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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 RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiff Sandra L. Eskew, as Special Administrator of the Estate of William George Eskew, opposes the Defendant's Motion for Judgement as a Matter of Law.

INTRODUCTION

Sierra Health and Life Insurance's renewed motion for judgment as a matter of law asks this Court to throw out the jury's verdict based on arguments that SHL has repeatedly made before, and that have repeatedly been rejected by this Court. SHL identifies no new authority, changed facts, or intervening legal development—nothing—to warrant a 180-degree turn.

Nor can SHL overcome the even higher burden it now faces after trial. This Court "must view the evidence and all inferences most favorably" to the Eskews, *M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008), and may grant a directed verdict only if the "the evidence is so overwhelming" *in SHL's favor* "that any other verdict would be contrary to the law." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009).

Here, just the opposite is true: The evidence that the jury heard was overwhelmingly in the Eskews' favor. SHL's lead argument is that there was not enough evidence for any rational jury to conclude that SHL acted in bad faith. But this case exemplifies bad faith. SHL sold Bill and Sandy Eskew an insurance policy that, on its face, covered the proton-radiation therapy that Bill sought. And SHL denied coverage for that very treatment based on a secret corporate policy, without so much as looking at Bill's contract or conducting any investigation. SHL also argues that the Court should not have allowed the jury to award punitive damages. But, as this Court has already ruled, there was abundant evidence from which a reasonable jury could conclude that SHL acted with conscious disregard for the Eskews' rights, and with a shocking disregard for Bill's health, safety, and well-being. SHL's motion should be denied.

BACKGROUND

In 2015, Bill Eskew was diagnosed with lung cancer. App-1226. Although it was Stage IV cancer, he had a "good chance to have a disease free life." Liao Dep. 127. So, in an effort to maximize his chances of survival, Bill decided to seek treatment at the MD Anderson Cancer Center at the University of Texas—the highest-ranked cancer-treatment center in the world. Liao Dep. 27; App-1373–77. MD Anderson treats patients with a wide variety of therapies including proton-beam therapy, which enables doctors to target radiation at a tumor more

precisely than other methods, decreasing the amount of radiation that passes through healthy tissue. *See* Liao Dep. 30–32, 34–36.

Around the same time that he was diagnosed, Bill's health-insurance company canceled his policy. App-1374. So he sought a new policy that would cover his treatment. App-1386–87. Bill's wife, Sandy, contacted SHL's authorized agent and explained that Bill was seeking treatment for lung cancer at MD Anderson and, specifically, that he was going to be evaluated for proton-beam therapy. App-1387–88. She asked whether SHL had a policy that would cover this treatment. *Id.* In response, the agent offered Bill and Sandy a platinum health-insurance policy that explicitly stated that it covers therapeutic-radiation services. App-1039–40, 1390–91; Trial Ex. 2, at 13, 48. Proton-beam therapy is a form of therapeutic radiation. App-264, 1392. It is therefore covered by the policy. App-2058–59. So Bill bought the policy—the most expensive policy that SHL offered. App-1039, 1390–92.

Unbeknownst to Bill, at the same time that SHL sold him insurance coverage, the company had a hidden corporate policy of denying all claims for proton-beam therapy for lung cancer. App-104, 331–33, 813–18. This internal policy was not mentioned anywhere in the insurance policy documents that SHL provided the Eskews, nor did SHL tell Bill that it had a corporate policy of denying the very treatment for which it knew they sought insurance. App-1392–94. SHL knew that this corporate policy was not noted in the insurance policy that it sold to Bill. *See* App-326–27, 857, 2086.

