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

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Sierra Health and Life Insurance Company, Inc. is a Nevada corporation. It is a subsidiary of United HealthCare Services, Inc., which is in turn a subsidiary of UnitedHealth Group Incorporated. No other publicly held corporation owns 10% or more of Sierra Health and Life Insurance Company, Inc., United HealthCare Services, Inc., or UnitedHealth Group Incorporated.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and Gibson, Dunn & Crutcher LLP are the only law firms that have appeared on behalf of Sierra Health in this matter or are expected to appear in this Court.

DATED: April 11, 2023.

/s/ D. Lee Roberts, Jr.
Attorney for Appellant

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JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1) and (2) because this is an appeal from an amended final judgment entered following a jury trial and from a denial of post-judgment relief under NRCP 50(b) and 59. *See* 18-JA-3659-66; 18-JA-3667-76; 18-JA-3677-86. This appeal is timely under NRAP 4(a)(1) because the district court entered the amended judgment on October 24, 2022, and Appellant Sierra Health and Life Insurance Company, Inc. (SHL) filed its amended notice of appeal on October 31, 2022. *See* 18-JA-3659-66; 18-JA-3687-90.

ROUTING STATEMENT

The Supreme Court should retain this case because it raises substantial issues of first impression and of statewide public importance regarding the standard for bad-faith claims against an insurer and the standard for an award of punitive damages, and because the compensatory and punitive damages awarded below are five and eight times larger, respectively, than any previously upheld in Nevada history. *See* NRAP 17(a)(12). This case does not fall within any of the categories of cases presumptively assigned to the Court of Appeals. *See* NRAP 17(b).

ISSUES PRESENTED

1. Whether SHL is entitled to judgment as a matter of law on Plaintiff's bad-faith claim because Plaintiff (a) failed to prove that SHL lacked a reasonable basis for denying coverage; (b) failed to prove that SHL knew or recklessly disregarded that it lacked a reasonable basis for denying coverage; and (c) failed to prove damages.

2. Whether SHL is entitled to judgment as a matter of law on the punitive damages claim because Plaintiff failed to prove by clear and convincing evidence that SHL acted with malice or oppression.

3. Whether SHL is entitled to a new trial because (a) the persistent misconduct of Plaintiff's counsel inflamed and biased the jury; (b) the district court erred in admitting irrelevant and highly prejudicial evidence that Plaintiff's counsel used to attack and impugn SHL; and (c) the jury's $200 million verdict resulted from passion and prejudice.

4. Whether SHL is entitled to a substantial remittitur because the compensatory and punitive awards are grossly excessive, irrational, and unconstitutional.

STATEMENT OF THE CASE

This case arises from a dispute over insurance coverage. In February 2016, William Eskew, who was afflicted with stage IV lung cancer, submitted a request to Sierra Health and Life Insurance Company, Inc. (SHL), seeking coverage for proton therapy. The insurance contract did not cover treatments that were "unproven" or not "medically necessary."

SHL determined that proton therapy was neither proven nor medically necessary in Mr. Eskew's case, and denied coverage. SHL's determination was based on its 26-page Medical Policy on proton therapy. SHL's exhaustively researched policy adhered to the then-prevailing consensus in the scientific and medical literature that proton therapy was not a proven or medically necessary treatment for lung cancer. SHL's policy also aligned with the policies of the nation's 12 largest insurers, none of which deemed proton therapy medically necessary to treat lung cancer.

SHL instead authorized coverage for intensity-modulated radiation therapy—the most widely administered therapy for lung cancer. Mr.

Eskew received this treatment. His cancer progressed, and he passed away in March 2017.

Plaintiff Sandra Eskew, the administrator of Mr. Eskew's estate, sued SHL in February 2019 for bad-faith denial of coverage, and the case went to a jury in March 2022. At trial, Plaintiff did *not* allege that the denial of proton therapy caused or even hastened Mr. Eskew's death. Rather, Plaintiff sought damages only for emotional distress caused by the denial of coverage, and for Mr. Eskew's pain-and-suffering caused by his development of grade III esophagitis—even though Plaintiff's expert admitted that Mr. Eskew still would have developed at least grade II esophagitis even if he had received proton therapy. Plaintiff also sought punitive damages.

Plaintiff's counsel had little interest in a trial focused on science, clinical evidence, or peer-reviewed medical studies concerning whether proton therapy was proven and medically necessary for stage IV lung cancer in 2016. Instead, Plaintiff's counsel set out to inflame and incite the jury by attacking the integrity of SHL, its witnesses, and its counsel.

From beginning to end, Plaintiff's counsel accused SHL of running a "rigged system," instructed the jurors to use their verdict to regulate

the insurance industry, and exhorted the jury to punish SHL with a massive damages award. Counsel offered the jury a running commentary of their own personal views on the credibility of SHL's witnesses ("I think … everything [SHL's witnesses] say about" proton therapy is "unbelievable."), the company's integrity and truthfulness ("The hypocrisy of [SHL] just knocks the wind out of me."), and even urged the jury to impose an enormous multimillion-dollar penalty on SHL by personally vouching for the justness of their cause ("We wouldn't ask you to do it if we weren't convinced it was the right thing to do.").

A key element of Plaintiff's trial presentation was evidence that in 2019—three years after the coverage decision at issue here—a distant corporate relative of SHL owned a minority stake in a company that opened a proton-therapy center in New York. The district court admitted this evidence over SHL's objections, and Plaintiff used it aggressively, accusing SHL of "speaking out of both sides of [its] mouth," and urging the jury to determine the compensatory award based on the amount of money SHL's affiliate had invested in the proton center.

All of these tactics and arguments were grossly improper—but they worked. The jury deliberated for an hour before awarding Plaintiff $40

million in noneconomic compensatory damages—$10 million more than Plaintiff's counsel had asked the jury to award—and determined that punitive damages were warranted.

The trial proceeded to a second phase on punitive damages, and Plaintiff's counsel took their tactics to another level. Over SHL's repeated objections, Plaintiff's counsel commanded SHL's witness to turn in her chair, face the jury, and admit the company's guilt. The jury deliberated for less than an hour before awarding $160 million in punitive damages.

The damages awards are stunning outliers and confirm beyond any doubt that the jury was influenced by passion and prejudice. The $40 million award for emotional distress and pain-and-suffering is *five times* the largest such award ever upheld in Nevada history. The $160 million punitive award is more than *eight times* the largest punitive award ever upheld in Nevada history.

This Court should enter judgment in SHL's favor. Under Nevada law, an insurer cannot be liable for bad faith unless it lacked a reasonable basis for denying coverage *and* knew (or recklessly disregarded) that it lacked a reasonable basis for the decision. Here, SHL plainly had a

reasonable basis for the denial. Its Medical Policy—which provided that proton therapy was not a proven, medically necessary treatment for lung cancer—was based on the views of the leading medical and scientific organizations and the peer-reviewed literature; it was the same policy followed by the nation's largest insurers; and it was consistent with court decisions addressing the issue.

If this Court does not enter judgment for SHL, it should order a new trial or enter a drastic remittitur. Counsel's extensive misconduct at trial, and the district court's erroneous decision to admit the proton-center evidence, led the jury to render an excessive verdict tainted by passion and prejudice. At a minimum, the Court should reduce the shocking and irrational damages awards to amounts that are permissible under Nevada law and the U.S. Constitution.

STATEMENT OF FACTS

1. Plaintiff Sandra Eskew is the administrator of the estate of her late husband, William Eskew, who was diagnosed with stage IV lung cancer. 16-JA-3332. Stage IV lung cancer means that the cancer has metastasized to more than one area of the body. 12-JA-2465-66. It is the most advanced stage of lung cancer, and the median survival time

following diagnosis and subsequent treatment is between 4 and 14 months. *See generally* NIH, Nat'l Cancer Inst., *Non-Small Cell Lung Cancer Treatment* (Feb. 17, 2023), https://bit.ly/3o4mDIc.

Mr. Eskew was insured under a contract issued by Defendant SHL. 15-JA-2909-3010. Mr. Eskew's plan was not an employer-offered healthcare plan covered by the Employee Retirement Income Security Act; rather, it was purchased from the Affordable Care Act Exchange. 5-JA-903-04; 8-JA-1609-10; 11-JA-2283.

The contract limited coverage to procedures deemed "medically necessary," 15-JA-2947-48; 15-JA-2955(§§4.1,5,6.1), defined as a service that, "as determined by SHL," is:

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

15-JA-2972(§13.66). The contract provided that, in making medical-necessity determinations, SHL may consider "reports in peer-review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations." *Id*. The contract

expressly excluded coverage for any "[e]xperimental, investigational or unproven treatment or devices as determined by SHL." 15-JA-2957(§6.34).

Cancer treatments are constantly evolving in light of medical, scientific, and clinical advances in surgical, chemical, and radiation therapies. Prior to 2015, "the most common therapeutic practice" for radiation treatment was three-dimensional conformal radiation therapy. 16-JA-3229; 16-JA-3203; 10-JA-2105; 5-JA-1044-45. By 2015, many patients were receiving a more advanced treatment known as intensity-modulated radiation therapy (IMRT), which uses computer-controlled linear accelerators to deliver precise doses of photons to the target area while minimizing the dose delivered to surrounding healthy tissue. 16-JA-3203; 5-JA-1044-45.

A third type of radiation therapy known as proton therapy was also being developed as a potential new method for treating certain cancers. Rather than using photons to destroy cancer cells, proton therapy uses a beam of protons that can deliver radiation in a more confined way. 15-JA-3108. As of 2016, however, there was "limited clinical evidence" demonstrating proton therapy's effectiveness for many types of cancer,

including "[l]ung cancer." 15-JA-3106; 16-JA-3229; 11-JA-2301-08. The potential adverse side effects of proton therapy had not been closely studied, and there were fears that it would deliver a much higher "maximum dose" of protons, which could rupture the esophagus and other sensitive organs. 12-JA-2472-76.

