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 REPLY BRIEF

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INTRODUCTION

Plaintiff's Answering Brief confirms that her claims for bad faith and punitive damages fail as a matter of law. The evidence does not support a finding of liability, let alone warrant upholding a shocking $200 million damages award imposed by a jury swayed by passion and prejudice.

Plaintiff's brief confirms that the following points are undisputed:

- The plain language of the insurance contract at the heart of this case provides coverage for proton therapy only when Sierra Health and Life Insurance Company, Inc. (SHL) deems it medically necessary.
- The Medical Policy SHL relied on in denying coverage—which was based on the latest scientific literature and peer-reviewed studies from the Nation's leading medical and radiological organizations—determined that proton therapy was unproven and not medically necessary for persons with stage IV lung cancer, such as Mr. Eskew.
- As of 2016, when SHL made the challenged coverage decision, the 12 largest insurers in the United States—and the courts to have

considered the issue—had all concluded that proton therapy was unproven and not medically necessary for treating lung cancer.

Although Plaintiff argues at length that Mr. Eskew's treating physician and Plaintiff's expert witness thought proton therapy was medically necessary in Mr. Eskew's case, the question before this Court is not whether proton therapy *was* medically necessary, but simply whether SHL had a *reasonable basis* for the decision it made. It plainly and indisputably did. SHL reached the same conclusion as did the Nation's leading scientists and doctors, the largest insurance companies, and the courts that had ruled on the question. As explained in the amicus brief from the U.S. Chamber of Commerce and the Vegas Chamber of Commerce, Plaintiff is attacking Nevada's entire system of managed care—the system under which insurance companies provide prior authorization for medically necessary healthcare services pursuant to standards and procedures set by the Nevada Legislature.

The $200 million verdict bears all the hallmarks of passion and prejudice. Both the $40 million compensatory award (all in noneconomic damages for pain-and-suffering and emotional distress) and the $160 million punitive award (imposed after less than 60 minutes of jury

deliberation) are stunning outliers in Nevada history. Both exceed by many multiples all such awards that have been upheld in the State. That these awards were issued in a case like this—a single-plaintiff dispute over insurance coverage, in which Plaintiff is not arguing that the denial of coverage caused or even hastened Mr. Eskew's death—leaves no doubt that Plaintiff's counsel succeeded in their attempts to incite and inflame the jury. Plaintiff's efforts to pass off their tactics as legitimate advocacy fall flat. The verdict is irrational on its face and easily meets Rule 59's new-trial standard of "excessive damages appearing to have been given under the influence of passion or prejudice."

Although Plaintiff, for obvious reasons, does not want this Court to consider other awards in analyzing excessiveness, this Court has done so before—and the U.S. Supreme Court holds that a comparative approach is a constitutional mandate. The damage awards in this case must be drastically reduced if they are permitted to survive at all. A bad-faith insurance claim is limited to "rare and exceptional cases," *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997), and neither the evidence nor the U.S. Constitution permits this $200 million award to stand.

ARGUMENT

Plaintiff urges the Court to take a deferential approach to this stunning and irrational verdict, falsely claiming that SHL's arguments are "purely factual" and thus insulated from meaningful review. RAB.25. But this Court "reviews de novo the district court's decision" where, as here, a bad-faith claim presents "a genuine dispute regarding an insurer's legal obligations." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 317, 212 P.3d 318, 329-30 (2009). Likewise, "the standard of appellate review for an order under either NRCP 50(a) or 50(b) is de novo," *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 425 (2007), as is the interpretation of an insurance contract, *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (per curiam). And even as to arguments challenging the sufficiency of the evidence, a jury verdict that is not supported by "substantial evidence" must be set aside. *Allstate*, 125 Nev. at 308, 212 P.3d at 324.

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

Plaintiff begins by misstating the relevant question. It is *not* whether "the jury could conclude that proton therapy was 'medically necessary' to treat" lung cancer. RAB.26. Rather, the question—as

Plaintiff acknowledges elsewhere, RAB.5—is whether SHL "had no reasonable basis for disputing coverage" *and* "knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." AOB.21. The answer to *those* questions is no, and SHL is therefore entitled to judgment on the bad-faith claim.

A. Plaintiff Failed To Establish That SHL Lacked Any Reasonable Basis To Deny Coverage.

1. Plaintiff opens her argument with a flat misrepresentation of the trial record. Plaintiff asserts that SHL's "own employees and experts conceded that proton therapy" was a medically necessary treatment. RAB.3, 26. That never happened, as illustrated by the fact that Plaintiff cites *her own expert's testimony* as proof of SHL's purported concession. RAB.26 (citing 8-JA-1632).

