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 06:47 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

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & THE VEGAS CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT

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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.

Both entities are represented as *Amici Curiae* by Snell & Wilmer LLP.

STATEMENT OF INTEREST OF *AMICI CURIAE*

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.

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 entire world.

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INTRODUCTION

This appeal arises from a jury's staggering award of $200 million in a purely noneconomic and punitive damages based on Sierra Health and Life Insurance's ("SHL") denial of Mr. Eskew's request for proton beam therapy ("PBT") as treatment for lung cancer, even though *none* of the country's 12 largest insurers – covering nearly 80% of all insured Americans – considered this experimental treatment to be proven or medically necessary for treating lung cancer at that time. Lacking any evidence that SHL's decision was in bad faith, Mr. Eskew's Estate devoted the trial to instead attacking the managed-care system, despite being the predominant form of health insurance nationwide and in Nevada. What's more, the conscience-shocking sum of $200 million was not only wholly arbitrary, but at the Estate's urging, improperly based on amounts that one of SHL's distant corporate relatives invested in PBT's advancement, perversely penalizing investment in emerging medical treatment.

This Court should reverse the judgment, or, at a minimum, remit the grossly excessive, arbitrary, and unconstitutional damages award. To start, the Estate failed to establish its insurance bad-faith claim. Contrary to its position at trial, SHL's participation in the managed-care

system cannot, as a matter of law, constitute bad faith. Rather than addressing the issues particular to Mr. Eskew, the trial instead served as a referendum on the managed-care system, as the 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. *E.g.*, 14-JA-2818-19. The district court committed serious legal error by allowing this line of argument and accepting it as a basis for bad faith.

Indeed, regardless of the jury's, or anyone's, personal views about managed care, it is this country's predominant system of healthcare, covering 99% of the 159 million individuals with employer-based plans;[1] "nearly half … of the eligible Medicare population";[2] and 72% (57 million) Medicaid beneficiaries.[3] Congress propelled the growth of these

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[1] Gary Claxton et al., *Employer Health Benefits: 2022 Annual Survey* 58, 74 (2022), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2022-Annual-Survey.pdf.

[2] Meredith Freed, et al., *Medicare Advantage in 2022*, KFF (Aug. 25, 2022), https://www.kff.org/medicare/issue-brief/medicare-advantage-in-2022-enrollment-update-and-key-trends/.

[3] Elizabeth Hinton & Jada Raphael, *10 Things to Know About Medicaid Managed Care*, KFF (Mar. 1, 2023), https://www.kff.org/medicaid/issue-brief/10-things-to-know-about-medicaid-managed-care/.

programs by enacting the HMO Act of 1973 in response to an explosive rise of health care costs during that decade – costs that the healthcare system primarily allocated to patients under the prevailing indemnity plans of that era. Peter R. Kongstvedt, *Essentials of Managed Health Care* at 6 (6th ed. 2012) (in 1960, approximately 56% of all healthcare costs nationally were paid out of pocket, which "declined steadily" to 14.2% in 2020). Today, nearly every state provides for and regulates managed care, which Nevada law recognizes as a system that "encourages the efficient use of health care services." NRS 695G.040. Nevada thus expressly permits insurers to determine whether procedures are "medically necessary" after a physician submits the procedure for "prior authorization" of insurance coverage. NRS 695G.055

Moreover, the Estate failed to establish its bad-faith claim as a matter of law because it did not show that SHL formed or applied its PBT medical policy – which reflected the medical community's widespread consensus on PBT's efficacy at the time – in bad faith. Indeed, the Estate's own expert agreed that the policy neither omitted nor skewed the relevant available studies. Even the doctor who submitted Mr. Eskew's coverage request to SHL acknowledged in a medical journal

two years later that PBT's "clinical advantages … have remained largely theoretical …." 16-JA-3223. And it is undisputed that the traditional radiation therapy Mr. Eskew received was equally efficacious and as such neither caused nor hastened his death. Because the evidence establishes that, at most, there was a genuine, good-faith dispute concerning PBT's efficacy, the Estate's bad-faith claim necessarily fails. Left undisturbed, this verdict would expand the tort of insurance bad faith well beyond its recognized parameters.

Finally, if the Court declines to reverse the judgment, or grant SHL the new trial it requests, it should remit the colossal and inherently arbitrary $40 million compensatory damages award for purely noneconomic harm because it is likewise unsupported and conflicts with longstanding precedent requiring that awards be anchored to some objective metric. Likewise, allowing that already outrageous sum to be multiplied four-fold to award an additional $160 million in punitive damages violates due process. This Court should reverse.

ARGUMENT

I. SHL's Application of Its Managed-Care Program Cannot Constitute Bad Faith Because There Is No Evidence that It Formed or Relied on Its Medical Policy in Bad Faith.

