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[1]
Volume 18 of 18

D. LEE ROBERTS, JR. (SBN 8877)
PHILLIP N. SMITH (SBN 10233)
RYAN T. GORMLEY (SBN 13494)
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118
(702) 938-3838
rgormley@wwhgd.com

THOMAS H. DUPREE JR.
(*admitted pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Attorneys for Appellant

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[1] Pursuant to NRAP 30(a), the parties met and conferred and have made a good faith effort to include all necessary material in this Joint Appendix. Nevertheless, the parties anticipate that Respondent may supplement the record upon review of Appellant's Opening Brief.

MOT
Matthew L. Sharp, Esq.
Nevada State Bar #4746
MATTHEW L. SHARP, LTD.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Douglas A. Terry, Esq.*
**Admitted PHV*
DOUG TERRY LAW, PLLC
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Deepak Gupta, Esq.*
Matthew W.H. Wessler, Esq.*
**Admitted PHV*
GUPTA WESSLER PLLC
2001 K St., NW, Ste. 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
matt@guptawessler.com

Attorneys for Plaintiff

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 REQUESTED**

MOTION FOR ENTRY OF EXPRESS FINDINGS AS REQUIRED BY *LIOCE V. COHEN*

MEMORANDUM OF POINTS AND AUTHORITIES

"When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings." *Lioce v. Cohen*, 124 Nev. 1, 7, 174 P.3d 970, 974 (2008). Yesterday, this Court signed the written order denying Defendant's Motion for New Trial or Remittitur and Defendant's Renewed Motion for Judgment as a Matter of Law. The order this Court signed was proposed by the Defendant, and the Defendant's order did not include the express factual findings required by *Lioce*.

Exhibit 1 are proposed findings and conclusions consistent with requirement of *Lioce*. To facilitate meaningful appellate review now—and to avoid the unnecessary delay of a remand and successive appeal—Plaintiff requests this Court to enter specific written findings under *Lioce* as set forth in Exhibit 1.[1]

By way of background, on August 15, this Court entered a minute order denying Defendant's motion for a new trial and directing the Plaintiff to prepare the proposed orders, which were to "include proposed Findings of Fact and Conclusions of Law." *See* Ex. 3. On August 29, Plaintiff submitted proposed Findings of Fact, Conclusions of Law, and Order Denying Defendant's Motion for a New Trial or Remittitur ("Findings of Fact") to this Court. Plaintiffs' proposed Findings of Fact (Section IV at pp 14-24) included the findings required

[1]The Nevada appellate courts have consistently remanded cases for factual findings when the order denying new trial on the basis of misconduct does not include findings of fact. *ee*, *e.g.*, *Carr v. Paredes* 130 Nev. 1161, 2014 WL 549715 (Unpub. Nev. Feb. 10, 2014) ("[T]he district court failed to make the necessary findings; therefore, we vacate the court's order denying Carr's motion and remand this matter to the district court"); *Carr v. Paredes*, 133 Nev. 993, 387 P.3d 215 (Unpub. Nev. January 13, 2017) ("This court previously vacated the district court's order denying the motion for a new trial and remanded the matter to the district court to make specific findings regarding attorney misconduct pursuant to *Lioce v. Cohen*, 124 Nev. 1, 19–20, 174 P.3d 970, 982 (2008)) (finding no misconduct the second time around); *Jimenez v. Blue Martini Las Vegas, LLC*, 134 Nev. 963, 2018 WL 3912241, at *1 (Unpub. Nev. App., July 27, 2018) (holding that "a remand is necessary for the district court to make specific findings on the record regarding attorney misconduct, as required by the supreme court and this court's jurisprudence."); *Jimenez v. Blue Martini Las Vegas, LLC*, 2019 WL 5681078, at *1 (Unpub. Nev. App., Oct. 31, 2019) (finding no misconduct in a second appeal a year later, after the district court had made the requisite findings); *see also Wynn Las Vegas, LLC v. Blankenship*, 131 Nev. 1366, 2015 WL 4503211 (Unpub. Nev. App. July 17, 2015) ("Without reasoning supporting the district court's decision, we are unable to determine whether the district court abused its discretion in denying Wynn's motion for a new trial based on attorney misconduct. As such, we vacate the district court's order denying that motion and remand this matter to the district court for a decision applying the standards set forth in *Lioce*."). Ex. 2.

under *Lioce*. Plaintiff's proposed Findings of Fact explained (page 14 ¶ 44) that, under *Lioce,* "the Court is required to make specific findings" on the issue of alleged attorney misconduct.

The Defendant filed written objections to Plaintiff's proposed Findings of Fact. The Defendant's objection with respect to attorney misconduct was to a single sentence: "And in the Court's view, counsel's subsequent remarks that counsel was 'not here pointing the fingers at people like' the witness defeat any inference that counsel intended to impugn the witness's credibility." *See* Defendants Further Objections, filed August 31, 2022 at 6:23-25.

After Plaintiff submitted her proposed Findings, this Court requested that the Defendant submit a competing order and a strikethrough. The Defendant submitted a proposed order that mirrored the Court's minute orders but omitted the request that Plaintiff submit findings of fact. Ex. 4, e-mail string. The Defendant's order omitted any findings mandated by *Lioce.*

Exhibit 1 to this Motion sets forth proposed Findings of Fact and Conclusions consistent with the requirements by *Lioce*. Exhibit 1 is substantively the same as Section IV to Plaintiff's proposed Findings of Fact, and the objected to language from the Defendant to the proposed Findings of Fact with respect to the findings on attorney misconduct has been removed.[2]

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[2]Ex. 1 at ¶ 11 and compared to Findings of Fact at ¶ 52:7-9.

To facilitate meaningful appellate review Plaintiff requests this Court to enter specific written findings under *Lioce* as set forth in Exhibit 1.

DATED this 6th day of October 2022.

/s/ *Matthew L. Sharp*

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
MATTHEW L. SHARP, LTD.
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

DOUGLAS A. TERRY, ESQ.
Admitted pro hac vice
DOUG TERRY LAW, PLLC
200 E. 10th Street Plaza, Suite 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

DEEPAK GUPTA, ESQ.
Admitted pro hac vice
GUPTA WESSLER PLLC
2001 K Street, NW, Suite 850 North
Washington, DC 20001
(202) 888-1741
deepak@guptawessler.com

Attorneys for Plaintiff

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 addresses noted below:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 6th day of October 2022.

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

EXHIBIT 1

FCL
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorneys for Plaintiffs

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., UNITED HEALTHCARE, INC. Defendants.	Case No. A-19-788630-C Dept. No. 4

FINDINGS AND CONCLUSIONS AS TO ALLEGATIONS OF ATTORNEY MISCONDUCT

Following an eleven-day trial, a jury found Defendant Sierra Health & Life Insurance Company ("SHL") liable for breaching the duty of good faith and fair dealing and awarded $40 million in compensatory damages and $160 million in punitive damages to Plaintiff Sandra Eskew, who is proceeding individually and as Special Administrator of the Estate of William George Eskew. SHL filed a Motion for New Trial or Remittitur. The Court denied the motion.

As part of its Motion for New Trial, SHL asked for new trial based upon the allegation of attorney misconduct. With respect to the order denying SHL's Motion for New Trial on the basis of alleged attorney misconduct, this Court makes express findings as a required by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

1. When a party makes a motion for a new trial on the basis of allegations of attorney misconduct at trial, the district court must apply the detailed, sliding-scale standard first articulated by the Nevada Supreme Court in *Lioce v. Cohen*, 124 Nev. at 16, 174 P.3d at 980. Under *Lioce*, when ruling on a motion for a new trial based on attorney misconduct, "district courts must make express factual findings." *Id.*

2. As this Court observed at the end of the trial, counsel for both parties conducted themselves with exemplary professionalism throughout the trial in this matter. *See* App–2832. This was not a trial marred by persistent misconduct or lapses in decorum. The record cannot support a finding of prejudicial misconduct. At trial, neither party conveyed a contrary view. Though both parties leveled ordinary courtroom objections to one another's conduct, SHL raised only a few objections to Mrs. Eskew's counsel's conduct on misconduct grounds and did not seek a single curative admonishment.

3. Only after the jury returned a verdict against it did SHL claim for the first time, in its post-trial briefing, that the trial was tainted by misconduct. SHL's motion for a new trial quotes numerous statements from the trial out of context and attempts to portray them as attorney misconduct that undermined the trial. But after carefully considering each statement identified by SHL, based on its vantage point presiding over the entire trial, the Court is unable to find any instance of attorney misconduct, let alone misconduct that would warrant a new trial under the exacting prejudice standards outlined by the Nevada Supreme Court.

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

4. 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 v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). This requires showing that misconduct

occurred. *See Id.* And in addition, "[t]o 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).

5. As a general matter, 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, 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). An attorney's argument 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).

6. Even when a party engages in misconduct, whether that misconduct results in "unfair prejudice" warranting a new trial depends on the context in which the misconduct occurred. *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*, 124 Nev. at 16, 174 P.3d at 980. 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.

7. 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 rights," 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. Viewed in context, and applying the proper legal standards, none of counsel's conduct constituted misconduct warranting a new trial.

8. SHL points to three types of statements that it says amount to misconduct warranting a new trial. It says that counsel improperly injected their "personal beliefs into the proceedings," improperly leveled personal "attack[s]" on SHL's counsel, and improperly questioned one SHL witness. Counsel may 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." *Lioce*, 124 Nev. at 21, 174 P.3d at 983. And they may not impugn parties or witnesses with a stream of offensive epithets. *See Born v. Eisenman,* 114 Nev. 854, 861–62, 962 P.2d 1227, 1231–32 (1998). In the Court's view, counsel did not violate either of these proscriptions here.

i. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they observed that various facts were "remarkable" or "tragic."

9. Counsel did not offer a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they described Jury Instruction 24 as "remarkable." App-2531. Instruction 24 explained to the jury that (1) 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" and (2) bad faith "requires an awareness that no reasonable basis exists to deny the insurance claims." Jury Ins. No. 24. In calling the instruction "remarkable," counsel was observing the relationship between the instruction and the evidence at trial: The instruction, they argued, did not set a high bar, yet the evidence showed SHL nevertheless fell short. App-2531–32. The remark thus was not a personal opinion on one of the prohibited topics at all. The Court finds that it was an

inconsequential observation in the course of a detailed, fact bound explanation of why the evidence at trial reflected bad faith.

10. Nor did counsel offer such a prohibited personal opinion when, shortly thereafter, they described as "remarkable" which policies SHL had adopted in light of its obligations not to violate the duty of good faith. App-2532. The Court finds that the observation offered only mild emphasis as counsel explained the relationship of the evidence to the duty.

11. Counsel likewise did not offer an improper personal opinion when they remarked that it was "tragic" that a particular witness had not heard of the duty of good faith. App-2543. As above, this statement is not a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant. It was a stray observation on the extent of the witness's knowledge.

12. Counsel did not offer an improper personal opinion when they said it was "remarkable" that SHL failed to put on a particular witness. App-2543–44. Like the statements above, the comment is not a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant. In context, the Court finds that it was an ordinary trial argument about the evidence that SHL decided to present at trial.

13. Counsel did not offer a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they used the adverb "amazingly" to characterize SHL's lack of supervision over reviewers like Dr. Ahmad. App-2545. At most, the Court finds that the adverb was argumentative language deployed to characterize the evidence.

14. Even if any of the comments just listed could be deemed personal opinions as to the justness of a cause, credibility of a witness, or culpability of a civil litigant, they would not warrant a new trial. SHL did not object to a single one at trial—either contemporaneously or when the Court explicitly asked if the parties had any issues to raise outside the presence of the jury. *See* App-2535–41. They are thus reviewed for plain error.

15. There was no plain error here. There are "other reasonable explanation[s]" for the jury's verdict, *Gunderson*, 130 Nev. at 75, 319 P.3d at 612, than the "few sentences" SHL identifies, *Cox*, 507 P.3d at 1228, because the evidence at trial, viewed in the light most favorable to Mrs. Eskew, was overwhelming. The jury heard evidence that SHL sold Mr. Eskew a platinum health insurance

policy that expressly covered therapeutic radiation services like proton-beam therapy. App-1035–40, 1057. It heard evidence that Mr. Eskew's doctor, a leading expert, determined that proton-beam therapy was necessary to treat his lung cancer while sparing critical nearby organs. Liao Dep. 48–49, 69–75, 84–88; App-531–33, 539–40, 1067–68, 1106. But, the jury learned, SHL refused to approve the treatment, instead applying its corporate medical policy of refusing to approve proton-beam treatment for lung cancer in any circumstances. App-331–33, 813–18, 837–45. It sent Mr. Eskew's claim to a reviewer who had no expertise in radiation oncology and who did not investigate his claim, instead taking only 12 minutes to deny it. App-247–48, 250, 319–21, 337–41, 463, 1083–84, 1114. SHL defended its policy on the ground that proton-beam therapy was not medically necessary, but the 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); App-720–22, 901–11 (SHL's sister company operated a proton-beam therapy center).

16. The jury heard evidence that the IMRT treatment Mr. Eskew had to receive instead caused great harm to his physical and emotional health. It learned that the intensive radiation generated by IMRT caused "Grade III esophagitis"—meaning that Mr. Eskew 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 Mr. Eskew became withdrawn, isolated, and unhappy, unable to enjoy the company of his family or the activities he previously enjoyed. App-1200–02, 1256, 1259–60, 1416–18, 1610.

17. The Court thus cannot find that the record supports SHL's claim that counsel's statements made a meaningful difference.

ii. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they invited the jury to consider SHL's contradictory behavior.

18. Counsel likewise did not state a personal opinion on a prohibited topic when they encouraged the jury to consider the hypocrisy in SHL's behavior. App-2655. Counsel's remarks arose in the context of a detailed, fact bound argument that, even while SHL took the position that proton-beam therapy for lung cancer was unproven and medically unnecessary, its sister company promoted the use of the treatment to avoid exactly the same complications Mr. Eskew experienced.

App-2653–55. In describing this conduct as hypocritical, counsel was "invit[ing] the jury to consider the contradiction" in SHL's behavior. *Cox*, 507 P.3d at 1227. That "amount[s] to advocacy, not misconduct," and does not "establish grounds for a new trial." *Id.*

19. Towards the end of his delivery, counsel's remarks edged towards excessive, unnecessarily personal rhetoric on this point. *See* App-2655. SHL objected and the Court sustained the objection. *Id.* But SHL did not request an admonishment, so the statements are reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect. *See Gunderson*, 130 Nev. at 77, 319 P.3d at 613. And viewed in context, the Court finds that the statements fall far below this bar. Immediately following the Court's sustainment, Mrs. Eskew's counsel corrected his emphasis, explaining that his point was not personal at all, but rather about what would be "unbelievable to somebody listening." App-2655. Sustainment thus easily removed any prejudicial effect.

20. That is especially so because not only did counsel correct himself, but the jury was explicitly instructed that counsel's statements, arguments, and opinions were not evidence and that it should disregard evidence to which an objection was sustained. Jury Ins. No. 8. Juries presumptively follow such instructions, *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), and a sustained objection under these circumstances generally precludes a finding of prejudice, *see Walker v. State*, 78 Nev. 463, 467–68, 376 P.2d 137, 139 (1962).

iii. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they described Dr. Parvesh Kumar's testimony.

21. Counsel's statements concerning Dr. Parvesh Kumar's testimony during closing are also not improper personal opinions. In describing the testimony, counsel's argument was that the jury should reject Dr. Kumar's testimony because he was not the subject-matter expert he and SHL both held him out to be. App-2511. In addition, although counsel at one point compared Dr. Kumar to other witnesses he had observed, his argument remained about how the *jury* should assess Dr. Kumar's credibility, not about how counsel personally did so.

22. Counsel's statements thus are far afield from the sorts of statements Nevada courts have held amount to prohibited personal opinions. Those statements typically ask jurors to "step

outside the relevant facts" and instead reach a verdict based on their emotions. *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). Here, by contrast, counsel's statements were closely tied to and about the evidence the jury did see—that Dr. Kumar could not "uphold the opinions he gave." App-2512.

23. Even if these statements amounted to misconduct, they would not 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 the Court finds no reason to conclude that counsel's characterization of one witness's testimony made a difference to the jury.

iv. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they discussed the verdict form.