On February 3, 2016, Mr. Eskew's treating physician submitted a prior-authorization request to SHL for proton therapy. 15-JA-3011. The request was reviewed by Dr. Shamoon Ahmad, a board-certified medical oncologist. 15-JA-3012; 5-JA-942; 5-JA-976; 5-JA-1040-43; 11-JA-2263. Dr. Ahmad reviewed the request in accordance with SHL policy, and on February 5, 2016, SHL denied the request. 5-JA-1046-63; 15-JA-3043-45. The denial letter explained that the requested proton treatment was not covered under the contract because it was both "unproven" and not "medically necessary." 15-JA-3043.

The denial was based on SHL's then-current "Medical Policy" entitled "Proton Beam Radiation Therapy." Like most insurers, SHL maintains medical policies to guide coverage decisions that turn on whether a requested treatment is "medically necessary" under the terms of an insurance contract. 15-JA-3105-30; 11-JA-2301-02. Mr. Eskew's

contract specified that "SHL may adopt reasonable policies, procedures, rules and interpretations to promote the orderly and efficient administration of this Plan." 15-JA-2961(§10.7). SHL's medical policies are exhaustively researched and continually updated whenever the evidence warrants it—at least annually, based on the most recent medical literature and clinical studies. 15-JA-3130; 16-JA-3149; 16-JA-3222; 11-JA-2263-64.

The Medical Policy—which was publicly available online in 2015, when Mr. Eskew entered into the insurance contract, 5-JA-1021—identified the circumstances in which SHL would deem proton therapy to be "proven and medically necessary," 15-JA-3106. The Medical Policy stated that proton therapy "is covered without further review" for persons under 19, and for persons 19 and older it is "proven and medically necessary" to treat intracranial arteriovenous malformations, ocular tumors, and skull-based tumors. 15-JA-3105-06. But proton therapy "is unproven and not medically necessary" for other types of cancer, including "[l]ung cancer." 15-JA-3106.

To support this determination, the Medical Policy documented the then-prevalent view within the scientific and medical communities. It

canvassed and analyzed the scientific and medical literature—including 11 peer-reviewed studies conducted between 2008 and 2015—that specifically addressed whether proton therapy is a proven treatment for lung cancer. 15-JA-3117-19. The Medical Policy also relied upon guidance from two of the nation's leading organizations for radiation oncology and medical research, both of which had determined that proton therapy was *not* a proven therapy for lung cancer. The American Society for Therapeutic Radiation Oncology (ASTRO) concluded that "current data do not provide sufficient evidence to recommend [proton therapy] outside of clinical trials in lung cancer." 15-JA-3109. Likewise, the Agency for Healthcare Research and Quality (AHRQ)—a federally supervised agency recognized by the Nevada Legislature as an expert research institute, *see* NRS 695G.053(5)(a)—determined that "the evidence is insufficient to draw any definitive conclusions as to whether [proton therapy] has any advantages over traditional therapies." 15-JA-3119.

Based on this review of the scientific and medical literature, the Medical Policy concluded that "[c]urrent published evidence does not allow for any definitive conclusions about the safety and efficacy of proton

beam therapy to treat [lung cancer] as proven and medically necessary." 15-JA-3106.

SHL's Medical Policy matched the policies of the nation's 12 largest insurers. Given the prevailing views within the scientific and medical communities, none of the nation's 12 largest insurers—covering 75-80% of commercially insured persons in the United States—deemed proton therapy a medically necessary treatment for lung cancer. *See* 11-JA-2301-08 (Aetna, Anthem, Blue Cross Blue Shield of California, Cigna, Centene Corp., FloridaBlue, HCSC, Highmark Group, Humana, Independence Health Group, Molina, and UnitedHealthcare all considered "proton beam therapy for lung cancer [to be] unproven, and/or not medically necessary").

Neither Mr. Eskew nor his treating physician appealed the denial even though an expedited appeal would have been decided within 72 hours. 15-JA-2965(§12.2); 5-JA-1062-63; 7-JA-1489-90. Instead, Mr. Eskew requested coverage for IMRT, which his treating physician described as "a treatment strategy that ensures good target coverage and normal tissue sparing in regions affected by respiratory motion." 16-JA-3225-28. IMRT is a common treatment for lung cancer, 5-JA-1044-45; 8-

JA-2104, and the medical literature shows that IMRT is at least as effective as proton therapy in attacking cancer, 7-JA-1481; 16-JA-3223-24; 6-JA-1219. Indeed, at the time of Mr. Eskew's request, the use of IMRT for lung cancer was "cutting edge." 10-JA-2105. SHL approved the request for IMRT and Mr. Eskew began the treatment on February 10, 2016, five days after the proton-therapy request was denied. 7-JA-1500.

Mr. Eskew's lung cancer continued to progress and he suffered from esophagitis (inflammation of the esophagus) before he passed away on March 12, 2017. 6-JA-1201-02; 7-JA-1501-07; 14-JA-2709. Plaintiff admitted that Mr. Eskew would have developed grade I and II esophagitis even if he had received proton therapy, 6-JA-1233-36; 6-JA-1272, but alleged that Mr. Eskew developed grade III esophagitis (a more serious form of the condition) as a result of the IMRT treatment, 1-JA18-19; 5-JA-911.

There was no allegation at trial that SHL's approval of IMRT rather than proton therapy "caused or contributed to Mr. Eskew's death." 16-JA-3342 (jury instruction). Plaintiff's radiation-oncology expert testified

that the use of IMRT rather than proton therapy did not affect the progression of Mr. Eskew's cancer. 6-JA-1219-20.

2. Plaintiff Sandra Eskew, as the administrator of Mr. Eskew's estate, sued SHL for insurance bad faith. She did not claim any economic harm or damages. Rather, she claimed entirely noneconomic damages, of two types: damages for Mr. Eskew's emotional distress caused by the denial of proton-therapy coverage, and pain-and-suffering damages resulting from the esophagitis. 1-JA-19-20; 5-JA-913. She also sought punitive damages. 1-JA-23; 14-JA-2702.

Trial began on March 16, 2022. In the trial's initial phase on liability and compensation, Plaintiff's counsel exhorted the jury to punish SHL with massive damages and to use its verdict as a way to regulate the insurance industry, arguing that "juries regulate insurance companies more than anyone, including the government" and that "jury verdicts can be a good thing to regulate conduct." 14-JA-2833. Plaintiff's counsel also launched repeated assaults on SHL's counsel, telling the jury that SHL's counsel "haven't been able to beat [Ms. Eskew] down. No matter what they do to her and her kids on the stand." 14-JA-2836-37; 9-JA-1972-73. In addition, Plaintiff's counsel repeatedly injected their

personal views into the case, instructing the jurors how his co-counsel "Mr. Terry and I would" complete the verdict form, and reassuring the jurors that "[w]e wouldn't ask you to do it if we weren't convinced it was the right thing to do." 14-JA-2755; 14-JA-2838. Many of these arguments—and more—were made over SHL's objections, which were frequently sustained by the trial court. But Plaintiff's counsel were not deterred from continuing the attacks.

Over SHL's objection, the district court admitted evidence that in 2019—three years after SHL denied Mr. Eskew's coverage request—a distant corporate affiliate of SHL owned a minority share of a company that opened a proton-therapy center in New York. Plaintiff used this evidence to accuse SHL of "hypocrisy" and told the jury that the proton-therapy center "render[ed] everything [SHL's witnesses] say about [proton therapy] unbelievable." 14-JA-2811-12.

The jury deliberated for just over an hour before finding SHL liable for insurance bad faith. 14-JA-2840-43. Although Plaintiff's counsel had asked the jury to award $30 million in compensatory damages, it awarded $40 million, and also decided that punitive damages were warranted. 14-JA-2838; 14-JA-2842.

Plaintiff's counsel picked up where they left off in the phase 2 proceeding on punitive damages. Over SHL's objections, Plaintiff's counsel ordered 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." 14-JA-2868. Counsel then repeated this tactic twice more, commanding SHL's witness to turn in her chair, face the jury, and publicly affirm the company's guilt. 14-JA-2868-69.

The jury deliberated for less than an hour and awarded $160 million in punitive damages. 14-JA-2902-06; 16-JA-3353.

3. SHL renewed its motion for judgment as a matter of law, and also moved for a new trial or remittitur. 17-JA-3370-3418. The district court calendared argument on these motions, but just 48 hours before the hearing, the court canceled argument and issued two opinions that contained no reasoning and instead simply string-cited lists of cases. 17-JA-3553-56. The district court later adopted, nearly verbatim, proposed findings and conclusions written by Plaintiff's counsel concerning their own alleged misconduct. 18-JA-3560-15; 18-JA-3639-58.

SUMMARY OF THE ARGUMENT

I. SHL is entitled to judgment as a matter of law on the bad-faith claim. Bad-faith insurance actions are limited to rare and exceptional cases where the insurer had no reasonable basis for denying coverage *and* the insurer knew or recklessly disregarded that it lacked any reasonable basis. The plaintiff must also prove damages from the coverage denial.

A. Plaintiff failed to establish that SHL lacked any reasonable basis to deny Mr. Eskew's request for coverage. The denial was based on SHL's Medical Policy providing that proton therapy is an unproven and not medically necessary treatment for lung cancer. The Medical Policy was grounded in the then-current consensus in the medical and scientific literature that, based on clinical trials and peer-reviewed studies, proton therapy was not a proven or medically necessary treatment for lung cancer. Moreover, SHL's policy was identical to the policies of the nation's 12 largest insurers, *all* of which had reached the same conclusion that proton therapy was not a medically necessary treatment for lung cancer. Finally, the courts that had considered the question had all reached the same conclusion—that proton therapy was not a medically

necessary treatment for lung cancer. SHL's denial of coverage, even if it could somehow be deemed incorrect under the terms of the contract, plainly had a reasonable basis.

B. There is no evidence that SHL knew or recklessly disregarded that it lacked a reasonable basis for denying coverage. SHL believed it had a reasonable basis in light of its Medical Policy that drew upon the latest medical and scientific studies, and all of its industry competitors were following the same policy. Moreover, SHL faithfully followed its own procedures in reviewing Mr. Eskew's claim. Although Plaintiff tried to create the false impression that SHL acted in misleading ways in selling the insurance policy and during the claims-handling process, these arguments have no bearing on the bad-faith claim and are not supported by the record.

