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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SANDRA L. ESKEW, as Special Administrator of the Estate of William George Eskew,

Plaintiff,

vs.

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Defendant.

Case No. A-19-788630-C

Dept. No. 4

Hearing Date: August 17, 2022

Hearing Time: 9:00 a.m.

OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL OR REMITTITUR

Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, opposes the Defendant's Motion for New Trial or Remittitur.

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INTRODUCTION

After a thorough evaluation with a team of leading experts, a world-renowned radiation oncologist concluded that Bill Eskew needed proton beam therapy to treat his lung cancer. Unlike other treatment options, proton therapy would target his cancer, while sparing the critical organs that surrounded it. But Bill couldn't get the treatment he needed because Sierra Health and Life denied coverage. The jury in this case was presented with overwhelming evidence that in doing so, SHL breached its duty of good faith and fair dealing. And following eleven days of trial, the jury agreed, awarding Bill's wife Sandy substantial compensatory and punitive damages.

SHL nevertheless contends that it is entitled to a do-over. It gives two reasons why. *First*, it cobbles together a hodgepodge of statements from the Eskews' counsel, taken out of context over the course of the 11-day trial, and claims that they constitute misconduct that was so egregious that it undermines the reliability of the jury's verdict—even though, during trial, SHL never objected to the lion's share of that supposed misconduct. SHL's failure to object means that it must show that those statements constitute "plain error"—that is, that "it is plain and clear that no other reasonable explanation for the verdict exists." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 75, 319 P.3d 606, 612 (2014). *Second*, SHL argues that the jury's verdict is simply too high—so high it must reflect passion and prejudice. But "[t]he mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993). Instead, the court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 258, 235 P.3d 592, 602 (2010).

Both of SHL's arguments fail, and for the same reason: The verdict is easily explained by the evidence. The overwhelming evidence at trial showed that SHL sold Bill a platinum insurance plan that expressly covered therapeutic radiation, but—unbeknownst to Bill—the company had a secret internal policy of automatically denying coverage for proton beam therapy, the kind of therapeutic radiation he needed. Although SHL claimed this corporate

policy was based on science, there was ample evidence that it was actually based on cost. In fact, SHL's sister corporation itself operated a proton beam therapy center. There was also ample evidence that the treatment Bill had to settle for because he wasn't able to get the proton therapy he needed caused Grade III esophagitis, leading him to spend the last months of his life in pain, isolated, ill, unable to eat or drink, and vomiting daily.

Thus, even if statements made by the Eskews' lawyers at trial constituted misconduct—and they did not—SHL cannot show that the jury would have reached a different conclusion in their absence. Nor can it show that the jury was motivated by passion and prejudice.

For similar reasons, SHL is not entitled to a remittitur. Substantial evidence supports the jury's compensatory and punitive awards, and due process does not require a different result. The punitive award that the jury approved—of just four times its compensatory award—is well within constitutional and statutory bounds. That is especially so because Nevada's legislature specifically gave insurers notice that they may face awards of a similar ratio when they commit bad faith.

LEGAL STANDARDS

A district court may grant a new trial based on the prevailing party's misconduct or an award of "excessive" damages only if the movant can demonstrate that its "substantial rights" have been "materially affect[ed]." NRCP 59(a)(1)(B) & (F). The court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena*, 126 Nev. at 258, 235 P.3d at 602 (here, and unless otherwise mentioned, throughout, all quotations cleaned up). A district court draws the same presumptions and inferences in evaluating a motion for a remittitur. *Wyeth v. Rowatt*, 126 Nev. 446, 470, 244 P.3d 765, 782 (2010). So long as "substantial evidence" supports the jury's verdict, it may not be subject to judicial revision. *Id.*

ARGUMENT

SHL seeks a new trial on the grounds that the only possible explanation for the jury's verdict are remarks made by the Eskews' counsel or the jury's own passion and prejudice. Failing that, SHL asks the Court for a "drastic" judicial revision of the jury's damages awards.

It is wrong on all counts. As this Court well knows from observing every stage of this trial, Sandy introduced ample evidence from which the jury could have reached its result. SHL, therefore, falls far short of showing that the jury's award was based on any unfair prejudice.

I. The Eskews' counsel did not engage in misconduct warranting a new trial.

A. Nevada law places a heavy burden on objecting parties to establish that misconduct warrants a new trial.

Nevada law permits a district court to grant a new trial based on a prevailing party's misconduct only if the movant can show misconduct affecting its "substantial rights." *Gunderson*, 130 Nev. at 74, 319 P.3d at 611. This requires showing misconduct in the first place. *See id.* But even misconduct isn't enough. "To justify a new trial, as opposed to some other sanction, unfair prejudice affecting the reliability of the verdict must be shown." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 132–33, 252 P.3d 649, 656 (2011); *see also Gunderson*, 130 Nev. at 74, 319 P.3d at 611. Together, these elements pose a high bar.

Counsel "enjoy[] wide latitude in arguing facts and drawing inferences from the evidence." *Grosjean v. Imperial Palace*, 125 Nev. 349, 364 212 P.3d 1068, 1078 (2009). What they may not do is "make improper or inflammatory arguments that appeal solely to the emotions of the jury." *Id.* Thus, the Nevada Supreme Court has generally instructed that statements "cross[] the line between advocacy and misconduct" when they "ask[] the jury to step outside the relevant facts" and reach a verdict based on its "emotions" rather than the evidence. *Cox v. Copperfield*, 138 Nev. Adv. Op. 27, 507 P.3d 1216, 1227 (2022); *see also Grosjean*, 125 Nev. at 365, 212 P.3d at 1079. Argument thus may urge the jury to "send a message"—but it cannot ask the jury to "ignore the evidence." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017).

Even when misconduct occurs, whether it amounts to "unfair prejudice" warranting a new trial depends on context. *Roth*, 127 Nev. at 132–33, 252 P.3d at 656. Most importantly, it depends on whether the moving party "competently and timely" stated its objections and sought to correct "any potential prejudice." *Lioce v. Cohen*, 124 Nev. 1, 16, 174 P.3d 970, 980 (2008).

That is because "the failure to object to allegedly prejudicial remarks at the time an argument is made . . . strongly indicates that the party moving for a new trial did not consider the arguments objectionable at the time they were delivered, but made that claim as an afterthought." *Ringle v. Bruton*, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004). Nor is simply objecting enough. Parties must also "promptly" request that the court admonish the offending counsel and the jury. *Gunderson*, 130 Nev. at 77, 319 P.3d at 613.

The Supreme Court thus has adopted a sliding scale for assessing prejudice. When the moving party fails to object, it bears a particularly high burden: It must show "plain error"—that is, that the misconduct "amounted to irreparable and fundamental error" resulting "in a substantial impairment of justice or denial of fundamental right," such that "it is plain and clear that no other reasonable explanation for the verdict exists." *Id.*, 130 Nev. at 75, 319 P.3d at 612. When, by contrast, the moving party *does* object, the question becomes what steps the party took to cure any prejudice. If the court sustained an objection and admonished counsel and the jury, the moving party must show that the misconduct was "so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 124 Nev. at 17, 174 P.3d at 981. If the moving party never sought an admonishment, it must instead show that the misconduct was "so extreme" that what did occur—objection and sustainment—"could not have removed the misconduct's effect." *Gunderson*, 130 Nev. at 77, 319 P.3d at 613. Meanwhile, if the moving party objected but its objection was overruled, it bears the burden of showing that it was error to overrule the objection and that an admonition would have affected the verdict in its favor. *Lioce*, 124 Nev. at 18, 174 P.3d at 981.

B. SHL has not carried its burden of showing that any attorney conduct here meets the high standards for misconduct warranting a new trial.

SHL cannot meet these standards. It points to three types of statements that supposedly warrant a new trial here: (1) injection of "personal beliefs into the proceedings," (2) leveling personal "attack[s]" at SHL's counsel, and (3) urging SHL's witness to make certain commitments. But none of the statements it points to constitutes misconduct. Indeed, at trial,

most of them didn't trouble SHL at all. That means that especially stringent standards for ordering a new trial apply. And SHL has not met them.

1. Counsel's supposed statements of personal belief were not misconduct warranting a new trial.

SHL first argues that various counsel statements violated RPC 3.4(e), which bars attorneys from "stat[ing] to the jury a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant." *Lioce*, 124 Nev. at 21, 174 P.3d at 983. But most of the statements SHL complains about are far outside this rule's ambit. And even the statements that touched on the subject matter RPC 3.4(e) prohibits didn't rise to the level of misconduct. And even if they were misconduct, under the applicable standards of review, they do not warrant a new trial.

a. Descriptions of facts as "remarkable" or "tragic." Start with counsel's occasional statements about what was "remarkable" or "tragic." Even if these were personal opinions, they weren't opinions about the justness of a cause, credibility of a witness, or culpability of a litigant. *See, e.g.*, App-2531 (a particular jury instruction was "remarkable"); App-2543–44 ("remarkable" which witnesses SHL put on); App-2543 ("tragic" that a witness hadn't heard of the duty of good faith). Indeed, the statements are so banal that SHL didn't bother to object to a single one—failing not only to object contemporaneously, but also when the Court explicitly asked if the parties had any issues to raise outside the presence of the jury. *See* App-2535–41.

That means that even if these stray remarks were misconduct, they are reviewed for plain error—which SHL can't show. Errant comments cannot provide the only possible explanation for the verdict because "other reasonable explanation[s]" exist. *Gunderson*, 130 Nev. at 75, 319 P.3d at 612. The evidence, viewed in the light most favorable to Bill's estate, was overwhelming. As we explain in more detail in our opposition to SHL's motion for judgment as a matter of law, the jury heard evidence that SHL sold Bill a platinum health insurance policy—one that expressly covered therapeutic radiation services like PBT. App-1035–40, 1057. It heard evidence that Bill's doctor—a leading expert in radiation oncology at the leading cancer center in the world—determined that PBT was medically necessary to treat

his lung cancer, while sparing the critical organs nearby. Liao Dep. 48–49, 69–75, 84–88; App-531–33, 539–40, 1067–68, 1106.

But, the jury learned, SHL refused to approve PBT. That's because SHL had a corporate medical policy of refusing to approve PBT for lung cancer at all. App-331–33, 813–18, 837–45. So when SHL sent Bill's claim through PBT's standard prior approval process, the jury heard that its reviewer—who SHL held out as a medical expert, but who had no expertise in radiation oncology and couldn't even answer basic questions about Bill's tumors or radiation treatment—didn't bother to investigate the claim. App-247–48. 250, 337–41, 463, 1083–84, 1114. Instead, he took all of 12 minutes to deny the claim. App–319–21. SHL contends it did this because PBT is not medically necessary, but overwhelming evidence showed otherwise, *see* App-106, 116–17, 331–41 (SHL policy acknowledging benefits of PBT); App-660–61 (studies cited in SHL policies support use of PBT)—indeed, its own sister company operated a PBT center, App-720–22, 901–11. In other words, the evidence showed that SHL denied coverage for PBT not because of science but because of cost.

Meanwhile, the jury heard that the IMRT treatment Bill had to get instead devastated his physical and emotional health. It learned that the intensive radiation generated by IMRT caused "Grade III esophagitis"—meaning Bill spent the last months of his life weak, unable to eat or drink, vomiting daily, and losing weight or unable to keep it on. App-594–606, 680–83, 709–11, 719–20, 1203–08, 1256–58, 1324, 1401–13; Liao Dep. 76–77, 81–83, 155. And it learned that Bill became withdrawn, isolated, and unhappy, unable to enjoy the company of his family or the activities he once loved. App-1200–02, 1256, 1259–60, 1416–18, 1610.

Faced with this evidence, the verdict here is no surprise: SHL did not, and could not, show that a few words by the Eskews' counsel constituted an "irreparable and fundamental error" without which the jury would have reached a different conclusion. *Lioce*, 124 Nev. at 19, 174 P.3d at 982. SHL's argument to the contrary (at 3) is that the short length of the jury's deliberation and the damages awards it settled on somehow show that the purported misconduct "worked." Exactly the opposite is true. The jury didn't need long to deliberate, and reached its awards, because the evidence was overwhelming—not because of a "few sentences" counsel

uttered over the course of a "lengthy" trial. *Cox*, 507 P.3d at 1228. SHL thus falls far short of showing that this is the "rare" circumstance in which misconduct amounts to plain error. *Lioce*, 124 Nev. at 19, 174 P.3d at 982.

b. Suggestions of hypocrisy. Counsel's statements concerning SHL's contradictory behavior don't warrant a new trial either. *See* Mot. at 8. They, too, aren't prohibited personal opinions. The suggestion that it was "hypocrisy" for SHL's sister company to offer the very treatment the company refused for Bill, for instance, was a summary of the evidence—which showed that SHL put on witnesses insisting that PBT was medically unnecessary while another part of its corporate umbrella was investing in a PBT treatment center. *Compare* App-1817–20, 2037–44, 2302–14, *with* App-720–22, 901–11. Pointing out this sort of contradiction isn't misconduct. As the Nevada Supreme Court has explained, statements "invit[ing] the jury to consider the contradiction" between statements made in court and other evidence in the record "amount[] to advocacy, not misconduct, and do not establish grounds for a new trial." *Cox*, 507 P.3d at 1227.

And even if the statements were misconduct, they wouldn't warrant a new trial. SHL did level a successful objection to the comments. But because it failed to request an admonishment, the statements are reviewed for whether the misconduct was so extreme that objection and sustainment could not have removed any prejudicial effect.[1] *See Gunderson*, 130 Nev. at 77, 319 P.3d at 613. SHL falls far short of this showing. It doesn't even bother to explain why sustainment was insufficient—let alone how a jury that was concerned about SHL's hypocrisy would put more weight on counsel's opinion to this effect than on the strong underlying evidence on that point. And sustainment easily removed any prejudicial effect. The jury was explicitly instructed not only that counsel's statements, arguments, and opinions were not evidence, but also that it should disregard evidence to which an objection was sustained. Instruction 8. Juries presumptively follow such instructions. *Summers v. State*, 122 Nev. 1326,

[1] The one admonishment SHL did obtain—this Court's informing counsel at one point that his behavior was "inappropriate," App-2315—had nothing to do with any of the purported misconduct SHL highlights here, but rather with one witness's questioning, *see* App-2299–314. SHL has not suggested that this had anything to do with the jury verdict.

1333, 148 P.3d 778, 783 (2006). A sustained objection under these circumstances thus generally precludes a finding of prejudice. *See Walker v. State*, 78 Nev. 463, 467–68, 376 P.2d 137, 139 (1962). So too here.

c. Statements describing witness conduct. SHL also complains (at 8) about counsel's description of Dr. Kumar's testimony. *See* App-2511. These statements are no closer to actionable misconduct, but even if they were, SHL again cannot show prejudice.

Nevada courts have not turned every arguable statement of personal belief into an instance of misconduct. Rather, they have instructed that what matters is what the statements ask the jurors to do—to "step outside the relevant facts" and reach a verdict based on their emotions instead. *Cox*, 507 P.3d at 1227 (statements were improper "because they asked the jury to step outside the relevant facts" and hold a party not liable because of its bad motivations; while statements that simply invited the jury to consider the contradiction between different statements were not improper personal opinions); *Grosjean*, 125 Nev. at 368–69, 212 P.3d at 1081–82 (attorney committed misconduct by appealing to jury's emotions rather than facts in evidence); *Lioce*, 124 Nev. at 21–22, 174 P.3d at 983–84 (attorney committed misconduct by calling a plaintiff's case frivolous and worthless). Counsel's statements here did none of these things. They were closely tied to and about the evidence the jury did see—that Dr. Kumar couldn't "uphold the opinions he gave." App-2512.

And even if these statements could amount to misconduct, they wouldn't warrant a new trial. Because SHL failed to object to them, they are reviewed for plain error. And it is not "plain and clear that no other reasonable explanation for the verdict exists." *Gunderson*, 130 Nev. at 75, 319 P.3d at 612. As above, the strong evidence supporting the plaintiff's case easily supplies that explanation, and SHL gives no reason to think counsel's characterization of one witness's testimony made a difference.

d. Instructing the jury how to fill out the verdict form. Counsel's statements concerning the verdict form are no more objectionable. These statements simply explained how the jury should complete the verdict form if it agreed with the plaintiff. *See* App-2578, 2692. They were offered as part of counsel's ordinary function of assisting the jury in supplying the evidence to

the law. *See* Instruction 38. SHL's counsel made similar statements. *See, e.g.*, App-2634–35 ("So I think you'd start with that if you find that we should have approved it."). And that's because these are ordinary ways of expressing what a party seeks—not means of injecting an improper personal opinion into the proceedings. Presumably that's why SHL didn't object to the comments at the time.

Nor can SHL meet the plain error standard that thus applies. The Eskews' strong evidence again far outweighs any possible prejudicial effect from the way counsel described the verdict form.

2. Counsel did not level improper personal attacks, and even if they had, a new trial wouldn't be warranted.

SHL next argues (at 9–11) that it deserves a new trial because its counsel faced improper personal attacks "falsely accusing" them "of calling Ms. Eskew a liar." This wasn't misconduct either, let alone misconduct warranting a new trial.

For starters, the statements SHL complains about weren't false. SHL's objective at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony. When Tyler Eskew took the stand, for instance, SHL began suggesting that the family was exaggerating Bill's complaints. *See* App-1221–24, 1239–43. The same tactic continued with BJ. *See* App-1342, 1346–52. And SHL doubled down with Sandy. *See, e.g.*, App-1448–49, 1484–1526, 1529–41. It repeatedly suggested that Sandy's testimony was driven by what was "helpful for your case," rather than the truth. App-1448–49; *see also* App-1489–90 (asking for agreement that "memories can sometimes fade" or be "influenced" because people can have "an intent to say certain things, a reason, a motive").

At the time, there was no doubt about SHL's intentions: to suggest to the jury that Sandy was lying. That's how Sandy understood them. *See* App-1549–50 (Q: "And would you agree that [the monetary recovery in this case provides] an incentive for you to say what you're saying; correct?" A: "No. I did not lie."). And it's what SHL's counsel thought too. At a break, when plaintiff's counsel noted that SHL was suggesting that Sandy was "lying or magnifying her problems," counsel for SHL agreed: "And yes, obviously it's my client's position that it

shouldn't be a surprise to anyone in this room that Mrs. Eskew is embellishing on her husband's condition." App-1458–59; *see also* App-1460 (claiming the "right" to cross-examine and challenge whether or not she is being accurate and truthful"). SHL thus at the very least implied that the Eskews were lying—and it wasn't misconduct to point that out.

All the more so because it's not an "attack," let alone one amounting to attorney misconduct, to suggest that a party or counsel for one party called another a liar. Nevada courts have never hinted otherwise. The only remotely relevant case SHL can identify concerns wildly different comments than this one—comments falsely insisting it was "outrageous" for opposing counsel to request a sidebar and comments referring to opposing counsel, co-counsel, and witnesses with shocking, profane terms. *Born v. Eisenman*, 114 Nev. 854, 861–62, 962 P.2d 1227, 1231–32 (1998). It doesn't stand for the proposition that any comment that could somehow reflect poorly on opposing counsel amounts to misconduct.

And in any event, even if the conduct were misconduct, it wasn't prejudicial. Most of it should be reviewed for plain error, as SHL doesn't seem to have thought it was a problem during trial. Although it objected to one line of questioning, it did so on relevance grounds—and the Court overruled those objections, as the comments were obviously relevant given the line of questioning SHL had just embarked on. *See* App-1543–45. Only at closing did SHL make the objection it now raises. But viewed in context, that objection and its sustainment were more than sufficient to cure any possible prejudice. Counsel immediately and plainly clarified his meaning—that SHL had at minimum suggested that Sandy was "embellishing" what happened to her. App-2509. Especially once clarified, counsel's comments do not provide the only possible explanation for the verdict.

3. Asking a witness for their position on their employer's conduct is not misconduct warranting a new trial.

Finally, SHL insists that the Eskews' counsel committed misconduct in questioning SHL's director of pre-service reviews, Shelean Sweet. During the trial's liability phase, Ms. Sweet had testified that no one at SHL had informed her about the duty of good faith and fair dealing. App-779–80. By the damages phase, though, she said that would change: Because of

the jury's liability decision, the company was now going to offer annual training on that duty. App-2774–75. To probe whether the company took the jury's verdict seriously as she claimed, counsel asked her to tell the jury the company's view of that verdict. App-2778–79. SHL takes issue with that question because, it says (at 3, 11), it was given as a "command," and therefore was a "blatant and shocking violation" of the "norms" of American law. But it's not misconduct to phase a question as a statement rather than a question, and SHL cites no authority to the contrary. Nor does SHL explain why it was improper for Sandy's counsel to examine whether SHL was as contrite as it claimed.

And again, SHL failed to object on these grounds at trial. All it said at the time was that the "form" of the question was "too broad"—not that it was improper or somehow violating American legal norms. App-2778–79. But in any event, whether reviewed for plain error or for whether an admonishment could somehow have changed the verdict, SHL hasn't shown that this line of questioning had any impact, let alone that it warrants a new trial.

4. Cumulative review makes no difference.

Perhaps recognizing that none of this conduct can, standing alone, demonstrate the need for a new trial, SHL urges the Court to weigh its assorted misconduct claims together and conclude that they are prejudicial as a whole. That is neither warranted nor helpful to SHL. Nevada courts have held that persistent misconduct should be evaluated differently when it is repeatedly objected to. *See, e.g.*, *Lioce*, 124 Nev. at 18, 174 P.3d at 981. That rule is designed to avoid requiring counsel to repeat objections that have already been made and sustained and failed to change counsel behavior. But it provides no guidance when, as here, most of the conduct SHL complains of was never objected to at all. And in any event, SHL's arguments fare no better when plaintiff's counsel's supposed misconduct is aggregated. However it is viewed, the handful of assorted statements SHL complains about fall far short of explaining the jury's verdict. As this Court noted when it observed the parties' professionalism throughout trial, *see* App–2832, this trial was an ordinary one not marred by persistent misconduct.

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II. A new trial is not warranted on the grounds that the verdict was tainted by passion and prejudice.

Nevada law also permits a new trial on the ground that the verdict included "excessive damages." NRCP 59(a)(1)(F). Here, too, the standard is high. The Supreme Court has "long held that 'in actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed.'" *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443, 454–55, 686 P.2d 925, 932 (1984) (citation omitted). A court thus "is not justified" in "granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Id.* In this inquiry, as above, the court must "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Bahena*, 126 Nev. at 258, 235 P.3d at 602.

SHL offers two reasons (at 12–17) why the verdict here supposedly reflects improper passion and prejudice: The damages were too large, and counsel's purported misconduct "so thoroughly permeated the proceeding" that it "tainted the entire trial." Both fail.

1. The size of the verdict does not demonstrate that it was flagrantly improper.

SHL argues that the size of the jury's verdict is somehow on its own "indisputable evidence" that the jury here acted on passion and prejudice. But this argument misapprehends Nevada law. Applying the proper standard, the record here easily supports the jury's verdict.

The Nevada Supreme Court has been clear: "The mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192, *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999); *see also Guaranty Nat. Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 273 (1996) ("size of award" is not "conclusive evidence" of passion or prejudice); *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 285, 646 P.2d 553, 555 (1982) (despite being "unusually high," jury's award was not so "flagrantly improper" as to suggest passion, prejudice, or corruption).

That rule makes sense. Successful plaintiffs, the Supreme Court has emphasized, are "entitled to compensation for all the natural and probable consequences" of a wrong, including "injury to the feelings from humiliation, indignity and disgrace to the person," and both "physical" and "mental suffering." *Hernandez v. City of Salt Lake*, 100 Nev. 504, 507, 686 P.2d 251, 253 (1984). What that pain and suffering is worth is a "wholly subjective" question, one that by its "very nature . . . falls peculiarly within the province of the jury." *Stackiewicz*, 100 Nev. at 454–55, 686 P.2d at 932. Only where an award is unsupported by substantial evidence such that it "shock[s]" the "judicial conscience," *Guaranty*, 112 Nev. at 207, 912 P.2d at 272–73, can a court consider "substitut[ing its] judgment for that of the jury," *Hernandez*, 100 Nev. at 507–08, 686 P.2d at 253.

The record here easily supports the jury's judgment. As discussed above, Sandy introduced evidence supporting each element of her claim. When it came to compensatory damages, the jury heard detailed evidence of the devastating consequences Bill suffered as a result of being denied PBT. It heard that he led a happy, family-oriented life prior to his diagnosis and treatment, App-1185–86, 1318, 1357, 1365, 1371–72, 1607, including that he was a lover of food who eagerly visited restaurants and proudly hosted and cooked a weekly family dinner, App-1186–88, 1249, 1259, 1357, 1365–67, 1608–09. But, the jury learned, the treatment for Bill's cancer changed all that. It learned that when SHL denied him access to PBT, he had to get IMRT instead. Liao Dep. 92–93, 155–157; App-341, 606–07. And that treatment, experts explained, scorched Bill's esophagus, causing acute and then chronic Grade III esophagitis—a debilitating condition that prevented Bill from eating and caused weight loss, vomiting, and isolation up until his death. App-593–99606, 676, 681–83, 709–11, 718–20; Liao Dep. 76–77, 81–83, 155. Bill's family testified that the condition made Bill's last months on earth miserable. He could barely walk and was in a lot of pain, App-1400–01; was unable to eat or swallow, feeling that something was constantly stuck in his throat, App-1203–04, 1256, 1611–12; vomited (or dry heaved) constantly, App-1204–06, 1257–58, 1324, 1412–13; became physically weak, App-1256, 1319, 1324–25; and lost much of his dignity, App-1256–59. His personality and enjoyment of life suffered too. He became withdrawn and angry, dodging once-beloved

mealtimes, holidays, family gatherings, and friends. App-1200–04, 1259–60, 1416, 1610. It was well within the jury's discretion to value Bill's excruciating pain from a scorched and scarred esophagus, his inability to eat, his loss of the enjoyment of life and family relationships, his mental anguish and loneliness, and his loss of his personality at $40 million.

Meanwhile, as discussed further below, the jury heard extensive evidence supporting a punitive damages award several times the size of this compensatory award. For instance, the jury heard that Bill's suffering was part of a pattern or practice—specifically, that it was the result of a corporate policy motivated by profit rather than a high standard of care. When it was responsible for *paying* for treatment, SHL deliberately set up a procedure to automatically deny PBT claims, without regard to the recommendations of the treating physician, the needs of the individual patient, or its duty of good faith and fair dealing. App-287, 339–41, 779–80, 822–23, 837–46, 860–63, 876–80, 1082–87. But when it came to *selling* that treatment, SHL had no such concerns. Despite SHL's automatically denying claims like Bill's, its sister corporation invested in a proton center that employs the exact same treatment the company denied Bill to treat cancers just like his. App-720–22, 901–11. The jury could have concluded that this behavior warranted a meaningful punishment. And it could have placed similar weight on other evidence—like the evidence that SHL could have, but chose not to, inform patients about its hidden corporate policy to automatically deny PBT claims before they obtained coverage. *See* App-1061–62.

These circumstances stand in stark contrast to the cases relied on by SHL, where there was "no objective basis in the record" to support the jury's verdict and ample "conflicting testimony" regarding the extent of the plaintiffs' injuries. *See DeJesus v. Flick*, 116 Nev. 812, 820, 7 P.3d 459, 464–65 (2000), *overruled by Lioce*, 124 Nev. at 1, 174 P.3d at 970.

SHL's arguments that this Court should nevertheless reject the jury's result fail. *First*, SHL puts excess weight on outcomes in other cases. Nevada courts have counseled against exactly this approach, instructing that courts should look to whether an award is reasonable "under the facts and circumstances of the particular case" and disapproving treating "the fact that juries in other similar cases have fixed a much lower amount as damages as controlling on

the question of excessiveness." *Wells, Inc., v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947); *see Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10 (citing *Wells* and describing as an "abuse of discretion" considering whether damages awards are "excessive as compared to damages awards rendered in similar cases"); *see also Morga v. FedEx Ground Package Sys., Inc.*, -- P.3d --, 2022 WL 1594784, at *6–7 (N.M. 2022) ("[W]e remain skeptical" of the "usefulness of comparing awards" across cases given that "the amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and in the final analysis, each case must be decided on its own facts and circumstances.").

And in any event, SHL is mistaken. The verdict here is not an outlier. SHL can only argue otherwise by artificially restricting its comparison to cases available through a limited Westlaw keyword search in which Nevada appellate courts have upheld verdicts. But Bill Eskew's suffering was not different because he happened to live in the state of Nevada, and the range of reasonable verdicts are not limited to those that have been the subject of appellate review. And looking to cases around the country, juries routinely reach verdicts comparable to what this jury reached here. For instance, when it comes to compensatory damages, contemporary juries have valued the pain and suffering a child suffered in a boating accident at $75 million. *See Batchelder v. Malibu Boats, LLC*, No. 2016-cv-0114 (Ga. Super. Ct. Aug. 28, 2021).[2] They have awarded the estate of the victim of a semiautomatic gun attack over $100 million.[3] They have valued one worksite accident victim's pain and suffering to date at $55 million, *see Cruz v. Allied Aviation*, No. 2019-81830 (Tex. Dist. Ct. Oct. 25, 2021),[4] and awarded another $38 million, *see Ford v. Ford Motor Co.*, 585 S.W.3d 317, 323–27 (Mo. Ct. App. 209); *cf., e.g.*, *Morga*, 2022 WL 1594784, at *2 (compensatory damages of $61 million, $32 million, and $40 million); *Latham v. Time Ins. Co.*, No. 2006cv1040 (Colo. Dist. Ct. Jan.

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[2] Verdict viewable at https://perma.cc/6ENY-KM8E.

[3] *See* Kristen Fiscus and Mariah Timms, *Jury awards over $200 million to mother of Waffle House shooting victim,* Tennessean (May 12, 2022), https://perma.cc/K58M-82Q5.

[4] Verdict viewable at https://perma.cc/ECD8-MSRH.

2010) (compensatory damages of $37 million); *Lennig v. CRST*, No. MC025288, 2018 WL 1730708 (Sup. Ct. Cal. Feb. 21, 2018) (compensatory damages of $53.6 million).

And punitives are no different: Juries routinely reach multimillion-dollar verdicts and give punitive damages awards that are orders of magnitude larger than their compensatory equivalents. *See, e.g.*, *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-cv-1087 (N.D. Tex., Feb. 14, 2001) (punitive award of $310 million, with ratio over 100:1); *Indus. Recovery Capital Holdings Co. v. Simmons*, No. 08-2589 (Tex. Dist. Ct. July 17, 2009) (punitive damages award of $140 million, with ratio over 4:1); Erik Eckholm, *$85 Million Awarded Family Who Sued HMO* (N.Y. Times Dec. 30, 1993), https://perma.cc/DHM9-T7UC (punitive damages award of $77 million, with 6:1 ratio); *Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp. 2d 1168, 1191 (D. Nev. 2008) (punitive award of $24 million and 9:1 ratio not excessive).

Second, the jury's award did not, as SHL suggests (at 14), "far exceed[]" what the Eskews sought. The jury was qualified for a broad range, and $30 million was offered as a mere "suggestion," not an upper bound. App-2575–77; *see also id.* (noting that $50 million would also be reasonable); App-2766 (Sandy asked for "upwards of $50 million in voir dire"). Nevada courts have weighed this concern heavily only where the verdict has been *three to four times* what was requested, *see, e.g.*, *DeJesus*, 116 Nev. at 820, 7 P.3d at 465, while describing as "permissibl[e]" deviations far greater than what occurred here, *see Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006) (50 percent larger than plaintiffs' request).

Third, counsel was not somehow "desperately attempt[ing] to salvage" a flawed compensatory award when they suggested a punitive range. There's nothing wrong with the compensatory award (or the punitive damages award). *Fourth*, the fact that SHL is a corporation does not suggest that the jury was motivated by passion or prejudice. The jury was explicitly admonished not to be influenced by that fact, *see* Instruction No. 6, an obligation SHL's counsel made sure they were aware of, *see* App-2582–83. And *finally*, the reduction in *Nevada Independent Broadcasting Corporation v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983), is of no moment here. As the Nevada Supreme Court has subsequently emphasized, that award was reduced "because of the specific circumstances of that case," including the fact that the

involvement of a media defendant placed "First Amendment concerns" at the "forefront" in any evaluation of the damages award. *Bongiovi*, 122 Nev. at 578, 138 P.3d at 449.

2. SHL's hodgepodge of counsel statements does not demonstrate that the verdict was flagrantly improper.

SHL next urges the court to conclude that the jury was "swayed by passion and prejudice" because counsel's supposed misconduct "so thoroughly permeated the proceeding" that it "tainted the entire jury trial." Br. at 14 (quoting *DeJesus*, 116 Nev. at 820, 7 P.3d at 464.) The insurer's only argument on this point is to assert that the statements discussed above, together with "other ways" that counsel "fuel[ed] the fires of prejudice," are the only possible explanations for the jury's verdict. But we explained above why that's not true of counsel's statements. And the smattering of other conduct SHL complains of doesn't explain the verdict either.

SHL cites no authority suggesting that the arguments employed here would so "inflame" a jury as to require depriving it of its customary role evaluating how to compensate or punish harm. And that is because there is none. It was an ordinary argument that SHL's claims system was rigged to favor a cheaper procedure, and ordinary advocacy to point out the contradictions in SHL's position—all well-supported by the evidence. *See Cox*, 507 P.3d at 1227 ("invit[ing] the jury to consider" a contradiction amounts to "advocacy" and does "not establish grounds for a new trial"). Meanwhile, SHL's *own witnesses* agreed that jury verdicts play a role in regulating conduct. *See* App-1786–88, 2685.

The cases SHL can find don't say otherwise. In *Hazelwood*, for instance, there was no evidence that the plaintiff had even suffered a physical injury—let alone experienced the sort of suffering Bill did. 109 Nev. at 1010, 862 P.2d at 1192. And that case, in any event, concerned a different question than this one—whether a district court had abused its discretion in reducing an award, not whether it should grant a new trial or reduce the award in the first place. Meanwhile, although *Lioce* reiterated the common rule that counsel may not make golden-rule arguments, counsel here did not do so. Viewed in context, counsel's statements about "your health" were descriptions of Bill's experience—what it was like to be "married to a woman for

30 years" and to have "two kids." App-2576. They weren't invitations for the jury to make a decision based on an improper hypothetical. *See Lioce*, 124 Nev. at 22, 174 P.3d at 984.

And, finally, each instance of misconduct documented in *DeJesus* was dramatically worse than anything in this case. 116 Nev. at 817–20, 7 P.3d at 463–65. That included a lawyer's personal guarantee that he could have gotten a defense witness to offer contradictory testimony for enough money; the statement that certain lines of questioning weren't needed because they would merely have made the witness "look a little more stupid" than he already did; the instruction to take a witness's testimony and "tear it up and throw it in the garbage"; the statement that the lawyer personally did not like the defendant because the defendant had "nearly killed a couple people"; and impermissible golden-rule arguments. *Id.* And these were just illustrative examples of the lawyer's statements in *DeJesus*—the lawyer's improper conduct had "permeated" the proceedings. *Id.* Nothing similar happened here.[5]

III. The Court should not remit the damages awards.

"A jury is permitted wide latitude in awarding tort damages." *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). Thus, just as a court is constrained in ordering a new trial based on a jury's damages award, so it "may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." *Stackiewicz*, 100 Nev. at 455, 686 P.2d at 932; *see also Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192. When faced with a request for a remittitur, Nevada courts "presume that the jury believed" the prevailing party's evidence and "any inferences" derived therefrom and ask whether substantial evidence supports the verdict. *Wyeth*, 126 Nev. at 470, 244 P.3d at 782. In general, they will only reduce a damages award that was "given under the influence of passion or prejudice or "shocks" the conscience. *Id.* Or, in rare cases, an award may be so large as to violate due process. SHL can't show either circumstance here.

[5] And in any event, the Nevada Supreme Court in *Lioce* disapproved the tests employed in *DeJesus*, describing the "permeation rule" as "incomplete" and the "inflammatory quality and sheer quantity" test as "unworkable," and explaining the importance of developing a plain error standard that incentivizes attorney objection. *Lioce*, 124 Nev. at 17, 174 P.3d at 980.

A. The compensatory damage award wasn't given under the influence of passion or prejudice and is supported by substantial evidence.

We have already explained why substantial evidence supports the jury's compensatory damages award. SHL's arguments to the contrary (at 17–18) fail.

It first argues that one of the plaintiff's experts conceded that the use of IMRT did not affect the progression of Bill's cancer. But the Eskews' pain-and-suffering arguments weren't about the progression of Bill's cancer—they were about the excruciating pain and suffering caused by the only treatment SHL allowed Bill to access. Relatedly, SHL claims that much of Bill's pain and suffering could be attributed to his cancer rather than its treatment. But it doesn't say what evidence the jury was obligated to treat as definitive on this point—nor does it explain why the jury was required to disregard the ample contrary testimony, including multiple experts' assessments that that suffering was caused by IMRT. *See* Liao Dep. 76–78; 81–83, 155; App-598–99, 602–06, 676, 680–81, 710–11, 718–20.

SHL also contends that the suffering involved in an esophagus so scorched and scarred by radiation that it could barely function is minimized by the fact that it lasted less than a year. But the jury heard ample evidence of how SHL took from Bill the biggest joys in his life and left him with months upon months of excruciating suffering and anguish—and it was in the best position to evaluate how to measure that pain in damages.

Then, SHL insists that the jury's damages award had to be limited to the difference between the Grade III esophagitis Bill suffered and the Grade I or II esophagitis he would have experienced had he been treated for PBT anyway. But the jury was instructed how to evaluate causation in this case. Jury Instructions 27 and 28. And it was entitled to believe the evidence that SHL's decisions caused Bill's pain and suffering, including the witnesses who attributed that suffering to Grade III esophagitis and testified that he would not have experienced those symptoms if he had received PBT. *See, e.g.*, Liao Dep. at 69–70, 73–75, 80–83; App-598–99, 605–08.

Further, SHL argues that the jury couldn't award any emotional damages because the plaintiffs didn't present evidence of a "physical manifestation of emotional distress." But that is not the law. The physical manifestation requirement applies only to cases "where emotional

damages are not secondary to physical injuries, but rather, precipitate physical symptoms." *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998). Here, emotional damages *are* secondary to physical injuries, as there was ample evidence that SHL's conduct caused debilitating esophagitis—a physical injury to the esophagus. The emotional damages documented here thus are exactly the sort of harms Nevada courts have accepted as evidence supporting compensatory damages. *See Guaranty*, 112 Nev. at 207, 912 P.2d at 272; *see also* Restatement (Second) of Torts § 924(a) (1979) ("One whose interest of personality have been tortuously invaded is entitled to recover damages for past or prospective bodily harm and emotional distress.").

SHL's caselaw doesn't say otherwise. The fact that scattered courts have occasionally remitted large awards in cases presenting entirely different facts than this one provides no guidance as to whether the evidence in this case was sufficient, *see Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783—especially when, as we explained above, there are plenty of verdicts similar to the one here. And most of SHL's cases are simply inapposite. We have already explained why that is true of *Hazelwood* and *Nevada Independent Broadcasting*. In *State v. Eaton*, 101 Nev. 705, 710, P.2d 1370 (1985), meanwhile, the district court ordered reductions because of a statutory requirement—not because it deemed it proper to invade the province of the jury. And *Jacobson v. Manfredi*, 100 Nev. 226, 679 P.2d 251 (1984), involved a district court's *additur* because a jury's verdict was manifestly insufficient. It provides no guidance on whether this jury's verdict was excessive.

B. Due process does not require judicial revision of the jury's damages award.

SHL finally contends that, if nothing else, the award in this case must be reduced in order to comport with the standards of due process. It is wrong. "Only when an award can fairly be categorized as 'grossly excessive,'" *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 582 (1996), such that it "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm Mut. Aut. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003), does the due process clause authorize—let alone require—reducing that award. Neither award in this case meets that standard.

1. The punitive award is not grossly excessive.

Due process constraints on punitive damages exist to ensure that every party has "fair notice" of what sorts of penalties it may face. *State Farm*, 538 U.S. at 417. The United States Supreme Court has identified three "guideposts" for whether this has occurred: (1) "the degree of reprehensibility" in the defendant's conduct; (2) "the disparity between the actual or potential harm suffered . . . and the punitive damages award"; and (3) "the difference between" the remedy awarded "and the civil penalties authorized or imposed in comparable cases." *Id.* at 418; *see also Bongiovi*, 122 Nev. at 583, 138 P.3d at 452 (adopting the same standard for Nevada). All three factors support the jury's award here.

a. SHL's conduct was reprehensible. The first factor is the "most important"—the "degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. This factor takes into consideration whether the harm the jury's award punished was "physical as opposed to economic"; whether "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others"; whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"; whether "the conduct involved repeated actions or was an isolated incident"; and whether "the target of the conduct had financial vulnerability." *Id.*

SHL's conduct checks all the boxes. *First*, the evidence showed that SHL's conduct caused physical harm to Bill. *Second*, the evidence showed that SHL's conduct evinced an indifference to or reckless disregard for the safety of others. To award punitive damages, the jury had to conclude that SHL's conduct was oppressive and in conscious disregard of Bill's rights, and that it subjected him to a cruel and unjust hardship. *See* Instruction 32. And the evidence easily allowed it to do so. Patients like Bill relied on SHL to make good-faith decisions about some of the most important questions in their lives. Yet SHL designed its policies to prioritize its own profits over their individual medical needs. *See, e.g.*, App-335–41 (PBT's usefulness); App-660–61 (studies cited in SHL policies support PBT); App-720–22, 901–11 (SHL's investments in its own proton center); App-837–45 (prior authorization policy automatically denied PBT without regard to patient circumstances, the terms of the insurance

policy, or SHL's duty of good faith and fair dealing). *Third*, the harm Bill suffered was not a mere "accident." To award punitive damages, the jury had to conclude that there was "clear and convincing evidence" that SHL acted with "malice," or "oppression"—where malice and oppression were both defined as requiring conscious disregard of his rights. Instruction 32. Here too, the evidence clearly supported the jury's finding. *See* App-335–41, 660–61, 720–22, 837–45. *Fourth*, as SHL itself argued, the insurer's denial of treatment was the result of an intentional policy of denying PBT claims automatically and in conscious disregard for its duty of good faith and fair dealing—a policy that applied not just to Bill, but to all its policyholders in Nevada and 150 million people nationwide. And the evidence showed that SHL employed that policy not because PBT didn't work—the plaintiffs introduced substantial evidence that SHL knew it did, *see, e.g.*, App-115–17, App-660–61, and SHL's own sister company eagerly invested in the procedure—but because it deemed PBT too expensive. *Finally*, SHL's policy affected particularly vulnerable people—cancer patients who did not have time to shop around for new insurance or conduct futile appeals. That included patients like Bill, who purchased SHL's policy specifically because they thought it covered treatments like PBT. *See* App-1035–40, 1387–91.

SHL's counterarguments on these points fall flat. The insurer emphasizes that it was acting pursuant to a policy, but as we have just explained, that fact cuts against it. It's precisely because the company established a corporate policy of automatically denying coverage for PBT that its conduct was reprehensible. What's more, SHL's own conduct undercuts the very premise of that policy. It claimed that PBT for lung cancer in 2016 and as of time of trial in March 2022 was unproven and not medically necessary. Yet the studies it depended on refuted that point. App-115–17, App-660–61. As it well knew. After all, its sister company actively invested in and operated a PBT center to treat lung cancer. Once that center was up and running, SHL, without any change in the literature, decided it would approve PBT for patients in Bill's situation after all. *See* App-1818–25, 2813–14. These facts amounted to an implied admission that PBT either *is* proven and necessary, or that the company only found it so when it was in the company's interest. SHL next tries to argue that in fact it made medical necessity

determinations that carefully weighed the circumstances of each case. But there was overwhelming evidence that SHL conducted no investigations at all. *See, e.g.*, App-247–48, 319–21, 326–41, 813–18, 837–45,1084–85, 1114.

And the mitigating factors SHL tries to emphasize—that it now sends requests for review to a radiation oncologist, requires new training, and eventually decided to cover PBT for lung cancer—don't help it either. The jury easily could have concluded that these steps were cosmetic, ineffective, and contrived. As to training, for instance, SHL spent the liability phase insisting that all its practices were reasonable, App-1958, 1968–2000, 2011–15, 2379, and admitted the idea for training only came from its counsel following developments in this case, App-2775. By contrast, in *Guaranty*, on which SHL relies, there was evidence of the defendant's mitigating conduct *during* the commission of the tort and prior to trial. 112 Nev. at 209, 912 P.2d at 274. The insurer's new review practices fare no better. The jury could have found that SHL lacked credibility in undertaking this mitigation, too, because the jury wasn't told about it until the damages phase—and heard numerous liability-phase witnesses vehemently claim that medical oncologists were perfectly qualified to conduct reviews. *See* App-1968–70, 1972–76, 1987. All the more so because SHL refused to consider other meaningful changes, like changing its practice of denying claims without regard to an insured's contract—and it continued to insist that it had done nothing wrong in this case, despite now offering PBT for patients like Bill. *See* App-2777.

The few cases it can muster don't say otherwise. One is an unpublished and minimally explained decision to reduce an award, *see Rowatt v. Wyeth*, No. CV04-1699, 2008 WL 876652 (D. Nev. Feb. 19, 2008), while another does not even concern the due process clause, but rather a reduction that occurred because an award was nearly a quarter of the defendant's net worth and exceeded the compensatory award by a factor of 30, *Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1266–67, 969 P.2d 949, 961 (1998).

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2. The ratio between the compensatory and punitive awards comports with Supreme Court caselaw and Nevada statutory law.

There is likewise a "reasonable" relationship between the punitive and compensatory damages awards given here. *State Farm*, 538 U.S. at 426.

First, the U.S. Supreme Court has instructed that it is appropriate to weigh the magnitude not only of the *actual* harm a defendant caused, but also of any *potential* harm that it would have caused if its wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). The Court has thus "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *Id.* For example, if "a man wildly fires a gun into a crowd" and "no one is injured and the only damage is to a $10 pair of glasses," a jury could reasonably award "only $10 in compensatory damages" but far more in punitive damages. *Id.* at 459. Under this approach, a $10 million punitive-damages award may be permissible even if the value of the potential harm "is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million." *Id.* at 462. And here, compensatory damages reflect only the pain and suffering and concomitant emotional harms Bill suffered. But in another case, the same conduct could have led to additional suffering—enduring Grade III esophagitis for a longer period, for instance, or even experiencing heart problems or premature death. *See* Liao Dep. at 71–74.

Even taken at face value, the ratio between the compensatory and punitive awards given here is within reason. The Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," *Gore*, 517 U.S. at 582, establishing a "bright-line ratio which a punitive damages award cannot exceed," *State Farm*, 538 U.S. at 424–25. A 4-to-1 ratio, however, is well within the ordinary. *See id.* ("Single-digit multipliers are more likely to comport with due process" than "awards with ratios in the range of 500 to one"; there is a "long legislative history . . . providing for sanctions of double, treble, or quadruple damages to deter and punish."). That's true not just in general, but in insurance bad-faith cases in particular. *See Merrick v. Paul Revere Life Ins. Co.*, 594 F. Supp.2d 1168 (Nev. Dis. 2008) (upholding 9:1 ratio); *cf. Wohlers*, 114 Nev. at 1268–69, 969 P.2d at 962

(reducing award to 13:1). Thus, contrary to SHL's arguments, the Court has never suggested that a 1:1 ratio is an "outermost" constitutional limit.

That is especially true here, where Nevada law expressly provides clear notice that exactly this sort of ratio could apply. Nevada law provides, as a general matter, that actions for breach of a noncontractual obligation are subject to a 3:1 ratio. NRS 42.005. But when it comes to insurance bad faith claims, the law contains an express exemption: No insurer "who acts in bad faith regarding its obligations to provide insurance coverage" is entitled to the law's statutory limits. *Id.* This statutory scheme puts insurers on notice that the legislature considered whether to apply a ratio of 3:1 to bad-faith insurance cases and expressly decided not to. That means insurers should expect to face higher ratios in bad-faith insurance cases. And that notice is meaningful: "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should "accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583.

To justify its contrary rule, SHL says (at 24) that a 1:1 ratio—or an even lower one—is required whenever a jury's award consists of noneconomic damages, is "substantial," or contains a punitive element. That has never been the law. SHL gives no reason, other than the fact that the compensatory damages award was "large" and "noneconomic," to infer that the compensatory award here necessarily contained a punitive element. The jury was clearly instructed not to include punitive damages in its compensatory award, including being instructed that the whole point of a Phase 2 would be to ascertain the proper amount of punitive damages—*if* the jury thought they were warranted. Instruction 3; *see also* App-2804–05. And, unlike in *State Farm*, the injuries here included profound physical harm. The bulk of distress Bill suffered thus was not "caused by [] outrage and humiliation," but rather by dealing with those physical injuries. And even applying *State Farm*'s rule, the Court there said nothing about some required 1:1 ratio—it just held there was a "presumption against" a 145:1 ratio. On remand, the Utah Supreme Court approved a 9:1 ratio for punitive damages, *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004)—a ratio far above what the jury awarded here.

3. SHL has not identified any meaningful differences between the jury award and the penalties authorized in comparable cases.

Turning to the third factor, neither of the analogies SHL tries to draw—to mere "deceptive trade practice[s]" or to "unauthorized transaction[s] of insurance"—bears any resemblance to the claim here. The law provides four more meaningful guideposts. *First*, as just explained, Nevada statutory law places insurers like SHL on notice of the sorts of penalties they may face for bad-faith claims. The law provides an upper bound on both the total recovery and the sorts of ratios permissible in other sorts of cases—and pointedly declines to extend those limits to the bad-faith insurance context. That informs insurers that they can expect penalties far larger than $100,000 and punitive-to-compensatory ratios in excess of 3:1. *Second*, Nevada law authorizes the state to revoke an insurer's certificate of authority if it adopts practices in conscious disregard of its duties. *See* NRS 680A.200(1)(c). That could mean an insurer's entire book of Nevada business—a cost in the hundreds of millions to billions. *Third*, state enforcement actions routinely hold insurers responsible for mismanaging the prior authorization process and other violations of consumers' reasonable expectations. These awards routinely reach into the tens and hundreds of millions. *See, e.g.*, Cal. Dep't of Managed Healthcare, *State Fines L.A. Care Health Plan $55 Million in Enforcement Action to Protect Consumers*, https://perma.cc/GTP3-JWU2; *cf.* Office of Okla. Attorney General, *Attorney General Hunter, Insurance Commissioner Mulready Announce $25 Million Settlement with Farmers Insurance*, https://perma.cc/H3GK-R36U. *Fourth* and finally, as discussed above, jury awards place insurers on notice of these sorts of damages too. Juries routinely award tens of millions of dollars for pain and suffering, and they regularly reach award punitives at ratios exceeding the 4:1 ratio the jury settled on here.

Taken together, these varied sources supplied SHL with ample notice that it could face substantial sanctions for conduct like the policies it subjected Bill to. They show that Nevada, along with other states and juries, views damages awards of this magnitude as "reasonably necessary" to vindicate its "legitimate interests in punishment and deterrence." *Gore*, 517 U.S. at 568. They thus demonstrate that the award given here was well within constitutional bounds.

4. There is nothing unconstitutionally punitive about the compensatory award.

Finally, SHL briefly suggests that the jury's compensatory award, too, is somehow constitutionally suspect. Its only argument on this score (at 21) is that the jury wasn't given "meaningful guidance." But that is false. The jury was instructed to take into consideration "the nature, extent, and duration of the damage Bill sustained," and to "decide upon a sum of money sufficient to reasonably and fairly compensate for the physical pain, mental suffering, anguish, disability, loss of enjoyment of life, and emotional distress" he suffered. Instruction 29. It likewise received instructions cautioning that there was "no definite standard . . . by which to fix reasonable compensation" for those injuries and that no witness opinion was required. Instruction 30. This is all that exists in most cases, and because juries are presumed to follow instructions they are given, it is typically sufficient. *See Summers*, 122 Nev. at 1333, 148 P.2d at 783. SHL's only argument otherwise is that this feature of the jury system is somehow a bug. But the only support it can find for this claim is in scholarship and out-of-state caselaw. Nevada courts have never approved intervening in the province of the jury on this basis. This Court should not be the first to do so.

CONCLUSION

The Court should deny SHL's motion on all issues. It should not grant a new trial or remit the jury's award.

DATED this 29th day of June 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Matthew L. Sharp, Ltd., and that on this date, a true and correct copy of the foregoing was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and NEFCR 9, via the electronic mail address noted below:

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