24. Counsel's statements concerning the verdict the jury should reach also do not amount to a prohibited personal opinion. SHL contends that counsel committed misconduct by stating that they would not request a particular award if they were not "convinced" it was "the right thing to do." App-2692. SHL's argument is that this comment conveyed an impermissible, moralistic commentary on the evidence. But, viewed in context, the statement is just as easily understood as telling the jury that the requested verdict was the right thing to do according to the law as embodied in the Court's instructions and the evidence at trial.

25. In any event, even if the statement amounts to a personal opinion, the Court cannot find that the record reflects any prejudice. Although SHL leveled a successful objection to the comments, it did not seek an admonishment, and so the statement is reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect. *See Gunderson*,

130 Nev. at 77, 319 P.3d at 613. The record does not meet this standard. Nothing about the comment was "extreme," and, in any event, counsel again promptly corrected any impression that they were conveying a personal opinion: Following objection and sustainment, counsel emphasized that the argument was about what the jury should do, not what counsel thought. *See* App-2692 ("It's the right thing to do."). Thus, if there was any prejudicial effect here, it was modest in light of the powerful evidence on the plaintiff's case, and it was immediately cured. Accordingly, the comment does not warrant a new trial.

v. Counsel did not level improper personal attacks, and even if they had, a new trial would not be warranted.

26. SHL also contends that Mrs. Eskew's counsel committed misconduct because they "falsely accused" SHL's counsel "of calling Mrs. Eskew a liar." The Court finds that the record does not support either SHL's version of the facts or the conclusion it draws from them.

27. The statements that SHL identifies were not meaningfully false, because the company's strategy at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony. *See* App-1448–49 (suggesting testimony was driven by what was "helpful for your case" rather than the truth); 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"); *see also* App-1221–24, 1239–43, 1342, 1346–52, 1484–1526, 1529–41. At trial, witnesses and the parties understood this to be SHL's argument. *See, e.g.*, App-1549–50 (Q: "And you would 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."). Indeed, at a break, when plaintiff's counsel noted that SHL was suggesting that Mrs. Eskew 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").

28. SHL objects that the statements are "improper" because the company only "implied" that the Eskews were lying and that Mrs. Eskew's counsel exaggerated the effect. But Nevada law does not hold that an exaggerated characterization of counsel's arguments or conduct is improper at

all, let alone so improper as to amount to misconduct. The only supportive authority SHL identifies concerns "abusive language," "derogatory remarks," and offensive epithets. *See Born*, 114 Nev. at 861–62, 962 P.2d at 1231–32 (counsel engaged in repeated, incendiary outbursts, including describing opposing counsel and witnesses with offensive epithets in the jury's hearing and exclaiming that requests for a sidebar were "outrageous"); *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 272 (D.N.J. 1991) (closing argument focused on claims that "counsel had lied to the jury, had suborned perjury from witnesses (flavoring these comments with [] titillating remarks . . .), and had done it for money"). Nothing like that happened here. And the cases have no bearing on the propriety of one counsel's commenting on another's behavior in questioning a witness.

29. Even if counsel's remarks could amount to misconduct, they were not prejudicial. SHL made only one objection on these grounds and never sought an admonishment. But that objection, and the Court's decision to sustain it, was more than sufficient to cure any possible prejudice. Following the objection, counsel immediately and plainly clarified his meaning—that SHL had at minimum suggested that Mrs. Eskew was "embellishing" what happened to her. App-2509. SHL says it made a second objection, but that objection, viewed in context, went to a different issue—whether there was evidence supporting Mrs. Eskew's argument that SHL had not been able to dissuade Mrs. Eskew from pursuing her case. *See* App-2690. In any event, the Court finds no reason in the record to treat either objection and its sustainment as inadequate to remove any modest prejudicial effect that could have resulted.

30. SHL also argues that counsel's conduct was improper because it violated a motion in limine excluding evidence, argument, or testimony relating to litigation conduct. But that motion in limine was issued for an unrelated reason: to bar the parties from introducing evidence or argument concerning litigation conduct during the discovery process. And in any event, SHL failed to object to any of Mrs. Eskew's counsel's conduct on these grounds. *See Roth*, 127 Nev. at 136–38, 252 P.3d at 658–59 (parties are obligated to make "contemporaneous objections to claimed violations of an order produced by a motion in limine . . . to prevent litigants from wasting judicial, party, and citizen-juror resources"). It thus waived any objection except in an instance of plain error, which the Court cannot find. *See Id.*

vi. Counsel's questioning of SHL's witness was not misconduct warranting a new trial.

31. SHL also argues that Mrs. Eskew's counsel committed misconduct when they questioned SHL's director of pre-service reviews during the damages phase. According to SHL, their questioning amounted to a "blatant and shocking violation" of the "norms" of American law. The Court finds otherwise. During the challenged questioning, SHL's director testified that, in response to the jury's verdict, the company was going to begin offering annual training on the duty of good faith and fair dealing. App-2774–75. To examine whether the company was as contrite as she suggested, counsel for Mrs. Eskew urged the director to tell the jury her true view of its verdict. App-2778–79. SHL takes issue with that question because it says the question was given as a "command" and was therefore "demeaning" and necessarily improper. The Court finds no reason to agree. It is not misconduct to phrase a question as a statement rather than a question, especially in the context in which this exchange arose. SHL has offered no authority to the contrary.

32. SHL did not object on these grounds at trial, saying only that the "form" of the question was "too broad." App-2779. And even then, it did not request an admonishment. *Id.* In any event, even if reviewed for whether an admonishment could have changed the verdict, the record here leaves no reason to conclude that this line of questioning had any impact, let alone that it warrants a new trial.

C. Cumulative review of counsel's conduct makes no difference.

33. SHL urges the Court to weigh its assorted misconduct claims together and conclude that even if they were not individually prejudicial misconduct, they rise to that level as a whole. But however SHL's allegations are weighed, the Court can find no basis to grant a new trial.

34. The Court finds that SHL cannot meet the standard that applies to grant a new trial "based on the cumulative effect of attorney misconduct." *Gunderson*, 130 Nev. at 78, 319 P.3d at 614. To obtain that result, a party "must demonstrate that no other reasonable explanation for the verdict exists." *Id.* That generally requires identifying "multiple severe instances of attorney misconduct as determined by their context." *Id.* Yet as explained above, in the context of this trial, the Court cannot find that SHL has identified a single "severe instance[]" of attorney misconduct. *Id.* At best, it has pointed to a smattering of rhetorical and hyperbolic comments that pale in comparison to the extensive evidence marshaled at trial. In the Court's view, the "scope, nature, and quantity" of

this alleged misconduct had no appreciable impact on the "verdict's reliability." *Id.* The handful of assorted statements SHL has identified thus fall far short of explaining the jury's verdict.

35. The Court is particularly inclined to reach that finding in light of SHL's failure to object to the lion's share of the asserted misconduct—and, where it did object, to even once seek an admonishment. While it is true that counsel are not required to repeat objections that have already been made and sustained and failed to change counsel's behavior, *see Lioce*, 124 Nev. at 18, 174 P.3d at 981, it is equally true that the failure to object "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*, 120 Nev. at 95, 86 P.3d at 1040. The Court finds that the record in this case is more consistent with the latter concern than the former, and thus undermines any inference that SHL would have been penalized for objecting or requesting admonishments.

For the foregoing reasons, the above findings and conclusions are hereby ENTERED.

DATED this _____ day of _____ 2022.

_____
DISTRICT COURT JUDGE

Prepared and submitted by:

/s/ Matthew L. Sharp

Matthew L. Sharp, Esq. (NSB 4746)
MATTHEW L. SHARP, LTD.
432 Ridge St.
Reno, NV 89501
matt@mattsharplaw.com

Douglas A. Terry, Esq. (*Admitted PHV)*
DOUG TERRY LAW, PLLC
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
doug@dougterrylaw.com

Deepak Gupta, Esq. (*Admitted PHV)*
Matthew W.H. Wessler, Esq. (*Admitted PHV)*
GUPTA WESSLER PLLC
2001 K St. NW, Ste. 850 North
Washington, DC 20006
deepak@guptawessler.com
matt@guptawessler.com
Attorneys for Plaintiffs

EXHIBIT 2

130 Nev. 1161
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

John CARR, Appellant,
v.
Gustavo PAREDES; and Kayla D. Paredes, Respondents.
John Carr, Appellant,
v.
Gustavo Paredes; and Kayla D. Paredes, Respondents.

Nos. 60318, 61301.
|
Feb. 10, 2014.

Attorneys and Law Firms

Prince & Keating, LLP

Pyatt Silvestri & Hanlon

ORDER VACATING IN PART AND REMANDING

***1** These are consolidated appeals from district court orders entering judgment on a jury verdict, awarding costs, and denying a motion for a new trial based on attorney misconduct. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

After the conclusion of appellant John Carr's personal injury suit against respondent Gustavo Paredes, Carr filed a motion for a new trial based on attorney misconduct. Carr provided three grounds to support his claim, and the parties fully briefed the issue. The district court denied Carr's motion, but failed to explain the reasoning behind its decision.

Now, we must determine if the district court's unexplained denial was an abuse of discretion. *See Grosjean v. Imperial Palace, Inc.,* 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009) (this court reviews a ruling on a motion for a new trial for an abuse of discretion).

When a district court rules on a motion for a new trial based on attorney misconduct, it "*must* make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards" enumerated in *Lioce v. Co hen,* 124 Nev. 1, 174 P.3d 970 (2008). *Lioce* at 19–20, 174 P.3d at 982 (emphasis added).

Here, the district court failed to make the necessary findings; therefore, we vacate the court's order denying Carr's motion and remand this matter to the district court. Carr raised additional issues on appeal,* however, our decision regarding the district court's denial of Carr's motion for a new trial could render the other issues moot. Accordingly, we refrain from making a determination regarding the additional issues at this time. Also, we note that the record in this matter is inadequate. Large portions of transcripts from various court proceedings are missing. This inadequacy will hinder this court's review and should be immediately corrected. Accordingly, we

VACATE the district court's order denying the motion for a new trial and REMAND this matter to the district court for proceedings consistent with this order.

End of Document

133 Nev. 993
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

John CARR, Appellant,
v.
Gustavo PAREDES; and Kayla D. Paredes, Respondents.
John Carr, Appellant,
v.
Gustavo Paredes; and Kayla D. Paredes, Respondents.

No. 60318, No. 61301
|
FILED JANUARY 13, 2017

Attorneys and Law Firms

Phillip Aurbach, Settlement Judge

Eglet Prince

Keating Law Group

Pyatt Silvestri

ORDER OF AFFIRMANCE

***1** These are consolidated appeals from a district court order entering judgment on a jury verdict in a tort action and post-judgment orders awarding costs and denying a motion for a new trial. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Senior Judge; Kerry Louise Earley, Judge.

Appellant John Carr sued respondent Gustavo Paredes for injuries allegedly sustained when Paredes's car slid into Carr's on a snowy day. The jury returned a verdict for Paredes and Carr moved for a new trial, which the district court denied. Carr appeals, seeking reversal and remand for a new trial. He raises four issues: (1) the jury manifestly disregarded its instructions, (2) the district court erred when it allowed Dr. Duke to testify as an expert rebuttal witness, (3) the district court erred when it refused to allow Dr. Grover and Dr. Leon to surrebut Dr. Duke, and (4) Paredes's attorney's improper remarks warrant a new trial. We affirm.

Whether the jury manifestly disregarded its instructions

NRCP 59(a)(5) authorizes a district court to grant a new trial if there has been a "[m]anifest disregard by the jury of the instructions of the court." To meet this demanding standard, the movant must establish "that, had the jurors properly applied the instructions of the court, it would have been *impossible* for [the jury] to reach the verdict" they did. *Weaver Bros., Ltd. v. Misskelley,* 98 Nev. 232, 234, 645 P.2d 438, 439 (1981) (emphasis added). Denial of a motion for a new trial is reviewed for abuse of discretion. *Grosjean v. Imperial Palace, Inc.,* 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009). Although the evidence was in sharp dispute, the record demonstrates that it was not impossible for the jury to find Carr failed to prove that Paredes's negligence caused the injuries and consequent damages he claimed. Thus, the district court did not abuse its discretion in denying Carr's motion for a new trial under NRCP 59(a)(5).

Dr. Duke's designation and testimony as an expert rebuttal witness

The admissibility of expert rebuttal testimony lies within the sound discretion of the trial court. *Hallmark v. Eldridge,* 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Expert rebuttal witnesses are proper if they contradict or rebut the subject matter of the original expert witness. *Downs v. River City Grp., LLC,* No. 3:11-cv-00885-LRH-WGC, 2014 WL 814303, at *2 (D. Nev. Feb. 28, 2014). Harmless error does not warrant a new trial. *See* NRCP 61. For error in the admission or exclusion of evidence to merit a new trial, "the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 126 Nev.

446, 465, 244 P.3d 765, 778 (2010); *see also Bongiovi v. Sullivan*, 122 Nev. 556, 575, 138 P.3d 433, 447 (2006) ("an error in the admission of evidence is not grounds for a new trial or for setting aside a verdict unless the error is inconsistent with substantial justice").

Carr's discussion of Dr. Duke's designation and trial testimony confuses expert rebuttal witnesses, who are designated pretrial "to contradict or rebut" case-in-chief experts, *see* NRCP 16.1(a)(2)(C) (2011), with lay rebuttal witnesses, who may be called at trial to rebut new or unforeseen evidence offered by the adverse party, *see Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554 (5th Cir. 1979). While an expert rebuttal witness cannot testify to matters beyond the scope and subject matter of the case-in-chief expert's opinions, a rebuttal expert is designated pretrial to refute a designated case-in-chief expert's expected testimony. The standards for rebutting surprise lay witness testimony at trial differ from the standards that apply to designated rebuttal experts.

***2** Here, Dr. Duke was designated during discovery to rebut the expected opinions of the treating physicians Carr designated. Both in his designation and at trial, Dr. Duke largely confined his testimony to the opinions offered by Carr's treating-physician experts, Dr. Shang, Dr. Leon, and Dr. Grover, the scope and subject matter of whose testimony concerned: (1) the diagnosis, (2) treatment, (3) response, and (4) medical billing of Carr. Since Dr. Duke stayed within the scope and subject matter of Carr's treating physicians' expected and actual trial testimony, the district court did not abuse its discretion in allowing Dr. Duke to testify as a rebuttal expert.[1] While we question whether Dr. Duke exceeded the scope of a true rebuttal expert in remarking upon Carr's psychological factors, the error in allowing this testimony, if any, did not affect Carr's substantial rights because it does not reasonably appear likely to have changed the outcome at trial.

[1] We note that Paredes timely designated a case-in-chief expert, whom he did not call at trial, but whose designation covered some of the same subjects as Dr. Duke and Carr's treating physicians did.

Dr. Grover's and Dr. Leon's surrebuttal testimony

To preserve excluded testimony for appeal, the party must make a specific offer of proof to the trial court on the record. *Van Valkenberg v. State,* 95 Nev. 317, 318, 594 P.2d 707, 708 (1979); *see also* NRS 47.040(1)(b). The specific offer of proof affords a basis for both the district court and this court to determine if the surrebuttal testimony would be cumulative or if it moved past treatment to subjects that would have required a pretrial disclosure, even from a treating physician. Because Carr did not make an offer of proof respecting the proffered surrebuttal, and each of the proposed surrebuttal witnesses had already testified in Carr's case in chief, it is unclear that their testimony on surrebuttal would not have been merely cumulative. Rather than address this point, Carr merely argued that his expert witnesses should be allowed to surrebut Dr. Duke because their rebuttal would be based upon their personal treatment of Carr. While the district court's ruling excluding the surrebuttal may have been error because treating physicians are not required to submit a report unless their testimony exceeds their personal treatment of the patient, *FCH1, LLC v. Rodriguez,* 130 Nev., Adv. Op. 46, 335 P.3d 183, 189 (2014), we cannot resolve the matter due to the failure to specify the substance of the proffered surrebuttal testimony on the record. The error, if any, in denying surrebuttal thus was waived and appears harmless in any event.