C. Plaintiff failed to prove fiscal injury, as required to recover on a bad-faith claim against an insurer. Plaintiff alleged only noneconomic damages for emotional distress and pain-and-suffering, which cannot support a bad-faith claim.

II. SHL is also entitled to judgment on punitive damages. Plaintiff failed to prove, under the heightened clear-and-convincing-

evidence standard, that SHL acted with "malice" or "oppression." There was no evidence—and Plaintiff did not even attempt to prove—that SHL acted with hatred or an evil motive, the common-law standard that governs punitive damage claims in a bad-faith case. Nor can Plaintiff satisfy her own preferred "conscious disregard" standard. SHL's coverage determination was consistent with the plain language of the insurance contract, its own procedures and Medical Policy, and the uniform practice of all the nation's largest insurers.

III. Alternatively, SHL is entitled to a new trial on all issues.

A. The misconduct of Plaintiff's counsel warrants a new trial. From beginning to end, counsel made improper arguments that were intended to, and did, incite, inflame, and prejudice the jury. Counsel launched *ad hominem* attacks against SHL's counsel, accusing them of trying to "beat [Ms. Eskew] down." 14-JA-2836-37; 9-JA-1972-73. Plaintiff's counsel commanded SHL's witness to turn in her chair, face the jury, and admit SHL's guilt. 14-JA-2868-69. And throughout the trial, Plaintiff's counsel inundated the jury with their personal views of the evidence, commented on the credibility of witnesses, and told the jurors they should hit SHL with a massive award because "[w]e wouldn't

ask you to do it if we weren't convinced it was the right thing to do." 14-JA-2838.

B. The district court's erroneous admission of the proton-therapy center evidence also requires a new trial. The evidence was irrelevant: that SHL's distant corporate relative owned a minority stake in a New York proton-therapy center that opened in 2019 has no bearing on whether SHL acted in bad faith when it denied Mr. Eskew's coverage request in 2016. Its admission gravely prejudiced SHL, as Plaintiff wielded this evidence to accuse SHL of hypocrisy and urged the jury to use the investment in the proton-therapy center as the yardstick for a massive damages award.

C. A new trial is required because this is plainly a case of "excessive damages appearing to have been given under the influence of passion or prejudice." NRCP 59(a)(1)(F). The $40 million compensatory award for noneconomic harm and the $160 million punitive award each exceed—by multiple times—the largest such awards ever upheld in Nevada history. That the awards were imposed approximately one hour after Plaintiff's counsel concluded a trial presentation infused with

appeals to the jury's passions and prejudices leaves no doubt that the verdict was tainted and must be set aside.

IV. Both damages awards are grossly excessive and must be reduced if they are not vacated entirely. The compensatory award for emotional distress and pain-and-suffering is not supported by substantial evidence and is a serious outlier when compared to awards in similar cases. The punitive award is excessive and unconstitutional, and, if it survives at all, should be reduced to an amount that does not exceed a sufficiently remitted compensatory award.

ARGUMENT

I. SHL Is Entitled To Judgment As A Matter Of Law On The Bad-Faith Claim.

The denial of a motion for judgment as a matter of law is reviewed *de novo*, as are questions of law. *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). When an appeal challenges the sufficiency of evidence, "[t]his court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009).

Nevada recognizes a cause of action for bad-faith refusal to pay an insurance claim, derived from California law. *USF&G v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975) (relying on *Silberg v. Cal. Life Ins. Co.*, 521 P.2d 1103 (Cal. 1974)). Bad-faith insurance actions are limited to "rare and exceptional cases" where the insurer has engaged in "grievous and perfidious misconduct." *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997).

"To establish a prima facie case of bad-faith refusal to pay an insurance claim, the plaintiff must establish" *first* "that the insurer had no reasonable basis for disputing coverage," and *second* "that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 702-03, 962 P.2d 596, 604 (1998). Thus, a bad-faith claim "requires an insurer's denial of benefits to be both objectively and subjectively unreasonable." *Ragonesi v. Gewico Cas. Co.*, 2020 WL 7643225, at *3 (D. Nev. Dec. 23, 2020). To recover noneconomic damages—the only type of compensatory damages Plaintiff sought here—plaintiffs must also prove they suffered an *economic* loss. Because

Plaintiff has failed to establish any of those three elements, the bad-faith claim fails as a matter of law.

A. Plaintiff Failed To Establish That SHL Lacked A Reasonable Basis To Deny The Claim.

The evidence does not support a finding that SHL "had no reasonable basis for disputing coverage." *Powers*, 114 Nev. at 703, 962 P.2d at 604. To the contrary, the evidence establishes—conclusively and indisputably—that SHL's denial was reasonable because (1) it was grounded in then-current scientific and medical literature; (2) it was consistent with the policies of all major U.S. insurers; and (3) courts that had considered the issue at the time had affirmed denials of coverage for proton therapy. In 2016, proton therapy was "unproven," carried unknown side effects, and was not "medically necessary" to treat stage IV lung cancer. But even if proton therapy could somehow have been deemed a covered service (which it was not), the bad-faith claim still fails because Plaintiff did not prove that SHL lacked any reasonable basis for denying the claim. "[T]he insurer is not liable for bad faith for being incorrect about policy coverage as long as the insurer had a reasonable basis to take the position that it did." *Pioneer Chlor Alkali Co. v. Nat'l*

Union Fire Ins. Co. of Pittsburgh, 863 F. Supp. 1237, 1242 (D. Nev. 1994). That is the case here.

1. SHL's denial was reasonable because it was based on SHL's Medical Policy's finding that proton therapy is neither proven nor medically necessary for treating lung cancer.

The Medical Policy reflected the then-prevailing view in the medical and scientific communities. *See supra* pp.8-11. The Medical Policy relied on an extensive array of peer-reviewed studies and clinical trials and on the findings of leading medical and radiology organizations in concluding that, as of 2016, "[c]urrent published evidence does not allow for any definitive conclusions about the safety and efficacy of proton beam therapy to treat" lung cancer "as proven and medically necessary." 15-JA-3106; 15-JA-3117-19; 11-JA-2285-86. For example, it looked to ASTRO's conclusion that current data do not "provide sufficient evidence to recommend [proton therapy] outside of clinical trials in lung cancer." 15-JA-3109; 6-JA-1256-57. And it relied on the judgment of AHRQ, which determined that "the evidence is insufficient to draw any definitive conclusions as to whether [proton therapy] has any advantages over traditional therapies." 15-JA-3119; 6-JA-1257-58.

Even Plaintiff's expert, Dr. Andrew Chang, conceded that the Medical Policy had thoroughly analyzed the literature and studies on proton therapy. He could not identify a single published peer-reviewed article or study that the Medical Policy should have cited, but did not. 6-JA-1254-55. The Medical Policy, and the vast amount of scientific and medical evidence underlying it, establish an objectively reasonable basis for SHL's conclusion that "[p]roton beam radiation therapy is unproven and not medically necessary for … [l]ung cancer." 15-JA-3106.

To be sure, Dr. Chang (and Dr. Zhongxing Liao, Mr. Eskew's treating physician) opined that, in their view, proton therapy was proven and medically necessary. 6-JA-1162-63; 7-JA-1430-31. But their testimony focused on the state of proton therapy in 2022, when they testified, rather than on the state of proton therapy in 2016, when the claim denial occurred. *See* 7-JA-1430-36; 6-JA-1160 (evaluating proton therapy "over the history of it up to now"). In fact, in 2018 Dr. Liao wrote an article that concluded: "the clinical advantages of proton therapy … have remained largely theoretical." 16-JA-3223. Even if advances in proton therapy had caused it to become a more-recognized treatment by 2022, the relevant inquiry is whether SHL had a reasonable basis for

concluding in 2016 that proton therapy was not a proven, medically necessary treatment for lung cancer—and the evidence establishes that SHL plainly had a reasonable basis for reaching that conclusion.

Even if the opinions of Plaintiff's experts could be said to reflect a reasonable disagreement in the medical community as of February 2016 over whether proton therapy was a medically necessary treatment for stage IV lung cancer, that would not mean SHL lacked a reasonable basis for denying coverage. To the contrary, the existence of a reasonable disagreement *precludes* a finding of bad faith. *See Basu v. Mass. Mut. Life Ins. Co.*, 2023 WL 1765676, at *5 (D. Nev. Feb. 3, 2023) ("The fact there is evidence to support both conclusions … is exactly the sort of genuine dispute in coverage that defeats a bad faith insurance claim."); *Phillips v. Clark Cnty. Sch. Dist.*, 903 F. Supp. 2d 1094, 1104 (D. Nev. 2012) ("genuine dispute as to coverage" precludes bad-faith claim because even if insurer's view was "incorrect," it was "at least" reasonable); *McCall v. State Farm Mut. Auto. Ins. Co.*, 2018 WL 3620486, at *4 (D. Nev. July 30, 2018) (bad-faith claim failed because insurer was entitled "to believe its own expert's opinion over [the plaintiff's]," even though the

court ruled that the insurer's expert was wrong), *aff'd*, 799 F. App'x 513 (9th Cir. 2020).

Plaintiff also argued below that the insurance contract expressly covered proton therapy. It did not. The contract specifically provides that it does *not* cover all "[t]herapeutic radiology services," but only those services that are "authorized by the Managed Care Program," 15-JA-2951(§5.18)—and the "Managed Care Program" is "the process that determines Medical Necessity," 15-JA-2972(§13.63). The contract's plain language is clear that therapeutic radiology services are covered only when SHL determines that they are medically necessary. Plaintiff even admitted at trial that she would have been aware of this limitation when she bought the plan. 9-JA-1888. In short, even if SHL's interpretation of the contract could somehow be deemed incorrect, it was not unreasonable or "implausible." 14A Couch on Ins. § 204:122 (3d ed.). SHL is therefore entitled to judgment as a matter of law.

