancer. App-544. The FDA, he noted, has approved proton-therapy

[5] Technically, the contract says that "medically necessary means a service or supply needed to improve a specific health condition or to preserve the Insured's health," which meets these three prongs. App-64. But SHL does not argue that a reasonable juror could not have concluded that proton-beam therapy is a service "needed to improve a specific health condition." *Cf. Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3 (failure to raise issues in opening brief waives them). Nor could it. Dr. Liao and Dr. Chang both testified otherwise.

machines. App-532. And Medicare pays for proton-therapy treatment of lung cancer. *See id.* So too does Tricare, the medical-insurance program that covers retired service members. App-532–33. In fact, not a single witness testified that proton therapy is inconsistent with lung-cancer treatment. Besides a passing reference in its closing argument, SHL has never seriously disputed the point.

Nor is there any dispute that treating Bill with proton therapy satisfied the third prong of the definition—that the treatment was not "solely for the convenience" of Bill Eskew, Dr. Liao, or MD Anderson. Even SHL's own witness, Dr. Owens, testified that it would be "very obvious" that Bill wasn't undergoing proton-beam therapy because it was convenient. App-2073; *accord* Liao Dep. 84 (testimony of Dr. Liao that proton therapy was not for the convenience of Bill or Dr. Liao); App-1068 (Prater testimony to the same effect).

The only prong SHL has ever seriously disputed is the second one—whether proton-beam therapy was "the most appropriate level of service which [could] safely be provided to" Bill. But, here too, there was ample evidence from which a reasonable juror could conclude that this requirement was satisfied. Multiple witnesses testified that "level of service" means the clinical setting of the treatment—for example, whether it is inpatient or outpatient. App-851–53, 1051–52, 1068, 1072; *see* Liao Dep. 84. They also testified—and SHL has never disputed—that the outpatient setting, in which Bill's proton therapy was to be performed, is "the most appropriate" clinical setting for his treatment. Liao Dep. 84; App-1068; *see also* App-853 (SHL witness testifying both IMRT and proton therapy are outpatient). A reasonable juror certainly could have agreed.

To be sure, SHL tried to convince the jury to adopt a different understanding of the phrase "level of service." Dr. Owens—an insurance-industry consultant that testified on SHL's behalf—asserted that the phrase refers not just to clinical setting, but to cost: that "an expensive treatment" is not "an appropriate level of service if there's a less expensive treatment that works just as well." App-2036. But the jury was not required to believe this testimony. In fact, Dr. Owens couldn't identify a single document that supports his definition. App-2093–92. And his testimony was contradicted not only by Ms. Eskew's insurance expert, but by SHL's own

director of preauthorization review, as well as the company's own internal documentation. App-852–53; Trial Ex. 13. At best, then, the phrase is ambiguous, so—as a matter of law—it must be construed in favor of coverage. *See Century Sur. Co.*, 130 Nev. at 398, 329 P.3d at 616; *see also Albert H. Wohlers & Co.*, 114 Nev. at 1259, 969 P.2d at 956–57 (holding that insurance companies cannot avoid bad-faith liability by drafting ambiguous contracts—or manufacturing ambiguity after the fact).

But even if the jury had accepted Dr. Owens's definition, there was sufficient evidence from which it could conclude the definition was satisfied: Both Dr. Liao and Dr. Chang testified that proton therapy would have delivered less radiation to Bill's esophagus than IMRT—and that had Bill received proton therapy rather than IMRT, he would not have suffered the Grade III esophagitis that caused him to spend his last months unable to eat or drink, vomiting daily, miserable and in pain. In other words, they testified that IMRT was *not* just as good as proton therapy—proton therapy was better. And there was documentary evidence to support their testimony: the comparative treatment plan. Thus, there was more than sufficient evidence for the jury to conclude not only that proton therapy satisfied the definition of "medically necessary" that was actually in Bill's insurance contract, but also that it satisfied the definition that SHL invented after the fact.

3. SHL's motion doesn't mention any of this evidence. Instead, it focuses entirely on its corporate proton policy: In denying Bill's treatment, the company says, Dr. Ahmad relied on SHL's corporate proton policy; and that policy, in turn, references scientific studies and evidence-based reports in support of its assertion that proton therapy is never "medically necessary" for lung cancer.[6] Therefore, the company concludes, the jury could not reasonably find that treating Bill with proton therapy met the definition of "medically necessary" in his contract.

[6] To the extent SHL asserts that Dr. Ahmad relied directly on scientific literature, that assertion cannot be credited here. At this stage, the evidence must be viewed most favorably to Bill, and there was ample evidence demonstrating that Dr. Ahmad did not, in fact, rely on anything besides the proton policy. *See supra* page 4–5.

This argument is difficult to follow. It seems to rely on the premise that Bill's insurance "plan specifically provides that SHL may determine that a service is not 'medically necessary' based on peer-reviewed studies and reports of expert organizations." JMOL 7. But that premise is incorrect. The contract says the company may "*give consideration*" to studies and reports in determining whether a particular treatment for which a policyholder seeks coverage satisfies the *contract's* definition of "medically necessary." App-64 (emphasis added). On SHL's own account, it never even attempted to determine whether treating Bill with proton therapy satisfied *his contract's* definition of "medically necessary." Dr. Ahmad didn't read the contract; he relied entirely on the proton policy. And, as SHL's director of preauthorization review testified at trial, the definition of "medically necessary" upon which the proton policy was based differs from the definition in Bill's contact in a crucial respect: the proton-policy definition requires the company to consider cost, while Bill's contract does not even permit it to do so. *See* App-857, 1052, 1071–74; *see also* Trial Ex. 13. SHL does not explain how the proton policy could even shed light on whether Bill's treatment met the definition of "medically necessary" in his contract—let alone justify overturning the jury's decision that it does.

Ultimately, SHL's real argument seems to be that it doesn't matter whether proton therapy, in fact, meets the contract's definition of "medically necessary"; a treatment is covered only if SHL "*determines*" that it meets that definition, and SHL did not do so here. JMOL 7–8 (emphasis added). On that view, SHL's insurance policy is worthless: The company can avoid paying for treatment just by refusing to determine that it's medically necessary—regardless of whether it meets the contractual definition. That cannot possibly accord with Bill's "reasonable expectations"—or the requirement that insurance coverage be interpreted broadly. *See Powell*, 127 Nev. at 162, 252 P.3d at 673; App-2494. Indeed, interpreting the insurance policy in this way is almost certainly itself bad faith. *See Albert H. Wohlers & Co.*, 114 Nev. at 1259, 969 P.2d at 956–57 (unreasonable interpretation of insurance policy constitutes bad faith); App-1008–09, 1043, 1059, 1066–74, 2493–95 (insurers must fairly interpret insurance policy).

Perhaps recognizing this problem, SHL briefly argues that proton therapy was, in fact, not medically necessary because it was "unproven." JMOL 7. But there was substantial evidence at

trial to the contrary. Dr. Liao testified otherwise; Dr. Chang testified otherwise. Liao Dep. 43–44, 90–91; App-659. Again, Dr. Chang testified that the studies SHL itself referenced in the proton policy's section on lung cancer "show that [proton therapy] *is* proven and medically necessary." App-660 (emphasis added). SHL's assertion to the contrary, he told the jury, "was inaccurate." *Id.* SHL may wish that the jury had taken its word over that of the world's leading radiation oncologists, but that is not a basis on which the verdict may be overturned.

C. The evidence at trial was more than sufficient for a reasonable juror to conclude that SHL caused Bill's injuries.

1. SHL halfheartedly argues that there was insufficient evidence that the company's bad-faith denial of Bill's claim caused his injury. As this Court instructed the jury, SHL's misconduct was a proximate cause of Bill's injuries if it was a "substantial factor in bringing" them about. App-2497; *see Holcomb v. Georgia Pac., LLC*, 128 Nev. 614, 627, 289 P.3d 188, 196–97 (2012). And "a substantial factor is a factor that a reasonable person would consider to have contributed to [the] harm"—it need not be "the only cause." App-2497–98. There was more than enough evidence for a reasonable juror to conclude that SHL's bad-faith denial of Bill's claim "contributed to" his harm.

Both Dr. Liao and Dr. Chang testified "to a reasonable degree of medical probability" that had Bill received proton therapy rather than IMRT, he would not have developed Grade III esophagitis. Liao Dep. 155; App-184–85. This testimony was supported by the comparative plan Dr. Liao's team created when evaluating Bill's treatment options, which showed that IMRT would subject Bill's esophagus to a dangerous level of radiation, while proton therapy would not. And both doctors testified that it was his Grade III esophagitis that—by definition—prevented him from eating and drinking, which caused his extreme weight loss, weakness, fatigue, pain, and anger.

SHL takes aim at Dr. Chang's testimony, but its criticism confuses the likelihood that a patient will develop Grade III esophagitis from IMRT in the first place with the likelihood that a patient—like Bill—who *did* develop Grade III esophagitis would have developed the same injury had they been treated with proton therapy instead. Dr. Chang testified that he was "above

95 percent" certain that Bill would not have developed Grade III esophagitis had he been treated with proton therapy. App-637–38. Perhaps SHL disagrees with his reasoning, but the jury was entitled to credit his testimony. And, in any event, even absent Dr. Chang's testimony, the jury would still have heard from Dr. Liao and seen her comparative plan—evidence with which SHL takes no issue. That evidence, standing alone, is sufficient for a reasonable jury to conclude that SHL's denial of Bill's claim was a substantial factor in causing his injuries.[7]

2. Most of SHL's argument on causation is not actually about causation at all, but damages. SHL raises two damages issues, both of which are easily dispatched. *First*, SHL asserts that Bill's estate cannot recover emotional distress damages absent proof of economic loss. SHL raised this argument in its motion to dismiss, and Judge Cory rejected it—three years ago. Court Minutes, June 18, 2019; SHL Mot. Dismiss, at 9–12 (May 10, 2019). SHL has not asked this Court's permission to seek reconsideration. Nev. R. P. 2.24 ("No motions once heard and disposed of may be renewed in the same cause, *nor may the same matters therein embraced be reheard*, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." (emphasis added)). Nor has it even attempted to demonstrate that new facts have come to light or that this Court's prior decision was clearly erroneous. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). It simply repeats the same argument this Court rejected.

[7] SHL briefly suggests that there were intervening factors, but the company doesn't even argue the point. And, in any event, its denial need not be the sole cause of Bill's harm—just a substantial factor in bringing it about. SHL did not ask for an intervening-cause instruction for good reason: It was entirely foreseeable that a stage IV cancer patient would proceed with whatever treatment his insurance company would approve rather than attempt to pay for treatment out of pocket or delay all treatment in an effort to appeal—especially when, as here, the company virtually never grants appeals. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491–92, 215 P.3d 709, 724 (2009) ("An intervening act will only be superseding and cut off liability if it is unforeseeable."). Moreover, where, as here, an "actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement (Second) of Torts §435.

Reconsideration should be granted "only in very rare instances." *N. Main, LLC v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 128 Nev. 922, 381 P.3d 646 (2012). Here, SHL seeks reconsideration without seeking leave to do so, without meeting—or even setting forth—the standard, and following a jury trial in which the plaintiff relied on this Court's ruling in determining what evidence need to be presented. That is not the kind of "rare" circumstance in which reconsideration is warranted.

And even if this Court were to grant reconsideration, SHL's argument fails for the same reasons it did three years ago. *See* Opp'n Mot. Dismiss (May 24, 2019). Nevada has never adopted the rule that a plaintiff seeking emotional damages on a bad-faith insurance claim must also prove economic loss. In fact, the Supreme Court approved a damages award purely for emotional distress in a bad-faith insurance case. *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996).

Rather than take the lead of the Nevada Supreme Court, SHL asks this Court to follow California courts. But California also lacks the rigid rule that SHL seeks. Although California courts have held that plaintiffs in bad-faith insurance cases may not seek emotional distress damages without economic loss, every case in which they have done so is a case in which the relevant loss would, in fact, be economic.[8] These cases simply reflect an (increasingly outmoded) principle in California law that, ordinarily, compensation for emotional harm may be sought only either where it is tied to a physical or economic injury or where the emotional harm is severe. *See, e.g.*, *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 578–81 (1973). Bad-faith cases tend to cause economic injury (*e.g.*, having to pay for treatment out of pocket), so the case law describes the requirement in those terms. *See, e.g.*, *id.* But the purpose of the rule, where it applies at all, is to address "the fear of fictitious or trivial claims," *id.* at 580—a fear that is equally allayed by physical harm as by economic. *See also* 4A American Law of Torts § 16:2 ("There appears to be no dissent from the general proposition in the American law of damages

[8] This includes the case SHL argues shows otherwise. *See Maxwell v. Fire Ins. Exch.*, 60 Cal. App. 4th 1446, 1451 (1998). The plaintiff there was physically injured, but not by the insurance company. *See id.* at 1447–48.

recoverable for tort that mental suffering or anguish actually accompanying a physical bodily injury is compensable.").