Paredes's attorney's improper remarks

Finally, Carr complains that the opposing counsel's misconduct requires a new trial. This court previously vacated the district court's order denying the motion for a new trial and remanded the matter to the district court to make specific findings regarding attorney misconduct pursuant to *Lioce v. Cohen,* 124 Nev. 1, 19–20, 174 P.3d 970, 982 (2008). *See Carr v. Paredes,* Docket Nos. 60318 & 61301 (Order Vacating In Part and Remanding, February 10, 2014). The district court subsequently found that Paredes's attorney (1) did not violate the order in limine prohibiting her from referring to the accident as unavoidable, and (2) the improper comments to which Carr failed to object did not amount to plain error. Because Carr's motion for new trial did not

challenge Paredes's counsel's golden rule arguments or interjection of personal opinion, the district court did not rule on those two issues.

When a party objects to attorney misconduct and the objection is sustained, the misconduct must be "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 objection is overruled, then the overruling must be in error and the court's admonishment would have likely changed the verdict. *Id.* at 18, 174 P.3d at 981. If there was no objection, then there must be no other reasonable explanation for the verdict, i.e., plain error. *Id.* at 19, 174 P.3d at 981–82, *Grosjean,* 125 Nev. at 364, 212 P.3d at 1079. "Whether an attorney's comments are misconduct" is reviewed de novo; "however, we will give deference to the district court's factual findings and application of the standards to the facts." *Lioce,* 124 Nev. at 20, 174 P.3d at 982.

***3** The unobjected-to conduct did not constitute plain error because there was another reasonable explanation for the verdict: the jury simply could have found that Carr did not suffer compensable injury as a result of a breach of duty by Paredes. Turning to the conduct that was objected to but overruled, we conclude that an admonishment was unlikely to have changed the verdict. Finally, Carr has not met his burden of proving that the objected-to misconduct had an effect upon the jury. While certain of Paredes's attorney's comments were improper, they were not of the severity and pervasiveness as found in *Lioce,* and did not encourage the jury to ignore the facts and decide the case based upon their personal prejudices and opinions.

Accordingly, we ORDER the judgments of the district court AFFIRMED.

All Citations

133 Nev. 993, 387 P.3d 215 (Table), 2017 WL 176591

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134 Nev. 963

This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.

Court of Appeals of Nevada.

Blanca Esthela JIMENEZ, an Individual, Appellant,
v.
BLUE MARTINI LAS VEGAS, LLC, d/b/a Blue Martini, Respondent.
Blanca Esthela Jimenez, an Individual, Appellant,
v.
Blue Martini Las Vegas, LLC, d/b/a Blue Martini, Respondent.

No. 72539, No. 73953
|
FILED JULY 27, 2018

Attorneys and Law Firms

Law Office of Neal Hyman

Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas

ORDER VACATING POST-TRIAL ORDER AND REMANDING

***1** Blanca Esthela Jimenez appeals from a judgment entered pursuant to a jury verdict in a tort action, from a post-trial order denying Jimenez's motion for a new trial, from an order granting attorney fees and costs, and from an order staying the execution of judgment pending appeal. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.[1]

[1] Although Judge Miley presided over the trial and post-trial motions, Senior. Judge J. Charles Thompson, signed the judgment on the jury verdict.

Appellant Jimenez fell down a small two-step-high stairway, injuring her wrist, knee, and ankle, while patronizing the Blue Martini nightclub.[2] Jimenez sued Blue Martini for her injuries. After a nine-day jury trial, the jury returned a defense verdict in favor of Blue Martini. Jimenez moved for a new trial, arguing that the verdict was not supported by substantial evidence, that Blue Martini's attorney committed misconduct by calling Jimenez a liar repeatedly in his closing argument, and that the district court committed several errors in pre-trial and trial rulings. Blue Martini opposed the motion, arguing that a new trial was not warranted. The district court denied Jimenez's motion for a new trial, finding that the jury's verdict was supported by substantial evidence, Blue Martini's attorney did not commit misconduct, and the district court did not err in its rulings. Thereafter, Blue Martini filed a motion for attorney fees and costs, which the district court granted. Jimenez filed a motion to stay the execution of judgment pending appeal and requested the district court waive any bond requirement. The district granted Jimenez's motion to stay the judgment execution but required Jimenez to post a $50,000 bond.

[2] We do not recount the facts except as necessary to the disposition.

On appeal, Jimenez asserts various errors. However, because the district court failed to properly analyze Jimenez's claims of attorney misconduct we need only address that contention, and we conclude a remand is necessary for the district court to make specific findings on the record regarding attorney misconduct, as required by the supreme court and this court's jurisprudence.[3] *See Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008); *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 813-14, 357 P.3d 387, 394 (Ct. App. 2015).

[3] We note that Jimenez also contends a new trial is warranted due to the district court's interlocutory rulings admitting evidence that Jimenez had a prior back condition and knee injury, allowing Blue Martini to show its expert a silent video of Jimenez testifying, giving a comparative fault jury instruction, denying Jimenez leave to amend to seek punitive damages, admitting a witness'

deposition testimony, and declining to sanction Blue Martini for failing to preserve certain surveillance video. However, we conclude Jimenez's arguments are unpersuasive, as the district court's rulings were proper. *See* NRS 48.025 ("All relevant evidence is admissible ...."); NRS 50.285 (allowing an expert to base an opinion or inference on facts "made known to the expert at the hearing"); NRCP 32(a)(3)(D) (stating that a party may introduce a deposition into evidence if the party cannot procure the witness by subpoena); *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. ——, ——, 31, 416 P.3d 249, 254-55 (2018) (affirming a district court's denial of a motion to amend a complaint for undue delay); *FGA, Inc. v. Giglio*, 128 Nev. 271, 283, 285, 278 P.3d 490, 498, 499 (2012) (holding that evidence of prior injury is admissible to show "a causal connection between the prior injury and the injury at issue," and that "[e]vidence of a party's possible intoxication may be probative of the issues of causation and comparative negligence"); *Bass-Davis v. Davis*, 122 Nev. 442, 447-48, 134 P.3d 103, 106-07 (2006) (addressing sanctions for spoliation). Finally, to the extent Jimenez challenges the verdict form, we deem that argument waived because Jimenez did not object to the verdict form below. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

***2** Jimenez argues that Blue Martini's counsel committed misconduct, which led to jury nullification, when he repeatedly accused Jimenez of lying on the stand and asked the jury whether they should reward a person who lies.

"Whether an attorney's comments are misconduct is a question of law" reviewed de novo; but we will defer "to the district court's factual findings and application of the [legal] standards to the facts." *Lioce*, 124 Nev. at 20, 174 P.3d at 982; *see also* NRCP 59(a)(2) (stating that misconduct may warrant a new trial). And, we review unobjected to attorney misconduct for plain error, *Lioce*, 124 Nev. at 19, 174 P.3d at 982. "[D]etermining whether 'plain error' has occurred as a result of unobjected-to misconduct requires the court to closely examine the record, weigh the severity and persistence of the misconduct against the evidence presented, and assess what role, if any, the misconduct likely played in the jury's verdict." *Pentair Water Pool & Spa*, 131 Nev. at 817, 357 P.3d at 397. Under *Lioce*, a district court resolving a motion for a new trial based on unobjected to attorney misconduct is required to make specific findings on the record during the oral proceedings and also in its written order, as to whether the misconduct amounts to plain error, and whether the party moving for a new trial has demonstrated that the misconduct rises to the level of irreparable and fundamental error. *Lioce*, 124 Nev. at 19-20, 174 P.3d at 982. When district court fails to provide reasoning for its decision such that this court cannot determine whether the district court abused its discretion in denying the motion for a new trial, we must remand for a decision on the motion based upon the standards set forth in *Lioce*. *See id.* at 24-25, 174 P.3d at 985.

Here, Jimenez's motion for a new trial detailed incidents of purported misconduct. But, in its order the district court denied Jimenez's motion for new trial without setting forth adequate specific findings under *Lioce*'s plain error standards for evaluating attorney misconduct. The district court merely stated, briefly, that it found nothing in the record to indicate Blue Martini's counsel was acting inappropriately in its closing argument. Yet, the record includes numerous instances wherein Blue Martini's counsel accused Jimenez of lying. *C.f. id.* at 21-22. 174 P.3d at 983 (noting that "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"); NRPC 3.4(e). Thus, these findings are deficient under *Lioce* and we are unable to determine whether the district court abused its discretion. The district court must revisit Jimenez's NRCP 59(a)(2) motion for a new trial and, in so doing, make specific findings about the alleged attorney misconduct under the standards set forth in *Lioce*. As a result, we vacate the district court's denial of Jimenez's attorney misconduct based request for new trial, and remand this matter for further proceedings.

Accordingly we,

***3** ORDER the post-trial order of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.[4]

[4] We decline to resolve other issues raised in this appeal regarding the district court's denial of the motion for a new trial in light of this remand for additional findings.

All Citations

Not Reported in Pac. Rptr., 134 Nev. 963, 2018 WL 3912241

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2019 WL 5681078
Only the Westlaw citation is currently available.

Court of Appeals of Nevada.

Blanca Esthela JIMENEZ, Appellant,
v.
BLUE MARTINI LAS VEGAS, LLC, d/b/a Blue Martini, Respondent.

No. 77226-COA
|
FILED OCTOBER 31, 2019

Attorneys and Law Firms

Law Office of Neal Hyman

Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas

ORDER OF AFFIRMANCE[1]

[1] The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter.

***1** Blanca Jimenez appeals from a district court order denying a motion for a new trial in a tort action and an order awarding fees and costs. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Jimenez sued Blue Martini nightclub for negligence, alleging she suffered injuries when she fell down a two-step staircase at Blue Martini.[2] During a nine day jury trial, Jimenez and Blue Martini presented conflicting evidence concerning the cause of Jimenez's injuries. For example, Jimenez called an expert who testified Blue Martin's steps were shorter than building codes required. Conversely, Blue Martini's building expert disputed Jimenez's expert's measurements, and testified that, in his opinion, the steps did not cause Jimenez's fall. Jimenez also called an expert who testified the lighting levels were below the required levels in an egress area. However, Blue Martini's lighting expert testified the building code referenced by Jimenez's experts was not applicable, because it was the fighting requirement for residential structures.

[2] We do not recount the facts except as necessary to our disposition.

Likewise, Jimenez and Blue Martini presented conflicting evidence and expert testimony regarding both the extent and treatment of Jimenez's injuries. One of Jimenez's treating physicians testified a fall that causes injuries to a tibia and knee could "easily... hurt [Jimenez's] back." On the other hand, Blue Martini's orthopedic expert testified that after examining Jimenez and her medical records, he did not believe the fall injured her back. Further, Jimenez's knee and wrist doctor admitted to retroactively modifying Jimenez's medical records to show an initial complaint of back pain six months after her initial visit. After one of Jimenez's treating physicians testified of the treatment Jimenez needed and would require in the future, Blue Martini called a doctor who testified that the extent of treatment for Jimenez's knee injury was excessive.

During her testimony, Jimenez gave contradictory statements regarding her prior injury and her previous course of treatment. To discredit Jimenez's testimony, Blue Martini admitted into evidence the deposition of Aurora Alvarez, Jimenez's roommate. In her deposition, Alvarez testified that Jimenez had complained of back and knee pain prior to her fall at the Blue Martini.

During closing argument, Blue Martini's counsel emphasized the contradictory testimony of the experts who testified at trial, Jimenez's modified medical records, and inconsistencies in Jimenez's own testimony. Specifically, Blue Martini stated Jimenez's knee and wrist doctor had "fake[d]" medical records and Jimenez had lied about her prior injuries. After the jury returned a verdict in favor of Blue Martini, Jimenez moved for a new trial, arguing that the verdict was inconsistent with the evidence and that Blue Martini committed attorney misconduct. The district court denied the motion.

Subsequently, Jimenez appealed the verdict, the order denying Jimenez's motion for a new trial based on attorney misconduct, and the award of attorney fees and cost. This court considered Jimenez's initial appeal, and vacated and remanded the district court's order for failure to make specific findings under *Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008). On remand, the district court found that, under the standards set forth in *Lioce,* Blue Martini did not commit attorney misconduct. Jimenez appealed the district court's findings again.

***2** On appeal, Jimenez argues that the district court abused its discretion in denying her motion for new trial under NRCP 59 because Blue Martini's counsel committed attorney misconduct during closing arguments. Jimenez further argues the district court abused its discretion by awarding attorney fees and costs to Blue Martini.

As a starting point, Jimenez asserts a number of trial errors, such as the giving of an improper negligence per se instruction; the erroneous giving of a comparative fault instruction; and errors associated with the parties' opening statements. However, these alleged errors were either previously raised and resolved in Jimenez's prior appeal, or should have been raised in that prior appeal. Issues already raised and previously decided by this court become the "law of the case" and cannot be reargued, *Hsu v. Cty. of Clark,* 123 Nev. 625, 629-30, 173 P.3d 724, 728 (quoting *Wickliffe v. Sunrise Hosp.,* 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988). Issues that were not raised but could and should have been raised in that prior appeal are now waived. For example, Jimenez again argues that the court erred in its "negligence per se" and "comparative fault" jury instructions and that these errors were compounded when the jury used the short verdict form instead of the long one. Jimenez's argument is not that either instruction was wrongly phrased as a matter of law, but rather that the jury verdict form indicates that the jury did not accept those legal theories and therefore the instructions were unnecessary. But Jimenez raised this exact argument in his prior briefing and this court already considered and rejected all of Jimenez's arguments arising from the jury verdict form in footnote 3 of our prior order. *Jimenez v. Blue Martini Las Vegas, LLC,* Docket Nos. 72539 & 73953 (Order Vacating Post-Trial Order and Remanding, Ct. App., July 27, 2018).

Thus, the only district court actions that can be properly challenged in this appeal are any new district court determinations that took place following the prior remand or any issue that this court chose not to reach in the prior appeal, namely, the district court's resolution of the question of attorney misconduct and its award of attorney fees and costs following trial. Therefore, these are the only issues that can now be the proper subject of this appeal.

This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion, viewing the evidence and all inferences favorably to the party against whom the motion was made. *Michaels v. Pentair Water Pool & Spa, Inc.,* 131 Nev. 804, 814, 357 P.3d 387, 395 (Ct. App. 2015). "Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party's counsel] committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc.,* 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). An attorney commits misconduct when he or she "encourage[s] the jurors to look beyond the law and the relevant facts in deciding the case[ ] before them." *Lioce v. Cohen,* 124 Nev. 1, 6, 174 P.3d 970, 973 (2008).

To determine whether attorney misconduct warrants a new trial, this court must apply a three-step analysis. *Michaels,* 131 Nev. at 815, 357 P.3d at 395. We must first determine whether an attorney's comments constitute misconduct, which is a question of law reviewed de novo. *Id.* If there was misconduct, we must then decide which legal standard to apply to determine whether the misconduct warrants a new trial—a question resolved by determining whether the party alleging misconduct timely objected to it below. *Id.* Finally, we "must determine whether the district court abused its discretion in applying that standard." *Id.*

***3** If the party claiming misconduct did not object at trial, "the district court shall first conclude that the failure to object is critical and ... treat the attorney misconduct issue as having been waived, unless plain error exists." *Lioce,* 124 Nev. at 19, 174 P.3d at 982. Plain error exists only where misconduct occurred and "no other reasonable explanation for the verdict

exists." *Michaels*, 131 Nev. at 816, 357 P.3d at 396 (quoting *Lioce,* 124 Nev. at 19, 174 P.3d at 982).

Here, Jimenez failed to object to Blue Martini's closing argument below. Accordingly, the jury's verdict must stand unless Jimenez can demonstrate both that misconduct occurred and that misconduct is the only reasonable explanation for the verdict. We conclude that there would still be a reasonable explanation for the jury's verdict in favor of Blue Martini apart from any alleged misconduct. Thus, we conclude that plain error does not exist, and we uphold the district court's denial of Jimenez's motion for a new trial.