2. The denial had a reasonable basis for a second reason: SHL's policy was the same as all other major U.S. insurers. *None* of them covered proton therapy for lung cancer at the time. *See supra* p.11.

While industry custom is not determinative of bad-faith, *see Silberg*, 521 P.2d at 1109, whether the insurer's practice was an outlier or consistent with practices in the industry is relevant in assessing reasonableness. *See* Hon. H. Walter Croskey et al., *California Practice Guide: Insurance Litigation* ch. 12C-E, § 12:1011 (Rutter Grp. 2022) ("The fact the insurer's handling of the claim was consistent with insurance industry practice is relevant" to bad-faith analysis); *Hanson ex rel. Hanson v. Prudential Ins. Co. of Am.*, 783 F.2d 762, 767 (9th Cir. 1985) (that "Prudential's handling of the claim was in accord with insurance industry practice" supported "finding that Prudential did not act in bad faith"); *Breaux v. Am. Fam. Mut. Ins. Co.*, 554 F.3d 854, 863 (10th Cir. 2009) (bad-faith claim "requires the insured to prove, based on insurance industry standards, that the insurer's conduct was unreasonable"); 46A C.J.S. Insurance § 1880 ("The reasonableness of an insurer's conduct is determined objectively, based on proof of industry standards.").

Consistency with industry practice is a common-sense indicator of whether an insurer had a reasonable basis for a claim denial. If the insurer's determination is at odds with how other insurers would have

resolved the claim, that can be evidence of bad faith. But if the insurer decided the claim the exact same way all other insurers would have decided it, that is powerful evidence that (even if it was wrong) the decision had a reasonable basis.

Here, the undisputed evidence established that SHL's determination matched that of every one of the nation's 12 largest insurers. SHL's expert Dr. Gary Owen testified that, in 2016, *all* of those insurers—just like SHL—considered "proton beam therapy for lung cancer [to be] unproven, and/or not medically necessary." 11-JA-2301-08. Indeed, Dr. Owen could not find a single policy that covered proton therapy for lung cancer—and considered it "highly unlikely" that Plaintiff could even have obtained a policy that would have covered it. 11-JA-2307-08.

3. The denial had a reasonable basis for a third reason: There was no Nevada authority addressing whether proton therapy was medically necessary—and the courts that *had* addressed the question had concluded it was *not*.

"[I]f a coverage position by an insurer with respect to a legal interpretation of a policy provision is fairly debatable, a denial of

coverage cannot constitute bad faith where there is no contrary, controlling authority in the jurisdiction." *Brewington v. State Farm Mut. Auto. Ins. Co.*, 96 F. Supp. 3d 1105, 1109 (D. Nev. 2015). Even when "some cases support [the plaintiff] while other cases support [the insurer]," courts have found "a legitimate dispute as to that issue," meaning that "as a matter of law [the insurer] had a reasonable basis to deny [the plaintiff's] claim." *Pioneer Chlor Alkali*, 863 F. Supp. at 1247; *see Morris v. Paul Revere Life Ins. Co.*, 109 Cal. App. 4th 966, 970 (2003) (concluding insurer reasonably denied coverage—even though California Supreme Court later held coverage *was* required—because courts were split at time of denial).

At the time of the denial here, several courts had upheld insurers' determinations that proton therapy was *not* medically necessary for cancer treatment in cases involving similar definitions of "medically necessary." In *Baxter v. MBA Group Insurance Trust Health & Welfare Plan*, 958 F. Supp. 2d 1223, 1225 (W.D. Wash. 2013), the court upheld the denial of a request for proton therapy to treat prostate cancer, concluding it was not medically necessary because there is no "statistically significant evidence that [proton therapy] is superior to

[IMRT]." *Id.* at 1225, 1238. As here, the insurer made its medical-necessity determination based on its internal proton-therapy policy. *See id.* at 1225.

Other courts had reached the same conclusion. *See Stemme v. Blue Cross Blue Shield of Kansas City*, 2013 WL 12362335, at *7 (N.D. Tex. Feb. 25, 2013) (substantial evidence—namely, the insurer's internal medical policy—supported denial of proton therapy because "medical opinion differs as to the necessity of the procedure in these circumstances"); *Gardner v. Grp. Health Plan*, 2011 WL 1321403, at *5 (E.D.N.C. Apr. 4, 2011) ("[N]o reasonable jury could find that Defendant abused its discretion in denying coverage for [proton therapy] as experimental.").

Because there was no controlling caselaw foreclosing SHL's medical-necessity determination, and the available caselaw endorsed its conclusion, SHL had a reasonable basis for the denial and was entitled to judgment as a matter of law.

B. Plaintiff Failed To Establish That SHL Knew, Or Recklessly Disregarded, That It Lacked A Reasonable Basis For Denying Coverage.

1. There was also no evidence that SHL knew or recklessly disregarded that it lacked a reasonable basis for denying coverage. Under Nevada law, "[i]t is not enough to show that, in hindsight, an insurer acted unreasonably," *Fernandez v. State Farm Mut. Auto. Ins. Co.*, 338 F. Supp. 3d 1193, 1200 (D. Nev. 2018), and "[p]oor judgment or negligence on the part of an insurer does not amount to bad faith," *Goodrich v. Garrison Prop. & Cas. Ins. Co.*, 526 F. Supp. 3d 789, 801 (D. Nev. 2021). Rather, the plaintiff must also prove that the insurer had "'actual or implied awareness' that no reasonable basis exist[ed] to deny the claim." *Pioneer Chlor Alkali*, 863 F. Supp. at 1242. Plaintiff did not carry that burden here.

From SHL's perspective, it had more than just a reasonable basis to deny coverage—it had an overwhelmingly strong basis for doing so. SHL could look to its Medical Policy that drew upon the latest studies and analyses of whether proton therapy was a proven and medically necessary treatment for lung cancer; it could look to the policy followed by all of its industry competitors, and see that every one of them had

reached the same conclusion; and it could look at the decisions of courts that had held that proton therapy was not medically necessary. Even if this record could somehow support a finding that SHL lacked a reasonable basis for the denial (and it cannot), there is simply no evidence that SHL *knew or recklessly disregarded* that there was no reasonable basis for its decision. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-70 (2007) (insurer does not act with reckless disregard where, even though the Supreme Court "disagree[d] with [the insurer's] analysis," its understanding of its legal obligations was objectively reasonable and the "dearth" of caselaw meant the insurer lacked "the benefit of guidance from the courts").

The evidence is undisputed that SHL adhered to its own procedures in denying the claim. In assessing whether an insurer knew it lacked a reasonable basis for its actions, courts look to whether the insurer made its decision "in violation of [its] own procedures." *Powers*, 114 Nev. at 703, 962 P.2d at 604. Here, "Plaintiff offer[ed] no evidence that Defendant violated its own procedures." *Goodrich*, 526 F. Supp. 3d at 803. To the contrary, the evidence established that SHL's handling of

Mr. Eskew's claim was "consistent with [SHL's] policies and procedures." 7-JA-1327-28.

2. It became evident in post-trial briefing that Plaintiff had failed to prove that SHL lacked a reasonable basis for the denial of coverage—let alone that SHL *knew* it lacked a reasonable basis. At this point Plaintiff pivoted, focusing on two arguments that have no bearing on the question of bad faith. Plaintiff asserted that when she was shopping for insurance, SHL misled her into thinking proton therapy was a covered service; and she argued that SHL did not conduct a reasonable investigation of Mr. Eskew's request before denying it.

Neither of these arguments supports the four necessary elements of Plaintiff's bad-faith claim. *See* 16-JA-3334 (jury instruction that Plaintiff must prove four elements to recover for bad faith: proton therapy was a covered service; SHL lacked a reasonable basis for the denial; SHL knew or recklessly disregarded that it lacked a reasonable basis; and causation).

Plaintiff's argument that she was misled about the scope of coverage has no bearing on any of these elements. She did *not* bring a claim for fraud in the inducement. Her sole theory of liability was

insurance bad faith, *i.e.*, a breach of the implied covenant of good faith and fair dealing. The implied covenant provides that "neither the insurance company nor the insured will do anything to injure the rights of the other party to receive the benefits of the agreement." 16-JA-3333. As the jury instruction makes clear, an argument that the insurance agent wrongfully induced Plaintiff into purchasing the contract is irrelevant to whether SHL deprived her of the benefits of the agreement. *See Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230, 1236 (D. Nev. 2009) ("A party cannot breach the covenant of good faith and fair dealing before a contract is formed.").

In fact, when Plaintiff's counsel said they wanted to argue that the insurance agent had misled her into thinking that proton therapy was a covered treatment, the district court barred Plaintiff from presenting this issue to the jury. The court issued a pretrial order that "exclude[d] [any] evidence, argument, and/or testimony relating to pre-contract communications concerning insurance coverage." 16-JA-3244-45. It is not just legally wrong but highly improper for Plaintiff to argue not only that she circumvented the district court's order—but that the verdict

should be upheld on the basis of evidence the district court deemed irrelevant and excluded from the case.

Plaintiff also misstates the record. Although Plaintiff asserts she was misled because SHL denied the claim based on a "hidden" corporate policy, the policy was *not* hidden. To the contrary, the Medical Policy was publicly available online, just like the policies of all the major insurers providing that proton therapy for lung cancer was unproven and not medically necessary. *See* 5-JA-1021; 11-JA-2301-02. Insurers commonly make coverage decisions based on internal policies—and courts have long held that there is nothing remotely improper about doing so. *See Stemme*, 2013 WL 12362335, at *1, *6 ("[S]ubstantial evidence supports [insurer's] finding that [proton therapy] was not medically necessary" because insurer's internal "Medical Policy comes to that very conclusion," and "is reviewed annually.").