Unaware that SHL would refuse to pay for proton-beam therapy, Bill went to MD Anderson, where he was treated by Dr. Zhongxing Liao. *See* Liao Dep. 47–48. Dr. Liao is a world-renowned radiation oncologist who specializes in researching and treating lung cancer through various methods of radiation—including proton-beam therapy. Liao Dep. 11–15, 21–27, 30–32; App-541. Dr. Liao's team found that Bill had two tumors—a lung tumor and a tumor in "one of the lymph nodes . . . [b]etween his lungs." App-543; Liao Dep. 48; Trial Ex. 5, at 15. Bill's cancerous cells were "adjacent" to "a lot of critical structures," including the heart, trachea, and esophagus. App-543; Liao Dep. 50–51. Because radiation injures healthy tissue as well as cancer cells, Dr. Liao sought to ensure that enough radiation would reach the tumors to

destroy them, while minimizing the amount of radiation that passed through these critical organs. Liao Dep. 39–43, 45–46, 50–51.

Dr. Liao considered two potential methods of administering radiation to meet this goal: intensity-modulated radiation therapy (IMRT) and proton-beam radiation therapy. Liao Dep. 49–51, 69–75. Both would have delivered enough radiation to Bill's tumor. *See* App-579–80. The difference was the amount of radiation that would pass through adjacent healthy organs, like Bill's heart or esophagus. App-579–593.

Using sophisticated imaging and simulation techniques, Dr. Liao and her team compared the radiation dosages that would pass through Bill's healthy tissue in the two therapies. Liao Dep. 48–50, 52–53, App-549–62. They found that proton therapy would result in less radiation hitting healthy organs—particularly the heart, lungs, and esophagus. Liao Dep. 50–51, 53–55–, 57–60, 61–65, 68–75; App-562–93; Trial Ex. 160, at 8; Trial Ex. 161, at 70. That difference, Dr. Liao testified, was significant: The risk of "severe esophagitis"—scarring of the esophagus that can make it difficult or impossible to eat and drink—"is highly correlated" with radiation dosage. Liao Dep. 71–75.

Because proton therapy would lead to a significantly smaller dosage of radiation hitting "critical organs," Dr. Liao concluded it was a "better plan" for Bill than IMRT. Liao Dep. 75. And, at trial, another eminent radiation oncologist, Dr. Andrew Chang, agreed that she had made the correct decision. App-593, 608.

Having decided that proton therapy was necessary to treat Bill's cancer while sparing his organs, MD Anderson submitted a request to SHL to proceed with the treatment. Liao Dep. 51; Trial Ex. 5, at 9–27. In that request, Dr. Liao explained that using proton therapy instead of IMRT would "provide the optimum dose" to the tumors "without causing potentially serious normal tissue complications, especially to the heart, esophagus, spinal cord, and normal lungs." Trial Ex. 146, at 1. The accompanying records noted that Dr. Liao had compared IMRT with proton therapy. Trial Ex. 5, at 13; App-305.

SHL flatly refused to approve Bill's request for coverage for proton-beam therapy—or even to conduct a reasonable investigation of the merits of the request. Instead, the company

implemented its hidden corporate policy of refusing to approve proton-beam therapy. App-316–42, 813–18, 837–45, 860–63, 876–80, 1082–85, 1092–93, 1114.

Bill's coverage request was handled by Dr. Shamoon Ahmad, who at the time was working as a contractor for SHL. App-218, 229, 272; Ex. 78. Dr. Ahmad was not a radiation oncologist. App-223. He had no training in radiation oncology and was not qualified to make treatment decisions about radiation. App-247–50. Dr. Ahmad admitted that he did not have the expertise to evaluate the benefits of proton therapy or to determine whether proton therapy or IMRT would be better for Bill. App-250, 463. In fact, he had no knowledge of proton therapy. App-258–61, App-297–307.