Next, we consider whether the district court abused its discretion by awarding fees and costs to Blue Martini. Jimenez argues that the district court failed to consider the *Beattie* factors because Blue Martini's offer was not reasonable and Jimenez's rejection of the offer was reasonable. Blue Martini argues the district court fully considered the *Beattie* factors and the fees and costs were appropriate under *Brunzell.*

This court reviews the district court's decision regarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.,* 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). When awarding attorney fees, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank,* 85 Nev. 345, 455 P.2d 311 (1969). *Miller v. Wilfong,* 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). When awarding attorney fees in the offer of judgment context under NRCP 68, the district court must consider the factors set forth in *Beattie v. Thomas,* 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), and *Brunzell.*

Here, before awarding attorney fees and costs in favor of Blue Martini, the district fully considered the factors set forth in *Beattie* and *Brunzell.* The district court found that while Jimenez filed and maintained her claim in good faith, her rejection of the offer of judgment was unreasonable. Prior to trial, Blue Martini offered several times the value of Jimenez's medical costs and claimed lost wages despite evidence of prior injury, comparative negligence, and the disputed causation of Jimenez's fall. Accordingly, we conclude the district court did not abuse its discretion by granting Blue Martini's motion for attorney fees and costs.

Lastly, we consider Jimenez's appeal of the supersedeas bond. Jimenez argues that the district court abused its discretion by failing to consider her financial circumstances and imposing an excessive bond. A district court may use its discretion to set a supersedeas bond that will permit full satisfaction of the judgment. *Nelson v. Heer,* 121 Nev. 832, 834-35, 122 P.3d 1252, 1253 (2005). Thus, we conclude the district court did not abuse its discretion when it set the bond well below the judgment against Jimenez.

Based on the foregoing, we

Order the judgment of the district court AFFIRMED.

All Citations

Not Reported in Pac. Rptr., 2019 WL 5681078

2019 WL 5681078

End of Document

131 Nev. 1366
Only the Westlaw citation is currently available.

This is an unpublished decision. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.

Court of Appeals of Nevada.

WYNN LAS VEGAS, LLC, Appellant,
v.
Frances Ann BLANKENSHIP, Respondent.

No. 65615.
|
July 17, 2015.

Attorneys and Law Firms

Marquis Aurbach Coffing.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas.

Richard Harris Law Firm.
Before GIBBONS, C.J., TAO and SILVER, JJ.

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

***1** This is an appeal from a district court judgment on the jury verdict in a personal injury action and from a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

This appeal arises from a jury verdict in a personal injury claim for damages following a trip-and-fall in May 2009. Respondent Frances Ann Blankenship was on the premises of appellant Wynn Las Vegas, LLC ("Wynn") when she tripped over a curb. As a result of the fall, Blankenship suffered a broken arm and other injuries. Blankenship filed a complaint against Wynn alleging, as relevant to this appeal, negligence.

On the night of the incident, Blankenship ate dinner with her family and friends at the Botero restaurant at the Encore at Wynn Las Vegas, which is owned by Wynn. After finishing dinner, the group ordered dessert and coffee, and, while waiting to be served, Blankenship and her husband decided to leave the restaurant to smoke a cigarette. Blankenship and her husband exited the restaurant through the front doors, proceeded down some steps, and walked between two large columns that mark the restaurant's entrance. They then turned left and proceeded down a walkway that runs alongside the restaurant's patio area. A curb separates the walkway from the patio. Blankenship and her husband followed the walkway, passing alongside the curb, until they reached the Encore's pool area where they smoked their cigarettes.

After finishing their cigarettes, Blankenship and her husband did not use the walkway to return to the restaurant. Instead, they attempted to reach the restaurant's front doors by passing through its patio area. But, Blankenship tripped over the curb surrounding the patio area and fell.

Photographs were introduced at trial depicting the patio area, curb, walkway, and lighting in the area. The photographs show a number of tables and chairs inside the patio area and arranged alongside the curb. The photographs were taken during the day, however, and do not necessarily depict the tables and chairs as they were positioned on the night of the incident. The photographs also show overhead lighting in the patio area's canopy and lighting in the landscaping along the walkway.

At trial, Blankenship testified she did not see the curb or any indication she could not cross through the patio area, and she would have used an alternate route if she saw the curb. Blankenship also testified she recalled the space between the tables being larger than depicted in the photographs. According to Blankenship, her chosen route appeared to be a safe, direct route to the entrance that would not intrude on other patrons' dining experience. Blankenship testified she did not know what part of her foot hit the curb, but "she fell flat and it knocked [her] out."[1]

[1] Blankenship's medical records from the night of the incident states Blankenship saw the curb and was stepping over it, suggesting she knew the curb was there and attempted to navigate it. Blankenship testified she did not recall making that statement, and she was groggy when she went to the hospital.

Blankenship acknowledged she purchased four alcoholic beverages on the day of the incident: two beers during the day, a scotch and water at the bar before dinner, and a scotch and water at dinner. But, Blankenship also testified she did not recall whether she drank the entire scotch and water at the bar, and she did not drink the entire scotch and water at dinner. Blankenship further acknowledged she was wearing two and one-half inch heels when she fell.

***2** Blankenship retained an expert to testify regarding the curb, but the district court granted Wynn's motion to strike that expert because the expert relied upon photographs of the curb to form an opinion.[2] Thus, Blankenship did not adduce expert testimony regarding the curb.

[2] Blankenship alleges Wynn redesigned the curb before offering her an opportunity to inspect it. To the extent Blankenship argues Wynn spoliated evidence, that argument fails on appeal because she did not raise it before the district court. *See Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

Wynn's expert, Deruyter Orlando Butler, testified the building code required Wynn to install a barrier between the patio area and the walkway due to a small elevation difference between the two surfaces. Mr. Butler further testified the curb was compliant with the building code, but other barriers, including a planter, rails, or glass would have also been compliant. Mr. Butler acknowledged the curb was not the safest possible barrier, Wynn has used different barriers at other properties, Wynn selected the curb for aesthetic purposes, and other barriers would have also served those aesthetic purposes. Finally, Mr. Butler testified Wynn painted the curb a contrasting color to promote guest safety and the lighting in the area was code compliant.

The jury returned a verdict in favor of Blankenship, awarding $100,000 in damages, but that amount was reduced to $60,000 because the jury also found Blankenship forty percent liable for the incident. Thereafter, Wynn brought a post-trial motion for judgment as a matter of law, or, in the alternative, a motion for a new trial, which the district court denied. This appeal followed.

On appeal, Wynn challenges the district court's determination on several bases. First, Wynn contends substantial evidence did not support the jury's verdict. Second, Wynn argues the jury manifestly disregarded the district court's instructions, and, therefore, the district court abused its discretion by denying Wynn's motion for a new trial. Third, Wynn asserts the district court abused its discretion by denying Wynn's motion for a new trial because Blankenship's counsel encouraged jury nullification during voir dire.

Whether substantial evidence supported the jury's verdict

Wynn maintains the present case concerned the design and construction of a curb. Wynn argues the standard applicable to the design and construction of a curb is not within the common knowledge of laypersons, and, therefore, Blankenship was required to present expert testimony regarding the standard of care. Because Blankenship did not present expert testimony, Wynn asserts substantial evidence did not support the jury's verdict. By contrast, Blankenship contends the case was not about the design and construction of the curb, but rather, whether the Wynn unreasonably placed it at the location of the fall. Blankenship further argues expert testimony regarding the standard of care was not required because the reasonableness of the curb at the location of the fall was within the common knowledge of laypersons. Thus, Blankenship maintains substantial evidence supported the jury's verdict.

We will not overturn a jury's verdict if it is supported by substantial evidence, unless, "it was clearly wrong from all the evidence presented." *Allstate Ins. Co. v. Miller,* 125 Nev. 300, 308, 212 P.3d 318, 324 (2009). "Substantial evidence is that

which a reasonable mind might accept as adequate to support a conclusion." *Yamaha Motor Co. v. Arnoult,* 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (internal quotation marks omitted). In reviewing a jury's verdict, we are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, [we draw] all favorable inferences ... towards the prevailing party." *Id.*

***3** It is well-established in Nevada "that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons." *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.,* 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982). "Where ... the service rendered does not involve esoteric knowledge or uncertainty that calls for [a] professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." *Id.* (citing *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.,* 392 F.2d 472, 478 (8th Cir.1968) ("general rule requiring expert testimony to establish a reasonable standard of professional care ... is not necessary in passing on commonplace factual situations that the ordinary jury layman can readily grasp and understand.").

Wynn cites *Woodward v. Chirco Constr. Co.,* 687 P.2d 1275 (Ariz.Ct.App.1984), *Miller v. Los Angeles Cnty. Flood Control Dist.,* 505 P.2d 193 (Cal.1973), *Lemay v. Burnett,* 660 A.2d 1116 (N.H.1995), and *Nat'l Cash Register Co. v. Haak,* 335 A.2d 407 (Pa.Super.Ct.1975) for the proposition that the standard of care associated with the design and construction of the curb is not within the common knowledge of laypersons. We are not persuaded by Wynn's argument. Even if those cases were binding, which they are not, they are distinguishable because Blankenship's underlying claim was not limited to negligent construction or design. Instead, Blankenship tried the case on the theory that the curb presented an unreasonable risk of harm at the location of the fall.

Given Blankenship's theory of the case, the jury was not charged with assessing the structural integrity of the curb or whether a design defect was present in the curb. It was asked to consider whether Wynn, by placing the curb at the location of the fall, created an unreasonable risk of harm—specifically, a tripping hazard. Because that issue falls within the common knowledge of laypersons, we conclude Blankenship was not required to present expert testimony regarding the standard of care. *See Daniel,* 98 Nev. at 115, 642 P.2d at 1087; *see also Foster v. Costco Wholesale Corp.,* 128 Nev. ——, ——, 291 P.3d 150, 156 (2012) (holding where a dangerous condition is open and obvious, the jury must decide whether a landowner breaches its duty of care by permitting the condition to exist and allowing a guest to encounter the condition). Given our conclusion, we turn to whether substantial evidence supports the jury's verdict.

At trial, Blankenship presented photographs depicting the area in which the fall took place. Thus, the jury was able to view the curb, walkway, and patio area; the lighting in the area; and the lack of warnings regarding the curb. Blankenship and her husband both testified they did not see the curb or any indication that they could not walk from the walkway through the patio area. Wynn's expert testified the building code required a barrier between the walkway and patio area due to a small elevation change. But, Wynn's expert also testified (1) a curb was not the only option for the location, (2) Wynn selected the curb for aesthetic purposes, and (3) other barriers may have been safer options for the location. Based on the record and given our conclusion that Blankenship was not required to present expert testimony regarding the standard of care, we conclude substantial evidence supported the jury's verdict.

Whether the jury manifestly disregarded the district courts instructions

***4** Wynn contends that without expert testimony regarding the standard of care, the jury could not have found in favor of Blankenship unless it manifestly disregarded the district court's instructions. Thus, Wynn maintains the district court abused its discretion by denying Wynn's motion for a new trial. Blankenship counters she was not required to present expert testimony regarding the standard of care. Hence, Blankenship asserts the district court did not abuse its discretion by denying Wynn's motion for a new trial because the jury did not manifestly disregard the district court's instructions.

A district court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Krause, Inc. v. Little,* 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). Under NRCP 59(a)(5), a district court may grant a new trial if there has been a "[m]anifest disregard by the jury of the instructions of the court." Our Supreme Court has held "[t]his basis for granting a new trial may only be used if the jury, as a matter of law, could not have reached the conclusion that it reached ." *Carlson v. Locatelli,* 109 Nev. 257, 261, 849 P.2d 313, 315 (1993). In considering whether the jury manifestly disregarded the district court's instructions, we must "assume that the jury understood the instructions and correctly applied them to the evidence." *McKenna v. Ingersoll,* 76 Nev. 169, 175, 350 P.2d 725, 728 (1960).

We already concluded Blankenship was not required to present expert testimony regarding the standard of care, and, therefore, Wynn's argument that the jury must have manifestly disregarded the district court's instructions fails. Moreover, nothing in the record suggests the jury's verdict is based on a misunderstanding or misapplication of the district court's instructions. The district court properly instructed the jury, without objection from the Wynn, that "a property owner is not an insurer of the safety of a person on its premises[,]" but a property owner still "owes its patrons a duty to keep the premises in a reasonably safe condition for its intended use." The district court also properly instructed the jury, once again without objection from the Wynn, to use common sense and draw reasonable inferences in considering the evidence. Based on the district court's instructions as well as the evidence and testimony presented at trial, it cannot be said, as a matter of law, the jury could not have reached the conclusion that it reached.

Whether Blankenship's counsel encouraged jury nullification

We next turn to Wynn's contention that a new trial is warranted because Blankenship's counsel engaged in misconduct by encouraging jury nullification. A district court has discretion to grant or deny a motion for new trial based on attorney misconduct, and we will not reverse that decision absent an abuse of discretion. *See Lioce v. Cohen,* 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

***5** Our Supreme Court has held when a district court rules on a motion for a new trial based on attorney misconduct, "the district court *must* make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described [in *Lioce*] to the facts of the case before it." *Id.* at 19–20, 174 P.3d at 982 (emphasis added).

In the present case, the district court failed to make the necessary findings—both during oral proceedings and in its written order. Without reasoning supporting the district court's decision, we are unable to determine whether the district court abused its discretion in denying Wynn's motion for a new trial based on attorney misconduct. As such, we vacate the district court's order denying that motion and remand this matter to the district court for a decision applying the standards set forth in *Lioce.* Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

All Citations

Not Reported in P.3d, 131 Nev. 1366, 2015 WL 4503211

End of Document

EXHIBIT 3

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.

EXHIBIT 4

Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health
Date: Monday, September 19, 2022 at 11:59:47 AM Pacific Daylight Time
From: Gormley, Ryan
To: Sorensen, David
CC: 'Deepak Gupta', 'Doug Terry', 'Matthew Wessler', Roberts, Lee, 'Dupree Jr., Thomas H.', 'Cristin Sharp', 'suzy@mattsharplaw.com', Everett, Tia, 'Matt Sharp', Everett, Tia
Attachments: image001.jpg, image002.png, e-sig2022final_ba5cc7df-d101-455c-b785-e4dfc6477db3.png, SHL_s Proposed Order Denying JAML_105727195_1 (002).docx, SHL_s Proposed Order Denying New Trial_105727199_1 (002).docx, SHL_s Proposed Order Denying New Trial_105727199_1 (002).pdf, SHL_s Proposed Order Denying JAML_105727195_1 (002).pdf

Please find attached Defendant's proposed orders in PDF and word format.

Thank you,

From: Sorensen, David <Dept04LC@clarkcountycourts.us>
Sent: Monday, September 19, 2022 7:47 AM
To: Gormley, Ryan <RGormley@wwhgd.com>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; Roberts, Lee <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; 'suzy@mattsharplaw.com' <suzy@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

This Message originated outside your organization.

Mr. Gormley,
Per my previous email and per the request of the Judge, please provide your proposed orders to me no later than today at noon.
Regards,

DAVID S. SORENSEN, Esq.
Law Clerk to the Honorable Nadia Krall
Eighth Judicial District Court – Department 4
Phone – (702) 671-0513
Dept04LC@clarkcountycourts.us

From: Gormley, Ryan <RGormley@wwhgd.com>
Sent: Friday, September 16, 2022 4:03 PM
To: Sorensen, David <Dept04LC@clarkcountycourts.us>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; Roberts, Lee <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; 'suzy@mattsharplaw.com' <suzy@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT

Thank you, Mr. Sorensen. While we would be pleased to submit anything the Court desires, we presented our objections to plaintiff's proposed orders in writing and did not plan to submit anything further. Redlined documents would not assist the Court because we cannot agree to virtually anything in the plaintiff's proposed orders. We suggest that the Court simply issue short orders that track the language in the Court's August 15 minute orders denying defendant's post-trial motions, rather than adopt plaintiff's overlength, argumentative, and inaccurate proposals.

Thank you,

From: Sorensen, David <Dept04LC@clarkcountycourts.us>
Sent: Wednesday, September 14, 2022 2:54 PM
To: Gormley, Ryan <RGormley@wwhgd.com>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; Roberts, Lee <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; 'suzy@mattsharplaw.com' <suzy@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

This Message originated outside your organization.

Mr. Gormley,

Judge is requesting that you submit your competing orders and strike-through/redline versions of both of Plaintiffs proposed orders no later than next Monday(9/19/2022 at noon).