Plaintiff's other theme was that SHL did not reasonably investigate Mr. Eskew's request before denying it. But this does not provide a basis for upholding the verdict either. A bad-faith finding cannot be based on a failure to investigate where, as here, there was a genuine dispute over coverage, *see Rios v. Scottsdale Ins. Co.*, 119 Cal. App. 4th 1020, 1028

(2004) (plaintiff's "assertion that the matter was not properly investigated does not support her bad faith claims" given existence of "genuine dispute"), and Plaintiff identifies no undiscovered fact that would have compelled a different coverage decision, *see Bannister v. State Farm Mut. Auto. Ins. Co.*, 692 F.3d 1117, 1128 (10th Cir. 2012).

In any event, SHL conducted a reasonable investigation. Dr. Ahmad reviewed Mr. Eskew's medical records and the Medical Policy. *See* 5-JA-1011-12. Although Plaintiff faulted Dr. Ahmad for not scrutinizing the particulars of Mr. Eskew's contract, SHL had already conducted extensive research and made an evidence-backed determination that proton therapy was not a proven or medically necessary treatment for lung cancer. That scientifically grounded medical conclusion would not change based on the particulars of Mr. Eskew's contract. Dr. Ahmad testified that he was "very familiar" with the terms of coverage in SHL's contracts, which he had reviewed "[m]any times" before, and Mr. Eskew's policy was the same as those standard contracts. 5-JA-1046; 5-JA-1049. Moreover, SHL (as it does in all cases) had a reviewing nurse act as a second-level backstop by analyzing the terms of the contract to alert Dr. Ahmad if it contained terms that were

inconsistent with SHL's standard terms (which it did not). 5-JA-1047; 5-JA-1049; 12-JA-2563-64. Finally, there is no merit to Plaintiff's claim that the denial letter was misleading. It accurately stated that proton therapy was not covered because it was "not medically necessary" under the plain terms of Mr. Eskew's contract. 15-JA-3043-45.

In sum, there is no evidence suggesting that SHL knew or recklessly disregarded that it lacked a reasonable basis to deny the claim.

C. Plaintiff Did Not Prove An Entitlement To Noneconomic Damages.

A plaintiff in a bad-faith insurance action cannot recover noneconomic damages—such as damages for emotional distress or pain-and-suffering—without proving economic loss. Here, Plaintiff made no attempt to prove economic loss, and sought and obtained only noneconomic damages. 5-JA-913 (Plaintiff's counsel: "[H]arms and losses, I've gone through them. There are pain and suffering, mental suffering, emotional distress, and loss of enjoyment of life."). SHL is entitled to judgment because Plaintiff failed to prove economic loss.

This Court traditionally looks to California law in defining the requirements of bad-faith insurance claims. California courts have long held that noneconomic damages are recoverable on a bad-faith claim *only*

if the plaintiff introduces evidence proving an economic loss. *See Cont'l Ins. Co. v. Super. Ct.*, 37 Cal. App. 4th 69, 85-86 (1995) ("a claim for emotional distress in a bad faith action … must be accompanied by some showing of economic loss"). The noneconomic harm "must be tied to actual, not merely potential, economic loss." *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1214 (2009). The rule serves an important purpose: a bad-faith action is "not a suit for personal injury, but rather [is one relating] to financial damage." *Gourley v. State Farm Mut. Auto. Ins. Co.*, 822 P.2d 374, 378 (Cal. 1991). Because "the award of damages in bad faith cases for personal injury, including emotional distress, is incidental to the award of economic damages," a plaintiff cannot recover incidental damages for *noneconomic* injury without having proved the predicate *economic* injury. *Maxwell v. Fire Ins. Exch.*, 60 Cal. App. 4th 1446, 1451 (1998).

Courts applying Nevada bad-faith law have adopted the California rule, requiring the plaintiff to prove "fiscal injury to recover on a bad-faith claim against an insurer." *Saleh v. Am. Nat'l Prop. & Cas. Co.*, 2010 WL 11575639, at *4 (D. Nev. Jan. 8, 2010). Adopting the rule makes sense because "Nevada looked to California law when it established the

implied covenant of good faith and fair dealing in the insurance context" in the first place. *Id*.

SHL highlighted this gap in Plaintiff's proof when it moved for judgment at the close of Plaintiff's case. 16-JA-3261-62. But rather than cure the deficiency by putting on evidence of economic loss, Plaintiff's counsel gambled that their legal position was correct and that they did not need to prove economic loss. That was a mistake. Introducing evidence of physical injury is not enough. *See Waters v. United Servs. Auto. Ass'n*, 41 Cal. App. 4th 1063, 1069 (1996) (reversing jury verdict because, although there was evidence of physical injuries from emotional distress due to benefit denial, plaintiffs "did not put on *any* evidence of any kind of financial loss" as a result of the denial).

II. SHL Is Entitled To Judgment As A Matter Of Law On Punitive Damages.

The evidence at trial was insufficient to support an award of punitive damages. A plaintiff seeking punitive damages must prove, under the heightened clear-and-convincing-evidence standard, that the defendant acted with "malice" or "oppression" toward the plaintiff. NRS 42.005(1). Plaintiff did not make that showing here. SHL's coverage denial—even if it could be deemed erroneous—faithfully followed its

claim-review policies, was reasonably based on the judgments of the nation's leading medical organizations, and was consistent with the practices of the 12 largest insurers in the United States.

A. The Record Does Not Clearly Establish That SHL Acted With Hatred Or An Evil Motive.

Under Nevada law, "[a] plaintiff is never entitled to punitive damages as a matter of right," and this Court will overturn an award of punitive damages unless it is "supported by substantial clear and convincing evidence" of "malice" or "oppression." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000). "[P]roof of bad faith, by itself, does not establish liability for punitive damages." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512, 780 P.2d 193, 198 (1989). Rather, in bad-faith insurance cases, "[t]he standard for punitive damages is much more stringent than that for bad faith." *Polymer Plastics Corp. v. Hartford Cas. Ins. Co.*, 389 F. App'x 703, 707 (9th Cir. 2010).

The Nevada Legislature has directed that when punitive damages are sought in a bad-faith insurance case, the statutory definitions of "malice" and "oppression" are "not applicable"; rather, "the corresponding provisions of the common law apply." NRS 42.005(5).

At common law, proving "malice" and "oppression" required a showing that the defendant harbored an intent to injure or an evil motive. *See Craigo v. Circus-Circus Enters., Inc.*, 106 Nev. 1, 4, 786 P.2d 22, 23 (1990) (plurality) ("malice" requires "the motive and willingness to vex, harass, annoy, or injure" (quoting *Davis v. Hearst*, 116 P. 530, 538-39 (Cal. 1911))); *Davis*, 116 P. at 539 ("oppression" requires an "evil motive"). As this Court explained, "[c]ommon law malice focuses on ill will and hatred harbored by the defendant against the plaintiff." *Schwartz v. Est. of Greenspun*, 110 Nev. 1042, 1046 n.2, 881 P.2d 638, 641 n.2 (1994). Punitive damages are precluded when this demanding common-law standard was not met. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 709, 692 P.2d 1282, 1286 (1984) (punitive damages require "ill-will, or a desire to do harm"); *Caple v. Raynel Campers, Inc.*, 90 Nev. 341, 344, 526 P.2d 334, 336 (1974) (malice requires "willful" and "intentional" wrongdoing).

Here, Plaintiff made no effort to show that SHL *intended* to injure Mr. Eskew or harbored an evil motive. Any such claim would have been absurd and there is no evidence that would remotely support it.

For that reason, Plaintiff urged the district court to adopt a different standard than the one the Legislature directed. Plaintiff argued

that all that was required was a showing that the defendant acted in "conscious disregard" of the plaintiff's rights, without any evidence of intent or even despicable conduct. *But see* NRS 42.001(3)-(4). The district court agreed and, over SHL's objection, allowed Plaintiff to recover punitive damages based a showing of "conscious disregard" alone. 13-JA-2662-66; 16-JA-3345-46.

The district court instructed the jury to award punitive damages based on an incorrect legal standard. 16-JA-3345-46. Under the correct legal standard, SHL is entitled to judgment on punitive damages because there is *no* evidence—let alone the requisite clear-and-convincing evidence—of an intent to injure or any evil motive on the part of SHL, and Plaintiff did not contend otherwise. At a minimum, the instructional error requires a new trial on all issues.

B. The Record Does Not Clearly Establish That SHL Acted In Conscious Disregard Of Mr. Eskew's Rights.

Even under the "conscious disregard" standard, the evidence was insufficient to support punitive damages.

SHL's denial of coverage was based on the contract's plain language, which provided that "[o]nly Medically Necessary services are" covered, 15-JA-2948(§5), and that, in determining whether a service is

"Medically Necessary," SHL may consider "peer-review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations that include supporting scientific data," 15-JA-2972(§13.66). The contract also expressly excluded coverage for any "unproven treatment … as determined by SHL." 15-JA-2957(§6.34).

Dr. Ahmad acted consistently with the contract and with SHL's standard procedure when he consulted the Medical Policy and determined that proton therapy was "unproven" and "not medically necessary" for treating lung cancer. The Medical Policy, in turn, was based on the latest scientific and medical literature analyzing and identifying the conditions for which proton therapy was medically necessary. Even if Dr. Ahmad could somehow be found to have erroneously denied the request for coverage, or to have acted negligently, nothing in the process he followed shows a conscious disregard of Mr. Eskew's rights. To the contrary, Dr. Ahmad testified he believed he had followed the proper procedure in reviewing the claim and believed he had made the correct decision under the Medical Policy. 5-JA-954-55; 5-JA-1019-20.

According to this Court, "the necessary requisites to support punitive damages are not present" when an insurer denies benefits in accordance with its standard procedures. *Peterson*, 91 Nev. at 620, 540 P.2d at 1072. In *Peterson*, an insured presented numerous claims to its insurer under a liability policy, but the insurer delayed and refused to pay the claims despite its awareness of the insured's "increasingly precarious financial condition." *Id*. at 619, 540 P.2d at 1071. The Court held that even the insurer's "knowledge of the effect of its refusal to pay on [the insured's] financial condition" and its continued "refus[al] to negotiate or pay the sums known to be due" to the insured were not enough to warrant punitive damages. *Id.* at 620, 540 P.2d at 1071. This case presents an even weaker case for punitive damages, in that there is no evidence SHL refused to make payments or provide coverage it had "known to be due."