Dr. Ahmad admitted that he was not qualified to overrule the medical judgment of Dr. Liao. App-346. Indeed, Dr. Ahmad lacked even a basic understanding of radiation oncology: At trial, he was unable to interpret Dr. Liao's records at the level of even a first-year resident. App-338–40, 563–65. And he conceded that he did not attempt to speak with Dr. Liao before denying coverage. App-287. He also admitted that he didn't review Bill's insurance policy before deciding that it did not cover proton therapy, App-274, 1083–84. SHL's own records revealed that Dr. Ahmad conducted no investigation of Bill's claim at all and that he likely spent all of 12 minutes (or less) before rejecting the claim. *See* Trial Ex. 7; App-316–20. There's no evidence that Dr. Ahmad even read Bill's medical records. App-1092–93.[1]

Instead, Dr. Ahmad denied coverage based on SHL's corporate policy on the issue, which categorically asserts that proton therapy for lung cancer is never "medically necessary." App-104, App-1092. He did so even though that internal policy is based on a definition of "medically necessary" that considers the cost of treatment—a consideration that Bill's policy does not permit. App-857, 1052, 1071–74; *see also* Trial Ex. 13.

Both Dr. Liao and Dr. Chang, the other radiation oncology expert, testified that the assertion in SHL's policy that proton therapy is not "medically necessary" is incorrect. Liao

[1] In this and other key respects, Dr. Ahmad's trial testimony contrasted sharply with his deposition testimony in which he claimed that he spent much more time evaluating the prior-authorization claim. SHL-App-311-312; Instruction 10. The jury could have concluded these contradictions undermined his credibility.

Dep. 43–44, 90–91; App-659. To the contrary, they testified, proton therapy is widely recognized as a safe and effective treatment for lung cancer—used in many of the foremost cancer-treatment centers in the United States. Liao Dep. 38, 43–45, 85; App-532–33, 540, 543–44, 639. And there was substantial evidence in the record that SHL knew that. Dr. Chang testified that the studies that SHL itself relied upon in the lung-cancer section of its proton-therapy policy "show that [the therapy] is proven and medically necessary." App-660. The policy itself even recognizes that because "protons can deliver a dose of radiation in a more confined way to the tumor" than IMRT, it "may be useful when" a tumor "is in close proximity to one or more critical structures." App-106. And SHL's sister company operates its own proton-therapy center, which explains the benefits of proton therapy for lung cancer on its website— including its ability to avoid negative side effects such as "difficulty swallowing," the very side effect that Bill suffered. App-721–22, 1858–59. Proton therapy is, however, more expensive than IMRT. App-345, 369, 1076.

Dr. Liao knew that an appeal within SHL would be futile. Liao Tr. 92–93.[2] And because Bill's tumors were active and growing, it was essential that his treatment begin as soon as possible. *See* Trial Ex. 5, at 15–16. So although IMRT posed a greater threat to Bill's healthy organs, Dr. Liao decided that instead of wasting time fighting a losing battle with SHL while Bill's cancer progressed, she would have to use the only tool that remained to fight Bill's cancer. Liao Dep. 92–93. Dr. Liao therefore requested that SHL approve coverage for IMRT instead. Even though—as with proton therapy—there are not randomized clinical trials of the use of IMRT for lung cancer, SHL approved the request for the cheaper therapy. Trial Exs. 73, 74, App-464–69.

Following his treatment with IMRT, Bill developed Grade III esophagitis. His esophagus was scorched. During the acute phase, the esophagitis nearly killed Bill, but he fought back. As the chronic phase developed, scar tissue developed in his esophagus that left him unable to eat or drink, led to severe weight loss, and ultimately left him isolated and in pain

[2] SHL's own expert, Dr. Amitabh Chandra, confirmed that the appeals process is futile. He testified that only 0.14% of denied claims are overturned on appeal. App-1807–08.

for the rest of his life. App-573–74, 594–606, 676, 681–83, 709–11, 719–20, 1203–08, 1256–58, 1324, 1401–13; Liao Dep. 76–77, 81, 83; Trial Ex. 108, at 6; Trial Ex. 154, at 43, 52; Trial Ex. 169, at 51–54.