Regards,

DAVID S. SORENSEN, Esq.
Law Clerk to the Honorable Nadia Krall
Eighth Judicial District Court – Department 4
Phone – (702) 671-0513
Dept04LC@clarkcountycourts.us

From: Gormley, Ryan <RGormley@wwhgd.com>
Sent: Wednesday, August 31, 2022 4:35 PM
To: Sorensen, David <Dept04LC@clarkcountycourts.us>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; Roberts, Lee <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; 'suzy@mattsharplaw.com' <suzy@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT

Good afternoon Mr. Sorensen,

With respect to the proposed orders submitted by Plaintiff, Defendant filed an objection and further objection. They are attached here. At this time, Defendant does not intend to file or submit anything further in relation to the proposed orders. Please let us know if you have any questions.

Thank you,

Ryan Gormley, Attorney
Weinberg Wheeler Hudgins Gunn & Dial
6385 South Rainbow Blvd. | Suite 400 | Las Vegas, NV 89118
D: 702.938.3813 | F: 702.938.3864
www.wwhgd.com | vCard

From: Sorensen, David <Dept04LC@clarkcountycourts.us>
Sent: Tuesday, August 30, 2022 12:04 PM
To: 'suzy@mattsharplaw.com' <suzy@mattsharplaw.com>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; Roberts, Lee <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; Gormley, Ryan <RGormley@wwhgd.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

This Message originated outside your organization.

Suzy and Counsel for Defendants,
You need to attach that to the back of the order so that it is all one document and resend it to me. It appears that all of these are going to be competing orders. If opposing counsel can
Email me their version in both Word and PDF no later than close of business tomorrow I would appreciate it. Additionally, please redline/strikethrough any language that is not agreed upon.

Regards,

DAVID S. SORENSEN, Esq.
Law Clerk to the Honorable Nadia Krall
Eighth Judicial District Court – Department 4
Phone – (702) 671-0513
Dept04LC@clarkcountycourts.us

From: suzy@mattsharplaw.com <suzy@mattsharplaw.com>
Sent: Tuesday, August 30, 2022 11:40 AM
To: Sorensen, David <Dept04LC@clarkcountycourts.us>
Cc: 'Deepak Gupta' <deepak@guptawessler.com>; 'Doug Terry' <doug@dougterrylaw.com>; 'Matthew Wessler' <matt@guptawessler.com>; 'Lee Roberts' <LRoberts@wwhgd.com>; 'Dupree Jr., Thomas H.' <TDupree@gibsondunn.com>; 'Ryan Gormley' <RGormley@wwhgd.com>; 'Cristin Sharp' <cristin@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>; 'Matt Sharp' <matt@mattsharplaw.com>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT

David,

Here is the email communication not approving the proposed order that didn't get attached previously.

Suzy Thompson
Legal Assistant
Matthew L. Sharp, Ltd.
432 Ridge Street
Reno, NV 89501
Suzy@mattsharplaw.com
(775) 324-1500
(775) 284-0675 fax

From: Sorensen, David <Dept04LC@clarkcountycourts.us>
Sent: Tuesday, August 30, 2022 8:31 AM
To: 'Matt Sharp' <matt@mattsharplaw.com>
Cc: Deepak Gupta <deepak@guptawessler.com>; Doug Terry <doug@dougterrylaw.com>; Matthew Wessler <matt@guptawessler.com>; Lee Roberts <LRoberts@wwhgd.com>; Dupree Jr., Thomas H. <TDupree@gibsondunn.com>; Ryan Gormley <RGormley@wwhgd.com>; Suzy Thompson <suzy@mattsharplaw.com>; Cristin Sharp <cristin@mattsharplaw.com>; Everett, Tia <EverettT@clarkcountycourts.us>
Subject: RE: A-19-788630-FCCO-Eskew vs. Sierra Health

Counsel,
I am unable to print the PDF versions of your proposed orders. An error message appears when I try to print it.

Additionally, if counsel for Defendant intends on providing their own versions of these orders, please do so by the end of business tomorrow. Please email me Word and PDF visions of your competing orders with redlines/strikethroughs of the language that you do not agree with.
Regards,

DAVID S. SORENSEN, Esq.
Law Clerk to the Honorable Nadia Krall
Eighth Judicial District Court – Department 4
Phone – (702) 671-0513
Dept04LC@clarkcountycourts.us

From: Matt Sharp <matt@mattsharplaw.com>
Sent: Monday, August 29, 2022 8:56 PM
To: Sorensen, David <Dept04LC@clarkcountycourts.us>
Cc: Deepak Gupta <deepak@guptawessler.com>; Doug Terry <doug@dougterrylaw.com>; Matthew Wessler <matt@guptawessler.com>; Lee Roberts <LRoberts@wwhgd.com>; Dupree Jr., Thomas H. <TDupree@gibsondunn.com>; Ryan Gormley <RGormley@wwhgd.com>; Suzy Thompson <suzy@mattsharplaw.com>; Cristin Sharp <cristin@mattsharplaw.com>
Subject: Re: A-19-788630-FCCO-Eskew vs. Sierra Health

David,

Per the clerks request, I am attaching the proposed orders denying the Renewed Motion for Judgment Notwithstanding the Verdict and Motion for New Trial or Remittitur

We have attached a PDF of the proposed and a Microsoft Word version of the proposed order.

The defendant has not approved the proposed order. The email communication is attached to the PDF of the proposed order.

Matthew Sharp
432 Ridge St.
Reno, NV 89501
matt@mattsharplaw.com
775-324-1500
Past-President Nevada Justice Association
Board of Governors American Association for Justice
Leaders Forum American Association for Justice

MOT
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Deepak Gupta, Esq.*
Matthew W.H. Wessler, Esq.*
**Admitted PHV*
GUPTA WESSLER PLLC
2001 K St., NW, Ste. 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
matt@guptawessler.com

Attorneys for Plaintiff

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

PLAINTIFF'S MOTION TO CONSIDER PLAINTIFF'S MOTION FOR ENTRY OF EXPRESS FINDINGS AS REQUIRED BY *LIOCE V. COHEN* ON AN ORDER SHORTENING TIME BASIS

Plaintiff Sandra Eskew, as the Special Administrator of the Estate of William George Eskew ("Estate") filed a Motion for Entry of Express Findings as Required by *Lioce v. Cohen* ("Motion for Express Findings") on October 6, 2022. Plaintiff asks this Court to consider the Motion for Express Findings on an order shortening time basis. Exhibit 1 is the Motion for Express Findings with exhibits. An order shortening time is supported by the following: (1) the Declaration of Matthew L. Sharp; (2) the Motion for Express Findings with the supporting exhibits, (3) *Lioce v. Cohen* requires express factual findings and conclusions by the district court in its order denying a motion for new trial on the basis of alleged attorney misconduct; and (4) the order denying the Defendant's Motion for New Trial or Remittitur and Renewed Motion for Judgment Notwithstanding the Verdict, which was submitted by the Defendant, does not include express factual findings and conclusion on the denial of Defendant's Motion for New Trial on the basis of alleged attorney misconduct.

DATED this 6th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiffs

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ORDER SHORTENING TIME

Pursuant to the Declaration of Matthew L. Sharp Esq. below in support of the Motion for Order Shortening Time and good cause demonstrated:

IT IS ORDERED that the hearing on Plaintiff's Motion for Entry of Express Findings as Required by *Lioce v. Cohen* be set before this Department 4 at the hour of ___ a.m. on the _____ day of _____ 2022.

IT IS FURTHER ORDERED that Defendant shall have to and including 5:00 p.m. on _____ to file any opposition to this motion.

Dated this ___ day of October 2022.

_____
DISTRICT JUDGE NADIA KRALL

DECLARATION OF MATTHEW L. SHARP IN SUPPORT OF ORDER SHORTENING TIME

Under penalty of perjury, Matthew L. Sharp, Esq does declare under penalty of perjury as follows:

1. I am one of the attorneys who represents Sandra Eskew as the Administrator of the Estate of William George Eskew.

2. My understanding of *Lioce v. Cohen*, 124 Nev. 1, 7, 174 P.3d 970, 974 (2008) requires that the district court make express findings and conclusions when it denies a motion for new trial that requests a new trial upon the basis of alleged attorney misconduct.

3. Defendant filed a Motion for New Trial or Remittitur requesting a new trial, in part, upon the basis of alleged attorney misconduct.

4. On August 15, 2022, this Court entered a minute order denying the Defendant's Motion for New Trial or Remittitur and directed the Plaintiff to draft a proposed order which were to include Findings of Fact and Conclusions of Law.

5. On August 29, 2022, I submitted to chambers Plaintiff's proposed Findings of Fact and Conclusions of Law, and Order Denying Defendant's Motion for New Trial or Remittitur. Section IV at pages 14-22 contained findings consistent with the requirements of *Lioce v. Cohen.*

6. On September 14, 2022, this Court requested that Defendant submit a competing order and a redline version of Plaintiff's proposed order.

7. On September 22, 2022, Defendant submitted a proposed Order that mirrored the Court's minute order but removed the requirements for findings of fact and conclusions of law. A true and correct of the email string relating to the order that I received and maintain in the ordinary course of business is attached as Exhibit 4 to the Motion for Express Findings.

8. On October 5, 2022, this Court signed the proposed order submitted by the Defendant.

9. The order submitted by the Defendant does not contain the findings required by *Lioce v. Cohen*.

10. On October 5, 2022, I spoke with Ryan Gormley indicating that we intended to file a motion to request findings under *Lioce v. Cohen*.

11. On October 6, 2022, I filed the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* which is attached as Exhibit 1.

12. Thereafter, on October 6, 2022, I informed Mr. Gormley that I would be filing this Motion for Order Shortening Time.

13. Exhibit 1 to the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* is Plaintiff's proposed order which is substantively the same as Section IV to Plaintiff's proposed Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion for New Trial or Remittitur.

14. In the proposed order, I removed the language Defendant objected to relating to the findings on alleged attorney misconduct that were contained in Section IV to Plaintiff's proposed Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion for New Trial or Remittitur.

15. Given that this case will be and has been appealed by the Defendant and given the nature of the case, it is in all parties' interest to have findings of fact entered relating to the denial of the Motion for New Trial or Remittitur on the basis of alleged attorney misconduct. Otherwise, I

believe the Nevada Supreme Court will remand the case to direct this Court to make findings consistent with the requirements of *Lioce v. Cohen*.

16. I believe good cause exist to hear the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* on an order shortening time basis to facilitate a meaningful appellate review and to avoid unnecessary delay of a remand and successive appeal.

DATED this 6th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L Sharp

Matthew L. Sharp
Nevada Bar No.4746
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorney for Plaintiff

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 6th day of October 2022.

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

MOT
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Deepak Gupta, Esq.*
Matthew W.H. Wessler, Esq.*
**Admitted PHV*
GUPTA WESSLER PLLC
2001 K St., NW, Ste. 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
matt@guptawessler.com

Attorneys for Plaintiff

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

PLAINTIFF'S MOTION TO CONSIDER PLAINTIFF'S MOTION FOR ENTRY OF EXPRESS FINDINGS AS REQUIRED BY *LIOCE V. COHEN* ON AN ORDER SHORTENING TIME BASIS

Plaintiff Sandra Eskew, as the Special Administrator of the Estate of William George Eskew ("Estate") filed a Motion for Entry of Express Findings as Required by *Lioce v. Cohen* ("Motion for Express Findings") on October 6, 2022. Plaintiff asks this Court to consider the Motion for Express Findings on an order shortening time basis. Exhibit 1 is the Motion for Express Findings with exhibits. An order shortening time is supported by the following: (1) the Declaration of Matthew L. Sharp; (2) the Motion for Express Findings with the supporting exhibits, (3) *Lioce v. Cohen* requires express factual findings and conclusions by the district court in its order denying a motion for new trial on the basis of alleged attorney misconduct; and (4) the order denying the Defendant's Motion for New Trial or Remittitur and Renewed Motion for Judgment Notwithstanding the Verdict, which was submitted by the Defendant, does not include express factual findings and conclusion on the denial of Defendant's Motion for New Trial on the basis of alleged attorney misconduct.

DATED this 6th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiffs

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ORDER SHORTENING TIME

Pursuant to the Declaration of Matthew L. Sharp Esq. below in support of the Motion for Order Shortening Time and good cause demonstrated:

IT IS ORDERED that the hearing on Plaintiff's Motion for Entry of Express Findings as Required by *Lioce v. Cohen* be set before this Department 4 at the hour of ___ a.m. on the 10/18/2022 at 9:00 A.M. _____ day of _____ 2022.

IT IS FURTHER ORDERED that Defendant shall have to and including 5:00 p.m. on 10/13/2022 _____ to file any opposition to this motion.

Dated this 7th day of October, 2022

Dated this ___ day of October 2022.

F98 2F6 1CCD 83F6
Nadia Krall
District Court Judge

DISTRICT JUDGE NADIA KRALL

DECLARATION OF MATTHEW L. SHARP IN SUPPORT OF ORDER SHORTENING TIME

Under penalty of perjury, Matthew L. Sharp, Esq does declare under penalty of perjury as follows:

1. I am one of the attorneys who represents Sandra Eskew as the Administrator of the Estate of William George Eskew.

2. My understanding of *Lioce v. Cohen*, 124 Nev. 1, 7, 174 P.3d 970, 974 (2008) requires that the district court make express findings and conclusions when it denies a motion for new trial that requests a new trial upon the basis of alleged attorney misconduct.

3. Defendant filed a Motion for New Trial or Remittitur requesting a new trial, in part, upon the basis of alleged attorney misconduct.

4. On August 15, 2022, this Court entered a minute order denying the Defendant's Motion for New Trial or Remittitur and directed the Plaintiff to draft a proposed order which were to include Findings of Fact and Conclusions of Law.

5. On August 29, 2022, I submitted to chambers Plaintiff's proposed Findings of Fact and Conclusions of Law, and Order Denying Defendant's Motion for New Trial or Remittitur. Section IV at pages 14-22 contained findings consistent with the requirements of *Lioce v. Cohen.*

6. On September 14, 2022, this Court requested that Defendant submit a competing order and a redline version of Plaintiff's proposed order.

7. On September 22, 2022, Defendant submitted a proposed Order that mirrored the Court's minute order but removed the requirements for findings of fact and conclusions of law. A true and correct of the email string relating to the order that I received and maintain in the ordinary course of business is attached as Exhibit 4 to the Motion for Express Findings.

8. On October 5, 2022, this Court signed the proposed order submitted by the Defendant.

9. The order submitted by the Defendant does not contain the findings required by *Lioce v. Cohen*.

10. On October 5, 2022, I spoke with Ryan Gormley indicating that we intended to file a motion to request findings under *Lioce v. Cohen*.

11. On October 6, 2022, I filed the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* which is attached as Exhibit 1.

12. Thereafter, on October 6, 2022, I informed Mr. Gormley that I would be filing this Motion for Order Shortening Time.

13. Exhibit 1 to the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* is Plaintiff's proposed order which is substantively the same as Section IV to Plaintiff's proposed Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion for New Trial or Remittitur.

14. In the proposed order, I removed the language Defendant objected to relating to the findings on alleged attorney misconduct that were contained in Section IV to Plaintiff's proposed Findings of Fact and Conclusions of Law and Order Denying Defendant's Motion for New Trial or Remittitur.

15. Given that this case will be and has been appealed by the Defendant and given the nature of the case, it is in all parties' interest to have findings of fact entered relating to the denial of the Motion for New Trial or Remittitur on the basis of alleged attorney misconduct. Otherwise, I

believe the Nevada Supreme Court will remand the case to direct this Court to make findings consistent with the requirements of *Lioce v. Cohen*.

16. I believe good cause exist to hear the Motion for Entry of Express Findings as Required by *Lioce v. Cohen* on an order shortening time basis to facilitate a meaningful appellate review and to avoid unnecessary delay of a remand and successive appeal.

DATED this 6th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L Sharp

Matthew L. Sharp
Nevada Bar No.4746
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorney for Plaintiff

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 6th day of October 2022.