Nor is there anything in the Medical Policy itself that demonstrates a conscious disregard of the rights of Mr. Eskew. SHL did not act with malice or oppression when it adopted a policy that matched the judgments of the scientific and medical communities and all other major insurers. As Plaintiff's expert Dr. Chang admitted, the Medical Policy

was based on "peer review literature" and "evidence-based reports and guidelines published by nationally recognized professional organizations." 6-JA-1254-55. And Dr. Owen testified that he was not able to find a single insurance plan that covered proton therapy for lung cancer, and that it would be "highly unlikely" for Mr. Eskew to have found such a policy because it was "safe to say that" the consensus in the industry was that proton therapy was not medically necessary for lung cancer. 11-JA-2308. This Court's *Peterson* decision denying punitive damages in a bad-faith insurance case relied on *Silberg*, which held that punitive damages were unwarranted because the defendant insurer's actions were consistent with the "practice in the insurance industry." 521 P.2d at 1110; *see Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate [any suggestion of] conscious disregard."). The same conclusion applies here.

There is nothing in how SHL handled Mr. Eskew's claim—or in the Medical Policy itself—that amounts to clear-and-convincing evidence of the malice or oppression necessary to impose the extreme sanction of punitive damages.

III. In The Alternative, SHL Is Entitled To A New Trial.

If the Court does not order judgment in SHL's favor, it should order a new trial on one of three grounds: the "misconduct" of Plaintiff's counsel, NRCP 59(a)(1)(B); the district court's erroneous admission of the proton-therapy center evidence; or the "excessive damages appearing to have been given under the influence of passion or prejudice," NRCP 59(a)(1)(F).

A. Counsel's Extensive Misconduct Prejudiced The Jury Against SHL.

This Court may grant a new trial based on "misconduct of the … prevailing party." NRCP 59(a)(1)(B). In *Lioce v. Cohen*, the Court established "the standards that the district courts are to apply when deciding a motion for a new trial based on attorney misconduct": "When a party successfully objects to the misconduct, the district court may grant a subsequent motion for a new trial if the moving party demonstrates that the misconduct's harmful effect could not be removed through any sustained objection and admonishment," such as when the misconduct was "repeated or persistent." 124 Nev. 1, 6-7, 14, 174 P.3d 970, 973-74, 978 (2008). When a party does not object to the misconduct, the district court may grant a motion for a new trial "if the misconduct

amounted to plain error, so that absent the misconduct, the verdict would have been different." *Id*. at 7, 174 P.3d at 974. In conducting this analysis, the court should consider the cumulative "scope, nature, and quantity" of the misconduct. *Id.* at 17, 174 P.3d at 980. This Court reviews *de novo* the trial court's determination whether an attorney's comments constitute misconduct, giving deference to factual findings. *Grosjean v. Imperial Palace, Inc*., 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009).

Here, Plaintiff's counsel infused their trial presentation, from beginning to end, with arguments designed to prejudice the jury against SHL. The tactics of Plaintiff's counsel went well beyond the bounds of permissible argument. Counsel set out to inflame and incite the jury, running roughshod over the district court's pretrial orders in limine and mid-trial admonitions by deploying lines of attack designed to whip up the jury's prejudices and impose a massive, punitive verdict on SHL. *See* 12-JA-2525 (Court stating: "Mr. Terry, your behavior is inappropriate, you need to stop this."). Even though SHL lodged repeated objections, the barrage of misconduct was relentless—placing SHL in the untenable position of having to either object repeatedly and thereby risk "cast[ing]

a negative impression" on the jury and "emphasizing the improper point," or letting the misconduct pass by unmarked. *Lioce*, 124 Nev. at 18-19, 174 P.3d at 981. And counsel's misconduct had its intended effect—as demonstrated by the shocking and irrational damages awards the jury imposed after just one hour of deliberations.

Counsel launched a barrage of* ad hominem *attacks on SHL's counsel. Attacking opposing counsel in front of the jury is strictly prohibited under Nevada law. Yet Plaintiff's counsel did so again and again and again. After SHL's counsel conducted an ordinary cross-examination of Ms. Eskew by questioning her about the biases and incentives underlying her testimony, Plaintiff's counsel falsely accused SHL's counsel of calling Ms. Eskew a liar and abusing her on the stand.

Plaintiff's counsel told the jury: "I never thought that an insurance company … would stoop to that, what happened in front of you. To call honest people liars." 14-JA-2703; *see* 14-JA-2836-37 ("[SHL's counsel] haven't been able to beat [Ms. Eskew] down. No matter what they do to her and her kids on the stand"); 9-JA-1972-73 ("Well, he called her a liar"); 9-JA-1973 ("So Sandy, that guy just said that you have an incentive to get on that stand and lie; how does that make you feel?"); 9-JA-1976

("So this incentive, this money incentive that these people are accusing you of having to come here, do you think they have an incentive to come in here and call the widow of Bill Eskew and his children liars?"); *id.* ("[T]hey have an incentive to call you and BJ … and Tyler liars?").

This Court has made clear that *ad hominem* attacks like this are grounds for a new trial. In *Born v. Eisenman*, the Court held that "improper comments by counsel which may prejudice the jury against the other party, his or her counsel, or witnesses, is clearly misconduct by an attorney." 114 Nev. 854, 862, 962 P.2d 1227, 1232 (1998). "Where an attorney attacks opposing counsel in the presence of the jury, it constitutes grounds for a new trial if it appears that prejudice may have resulted." *Id.* "The test … is not necessarily that the misconduct complained of had a prejudicial effect upon the jury, but that it *might* have done so." *Id.* (emphasis added). This Court has repeatedly reaffirmed this strict prohibition. *See Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) ("[I]t is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics."); *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 79 n.4, 319 P.3d 606, 614

n.4 (2014) (new trial warranted for "repeated disparaging attacks on opposing counsel").

This grossly improper line of attack also violated the district court's order in limine that "[t]he parties may not comment on the litigation conduct of the lawyers." 16-JA-3248. And it violated Plaintiff's counsel's own pledge to the court. When SHL's counsel raised concern on the eve of trial that Plaintiff's counsel planned to attack SHL's counsel in front of the jury, Plaintiff's counsel assured the court that "we're not going to come in and say" SHL's counsel "Mr. Roberts … was mean to Mrs. Eskew." 1-JA-159. Yet that is *exactly* what he did.

SHL repeatedly objected to these attacks. 9-JA-1972-73, 9-JA-1976; 14-JA-2703, 14-JA-2836-37. The district court erred in overruling some of those objections, and even for those that were sustained, it could not remove the misconduct's prejudicial effect. A new trial is warranted if the attacks on opposing counsel "might" have "had a prejudicial effect upon the jury." *Born*, 114 Nev. at 862, 962 P.2d at 1232. Here, as demonstrated by the shocking and unprecedented $200 million verdict that followed the jury's fleetingly brief deliberations, there can be no serious dispute that the misconduct *did* have a prejudicial effect.

Counsel commanded SHL's witness to admit the company's guilt. Plaintiff's counsel compounded their misconduct when, in the punitive-damages phase, they directed 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." 14-JA-2868. The district court overruled SHL's objection, at which point counsel instructed the witness to make additional public acceptances of guilt before the jury. *See* 14-JA-2869 ("[T]urn to the jury and tell them that on behalf of Sierra Health and Life, as a Utilization Management Director, whether or not you accept that amount?"); *id.* ("[T]urn to that jury and tell them whether you accept [the compensatory damages verdict]."). SHL again lodged objections and the district court again overruled them. *Id.*

The district court erred in overruling SHL's objections. These direct commands to the witness violate the fundamental norm of American courtrooms that lawyers *question* witnesses, they do not *command* witnesses to make statements. *Cf. People v. Chatman*, 133 P.3d 534, 563 (Cal. 2006) (noting it is improper to ask "unanswerable" questions or to "masquerad[e]" "speech to the jury … as a question"). Leaving this

misconduct uncured prejudiced the jury. Plaintiff's counsel placed the witness in the untenable position of having to either state that SHL violated the law, or else reject the jury's verdict just at the moment that the jury was considering whether punitive damages should also be awarded. The trial court erred in allowing counsel to publicly humiliate, degrade, and demean SHL's witness by repeatedly directing her to turn in her chair, face the jury, and state that she agreed with their $40 million verdict.

Counsel deluged the jury with their personal opinions. Plaintiff's counsel repeatedly and improperly injected their personal beliefs into the proceedings, flouting *Lioce*'s warning 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." 124 Nev. at 21-22, 174 P.3d at 983; RPC 3.4(e).

The most egregious example of personal vouching for the justness of a cause came at the most critical moment in the trial—Plaintiff's closing argument, in which counsel spoke directly to the jury about how it should decide the case:

> Check yes on number one on the verdict form. Write in $30 million and do it with your chest stuck out and proud. And 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.

14-JA-2838 (emphasis added). This is a textbook example of offering a "personal opinion as to the justness of a cause"—exactly what *Lioce* and the Rules of Professional Conduct say lawyers must not do. The district court sustained SHL's objection, *id.*, but the prejudice could not be cured. Minutes later the jury did exactly what Plaintiff's counsel said they were personally "convinced" was "the right thing to do." In fact, the jury went even further, awarding $40 million even though counsel had requested only $30 million. *See Grosjean*, 125 Nev. at 366, 212 P.3d at 1080 (misconduct may warrant reversal where damages award exceeds amount plaintiff requested).

The record is replete with similar examples. Counsel repeatedly injected their personal views about the credibility of SHL, its witnesses, and its legal arguments, telling the jury that he found them "breathtaking." 14-JA-2811. Counsel observed that "[t]he hypocrisy of [SHL's actions] just knocks the wind out of me sometimes. I can't believe it." *Id.* And counsel commented that "I think … everything [SHL's witnesses] say about" proton therapy is "unbelievable." 14-JA-2811-12.