SHL's argument is also contrary to the weight of authority in other states. Several state supreme courts have held that a plaintiff in a bad-faith case can recover emotional-distress damages without any showing of additional harm—physical or economic. *See, e.g.*, *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 40 n.30 (Ky. 2017); *Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 432 (Haw. 2011); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409 (Colo. 2004). After all, requiring physical or economic loss would mean that, in many cases, insurers could unreasonably refuse the payment of valid claims unless and until a policyholder sued, at which point it could pay just that claim and dismiss the lawsuit on the ground that there was no loss. And "the jury system itself serves as a safeguard against fictitious claims of, and unlimited liability for, emotional distress damages allegedly resulting from an insurer's bad faith." *Miller*, 268 P.3d at 431. Especially given that it's already approved an award solely for emotional distress, there is no reason to believe the Nevada Supreme Court would undermine its bad-faith doctrine by grafting onto it a requirement of physical or economic harm. This Court should not do so either.

In any case, any such requirement would be satisfied. Bill suffered physical harm, the injury to his esophagus, and economic harm—SHL's refusal to pay for proton therapy, the need for Bill and his family to "get out" of their auto-care franchise because Bill could no longer handle the work, App-1253, and the cost of the lawsuit itself. *Cf. Delos v. Farmers Grp., Inc.*, 93 Cal. App. 3d 642, 659 (1979) (legal costs are sufficient).

Second, SHL argues (at 14) that there was insufficient evidence that Bill's emotional distress caused him physical harm. But as just explained, a plaintiff in a bad-faith insurance case can recover for emotional distress unaccompanied by any physical or economic harm. And even if that weren't the case, there was substantial evidence introduced at trial—which SHL does not attempt to dispute—that Bill suffered physical harm. As both Dr. Liao and Dr. Chang testified, esophagitis is a physical injury, the burning and scarring of the esophagus. *See, e.g.*, App-595–96; Liao Dep. 80. Bill's emotional distress was incident to that physical impact. He need not,

therefore, prove that it caused additional physical harm. *See, e.g.*, *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010) (requirement that emotional distress cause physical harm applies—if at all—only in cases "where emotional distress damages are not secondary to physical injuries" in the first place).

II. This Court did not err in allowing the jury to determine punitive damages under a "conscious disregard" standard.

A. As this Court has already held, the correct standard for instructing the jury was "conscious disregard of the plaintiffs' rights"—not "hatred and ill will or intent to injure."

SHL next contends that this Court erred in instructing the jury on punitive damages. But SHL's argument rests on the wrong legal standard. Under Nevada law, the correct question for the jury, as this Court explained when it rejected SHL's previous directed-verdict motion during trial, was whether "the defendant acted in conscious disregard of the plaintiffs' rights." App-1881; *see* Jury Instruction 32. SHL, by contrast, urged the Court to adopt a much higher standard: whether "the insurer acted with *hatred and ill will*, or manifested *an intent to injure*" the plaintiff. JMOL 16 (emphasis added). That is not Nevada law. And if it were, it would be virtually impossible for anyone to obtain punitive damages for reprehensible and harmful corporate policies.

Nevada sets out the requirements for punitive damages by statute. The statute permits punitive damages where plaintiffs can prove, among other things, that the defendant's conduct was characterized by implied malice or oppression. *See* NRS 42.005.1. Implied malice encompasses conduct that is "engaged in with a *conscious disregard* of the rights or safety of others." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.2d 243, 252 (2008). Similarly, "oppression" encompasses conduct that "subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." *Id.* Thus, both implied malice and oppression turn on "conscious disregard of a person's rights as a common mental element." *Id.* That standard is reflected in longstanding Nevada case law and standard jury instructions. *See, e.g., Ainsworth*, 104 Nev. at 593, 763 P.2d at 677; *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512–13, 789 P.2d 193, 198 (1989); State Bar of Nevada, *Nevada Jury Instructions:*

Civil (2018 ed.), 12.1 (defining malice as "conduct which is engaged in with a conscious disregard of the rights or safety of others" and "oppression" as "conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of that person").

SHL doesn't dispute that both oppression and implied malice are valid bases for punitive damages under this statute. And it doesn't dispute that this statute applies to insurance bad-faith cases. Indeed, the statute reflects that the Legislature took special steps to protect Nevadans from insurance-company misconduct by specifically encouraging punitive damages in bad-faith cases. *First*, the Legislature exempted bad-faith cases from the statutory damages cap and 1:3 ratio that otherwise apply across the board. NRS 42.005.2(b). *Second*, the Legislature provided that, in bad-faith cases, the strict definitions cabining punitive damages under NRS 42.001 "are not applicable and the corresponding provisions of the common law apply." NRS 42.005(5). This means that a plaintiff in a bad-faith case, unlike plaintiffs in ordinary tort cases, need not prove "despicable conduct" on the part of the insurer to obtain punitive damages. NRS 42.001. The legislative history reflects this intent to ensure that "claims of bad faith against an insurer are exempt from these punitive damage limitations." Legislative Counsel Bureau, Summary, S.B. 474 (1995), https://perma.cc/8FZ3-NJP8.

SHL draws the wrong lesson from these provisions, suggesting that the Legislature somehow meant to apply a *stricter* standard to bad-faith cases. That gets things backwards.

In making this argument, SHL first ignores that "oppression" is an independent basis for the jury's award. SHL never objected to the definition of oppression and does not offer any independent argument for why the Court should adopt a heightened standard for oppression in bad-faith cases. That issue is therefore waived. That alone is sufficient reason to reject SHL's motion and uphold the jury's punitive-damages award.[9]

[9] In any event, SHL is wrong. In *Powers v. United Services Automobile Association*, 114 Nev. 690, 962 P.2d 596 (1998), the Nevada Supreme Court upheld a punitive-damages award in an insurance bad-faith case, holding that the insurer "made numerous critical omissions in its investigative process; these omissions support a finding of oppression." *Id.* at 704. The holding that insurer omissions can constitute oppression is incompatible with a hatred or ill-will requirement. And *Powers* was decided in 1998—three years after the enactment of the statutory language on which SHL relies.

As for malice, SHL fundamentally misunderstands the common-law distinction between express and implied malice. The older cases on which SHL relies, *see* JMOL 15–16, all concern express malice or malice-in-fact (or malice in unrelated fields of law such as defamation). But Nevada has since made clear that "implied malice"—which doesn't require hatred or ill-will—"is a discrete basis for assessing punitive damages where conscious disregard can be demonstrated." *Thitchener*, 124 Nev. at 742–43; 192 P.2d at 254–55 & n.49 (repudiating the contrary view and explaining how Nevada's jurisprudence evolved). Again, there's no dispute that this statute applies here. *See* NRS 42.005.1 (allowing punitive damages on the basis of "oppression, fraud or malice, express or implied").

Even in the nineteenth century, under the common law, "the rule in a large majority of jurisdictions was that punitive damages … could be awarded without a showing of actual ill will, spite, or intent to injure." *Smith v. Wade*, 461 U.S. 30, 41 (1983). To be sure, explicit "malice" or "malice in fact" meant exactly what SHL says: "actual ill will, spite or intent to injure." *Id.* at 39 n.8. But "implied malice" meant something very different. This was "a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended." *Id.* It often encompassed only "an intent to do the act that caused the injury, as opposed to cause the injury itself." *Id.* In the punitive-damages context, then, implied malice encompassed conduct that was "recklessly negligent" or "wantonly indifferent to another's rights." *Id.* In other words, even under the common law one hundred years ago, implied malice was a basis for recovering punitive damages for conduct reflecting a conscious disregard of the plaintiff's rights.

B. This Court did not err in finding sufficient evidence that SHL had acted in conscious disregard of Bill's rights and his health.

Aside from trying to change the relevant legal standard, SHL makes only a halfhearted attempt to show that the jury's damages award should be overturned for insufficient evidence. But the Nevada Supreme Court will not disturb an award of punitive damages unless it is "not supported by substantial evidence" in the trial record. *First Interstate Bank v. Jafbros Auto Body*, 106 Nev. 54, 56, 787 P.2d 265, 766 (1990). Substantial evidence is "evidence that a

reasonable mind might accept as adequate to support a conclusion." *Thitchener*, 124 Nev. at 739. In reviewing the jury's award, the Nevada Supreme Court will "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Id.*

SHL's motion entirely ignores this Court's reasoning for denying its previous motion for a directed verdict. It should be denied again for that reason alone. This Court singled out three facts in concluding that the evidence was sufficient. *First*, "the insurance policy states that therapeutic radiation was a covered service, and proton therapy is a form of therapeutic radiation." App-1881. In other words, SHL denied Bill coverage for medically necessary cancer treatment that was plainly covered by his insurance policy—treatment that was the very basis for his decision to buy SHL's expensive platinum insurance policy in the first place. *Second*, "no one at the insurance company reviewed the insurance policy when this decision to deny coverage was made." *Id. Third,* "Dr. Chang clearly testified in his direct examination on the stand that within a 95 percent degree of medical probability," Bill "sustained Grade III esophagitis" as a result of undergoing IMRT treatment instead of the recommended proton therapy treatment. *Id.*

This Court was amply justified in relying on this and other evidence in denying SHL's motion for a directed verdict. *See Powers*, 114 Nev. P.2d at 704 (holding that an insurer's "numerous critical omissions" in denying a claim supported punitive damages); *Thitchener*, 124 Nev. at 744, 92 P.2d at 255–56 (holding that a mortgage company's failure to review foreclosure documents despite "warning signs" of "imminent, as opposed to merely a theoretical risk of harm," warranted punitive damages); *Wyeth v. Rowatt*, 126 Nev. 446, 474, 244 P.2d 765, 784 (2010) (holding that a drug company's conduct in disregarding the risk of cancer showed that it "acted with malice when it had knowledge of the probable harmful consequences of its wrongful acts"). Consequently, there should be little question that "the jury could have logically concluded that" SHL "consciously disregarded" Bill's rights, as well as his health, safety, and well-being. *Thitchener*, 124 Nev. at 744, 192 P.2d at 255–56.

Ignoring the evidence cited by the Court, SHL argues, first, that when it denied Bill's claim for proton therapy, it was just following its own "standard procedures," and, second, that the categorical denial of proton-therapy coverage was scientifically justified. JMOL 16–19. Far from showing that the jury's award of punitive damages should be overturned, these arguments demonstrate *exactly why* the award was justified. SHL's conduct in this case, even on the company's own account, was not an example of one-off negligence or a casual human mistake. It was instead the predictable result of a categorical, reckless corporate policy—a "standard" policy that was kept hidden from Bill and Sandy Eskew and others in their position who depend on their insurer to provide coverage in a moment of acute medical need. A "standard" policy that contradicted the very scientific studies it cited. A "standard" policy that placed the company's profits over the health and well-being of those who pay its premiums. It is precisely for egregious situations like this that punitive damages exist.

CONCLUSION

The renewed motion for judgment as a matter of law should be denied.

DATED this 29th day of June 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and that on this date, a true and correct copy of the foregoing was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and NEFCR 9, via the electronic mail address noted below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Defendant.

Case No.: A-19-788630-C
Dept. No.: 4

DEFENDANT'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Hearing Date: August 17, 2022
Hearing Time: 9:00 a.m.

REPLY MEMORANDUM

Defendant Sierra Health and Life Insurance Company, Inc. ("SHL") respectfully submits this reply in support of its renewed motion for judgment as a matter of law.

INTRODUCTION

Plaintiff's opposition brief confirms that her claims for bad faith and punitive damages both fail as a matter of law. There is no dispute that the plain language of the insurance contract at issue provides coverage for proton beam therapy only when SHL deems it medically necessary. There is no dispute that Plaintiff was aware of this limitation when she bought the policy. And there is no dispute that the proton policy SHL relied on provided that proton beam therapy was not medically necessary for individuals with lung cancer, such as Mr. Eskew. There is simply no evidence of bad faith, let alone evidence warranting the extraordinary sanction of punitive damages.

Plaintiff's case depended on attacking the proton policy and claims process. But here too, the undisputed evidence does not support the verdict. The record establishes that the policy was based on peer-reviewed and evidence-based studies, and was consistent with the policies of all other major insurance companies. Likewise, the record establishes that SHL followed its claims process to the letter in denying Plaintiff's preauthorization request.

That Plaintiff's experts stake out a different position on proton beam therapy—one at odds with leading medical and radiation oncology groups—does not mean SHL acted in bad faith or with malice in adopting its proton policy. An insurer is not liable for punitive damages simply because an opposing expert claims a particular treatment was medically necessary. Rather, the reasonableness of the insurer's conduct is assessed by reference to objective yardsticks of conduct, including whether its coverage decision was consistent with the plain language of the policy, and whether its assessment of medical necessity was an outlier or fell within the mainstream of the scientific and medical community and the approach taken by other insurers.

Under those metrics and standards of objective reasonableness, the evidence in this case does not support a finding of bad faith, let alone a finding of malice or oppression necessary for

an award of punitive damages. This Court should therefore enter judgment as a matter of law in favor of SHL.

ARGUMENT

I. SHL Is Entitled To Judgment On The Bad-Faith Claim.

Plaintiff's bad-faith claim fails because the evidence was insufficient to support any of the required four elements. As SHL explained in its opening memorandum (at 5), Plaintiff's evidence failed to show: (1) that the requested proton beam therapy was a covered service under the terms of Plaintiff's insurance plan; (2) that SHL had no reasonable basis for denying coverage; (3) that SHL knew, or recklessly disregarded, that it lacked a reasonable basis for the denial; or (4) that the denial was a legal cause of harm to Mr. Eskew. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998). Nothing in Plaintiff's opposition proves otherwise.