To prove insurance bad faith, a "plaintiff must establish that the

insurer had no reasonable basis for disputing coverage, and 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, 703, 962 P.2d 596, 604 (1998). As SHL addresses in its Opening Brief, the Estate did not establish either prong, and as discussed below, this Court should reject the Estate's attempt to render the application of a managed-care system as per se bad faith.

A. Managed Care Is an Established, Regulated Practice Under Federal and State Law.

As referenced above, managed-care plans proliferated after Congress enacted the HMO Act of 1973, largely replacing "indemnity plans" that reimbursed patients for a portion of medical costs after they were incurred. That same year, the Nevada Legislature enacted Chapter 695C, recognizing "the rising cost of health services in recent years" and its intention to "provide improved health care … at a lower cost" through health maintenance organizations, an early iteration of managed care. NRS 695C.020.

By 1996, managed care comprised 73% of employer-based plans – a full reversal from 1988, when traditional indemnity plans constituted nearly three-fourths of employer plans. Claxton et al., *supra*, at 74. It is

thus unsurprising that nearly every state, including Nevada, enacted laws during that decade to regulate what was quickly becoming a cornerstone of U.S. healthcare. In 1997, then-Assemblywoman Barbara Buckley successfully introduced AB 156, which created NRS Chapter 695G, "a new chapter regulating managed care organizations (MCOs)." Assemb., Summary of Legislation: A.B. 156, 69th Sess., at 1 (Nev. 1997). This statutory scheme recognizes utilization review and prior authorization as crucial components of managed care to provide for "the efficient use of health care services…." NRS 695G.040-.050; *see also* NRS 695G.080 (defining utilization review); NRS 695G.170(2) (establishing use of prior authorization). The Chapter also recognizes that utilization review and prior authorization turn on MCOs determining what procedures are "medically necessary," to ensure that medical services are "[p]rovided in accordance with generally accepted standards of medical practice" and are "[c]linically appropriate." NRS 695G.055. The Chapter thus defines what "medical or scientific evidence" may be considered in making such evaluations, including "[p]eer-reviewed scientific studies" and "medical literature," as well as "[f]indings, studies or research conducted by … nationally recognized

federal research institutes ...." NRS 695G.053(1), (2), (5).

Accordingly, an insurer's determination of "medical necessity" as part of the prior-authorization process is a critical component of the managed-care system that is firmly rooted in federal and state law.

B. Managed Care Was an Integral Part of Mr. Eskew's Insurance Plan.

Mr. Eskew's insurance plan ("the Plan") reflects Chapter 695G, extensively addressing "SHL's Managed Care Program," including which "Covered Services Require Prior Authorization." 15-JA-2946. For example, the Plan explains that covered services are available only if they are "[s]pecfically authorized through SHL's Managed Care Program" and are "Medically Necessary as defined in [the Plan]," requiring prior authorization for certain covered services. *Id*. "Only Medically Necessary services are considered to be Covered Services." 15-JA-2946.

These same overarching requirements also apply specifically to the Plan's enumerated "Diagnostic and Therapeutic Covered Services," including "[t]herapeutic radiology services" – which the parties agree encompasses PBT. 15-JA-2951. Those services are covered only "when [1] prescribed by an Insured's Physician and [2] authorized by the Managed Care Program ...." *Id*.

Each relevant provision leads to the same result: coverage under the Plan depends on SHL's medical director issuing prior authorization for a procedure prescribed by the insured's doctor by assessing whether that procedure is "Medically Necessary," which is "determined by SHL" based on listed factors. 15-JA-2972. That definition ends in a bolded warning that "**[s]ervices and accommodations will not automatically be considered Medically Necessary simply because they were prescribed by a Physician.**" *Id.*

Notably, the Plan's "Policies and Procedures" permit SHL to "adopt reasonable policies, procedures, rules and interpretations to promote the orderly and efficient administration of th[e] Plan" and informs insureds that "policies and procedures are maintained by SHL at its offices" and "may have bearing on whether a medical service and/or supply is covered." 15-JA-2961. Consistent with that provision, SHL adopted the Medical Policy on Proton Beam Radiation Therapy. 15-JA-3105. The Medical Policy provides that PBT is "proven and medically necessary" for certain cancers, such as "[o]cular tumors," but "is unproven and not medically necessary for treating ALL other indications, including but not limited to . . . [l]ung cancer." 15-JA-3106.

C. There Is No Evidence that SHL *Formed* Its Medical Policy in Bad Faith.

In assessing PBT's efficacy, the Medical Policy exhaustively analyzed myriad clinic studies and reports of professional institutions. 15-JA-3109. For example, the Policy cites a report by the Agency for Healthcare Research and Quality ("AHRQ"), which is the first "nationally recognized federal research institute[]," that Nevada lists as a source of "medical or scientific evidence" for evaluating medical necessity. NRS 695G.053(5). The AHRQ report concluded that "there is very limited evidence comparing the safety and effectiveness of [PBT] with other types of radiation therapies for cancer" and that it is thus "not possible to draw conclusions about [its] comparative safety and effectiveness … at this time." *Id.*

The Policy also analyzes studies specifically addressing lung cancer, uniformly concluding that there is insufficient evidence to draw any conclusions about whether PBT has advantages over traditional therapies in terms of survival, quality of life, symptomatic relief, and toxicities. 15-JA-3117-19. Indeed, the Estate and its expert, although disagreeing with the Policy's conclusions, never contended or demonstrated that the Policy omitted material studies or intentionally

skewed the available data to reach a contrived conclusion. 6-JA-1254-55. Absent such evidence, there remains at most a genuine disagreement regarding the conclusions reached from the available data and thus the medical necessity of the prescribed treatment.

But the "genuine dispute doctrine" precludes a finding of bad faith in this instance. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 669 (9th Cir. 2003). It is well established that, "[b]ecause the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was 'a genuine dispute as to coverage.'" *Id.* (citation omitted); *accord Cohan v. Provident Life & Accident Ins. Co.*, 140 F. Supp. 3d 1063, 1073 (D. Nev. 2015); *Phillips v. Clark Cnty. Sch. Dist.,* 903 F. Supp. 2d 1094, 1104 (D. Nev. 2012) (same); *see also Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 863 F. Supp. 1237, 1242 (D. Nev. 1994). As the Estate's expert's testimony underscores, the evidence the Estate adduced at trial at most demonstrated a genuine, good-faith dispute regarding PBT's comparative efficacy for treating lung cancer – though the broad consensus among the nation's largest insurers belies the existence of any actual debate. Such

a dispute is insufficient as a matter of law to establish bad faith.

D. There Is No Evidence SHL *Applied* the Policy or Insurance Plan in Bad Faith.

The Estate argued throughout trial that SHL incorrectly or improperly applied the Policy and Plan, repeatedly contending, for instance, that it expressly covered "therapeutic radiology" and that SHL thus manufactured a coverage limitation that did not exist in the Plan. *See* 5-JA-904 (representing to the jury that "no limitations were on … coverage" for "proton beam therapy"); 5-JA-972 (asserting during questioning that "looking just that far in the policy, … proton beam therapy, because it's a therapeutic radiology service, is covered"); 14-JA-2826 (telling the jury that "[t]herapeutic radiation is covered … It says so in black and white.").

But these assertions are demonstrably incorrect. The Plan clarifies that "therapeutic radiology services" must be deemed "medically necessary" by SHL's medical director during prior authorization to be covered. 15-JA-2947. The Estate cannot shear the Plan of its managed-care structure by reading one part of one sentence in isolation and to the exclusion of the entire provision or Plan. *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014) (requiring

that contracts be read as a whole "to give reasonable and harmonious meaning to the entire" agreement). And the district court notably misapprehended this precise point, denying SHL's motion for a directed verdict based (incorrectly) "on the fact that the insurance policy states that therapeutic radiation was a covered service, and proton therapy is a form of therapeutic radiation." 10-JA-2217.

Separately, the Estate contended at trial that "an insurance company cannot rely solely on an internal policy to deny a claim." 17-JA-3493. Not only does this statement misrepresent the law, it misstates the evidence. Dr. Shamoon Ahmad, the SHL medical director who reviewed Mr. Eskew's request, testified that he also analyzed the medical files Mr. Eskew's prescribing doctor transmitted and independently researched literature on PBT and lung cancer. 5-JA-1011.

Finally, while the Estate made much of the fact that Dr. Ahmad did not personally review Mr. Eskew's specific Plan, this is a red herring. A separate reviewing nurse confirmed for Dr. Ahmad that the Plan's terms comported with SHL's standard coverage language, with which Dr. Ahmad was "very familiar." 5-JA-980. And like all managed-care programs that require prior authorization, the coverage at issue turned

on whether PBT was medically necessary – an inquiry based on medical science.

Accordingly, the Estate presented no evidence that SHL misapplied the Policy or Plan – let alone it that did so with an intent to deny coverage in bad faith.

E. The Estate Improperly Framed the Trial as a Referendum on Managed Care.

Lacking any evidence that SHL's coverage decision was in bad faith, the Estate devoted the trial instead to vilifying managed care and utilization review. Indeed, it castigated managed care as a "rigged system" at least 14 times during opening statements and closing arguments. Within the first three sentences of trial, the Estate's counsel impressed upon the jury that "***[y]ou're here to pass judgment on what we will prove is a rigged system*** that has injured, will injure, and did injure William Eskew." 5-JA-886 (emphasis added). This theme of placing the managed-care system on trial permeated the proceeding:

- "And what … we believe that the evidence will show is that the defense of this case is built by the rigged system that was created by the corporate people that make UnitedHealthcare." 5-JA-913.
- "We created a rigged system that can hurt people…." 5-JA-915.

- "So this case really comes together about a normal person, Bill Eskew, and his widow, Sandy, against this rigged system, this insurance company. We submit to you, ladies and gentlemen, **that somebody has to do something about this.**" 14-JA-2821 (emphasis added).

Accord 10-JA-2216; 11-JA-2758; 14-JA-2821, 2822-23, 2829, 2882.

And the Estate pushed this theme even further during the trial's closing minutes, arguing that managed care and utilization review were not only "rigged" but evil:

> ***This system that we call rigged system***, for good reason….
>
> ***Always sounded kind of sinister, managed care and utilization management***. And, you know, it's – it's there to control cost. . . . Well, since the institution of managed care and utilization management, ***I haven't noticed premiums going down***. ***Cost of healthcare hasn't dropped off. The opposite***.

14-JA-2818–19 (emphasis added). The Estate similarly emphasized that, unless the jury found SHL liable, they would be giving this sinister "system that we're talking about [their] seal of approval." 14-JA-2829. As these and other statements at trial make clear (*see* AOB § III.C), the Estate put managed care itself on trial – expressly asking the jury to send SHL a "message" with a "language they understand[:] Money." 14-JA-2883.

This Court has repeatedly held that relief from a verdict is warranted when the resulting award "is so excessive as to suggest the intrusion of passion and prejudice upon [the jury's] deliberations." *Harris v. Zee*, 87 Nev. 309, 312, 486 P.2d 490, 492 (1971). Here, while the conscience-shocking $200 million award is alone highly probative of a tainted verdict, the passion and prejudice that the Estate expressly injected into the trial demonstrates that the finding of bad faith is unsupported by substantial – or, indeed, any – evidence.

F. The Estate Also Relied Heavily on Improperly Admitted Evidence That SHL's Distant Corporate Cousin *Subsequently* Opened a PBT Center.

The Estate also made much of the fact throughout trial that ProHealth – 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 in New York City in 2019. 1-JA-56. Notably, ProHealth is not an insurance company, and the PBT Center was opened because of a "lack of randomized studies demonstrating PBT's effectiveness in comparison with conventional therapies." 15-JA-3083. The Center would have the capacity for approximately 800 "patients with cancers for which the effectiveness of PBT has not been demonstrated,"

and was thus an investment aimed at exploring whether PBT was more effective than conventional therapies. 15-JA-3084. The Estate nonetheless accused SHL of "breathtaking … hypocrisy" because the Center's website, published *years after* the coverage decision, advertised PBT's benefits. *See* 14-JA-2811.

As SHL explains, the district court committed reversible error by admitting this evidence over SHL's objection given the clear lack of relevance and extreme prejudice this evidence entailed. AOB § III.B. Even placing aside how far removed SHL is from the entity that invested in the PBT Center, the 2019 opening of the Center is wholly irrelevant to SHL's February 2016 coverage decision. Medical science advances, and the 2016 coverage decision was based on the then-available studies and the expert opinions – as reflected in SHL's Medical Policy.

Thus, beyond failing to satisfy the threshold relevancy requirement, evidence of the PBT Center provided the jury an additional improper basis for attributing bad faith to SHL's coverage decision.

G. The Verdict Severely Erodes Managed Care and Other Important Public Policies.

The verdict is starkly at odds with not only the established parameters of insurance bad faith but, critically, *legislative* decisions by

Congress and the Nevada Legislature to permit and promote managed care and utilization review, with the aim to increase efficiencies in the healthcare system, while reducing out-of-pocket costs for patients. Kongstvedt, *supra*, at 6; *see also* NRS 695G.040.

The trial's fixation on SHL's Medical Policy likewise advances a deleterious result, as the Policy's conclusion that PBT is unproven and thus medically unnecessary was consistent with 12 of the nation's largest carriers – collectively insuring over 170 million individuals. 11-JA-2302. Taken to its logical conclusion, the Estate's position would require individual medical directors to make ad hoc decisions, unaided by standardized guideposts. This would undoubtedly result in inconsistent medical-necessity decisions for the same treatment under the same insurer. Such an ad hoc process would thus also eliminate the very systemwide efficiencies that Congress and state legislatures aimed to advance by spurring the growth of managed care. And if left undisturbed, the verdict will sow widespread uncertainty as to what long-established practices insurers should change to avoid this kind of nuclear liability.

Moreover, the district court's decision to admit the PBT Center evidence strongly conflicts with the well-established policy against citing

subsequent developments or "remedial measures" to prove liability. As the U.S. Supreme Court has emphasized:

> [O]ur cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced. Other areas of the law, moreover, have for strong policy reasons resisted rules crediting the notion that "because the world gets wiser as it gets older, therefore it was foolish before."

Dusenbery v. U.S., 534 U.S. 161, 172 (2002). And though the later creation of a PBT Center is not a remedial measure per se, admitting this evidence violates the policies underlying FRE 407 and Nevada's analogue, NRS 48.095. *See id.* ("[T]he same principle supports our conclusion that the Government ought not be penalized and told to 'try harder,' simply because the BOP has since upgraded its policies." (cleaned up)).

The PBT Center evidence thus likewise advances the same detrimental policy implications these evidentiary rules are designed to safeguard against. In the same way that evidence of later remedial measures disincentivizes companies from changing policies, evidence of the Center's subsequent creation highly discourages investment in emerging, experimental technologies for fear that advances in medical

science will, as here, be used to *retrospectively* penalize insurers for prior medical-necessity determinations.

Given the absence of bad faith and the verdict's wide-ranging impact, *Amici* join in SHL's request that this Court vacate the judgment.

II. Alternatively, this Court Should Drastically Reduce the Unprecedented Damages Award.

A damages award must be supported by "substantial evidence" in the record and will be reversed or reduced when it is "given under the influence of passion or prejudice" and when "it shocks [the judicial] conscience." *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010) (citation omitted). Neither the award for $40 million in compensatory damages nor $160 million in punitive damages is supported by substantial evidence – nor could they be given that the jury lacked any objective metric to measure the alleged emotional-distress damages.

A. The $200 Million Award Is Not Based on Any Objective Metric or Supported by Substantial Evidence.

1. Historic Standards for Emotional-Distress Damages Required Objective Criteria and Align with Nevada Law.

English courts initially shunned mental-suffering damages because they were "inherently subjective." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995) (discussing the "convoluted and complex" "history of

mental anguish damages in Anglo–American jurisprudence"). Even as American courts liberalized those rules, they imposed objective standards to govern review of noneconomic damages. For instance, recovery of emotional-distress damages was initially permitted only if the anguish was "(1) accompanied by a physical injury resulting from a physical impact, or (2) produced by a particularly upsetting or disturbing event." *Id.*; Dan B. Dobbs et al., *The Law of Torts* § 382 (2d ed. 2022 update) (discussing the evolution of "special limiting rules" on emotional distress).

States eventually began to relax these requirements. *Id.* A plaintiff, for instance, no longer needed to demonstrate a physical *impact* and could recover for emotional anguish if the underlying tort resulted in a physical *manifestation* of that anguish. *Id.* at 442–43; *see also* Dobbs et al., *The Law of Torts* § 393 (discussing the degrees of physical manifestation that courts have required). This approach still preserved some form of objective criterion. But over time, "a large number of cases have either dropped the requirement of physical symptoms or manifestations or have held that the requirement does not apply when the facts of the case tend to show the reality of the plaintiff's emotional

harm." Dobbs et al., *supra* § 393.

Nevada law presents an exception to that trend. This State continues to "require[] a plaintiff to demonstrate that he or she has suffered some physical manifestation of emotional distress in order to support an award of emotional damages." *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010). This Court has "relaxed the physical manifestation requirement in a few limited instances," such as a claim for assault. *Id.* at 167, 232 P.3d at 436. This is because "the nature of a claim of assault is such that the safeguards against illusory recoveries" addressed in prior holdings. *Olivero v. Lowe*, 116 Nev. 395, 400, 995 P.2d 1023, 1026 (2000). That reasoning reflects the reality that certain torts "are constructed for the very purpose of permitting recovery for distress." Dobbs et al., *supra*, § 382 ("The recovery for assault is a recovery for that unpleasant apprehension, a species of emotional distress.").

By contrast, torts premised on financial harm, although sometimes yielding economic distress as "derivative damages," *see id.*, generally require an objective criterion, such as evidence of underlying pecuniary injury. Insurance bad faith is a prime example. Although this Court has

not had the opportunity to address this particular issue, California courts – from which this State derives much of its bad-faith precedent[4] – have consistently held that damages for emotional distress require a showing of underlying economic harm. *E.g.*, *Waters v. United Servs. Auto. Assn.*, 41 Cal. App. 4th 1063, 1078 (Cal. App. Ct. 1996) ("However real th[e] distress [that the plaintiffs endured] was…, it was not 'economic' or 'financial' harm. It did not involve any pecuniary loss."). That conclusion stems from the fact that "bad faith actions seek recovery of a property interest, not personal injury." *Maxwell v. Fire Ins. Exch.*, 60 Cal. App. 4th 1446, 1451 (Cal. App. Ct. 1998); *see also Gourley v. State Farm*. 822 P.2d 374, 378 (Cal. 1991) (recognizing that a bad faith action "is not a suit for personal injury," but "financial damage").

The throughline of this historic arc is that Nevada, like California and in accordance with well-established tort principles, continues to look for objective metrics in awarding emotional-distress damages. And this approach exists for good reason: without some form of economic damages to which derivative mental anguish can be anchored, an award solely for

[4] *U.S. Fid. & Guar. Co. v. Peterson*, 91 Nev. 617, 619–20, 540 P.2d 1070, 1071 (1975) (adopting California bad-faith precedent).

emotional distress is entirely subjective and hinders meaningful post-verdict review. Indeed, as one of the leading torts treatises cautions:

> [E]motional harm, as distinct from the financial costs of treatment, cannot ordinarily be represented in dollar awards. We may be confident that the plaintiff suffers distress or some other form of diminished enjoyment in life, **but seldom can we give reasons why the distress is worth $100,000 rather than one-tenth as much or ten times as much**. That makes us uncertain about the justice and even-handedness of awards. Judicial review is correspondingly difficult or impossible.

Dan B. Dobbs et al., *The Law of Torts* § 383 (2022 update) (emphasis added).

Both the award of $40 million in compensatory damages and $160 million in punitive damages exemplify these concerns.

2. <u>The Damages Award Lacks Any Objective Basis.</u>

It is undisputed that the Estate claimed exclusively noneconomic damages: (1) emotional distress resulting from the denial of insurance coverage and (2) pain and suffering from the allegedly worse esophagitis Mr. Eskew experienced from his intensity-modulated radiation therapy (compared to the allegedly less severe esophagitis that he *may* have experienced if he had received PBT). The trial thus presented the jury with no objective anchor from which it could extrapolate the purely

noneconomic harm claimed.

The same absence of underlying economic loss was the very reason the California Court of Appeal reversed judgment on an insurance bad-faith claim in *Waters*. There, the plaintiffs "did not put on any evidence of any kind of financial loss—no medical or hospital bills paid (or even incurred), no attorneys' fees, no interest paid on borrowed funds," etc. 41 Cal. App. 4th at 1069. The Estate here likewise presented no evidence of any economic harm resulting from SHL's coverage decision, such as (hypothetically) additional hospitalization or aftercare needed, or lost time at work.

For the reasons SHL articulates in its Opening Brief, *Amici* urge the Court, consistent with California, to require some form of *proven* pecuniary loss (such as the out-of-pocket costs of alternative medical treatments or aftercare) as a prerequisite to claiming noneconomic damages under an insurance bad-faith claim. AOB § I.C. But even if this Court is not inclined to adopt a bright-line rule, the absence of economic harm presented at trial highlights the lack of any objective criteria for the resulting jury award.

Seen another way, there is no basis to justify the $40 million

awarded in compensatory damages, and without any basis, the jury could have instead awarded $400,000, $4 million, or $400 million under the same circumstances that resulted in the $40 million award. The lack of underlying economic harm deprived the jury of a "floor" of damages from which it could then compare the tens of millions that the Estate requested in emotional-distress damages. And aside from the application of the comparative approach (addressed below), the lack of pecuniary harm likewise deprives this Court of a meaningful means of reviewing the award. Simply stated, the award was inherently arbitrary.

3. The Estate Instead Anchored Its Award Request in an Improper Metric: The Money Invested in the PBT Center.

Not only did the Estate heavily rely on the tenuous connection between SHL's distant corporate cousin and the PBT Center to support the unfounded bad-faith theory, but it also expressly tied the measure of *compensatory* damages to this improper metric, asking the jury to award compensatory damages based on the sum that SHL's distant corporate cousin invested:

> [Y]our job is to apply these damages in common sense figure …
>
> ***And the only reasonable way to do this is by money***. I say 30 -- $30 million. Thirty million

> dollars. ***Just if you want an example***, just think about what this insurance -- what United Health Group was willing to invest to help people like Mr. Eskew on the medical arm. That was 15 to 250 million. ***If you use that as a context***, 50 million isn't that bad. Thirty million is my suggestion.

14-JA-2753-54 (emphasis added). Unable to provide any objective bases related to Mr. Eskew to justify $30 million in requested compensatory damages, the Estate expressly asked the jury to use a wholly improper substitute. The Estate thus cannot deny that the resulting $40 million in "compensatory" damages awarded was not a measure of the harm that Mr. Eskew incurred but is inherently and exclusively a punitive figure – one stemming from an irrelevant, highly prejudicial premise.

Given these realities and the lack of any objective basis with which to review the damages award, this Court should find that the award lacks substantial evidence and grant substantial remittitur.

B. The District Court Erred by Not Considering the Comparative – Or in Fact Any – Approach in Summarily Denying SHL's Remittitur Request.

In moving for remittitur, SHL asked the district court to reduce the damages award, in part, because it was grossly excessive as compared to awards upheld or reduced on appeal in other Nevada cases. 17-JA-3409-10. SHL supported this request by detailing cases from 1950

onward involving noneconomic damages. 17-JA-3420-29. The district court considered none of this evidence. Despite the weight of a $200 million verdict and the numerous dispositive issues raised in SHL's post-trial motions, the district court vacated the motions hearing and denied the motions with cursory minute orders comprised merely of bald string cites. 17-JA-3553-56.

This Court should thus presume that the district court declined to apply the comparative approach and/or failed to consider it. But this analytic tool is well-established in American jurisprudence and should be applied to this case given the lack of any objective criteria underlying the $200 million award.

1. The Comparative Approach Has Been an Established Part of American Jurisprudence for Centuries.

For hundreds of years, English and early American courts helped ensure objective appellate review of damages awards by comparing the awards before them against awards in factually similar cases. Around the middle of the eighteenth century, *See, e.g.*, *Wilford v. Berkeley* (1758) 97 Eng. Rep. 472, 472; 1 Burr. 609, 609 (describing a case that was "exactly similar to this [case]; and the very same sum . . . was given"); *Goldsmith v. Lord Sefton* (1796) 145 Eng. Rep. 1046, 1046; 3 Anst. 808,

809 ("[T]he injury was much more serious than here, the damages not so great, yet the verdict was set aside"); *Clapp v. Hudson R.R. Co.*, 19 Barb. 461, 463–67 (N.Y. Gen. Term. 1854) (analyzing verdicts in three similar cases). Courts even enlisted the comparative approach to review compensatory awards for pain and suffering. *See Murray v. Hudson River R. Co.*, 47 Barb. 196, 200–04 (N.Y. Gen. Term. 1866) (recognizing that the plaintiff's injury were "less severe than several of those in which new trials were awarded").

The comparative approach is also rooted in more modern jurisprudence. 23 Cal. Jur. 3d *Damages* § 209 (2022 update) ("The amount of an average award allowed for a particular injury in the past . . . has its place in ascertaining the damages to be allowed, and the appellate court may consider those amounts …." (footnotes omitted)). In *Gilbert v. DaimlerChrysler Corp.*, for instance, the Michigan Supreme Court endorsed and applied the comparative approach, holding that the damages award was excessive as compared to awards in comparable cases. 685 N.W.2d 391, 400–02 (Mich. 2004) ("[W]hen a verdict is unsupported by the record or entirely inconsistent with verdicts rendered in similar cases, a reviewing court may fairly conclude that the verdict

exceeds the amount required to compensate the injured party.").

This Court has likewise applied the comparative approach. *E.g.*, *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983). In *Allen,* the Court examined jury awards even from other jurisdictions to determine that the plaintiff "was entitled, as a matter of law, to less than these plaintiffs received." *Id*.

To be sure, this Court has not held that comparative approach is the *sine qua non* of reviewing damages awards and has upheld awards in which the district court did not apply the approach. *E.g.*, *Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10. *Allen* is, however, best read to warrant the comparative approach when some factor demonstrates the need for "added scrutiny" – which in that case stemmed from the First Amendment concerns underlying the defamation claim. But *Allen* never limited the comparative approach to defamation, and many of the factors addressed above warrant added scrutiny of the instant award, including: (1) the Estate using the trial as a referendum of managed care; (2) the award's colossal size; (3) the fact that the award is comprised solely of noneconomic damages: (4) the Estate's express invitation that the jury substitute the sum invested in the PBT Center for evidence of actual

compensatory damages; and (5) the fact that the court below denied the motion for a new trial or remittitur without a hearing and without issuing a reasoned decision.

2. The Comparative Approach Justifies Substantial Remittitur.

As SHL demonstrated (but the district court declined to consider), both the compensatory and punitive damages here are several times greater than the largest awards for noneconomic damages that this Court has ever upheld. *See Wyeth*, 126 Nev. at 451, 244 P.3d at 769. In *Wyeth*, three plaintiffs sued a pharmaceutical company after its hormone therapy pills contributed to their development of "invasive breast cancer." *Id*. Notably, even before this Court reviewed the damages award, the district court had applied remittitur, reducing the combined $35.1 million compensatory-damages award to $23 million and the $99 million in punitive damages to $57,778,909 – which this Court upheld. *Id*. at 460. Accordingly, the $40 million in compensatory damages here is ***more than five times*** the approximately $7.7 million per plaintiff upheld in *Wyeth*, while the $160 million in punitive damages here is ***more than eight times*** the approximately $19 million per plaintiff in *Wyeth*.

Beyond this comparison of raw figures, *Wyeth* is notable in several respects. First, in upholding punitive damages, this Court found that the pharmaceutical company's conduct, including its use of misleading labels, was "malicious" and "fraught with reprehension and deception." *Id.* at 460, 469. Here, there is no such evidence of malice, fraud, or reprehensible conduct given SHL's reliance on a Medical Policy that conformed with industry standards and prevailing medical views.

Second, despite the pharmaceutical company's reprehensible conduct, the district court reduced the original damages awards. The combined $200 million award *here* outpaces even the *original* combined award in *Wyeth* of $134.1 million. That reality is staggering considering that the latter figure compensated 3 separate plaintiffs in comparison to the single plaintiff in this matter.

Third, the district court in *Wyeth* reduced the damages because the "[p]laintiffs offered very limited evidence and argument in support of compensatory damages," failing to provide evidence of "lost wages or any other actual losses presented to the jury." *Rowatt v. Wyeth*, 2008 WL 876652 (Nev. Dist. Ct. Feb. 19, 2008). Rather, "[t]he great bulk of Plaintiffs' compensatory damages, past and future, were for pain,

suffering and emotional distress." *Id.* And though the district court recognized that the three plaintiffs had suffered tremendously and would forever live with the specter of "possible re-occurrence of cancer," it nonetheless concluded that the scope of the purely noneconomic damages was unfounded. *Id.* The same reasoning applies here with even greater force.

Accordingly, the comparative approach underscores the need for severely reducing the unprecedented $200 million award for purely noneconomic damages.

C. The $160 Million Punitive-Damages Award Violates Due Process.

"The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). That conclusion is premised on "elementary notions of fairness enshrined in our constitutional jurisprudence [that] dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 417 (cleaned up).

As thoroughly addressed in SHL's brief, even if the underlying

finding of bad faith is upheld, there is no evidence – let alone "substantial clear and convincing evidence" – that SHL acted with malice or oppression. AOB § II; *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000). And even if punitive damages are somehow warranted, the $160 million award is unconstitutionally excessive under the three guideposts articulated by the U.S. Supreme Court. AOB § IV.B.

Amici write separately on this latter issue to briefly highlight two related points. First, the compensatory damages in this case were inherently punitive. As addressed above, even during ***the liability-phase of trial***, the Estate expressly tied its request for damages to the money that SHL's corporate cousin *later* used in opening the PBT Center. 14-JA-2753-54. This argument undeniably asked the jury to punish – not to compensate. This punitive theme continued throughout the liability phase, with the Estate arguing to the jury:

- "Business as usual for this insurance company is to violate the law. They're above the law, that's business as usual." 14-JA-2719.
- "[J]uries regulate insurance companies more than anyone, including the government." 14-JA-2833.
- Jury verdicts can be a good thing to regulate conduct." *Id.*

These arguments again expressly asked the jury to award damages for a purpose other than compensation – here, to effectively impose a fine on SHL. While some of these themes may be appropriate for the punitive-damages phase of trial, they were categorically improper for determining a compensatory damages award, which was undeniably punitive in nature. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001) (addressing the "distinct purposes" between compensatory and punitive damages); 25 C.J.S. *Damages* § 22 (2023) ("The goal or primary purpose of awarding compensatory damages is not to punish the defendant but to redress the concrete loss that a plaintiff has suffered…."). Accordingly, if punitive damages are awarded, they should be limited to whatever figure this Court reduces the $40 million award to – a decreased figure that should be net of compensatory and punitive damages.

Second, to the extent the Court finds that a separate punitive-damages award is appropriate, the four-to-one ratio of damages is unconstitutionally excessive. That ratio is already skewed given that the compensatory damages were grossly inflated and arbitrary. And even placing that reality aside, the U.S. Supreme Court has made clear

that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. Given that the $40 million in compensatory damages is unquestionably substantial and inflated, even a 1:1 ratio is improper but is certainly the "outermost" limit.

Accordingly, if punitive damages are somehow warranted, due process calls for substantial remittitur.

D. Objective Review of Noneconomic Damages Helps Ensure Predictability and Certainty, Which Are Essential to the Rule of Law.

Each of the foregoing points demonstrates that objective, comparative review of noneconomic damages awards brings much-needed predictability and certainty to an otherwise haphazard process and, in doing so, furthers the rule of law. The rule of law, in turn, is essential to economic stability and growth.

In a 2019 survey of in-house general counsel, 89% agreed that "a state's litigation environment … is likely to impact important business decisions at their companies, such as where to locate or do business." U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey* 3 (Sept. 2019), https://instituteforlegalreform.com/research/2019-lawsuit-

climate-survey-ranking-the-states/. Damages awards are a significant component of a state's legal environment.[5] *Id.* at 10, 16. For instance, the avoidance of "inconsistent, excessive, and unpredictable awards" helps "stabilize or lower insurance costs for . . . businesses." Mark A. Behrens & Cary Silverman, *Building on the Foundation*, 34 Miss. C.L. Rev. 113, 122 (2015).

At bottom, while the threat of runaway damages awards incentivizes job creators to go elsewhere to receive fairer and more predictable treatment, meaningful review of noneconomic damages awards "encourage[s] businesses to bring much needed employment and other economic resources" to Nevada. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 17 (N.C. 2004).

[5] Notably, Nevada's tort costs are already high – $3,757 per household and 2.48% of the State's GDP. U.S. Chamber Inst. for Legal Reform, *Tort Costs in America* 18 (Nov. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf. The verdict here only exacerbates these costs.

CONCLUSION

For the foregoing reasons and those addressed in the Opening Brief, this Court should vacate the verdict or, alternatively, substantially reduce the damages award.

DATED: April 18, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & THE VEGAS CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because it contains approximately 6,991 words.

Finally, I hereby certify that I have read the **BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & THE VEGAS CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number,

if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 18, 2023

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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 **BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & 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.

4873-4275-2349