All of these are blatant violations of the prohibition on offering personal commentary on the credibility of witnesses, and the district court erred in denying a new trial.

B. The District Court Erred In Admitting The Proton-Therapy Center Evidence.

The district court abused its discretion in admitting evidence that in 2019—three years after SHL denied Mr. Eskew's coverage request—a distant corporate affiliate of SHL owned a minority stake in a proton-therapy center that opened in New York. SHL moved in limine to exclude this evidence, but the district court denied the motion. 1-JA-54-61; 16-16-JA-3245. SHL's contemporaneous objection at trial was also overruled. 10-JA-2198-99. Evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1); *Rives v. Farris*, 138 Nev. Adv. Op. 17, 506 P.3d 1064, 1070 (2022) ("[T]he district court abused its discretion in admitting the evidence and allowing it to be presented so extensively because the danger of unfair prejudice, confusing the issues, or misleading the jury substantially outweighed the probative value of that evidence."). This Court reviews evidentiary rulings for abuse of discretion, *M.C. Multi-Fam. Dev., LLC v.*

Crestdale Assocs., Ltd., 124 Nev. 901, 913, 193 P.3d 536, 544 (2008), and the district court palpably abused its discretion here.

SHL is a distant corporate relative of ProHealth Proton Center Management, LLC ("ProHealth"). ProHealth is a four-times-removed subsidiary of Optum, Inc., which in turn is a subsidiary of UnitedHealth Group Inc., SHL's ultimate parent company. ProHealth is a provider of healthcare services, whereas SHL is an insurer that offers healthcare insurance plans. In 2019, ProHealth joined with several other companies to open a proton-therapy center in New York. 15-JA-3074-96. The center provides proton therapy to patients with lung cancer, and its website, at the time of the trial, emphasized the benefits of proton therapy over IMRT. 16-JA-3183; 7-JA-1306-07; 10-JA-2199-2200.

Plaintiff's counsel used this evidence to contend that SHL's denial of Mr. Eskew's request was "inconsistent" with the existence of the proton-therapy center. 10-JA-2173. Counsel accused SHL of "hypocrisy" and of "speaking out of both sides of [its] mouth" and told the jury that the proton-therapy center "render[ed] everything [SHL's witnesses] say about [proton therapy]" "unbelievable." 14-JA-2811-12. Counsel argued that, years after denying Mr. Eskew's claim, SHL changed its Medical

Policy to allow broader coverage for proton therapy in order to enhance ProHealth's profits. 10-JA-2171-74; 16-JA-3131. And counsel even told the jury that the "15 to 250 million" dollars that "United Health Group was willing to invest" in the proton-therapy center should serve a benchmark for the jury's damages award. 14-JA-2753-54.

This evidence was irrelevant, highly prejudicial, and should not have been admitted. That SHL's distant corporate relative owned a minority stake in a proton-therapy center that opened in 2019 was utterly irrelevant to the reasonableness of SHL's coverage decision in 2016. So too with evidence of what the proton-therapy center said on its website in 2022. In deciding whether SHL denied Mr. Eskew's claim in bad faith, the jury's task was to determine the reasonableness of the coverage decision at the moment it was made. Evidence of a corporate affiliate's business ventures that occurred *years* after the coverage decision has no bearing on that determination.

Plaintiff's extensive use of this evidence—arguing that it proved bad faith, that it undermined the credibility of "everything" SHL witnesses said, and that the jury should use the amount of investment in the proton-therapy center to measure damages in this case—establishes

the unfair prejudice. As in *Rives*, "the evidence had no probative value, drew the jury's attention to a collateral matter, and likely led to the jury drawing improper conclusions [that] unfairly prejudic[ed]" the defendant. 506 P.3d at 1072.

C. The Jury Awarded Excessive Damages Under The Influence Of Passion And Prejudice.

A new trial is required when there are "excessive damages appearing to have been given under the influence of passion or prejudice." NRCP 59(a)(1)(F). "[N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice," *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521 (1931), and a new trial is warranted if excessive damages so much as "*appear*[]" to have resulted from passion or prejudice, NRCP 59(a)(1)(F) (emphasis added); *Hazelwood v. Harrah's*, 109 Nev. 1005, 1009-10, 862 P.2d 1189, 1191-92 (1993) (affirming district court's grant of new trial when $425,000 verdict was influenced by passion and prejudice), *overruled in part on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999); *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 285, 646 P.2d 553, 555 (1982) (verdict may be found

excessive if there is an "indicat[ion]" of "passion, prejudice or corruption in the jury").

The U.S. Supreme Court has emphasized that the size of the damages award is the strongest indicator that a verdict was given under the influence of passion or prejudice. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 422 (1994). Whereas the size of the award standing alone is "not conclusive that it is the result of passion or prejudice," *Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 828 (1962), *abrogated in part on other grounds by Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987), an award may be "so monstrous and excessive, as to be … evidence of passion or partiality in the jury," *Oberg*, 512 U.S. at 422, 425; *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (reviewing awards in other cases to determine that a $675,000 award was "simply beyond the range of reason").

Here, the staggering size of the damages awards, particularly when viewed in light of Plaintiff's counsel's improper and inflammatory arguments, leaves no doubt that the jury decided this case based on passion and prejudice and not on the evidence. The awards here eclipse all other noneconomic and punitive damages awards ever upheld in

Nevada history. The noneconomic compensatory award of $40 million is *five times* the largest award ever upheld in this state. 17-JA-3419-29. The punitive award of $160 million is more than *eight times* the largest punitive award ever upheld in Nevada. 17-JA-3430-35.

The compensatory award exceeds even the inflated figure that Plaintiff's counsel requested. They asked for $30 million—which would itself have been a shocking and unjustified award—but the jury awarded $40 million. Damages awards that "far exceed[] what counsel requested" are evidence that "a jury verdict … was the product of passion and prejudice." *DeJesus v. Flick*, 116 Nev. 812, 820, 7 P.3d 459, 464-65 (2000). Even Plaintiff's counsel implicitly acknowledged that the jury's award of compensatory damages strongly signaled passion and prejudice when he warned the jury during the punitive damages phase that for unspecified "legal reasons" "[y]ou won't be helping us if you" award more than $160 million. 14-JA-2885; 14-JA-2900.

Another powerful indicator that the jury was tainted by passion and prejudice is that it issued two stunning and unprecedented damages awards just minutes after hearing Plaintiff's counsel's improper arguments that were designed to incite and inflame. This Court has

recognized that improper arguments by counsel can lead to a "jury verdict that [i]s the product of passion and prejudice." *DeJesus*, 116 Nev. at 820, 7 P.3d at 464 ($1.47 million award "plainly reflects the influence of counsel's improper arguments"). Many of these arguments are detailed above. *See supra* pp.48-54. But there were many more arguments aimed at working up the jury into an impassioned state so that it would hit SHL with a massive punishment.

For example, Plaintiff's counsel repeatedly told the jury that SHL ran a "rigged system," 14-JA-2818; 14-JA-2821; 14-JA-2822; 14-JA-2823; 14-JA-2829; 14-JA-2882, and that SHL was a remorseless corporate behemoth that deserved the worst punishment—asserting, falsely, that no company representative attended the punitive-damages phase of the trial because they "d[id]n't want to face the music," 14-JA-2897-98; 14-JA-2901. Counsel stated that "juries regulate insurance companies more than anyone, including the government." 14-JA-2833. Counsel urged the jury to act as the conscience of the community, 14-JA-2834-35, and framed the case as an us-versus-them dispute by emphasizing that SHL was a large corporation at odds with "this community," 14-JA-2755-56.

In a brazen attempt to stir the jury's passions and prejudices, Plaintiff's counsel urged jurors to use their verdict to "send a message," claiming that there is only "one way" to get a "message through to an insurance company … . Money." 14-JA-2883. Counsel told the jury that if it did not "really punish" SHL, it would be "sending the opposite message"—that it was "okay if you do wrong." 14-JA-2898. Just as in *Grosjean*, counsel "asked the jury to send a message to [defendant] by punishing it." 125 Nev. at 368-69, 212 P.3d at 1081-82.

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

The "power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (brackets omitted). This Court should safeguard the jury-trial right by setting aside a shocking verdict that was indisputably the product of passion and prejudice.

IV. At A Minimum, The Damages Awards Must Be Remitted.

If the Court does not grant judgment in SHL's favor or order a new trial, it should drastically reduce the damages awards to amounts that are permissible under Nevada law and the U.S. Constitution. The compensatory award should be reduced to no more than $2 million, and the punitive award should be reduced to an amount that does not exceed the compensatory award.

A. The Compensatory Award Is Excessive And Irrational.

A compensatory award must be remitted when it is not supported by "substantial evidence" in the record. *Wyeth*, 126 Nev. at 470, 244 P.3d at 782. Plaintiff sought compensatory damages for two types of noneconomic harm to Mr. Eskew: pain-and-suffering for approximately one year (from the grade III esophagitis that allegedly resulted from

using IMRT rather than the grade II esophagitis that would have resulted from proton therapy); and emotional distress (from the denial of coverage). The evidence in this case does not come close to supporting a $40 million award of noneconomic compensatory damages.

As to pain-and-suffering, no evidence was presented at trial that justifies the award. Plaintiff's radiation-oncology expert testified that the use of IMRT rather than proton therapy did not affect the progression of Mr. Eskew's cancer. 6-JA-1219-20. In addition, Plaintiff conceded that even proton therapy would have caused grade I and II esophagitis, so the amount of compensable pain-and-suffering would be limited to the difference between a grade II case and a grade III case in any event. 6-JA-1233-34; 6-JA-1236; 6-JA-1272. And Mr. Eskew's condition lasted less than one year; indeed, Mr. Eskew was only ever formally diagnosed with grade II esophagitis and did not develop grade III symptoms until almost mid-November of 2016, just four months before his passing. 6-JA-1206; 6-JA-1209-10; 6-JA-1271-72. Finally, much of Mr. Eskew's pain-and-suffering during his final year was caused by his stage IV lung cancer, and the high dose of antibiotics and immunotherapy he received, rather than by esophagitis. 6-JA-1233-34; 6-JA-1276; 9-JA-1944.