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

OPPS

D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Nevada Bar No. 8877
Phillip N. Smith, Esq.
psmith@wwhgd.com
Nevada Bar No. 10233
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Thomas H. Dupree Jr., Esq.
Admitted pro hac vice
TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8547
Facsimile: (202) 530-9670

Attorneys for Defendant

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 OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF EXPRESS FINDINGS AS REQUIRED BY *LIOCE V. COHEN*

Hearing Date: 10/18/22
Hearing Time: 9:00 AM

Defendant Sierra Health and Life Insurance Co., Inc. ("SHL") responds to Plaintiff's Motion for Entry of Express Findings as Required by *Lioce v. Cohen* ("Motion") based on the following Memorandum of Points and Authorities and any oral argument that the Court may hear on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

SHL objects to Plaintiff's Motion for Entry of Express Findings as Required by *Lioce v. Cohen* because Plaintiff's proposed findings and conclusions include improper factual, legal, and credibility findings, some of which misstate the record, and all of which go beyond any statement by the Court.[1]

In its minute orders denying SHL's post-trial motions, this Court invited Plaintiff to submit proposed findings of fact and conclusions of law. Plaintiff submitted 65 pages of over-the-top language that contained serious misstatements of the law and distortions of the evidence. The Court wisely declined to put its name to Plaintiff's submission.

Plaintiff has now come back, asking the Court to reconsider and adopt a 12-page excerpt of their submission as its own opinion. The Court should decline to do so. Plaintiff's submission is riddled with factual and legal errors and is a work of advocacy rather than a neutral statement of factual findings. Moreover, Plaintiff's proposed findings go well beyond the topic of attorney misconduct; they extend to all sorts of topics and attempt to lure this Court into rendering findings on numerous hotly disputed factual questions that have nothing to do with whether the specific statements of Plaintiff's counsel amounted to misconduct warranting a new trial.

If the Court believes that issuing factual findings on attorney misconduct is warranted, SHL respectfully submits that the Court adopt its proposed submission, which is attached hereto as **Exhibit A**. The findings are neutral and judicial in tone, and confined to the specific statements challenged in SHL's new trial motion.

[1] SHL reserves all rights to challenge the judgment—as well as the orders and all issues leading to their entry—on appeal.

ARGUMENT

Plaintiff's proposed findings of fact and conclusions of law are legally and factually erroneous.

First, Plaintiff's Motion incorrectly states that "Defendant's objection [to Plaintiff's initial proposed findings of fact and conclusions of law] with respect to attorney misconduct was to a single sentence." Mot. at 3. That is incorrect. SHL objected to Plaintiff's entire submission, and submitted its own proposed order that deleted Plaintiff's language in its entirety. To the extent Plaintiff is arguing that SHL explained its specific objections to a limited number of particular sentences in Plaintiff's proposal, that is because Plaintiff sent SHL more than 65 pages of proposed orders and gave SHL less than one business day to review all of its proposals and make objections. For that reason, SHL objected to Plaintiff's submission in its entirety, and expressly noted that its objections "are necessarily illustrative not comprehensive." SHL's Aug. 31, 2022 Objections at 7.

Second, SHL objects to the proposed findings and conclusions because they improperly include numerous legal and factual conclusions that go far beyond any conclusions reached by the Court, either on the record during oral proceedings or in its minute orders. *See, e.g.*, Mot., Pl's Ex. 1 ("Ex. 1") at 4 ("In calling the instruction 'remarkable,' counsel was observing the relationship between the instruction and the evidence at trial: The instruction, they argued, did not set a high bar, yet the evidence showed SHL nevertheless fell short."); *id.* at 5 ("The Court finds that the observation offered only mild emphasis as counsel explained the relationship of the evidence to the duty."); *id.* ("this statement is not a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant. It was a stray observation on the extent of the witness's knowledge."); *id.* ("[T]he Court finds that it was an ordinary trial argument about the evidence that SHL decided to present at trial."); *id.* ("[T]he Court finds that the adverb was argumentative language deployed to characterize the evidence."); *id.* at 7 ("That 'amount[s] to advocacy, not misconduct,' and does not 'establish grounds for a new trial.'"); *id.* ("[A]lthough counsel at one point compared Dr. Kumar to other witnesses he had observed, his argument remained about how the *jury* should assess Dr. Kumar's credibility, not about how counsel

personally did so."); *id.* at 8 ("[V]iewed in context, the statement is just as easily understood as telling the jury that the requested verdict was the right thing to do according to the law as embodied in the Court's instructions and the evidence at trial."); *id.* ("[E]ven if the statement amounts to a personal opinion, the Court cannot find that the record reflects any prejudice."); *id.* at 9 ("counsel again promptly corrected any impression that they were conveying a personal opinion: Following objection and sustainment, counsel emphasized that the argument was about what the jury should do, not what counsel thought"); *id.* ("The Court finds that the record does not support either SHL's version of the facts or the conclusion it draws from them."); *id.* at 9–10 ("Nevada law does not hold that an exaggerated characterization of counsel's arguments or conduct is improper at all, let alone so improper as to amount to misconduct."); *id.* at 10 ("Following the objection, counsel immediately and plainly clarified his meaning—that SHL had at minimum suggested that Mrs. Eskew was 'embellishing' what happened to her."); *id.* ("It thus waived any objection except in an instance of plain error, which the Court cannot find."); *id.* at 11–12 ("In the Court's view, the 'scope, nature, and quantity' of this alleged misconduct has no appreciable impact on the 'verdict's reliability.'").[2]

Plaintiff's proposed findings also draw conclusions about the evidence presented at trial—and purport to resolve evidentiary disputes—which neither the jury nor the Court ever expressly weighed in on. For example, Plaintiff's proposed findings state that: Mr. Eskew's reviewer "t[ook] only 12 minutes to deny" Mr. Eskew's claim, *id.* at 6; "SHL['s] policy acknowledg[ed the] benefits of PBT," *id.*; and "studies cited in SHL policies support use of PBT," *id.*[3]

Third, many of Plaintiff's proposed findings blatantly misconstrue the record under *any* interpretation of the evidence:

- Plaintiff's proposed findings state that Mr. Eskew's claim reviewer had "no expertise in radiation oncology," *id.* at 6, but he had in fact received radiation oncology training as part of his medical oncology training, App. Vol. 2 (3/16 Tr.) at 355.

[2] Again, these are intended to be illustrative examples.

[3] These objections, too, are purely illustrative and are not meant to be comprehensive.

- Plaintiff's proposed findings state that SHL did not object to Plaintiff's counsel commanding its witness to make public acceptances of guilt, Ex. 1 at 11, but SHL's counsel clearly stated: "Objection to form. It's not a question." App. Vol. 12 (4/5 Tr.) at 2778.
- SHL's counsel clearly objected to Plaintiff's counsel's implication that SHL had called Ms. Eskew a liar, but Plaintiff now claims that that objection was actually about a "different issue." *Compare* Ex. 1 at 10; *with* App. Vol. 11 (4/4 Tr.) at 2509, 2689–90.
- Plaintiff's proposed findings imply that SHL did not object to the bulk of Plaintiff's counsel's injections of personal opinion at trial. *See* Ex. 1 at 5; *id.* at 8 ("Because SHL failed to object to them, they are reviewed for plain error."). But SHL repeatedly made sustained objections to counsel's injection of personal beliefs. App. Vol. 11 (4/4 Tr.) at 2655, 2656, 2692.
- Plaintiff suggests that the "only supportive authority SHL identifies" for the impropriety of Plaintiff's counsel's attacks on SHL's counsel are *Born* and *Fineman*. Ex. 1 at 10. Not so. *See* SHL's Reply in Support of Mot. for New Trial at 8 (citing *Butler v. State*. 120 Nev. 879, 898, 102 P.3d 71, 84 (2004)).

Finally, Plaintiff's proposed findings contain legal arguments that did not appear in its response in opposition to SHL's Motion for a New Trial or Remittitur. *See, e.g.*, Ex. 1 at 10 (arguments about Plaintiff's counsel's violation of this Court's motion *in limine*). These arguments are not properly before the Court and should not be included in any findings.

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For the foregoing reasons, SHL objects to Plaintiff's proposed findings of fact and conclusions in their entirety, and requests that the Court instead enter SHL's proposed findings, attached hereto as Exhibit A, if the Court concludes that findings are necessary.

DATED: October 13, 2022.

/s/ Ryan T. Gormley
D. Lee Roberts, Jr., Esq. (NSB 8877)
Phillip N. Smith, Esq. (NSB 10233)
Ryan T. Gormley, Esq. (NSB 13494)
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Thomas H. Dupree Jr., Esq. (*Admitted pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendant

.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022 a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS DENYING SHL'S MOTION FOR A NEW TRIAL OR REMITTITUR AND 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:

Matthew L. Sharp, Esq.
matt@mattsharplaw.com
MATTHEW L. SHARP, LTD.
432 Ridge St.
Reno, NV 89501

Douglas A. Terry, Esq.
doug@dougterrylaw.com
DOUG TERRY LAW, PLLC
200 E. 10th St. Plaza, Suite 200
Edmond, OK 73018
Attorneys for Plaintiffs
Sandra L. Eskew, Tyler Eskew and William G. Eskew, Jr.

/s/ Cynthia S. Bowman
An employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

EXHIBIT A

EXHIBIT A

FFCO

D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Nevada Bar No. 8877
Phillip N. Smith, Esq.
psmith@wwhgd.com
Nevada Bar No. 10233
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Thomas H. Dupree Jr., Esq.
Admitted pro hac vice
TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8547
Facsimile: (202) 530-9670

Attorneys for Defendant

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

FINDINGS AND CONCLUSIONS AS TO ALLEGATIONS OF ATTORNEY MISCONDUCT

Defendant Sierra Health and Life Insurance Co. ("SHL") has moved for a new trial on the basis of alleged misconduct by Plaintiff's counsel. In accordance with *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), and applying the standards set forth by the Supreme Court, this Court makes the following specific findings.

SHL's motion identifies certain statements by Plaintiff's counsel that SHL argues, taken individually or cumulatively, amount to misconduct warranting a new trial. These statements include:

- Plaintiff's counsel stated "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.
- Plaintiff's counsel stated that a jury instruction was "remarkable to me." *Id.* at 2531.
- Plaintiff's counsel stated that "it's remarkable to me that [SHL] would adopt policies and programs to violate the duty of good faith when they know if they give their best effort, we wouldn't be here. That's a statement of arrogance on their part." *Id.* at 2532.
- Plaintiff's counsel commented on "[w]hat I find remarkable" and "what I think is remarkable" about this case. *Id.* at 2543, 2544.
- Plaintiff's counsel commented on what was "amazing[] to [him]" about the case. *Id.* at 2545.
- Plaintiff's counsel stated "I think that's tragic." *Id.* at 2543.
- Plaintiff's counsel stated "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 filling out the verdict form. *Id.* at 2578.
- Plaintiff's counsel commented on alleged "hypocrisy" concerning proton beam therapy, stating "it'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.

- Plaintiff's counsel stated SHL was "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.
- Plaintiff's counsel stated "[s]o 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 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.
- Plaintiff's counsel asked if Ms. Eskew had been "lying" and suggested SHL's counsel "called her a liar." *See* App. Vol. 7 (3/24 Tr.) at 1543.
- Plaintiff's counsel then stated "[s]o, Sandy, that guy just said that you have an incentive to get on that stand and lie. How does that make you feel?" *Id.*
- Plaintiff's counsel stated "[s]o 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[?]" *Id.* at 1547.
- Plaintiff's counsel stated "Did that incentive call you and BJ . . . and Tyler liars? . . . Right here in the courthouse in front of people that you don't know?" *Id.*
- Plaintiff's counsel stated "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.
- Plaintiff's counsel stated 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." *Id.* at 2690.
- Plaintiff's counsel told 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.

- Plaintiff's counsel told Ms. Sweet to "turn to the jury and tell them that on behalf of Sierra Health and Life, as a utilization management director, whether or not you accept the amount?" *Id.* at 2778–79.
- Plaintiff's counsel told Ms. Sweet that "[t]here 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." *Id.* at 2779.

The Court finds that none of the above statements amounts to attorney misconduct warranting a new trial under the standards set forth in *Lioce*.

For the foregoing reasons, the above findings and conclusions are hereby ENTERED.

DATED this _____ day of _____ 2022.

_____
DISTRICT COURT JUDGE

Respectfully submitted by:

/s/ Ryan T. Gormley
D. Lee Roberts, Jr., Esq. (NSB 8877)
Phillip N. Smith, Esq. (NSB 10233)
Ryan T. Gormley, Esq. (NSB 13494)
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
lroberts@wwhgd.com
psmith@wwhgd.com
rgormley@wwhgd.com

Thomas H. Dupree Jr., Esq. (*Admitted pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
TDupree@gibsondunn.com

Attorneys for Defendant

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DISTRICT COURT

CLARK COUNTY, NEVADA

SANDRA ESKEW, Plaintiff, vs. SIERRA HEALTH AND LIFE INSURANCE COMPANY INC., Defendant.	CASE NO. A-19-788630-C DEPT. NO. IV

BEFORE THE HONORABLE NADIA KRALL, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 18, 2022

RECORDER'S TRANSCRIPT OF PROCEEDING:

PLAINTIFF'S MOTION FOR ENTRY OF EXPRESS FINDINGS AS REQUIRED BY LIOCE V. COHEN

APPEARANCES:

For the Plaintiff: MATTHEW L. SHARP, ESQ.,
DOUGLAS A. TERRY, EQ.

For the Defendant: D. LEE ROBERTS, JR., ESQ.,
RYAN GORMLEY, ESQ.

RECORDED BY: MELISSA BURGENER, RECORDER

Las Vegas, Nevada; Tuesday, October 18, 2022

[Proceeding commenced at 9:29 a.m.]

THE COURT: The last case is Eskew versus Sierra Health and Life, A-19-788630-C. We have Mr. Sharp present in the courtroom, Mr. Gormley present in the courtroom, Mr. Roberts present in the courtroom. Good morning.

MR. SHARP: And Mr. Terry present by BlueJeans.

THE COURT: Oh, Mr. Terry, yes. Good morning.

MR. TERRY: Good morning, Judge. How are you?

THE COURT: Great. How are you?

MR. TERRY: Alright. Thanks.

THE COURT: This is Plaintiff's motion for entry of express findings as required by *Lioce versus Cohen* on an order shortening time. Thank you whoever provided the binder, the Court appreciates it. The Court's read everything, Mr. Sharp, this is your motion.

MR. SHARP: Thank you, Your Honor. I don't have much to add beyond the motion. There needs to be findings of fact. We provided the findings of fact which were consistent with our points and authority in opposition to the motion for new trial. And your minute order directed that the findings of fact were based upon the memorandum of points and authorities. I can go through if you'd like each part of the order to verify it's part of the, excuse me, part of our opposition.

I noted that this morning reviewing the opposition I noted there's some questions about the findings of fact that were substantive to the case. And I would just point out to the Court in *Grosjean v.*

Imperial Palace, this Court is to basically accept the findings as if this were a summary judgment essentially. All evidence favorable to the Eskews is accepted as true. And with that, Your Honor, if you have any questions I'm happy to address them.

THE COURT: No, thank you.

Mr. Gormley?

MR. GORMLEY: Thank you, Your Honor. I'll keep it brief as well. Appellate counsel, Mr. Dupree, was hoping to be able to argue this motion but he had a preexisting unmovable conflict. So I'll do my best to stand in here.

But I think the issue today, it's real narrow based on the motion that was filed it's either their order, the order we submitted or no additional order. I would just add when it comes to their order, there's just comments in there where the rederick just seems over the top. And whatever the Court's hesitation was on signing their 65-page order before and electing to sign the orders that we submitted that were reflecting the Court's minute orders, I would submit that the same concerns would still be present with the order they submitted. If you want me to go over any of those in a little bit more detail I can touch on them.

And then from our perspective, the order we submitted is sufficient. I also want to say given the posture of everything, I just want to always make clear that all of our position on this is that a new trial is warranted for the misconduct. It was severe, it was pervasive and that warrants a new trial for all the arguments we've made in the motions and

objections that were made during trial and things of that nature. So I always want to be careful that we're not taking any inconsistent position or waiving any arguments or -- and that we're reserving all of our arguments on appeal at every stage of appeal. And I hope that that's clear for the record.

But, you know, given the competing orders we were -- it seemed appropriate for us to submit something that came across more neutral and in our view more judicial in tone and we think our order accomplishes that. And unless the Court has any questions for me?

THE COURT: No. Thank you, Mr. Gormley.

MR. GORMLEY: Thank you.

THE COURT: Mr. Sharp?