Plaintiff argues that the testimony of Mr. Eskew's treating physician, Dr. Zhongxing Liao, established that proton therapy was a medically necessary treatment in Mr. Eskew's case. RAB.26. Although Dr. Liao testified at the trial in 2022 that proton therapy is "widely accepted," 7-JA-1435, she had previously admitted that as of 2018—two years after the 2016 Eskew coverage decision—"the clinical advantages of proton therapy … have remained largely theoretical." 16-JA-3223.

Likewise, although unnamed "colleagues" of Dr. Liao, RAB.27, supported proton therapy for Mr. Eskew, that does not mean it was medically necessary. The contract says so explicitly: "Services and accommodations will not automatically be considered Medically Necessary simply because they were prescribed by a Physician." 15-JA-2972(§13.66).

Moreover, even were one to credit Plaintiff's claim that there was sufficient evidence "from which the jury could conclude that proton therapy was 'medically necessary' to treat Bill's lung cancer," RAB.26, Plaintiff failed to show that SHL lacked any reasonable basis for its decision. SHL denied the claim based on its Medical Policy's finding that proton therapy was neither proven nor medically necessary for treating lung cancer. The Medical Policy relied on a comprehensive collection of the most recent peer-reviewed studies and clinical trials in joining the then-prevailing consensus in the scientific and medical communities: "Current 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, 3117-19; 11-JA-2285-86. Plaintiff continually and inexplicably asserts that the Medical Policy

was "undisclosed" and "hidden." RAB.2, 29, 31. In fact, the Medical Policy was publicly available online. AOB.35; *see also* Medical Policy (as of Nov. 18, 2015), https://tinyurl.com/2jf9sk6z. Plaintiff never disputes that, nor does she dispute that the contract specifically advised her that "policies" that "may have bearing on whether a medical service … is covered" are "maintained by SHL at its offices." 15-JA-2961.

2. Plaintiff launches a barrage of attacks on the Medical Policy. None has merit.

First, Plaintiff argues that SHL could not have reasonably interpreted the Medical Policy "as establishing that proton therapy wasn't medically necessary." RAB.30. This is an odd claim and one that Plaintiff did not advance at trial. The "peer-review literature" and "evidence based reports and guidelines published by nationally recognized professional organizations," 15-JA-2972(§13.66), canvassed in the Medical Policy all pointed to the same conclusion: the scientific and medical evidence that existed in 2016 did not allow for any definitive conclusions that proton therapy was proven or medically necessary as a treatment for lung cancer under the terms of the contract. To take just one example, the Agency for Healthcare Research and Quality (AHRQ)

determined "the evidence is insufficient to draw any definitive conclusions as to whether [proton therapy] has any advantages over traditional therapies." 15-JA-3119. The Legislature has specifically identified AHRQ studies as a paradigmatic example of "[m]edical or scientific evidence" on which insurers should rely in determining whether particular treatments are proven and medically necessary. NRS § 695G.053(5)(a).

Plaintiff never denies that her expert conceded the Medical Policy thoroughly analyzed the relevant literature and did not omit any published, peer-reviewed studies or articles that should have been cited. 6-JA-1254-55. Although the expert claimed that the medical literature could be read to suggest that proton therapy *is* a "proven" and "medically necessary" treatment for lung cancer, RAB.33, Plaintiff sidesteps the fact that the expert focused on the state of proton therapy in 2022, rather than in 2016. 7-JA-1430-36; 6-JA-1160. Moreover, even if Plaintiff's expert believed that, as of 2016, proton therapy was a proven and medically necessary treatment for lung cancer, that would *not* mean that SHL lacked any reasonable basis for reaching the opposite conclusion. To the contrary, it would merely suggest at most a difference of opinion

in the scientific and medical communities—"exactly the sort of genuine dispute … that *defeats* a bad faith insurance claim." *Basu v. Mass. Mut. Life Ins. Co.*, 2023 WL 1765676, at *5 (D. Nev. Feb. 3, 2023) (emphasis added).

Second, Plaintiff asserts that SHL "never articulates what its interpretation [of the contract] is." RAB.30. But SHL did: "The contract's plain language is clear that therapeutic radiology services are covered only when SHL determines that they are medically necessary," and SHL determined that they were not medically necessary "based on SHL's Medical Policy's finding that proton therapy is neither proven nor medically necessary for treating lung cancer." AOB.23, 26; *see also* AOB.6-7, 37, 42-43; 13-JA-2647-48.

Third, Plaintiff implies that the Medical Policy was the "sole determiner" of the coverage denial—and that the decision was made "without regard to [Mr. Eskew's] individual circumstances." RAB.31. In fact, Dr. Shamoon Ahmad reviewed Mr. Eskew's individual medical records before making a coverage decision, 5-JA-1011, and his denial was not automatic, as Dr. Ahmad had discretion to disagree with the Medical Policy if the facts of the individual case warranted a different outcome,

5-JA-1021-22, 1026; 6-JA-1072, 1075. Plaintiff also argues (RAB.31) that SHL's reliance on the Medical Policy was unreasonable because the contract does not consider cost, whereas the Medical Policy considers cost when an alternative service "is at least as likely to produce equivalent" results, 15-JA-3101. But that distinction is irrelevant because, as Plaintiff admits, the Medical Policy's cost consideration did not apply here "because it considered cost only for 'equivalent' treatments," and "IMRT and proton therapy weren't" equivalent. RAB.32 n.2.