As to emotional distress, there was no evidence warranting an award of this magnitude, or anything close to it. Although there was testimony that the denial caused Mr. Eskew to feel "hopeless," "angry," 8-JA-1735, "[f]rustrated," 9-JA-1794, and "devastated," 9-JA-1854, the record is devoid of substantial evidence that Mr. Eskew suffered such extreme emotional distress from learning that the request for insurance preauthorization was denied that could justify this award.

Courts routinely reduce noneconomic damage awards even in cases where the emotional harm is far greater than the harm here. *See Rowatt v. Wyeth*, 2008 WL 876652 (Nev. Dist. Ct. Feb. 19, 2008) (reducing $11.7 million pain-and-suffering and emotional-distress award to three plaintiffs who had developed cancer after using defendant's product), *aff'd*, 126 Nev. at 477, 244 P.3d at 786; *Hazelwood*, 109 Nev. at 1009, 862 P.2d at 1191 (remitting $425,000 noneconomic damages award to $200,000); *Bravo v. United States*, 532 F.3d 1154, 1161-62 (11th Cir. 2008) (finding $20 million in noneconomic damages "shock[ed] the judicial conscience" even though medical malpractice caused severe brain injuries to a child); *Tretola v. Cnty. of Nassau*, 14 F. Supp. 3d 58, 85 (E.D.N.Y. 2014) ($3 million award for emotional injuries remitted to

$175,000); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 356 (Ark. 2003) ($15 million pain-and-suffering award "shock[ed] the conscience of th[e] court"); *Hughes v. Ford Motor Co.*, 204 F. Supp. 2d 958, 965-66 (N.D. Miss. 2002) ($4 million award remitted to $2.5 million even though plaintiff suffered intense pain and a "lifetime of disfigurement").

The awards in this case are entirely out of step with noneconomic damage awards that have been upheld by Nevada courts. While prior awards are not *conclusive* as to the excessiveness of a verdict, *Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10, prior awards (at least those that have been affirmed) are plainly *relevant*. Indeed, this Court has previously looked to similar damage awards as an objective measure of excessiveness. *See Nev. Indep. Broad. Corp.*, 99 Nev. at 419, 664 P.2d at 347. This approach matches the practices of other states. *See* Cal. Jur. 3d Damages § 209 (2022) ("The amount of an average award allowed for a particular injury in the past, as determined by jury verdicts which have been approved in previous actions … has its place in ascertaining the damages to be allowed.").

SHL collected all the pain-and-suffering and emotional-distress awards that have been upheld in Nevada, and the awards here are *multiples* of the largest awards in the state's history. *See* 17-JA-3419-29.

In light of the evidence presented to the jury and prior awards in the state, an award of no more than $2 million in compensatory damages is appropriate. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) ($1 million noneconomic damage award "substantial" in bad-faith case against insurer). Indeed, without substantial remittitur, the award would violate due process. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if … not labeled as 'punitive.'"). The jury was not given sufficient instructions—it was told that there was "[n]o definite standard" for assessing damages, 16-JA-3343, and simply to do what it thought was right (or, more precisely, what Plaintiff's counsel thought was right). The resulting award is completely out of step with the facts of the case. "[W]ithout rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" the U.S. Supreme Court established

constitutional limits. Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1417, 1420 (2004).

B. The $160 Million Punitive Award Violates Due Process.

This Court reviews constitutional challenges to the amount of a punitive award *de novo*, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001), and it should hold that the $160 million punitive award is excessive and unconstitutional, *Wyeth*, 126 Nev. at 474-75, 244 P.3d at 784-85.

The Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments." *State Farm*, 538 U.S. at 416. Excessive punitive awards are "tantamount to a severe criminal penalty" in which the defendant lacked "fair notice" of the severity of the punishment that could be imposed. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 585 (1996).

The U.S. Supreme Court has articulated three "guideposts" for assessing the constitutionality of a punitive award: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the punitive and compensatory awards; and (3) the difference between the

punitive award and the civil penalties for comparable conduct. *BMW*, 517 U.S. at 574, 585. This Court has adopted the *BMW* guideposts as the "proper standard." *Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006).

These guideposts make clear that the $160 million punitive award is grossly unconstitutional. Any punitive award in this case cannot exceed an amount equal to the final compensatory award, and if the compensatory award is not drastically remitted, then a ratio *lower* than 1:1 is constitutionally required. *See Williams v. First Advantage LNS Screening Sols. Inc.*, 947 F.3d 735, 768 n.25 (11th Cir. 2020) ("[I]t is appropriate to remand with instructions for the district court to remit the award to a specific amount, which we have determined is the highest amount that would comply with due process.").

First, SHL's actions were not reprehensible. The jury was instructed to consider three factors in assessing reprehensibility: SHL's "culpability and blameworthiness," whether SHL's conduct "was part of a pattern of similar conduct," and "any mitigating conduct." 16-JA-3355. Each factor cuts in SHL's favor.

SHL did not act with a high degree of culpability or blameworthiness. The denial of Mr. Eskew's request was based on the plain language of the contract and SHL's Medical Policy that proton therapy was unproven and not medically necessary for individuals with lung cancer—a policy that followed the conclusions of the nation's leading medical and scientific authorities, and was consistent with the policy followed by all of the nation's largest insurers. *See supra* p.11. And there was no evidence that SHL acted with any intent to harm Mr. Eskew.

Nor was SHL's conduct part of a pattern of similar conduct. Each medical-necessity decision turned on the individual's particular condition. 7-JA-1347. SHL *did* cover proton therapy for other types of cancer when there was evidence that it was an effective treatment, such as for "[i]ntracranial arteriovenous malformations," "[o]cular tumors, including intraocular/uveal melanoma," and "[s]kull-based tumors." 15-JA-3106.

Moreover, there was extensive mitigation evidence, including evidence that SHL now sends preauthorization requests for radiation-oncology treatments to an external-review organization, where they are reviewed by a radiation oncologist. 14-JA-2865. SHL also implemented

a good faith and fair dealing training course for its employees, *id.*, and it continually modifies its medical policies in light of recent advances in proton therapy as reflected in the current medical and scientific literature, 14-JA-2893-94; 16-JA-3131-49.

This Court has recognized that remittitur of far smaller punitive awards is warranted even when the defendant engaged in far more reprehensible conduct than is alleged here. In *Rowatt*, the district court remitted the jury's $99 million punitive award to $58 million under the due-process guideposts, awarding approximately $19 million each to three plaintiffs based on its recognition that "[t]he jury could justifiably find a significant degree of reprehensibility in Defendant's decision to misrepresent the risk[s] and benefits of a product which the jury determined caused Plaintiffs' cancers." 2008 WL 876652. Nonetheless, the court held "the amount of punitive damages to be excessive," *id.*, and this Court approved the reduced awards, 126 Nev. at 475, 244 P.3d at 785. If the facts of *Rowatt*—involving far more egregious conduct, with multiple victims who faced a lifetime of severe pain-and-suffering—would support no more than a $19 million punitive award, the facts of *this* case certainly cannot support a $160 million punitive award.

Similarly, in *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998), this Court reduced an $8 million punitive award to $3.9 million as "excessive and disproportionate to [the defendants'] degree of blameworthiness." *Id.* at 1268, 969 P.2d at 962. And in *Guaranty National Insurance Co. v. Potter*, a bad-faith insurance case, the court held that a $1 million punitive award was excessive and reduced it to $250,000. 112 Nev. 199, 208-09, 912 P.2d 267, 274 (1996). The Court should do the same here.

Second, even after a sufficient remittitur of the compensatory award in this case, a 1:1 ratio of compensatory to punitive damages would be the constitutional ceiling. The ratio between compensatory and punitive damages is a "central feature" of the due-process analysis, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008), and a 1:1 ratio is the "outermost" limit in cases where the compensatory award is "substantial," *State Farm*, 538 U.S. at 425. The $40 million compensatory award here unquestionably is "substantial."

A 1:1 ratio is particularly warranted here because the compensatory award is entirely for noneconomic damages. Emotional-distress awards already serve punitive purposes and are therefore

"duplicated in the punitive award." *State Farm*, 538 U.S. at 426 ("Much of the distress was caused by the outrage and humiliation the [insured plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element."); *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009) (emphasizing that 1:1 ratio is the constitutional maximum where there was a "substantial award of noneconomic damages").

Third, a review of "civil penalties authorized or imposed in comparable cases" makes clear that a remittitur is required. *BMW*, 517 U.S. at 575. Nevada's Deceptive Trade Practices Act provides for a $5,000 civil penalty for "willfully engag[ing] in a deceptive trade practice," NRS 598.0999(2), and NRS 679B.185(1) imposes a fine of up to $10,000 for "willfully engag[ing] in the unauthorized transaction of insurance." The award here is, respectively, 32,000 and 16,000 times larger than those civil penalties. And the punitive award here exceeds by multiples *all* other awards upheld in the history of this state, so SHL cannot be said to have received "fair notice." *BMW*, 517 U.S. at 574, 585. In the event the Court permits any portion of the punitive award to stand,

it should drastically reduce the award to bring it within constitutional bounds.

CONCLUSION

SHL respectfully requests that the Court reverse and remand with instructions to enter judgment in SHL's favor. In the alternative, SHL respectfully requests that the Court vacate the judgment and remand for a new trial. Finally, at a minimum, SHL respectfully requests that the Court substantially remit the compensatory and punitive awards.

DATED: April 11, 2023.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: April 11, 2023.

/s/ Ryan T. Gormley, Esq.
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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2021 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(i) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 13,975 words.

3. I certify that I have read this brief, and to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED: April 11, 2023.

/s/ Ryan T. Gormley, Esq.
Ryan T. Gormley, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that on April 11, 2023, I submitted the foregoing **Appellant's Opening Brief** and **18 Volumes of the Joint Appendix** for filing *via* the Nevada Supreme Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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