

IN THE SUPREME COURT OF THE STATE OF NEVADA

SIERRA HEALTH AND LIFE
INSURANCE,

Appellant,

v.

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

Respondent.

Electronically Filed
Apr 18 2023 06:45 PM
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.
85369

District Court Case No.
A-19-788630-C

**Appeal from the Eighth Judicial District Court, Clark County
The Honorable Nadia Krall, District Judge
District Court No. A-19-788630-C**

**UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR
AMICI CURIAE THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND THE VEGAS CHAMBER
OF COMMERCE IN SUPPORT OF APPELLANT**

Kelly H. Dove
Nevada Bar No. 10569
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NRAP 26.1 Disclosure Statement

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, *Amici Curiae* The Chamber of Commerce of the United States of America and the Vegas Chamber of Commerce submit this Disclosure Statement:

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.

The Chamber of Commerce of the United States of America has no parent corporations, and there are no publicly held companies that own 10% or more of the organization's stock.

The Vegas Chamber of Commerce has no parent corporations, and there are no publicly held companies that own 10% or more of the organization's stock.

The Chamber of Commerce of the United States of America and the Vegas Chamber of Commerce are represented as *Amici Curiae* by Snell & Wilmer LLP.

Pursuant to NRAP 29(a), NRAP 29(c), and the consent of the parties,¹ The Chamber of Commerce of the United States of America and the Vegas Chamber of Commerce hereby move for leave to file an amicus curiae brief in support of Appellant. The proposed brief is filed concurrently with this Motion.

Statement of Interest

The Chamber of Commerce of the United States of America (“the U.S. Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The Vegas Chamber of Commerce (“the Vegas Chamber”) is Nevada’s largest business federation. It represents approximately 3,500 direct members and indirectly represents the interests of companies and professional organizations of every size and in every industry sector.

¹ Both parties to the appeal, Sierra Health and Life Insurance, and Sandra L. Eskew, as special administrator of the Estate of William George Eskew, have consented to the filing of the brief by and through their respective counsel. *See* Exhibits 1 & 2. Under NRAP 29(a), such consent is sufficient for filing of an amicus brief.

An important function of both the U.S. Chamber and the Vegas Chamber (collectively, “*Amici*”) is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, *Amici* regularly file amicus briefs in cases, like this one, that raise issues of concern to the nation’s and Nevada’s business community.

Amici have a substantial interest in ensuring that Nevada business owners may engage in common commercial business practices without being subject to exorbitant, unfounded damages awards. They also have a substantial interest in ensuring that the judicial system adheres to the rule of law, which is essential to maintain the predictability and stability that are crucial to one of the most robust economies in Nevada, the nation, and the world.

An amicus brief is desirable in this case, which presents several important questions with far-ranging policy implications. To start, the verdict, if left undisturbed, would expand the tort of insurance bad faith well beyond its recognized parameters. Rather than address the issues particular to Mr. Eskew, the trial instead served as a referendum on the managed-care system, as his Estate’s counsel vilified managed care’s

very existence and improperly urged the jury to award unsupported damages to demonstrate their opposition to what they repeatedly and prejudicially called a “rigged” and “sinister” system. That reality not only highlights the absence of evidence of insurance bad faith but also underscores why the verdict is at odds with *legislative* decisions by Congress and the Nevada Legislature to permit and promote managed care, the predominate form of healthcare in America.

The verdict here erodes managed care by, among other things, disincentivizing insurers from creating uniform medical policies for determining whether experimental treatments are medically proven and necessary. Indeed, the trial fixated on SHL’s use of its medical policy on proton beam therapy (“PBT”), enough though the policy analyzed all the clinical studies and expert opinions available at the time and matched the conclusions of the nation’s 12 largest insurers – none of which deemed PBT medically necessary. The verdict thus encourages ad hoc coverage decisions and the elimination of standardized guideposts, which severely undercuts the very policy goals that Congress and state legislatures intended by spurring the growth of managed care.