A. The Evidence Did Not Establish That The Requested Proton Beam Therapy Was A Covered Service.

SHL explained in its opening memorandum (at 5-8) that under the plain terms of Plaintiff's plan, only procedures deemed "medically necessary" are covered, App. Vol. 1 at 39 [Section 4.1], and SHL determines "medical necessity" by considering a series of data-based factors, including "peer-review literature" and "[e]vidence based reports" by "professional organizations." App. Vol. 1 at 64 [Section 13.66]. Moreover, the plan expressly excludes coverage for any "[e]xperimental, investigational or unproven treatment or devices as determined by SHL." *Id*. at 49 [Section 6.34]. In short, the plan covers a procedure only if the peer-reviewed evidence demonstrates to SHL that the procedure is medically necessary—and not experimental or unproven.

The evidence at trial demonstrated that, at the time of the coverage request, proton beam therapy was *not* a medically proven treatment for lung cancer. Dr. Ahmad relied on the UnitedHealthcare Proton Policy in making his decision, *see* App. Vol. 2 (3/16 Tr.) at 372-73; Tr. Ex. 24, and Plaintiff's expert, Dr. Andrew Chang, agreed that the proton policy contained comprehensive references to "peer review literature" and "evidence based reports and guidelines

published by nationally recognized professional organizations," App. Vol. 3 (3/21 Tr.) at 659-60. Plaintiff vilifies the proton policy as a "secret," "hidden corporate policy of denying all claims for proton-beam therapy for lung cancer." Opp. 2, 3. In fact, the proton policy was publicly available online, as were the policies of all the largest insurers—and like SHL's, all of those policies determined that proton beam therapy for lung cancer was unproven and/or not medically necessary. *See* App. Vol. 2 (3/16 Tr.) at 326-27; App. Vol. 9 (3/28 Tr.) at 2037-38. Moreover, the proton policy was not an arbitrary policy set in stone. Rather, it was a dynamic, evidence-based evaluation that rested on studies and data presented in peer-reviewed journals, as well as on the conclusions reached by leading medical and radiology associations, including the American Society for Radiation Oncology and the Agency for Healthcare Research and Quality. Dr. Chang was not able to identify *any* published peer review article or study that the proton policy should have cited but did not. Vol. 3 (3/21 Tr.) at 660.

Plaintiff asserts that the policy "states that therapeutic radiation services—which include proton therapy—*are* covered." Opp. 14. But Plaintiff neglects to mention that the plan expressly provides that it does *not* cover *all* "therapeutic radiology … services," but only those services that are "authorized by the managed care program," App. Vol. 2 (3/16 Tr.) at 362–63 (quoting [Section 5.18])—and the managed care program is "the process that determines medical necessity," *id.* at 363-64 (quoting [Section 13.63]); *see also id.* at 360 ("SHL's managed care program … determines whether services … are medically necessary") (internal quotation marks omitted). The plan is clear that it covers therapeutic radiology services *only* when SHL determines that they are medically necessary. Indeed, Plaintiff concedes that the plain text of the contract "says [SHL] may 'give consideration' to studies and reports in determining whether a particular treatment for which a policyholder seeks coverage satisfies the contract's definition of 'medically necessary.'" Opp. 18 (italics omitted). That is exactly what the proton policy did: the policy was a detailed and comprehensive consideration of the relevant studies and reports, which came to the reasoned and well-founded conclusion that proton beam therapy was not a proven treatment for lung cancer.

Thus, Plaintiff's repeated accusation (at 10, 13, 18) that Dr. Ahmad did not review the terms of Mr. Eskew's contract is beside the point. SHL had already conducted extensive research and made a reasoned, evidence-backed determination that proton beam therapy was not a proven and medically necessary procedure for lung cancer. That scientifically grounded medical conclusion would not change based on the particulars of Mr. Eskew's contract.

In any event, Plaintiff ignores the fact that Dr. Ahmad was "very familiar" with the terms of coverage in SHL's contracts. App. Vol. 2 (3/16 Tr.) at 274. He had reviewed SHL's contracts "[m]any times" before, *id*. at 357, and the terms of Mr. Eskew's plan were consistent with contracts he had reviewed previously, *id*. at 361. Moreover, SHL's review process included reviewing nurses who analyzed the terms of the contract and alerted reviewing physicians if additional review was needed. *Id*. at 358. In accordance with this process, Nurse Amogawin read Mr. Eskew's plan. Trial Tr. Day 10 (3/29) at 135-36. There was no reason for Dr. Ahmad to again review terms with which he was already very familiar, and which Nurse Amogawin had already reviewed to confirm that they were identical to those in the typical plans.

Plaintiff further criticizes the plan as "worthless," Opp. 18, because it provides that medical necessity will be "determined by SHL" in light of "peer-review literature," "[e]vidence based reports," and "[o]ther relevant information obtained by SHL." App. Vol. 1 at 64 [Section 13.66]. Similarly, Plaintiff argues that it was unreasonable for SHL to sell Mrs. Eskew a policy that covered only medically necessary procedures, erroneously suggesting that SHL "misl[e]d" Mrs. Eskew. Opp. 10. But as Mrs. Eskew admitted, she was aware of the "medically necessary" limitation when she bought the plan. App. Vol. 6 (3/24 Tr.) at 1439; *see also id.* at 1484 (Mrs. Eskew testifying that, under the plan, it was her understanding that not every request for proton beam therapy would be approved, but only those that have been scientifically proven to work); *id.* at 1391 (Ms. Eskew testifying that she knew the contract covered a certain service only if "authorized by the Managed Care Program").

In short, Plaintiff's bad-faith claim fails because the plan did not cover proton beam therapy for lung cancer. *See Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 605, 729 P.2d

1352, 1355 (1986) (per curiam) ("Because we conclude that AEI's interpretation of the contract was reasonable, there is no basis for concluding that AEI acted in bad faith."); 44A Am. Jur. 2d Insurance § 1739 ("[T]o find that an insurer committed bad faith, there must also have been a duty under the contract that was breached.").

B. The Evidence Did Not Establish That SHL Lacked A Reasonable Basis For The Denial.

Moreover, even if the plan did cover proton beam therapy for lung cancer, Plaintiff failed to prove that SHL lacked any reasonable basis for denying coverage. *See Polymer Plastics Corp. v. Hartford Cas. Ins. Co.*, 389 F. App'x 703, 706 (9th Cir. 2010) ("When an insurance company's interpretation of the contract is reasonable, there can be no basis for concluding that the insurance company acted in bad faith." (applying Nevada law)). An insurer's "honest mistake, bad judgment, or negligence" is not enough. *See Allstate Ins. Co. v. Miller*, 125 Nev. 300, 317, 212 P.3d 318, 330 (2009). And an insurer "is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did." *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 863 F. Supp. 1237, 1242 (D. Nev. 1994).

Plaintiff ignores the overwhelming evidence demonstrating that SHL's conclusion regarding proton beam therapy was entirely reasonable, even if it could be deemed mistaken. *See* Opp. 11-12. Numerous scientific organizations had concluded that existing data did "not provide sufficient evidence to recommend proton beam therapy outside of clinical trials in lung cancer." App. Vol. 3 (3/21 Tr.) at 662 (statement of Emerging Technology Committee of the American Society for Radiation Oncology) (quotation marks omitted); *see also* App. Vol. 3 (3/21 Tr.) at 663-64 (statement of Agency for Healthcare Research and Quality that "the evidence is insufficient to draw any definitive conclusions as to whether proton beam therapy has any advantages over traditional therap[ies]") (quotation marks omitted). The proton policy rested on the findings of some of the nation's leading medical and radiology organizations in concluding that "[c]urrent published evidence does not allow for any definitive conclusions about the safety and efficacy of

proton beam therapy to treat" lung cancer "as proven and medically necessary." App. Vol. 9 (3/28 Tr.) at 2016 (quotation marks omitted). And Plaintiff does not contest that Mr. Eskew's preauthorization request was handled in a manner "consistent with the policies and procedures at Sierra Health and Life." App. Vol. 4 (3/22 Tr.) at 876.

Moreover, the undisputed evidence showed that *none* of the nation's 12 largest insurers considered proton beam therapy to be medically necessary for someone in Mr. Eskew's situation. *See* App. Vol. 9 (3/28 Tr.) at 2039-43. Dr. Owens could not find a single policy that covered proton beam therapy for non-small cell lung cancer, and considered it "highly unlikely" that Plaintiff could even have obtained a policy that would have covered it. *Id.* at 2045; *see also Hanson v. Prudential Ins. Co. of Am*., 783 F.2d 762, 767 (9th Cir. 1985) (courts look to whether the insurer's "handling of the claim was in accord with insurance industry practice"); *Schultz v. GEICO Cas. Co*., 429 P.3d 844, 847 (Colo. 2018) ("The reasonableness of the insurer's conduct … is based on proof of industry standards.") (quotation marks omitted).

Plaintiff suggests that the denial of the preauthorization request could not reasonably be grounded in the proton policy because the policy and Plaintiff's contract adopted different definitions of medical necessity. Opp. 18. Plaintiff contends that the proton policy requires consideration of cost, whereas the contract prohibits it. *Id.* Plaintiff is mistaken. The contract provides that a "'Managed Care Program,' means the process that determines Medical Necessity and directs care to the most appropriate setting to provide quality care in a *cost-effective* manner." App. Vol. 1 at 64 (Section 13.63 (emphasis added)); App Vol. 2 (3/16 Tr.) at 364. And in any event, Dr. Ahmad testified that he did not consider cost in denying Plaintiff's request. App. Vol. 2 (3/21 Tr.) at 374, 470-71.

Finally, Plaintiff contends that a reasonable but mistaken interpretation of a contract cannot support judgment as a matter of law for the defendant. Opp. 13 (citing *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1258-59, 969 P.2d 949, 958 (1998)). But *Wohlers* held no such thing. Rather, in that case, the court concluded that the insurer's interpretation could not support judgment as a matter of law because it was "absurd," not reasonable. *Wohlers*, 114 Nev. at 1260,

969 P.2d at 957. Similarly, *Wohlers* relied on *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529 (1982), but courts have deemed *Sparks* "distinguishable" when the insurer's interpretation "is not internally inconsistent," *Rulison v. Blue Cross of California*, 908 F.2d 977 (9th Cir. 1990). Here, there is nothing "absurd" or "internally inconsistent" about interpreting the contract language providing that SHL may determine "medical[] necess[ity]" by considering "peer-review literature" and "[e]vidence based reports," App. Vol. 1 at 64 [Section 13.66], to allow SHL to determine medical necessity by considering peer-reviewed literature and evidence-based reports.

C. The Evidence Did Not Establish That SHL Knew That It Lacked A Reasonable Basis For The Denial.

Even if SHL's coverage determination could be deemed unreasonable, there is no evidence in the record establishing that anyone at SHL *knew* that it had no reasonable basis for the denial. This is a critical and necessary element of a bad faith claim, *see Pioneer Chlor Alkali Co.*, 863 F. Supp. at 1242, yet Plaintiff identifies no evidence proving SHL's knowledge. In fact, the evidence shows that SHL believed it *had* a reasonable basis. An insurer that bases its determination on a policy that is scientifically grounded, rests on the considered judgments of the nation's leading medical organizations, and tracks the policies adopted by all other large insurers cannot possibly be deemed to have *knowingly* made a coverage decision that lacks a reasonable basis.

Plaintiffs gets both the law and the facts wrong in launching a series of attacks on SHL's review process and coverage determination. First, Plaintiff announces that the "parties agree" on "several well-established standards" for insurer conduct, including that insurers may not "rely on internal corporate policies to automatically deny certain categories of claims." Opp. 9. To support this assertion, Plaintiff quotes the testimony of Mr. Prater, Plaintiff's bad-faith expert. *Id.* But this Court already ruled that Mr. Prater may not testify as to legal conclusions. *See* Order Regarding Defendants' Motions in Limine at 2 (MIL No. 1). And SHL's expert did *not* agree with all of Mr. Prater's testimony. To the contrary, SHL's expert agreed with Mr. Prater's description of industry norms only at a "high level." App. Vol. 9 (3/28 Tr.) at 2055-56. SHL's expert also expressed

doubt that Mr. Prater, "understood" or properly "engaged" with the complexities of good-faith provision of medical insurance. *Id.* at 2057. Further, the purported industry standards that Mr. Prater identified were not, in fact, uniform industry practice. Ms. Eskew, for example, admitted that when she worked as a dental claim reviewer, her employer's conduct did not comport with each of Mr. Prater's alleged standards. App. Vol. 6 (3/24 Tr.) at 1430.

Second, Plaintiff repeatedly cites to Nevada's Unfair Practices in Settling Claims Act and Administrative Code to suggest that SHL acted in bad faith by failing to provide a reasonable explanation for the denial and by "falsely stating" that the denial was based on the contract. Opp. 9-11 (citing NRS 686A.310 and Nev. Admin Code § 686A.675). But Plaintiff has not maintained a statutory violation claim and statutory violations are not coextensive with acts of bad faith in any event. *See, e.g., Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F.Supp.2d 1223, 1236 (D. Nev. 2010) ("Our conclusions regarding the propriety of Zurich's denial of the claim and lack of bad faith are not dispositive of" Unfair Practices in Settling Claims issues.). As the Court's jury instructions made clear, the presence of a statutory violation "alone is not enough to determine whether the defendant's conduct was or was not in bad faith." Jury Instruction No. 25. Even if the law were otherwise, there was no statutory violation here. The denial letter accurately stated that proton beam therapy was not covered because it was "not medically necessary" under the plain terms of Mr. Eskew's contract. Tr. Ex. 5 at SHL 352. And even in the absence of a citation to a particular provision, the stated reason for the denial was accurate: "[t]his type of radiation therapy is considered unproven." *Id.* Further, the denial letter had no impact on Mr. Eskew's alleged injuries—Dr. Liao decided to proceed with IMRT treatment without even reading the letter. Trial Tr. Day 5 (3/22) at 180-81 (Liao Dep. at 117:20-118:5).

Third, Plaintiff argues (at 10) that Dr. Ahmad was not qualified to review the request for coverage. That is false. Although Dr. Ahmad was a medical oncologist, not a radiation oncologist, the industry standard of care does not require an exact match between the specialty of a reviewer and the type of case being reviewed. *See* App. Vol. 1 (3/16 Tr.) at 217; App. Vol. 8 (3/28 Tr.) at 1969. Coverage decisions are distinct from treatment decisions and each type of decision requires

a different skillset. App. Vol. 2 (3/16 Tr.) at 356-57 (describing differences between these two decisions). Regardless, Dr. Ahmad had received radiation oncology training as part of his medical oncology training, *id.* at 355, and he underwent inter-rater reliability testing at least once a year to ensure that his decisions aligned with those of other reviewers, *id.* at 435-46.

Fourth, Plaintiff mistakenly asserts (at 9, 10, 13) that Dr. Ahmad did not investigate Mr. Eskew's claim and instead automatically denied it based on SHL's proton policy alone. But Dr. Ahmad researched proton beam therapy literature and reviewed Mr. Eskew's medical records and the proton policy. App. Vol. 2 (3/16) Tr. at 314-15. And his denial was not automatic—he had discretion to disagree with corporate medical policy if the facts of the case warranted a different outcome. *Id.* at 327-28, 333, 428, 431. There is no evidence that Dr. Ahmad *knew* his determination lacked a reasonable basis.

Fifth, and finally, Plaintiff notes that SHL's sister corporation operates a proton-therapy center. Opp. 12. But even if this evidence were admissible or relevant—and SHL maintains it was not, *see* App. Vol. 8 (3/25 Tr.) at 1857, 1860-61—it simply shows that UnitedHealth Group invested in proton beam therapy to collect data about the efficacy of proton beam therapy. *Id.* at 1843-44. The fact that a different company within the same corporate family invested in proton beam therapy does not demonstrate that SHL knew that its coverage decision was unreasonable: a treatment can be unproven and not medically necessary, but still worthy of investment so that over time it can become proven and medically necessary in some circumstances. Plaintiff also contends that SHL has fabricated its concern over the lack of randomized control trials for proton beam therapy because (as Plaintiff tells it) IMRT also lacks randomized clinical trials. Opp. at 12. But Plaintiff's cited evidence supports only the much more limited contention that Dr. Ahmad was not sure whether SHL's IMRT policy contained studies supporting the use of IMRT for treatment of lung cancer, App. Vol. 2 (3/16 Tr.) at 469, and there is no serious dispute that IMRT is a proven treatment for lung cancer.

In sum, Plaintiff's bad faith claim fails because Plaintiff did not introduce legally sufficient evidence allowing the jury to conclude that SHL *knew* it lacked a reasonable basis for the denial.

D. The Evidence Did Not Establish Causation.

1. Plaintiff Did Not Introduce Evidence Of Economic Loss Necessary To Recover Damages For Emotional Distress.

Plaintiff challenges the longstanding position of many courts that an insured cannot recover noneconomic damages on a bad-faith claim without proof of economic loss. *See, e.g., Cont'l Ins. Co. v. Superior Court*, 37 Cal. App. 4th 69, 86, 43 Cal. Rptr. 2d 374, 384 (Cal. App. 1995) ("In the absence of any economic loss there is no invasion of [the insureds'] *property rights* to which their alleged emotional distress over [the insurer's] denial and delay could be incidentally attached. In short, there would be no legal basis for an action for bad faith.").

First, Plaintiff incorrectly asserts that SHL's argument has already been rejected and can be addressed only through a request for reconsideration. Opp. 20. Judge Cory never made a ruling on SHL's argument regarding economic loss, so the matter has not been "disposed of." Nev. R. P. 2.24; *see also Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (reconsideration applies to a "*previously decided* issue" (emphasis added)). In fact, when presented with that argument, Judge Cory specifically instructed Plaintiff to amend the complaint in order to seek economic damages. *See* Court Minutes, June 18, 2019 (denying motion to dismiss to allow Plaintiff to amend to properly allege economic loss). Thus, if anything, Judge Cory's statement confirms not only that the issue remains live—but that Plaintiff cannot recover absent proof of economic loss.

Second, Plaintiff contends that the Supreme Court has already decided that damages are available "purely for emotional distress in a bad-faith insurance case." Opp. 21 (citing *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996)). But *Potter* never addressed that question. Rather, *Potter* addressed only whether the award was "excessive." 112 Nev. at 207, 912 P.2d at 272. In fact, while considering the excessiveness of the award, the court confirmed that the plaintiffs *had* suffered economic injury, in the form of "two years of … litigation the [plaintiffs] had to endure and the damage to their credit reputation." 112 Nev. at 207, 912 P.2d at 273. Thus, *Potter* does not resolve the issue.

Third, Plaintiff argues that California law does not require economic loss where the physical injury stems from the alleged acts of the insurance company. Opp. 21 & n.8. But Plaintiff does not cite any cases standing for this purported rule. To the contrary, California courts consistently hold that plaintiffs bear the burden to demonstrate economic loss, even when they allege that the denial of benefits caused physical harm. For example, in *Waters v. United Servs. Auto. Assn.*, 41 Cal. App. 4th 1063, 1069 (1996), the California Court of Appeal reversed a jury verdict, noting that the plaintiffs "put on evidence of their extreme emotional distress and outrage" stemming from the denial of benefits—including that "Mrs. Waters … , based on USAA's conduct, … had twice collapsed and been hospitalized." *Id.* Nevertheless, the verdict had to be reversed because the plaintiffs "did not put on *any* evidence of any kind of financial loss—no medical or hospital bills paid (or even incurred), … —in short, nothing to suggest the Waters spent a penny of their own (or lost income they would have otherwise received) as a result of USAA's delay in paying the amounts claimed under the policy." *Id.* California courts thus explicitly hold that economic loss is required even when the alleged physical injury results from the alleged acts of the insurance company.

Fourth, Plaintiff urges the Court not to follow California's rule, but instead to follow the lead of other states, such as Kentucky and Colorado. Opp. 22. But as SHL explained in its opening brief (at 11), Nevada's bad-faith law derives from California law. *See U.S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975); *see also Avila v. Century Nat'l. Ins. Co.*, 473 F. App'x 554, 556 (9th Cir. 2012) ("We presume that Nevada would look to California law in determining whether the bad faith claim would be viable"). Thus, other courts have applied California's rule regarding "the need for fiscal injury to recover on a bad-faith claim against an insurer" under Nevada law precisely because "Nevada looked to California law when it established the implied covenant of good faith and fair dealing in the insurance context" in the first place. *Saleh v. Am. Nat'l Prop. & Cas. Co.*, No. 2:07-CV-1490-LDG-LRL, 2010 WL 11575639, at *4 (D. Nev. Jan. 8, 2010). Plaintiff has no response to this argument. *See* Opp. 22.

Finally, Plaintiff suggests that she demonstrated economic loss through "SHL's refusal to pay for proton therapy, the need for Bill and his family to 'get out' of their auto-care franchise

because Bill could no longer handle the work, and the cost of the lawsuit itself." Opp. 22 (citation omitted). But Plaintiff never offered any "proof" at trial of what economic losses she now claims to have incurred. *Waters*, 41 Cal. App. 4th at 1081. This is a manufactured, after-the-fact rationale that was not established through evidence at trial. Accordingly, the Court should grant judgment as a matter of law because "Plaintiff testified to no consequential damages arising from nonpayment of the claim." *Blake v. Aetna Life Ins. Co.*, 99 Cal. App. 3d 901, 925 (Cal. Ct. App. 1979) (reversing denial of motion notwithstanding the judgment).

2. Plaintiff Did Not Prove That SHL Proximately Caused Harm To Mr. Eskew.

SHL demonstrated in its opening brief (at 13-14) that Plaintiff did not introduce sufficient evidence establishing that SHL was the proximate cause of Mr. Eskew's pain-and-suffering. *See Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981) ("For an act to be the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." (quotation marks omitted)). Here, there was insufficient evidence linking the preauthorization denial to the pain-and-suffering that Mr. Eskew endured, because Plaintiff's expert, Dr. Chang, conceded that the Grade I and Grade II esophagitis was not attributable to the use of IMRT instead of proton beam therapy, App. Vol. 3 (3/21 Tr.) at 634, and that the use of IMRT instead of proton beam therapy increased the likelihood of Mr. Eskew developing Grade III esophagitis only marginally—from 3% to 15%, *id.* at 593.

In response, Plaintiff contends that SHL misunderstood Dr. Chang's testimony regarding the likelihood of developing Grade III esophagitis, rather than Grade II esophagitis. Opp. 19-20. But Plaintiff ignores that her own expert testified that the likelihood of Grade III esophagitis resulting from IMRT was only 15%. App. Vol. 3 (3/21 Tr.) at 593, 636. That is not significantly higher than the 3% chance of developing Grade III esophagitis from proton beam therapy, and therefore the evidence at trial (including the testimony of Dr. Liao and Dr. Chang) cannot support Plaintiff's counterfactual hypothetical that Mr. Eskew would not have developed Grade III esophagitis from proton beam therapy.

3. Plaintiff Did Not Prove That Mr. Eskew's Emotional Distress Led To Any Physical Injuries

As SHL detailed in its opening brief (at 14) Plaintiff's claim for emotional distress also fails because she did not produce substantial evidence demonstrating that emotional distress caused Mr. Eskew's injuries. Under Nevada law, a plaintiff must introduce evidence of "some physical manifestation of emotional distress" in cases "where emotional damages are not secondary to physical injuries." *Betsinger v. D. R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010); *see also Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448 956 P.2d 1382, 1387 (1998) (same). Plaintiff now argues that the emotional distress damages were secondary to physical injuries, Opp. 22-23, but that was not the claim presented at trial. Plaintiff's claim for emotional distress damages was based solely on the claim denial; it was not secondary to any physical injury caused by esophagitis. *See* App. Vol. 11 (4/4 Tr.) at 2507 ("[T]he third thing we're going to prove to you with the evidence is the harm to Mr. Eskew, and we presented that harm in two fashions: The anxiety, distress, despair the denial itself caused, and then the second aspect is the injury to the esophagitis."). Plaintiff's claim for emotional distress thus necessarily fails.

II. SHL Is Entitled To Judgment On The Punitive Damages Claim.

SHL demonstrated in its opening brief (at 14-19) that Plaintiff did not introduce sufficient evidence—under the heightened clear-and-convincing-evidence standard—to support an award of punitive damages. First, Nevada law does not allow punitive damages for a bad-faith insurance claim unless the plaintiff proves that the insurer's conduct evinced hatred, ill will, or an intent to injure, as required under the common-law definitions of malice and oppression. Second, even under Plaintiff's preferred standard of "conscious disregard," the evidence was not sufficient to sustain an award of punitive damages.

A. Plaintiff Did Not Show That SHL Acted With Hatred, Ill Will, Or An Intent To Injure.

To obtain punitive damages, Plaintiff must establish that SHL acted with malice or oppression—which requires a showing that SHL acted with bad intent, i.e., that it acted with hatred, ill will, or an intent to injure.

Plaintiff disputes the common-law definition of "malice," arguing that it does not require an intent to injure. Opp. 25. But the case on which Plaintiff relies states that, in the nineteenth century, the term "malice" was "*not often*" used in Plaintiff's preferred "sense as a ground for punitive damages." *Smith v. Wade*, 461 U.S. 30, 41 n.8 (1983) (emphasis added). Moreover, Nevada derived its understanding of malice and oppression from *Davis v. Hearst*, which required proof of "the actual existence of [defendant's] hatred and ill will." 160 Cal. 143, 162, 116 P. 530, 538 (1911).

Plaintiff contends that the Legislature, in preserving the common-law definition of "malice" and "oppression" for bad-faith insurance cases, actually meant to *expand* the definition to encompass *more* situations than would otherwise be covered. Opp. 24. The history of the statute tells a different story. The year before the statute was enacted, the Supreme Court had made clear: "Common law malice focuses on ill will and hatred harbored by the defendant against the plaintiff." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046 n.2, 881 P.2d 638, 641, n.2 (1994). And just a few years before that, two Supreme Court cases had split on whether Nevada's punitive-damages statute codified the original "malice" definition of a "deliberate intention to injure," or "had evolved beyond th[os]e restrictions." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 741, 192 P.3d 243 (2008) (citing *Craigo v. Circus-Circus Enterprises, Inc.*, 106 Nev. 1, 9, 786 P.2d 22, 27 (1990); *Granite Const. Co. v. Rhyne*, 107 Nev. 651, 817 P.2d 711 (1991)). Against this backdrop, the Legislature deliberately chose to retain the older, common-law definition of "malice."

Plaintiff also argues that "'oppression' is an independent basis for the jury's award." Opp. 24. But Plaintiff ignores SHL's argument: The common-law definition of "oppression" *also* required a showing of an evil intent to injure. *See* Mot. for JML at 16. To prove oppression at common law, "there must be made to appear to the satisfaction of the jury the evil motive, the animus malus." *Davis*, 160 Cal. at 162, 116 P. at 538. Thus, to obtain punitive damages in a bad-faith insurance case in Nevada, the insured must prove, by clear and convincing evidence, that the insurer acted with hatred and ill will, or manifested an intent to injure them. Finally, Plaintiff

asserts that *Powers v. United Services Automobile Association*, 114 Nev. 690, 962 P.2d 596 (1998), held that punitive damages are warranted under the "oppression" standard even for "omissions." Opp. 24 n.9. But the example of "oppressive" conduct that the *Powers* court identified was the insurance company's deliberate fabrication of videotape "evidence." *Id.* This example obviously involves an "evil motive."

B. Plaintiff Did Not Show That SHL Acted With Conscious Disregard.

Even if punitive damages could be based on the defendant's "conscious disregard" toward the plaintiff, there is no evidence—let alone clear-and-convincing evidence—that SHL acted with conscious disregard.

Plaintiff does not dispute SHL's denial of the preauthorization request followed SHL's standard procedures. Opp. 27. The Nevada Supreme Court has held that "the necessary requisites to support punitive damages are not present" when an insurer denies benefits in accordance with its standard procedures without any malice or oppression toward the insured. *Peterson,* 91 Nev. at 620, 540 P.2d at 1072. Moreover, the undisputed evidence showed that SHL's policy regarding proton beam therapy for lung cancer aligns with widespread industry practice; indeed, Dr. Owens was not able to find a single plan that would have provided coverage for the request in this case. App. Vol. 9 (3/28 Tr.) at 2037-44. This fact is crucial because "[c]ompliance with industry standard and custom serves to negate [any suggestion of] conscious disregard." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *see also Silberg v. Cal. Life Ins. Co.*, 11 Cal. 3d 452, 463, 521 P.2d 1103, 1110 (1974) (holding punitive damages unwarranted because the "practice in the insurance industry" was consistent with the defendant insurer's actions). Plaintiff has no response to these cases or the undisputed fact that SHL's policy was consistent with industry practice.

Plaintiff argues that Mr. Eskew's policy did cover proton beam therapy for lung cancer, that no one at SHL reviewed the policy when denying the claim, and that Plaintiff's expert testified that Mr. Eskew likely sustained Grade III esophagitis because he underwent the IMRT treatment, rather than proton beam therapy. Opp. 26. As detailed above, *see* Parts I.A & I.D *supra*, Plaintiff's

evidence does not support Plaintiff's characterizations. Nor does any of this evidence speak to whether SHL acted with malice. To the contrary, these arguments are simply recycled from Plaintiff's bad faith claim, and even if these arguments were sufficient to prove bad faith (and they are not), they do not establish liability for punitive damages because "[t]he standard for punitive damages is much more stringent than that for bad faith." *Polymer Plastics Corp. v. Hartford Cas. Ins. Co.*, 389 F. App'x 703, 707 (9th Cir. 2010) (applying Nevada law). "[S]ufficient evidence of the insurance company's bad faith" does *not* establish "the necessary requisites to support punitive damages." *Peterson*, 91 Nev. at 620, 540 P.2d at 1072.

The record is devoid of evidence showing that anyone at SHL acted with a *conscious* disregard of the rights of Plaintiff or Mr. Eskew. Even if SHL's coverage discussion could be deemed incorrect, there is no evidence that SHL or any of its employees were aware that they were acting in violation of the rights of their insured—and proceeded to do so despite that awareness. For that reason, even if the Court were to deem the evidence to support a bad faith finding and liability for compensatory damages, it should vacate the award of *punitive* damages.

CONCLUSION

The Court should enter judgment in SHL's favor on Plaintiff's claims for insurance bad faith and punitive damages.

DATED: July 20, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2022 a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Defendant.

Case No.: A-19-788630-C
Dept. No.: 4

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR A NEW TRIAL OR REMITTITUR

Hearing Date: August 17, 2022
Hearing Time: 9:00 am

REPLY MEMORANDUM

Defendant Sierra Health and Life Insurance Company, Inc. ("SHL") respectfully submits this reply in support of its motion for a new trial or remittitur.

INTRODUCTION

The stunning $200 million verdict bears all the hallmarks of passion and prejudice. The size of the verdict is irrational on its face, disconnected from the evidence, and exceeds by many times the largest such compensatory *and* punitive awards ever upheld in Nevada history. And these unprecedented awards came in the immediate wake of counsel's inflammatory and grossly improper appeals to the jurors' passions and prejudices.

Plaintiff's brief in opposition rolls out the tired refrain that the verdict is "explained by the evidence." Opp. 2. If the verdict were a fraction of what the jury awarded—or if Plaintiff had tried a case focused on facts and science rather than on invective and incitement—that might be a more persuasive argument. Here, however, the record leaves no doubt that Plaintiff's counsel's improper arguments tainted the jury's consideration of the evidence and require a new trial. And even if counsel's misconduct could be overlooked, the evidence cannot support the $40 million noneconomic damage award for pain-and-suffering and emotional distress, or the $160 million punitive damage award for a coverage determination that was backed by the nation's leading organizations for radiation oncology and medical research.

Plaintiff argues at many points that SHL did not object to the misconduct, but the record shows that SHL *did* object, repeatedly, to many of Plaintiff's improper arguments—and in numerous instances this Court sustained the objections. Plaintiff also tries to pass off counsel's comments as legitimate advocacy, an argument foreclosed by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008)—which the Court presciently directed all counsel to read prior to trial—as well as by other Supreme Court decisions prohibiting counsel from injecting their personal opinions into the trial or from attacking the integrity of opposing counsel before the jury. To warrant a new trial based on "misconduct of the … prevailing party," NRCP 59(a)(1)(B), it is sufficient that the prejudice could not have been remedied—a standard easily met here, especially in light of *Lioce*'s

direction to district courts to "give great weight" to instances of repeated misconduct because in those situations the prejudice "might not be curable." 124 Nev. at 18-19, 174 P.3d at 981.

Plaintiff's insistence that the "evidence" explains the $200 million verdict, Opp. 2, cannot be credited. The damage awards were the direct result of counsel's inflammatory arguments and must be drastically remitted in the event they are not vacated entirely. Plaintiff does not dispute SHL's research establishing that the compensatory and punitive awards are each stunning outliers in their own right. *See* Mot. for New Trial, Exs. 14-16. Rather, Plaintiff challenges the very idea of looking to comparable awards that have been upheld under Nevada law. Opp. 15. But the Supreme Court has looked to comparable awards for guidance in analyzing excessiveness, *see Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983), as has the United States Supreme Court, which has specifically held that the Due Process Clause *requires* courts to consider "the difference between the punitive damages awarded by the jury and the civil penalties … imposed in comparable cases," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). This is a single-plaintiff dispute over insurance coverage, in which Plaintiff is not arguing that the denial of coverage caused or even hastened Mr. Eskew's death. Neither the evidence nor the Constitution permits a $200 million damage award.

ARGUMENT

The Court should grant a new trial on all issues or, at a minimum, remit the compensatory damage award to no more than $2 million, and reduce the punitive damage award to an amount that does not exceed the remitted compensatory award.

I. The Court Should Grant A New Trial Based On Counsel's Repeated Misconduct.

Plaintiff attempts to downplay and minimize counsel's misconduct through tortured and elaborate explanations, Opp. 4-12, that only succeed in confirming the obvious: this is not a case where counsel inadvertently made a stray remark that crossed the line. To the contrary, appealing to the jury's biases and emotions was the central focus of Plaintiff's trial strategy, and is reflected in counsel's injection of their personal opinions on the credibility of witnesses and the justness of

Plaintiff's cause, their attacks on defense counsel, and their many other improper lines of attack recounted in SHL's opening brief. *See* Mot. for New Trial at 6-11.

First, Plaintiff errs in urging the Court to apply a relaxed standard of review on the basis that SHL supposedly did not object to "the lion's share" of misconduct and did not always demand an immediate admonishment. Opp. 2. SHL's opening brief identified its many specific objections and the specific admonishments that resulted. *See* App. Vol. 11 (4/4 Tr.) at 2655, 2656, 2692 (sustained objections to counsel's injection of personal beliefs); App. Vol. 7 (3/24 Tr.) at 1543, 1547; App. Vol 11 (4/4 Tr.) at 2509, 2690 (sustained objections to counsel's attacks on SHL's counsel); App. Vol. 12 (4/5 Tr.) at 2778 (objections to directing SHL claims manager Shelean Sweet to face jury and admit she agrees with verdict). Much of the misconduct also violated the Court's pretrial order in limine providing that "[t]he parties may not comment on the litigation conduct of the lawyers." Order Regarding Defendants' Motions in Limine at 6 (MIL No. 17). As to all of these acts of misconduct, SHL need only show that the Court's actions could not erase "the misconduct's harmful effect." *Lioce*, 124 Nev. at 6-7, 174 P.3d at 973-74. As to the remaining instances of misconduct that were not objected to, SHL must show that the misconduct affected the verdict. *Lioce*, 124 Nev. at 7, 174 P.3d at 974.

Plaintiff wrongly suggests that the cumulative effect of only the objected-to misconduct may be considered. Opp. 12. But the Supreme Court has underscored that the "scope, nature, and quantity of the misconduct" are key "indicators of the verdict's reliability." *Grosjean v. Imperial Palace*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009) (considering cumulative impact of unobjected-to misconduct). Thus, a new trial may be warranted based on the "cumulative effect" of attorney misconduct—whether objected to or not—if there have been "multiple severe instances of attorney misconduct as determined by their context." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 78, 319 P.3d 606, 614 (2014). That is because when "misconduct is persistent or repeated," the court may conclude "that, by engaging in continued misconduct, the offending attorney accepted the risk that the jury will be influenced by his misconduct." *Id.* (citing *Lioce*, 124 Nev. at 18-19, 174 P.3d at 981).

Second, Plaintiff disputes that counsel engaged in any misconduct. Opp. 6-12. Whether an attorney's comments are misconduct is a question of law that the Supreme Court will review de novo on appeal. *Lioce*, 124 Nev. at 20, 174 P.3d at 982. Here, Plaintiff's insistence that not a single one of counsel's numerous egregious statements documented in SHL's opening brief amounts to misconduct is unpersuasive. The Supreme Court could not have spoken more clearly in holding that attorneys cannot inject their personal views into a case; they cannot share their opinion that a witness lacks credibility; they cannot attack the integrity of opposing counsel; and they cannot make arguments intended to stir the passions and biases of the jury. Not only did counsel do *all* of those things here—they did them *repeatedly*, often in open defiance of this Court's rulings and admonishments. The Supreme Court could have been speaking about this case when it held in *Lioce*, and emphasized again in *Gunderson*, that in cases of repeated misconduct, "the district court *must* acknowledge that although specific instances of misconduct alone might have been curable by objection and admonishment, the effect of persistent or repeated misconduct might be incurable." *Gunderson*, 130 Nev. at 75, 319 P.3d at 612 (emphasis added).

Improper Injection of Personal Beliefs. Plaintiff's counsel repeatedly violated the rule in *Lioce*: "an attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is … improper in civil cases and may amount to prejudicial misconduct necessitating a new trial." 124 Nev. at 21-22, 174 P.3d at 983 (citing RPC 3.4(e)).

- Counsel impermissibly opined on "the justness of a cause" when he told the jury that he was "convinced" that delivering a verdict in Plaintiff's favor was "the right thing to do." App. Vol. 11 (4/4 Tr) at 2692 ("Write in $30 million and do it with your chest stuck out and proudly. Don't hesitate. It's the right thing to do. We wouldn't ask you to do it if we weren't convinced it was the right thing to do.") (emphasis added). Plaintiff offers no defense of these statements, other than characterizing them in a way that borders on the comical. *See* Opp. 9 ("These statements simply explained how the jury should complete the verdict form if it agreed with the plaintiff."). Plaintiff's claim that SHL did not object (*id*. at 10) is false. SHL's objection to this egregious violation

of *Lioce* was sustained. *See* App. Vol. 11 (4/4 Tr.) at 2692. And Plaintiff's claim that SHL's counsel "made similar statements," Opp. 10, is untrue, but in any event "a court of law is no place to resort to the argument of 'he said it first' or 'he did it too.'" *Lioce*, 124 Nev. at 26, 174 P.3d at 986. Indeed, "engaging in misconduct because another lawyer is also engaging in misconduct is in and of itself misconduct." *Id.*

- Counsel blatantly violated the prohibition on offering personal opinions as to "the credibility of a witness" when he accused SHL of "speaking out of both sides of [its] mouth" and asserted: "I think it renders everything they say about that topic unbelievable." App. Vol. 11 (4/4 Tr.) at 2655-56. Counsel further violated the rule when he described SHL's "hypocrisy" as "breathtaking to me," telling the jury that he was "God smacked" and stating that "[t]he hypocrisy of that just knocks the wind out of me." *Id*. Plaintiff's assertion that none of this was a "prohibited personal opinion," Opp. 8, is meritless—these statements obviously reflect counsel's personal opinion as to the credibility of SHL's witnesses and its defense as a whole. Although Plaintiff notes that a lawyer may invite the jury "to consider the contradiction" between a witness's testimony and the evidence, Opp. 8 (citing *Cox v. Copperfield*, 507 P.3d 1216, 1227 (2022)), that is very different from what happened here: counsel told the jury that *his personal opinion* was that SHL's position was "hypocrisy" and the testimony of their witnesses was "unbelievable." Indeed, in *Cox*, the court emphasized that inviting the jury to "consider the contradiction" was permissible precisely because counsel "did *not* offer personal opinions." *Id*. (emphasis added). And with regard to counsel's comments concerning Dr. Kumar, Plaintiff is wrong in contending that "what matters" is whether counsel asked the jurors "to step outside the relevant facts." Opp. 9 (quotation marks omitted). *Lioce* holds that what matters is simply whether counsel made a statement of personal opinion concerning the credibility of a witness, 124 Nev. at 21-22, 174 P.3d at 983, and counsel indisputably crossed that line here. *See* App.

Vol. 11 (4/4 Tr) at 2511 ("I will tell you, I have seen a lot in a courtroom. I have never seen a witness implode like Dr. Kumar.")

- Counsel repeatedly offered his own views as to what he personally found "remarkable," "amazing," and "tragic" about the case. *Id*. at 2531-32, 2543-45, 2578. Although Plaintiff brushes these aside as "stray remarks," Opp. 6, they underscore how counsel, from beginning to end, infused their trial presentation with a constant stream of prejudicial commentary reflecting their personal views, opinions, and reactions to the evidence and witness testimony.

Attacks on Opposing Counsel. Over SHL's repeated objections, and in plain violation of the pretrial order in limine, Plaintiff's counsel attacked SHL's counsel before the jury. They falsely accused SHL's counsel of calling Ms. Eskew a liar and told the jurors that Ms. Eskew was "a 69-year-old woman," and that SHL's counsel "haven't been able to beat her down no matter what they do to her and her kids on the stand." *See* Mot. for New Trial 9-10.

In response, Plaintiff incorrectly argues that SHL failed to object to the personal attacks. Opp. 11. SHL's counsel objected multiple times to this line of attack and this Court sustained their objections. *See* App. Vol. 11 (4/4 Tr.) at 2509, 2690. And the arguments violated the ruling in limine in any event. *See* Order Regarding Defendants' Motions in Limine at 6 (MIL No. 17). ("The parties may not comment on the litigation conduct of the lawyers.").

Plaintiff contends SHL's counsel "implied" that Ms. Eskew was lying, Opp. 11, but the transcript pages Plaintiff cites makes clear that SHL's counsel *never* accused her of lying. Asking a witness questions that probe the accuracy of her recollections should not open the door to ad hominem attacks on the lawyer and accusations that the lawyer is trying to "beat her down" and "do [bad things] to her and her kids on the stand." App. Vol. 11 (4/4 Tr.) at 2690. Tellingly, Plaintiff makes no effort to explain how criticizing SHL's counsel for trying "to beat [Ms. Eskew] down … on the stand" did not violate the order in limine prohibiting any "comment on the litigation conduct of the lawyers." Order Regarding Defendants' Motions in Limine at 6.

"[I]mproper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses, is clearly misconduct." *Born v. Eisenman*, 114 Nev. 854, 862, 962 P.2d 1227, 1232 (1998). In the criminal context, the court has explained that "[d]isparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.' And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics." *Butler v. State*, 120 Nev. 879, 898 102 P.3d 71, 84 (2004). The same holds true in civil cases. A new trial is warranted if the misconduct complained of "might" have "had a prejudicial effect upon the jury." *Born*, 114 Nev. at 862, 962 P.2d at 1232; *see also Gunderson*, 130 Nev. at 79, 319 P.3d at 614 n.4 (citing approvingly to case holding new trial warranted based on "repeated disparaging attacks on opposing counsel"). Plaintiff's counsel cannot seriously dispute that their false and outrageous attacks on SHL's counsel before the jury "might" have "had a prejudicial effect." *Id.*

Forced Admission of Guilt. Plaintiff's counsel committed additional misconduct by ordering SHL's witness, Shelean Sweet, to turn in her chair and repeatedly state to the jury that she accepted their verdict. *See* App. Vol. 12 (4/5 Tr.) at 2778-79. In response, Plaintiff euphemistically recharacterizes this egregious tactic as nothing more than their "urging SHL's witness to make certain commitments," and mischaracterizes the record in describing what happened as "questioning." Opp. 5, 11. It was not "questioning"—it was a *command* to turn to the jury and publicly accept guilt.

This demeaning tactic has no place in the courtroom and should never have been allowed. The command was given at a time when the jury was hearing evidence bearing on punitive damages. It put SHL in the untenable position of having to publicly accept guilt or be seen as repudiating the initial determination of the very jury that was now weighing punishment. Plaintiff identifies no authority suggesting that a "turn to face the jury and proclaim your guilt" command is a permissible "question" at trial, and it obviously is not. Plaintiff is wrong in asserting that SHL did not object on these grounds, *see* App. Vol. 12 (4/5 Tr.) at 2778 ("Objection to form … It's not a question."), and this extraordinary and outrageous tactic requires a new trial.

Third, Plaintiff contends that even if counsel's attacks and commentary amounted to misconduct, the sustained objections removed any prejudicial effect. Opp. 8, 11. That suggestion is implausible, to put it mildly, in light of the $200 million verdict in a single-plaintiff insurance coverage dispute where the claimed damages arose from Mr. Eskew enduring the difference between Grade II and Grade III espohagitis for 11 months. In particular, the shocking $160 million punitive damage award is the direct result of counsel's grossly improper attacks on SHL as a large company running a "rigged" system at the expense of the "community," their telling the jury that they were personally "convinced" that a mammoth damages award was "the right thing to do," their repeated tarring of SHL witnesses as lying hypocrites, their constant attempts to impugn SHL's counsel, and their incessant running commentary that they viewed the evidence as "remarkable," "amazing," and "tragic." When "the evidence in the record is insufficient to reasonably explain the jury's verdict even when viewed in the light most favorable to the prevailing party, or if it does so only very weakly or implausibly, then trial misconduct is likely to have resulted in fundamental error." *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 816, 357 P.3d 387, 396 (Nev. App. 2015). The evidence in this record does not come remotely close to explaining a $200 million verdict.

This Court should reject Plaintiff's suggestion that the prejudicial impact from their torrent of invective and personal opinion was all washed away by the sustainment of SHL's objections and the standard jury charge that counsel's statements are not evidence. Opp. 8. If Plaintiff were correct that sustained objections and the standard charge meant that there could be no lasting prejudice, Rule 59 would be drained of any constraining force. Counsel could make egregiously improper arguments, secure in the knowledge that the standard charge would protect them from a new trial. Of course, that is not the law of Nevada. *Lioce* makes clear that even when the jury is instructed that the arguments of counsel are not evidence, a court must still examine whether sustainment was sufficient to erase any possible "harmful effect." 124 Nev. at 6-7, 174 P.3d at 973-74. Here, the sheer volume and frequency of counsel's misconduct—especially when viewed

in light of the stunning verdict that immediately followed—leave no doubt that objection and sustainment could not eliminate the harmful effect.

II. The Court Should Order A New Trial Because The Verdict Was Tainted By Passion And Prejudice.

The Supreme Court has identified two red flags that signal when a verdict may have been tainted by passion and prejudice: an excessive damage award, and improper arguments by counsel. Here, *both* flags are present. The damage awards exceed by many times the largest such awards ever upheld in Nevada history. And they were imposed on the heels of repeated indisputable misconduct by counsel that permeated the proceedings from beginning to end. Under the Nevada Supreme Court's well-established standards for reviewing jury verdicts for passion and prejudice, the system is blinking red.

A. The Damage Awards Demonstrate Passion And Prejudice.

Plaintiff concedes that Nevada law requires this Court to order a new trial if the amount of the award is so excessive as to indicate passion or prejudice. Opp. 13. If the jury's $200 million award does not meet this standard, nothing does.

Plaintiff notes that just because a verdict is "large," that does not establish passion and prejudice. Opp. 13. But the verdict in this case is not merely "large"—the compensatory and punitive damage awards each exceed by multiple times the largest such awards ever upheld in Nevada history. If awards that are more than 5 or 8 times the biggest previous awards do not suggest that the jury may have been influenced by passion or prejudice, what would? Plaintiff does not say. Plaintiff also contends that the amount of a damage award is not "conclusive" evidence of passion or prejudice. *Id.* But no one is arguing otherwise. Nevada law is very clear that while the amount of a damage award is not *conclusive*, it is highly *relevant* to determining whether a jury was impassioned. Indeed, it is not just Nevada law but common sense that an excessive award—one wildly disproportionate to the evidence—can signal that the jury may have been swayed by passion or prejudice. Finally, Plaintiff notes that calculating the amount of pain-and-suffering damages is within the jury's province. Opp. 14. True enough, but there are well-

recognized indicators for when a jury may have been swayed by passion and prejudice, including where, as here, the amounts awarded by the jury are shocking and disconnected from the evidence.

SHL's opening brief established that the $40 million compensatory award and $160 million punitive damage award are stunning outliers that dwarf all such awards that have ever been upheld in Nevada history. Plaintiff does not dispute the accuracy of the charts listing prior such awards for emotional distress, pain-and-suffering, and punitive damages. *See* Mot. for New Trial, Exs. 14-16. Instead, Plaintiff reprises the argument that awards in other cases should not be treated as "controlling." Opp. 15 (quoting *Wells, Inc. v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947)). But while not controlling, the size of the damages award is very strong evidence of passion or prejudice. As the United States Supreme Court has explained, trial courts for centuries have "infer[red] passion, prejudice, or partiality from the size of the award," and recognized that damages "may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422, 425 (1994). Plaintiff overreads a footnote from *Wyeth* declining to take a comparative approach, as the court's citation to *Wells* simply reaffirmed the point that prior awards are not controlling—*not* that they are irrelevant to analyzing excessiveness. *See Wyeth v. Rowatt*, 126 Nev. 446, 472 n.10, 244 P.3d 765, 783 n.10 (2010).

Contrary to the false impression Plaintiff seeks to create, the Nevada Supreme Court looks to awards in other cases when determining whether a noneconomic damages award was influenced by passion and prejudice. *See, e.g.*, *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983). No doubt that is why Plaintiff relies on a decision from New Mexico. *See* Opp. 16. Plaintiff attempts to limit *Nevada Independent Broadcasting Corp*. to "the specific circumstances of that case" by focusing on the First Amendment concerns at issue. Opp. 17-18 (quotation marks omitted). But the significance of that case is not whether a larger remittitur was justified because of the First Amendment issues; the significance is that the Nevada Supreme Court did *exactly* what Plaintiff argues this Court cannot do here—look to awards in comparable cases in analyzing excessiveness.

Plaintiff's blithe reassurance, Opp. 16, that "[t]he verdict here is not an outlier" cannot be credited. It is akin to a drenched man standing in a torrential downpour and solemnly insisting that it is not raining. Plaintiff argues that the universe of comparable awards should not be limited to Nevada cases and should not be limited to awards that were upheld on appeal. Opp. 16. But looking to Nevada awards that were affirmed on appeal is the proper comparison because those are the cases where a jury's award was held to be permissible under Nevada law. Looking to awards that were never challenged on appeal—either because the defendant settled or did not raise an excessiveness challenge—is not a meaningful comparison, because in those cases there was no judicial determination that the award was permissible as a matter of Nevada law. For that reason, Plaintiff's citations to exorbitant jury awards from other states (Opp. 16-17) is pointless—there is no reason to believe that *any* of those awards were permissible under the laws of those states, let alone under the law of Nevada.

Next, Plaintiff downplays the fact that the jury's compensatory damage award even exceeded the overinflated amount Plaintiff's counsel requested—yet another red-flag indicator of passion and prejudice. *See DeJesus v. Flick*, 116 Nev. 812, 820, 7 P.3d 459, 464-65 (2000) (award that "far exceeds what counsel requested" is evidence of "a jury verdict that was the product of passion and prejudice"). Counsel asked the jury for $30 million, *see* App. Vol. 11 (4/4 Tr.) at 2578, and the jury awarded $40 million. Plaintiff tries to argue that a $10 million difference is not a significant deviation, but in *DeJesus*, the court held that an award of just a few hundred thousand dollars more than counsel requested was significant enough to support reversal. *See* 116 Nev. at 820 n.5, 7 P.3d at 464-65 n.5. Whether viewed in absolute terms, or as a percentage of the total award (more than 133% of what Plaintiff requested), there can be no dispute that the jury was impassioned when it awarded dramatically more than even Plaintiff's counsel considered the maximum he could claim under Nevada law. Similarly, Plaintiff downplays counsel's desperate attempt to salvage the verdict by urging the jury—for what he mysteriously referred to as "legal reasons"—not to go too far in imposing punitive damages. App. Vol. 12 (4/5 Tr.) at 2801; *id*. at 2823. Plaintiff resists the obvious implication of this extraordinary plea—counsel knew full well

the jury went way too far in awarding compensatory damages and that the verdict would be in serious jeopardy under passion-and-prejudice review.

B. Counsel's Improper Arguments And Misconduct Further Demonstrate That The Verdict Resulted From Passion And Prejudice.

Plaintiff does not dispute that in determining whether a verdict is tainted by passion and prejudice, Nevada courts look at what led to the verdict. If counsel presented "improper arguments" that incited and inflamed jurors, that is strong evidence of "a jury verdict that was the product of passion and prejudice." *DeJesus*, 116 Nev. at 820, 7 P.3d at 464.

Plaintiff does not deny what counsel said. Instead, Plaintiff brushes off all of the arguments as "ordinary advocacy." Opp. 18. It was no such thing. As discussed above, *see* Part I *supra*, these comments were grossly improper and require a new trial. But even if they did not require reversal standing alone, these comments are overwhelming and indisputable evidence that the jury was inflamed and its deliberations tainted by passion and prejudice.

Confronted with example after example of impermissible argument, Plaintiff concocts tortured and unpersuasive justifications for everything. *See* Opp. 18. That effort fails: All of the arguments recounted in SHL's opening brief—arguments that SHL ran a "rigged system," accusations that SHL witnesses talked out of both sides of their mouth, false claims that no company witness would "face the music" by attending the Phase 2 hearing, framing the dispute as "a large insurance company" versus "this community," and blatant violations of the prohibition on Golden Rule arguments—were designed to incite jurors and inflame their passions. *See* Motion for New Trial at 15-16. Counsel's urging the jury to act as an insurance regulator with its verdict, *see* App. Vol. 11 (4/4 Tr.) at 2685, defies *State Farm*, where the United States Supreme Court condemned this exact tactic. *See* 538 U.S. at 420 (due process prohibits using a single insurance-coverage dispute "as a platform to expose, and punish, the perceived deficiencies of [the insurer's] operations throughout the country"). Plaintiff's argument that the lawyer's misconduct in *DeJesus* was worse, Opp. 19, misses the point entirely. The Nevada Supreme Court did not remotely suggest that anything less egregious than what happened in *DeJesus* is permissible advocacy. To

the contrary, the court in *DeJesus*, in *Lioce*, and in many other cases has identified types of arguments that are categorically off-limits. Counsel's arguments here hit almost every prohibited argument on the list.

As the verdict so plainly reflects, these tactics worked. It is no coincidence that immediately following day after day after day of counsel's improper appeals to the jurors' passions and prejudices, the jury issued two utterly irrational awards that are stunning outliers in Nevada judicial history.

III. At A Minimum, The Court Should Drastically Remit The Compensatory And Punitive Damage Awards.

In the alternative, and at a bare minimum, the Court should enter a drastic remittitur to reduce the compensatory and punitive damage awards to amounts that are permissible under Nevada law and the United States Constitution.

A. The Compensatory Damage Award Is Not Supported By Substantial Evidence, And Is An Excessive And Irrational Punishment.

Plaintiff does not show that the evidence warranted a $40 million compensatory damage award, or anything close to it. Plaintiff observes that juries have discretion in awarding damages, Opp. 19, but fails to note the well-settled limits on that discretion—and that a trial court *must* remit awards that are excessive in light of the evidence. *See Wyeth*, 126 Nev. at 470, 244 P.3d at 782.

Plaintiff concedes that the award for pain-and-suffering was *not* based on "the progression of [Mr. Eskew's] cancer." Opp. 20. Rather, the award was based on Mr. Eskew's reactions to the IMRT therapy—a period of time that lasted less than a year. *See* Opp. 14-15 (discussing evidence of pain, nausea, and loss of dignity and enjoyment of life). More precisely, the award reflected the difference between the pain-and-suffering caused by Grade III esophagitis (which Plaintiff alleged was caused by IMRT) and that caused by Grade II esophagitis (which Plaintiff admitted would have resulted even if Mr. Eskew had been given proton beam therapy). Plaintiff cites testimony that Mr. Eskew would not have experienced the symptoms of Grade III esophagitis if he had received proton beam therapy, Opp. 20, but that just reinforces the point: the denial of proton beam therapy cannot give rise to pain-and-suffering damages that would have resulted even

if he had been given proton beam therapy (i.e., the pain-and-suffering from Grade II esophagitis). Finally, the undisputed fact that Mr. Eskew endured pain-and-suffering for less than a year is not a basis for "mimimiz[ing]" the damages award. Opp. 20. Rather, it is a highly relevant fact that bears directly on whether a $40 million award is excessive.

Plaintiff offers little to support the emotional distress award. Plaintiff points to *no* evidence—let alone the requisite "substantial evidence," *Wyeth*, 126 Nev. at 470, 244 P.3d at 782—that Mr. Eskew suffered extreme emotional distress from learning that the request for insurance preauthorization was denied. Plaintiff concedes that under Nevada law, a plaintiff must introduce evidence of "some physical manifestation of emotional distress" in cases "where emotional damages are not secondary to physical injuries." *Betsinger v. D. R. Horton, Inc*., 126 Nev. 162, 166, 232 P.3d 433, 436 (2010); *see also Barmettler v. Reno Air, Inc*., 114 Nev. 441, 448 956 P.2d 1382, 1387 (1998) (same). Although Plaintiff now argues that the emotional distress damages *were* secondary to physical injuries, Opp. 20-21, that was not the claim presented at trial. Plaintiff's claim for emotional distress damages was based solely on the claim denial; it was not secondary to any physical injury caused by esophagitis. *See* App. Vol. 11 (4/4 Tr.) at 2507 ("[T]he third thing we're going to prove to you with the evidence is the harm to Mr. Eskew, and we presented that harm in two fashions: The anxiety, distress, despair the denial itself caused, and then the second aspect is the injury to the esophagitis.").

SHL's opening brief discussed numerous cases where Nevada courts have reduced noneconomic damage awards in cases involving far more serious pain-and-suffering, and far more severe emotional harm, than presented here. *See* Mot. for New Trial at 18-19. Plaintiff tries to brush all of these cases aside because they involved "different facts." Opp. 21. But the essence of judicial review involves looking to precedent and considering prior cases for guidance as to how past courts have applied the law to comparable—if not identical—constellations of facts. That is precisely what the Nevada Supreme Court has done in determining whether a particular jury award is excessive. *See, e.g*., *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983). And it is what the Court should do here. Just as in *Wyeth*, this Court should "find that these

amounts [of noneconomic damages] are obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." 2008 WL 876652, at *2 (D. Nev. Feb. 19, 2008) (quotation marks omitted), *aff'd*, *Wyeth v. Rowatt*, 126 Nev. 446, 472, 244 P.3d 765, 783 (2010).

Absent remittitur, the noneconomic damage awards would violate due process because they are grossly excessive, punitive, and were imposed without any meaningful standards to guide or cabin the jury's discretion. Plaintiff concedes that the jury was given "no definite standard" (Opp. 28, quoting Instruction 30) to use in determining the amount of the awards, but contends that this literally standardless approach should be viewed a "feature" not a "bug." Opp. 28. However, "the Due Process Clause does not permit a State to classify arbitrariness as a virtue," including through "[v]ague instructions" that "merely inform the jury to avoid "passion or prejudice," and "do little to aid the decisionmaker." *State Farm*, 538 U.S. at 417-18 (quotation marks omitted).

B. The Punitive Damage Award Is Grossly Excessive And Unconstitutional.

The punitive damage award is grossly excessive and cannot be sustained under the Due Process Clause of the United States Constitution. It should be reduced to an amount no greater than the remitted award of compensatory damages.

1. Reprehensibility. Plaintiff argues that SHL's conduct was reprehensible because it denied claims for proton beam therapy, while at the same time a sister corporation invested in proton beam therapy. Opp. 15. But what a different corporation does has no bearing on SHL's reprehensibility. Nor is there anything reprehensible about one company investing in a center that offers proton beam therapy, even though another company (an insurer) deems the therapy not medically necessary. Plaintiff also argues that SHL did not inform patients about what it calls a "hidden corporate policy," Opp. 15, but the policy was not "hidden"—it was publicly available on the internet. *See* App. Vol. 2 (3/16 Tr.) at 326-27; App. Vol. 9 (3/28 Tr.) at 2037-38. Plaintiff's arguments on reprehensibility are almost identical to the arguments the United States Supreme Court rejected in *State Farm*, where it held that a punitive damages award against an insurer

violated due process. The Court specifically rejected "an explicit rationale of the trial court's decision in approving the award"—that the challenged policy "was not a local anomaly, but was a consistent, nationwide feature of [the insurer's] business operations." *State Farm*, 538 U.S. at 420 (quotation marks omitted).

In discussing the evidence bearing on reprehensibility, Plaintiff focuses on what the jury "could have found." Opp. 24. That is the sufficiency-of-the-evidence standard, but it is not the correct standard for analyzing evidence going to the amount of punitive damages. This Court is constitutionally obligated to conduct an "[e]xacting" de novo review, *State Farm*, 438 U.S. at 418, precisely because the amount of punitive damages is *not* a "fact" found by the jury, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001), and so this Court does not base its decision on what the jury "could have found." Nor can the Court simply ignore evidence favoring SHL on the basis that the jury "could have concluded" it was "contrived" or "lacked credibility." Opp. 24. Rather, this Court must make its own "thorough, independent," and *de novo* assessment of the evidence bearing on the amount of punitive damages. *Cooper Indus.*, 532 U.S. at 441.

Plaintiff discusses five factors ostensibly bearing on reprehensibility, Opp. 22-23, but none of this comes close to justifying a $160 million punitive damage award. First, the "[p]hysical injury" consideration typically involves *intentional* torts—for example, assault cases where the defendant intended to cause physical injury. Here, there is no allegation that SHL intended to cause physical harm to Mr. Eskew, and any such contention would be absurd. Second, the claim that SHL's conduct evinced a "reckless disregard" of safety is baseless. The undisputed evidence showed that SHL's coverage decision was based on the views of the nation's leading medical and scientific authorities, and was consistent with the policies of many other insurers. The evidence demonstrates that SHL made a careful, scientifically-grounded, and well-supported decision that is the opposite of reckless disregard. Third, there is no evidence that SHL acted with malice or sought to trick or deceive Plaintiff. The insurance policy expressly stated that SHL would preauthorize only those treatments it determined to be "medically necessary," and SHL's determination that proton beam therapy was "unproven" and not "medically necessary" was

plainly reasonable and cannot possibly be deemed malicious or deceptive. Fourth, the conduct that allegedly harmed Mr. Eskew was a single coverage decision rather than "repeated actions," and a jury cannot award punitive damages based on coverage decisions involving what Plaintiff claims are "150 million people nationwide." Opp. 22-23; *see also Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) ("[T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation."); *State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."). Fifth, there is no evidence that SHL targeted Plaintiff or Mr. Eskew because they were "financially vulnerable." As the United States Supreme Court held in *State Farm*, 538 U.S. at 419, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."

Plaintiff's remaining arguments fall short of the mark. The suggestion that SHL acted reprehensibly because "it was acting pursuant to a policy" (Opp. 23) does not indicate reprehensibility; to the contrary, it shows that SHL (like all insurers) had established rules governing coverage in advance and adhered to them. Plaintiff further errs in contending that the studies SHL relied on "refuted" the idea that proton beam therapy was unproven and not medically necessary. Those studies strongly *support* SHL's determination that "there is insufficient evidence to recommend proton bean therapy outside of clinical trials for lung cancer." App. Vol. 1 (Proton Policy) at 116. And the fact that a different company within the same corporate family invested in proton beam therapy does not make SHL's coverage decision unreasonable: a treatment can be unproven and not medically necessary, but still worthy of investment so that over time it can *become* proven and medically necessary in some circumstances.

SHL introduced substantial evidence of mitigation, including changing the proton policy, modifying the preauthorization process, and instituting training on Nevada's duty of good faith and fair dealing. *See* App. Vol. 12 (4/5 Tr.) at 2774-75, 2813-14. Plaintiff contends that all of this

should be disregarded because the mitigation evidence was not introduced until the punitive damages phase of the trial. Opp. 24. That argument is misplaced because the mitigation evidence only became relevant once the jury decided to award punitive damages in Phase 1. Until that point, there was nothing to "mitigate." Mitigation evidence bears on the need for deterrence. Where, as here, the punishable conduct has ceased and the defendant has made changes to the policies at issue, there is no need for deterrence and hence no need for a substantial award of punitive damages.

2. Ratio. The United States Supreme Court has squarely held that a 1:1 ratio between punitive and compensatory damages may be the "outermost" constitutional limit in cases, like this one, where the compensatory damage award is "substantial." *State Farm*, 538 U.S. at 425. Plaintiff does not dispute that a $40 million compensatory damage award is "substantial." *See Bains LLC v. Arco Prods. Co*., 405 F.3d 764, 776 (9th Cir. 2015) ($50,000 compensatory damage award is substantial). Instead, Plaintiff argues that there is no "mathematical formula" and that single-digit ratios are "more likely to comport with due process." Opp. 25 (quotation marks omitted). True enough, but the question presented here is *which* single-digit ratio is appropriate—and the Supreme Court answered that question in *State Farm* with regard to cases involving "substantial" compensatory damage awards. Indeed, in *Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006), the court approved a 1:1 ratio in a case involving a $250,000 compensatory award, even though it deemed the defendant's conduct "reprehensible." 122 Nev. at 583, 138 P.3d at 452. The only two cases Plaintiff cites both involve compensatory damage awards that are far smaller than the $40 million award here. *See Merrick v. Paul Revere Life Ins. Co*., 594 F. Supp. 2d 1168, 1191 (D. Nev. 2008) (compensatory award of approximately $2.9 million); *Wohlers v. Bartgis*, 114 Nev. 1249, 1268-69, 969 P.2d 949, 962 (1998) (compensatory award of $275,000).