When he got home from the hospital, Bill's family explained, he was unrecognizable. App-1400. He had lost huge amounts of weight, could barely walk, and was in a lot of pain. App-1400–01. And over the course of the next year, he couldn't eat or swallow, complaining of things being stuck in his throat and of being unable to eat meals. App-1203–04, 1256, 1611–12. He had to live with a "puke bucket" by his side at all times—but was often left dry heaving because there was nothing to throw up. App-1204–06, 1257–58, 1324, 1412–13. He became physically weak, unable to walk across the house or get himself to the doctor's office. App-1256, 1319, 1324–25. And he lost much of his dignity, depending on his family to assist him around the home and even out of the bathroom. App-1256–59. His personality and enjoyment of life suffered too. He became withdrawn, dodging mealtimes, holidays, trips, family gatherings, and friends. App-1200–04, 1259–60, 1416, 1610. And he became angry—at family members for pressuring him to eat when he couldn't, and at SHL for denying him treatment he had sorely needed. App-1200, 1204, 1257, 1260–61.

Both Dr. Liao and Dr. Chang testified "to a reasonable degree of medical probability" that had Bill received proton therapy rather than IMRT, he would not have developed Grade III esophagitis. Liao Dep. 155:11–15; App-184–85. Indeed, Dr. Chang testified that he was "above 95 percent" certain that Bill would not have developed Grade III esophagitis had he been treated with proton therapy. App-637–38.

LEGAL STANDARD

A renewed motion for judgment as a matter of law may be granted only when "the evidence is so overwhelming for one party that any other verdict would be contrary to the law." *M.C. Multi-Fam. Dev.*, 124 Nev. 901 at 910, 193 P.3d at 542. In other words, so long as a plaintiff "presented sufficient evidence such that the jury could grant relief," a defendant's request for judgment notwithstanding the verdict must be denied. *Harrah's Las Vegas, LLC v. Muckridge*, 473 P.3d 1020 (Nev. 2020). In making this determination, "the trial court must view

the evidence and all inferences most favorably to the party against whom the motion is made." *M.C. Multi-Fam. Dev.*, 124 Nev. at 910, 193 P.3d at 542. "If there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question" remains "one of fact for the jury and not one of law for the court"—and the court, therefore, may not substitute its judgment for that of the jury. *Broussard v. Hill*, 100 Nev. 325, 327, 682 9.2d 1376, 1377 (1984).

ARGUMENT

I. There is no basis to override the jury's verdict that SHL violated its duty of good faith and fair dealing.

A. As this court has already held, there is sufficient evidence from which a reasonable juror could conclude that SHL acted in bad faith.

1. "The relationship of an insured to an insurer is one of special confidence." *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988). People depend on their insurance company "for security, protection, and peace of mind." *Id.*; *see also* App-2493. And insurance claims often arise when policy holders are at their most vulnerable—after an accident, for example, or a cancer diagnosis. *See, e.g.*, *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1262, 969 P.2d 949, 958 (1998), *as amended* (Feb. 19, 1999); App-996–99. The insurer, therefore, has a fiduciary-like obligation "to negotiate with its insureds in good faith and to deal with them fairly." *Ainsworth*, 104 Nev. at 592, 763 P.2d at 676. This obligation is imposed by law, not merely by the insurance contract itself. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009).

A "violation of" that legal obligation "gives rise to a bad-faith tort claim." *Id.* Although the tort often arises when an insurance company unreasonably denies or delays payment of a valid claim, the tort of bad faith is not "limited to such cases." *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 205–06, 912 P.2d 267, 272 (1996). Rather, "[b]ad faith is established" whenever an insurer (1) "acts unreasonably and" (2) "with knowledge" or reckless disregard "that there is no reasonable basis for its conduct." *Albert H. Wohlers & Co.*, 114 Nev. at 1258, 969 P.2d at 956; *see Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 703, 962 P.2d 596, 604 (1998), *opinion*

modified on denial of reh'g, 115 Nev. 38, 979 P.2d 1286 (1999) (stating reckless disregard is sufficient).