The verdict also raises the issue of whether an insured may rely on

evidence of subsequent medical advances to retrospectively determine whether a coverage decision was made in good faith. Here, for instance, the Estate made much throughout trial of the fact that a five-times removed subsidiary of SHL's parent company was one of several non-party entities that invested in a PBT treatment Center that opened years after the coverage decision at issue. The Center was created because of the lack of clinical evidence supporting the use of PBT – the very reason it was deemed medically unnecessary for treating Mr. Eskew. Accordingly, the Center's creation – which the Estate presented as evidence of SHL's "hypocrisy" – reflects advances in medical science – not bad faith. The introduction of this irrelevant, highly prejudicial evidence was not only legal error but highly discourages investment in emerging, experimental technologies for fear that such advances will, as here, be used to penalize insurers for past medical-necessity determinations.

Finally, the size of the \$200 million damages award for purely noneconomic damages alone raises important questions. The \$40 million in compensatory damages, for instance, conflicts with longstanding precedent requiring that awards be anchored to some objective metric. The district court's refusal to apply the "comparative approach" in

reviewing that award or the \$160 million in punitive damages thus demonstrates the absence of much-needed predictability for businesses (and all litigants) in forecasting potential liability.

Given *Amici's* familiarity with these important policy issues and their impact on businesses throughout Nevada and the country, *Amici* respectfully request leave to file the concurrently submitted amicus brief.

Conclusion

This Court should grant leave for The Chamber of Commerce of the United States of America and the Vegas Chamber of Commerce to file an amicus brief.

DATED: April 18, 2023

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

Kelly H. Dove (NV Bar No. 10569)

Gil Kahn (NV Bar No. 14220)

3883 Howard Hughes Parkway, Suite 1100

Las Vegas, NV 89169

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 18, 2023, I caused to be served a true and correct copy of the foregoing **UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE VEGAS CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT** upon the following by the method indicated:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Maricris Williams

An Employee of SNELL & WILMER L.L.P.

EXHIBIT 1

EXHIBIT 1

From: Matt Sharp <matt@mattsharplaw.com>
Sent: Monday, April 17, 2023 9:20 PM
To: Dove, Kelly
Cc: abbe@guptawessler.com; doug@dougterrylaw.com; Kahn, Gil
Subject: Re: Sierra Health & Life Ins. Co. v. Eskew

[EXTERNAL] matt@mattsharplaw.com

Kelly,

We will consent to the amicus.
Sent from my iPad

On Apr 17, 2023, at 1:29 PM, Dove, Kelly <kdove@swlaw.com> wrote:

Good afternoon,

We represent the U.S. Chamber of Commerce and the Las Vegas Chamber of Commerce as proposed amici in this appeal. I am writing to request your consent to file their brief in support of Appellant. See NRAP 29(a).

Please don't hesitate to contact me if you have any questions.

Thank you,
Kelly

Kelly H. Dove (she/her/hers)

office: 702.784.5286 | mobile: 702.328.9452
email: kdove@swlaw.com

Snell & Wilmer
Hughes Center | 3883 Howard Hughes Parkway | Suite 1100 | Las Vegas, NV 89169-5958
The Broadway Tower | 1455 SW Broadway | Suite 1750 | Portland, OR 97201

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EXHIBIT 2

EXHIBIT 2

From: Dupree Jr., Thomas H. <TDupree@gibsondunn.com>
Sent: Tuesday, April 18, 2023 3:13 AM
To: Dove, Kelly
Cc: rgormley@wwhgd.com; lroberts@wwhgd.com
Subject: Re: Sierra Health & Life Ins. Co. v. Eskew

[EXTERNAL] tdupree@gibsondunn.com

Yes, we consent. Thank you.

On Apr 18, 2023, at 12:36 AM, Dove, Kelly <kdove@swlaw.com> wrote:

[WARNING: External Email]

Good afternoon,

We represent the U.S. Chamber of Commerce and the Las Vegas Chamber of Commerce as proposed amici in this appeal. I am writing to request your consent to file their brief in support of Appellant, Sierra Health & Life Ins. Co. *See* NRAP 29(a).

Please don't hesitate to contact me if you have any questions.

Thank you,
Kelly

Kelly H. Dove (she/her/hers)

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