Plaintiff argues that "the U.S. Supreme Court has instructed that it is appropriate to weigh the … *potential* harm that [the defendant] would have caused if its wrongful plan had succeeded." Opp. 25. But Plaintiff fails to disclose that the sole case she cites to support a "potential harm" argument is not a majority decision. The opinion, *TXO Production Corp. v. Alliance Resource*

Corp., 509 U.S. 443 (1993) (Stevens, J.), did not command five votes. Yet Plaintiff's brief attempts to pass *TXO* off as a majority decision and repeatedly (and falsely) suggests it reflects the views of "the Court." *See* Opp. 25. It does not, any more than does Justice O'Connor's opinion, in which she criticized the use of potential harm as "little more than an after-the-fact rationalization invented by counsel to defend [a] startling award on appeal." *TXO*, 509 U.S. at 484-85 (O'Connor, J., dissenting). Indeed, there are obvious due process problems with punishing a defendant for something that never happened. Relying on "potential harm" to justify a punitive damage award circumvents the traditional limitations on punitive damages. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 580 (1996) ("perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the *actual* harm inflicted on the plaintiff") (emphasis added).

Plaintiff's argument that Nevada's statutory limits on punitive damage awards should inform the ratio analysis, Opp. 26, is misplaced. Plaintiff quotes a passage from *Gore* about deferring to legislative judgments, but the passage in question has nothing to do with the ratio guidepost; rather, it appears in an entirely different section of the opinion concerning the comparable penalties guidepost. *See Gore*, 517 U.S. at 583. Moreover, the very point of the due process guideposts is to rein in excessive punitive damage awards that were imposed *in accordance with* state-law standards; that the Nevada statute may permit higher ratios in certain types of cases does not mean the federal constitutional limits are diluted or can be ignored. The Nevada statute simply has no bearing on the application of the ratio guidepost.

Finally, Plaintiff mischaracterizes SHL's position as arguing that a 1:1 ratio is "required" when a jury's compensatory damages include noneconomic damages or otherwise already contain a punitive element. Opp. 26. The Supreme Court has explained that a *lower* ratio is warranted in such cases because an emotional distress award serves punitive purposes—and vindicates the dignitary interests of the plaintiff—and these interests are then "duplicated in the punitive award." *State Farm*, 538 U.S. at 426. Plaintiff disputes this point, but elsewhere in her brief she cites Mr. Eskew's loss of dignity as supporting the award of compensatory damages. *See, e.g.*, Opp. 14.

The same interests that were served by the $40 million noneconomic damage award—vindicating the loss of dignity—were then duplicated in the punitive damage award.

3. Comparable penalties. Plaintiff gives short shrift to the third guidepost, all but conceding that it cuts strongly in favor of a reduced award. Plaintiff dismisses, without any explanation, two comparable statutory penalties—the $5,000 penalty for violations of the Deceptive Trade Practices Act, *see* NRS 598.0999, and the $10,000 penalty for willful violations of the prohibition on unauthorized insurance transactions, *see* NRS 678B.185. Plaintiff's failure to offer any meaningful distinction confirms the relevance of these two penalties.

Plaintiff makes four cursory points (Opp. 27) that all fail. First, the provision of the Nevada statute concerning permissible ratios is irrelevant to this guidepost because it does not specify the amounts of penalties; moreover, to the extent the statute eliminates any upper limit on punitive damage awards, it provides *no* notice as to the amount of a penalty that could be imposed. Second, Plaintiff hypothesizes that the state could revoke SHL's right to do business in Nevada, but *State Farm* specifically warns against using the "remote possibility" of such a severe sanction as a way of supporting a punitive damage award. *See* 538 U.S. at 428. Third, the fact that regulators in California and Oklahoma have recovered large judgments through state enforcement actions—brought on behalf of all citizens in the state—has no bearing on the appropriate sanction in a single-plaintiff tort action under Nevada law. Fourth, the suggestion that prior cases provided notice that a $160 million punitive damage award was permissible is baseless. This award—under any standard, and by any measure—is irrational, excessive, and indisputably unconstitutional.

CONCLUSION

The Court should grant a new trial on all issues. In the alternative, the Court should reduce the compensatory damage award to no more than $2 million, and reduce the punitive damage award to an amount that does not exceed the remitted compensatory damage award.

DATED: July 20, 2022.

/s/ Ryan T. Gormley

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2022 a true and correct copy of the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR A NEW TRIAL OR REMITTITUR** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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A-19-788630-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Insurance Tort	**COURT MINUTES**	**August 15, 2022**

A-19-788630-C Sandra Eskew, Plaintiff(s)
vs.
Sierra Health and Life Insurance Company Inc, Defendant(s)

August 15, 2022	**3:00 AM**	**Minute Order**	**Defendant's Motion for a New Trial or Remittitur**

HEARD BY: Krall, Nadia **COURTROOM:** Chambers

COURT CLERK: Pharan Burchfield

JOURNAL ENTRIES

- NRCP 1 and NRCP 1.10 state that the procedures in district court shall be administered to secure efficient, just and inexpensive determinations in every action and proceeding.

Pursuant to EDCR 2.23(c), the judge may consider the motion on its merits at any time with or without oral argument, and grant or deny it.

Defendant's Motion for a New Trial or Remittitur filed on 5/16/2022; Plaintiff's Opposition to Defendant's Motion for a New Trial or Remittitur filed on 6/29/2022; Defendant's Reply in Support of Its Motion for a New Trial or Remittitur filed on 7/20/2022; and Defendant's Motion for Leave to File Supplemental Authority in Support of its Motion for a New Trail or Remittitur filed on 8/10/2022.

The Court reviewed all of the pleadings and attached exhibits regarding the pleadings on file.

COURT ORDERED, Defendant's Motion for a New Trial or Remittitur filed on 5/16/2022 is DENIED pursuant to Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243 (2010); NRCP 59(a)(1)(B) & (F); Wyeth v. Rowatt, 126 Nev. 446 (2010); Bayerische Moteren Werke Aktiengesellschaft v. Roth, 127 Nev. 122 (2011); Grosjean v. Imperial Palace, 125 Nev. 349 (2009); Cox v. Copperfield, 138 Nev. Adv. Op. 27 (2022); Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. 261 (2017); Lioce v. Cohen, 124 Nev. 1 (2008); Ringle v. Bruton, 120 Nev. 82 (2004); Walker v. State, 78 Nev. 463 (1962); Born v. Eisenman, 114 Nev. 854 (1998); Satackiewicz v. Nissan Motor Corp. in U.S.A., 100 Nev. 443 (1983); Guaranty Nat. Ins. Co. v. Potter, 112 Nev. 199 (1996); Automatic Merchandisers, Inc. v. Ward, 98 Nev. 282 (1982); Hernancez v. City of Salt Lake, 100 Nev. 504 (1984); Dejesus v. Flick, 116 Nev. 812 (2000); Wells, Inc.

v. Shoemake, 64 Nev. 57 (1947); Nevada Independent Broadcasting Corporation v. Allen, 99 Nev. 404 (1983); Quintero v. McDonald, 116 Nev. 1181 (2000); Barmettler v. Reno, Air, Inc., 114 Nev. 441 (1998); State v. Eaton, 101 Nev. 705 (1985); Jacobson v. Manfredi, 100 Nev. 226 (1984); BMW of N. Am. Inc. v. Gore, 517 U.S. 559 (1996); State Farm Mut. Aut. Ins. Co. v. Campbell, 538 U.S. 408 (2003); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Merrick v. Paul Revere Life Ins. Co., 594 F.Supp.2d 1168 (Nev. Dis. 2008); and Campbell v. State Farm. Mut. Auto Ins. Co., 98 P.3d 409 (Utah 2004).

COURT FURTHER ORDERED, counsel for Plaintiff to draft and circulate a proposed order for opposing counsel's signature prior to submitting it to the Department 4 inbox for the Judge's review and signature within fourteen (14) days and distribute a filed copy to all parties involved in this matter.

COURT FURTHER ORDERED, counsel for Plaintiff to include Findings of Fact and Conclusions of Law based upon the Memorandum of Points and Authorities set forth in Plaintiff's pleadings.

COURT FURTHER ORDERED, Defendant's Motion for a New Trial or Remittitur filed on 5/16/2022 and scheduled for hearing on 8/17/2022 at 9:00 A.M. is VACATED.

CLERK'S NOTE: This minute order was electronically served by Courtroom Clerk, Pharan Burchfield, to all registered parties for Odyssey File & Serve.//pb/8/15/22.

A-19-788630-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Insurance Tort	**COURT MINUTES**	**August 15, 2022**

A-19-788630-C Sandra Eskew, Plaintiff(s)
vs.
Sierra Health and Life Insurance Company Inc, Defendant(s)

August 15, 2022	**3:00 AM**	**Minute Order**	**Defendant's Renewed Motion for Judgment as a Matter of Law**

HEARD BY: Krall, Nadia **COURTROOM:** Chambers

COURT CLERK: Pharan Burchfield

JOURNAL ENTRIES

- NRCP 1 and NRCP 1.10 state that the procedures in district court shall be administered to secure efficient, just and inexpensive determinations in every action and proceeding.

Pursuant to EDCR 2.23(c), the judge may consider the motion on its merits at any time with or without oral argument, and grant or deny it.

Defendant's Renewed Motion for Judgment as a Matter of Law filed on 5/16/2022; Plaintiff's Opposition to Defendant's Renewed Motion for Judgment as a Matter of Law filed on 6/29/2022; and Defendant's Reply in Support of its Renewed Judgment as a Matter of Law filed on 7/20/2022.

The Court reviewed all of the pleadings and attached exhibits regarding the pleadings on file.

COURT ORDERED, Defendant's Renewed Motion for Judgment as a Matter of Law filed on 5/16/2022 is DENIED pursuant to M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd., 124 Nev. 901 (2008); Harrah's Las Vegas, LLC v. Muckridge, 473 P.3d 1020 (Nev. 2020); Broussard v. Hill, 100 Nev. 325 (1984); Ainsworth v. Combined Ins. Co. of Am., 104 Nev. 587 (1988); Albert v. H. Wohlers & Co. v. Bartgis, 114 Nev. 1249 (1998); Allstate Ins. Co. v. Miller, 125 Nev. 300 (2009); Guar. Nat. Ins. Co. v. Potter, 112 Nev. 199 (1996); Powers v. United Servs. Auto Ass'n, 114 Nev. 690 (1998); Century Sur. Co. v. Casino W., Inc., 130 Nev. 395 (2014); Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156 (2011); Holcomb v. Georgia Pac., LLC, 128 Nev. 614 (2012); NRS 51.005; Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. 725 (2008); Ainsworth v. Combined Ins. Co. of America, 104 Nev. 587 (1988); United Fire Ins. Co. v. McClelland, 105 Nev. 504 (1989); First

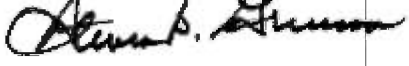
Interstate Bank v. Jafbros Auto Body, 106 Nev. 54 (1990); and Wreth v. Rowatt, 126 Nev. 446 (2010).

COURT FURTHER ORDERED, counsel for Plaintiff to draft and circulate a proposed order for opposing counsel's signature prior to submitting it to the Department 4 inbox for the Judge's review and signature within fourteen (14) days and distribute a filed copy to all parties involved in this matter.

COURT FURTHER ORDERED, counsel for Plaintiff to include Findings of Fact and Conclusions of Law based upon the Memorandum of Points and Authorities set forth in Plaintiff's pleadings.

COURT FURTHER ORDERED, Defendant's Renewed Motion for Judgment as a Matter of Law filed on 5/16/2022 and scheduled for hearing on 8/17/2022 at 9:00 A.M. is VACATED.

CLERK'S NOTE: This minute order was electronically served by Courtroom Clerk, Pharan Burchfield, to all registered parties for Odyssey File & Serve.//pb/8/15/22.



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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Defendant.

Case No.: A-19-788630-C
Dept. No.: 4

NOTICE OF APPEAL

Please take notice that Defendant Sierra Health and Life Insurance Company, Inc. hereby appeals to the Supreme Court of Nevada from all judgments, rulings, and orders in this case, including:

1. Judgment Upon the Jury Verdict, filed April 18, 2022, notice of entry of which was served electronically on April 18, 2022 (Exhibit A);
2. Order Granting In Part and Denying In Part Defendant's Motion To Retax, filed June 8, 2022, notice of entry of which was served electronically on June 9, 2022 (Exhibit B);
3. Minute Order denying Defendant's Renewed Motion for Judgment as a Matter of Law, electronically served by Courtroom Clerk on August 15, 2022 (Exhibit C);
4. Minute Order denying Defendant's Motion for a New Trial or Remittitur, electronically served by Courtroom Clerk on August 15, 2022 (Exhibit D); and
5. All judgments, rulings and interlocutory orders made appealable by any of the foregoing.

DATED: September 14, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022 a true and correct copy of the foregoing **NOTICE OF APPEAL** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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