The parties agree that there are several well-established standards that set the bounds of reasonable insurer conduct. *See* App-977–1180 (plaintiff's expert testifying about these standards); App-2056 (SHL's expert testifying that he has "no reason to disagree"); *see also* App-2495–97 (jury instructions setting forth obligations of insurers). Among other things, insurance companies must give equal consideration to their policyholders' interests as they do to their own. App-1006–08, 2054–55; *see Miller*, 125 Nev. at 305, 212 P.3d at 322. They may not misrepresent the scope of their insurance plans—either affirmatively or by omission. App-1022–23, 2496; *see Albert H. Wohlers & Co.*, 114 Nev. at 1259–60, 969 P.2d at 957. Nor may they rely on internal corporate policies to automatically deny certain categories of claims. App-1117–21, 2086–87. Instead, they must conduct a prompt, fair, and thorough investigation of each claim they receive. App-1012–14, 2495; *see Ainsworth*, 104 Nev. at 591, 763 P.2d at 675. And "[w]hen investigating a claim, an insurer has a duty to diligently search for, and to consider, evidence that supports the insured's" claim. App-2495.

More specifically, health insurers may not deny claims unless there is a proper basis in the insurance contract for doing so; they have diligently searched for and considered evidence that supports the requested treatment; they have given due weight to the treating physician's opinion; and the decision to refuse coverage is made by a doctor with sufficient expertise to evaluate the proposed treatment, who has reviewed the patient's medical records and other relevant documentation. App-1010–11, 1015–18, 2082, 2495; NRS 695G.150.

And when an insurance company does deny a claim, it is required to promptly provide a reasonable explanation of the basis in the insurance policy for its denial. App-1121, 2126–27, 2496; NRS 686A.310(1)(n). "No insurer may deny a claim on the grounds of a specific policy, provision, condition or exclusion unless reference to that provision, condition, or exclusion is included in the denial." Nev. Admin. Code § 686A.675; App-2497; *see* App-2083, 2134–36.

2. This case is a paradigmatic example of bad faith. Indeed, the evidence at trial demonstrated that bad faith infected SHL's relationship with Bill from the very beginning: A

reasonable juror could have found that the company knew Bill sought coverage for proton therapy to treat lung cancer, sold him an expensive insurance policy that, on its face, covered this treatment, yet failed to mention that the company had a hidden internal policy of automatically denying coverage for this very treatment.[3] That alone is sufficient for a reasonable juror to conclude that SHL acted unreasonably—and that it knew of, or at the very least recklessly disregarded, the lack of a reasonable basis for its conduct. No reasonable insurer would believe it could mislead its policyholders about the scope of their coverage: It's well-established it may not. *See* App-1022-23; *see also Albert H. Wohlers & Co.*, 114 Nev. at 1259–60, 969 P.2d at 957 (insurer acted in bad faith in part by failing to notify insured of limited scope of coverage); *Powers*, 114 Nev. at 701, 962 P.2d at 603 ("Misconduct, such as misrepresenting or concealing facts to gain an advantage over the insured, is a breach of this kind of fiduciary responsibility.").

There was also substantial evidence that SHL continued to act in bad faith when it denied Bill coverage for proton therapy. The company assigned the coverage determination to a doctor who, by his own admission, lacked the expertise to evaluate Bill's treatment. App-250, 463. That doctor then denied coverage based solely on SHL's internal proton-therapy policy—without even reviewing Bill's insurance contract, let alone investigating his claim. App-274, 287, 1083–84. SHL's own records reflect that the only thing Dr. Ahmad knew about Bill's claim before denying it was that he sought proton therapy to treat a mediastinal tumor. Trial Ex. 5, at 5. A reasonable juror could conclude that Dr. Ahmad never even read Bill's medical records. App-1092–93. This automatic denial of coverage violates virtually every standard the parties agree governs insurance companies' conduct—in many ways, it violates the law. *See supra* page 9. The jury was certainly entitled to conclude that automatic denial is unreasonable and that SHL knew it.