THE RECORDER: Is there any cell phones on the table?

MR. GORMLEY: Mine's in my pocket.

MR. ROBERTS: No.

MR. GORMLEY: But, no.

THE RECORDER: Okay I just wanted to make sure.

MR. SHARP: Your Honor, I would just point out a couple of things. And I think we address this in the reply, but the order proposed by the Defendants doesn't comply with *Lioce.* The rhetoric is what it -- the characterization of that. Again, this is based directly on our opposition to the motion for new trial, it's apparent that it is. And I think third, it's clear on the record, it's been clear for a long time that both parties have differing views of this case. And the Nevada Supreme Court will ultimately decide who prevails on appeal.

I don't think anybody has suggested the Defendants are waiving any appealable issues. They've made their record and we just need findings of fact to get this up on appeal. With that, thank you.

THE COURT: Thank you. So the Court's going to grant Plaintiff's motion for entry of express findings as required by *Lioce versus Cohen.* The Court rejected the 65-page proposed findings of fact and conclusions of law as too broad and beyond the scope. The Court did note that Plaintiff after the Court rejected that 65-page proposed findings of fact conclusions of law, pared it down to 12 pages with input from Defense counsel. Defense counsel has submitted their own proposal.

The Court's going to order that both parties submit a Word version of each of their current proposals to the Court and the Court will make any changes it deems necessary. The Court has to review the objections under the plain error standard because the Court finds that the majority of these issues that were brought up by the Defense were not objected to at the time of trial. And no curative instruction was requested or denied by the Court.

So -- and the Court finds that the counsel's statements by Plaintiff Mr. Sharp and Mr. Terry were based on the evidence and not his own personal opinion prohibited by *Lioce versus Cohen.* And during the trial if an objection was sustained and an admonishment was requested, it was given by the Court and both parties changed course during the trial based upon objections.

So, do the parties have any questions?

MR. SHARP: No, Your Honor.

MR. GORMLEY: No, Your Honor. Actually you want a Word version of ours and theirs submitted?

THE COURT: Yes.

MR. GORMLEY: Okay. Thank you.

THE COURT: The Court's going to review it one more time. And no new trial is going to be granted at this time. This isn't -- once this order is signed -- this is a matter for the Supreme Court to decide. And the Trial Court will abide by any direction the Supreme Court would like to give to the Trial Court.

MR. GORMLEY: Your Honor, for submitting it, do you know which email we should send it to?

THE COURT: Mr. Sorenson.

MR. GORMLEY: Okay. Thank you.

THE COURT: Just submit it directly to him and then he'll print it and I'll review it personally. And I will personally make any changes.

MR. GORMLEY: Thank you, Your Honor.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Thank you. Have a great day.

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MR. SHARP: Thank you, Your Honor.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Off the record.

[Proceeding concluded at 9:36 a.m.]

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

Melissa Burgener
Court Recorder/Transcriber

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Steven D. Grierson
CLERK OF THE COURT

NEFF
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorney for Plaintiffs

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 FINDINGS AND CONCLUSIONS AS TO ALLEGATIONS OF ATTORNEY MISCONDUCT

PLEASE TAKE NOTICE that the Findings and Conclusions as to Allegations of Attorney Misconduct was filed herein on October 24, 2022, in the above-captioned matter.

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A copy of the Findings and Conclusions as to Allegations of Attorney Misconduct is attached hereto as Exhibit 1.

DATED this 24th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiffs

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 24th day of October 2022.

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

EXHIBIT 1

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., UNITED HEALTHCARE, INC. Defendants.	Case No. A-19-788630-C Dept. No. 4

FINDINGS AND CONCLUSIONS AS TO ALLEGATIONS OF ATTORNEY MISCONDUCT

Following an eleven-day trial, a jury found Defendant Sierra Health & Life Insurance Company ("SHL") liable for breaching the duty of good faith and fair dealing and awarded $40 million in compensatory damages and $160 million in punitive damages to Plaintiff Sandra Eskew, who is proceeding individually and as Special Administrator of the Estate of William George Eskew. SHL filed a Motion for New Trial or Remittitur. The Court denied the motion.

As part of its Motion for New Trial, SHL asked for new trial based upon the allegation of attorney misconduct. With respect to the order denying SHL's Motion for New Trial on the basis of alleged attorney misconduct, this Court makes express findings as a required by *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

1. When a party makes a motion for a new trial on the basis of allegations of attorney misconduct at trial, the district court must apply the detailed, sliding-scale standard first articulated by the Nevada Supreme Court in *Lioce v. Cohen*, 124 Nev. at 16, 174 P.3d at 980. Under *Lioce*, when ruling on a motion for a new trial based on attorney misconduct, "district courts must make express factual findings." *Id.*

2. As this Court observed at the end of the trial, counsel for both parties conducted themselves with exemplary professionalism throughout the trial in this matter. *See* App–2832. This was not a trial marred by persistent misconduct or lapses in decorum. The record cannot support a finding of prejudicial misconduct. At trial, neither party conveyed a contrary view. Though both parties leveled ordinary courtroom objections to one another's conduct, SHL raised only a few objections to Mrs. Eskew's counsel's conduct on misconduct grounds and did not seek a single curative admonishment.

3. Only after the jury returned a verdict against it did SHL claim for the first time, in its post-trial briefing, that the trial was tainted by misconduct. SHL's motion for a new trial quotes numerous statements from the trial out of context and attempts to portray them as attorney misconduct that undermined the trial. But after carefully considering each statement identified by SHL, based on its vantage point presiding over the entire trial, the Court is unable to find any instance of attorney misconduct, let alone misconduct that would warrant a new trial under the exacting prejudice standards outlined by the Nevada Supreme Court.

SHL's motion identifies certain statements by Plaintiff's counsel that SHL argues, taken individually or cumulatively, allegedly amount to misconduct warranting a new trial. These statements include:

- Plaintiff's counsel stated "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.
- Plaintiff's counsel stated that a jury instruction was "remarkable to me." *Id.* at 2531.
- Plaintiff's counsel stated that "it's remarkable to me that [SHL] would adopt policies and programs to violate the duty of good faith when they know if they give their best effort, we wouldn't be here. That's a statement of arrogance on their part." *Id.* at 2532.
- Plaintiff's counsel commented on "[w]hat I find remarkable" and "what I think is remarkable" about this case. *Id.* at 2543, 2544.
- Plaintiff's counsel commented on what was "amazing[] to [him]" about the case. *Id.* at 2545.

- Plaintiff's counsel stated "I think that's tragic." *Id.* at 2543.
- Plaintiff's counsel stated "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 filling out the verdict form. *Id.* at 2578.
- Plaintiff's counsel commented on alleged "hypocrisy" concerning proton beam therapy, stating "it'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.
- Plaintiff's counsel stated SHL was "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.
- Plaintiff's counsel stated "[s]o 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 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.
- Plaintiff's counsel asked if Ms. Eskew had been "lying" and suggested SHL's counsel "called her a liar." *See* App. Vol. 7 (3/24 Tr.) at 1543.
- Plaintiff's counsel then stated "[s]o, Sandy, that guy just said that you have an incentive to get on that stand and lie. How does that make you feel?" *Id.*
- Plaintiff's counsel stated "[s]o 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[?]" *Id.* at 1547.
- Plaintiff's counsel stated "Did that incentive call you and BJ . . . and Tyler liars? . . . Right here in the courthouse in front of people that you don't know?" *Id.*

- Plaintiff's counsel stated "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.
- Plaintiff's counsel stated 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." *Id.* at 2690.
- Plaintiff's counsel told 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.
- Plaintiff's counsel told Ms. Sweet to "turn to the jury and tell them that on behalf of Sierra Health and Life, as a utilization management director, whether or not you accept the amount?" *Id.* at 2778–79.
- Plaintiff's counsel told Ms. Sweet that "[t]here 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." *Id.* at 2779.

The Court finds that none of the above statements amounts to attorney misconduct warranting a new trial under the standards set forth in *Lioce*.

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

4. 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 v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). This requires showing that misconduct occurred. *See Id.* And in addition, "[t]o 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).

5. As a general matter, 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, 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). An attorney's argument 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).

6. Even when a party engages in misconduct, whether that misconduct results in "unfair prejudice" warranting a new trial depends on the context in which the misconduct occurred. *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*, 124 Nev. at 16, 174 P.3d at 980. 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.

7. 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 rights," 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. Viewed in context, and applying the proper legal standards, none of counsel's conduct constituted misconduct warranting a new trial.

8. SHL points to three types of statements that it says amount to misconduct warranting a new trial. It says that counsel improperly injected their "personal beliefs into the proceedings," improperly leveled personal "attack[s]" on SHL's counsel, and improperly questioned one SHL witness. Counsel may 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." *Lioce*, 124 Nev. at 21, 174 P.3d at 983. And they may not impugn parties or witnesses with a stream of offensive epithets. *See Born v. Eisenman,* 114 Nev. 854, 861–62, 962 P.2d 1227, 1231–32 (1998). In the Court's view, counsel did not violate either of these proscriptions here.

i. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they observed that various facts were "remarkable" or "tragic."

9. Counsel did not offer a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they described Jury Instruction 24 as "remarkable." App-2531. Instruction 24 explained to the jury that (1) 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" and (2) bad faith "requires an awareness that no reasonable basis exists to deny the insurance claims." Jury Ins. No. 24. In calling the instruction "remarkable," counsel was observing the relationship between the instruction and the evidence at trial: The instruction, they argued, did not set a high bar, yet the evidence showed SHL nevertheless fell short. App-2531–32. The remark thus was not a personal opinion on one of the prohibited topics at all. The Court finds that it was an inconsequential observation in the course of a detailed, fact bound explanation of why the evidence at trial reflected bad faith.

10. Nor did counsel offer such a prohibited personal opinion when, shortly thereafter, they described as "remarkable" which policies SHL had adopted in light of its obligations not to violate the duty of good faith. App-2532. The Court finds that the observation offered only mild emphasis as counsel explained the relationship of the evidence to the duty.

11. Counsel likewise did not offer an improper personal opinion when they remarked that it was "tragic" that a particular witness had not heard of the duty of good faith. App-2543. As above, this statement is not a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant. It was a stray observation on the extent of the witness's knowledge.

12. Counsel did not offer an improper personal opinion when they said it was "remarkable" that SHL failed to put on a particular witness. App-2543–44. Like the statements above, the comment is not a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant. In context, the Court finds that it was an ordinary trial argument about the evidence that SHL decided to present at trial.

13. Counsel did not offer a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they used the adverb "amazingly" to characterize SHL's lack of supervision over reviewers like Dr. Ahmad. App-2545. At most, the Court finds that the adverb was argumentative language deployed to characterize the evidence.

14. Even if any of the comments just listed could be deemed personal opinions as to the justness of a cause, credibility of a witness, or culpability of a civil litigant, they would not warrant a new trial. SHL did not object to a single one at trial—either contemporaneously or when the Court explicitly asked if the parties had any issues to raise outside the presence of the jury. *See* App-2535–41. They are thus reviewed for plain error.

15. There was no plain error here. There are "other reasonable explanation[s]" for the jury's verdict, *Gunderson*, 130 Nev. at 75, 319 P.3d at 612, than the "few sentences" SHL identifies, *Cox*, 507 P.3d at 1228, because the evidence at trial, viewed in the light most favorable to Mrs. Eskew, was overwhelming. The jury heard evidence that SHL sold Mr. Eskew a platinum health insurance policy that expressly covered therapeutic radiation services like proton-beam therapy. App-1035–40, 1057. It heard evidence that Mr. Eskew's doctor, a leading expert, determined that

proton-beam therapy was necessary to treat his lung cancer while sparing critical nearby organs. Liao Dep. 48–49, 69–75, 84–88; App-531–33, 539–40, 1067–68, 1106. But, the jury learned, SHL refused to approve the treatment, instead applying its corporate medical policy of refusing to approve proton-beam treatment for lung cancer in any circumstances. App-331–33, 813–18, 837–45. It sent Mr. Eskew's claim to a reviewer who had no expertise in radiation oncology and who did not investigate his claim, instead taking only 12 minutes to deny it. App-247–48, 250, 319–21, 337–41, 463, 1083–84, 1114. SHL defended its policy on the ground that proton-beam therapy was not medically necessary, but the 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); App-720–22, 901–11 (SHL's sister company operated a proton-beam therapy center).

16. The jury heard evidence that the IMRT treatment Mr. Eskew had to receive instead caused great harm to his physical and emotional health. It learned that the intensive radiation generated by IMRT caused "Grade III esophagitis"—meaning that Mr. Eskew 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 Mr. Eskew became withdrawn, isolated, and unhappy, unable to enjoy the company of his family or the activities he previously enjoyed. App-1200–02, 1256, 1259–60, 1416–18, 1610.

17. The Court thus cannot find that the record supports SHL's claim that counsel's statements made a meaningful difference.

ii. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they invited the jury to consider SHL's contradictory behavior.

18. Counsel likewise did not state a personal opinion on a prohibited topic when they encouraged the jury to consider the hypocrisy in SHL's behavior. App-2655. Counsel's remarks arose in the context of a detailed, fact bound argument that, even while SHL took the position that proton-beam therapy for lung cancer was unproven and medically unnecessary, its sister company promoted the use of the treatment to avoid exactly the same complications Mr. Eskew experienced. App-2653–55. In describing this conduct as hypocritical, counsel was "invit[ing] the jury to consider

the contradiction" in SHL's behavior. *Cox*, 507 P.3d at 1227. That "amount[s] to advocacy, not misconduct," and does not "establish grounds for a new trial." *Id.*

19. Towards the end of his delivery, counsel's remarks edged towards excessive, unnecessarily personal rhetoric on this point. *See* App-2655. SHL objected and the Court sustained the objection. *Id.* But SHL did not request an admonishment, so the statements are reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect. *See Gunderson*, 130 Nev. at 77, 319 P.3d at 613. And viewed in context, the Court finds that the statements fall far below this bar. Immediately following the Court's sustainment, Mrs. Eskew's counsel corrected his emphasis, explaining that his point was not personal at all, but rather about what would be "unbelievable to somebody listening." App-2655. Sustainment thus easily removed any prejudicial effect.

20. That is especially so because not only did counsel correct himself, but the jury was explicitly instructed that counsel's statements, arguments, and opinions were not evidence and that it should disregard evidence to which an objection was sustained. Jury Ins. No. 8. Juries presumptively follow such instructions, *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), and a sustained objection under these circumstances generally precludes a finding of prejudice, *see Walker v. State*, 78 Nev. 463, 467–68, 376 P.2d 137, 139 (1962).

iii. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they described Dr. Parvesh Kumar's testimony.

21. Counsel's statements concerning Dr. Parvesh Kumar's testimony during closing are also not improper personal opinions. In describing the testimony, counsel's argument was that the jury should reject Dr. Kumar's testimony because he was not the subject-matter expert he and SHL both held him out to be. App-2511. In addition, although counsel at one point compared Dr. Kumar to other witnesses he had observed, his argument remained about how the *jury* should assess Dr. Kumar's credibility, not about how counsel personally did so.

22. Counsel's statements thus are far afield from the sorts of statements Nevada courts have held amount to prohibited personal opinions. Those statements typically ask jurors to "step outside the relevant facts" and instead reach a verdict based on their emotions. *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). Here, by contrast, counsel's statements were closely tied to and about the evidence the jury did see—that Dr. Kumar could not "uphold the opinions he gave." App-2512.

23. Even if these statements amounted to misconduct, they would not 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 the Court finds no reason to conclude that counsel's characterization of one witness's testimony made a difference to the jury.

iv. Counsel did not improperly state a personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant when they discussed the verdict form.

24. Counsel's statements concerning the verdict the jury should reach also do not amount to a prohibited personal opinion. SHL contends that counsel committed misconduct by stating that they would not request a particular award if they were not "convinced" it was "the right thing to do." App-2692. SHL's argument is that this comment conveyed an impermissible, moralistic commentary on the evidence. But, viewed in context, the statement is just as easily understood as telling the jury that the requested verdict was the right thing to do according to the law as embodied in the Court's instructions and the evidence at trial.

25. In any event, even if the statement amounts to a personal opinion, the Court cannot find that the record reflects any prejudice. Although SHL leveled a successful objection to the comments, it did not seek an admonishment, and so the statement is reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect. *See Gunderson*, 130 Nev. at 77, 319 P.3d at 613. The record does not meet this standard.