Fourth, Plaintiff acknowledges that the contract excludes coverage for any "unproven treatment … as determined by SHL," 15-JA-2957(§6.34), but contends SHL did not mention this argument when moving for judgment as a matter of law, RAB.32. Plaintiff is wrong. SHL's opening memorandum in support of its motion argued that "SHL denied the" claim "because the treatment was 'unproven,'" and further argued that the insurance contract "expressly excludes coverage for any '[e]xperimental, investigational or unproven treatment … as determined by SHL.'" 17-JA-3373, 3376. Plaintiff admits SHL argued it again in its reply. RAB.32 n.3. And even if SHL had not argued it (which it did), the "unproven treatment" argument would not have been waived because it

is "not a new claim" but "a new argument to support what has been [SHL's] consistent claim" that Plaintiff failed to prove bad faith. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Plaintiff insists that the "unproven" clause must be "interpreted narrowly against the insurer," RAB.32, but there is no ambiguity in the word "unproven" that could be construed against SHL. It was SHL's contractual right and responsibility to determine whether certain therapies were medically proven by looking to the scientific literature. SHL did so through the Medical Policy. Plaintiff cannot credibly claim that SHL's determination—that proton therapy for lung cancer was an "unproven treatment"—lacked any reasonable basis when that was the exact conclusion of the Nation's scientific and medical communities in 2016.

3. SHL also reasonably relied on the policies and practices of the Nation's 12 largest insurers in determining that proton therapy was unproven and not medically necessary for lung cancer. SHL's expert testified he could not find a single policy that would have covered proton therapy for lung cancer. 11-JA-2301-08. Plaintiff never denies that

consistency with industry practice is an important metric for assessing the objective reasonableness of an insurer's coverage decision.

Instead, Plaintiff reprises her claims that SHL relied on a "hidden policy" as the "sole basis" for the denial—neither of which is true, as shown above. Plaintiff also argues that SHL "never established that other insurers used the same contract," RAB.36, but that is not a requirement for establishing compliance with industry practice. Moreover, SHL's expert (who examined the contracts of other insurers) testified that any differences in terminology ultimately meant "the same thing," and that the proton policies of the other insurers use "a similar process," "look at the same sources," and "all … are consistent" with SHL's Medical Policy. 11-JA-2301-08.

SHL's medical-necessity determination was also reasonable because there was no Nevada authority addressing the issue—and those courts that *had* addressed it had concluded that proton therapy was *not* medically necessary. "[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). Plaintiff does not identify a *single* "contrary" authority at the time of SHL's determination from *any* jurisdiction, let alone a "controlling" jurisdiction. *See* RAB.35-36. Plaintiff inadvertently confirms the absence of such authority by citing cases from 2020, 2022, and 2023. RAB.27.

Plaintiff tries to distinguish the cases holding that proton therapy was not medically necessary on the basis that they involved contracts that were not "substantially identical" to Mr. Eskew's. RAB.35. But there is no "substantially identical" requirement. The provisions at issue need only be "similar," *Brewington*, 96 F. Supp. 3d at 1109, and here the provisions are *very* similar, *compare* 15-JA-2972, *with Baxter v. MBA Grp. Ins. Tr. Health & Welfare Plan*, 958 F. Supp. 2d 1223, 1228 (W.D. Wash. 2013) (similar definition of "medical necessity"), *and Stemme v. BCBS*, 2013 WL 12362335, at *1 (N.D. Tex. Feb. 25, 2013) (same).

Finally, Plaintiff argues that SHL waived this argument and "can't try it for the first time now." RAB.35. But the state of the law is not a fact tried by the jury, and nothing prevents an appellant from bringing to an appellate court's attention case authorities that were not presented to the jury. Indeed, Plaintiff tries to prove unreasonableness by citing

cases that she did not present to the jury, some of which were even decided after the trial. RAB.27. To establish SHL's bad faith, it was *Plaintiff's* burden to prove that there was "contrary, controlling authority in the jurisdiction." *Brewington,* 96 F. Supp. 3d at 1109. She never did.

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

1. There is no evidence in the record that SHL *knew* that it lacked any reasonable basis to deny coverage. Indeed, Plaintiff "offer[ed] no evidence that Defendant violated its own procedures." AOB.32.

Instead, Plaintiff rehashes the argument that SHL misled her into believing the contract covered proton therapy. RAB.27-28. But SHL already explained (AOB.33-35) why that argument was:

- Barred by the district court's ruling "exclud[ing] [any] evidence, argument, and/or testimony relating to pre-contract communications concerning insurance coverage," 16-JA-3244-45;
- Legally irrelevant because "[a] party cannot breach the covenant of good faith and fair dealing before a contract is formed," *Larson*

v. Homecomings Fin., LLC, 680 F. Supp. 2d 1230, 1236 (D. Nev. 2009); and

- A gross distortion of the record because Plaintiff testified that she was aware of the coverage exclusions when signing the contract, 9-JA-1888, and the Medical Policy was publicly available online, 5-JA-1021.

Plaintiff ignores every one of these points. *See* RAB.27-28.

2. Plaintiff argues that SHL conducted an unreasonable investigation because the claims reviewer, Dr. Ahmad, supposedly lacked relevant training or knowledge and did not spend enough time reviewing the claim. RAB.13-14, 28-29. But Plaintiff never disputes that a bad-faith finding cannot be based on an insufficient investigation where, as here, there was a genuine dispute over coverage. AOB.35-36. That is a fundamental rule of law that bars Plaintiff's attempt to use Dr. Ahmad's investigation as grounds for sustaining the verdict.

Dr. Ahmad possessed more than sufficient "education, training and expertise" to make coverage determinations under Nevada law, NRS § 695G.150(1)(b), and his investigation was reasonable. Once again, Plaintiff manufactures a nonexistent "conce[ssion]." RAB.28. Dr. Ahmad

never conceded he lacked the relevant expertise or could not understand medical records. In fact, the evidence showed that Dr. Ahmad is a Board-certified medical oncologist who was "very familiar" with the terms of SHL's contracts and was supported by a reviewing nurse as a second-level backstop, reviewing all of the contracts. AOB.8, 36. The district court agreed that "Dr. Ahmad is a medical oncologist who is familiar with the published evidence on proton beam therapy versus IMRT." 13-JA-2650. Whether Dr. Ahmad could "tell a radiation oncologist" what to do or "identify how far [Mr. Eskew's] tumor was from his esophagus," RAB.13, is not the standard for qualifying to serve as a claims reviewer.

Plaintiff also faults Dr. Ahmad for not conducting a more exhaustive investigation of the claim. RAB.28-30, 35-36. In fact, Dr. Ahmad researched proton-therapy literature and reviewed Mr. Eskew's medical records in light of the Medical Policy before making a coverage decision. 5-JA-1011.

C. Plaintiff Made No Attempt To Prove Economic Loss.

Proof of economic loss is required in a bad-faith insurance action. Nevada derives its bad-faith cause of action from California law, which allows noneconomic damages only when "tied to actual, not merely

potential, economic loss." *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1214 (2009). Courts applying Nevada law have thus adopted the California rule, requiring "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).

Plaintiff contends this Court has allowed damages purely for emotional distress. RAB.37. But this Court has never addressed that question. To the contrary, *Guaranty National Insurance Co. v. Potter* confirmed that the plaintiffs *had* suffered economic injury, namely, "two years of … litigation the [plaintiffs] had to endure and the damage to their credit reputation," 112 Nev. 199, 207, 912 P.2d 267, 273 (1996), and the plaintiff in *Pemberton v. Farmers Insurance Exchange* suffered "wage loss," 109 Nev. 789, 791, 858 P.2d 380, 381 (1993) (per curiam). Plaintiff suggests that California has not adopted the economic-loss rule, RAB.37, but it has, *see, e.g.*, *Waters v. United Servs. Auto. Ass'n*, 41 Cal. App. 4th 1063, 1069 (1996) (rejecting bad-faith claim where plaintiff "did not put on *any* evidence of any kind of financial loss").

Plaintiff's argument that she *did* prove economic loss, RAB.38, is simply wrong. At trial Plaintiff told the jury that the only "harms and

losses" she had attempted to prove and was claiming were *noneconomic*: "pain and suffering, mental suffering, emotional distress, and loss of enjoyment of life." 5-JA-913.

Finally, Plaintiff faults SHL for not proposing jury instructions on economic loss. RAB.37. But SHL argued that Plaintiff's claim for purely noneconomic damages could not go to the jury absent proof of economic injury, 10-JA-2209-10; 16-JA-3261-62; 17-JA-3380-81, and SHL was not required to propose a jury instruction to preserve its claim for judgment as a matter of law.

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

An award of punitive damages requires "clear and convincing evidence" of "malice" or "oppression." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000). Plaintiff's punitive-damages claim never should have gone to the jury because the record does not clearly and convincingly establish *either* that SHL acted with hatred or an evil motive (the common law standard) *or* that SHL acted with "conscious disregard" of Mr. Eskew's contractual rights (the statutory standard).

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

Plaintiff does not even attempt to argue that the record shows SHL acted with hatred or an evil motive. *See* RAB.53 (defending the judgment only "[u]nder the conscious-disregard standard"). Accordingly, if this Court concludes the common-law standard applies, SHL is entitled to judgment on punitive damages.

Plaintiff argues that SHL "invited error" by requesting an instruction that defined "oppression" as acting with "conscious disregard" of Mr. Eskew's rights. RAB.51 (citing 16-JA-3293). But SHL objected to using the "conscious disregard" standard for the "malice" prong, 16-JA-3262-63, and because the jury rendered a general verdict there is no way to know if the punitive award was based on the faulty malice instruction. *See Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 312 (1986). Moreover, even if the *instructional* error were overlooked, the district court was still required to review the *sufficiency of the evidence* using the legally correct standard.

On the merits, Plaintiff cites *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008), to argue that "malice" and "oppression" are satisfied by "conscious disregard." RAB.51-52. But

Countrywide was discussing the *statutory* definitions of "malice" and "oppression." 124 Nev. at 739-40, 192 P.3d at 252-53 (quoting NRS § 42.001(3)-(4)). The same is true of the model jury instructions. RAB.52. Here, however, the statutory standards and definitions do not apply. *See* NRS § 42.005(5). Plaintiff cites *Smith v. Wade*, RAB.52, but there the Court explained that at common law in the nineteenth century, the term "malice" was "not often" used in Plaintiff's preferred "sense as a ground for punitive damages." 461 U.S. 30, 41 n.8 (1983).

B. The Record Does Not Clearly Establish That SHL Acted With Conscious Disregard.

Even under the "conscious disregard" standard, the record is nowhere near sufficient to support punitive damages under the heightened clear-and-convincing-evidence test. As explained above, SHL's denial of coverage was based on the contract's plain language, and Dr. Ahmad acted properly under the contract when he consulted the Medical Policy and determined that proton therapy was "unproven" and "not medically necessary" for treating lung cancer.

Although Plaintiff's brief announces that there is "[a]bundant evidence" supporting a finding of conscious disregard, the skimpy two paragraphs that follow expose the total absence of such evidence.

RAB.53-54. In those two paragraphs, Plaintiff identifies only two pieces of "evidence" supposedly justifying a $160 million punitive award.

The first is Plaintiff's assertion that SHL had "knowledge" that "wrongfully denying" coverage would cause physical harm to Mr. Eskew. RAB.53. But no one at SHL for a moment thought that a coverage denial would be "wrongful[]"—and Plaintiff cannot point to a shred of evidence supporting this claim. An insurer's knowledge that its insured would be harmed by a wrongful denial of coverage does not warrant punishment if the insurer had no idea its conduct might be deemed wrongful. Moreover, SHL quickly approved Mr. Eskew's immediate follow-up request for coverage of IMRT, which Plaintiff agrees is itself an "advanced form of radiation therapy." RAB.9. Plaintiff's expert admitted that the risk of developing grade III esophagitis from IMRT is 15% at most (6-JA-1201), meaning that the risk from IMRT is only slightly greater than the risk from proton therapy. And there is no dispute that, as of 2016, IMRT was widely viewed throughout the medical and scientific communities as a proven and equally effective treatment for lung cancer.

Plaintiff's second item of "evidence" supposedly warranting $160 million in punitive damages is that SHL "put[] Dr. Ahmad in a position

to review claims." RAB.54. Dr. Ahmad is a Board-certified medical oncologist—a doctor specifically educated and trained to treat cancer. Even the district court agreed that Dr. Ahmad was "familiar with the published evidence on proton beam therapy versus IMRT." 13-JA-2650. The law does not require that claims reviewers have the same qualifications as the insured's treating physician, let alone subject an insurer to punitive damages on that basis.

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

If the Court does not direct judgment for SHL, it should order a new trial on all issues.

A. Attorney Misconduct Warrants A New Trial.

Plaintiff solemnly recites the district court's "14 pages of detailed findings" on attorney misconduct (RAB.38) without ever acknowledging the true author of the "findings": Plaintiff's counsel themselves. It was Plaintiff's counsel who wrote, without irony, that they "conducted themselves with exemplary professionalism" (18-JA-3644), among other things, and the district court's decision to sign the extraordinary document counsel wrote does not insulate their conduct from judicial scrutiny. This Court has repeatedly warned district courts against

adopting "order[s] drafted unilaterally" by one party, and urged district courts to "either draft[] [their] own findings of fact and conclusions of law or announce[] them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." *Byford v. State*, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007) (per curiam). Especially in a case involving a $200 million verdict, the district court should have done more. In any event, "[w]hether an attorney's comments are misconduct is a question of law, which [this Court] review[s] de novo," *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 76, 319 P.3d 606, 611, 613 (2014), so on that question, there would be no reason to defer to the district court's findings even if they had been the product of the court's firsthand perspective and own independent analysis.

Plaintiff erroneously suggests that because SHL did not challenge every individual "finding[]" in the 14 pages, it is "foreclosed" from challenging the finding of no misconduct. RAB.38. In fact, SHL explained at length—in great factual and legal detail—precisely why the district court was wrong to deny a new trial. *See* AOB.47-54. This Court conducts its own independent analysis of potential misconduct regardless of whether the challenger lodges specific objections to every individual

finding, and Plaintiff cites no case that would impose such an impossible burden on parties seeking judicial review. Plaintiff further errs in suggesting (RAB.41) that SHL "hasn't argued that the court abused its discretion" in denying a new trial based on misconduct. The denial of a new trial under NRCP 59 is reviewed for abuse of discretion and SHL has argued that "the district court erred in denying a new trial." AOB.54.

Ad hominem *attacks.* Plaintiff's counsel's accusations and attacks against SHL's counsel violated this Court's admonition that "[d]isparaging remarks directed toward defense counsel have absolutely no place in a courtroom, and clearly constitute misconduct." *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004). Plaintiff says these attacks were acceptable because SHL's "strategy at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony." RAB.39. But it cannot be the law in Nevada that testing the accuracy of a witness's recollection and probing the incentives underlying a witness's testimony automatically open the door to *ad hominem* attacks on the lawyer and accusations that the lawyer is trying to "beat [the witness] down" and "do [bad things] to her and her kids on the stand." 14-JA-2836-37. Plaintiff does not explain how counsel's comments did

not violate the order *in limine* prohibiting any "comment on the litigation conduct of the lawyers," 16-JA-3248, a violation that itself is misconduct justifying a new trial, AOB.48-50.

Commanding SHL's witness to admit guilt. Three times Plaintiff's counsel commanded SHL's claims manager to turn in her chair, face the jury, and admit guilt. 14-JA-2868 (ordering witness "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"). Plaintiff defends this tactic—one that hearkens back to the era of Soviet show trials—by citing the district court's "finding[]" that what counsel did was not "demeaning" or "necessarily improper," and that SHL did not object. RAB.40 (citing 18-JA-3644). This Court can review the exchange for itself, *see* 14-JA-2868-69, confirm that SHL *did* object, and reach the common-sense conclusion that this was prejudicial error resulting in harm that could not have been remedied by an admonishment. Forcing a party to admit to having violated the law—or to tell jurors the company rejects their verdict just as the jury is considering whether to impose punitive damages—indisputably constitutes misconduct.

Injection of personal opinions. Plaintiff again reaches for the district court's "findings" to shield one of the clearest examples of misconduct. *Lioce v. Cohen* squarely forbids "an attorney's statements of personal opinion as to the justness of a cause," 124 Nev. 1, 21-22, 174 P.3d 970, 983 (2008), and at the trial's most critical moment, Plaintiff's counsel told the jury to award $30 million because: "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. The suggestion in the "findings" that "viewed in context" counsel was not offering a personal opinion, RAB.40, is utterly implausible, and in any event this Court reviews de novo whether counsel's statement rose to the level of misconduct. The prejudicial impact of this statement—and the many other times counsel injected their personal opinions into the proceedings, *see* AOB.52-54—could not be more evident: After a brief deliberation, the jury came back with $40 million. And $160 million more soon after that.

B. The Erroneous Admission Of The Proton-Therapy-Center Evidence Warrants A New Trial.

The district court erred in admitting evidence that a distant corporate affiliate of SHL owned a minority stake in a New York proton-therapy center that opened in 2019. AOB.54-57. Plaintiff argues this

error was not preserved because when SHL filed its motion *in limine* to exclude this evidence, UnitedHealthcare was still a party. RAB.41. Plaintiff's argument does not make sense. SHL argued the evidence should be excluded because "SHL and ProHealthPCM are distant affiliates," and knowledge on the part of ProHealth cannot be "imputed to SHL." 1-JA-57-58, 122. The arguments and the district court's ruling considered the relevance and prejudice to SHL. None of that turned on whether UnitedHealthcare was a party.

Plaintiff argues this evidence was probative because it showed that "institutions … understood proton therapy was proven and effective." RAB.42. But ProHealth invested in the Center precisely because "additional research [wa]s required to document the effectiveness of [proton therapy] in treating" "lung [cancer]." 15-JA-3083-84. Even if it were fair to attribute the actions of a distant corporate relative to SHL, counsel used this evidence to confuse and mislead the jury by arguing that an investment in learning about an *unproven* new treatment meant that the treatment was *already* proven.

Plaintiff does not defend counsel's improper use of this evidence to argue that the "15 to 250 million" dollars that "United Health Group was

willing to invest" in the center should serve as a guide for the jury's damages award. 14-JA-2753-54. That this was not propensity evidence or drug-use evidence, RAB.42, is beside the point. It is an abuse of discretion to admit *any* evidence that "introduces extraneous or ancillary issues" or "mislead[s] the jury into giving it more weight than it is worth." *Chu v. State*, No. 83824, 2023 WL 3053110, at *2 (Nev. Apr. 21, 2023) (unpublished disposition). That is exactly what occurred here.

C. Excessive Damages Awarded Under The Influence of Passion And Prejudice Warrant A New Trial.

A new trial on all issues is required where there are "excessive damages appearing to have been given under the influence of passion or prejudice," NRCP 59(a)(1)(F), and here there are four blazing red flags signaling that the verdict was so tainted.

First, the size of the damages award is a powerful indicator that a jury was swayed by passion and prejudice. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 425 (1994). Plaintiff does not dispute that the noneconomic compensatory award here is *five times* the largest award ever upheld in Nevada, 17-JA-3419-29, and the punitive award is more than *eight times* the largest punitive award ever upheld in the state, 17-JA-3430-35. If these staggering numbers do not meet the NRCP 59(a)(1)(F) standard—

which merely requires the *appearance* of passion and prejudice—it is impossible to conceive of a damages award that would.

Plaintiff attacks a straw man in arguing that "prior juries do not bind future juries," RAB.45; the point is that they are a *highly relevant* measure of excessiveness. Plaintiff insists the Court cannot consider damage awards in other cases. *Id.* (citing *Wyeth v. Rowatt*, 126 Nev. 446, 472 n.10, 244 P.3d 765, 783 n.10 (2010)). But *Wyeth* relied on *Wells, Inc. v. Shoemake*, which said only that damages awards in other cases are not "*controlling* on the question of excessiveness." 64 Nev. 57, 74, 177 P.2d 451, 460 (1947) (emphasis added). Indeed, in *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983), the Court analyzed excessiveness by looking to other cases.

The awards in this case are "obviously so disproportionate" to not only "the injury proved," but to *any* injury ever considered by *any* appellate court in this state as to "justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." *Wells*, 64 Nev. at 75, 177 P.2d at 460. Because Plaintiff cannot dispute that these awards are stunning outliers in the state of Nevada, she points to other awards that were rendered in other states or never tested on

appeal. RAB.46. But looking to Nevada awards that were affirmed on appeal is the proper comparison because those are the cases where a jury's award was held to be permissible under Nevada law.

Second, these shocking damage awards followed in the immediate wake of counsel's improper and inflammatory arguments, leaving no doubt the jury rendered its verdict in an impassioned state. Plaintiff's counsel launched repeated attacks against SHL's counsel, commanded SHL's witness to admit the company's guilt before the jury, and personally vouched for the justness of Plaintiff's cause. Plaintiff brushes all of this aside by announcing: "We have already explained that there was no misconduct." RAB.48. That is wrong and neither Plaintiff nor the district court has ever explained why exhorting the jury to "send a message," to act as the conscience of the community, and to blow up a "rigged" system through a massive damages award was proper argument. AOB.60-61. Even if these arguments did not amount to misconduct that itself requires a new trial—and they did, *see Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 368-69, 212 P.3d 1068 1081-82 (2009)—at a minimum they explain these aberrational damage awards and provide further evidence that the jury was swayed by passion and prejudice, *see DeJesus*

v. Flick, 116 Nev. 812, 820, 7 P.3d 459, 464 (2000) ($1.5 million award "plainly reflects the influence of counsel's improper arguments").

Plaintiff urges the Court to overlook their improper arguments because the jury was instructed that its compensatory award should not contain punitive damages that would then be duplicated in the punitive award. RAB.48. But this instruction has no bearing on whether the jury's awards were tainted by passion and prejudice. And any presumption that the jury follows instructions is just that—a presumption, which can be rebutted where the jury's verdict undeniably reflects that it acted in an impassioned state.

Third, an award that, like the compensatory award here, "far exceeds what counsel requested" is also evidence of "passion or prejudice." *DeJesus*, 116 Nev. at 820, 7 P.3d at 464-65. Plaintiff misleadingly asserts that *Bongiovi v. Sullivan* found a "deviation of 50 percent" "permissible," RAB.49, but the Court never considered whether the size of the punitive award was evidence of passion or prejudice, 122 Nev. 556, 583 n.86, 138 P.3d 433, 452 n.86 (2006).

Fourth, Plaintiff contends (RAB.50) that the lightning speed of the jury's deliberations following a 13-day trial—it awarded $40 million after

deliberating for just over an hour and another $160 million after deliberating for *under* an hour—"has no bearing" on whether the verdict "appear[s] to have been given under the influence of passion or prejudice," NRCP 59(a)(1)(F). But courts across the country have indicated that abbreviated jury deliberations may be evidence of passion or prejudice when "other red flags are flying." *Veranda Beach Club Ltd. P'ship v. W. Sur. Co.*, 936 F.2d 1364, 1383 (1st Cir. 1991). That is the case here.

IV. At A Minimum, The Damages Awards Should Be Substantially Remitted.

Absent a grant of judgment or a new trial, this Court should reduce the jury's damages awards to amounts that are permissible under Nevada law and the U.S. Constitution.

A. The Compensatory Award Is Excessive And Irrational.

The jury's $40 million compensatory award is not supported by "substantial evidence" and must be remitted. *Wyeth*, 126 Nev. at 470, 244 P.3d at 782.

As to pain-and-suffering, Plaintiff does not dispute that the use of IMRT rather than proton therapy did not affect the progression of Mr. Eskew's lung cancer and that his esophagitis lasted less than one

year, during which time he was also experiencing pain from the cancer. RAB.47. Nor can Plaintiff point to evidence that Mr. Eskew would not have developed grade II esophagitis even if he *had* received proton therapy; thus, pain-and-suffering damages are limited to the difference between grades II and III.

As to emotional distress, while there was evidence that Mr. Eskew was angry and frustrated, there is no evidence that his anger and frustration over the denial of preauthorization was so extreme as to warrant a $40 million award.

Finally, Plaintiff does not dispute SHL's evidence of all pain-and-suffering and emotional distress awards ever upheld in Nevada, *see* 17-JA-3419-29, or that the awards here are *multiples* of the highest in state history. If any portion of the compensatory verdict is allowed to stand, it should be reduced to no more than $2 million to conform to Nevada law.

B. The Punitive Award Is Unconstitutional.

The $160 million punitive award is grossly excessive, is unconstitutional, and should—under de novo review, *see Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001)—be reduced

to an amount no greater than the remitted award of compensatory damages.

Plaintiff's principal argument is that *no award* could have violated due process because insurers were on notice that anything goes, based on the lack of a statutory cap on punitive damages in bad-faith cases. RAB.56. But States cannot strip away federal constitutional protections by allowing infinite damages. Removing any limit on punitive awards *eliminates* any notice of the amount of a penalty that could be imposed.

Reprehensibility. SHL's actions were not reprehensible. Plaintiff criticizes the coverage decision, RAB.57, but SHL properly interpreted the contract—and even if its interpretation were deemed incorrect, SHL had a reasonable basis for reaching its conclusion. It cannot possibly be "reprehensible" to make the same decision made by the Nation's leading medical and scientific groups, all of the Nation's largest insurers, and all the courts to have considered the question at the time.

Plaintiff again attacks Dr. Ahmad, RAB.57-58, but the evidence shows he was a qualified reviewer by education and training; his review was comprehensive and followed SHL's procedures; and his determination was backed by the Medical Policy.

Plaintiff's remaining arguments are almost identical to those the U.S. Supreme Court rejected in *State Farm Mutual Automobile Insurance Co. v. Campbell*—namely, that the challenged policy "was not a local anomaly, but was a consistent, nationwide feature of [the insurer's] business operations." 538 U.S. 408, 420 (2003). Those arguments fare no better here.

Ratio. When compensatory damages are "substantial," a 1:1 ratio between punitive and compensatory damages may be the "outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. And Plaintiff does not dispute that a $40 million compensatory award is "substantial." Unsurprisingly—and contrary to Plaintiff's suggestion, RAB.4—plenty of courts have struck down single-digit punitive damages ratios on due process grounds. *See Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425 (6th Cir. 2009) (reducing 1.67:1 award to 1:1); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005) (reducing 4:1 award to 1:1); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069 (10th Cir. 2016) (listing other examples).

Plaintiff compares the 4:1 ratio here with the state-law statutory cap, but cites cases involving challenges to punitive awards under *state*

law, not under the federal Due Process Clause. RAB.59. Plaintiff further errs in suggesting that the punitive award does not duplicate the compensatory award. RAB.60. *State Farm* says the opposite. *See* 538 U.S. at 426. Plaintiff contends *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543 (2011), rejects this conclusion, but that case did not involve an emotional-distress award.

Comparable civil penalties. Plaintiff gives short shrift to the third guidepost, all but conceding that it cuts strongly in favor of a reduced award. The U.S. Supreme Court holds that a court reviewing a punitive award must consider "civil penalties authorized or imposed in comparable cases," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), and here Plaintiff does not dispute that civil penalties authorized or imposed in comparable cases are wildly eclipsed by the award here.

CONCLUSION

The Court should reverse and remand with instructions to enter judgment in SHL's favor. In the alternative, the Court should vacate the judgment and remand for a new trial. At a minimum, the Court should substantially remit the compensatory and punitive awards.

DATED: August 28, 2023

/s/ D. Lee Roberts, Jr.

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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: August 28, 2023

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

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 New Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(ii) 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 6,992 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: August 28, 2023

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

Pursuant to NRAP 25, I certify that, on August 28, 2023, I submitted the foregoing **Appellant's Reply Brief** for filing *via* the Nevada Supreme Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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