[3] *See, e.g.*, App-1387–88, 1392–94 (Sandy Eskew's testimony that she told SHL that she sought coverage for proton therapy, and that SHL did not mention its corporate proton policy); Trial Ex. 2, at 12, 47 (insurance policy stating therapeutic radiation is covered); App-264, 1392 (proton beam therapy is a form of therapeutic radiation).

Not to mention that SHL's denial letter itself violated insurance industry standards: It misrepresented the facts, falsely stating that SHL's determination was based on Bill's insurance contract, when it never even reviewed the contract. Trial Ex. 147, at 1. The letter provided no "explanation of the basis" for the denial in Bill's insurance policy—let alone a "reasonable explanation . . . with respect to the facts of [his] claim and the applicable law." App-2496; *see also* Trial Ex. 147, at 1. And it certainly did not identify the specific provision in Bill's contract on which the denial was based. *See* Nev. Admin. Code § 686A.675(1); App-2496. It couldn't. SHL's policy of categorically denying proton-therapy claims wasn't part of Bill's insurance contract.

Put simply: SHL sold Bill and Sandy an insurance policy that, on its face, covered the treatment that Bill sought, denied coverage for that very treatment based on a secret internal policy without so much as looking at Bill's contract or conducting any investigation, and then provided virtually no information about the reasons for its denial, making it impossible for Bill to meaningfully respond. As this Court concluded in denying SHL's motion for directed verdict the first time around, that's more than enough for a reasonable juror to conclude that SHL acted unreasonably and knew (or, at least, recklessly disregarded the fact that) it was doing so.

3. SHL doesn't seriously contest—or even address—any of this. Instead, the company asserts that a single fact renders its wholesale violation of the fundamental standards governing the insurance industry reasonable: its reliance on the corporate proton-therapy policy. But that doesn't absolve the company of bad faith; it *is* bad faith. As SHL's own expert testified, an insurance company cannot rely solely on an internal policy to deny a claim. App-1117–21, 2086–87. That alone is sufficient to support the jury's verdict.

SHL emphasizes that the policy cited scientific studies and the guidelines of professional organizations. But even if those studies irrefutably demonstrated that proton therapy was, as a general matter, not medically necessary to treat lung cancer—a premise Dr. Chang refuted at trial—that wouldn't change the facts: SHL sold Bill an insurance policy that said it covered radiation therapy, knowing it had a secret corporate policy of denying coverage for exactly the treatment Bill planned to seek; denied Bill's claim without even investigating it to determine if

an exception to that secret policy was warranted here—given that a world-renowned oncologist told the company proton therapy was necessary to spare Bill's critical organs and had a comparative plan to prove it; and then issued him a cursory denial that misrepresented its investigation and failed to identify what provision in his contract allowed the company to deny the claim. Even assuming the proton policy itself was unimpeachable and nobody at SHL believed otherwise, a reasonable juror could easily have held that these facts alone constitute bad faith.

And the jury was not required to believe SHL's self-serving assertions about the validity of the corporate proton-beam policy in the first place. There was more than sufficient evidence for the jury to conclude that SHL's real reason for creating the policy—and applying it here—was not medical necessity, but cost. Dr. Chang testified that, contrary to SHL's assertion, the studies SHL referenced in the proton policy's section on lung cancer "show that [proton therapy] *is* proven and medically necessary." App-660–61 (emphasis added). And although SHL claimed—and continues to claim, *see* JMOL 9—that it was troubled by the lack of randomized clinical trials comparing proton therapy with IMRT, the company approved treating Bill with IMRT, which lacks the same randomized clinical trials.[4] App-467–69, 645–47. Both Dr. Liao and Dr. Chang—leading experts in radiation oncology—testified that proton therapy is safe, effective, and widely accepted for the treatment of lung cancer. *See, e.g.*, App-540; Liao Dep. 43–45, 85. And, a reasonable juror could conclude that SHL agreed: SHL's sister corporation operates a proton-therapy center, the website of which explains the method's benefits for the treatment of lung cancer. App-720–22, 901–11. In short, there was substantial evidence that the real reason SHL denied Bill's claim was not that it believed proton therapy was medically unnecessary for him, but that proton therapy cost more than SHL wanted to pay. SHL does not dispute that a reasonable juror could conclude that it's unreasonable for an insurer to deny medically necessary treatment to save money, and that SHL knew that.