Nothing about the comment was "extreme," and, in any event, counsel again promptly corrected any impression that they were conveying a personal opinion: Following objection and sustainment, counsel emphasized that the argument was about what the jury should do, not what counsel thought. *See* App-2692 ("It's the right thing to do."). Thus, if there was any prejudicial effect here, it was modest in light of the powerful evidence on the plaintiff's case, and it was immediately cured. Accordingly, the comment does not warrant a new trial.

v. Counsel did not level improper personal attacks, and even if they had, a new trial would not be warranted.

26. SHL also contends that Mrs. Eskew's counsel committed misconduct because they "falsely accused" SHL's counsel "of calling Mrs. Eskew a liar." The Court finds that the record does not support either SHL's version of the facts or the conclusion it draws from them.

27. The statements that SHL identifies were not meaningfully false, because the company's strategy at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony. *See* App-1448–49 (suggesting testimony was driven by what was "helpful for your case" rather than the truth); 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"); *see also* App-1221–24, 1239–43, 1342, 1346–52, 1484–1526, 1529–41. At trial, witnesses and the parties understood this to be SHL's argument. *See, e.g.*, App-1549–50 (Q: "And you would 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."). Indeed, at a break, when plaintiff's counsel noted that SHL was suggesting that Mrs. Eskew 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").

28. SHL objects that the statements are "improper" because the company only "implied" that the Eskews were lying and that Mrs. Eskew's counsel exaggerated the effect. But Nevada law does not hold that an exaggerated characterization of counsel's arguments or conduct is improper at

all, let alone so improper as to amount to misconduct. The only supportive authority SHL identifies concerns "abusive language," "derogatory remarks," and offensive epithets. *See Born*, 114 Nev. at 861–62, 962 P.2d at 1231–32 (counsel engaged in repeated, incendiary outbursts, including describing opposing counsel and witnesses with offensive epithets in the jury's hearing and exclaiming that requests for a sidebar were "outrageous"); *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 266, 272 (D.N.J. 1991) (closing argument focused on claims that "counsel had lied to the jury, had suborned perjury from witnesses (flavoring these comments with [] titillating remarks . . .), and had done it for money"). Nothing like that happened here. And the cases have no bearing on the propriety of one counsel's commenting on another's behavior in questioning a witness.

29. Even if counsel's remarks could amount to misconduct, they were not prejudicial. SHL made only one objection on these grounds and never sought an admonishment. But that objection, and the Court's decision to sustain it, was more than sufficient to cure any possible prejudice. Following the objection, counsel immediately and plainly clarified his meaning—that SHL had at minimum suggested that Mrs. Eskew was "embellishing" what happened to her. App-2509. SHL says it made a second objection, but that objection, viewed in context, went to a different issue—whether there was evidence supporting Mrs. Eskew's argument that SHL had not been able to dissuade Mrs. Eskew from pursuing her case. *See* App-2690. In any event, the Court finds no reason in the record to treat either objection and its sustainment as inadequate to remove any modest prejudicial effect that could have resulted.

30. SHL also argues that counsel's conduct was improper because it violated a motion in limine excluding evidence, argument, or testimony relating to litigation conduct. But that motion in limine was issued for an unrelated reason: to bar the parties from introducing evidence or argument concerning litigation conduct during the discovery process. And in any event, SHL failed to object to any of Mrs. Eskew's counsel's conduct on these grounds. *See Roth*, 127 Nev. at 136–38, 252 P.3d at 658–59 (parties are obligated to make "contemporaneous objections to claimed violations of an order produced by a motion in limine . . . to prevent litigants from wasting judicial, party, and citizen-juror resources"). It thus waived any objection except in an instance of plain error, which the Court cannot find. *See Id.*

vi. Counsel's questioning of SHL's witness was not misconduct warranting a new trial.

31. SHL also argues that Mrs. Eskew's counsel committed misconduct when they questioned SHL's director of pre-service reviews during the damages phase. According to SHL, their questioning amounted to a "blatant and shocking violation" of the "norms" of American law. The Court finds otherwise. During the challenged questioning, SHL's director testified that, in response to the jury's verdict, the company was going to begin offering annual training on the duty of good faith and fair dealing. App-2774–75. To examine whether the company was as contrite as she suggested, counsel for Mrs. Eskew urged the director to tell the jury her true view of its verdict. App-2778–79. SHL takes issue with that question because it says the question was given as a "command" and was therefore "demeaning" and necessarily improper. The Court finds no reason to agree. It is not misconduct to phrase a question as a statement rather than a question, especially in the context in which this exchange arose. SHL has offered no authority to the contrary.

32. SHL did not object on these grounds at trial, saying only that the "form" of the question was "too broad." App-2779. And even then, it did not request an admonishment. *Id.* In any event, even if reviewed for whether an admonishment could have changed the verdict, the record here leaves no reason to conclude that this line of questioning had any impact, let alone that it warrants a new trial.

C. Cumulative review of counsel's conduct makes no difference.

33. SHL urges the Court to weigh its assorted misconduct claims together and conclude that even if they were not individually prejudicial misconduct, they rise to that level as a whole. But however SHL's allegations are weighed, the Court can find no basis to grant a new trial.

34. The Court finds that SHL cannot meet the standard that applies to grant a new trial "based on the cumulative effect of attorney misconduct." *Gunderson*, 130 Nev. at 78, 319 P.3d at 614. To obtain that result, a party "must demonstrate that no other reasonable explanation for the verdict exists." *Id.* That generally requires identifying "multiple severe instances of attorney misconduct as determined by their context." *Id.* Yet as explained above, in the context of this trial, the Court cannot find that SHL has identified a single "severe instance[]" of attorney misconduct. *Id.* At best, it has pointed to a smattering of rhetorical and hyperbolic comments that pale in

comparison to the extensive evidence marshaled at trial. In the Court's view, the "scope, nature, and quantity" of this alleged misconduct had no appreciable impact on the "verdict's reliability." *Id.* The handful of assorted statements SHL has identified thus fall far short of explaining the jury's verdict.

35. The Court is particularly inclined to reach that finding in light of SHL's failure to object to the lion's share of the asserted misconduct—and, where it did object, to even once seek an admonishment. While it is true that counsel are not required to repeat objections that have already been made and sustained and failed to change counsel's behavior, *see Lioce*, 124 Nev. at 18, 174 P.3d at 981, it is equally true that the failure to object "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*, 120 Nev. at 95, 86 P.3d at 1040. The Court finds that the record in this case is more consistent with the latter concern than the former, and thus undermines any inference that SHL would have been penalized for objecting or requesting admonishments.

For the foregoing reasons, the above findings and conclusions are hereby ENTERED.

Dated this 24th day of October, 2022

43A B64 EC33 3CFB
Nadia Krall
District Court Judge

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 Findings of Fact, Conclusions of Law and Judgment was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 10/24/2022

Audra Bonney	abonney@wwhgd.com
Cindy Bowman	cbowman@wwhgd.com
D. Lee Roberts	lroberts@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Matthew Sharp	matt@mattsharplaw.com
Cristin Sharp	cristin@mattsharplaw.com
Thomas Dupree	TDupree@gibsondunn.com
Ryan Gormley	rgormley@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Suzy Thompson	suzy@mattsharplaw.com

Marjan Hajimirzaee	mhajimirzaee@wwhgd.com
Maxine Rosenberg	Mrosenberg@wwhgd.com
Stephanie Glantz	sglantz@wwhgd.com
Douglas Terry	doug@dougterrylaw.com

NEOJ
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorney for Plaintiffs

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 AMENDED JUDGMENT UPON JURY VERDICT

PLEASE TAKE NOTICE that the Amended Judgment Upon Jury Verdict was filed herein on October 7, 2022 in the above-captioned matter.

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

DATED this 24th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiffs

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 24th day of October 2022.

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

EXHIBIT 1

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AJUJV
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorney for Plaintiffs

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

AMENDED 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]

On June 8, 2022, this Court issued an order awarding taxable costs to Plaintiff Sandra L. Eskew as Special Administrator of the Estate of William George Eskew in the amount $313,634.62.

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 of $313,634.62, all to bear interest as provided by NRS 17.130(2) from the date of entry of judgment of April 18, 2022 until paid in full.

DATED this __ day of October 2022.

Dated this 7th day of October, 2022

DISTRICT COURT JUDGE

6F8 956 5BA9 9FA7
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

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Service Date: 10/7/2022

Audra Bonney	abonney@wwhgd.com
Cindy Bowman	cbowman@wwhgd.com
D. Lee Roberts	lroberts@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Matthew Sharp	matt@mattsharplaw.com
Cristin Sharp	cristin@mattsharplaw.com
Thomas Dupree	TDupree@gibsondunn.com
Ryan Gormley	rgormley@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Suzy Thompson	suzy@mattsharplaw.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com

Maxine Rosenberg	Mrosenberg@wwhgd.com
Stephanie Glantz	sglantz@wwhgd.com
Douglas Terry	doug@dougterrylaw.com

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Steven D. Grierson
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NEOJ
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorney for Plaintiffs

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 ORDER DENYING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

PLEASE TAKE NOTICE that the Order Denying Renewed Motion for Judgment as a Matter of Law was filed herein on October 5, 2022, in the above-captioned matter.

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A copy of the Order Denying Renewed Motion for Judgment as a Matter of Law is attached hereto as Exhibit 1.

DATED this 24th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiffs

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 24th day of October 2022.

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

EXHIBIT 1

ORDD
D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Nevada Bar No. 8877
Phillip N. Smith, Esq.
psmith@wwhgd.com
Nevada Bar No. 10233
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Thomas H. Dupree Jr., Esq.
Admitted pro hac vice
TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8547
Facsimile: (202) 530-9670

Attorneys for Defendant

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

ORDER DENYING DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

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.

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

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).

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For the foregoing reasons, Defendant's Renewed Motion for Judgment as a Matter of Law is denied.

DATED this _____ day of _____ 2022.

Dated this 5th day of October, 2022

DISTRICT COURT JUDGE

4AA A72 41E3 4A93
Nadia Krall
District Court Judge

Submitted by:

/s/ Ryan T. Gormley
D. Lee Roberts, Jr., Esq.
Phillip N. Smith, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Thomas H. Dupree Jr., Esq.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendant

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:

Service Date: 10/5/2022

Audra Bonney	abonney@wwhgd.com
Cindy Bowman	cbowman@wwhgd.com
D. Lee Roberts	lroberts@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Matthew Sharp	matt@mattsharplaw.com
Thomas Dupree	TDupree@gibsondunn.com
Cristin Sharp	cristin@mattsharplaw.com
Ryan Gormley	rgormley@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Suzy Thompson	suzy@mattsharplaw.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com

Maxine Rosenberg	Mrosenberg@wwhgd.com
Stephanie Glantz	sglantz@wwhgd.com
Douglas Terry	doug@dougterrylaw.com

Electronically Filed
10/24/2022 3:30 PM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
MATTHEW L. SHARP, ESQ.
Nevada State Bar #4746
Matthew L. Sharp, Ltd.
432 Ridge St.
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

Doug Terry, Esq.
Admitted PHV
DOUG TERRY LAW, PLLC.
200 E. 10th St. Plaza, Ste. 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

Attorney for Plaintiffs

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 ORDER DENYING MOTION FOR A NEW TRIAL OR REMITTITUR

PLEASE TAKE NOTICE that the Order Denying Motion for a New Trial or Remittitur was filed herein on October 5, 2022, in the above-captioned matter.

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A copy of the Order Denying Motion for a New Trial or Remittitur is attached hereto as Exhibit 1.

DATED this 24th day of October 2022.

MATTHEW L. SHARP, LTD.

/s/ Matthew L. Sharp

MATTHEW L. SHARP, ESQ.
Nevada Bar No. 4746
432 Ridge Street
Reno NV 89501
(775) 324-1500
matt@mattsharplaw.com
Attorneys for Plaintiff

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:

D. Lee Roberts, Jr. Esq.; lroberts@wwhgd.com
Phillip N. Smith, Esq.; psmith@wwhgd.com
Ryan T. Gormley, Esq.; rgormley@wwhgd.com
WEINBERG WHEELER HUDGINS GUNN & DIAL LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

Thomas H. Dupree Jr., Esq.; TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendants

DATED this 24th day of October 2022.

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

EXHIBIT 1

ELECTRONICALLY SERVED
10/5/2022 11:00 AM

Electronically Filed
10/05/2022 10:59 AM
CLERK OF THE COURT

ORDD

D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Nevada Bar No. 8877
Phillip N. Smith, Esq.
psmith@wwhgd.com
Nevada Bar No. 10233
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Thomas H. Dupree Jr., Esq.
Admitted pro hac vice
TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8547
Facsimile: (202) 530-9670

Attorneys for Defendant

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

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL OR REMITTITUR

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.

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

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).

For the foregoing reasons, Defendant's Motion for a New Trial or Remittitur is denied.

DATED this _____ day of _____ 2022.

Dated this 5th day of October, 2022

DISTRICT COURT JUDGE

4FA E0A 2FD9 0D46
Nadia Krall
District Court Judge

Submitted by:

/s/ Ryan T. Gormley
D. Lee Roberts, Jr., Esq.
Phillip N. Smith, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Thomas H. Dupree Jr., Esq.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendant

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

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Cindy Bowman	cbowman@wwhgd.com
D. Lee Roberts	lroberts@wwhgd.com
Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
Matthew Sharp	matt@mattsharplaw.com
Thomas Dupree	TDupree@gibsondunn.com
Cristin Sharp	cristin@mattsharplaw.com
Ryan Gormley	rgormley@wwhgd.com
Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
Suzy Thompson	suzy@mattsharplaw.com
Marjan Hajimirzaee	mhajimirzaee@wwhgd.com

Maxine Rosenberg	Mrosenberg@wwhgd.com
Stephanie Glantz	sglantz@wwhgd.com
Douglas Terry	doug@dougterrylaw.com

ANOA
D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Nevada Bar No. 8877
Phillip N. Smith, Esq.
psmith@wwhgd.com
Nevada Bar No. 10233
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Thomas H. Dupree Jr., Esq.
Admitted pro hac vice
TDupree@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8547
Facsimile: (202) 530-9670

Attorneys for Defendant

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 **AMENDED 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. Amended Judgment Upon the Jury Verdict, filed October 7, 2022, notice of entry of which was served electronically on October 24, 2022 (Exhibit B);
3. 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 C);
4. Minute Order denying Defendant's Renewed Motion for Judgment as a Matter of Law, electronically served by Courtroom Clerk on August 15, 2022 (Exhibit D);
5. Minute Order denying Defendant's Motion for a New Trial or Remittitur, electronically served by Courtroom Clerk on August 15, 2022 (Exhibit E);
6. Order denying Defendant's Renewed Motion for Judgment as a Matter of Law, filed October 5, 2022, notice of entry of which was served electronically on October 24, 2022 (Exhibit F);
7. Order denying Defendant's Motion for a New Trial or Remittitur, filed October 5, 2022, notice of entry of which was served electronically on October 24, 2022 (Exhibit G);
8. Order granting Plaintiff's Motion for Order Shortening Time, filed on October 7, 2022 (Exhibit H);
9. Findings and Conclusions as to Allegations of Attorney Misconduct, filed on October 24, 2022, notice of entry of which was served electronically on October 24, 2022 (Exhibit I); and
10. All judgments, rulings and interlocutory orders made appealable by any of the foregoing.

DATED: October 31, 2022.

/s/ Ryan T. Gormley

D. Lee Roberts, Jr., Esq.
Phillip N. Smith, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118

Thomas H. Dupree Jr., Esq.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022 a true and correct copy of the foregoing **AMENDED 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:

Matthew L. Sharp, Esq.
matt@mattsharplaw.com
MATTHEW L. SHARP, LTD.
432 Ridge St.
Reno, NV 89501

Douglas A. Terry, Esq.
doug@dougterrylaw.com
DOUG TERRY LAW, PLLC
200 E. 10th St. Plaza, Suite 200
Edmond, OK 73018
Attorneys for Plaintiffs
Sandra L. Eskew, Tyler Eskew and William G. Eskew, Jr.

/s/ Cynthia S. Bowman
An employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC