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

RESPONSE TO PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

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Plaintiff has submitted to this Court a grab-bag of "supplemental authority"—most of which were issued long before the briefing in this case—but none of Plaintiff's cases cures the many flaws in the judgment below.

First, Plaintiff cites *Acuity Insurance Co. v. Swanson*, Nos. 85090, 85486, 540 P.3d 420, 2023 WL 8946299 (2023) (unpublished), in an effort to undermine the longstanding rule that this Court "reviews de novo the district court's decision" where, as here, a bad-faith claim presents "a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). But the defendant's argument in that case was a purely factual one: that the jury's finding was "not supported by substantial evidence." *Acuity*, 2023 WL 8946299, at *1 (defendant's argument turned on whether to credit "evidence that there was a third vehicle involved in the crash and that Acuity declined to thoroughly investigate the rear bumper, despite requests from Swanson's attorneys to do so").

Here, by contrast, SHL's principal argument is a legal one: that there exists a genuine dispute involving its "legal obligations," *Allstate Ins. Co.*, 125 Nev. at 317, 212 P.3d at 329-30—namely, whether the

contract covered the requested treatment as a legal matter, and the proper interpretation of the contractual terms "medically necessary" and "unproven." SHL's genuine-dispute argument is thus fundamentally different from the fact-bound arguments in *Acuity*.[1]

Plaintiff's own case, *Salim v. Louisiana Health Service & Indemnity Co.*, recognized this distinction, explaining that "a question of law arises … when the parties' dispute requires a court to interpret the term 'medically necessary' as expressly defined in the insurance contract." 2023 WL 3222804, at *3 n.1 (5th Cir. May 3, 2023) (unpublished). The same principle is at work in *Strauss v. Premera Blue Cross*, in which—unlike here—there was no "dispute over the meaning of the insurance contract provision." 194 Wash. 2d 296, 300 (2019).

In any event, even under a "substantial evidence" standard, Plaintiff did not come close to demonstrating that SHL "had no reasonable basis for disputing coverage" *and* "knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage," particularly

[1] Plaintiff also falsely asserts (at 1-2) that SHL "urges de novo review" "for the first time" in its Reply Brief. Not so. In its Opening Brief (at 20), SHL clearly explained: "The denial of a motion for judgment as a matter of law is reviewed de novo, as are questions of law," and proceeded to explain why the district court erred in allowing the claim to go to the jury.

given that SHL's coverage determination was right in line with the then-prevailing view in the medical, scientific, and insurance communities. *See* SHL Opening Br. 20-38.

Second, Plaintiff relies on *Taylor v. Brill*, but that case merely reiterates the rule that "[a]sking the jury to send a message is not prohibited *so long as the attorney is not asking the jury to ignore the evidence*." 539 P.3d 1188, 1195 (Nev. 2023) (emphasis added). But "ignore the evidence," *id.*, is exactly what Plaintiff's counsel asked the jury to do here in urging them to instead draw upon their role as the "voice of th[e] community" to impose outsized punitive damages, 14-JA-2898.

Moreover, Plaintiff attempts to lump in trial counsel's improper "statements of personal opinion as to the justness of a cause," *Lioce*, 124 Nev. at 21-22, 174 P.3d at 983; RPC 3.4(e), such as when they requested that the jury impose an enormous multi-million-dollar penalty on SHL in spite of the evidence, insisting that "it was the right thing to do," 14-JA-2838. *Taylor* has nothing to do with Nevada's prohibition on personal-opinion statements of this sort.

Finally, Plaintiff's reliance on *Weissman v. UnitedHealthcare Ins. Co.*, 2021 WL 858436 (D. Mass 2021), is equally unavailing. That case

involved a motion to dismiss, in which the court was bound to accept the plaintiff's allegations as true. *See id.* at *1. Here, by contrast, this Court must determine whether the danger of unfair prejudice and confusion presented by evidence of the New York Proton Center outweighed its probative value—the answer is "yes." Moreover, that error was compounded here by Plaintiff's counsel's improper suggestion that the sum of money that United invested in the New York Proton Center should inform the jury's damages verdict. 14-JA-2753-54. Finally, the evidentiary record below—unlike in *Weissman*—made clear that the New York Proton Center was opened precisely because "additional research [wa]s required to document the effectiveness of [proton therapy] in treating" "lung cancer." 15-JA-3083-84.[2]

[2] Plaintiff also erroneously contends that SHL did not object to the proton-center evidence. But SHL had already moved in limine to exclude that evidence, 1-JA-54-61, and the trial court had already denied that motion, 16-JA-3245. SHL did not need to do any more to preserve its objection. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011).

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CERTIFICATE OF SERVICE

I certify that, on February 2, 2024, I submitted the foregoing **Response to Notice of Supplemental Authority** for filing *via* the Nevada Supreme Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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