[4] As Dr. Chang testified, the reason both therapies lack randomized clinical trials is because those trials are used to tease out small differences between treatments. App-645–47. And the differences between IMRT and the prior widely used therapy, and proton therapy and IMRT, are so large that randomized clinical trials are unnecessary—oncologists simply adopt the better treatment. *Id.*

The company contends (at 8) that even if its interpretation of Bill's insurance contract was mistaken, it was at least reasonable. This argument is perplexing. SHL concedes that its denial of Bill's claim had nothing to do with his insurance contract; Dr. Ahmad didn't even look at it. SHL didn't misinterpret the contract; it ignored it entirely. And even if it hadn't, the Supreme Court has rejected the contention that an insurance company's "interpretation of its own contract as excluding coverage" entitles the insurer to judgment as a matter of law. *See, e.g.*, *Albert H. Wohlers & Co.*, 114 Nev. at 1258–59, 969 P.2d at 958 (quoting *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 539 (1982)).

SHL argues (at 10) that summarily denying Bill's claim based on its proton policy—regardless of what his insurance contract actually said—was "consistent with the policies and procedures at Sierra Health and Life." But that's exactly the point. A reasonable juror could certainly conclude that a sophisticated insurer like SHL has "actual or implied awareness" that it is unreasonable to deny a claim in violation of basic claim-handling standards like the duty to investigate or the obligation to assign a claim to someone competent to review it.

Finally, SHL complains (at 9–10) that other insurance companies have corporate policies similar to its proton policy. Assuming this claim is even accurate, SHL presented no evidence that these other companies rely on their policies to deny coverage automatically, regardless of what a policyholder's contract says, without so much as a reasonable investigation. Nor does it cite any authority for the proposition that the law authorizes an insurance company to act in bad faith, so long as enough other insurers do so too. The jury heard SHL's other-insurer evidence, weighed it against the overwhelming evidence that SHL repeatedly violated basic insurance industry standards, and concluded that the company acted in bad faith. The law does not permit—let alone require—this Court to overturn its decision.

B. The jury was not required to accept SHL's belated assertion that Bill Eskew's insurance plan didn't cover proton therapy.

SHL tries (at 5) to render its bad faith irrelevant by arguing that Bill's insurance policy didn't cover proton therapy for lung cancer in the first place. Of course, the policy itself doesn't

say that. To the contrary, it explicitly states that therapeutic radiation services—which include proton therapy—*are* covered. That's why Bill bought it.

Searching for a provision that could justify reading into the contract an unwritten categorical exclusion, SHL seizes—as it did at trial—on the contract's requirement that treatment be "medically necessary." Because the company's proton policy references scientific studies, SHL argues, no reasonable juror could conclude that proton therapy for lung cancer satisfied the insurance contract's definition of medical necessity. The company never explains this argument. It doesn't even identify which requirement of the contract's three-pronged definition it contends proton therapy does not satisfy, let alone point to any contractual provision that says the company may ignore that definition entirely so long as it cites scientific studies in doing so.

There was more than sufficient evidence from which the jury could conclude that treating Bill's lung cancer with proton therapy was "medically necessary" as defined by his insurance contract. SHL's assertion that its secret policy to deny all such treatment relied on studies is far from sufficient for this Court to overrule the jury's conclusion.

1. As the jury was instructed, because of the unique relationship between insurance companies and policyholders, there are special rules governing the interpretation of insurance contracts. "Clauses providing coverage are broadly interpreted so as to afford the greatest possible coverage to the insured," while "clauses excluding coverage are interpreted narrowly against the insurer." *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014). "To preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the exclusion in obvious and unambiguous language, (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court." *Id.* at 398–99, 329 P.3d at 616.

In addition, like all contracts, an unambiguous insurance agreement should be enforced according to the "plain and ordinary meaning of its terms." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 673 (2011). But if an insurance contract is ambiguous—that

is, if it "leads to multiple reasonable interpretations"—it must be interpreted against the insurance company. *Century Sur. Co.*, 130 Nev. at 398, 329 P.3d at 616. "Ultimately," insurance policies must be interpreted to "effectuate the reasonable expectations of the insured." *Powell*, 127 Nev. at 162, 252 P.3d at 673; *see also* App-2495.

2. Applying these standards here, there is more than enough evidence to support the jury's verdict that proton therapy was "medically necessary" under Bill's contract. The contract's definition of "medically necessary" has three prongs.[5] The treatment must be: (1) "consistent with the diagnosis and treatment of the Insured's Illness or Injury"; (2) "the most appropriate level of service which can safely be provided to the Insured"; and (3) "not solely for the convenience of the Insured, the Provider(s) or Hospital."

As to the first prong, Dr. Liao—again, a world-renowned radiation oncologist who works at the highest-ranked oncology center in the country—testified that proton therapy is "consistent with" the treatment of lung cancer. Liao Dep. 84; *accord* App-1068–69 (Mr. Prater testifying to the same effect). She explained that it is "a widely accepted position in the radiation oncology community around the world" that "proton therapy to treat lung cancer has been proven to be safe and effective." *Id.* 45–46. Indeed, Dr. Liao testified, it is a "standard of care in the medical profession." Liao Dep. 45. That's because it enables oncologists to irradiate tumors that, like Bill's, are dangerously close to critical organs, while minimizing the radiation—and therefore the damage caused—to those organs. Liao Dep. 35–36. Dr. Liao's testimony, standing alone, is sufficient for a reasonable juror to conclude that proton therapy is consistent with the diagnosis and treatment of lung cancer.

And Dr. Liao's testimony did not stand alone. Dr. Chang—another radiation oncologist and expert in proton therapy—agreed. He also testified that proton therapy is "widely accepted" for the treatment of lung cancer. App-544. The FDA, he noted, has approved proton-therapy

[5] Technically, the contract says that "medically necessary means a service or supply needed to improve a specific health condition or to preserve the Insured's health," which meets these three prongs. App-64. But SHL does not argue that a reasonable juror could not have concluded that proton-beam therapy is a service "needed to improve a specific health condition." *Cf. Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3 (failure to raise issues in opening brief waives them). Nor could it. Dr. Liao and Dr. Chang both testified otherwise.

machines. App-532. And Medicare pays for proton-therapy treatment of lung cancer. *See id.* So too does Tricare, the medical-insurance program that covers retired service members. App-532–33. In fact, not a single witness testified that proton therapy is inconsistent with lung-cancer treatment. Besides a passing reference in its closing argument, SHL has never seriously disputed the point.

Nor is there any dispute that treating Bill with proton therapy satisfied the third prong of the definition—that the treatment was not "solely for the convenience" of Bill Eskew, Dr. Liao, or MD Anderson. Even SHL's own witness, Dr. Owens, testified that it would be "very obvious" that Bill wasn't undergoing proton-beam therapy because it was convenient. App-2073; *accord* Liao Dep. 84 (testimony of Dr. Liao that proton therapy was not for the convenience of Bill or Dr. Liao); App-1068 (Prater testimony to the same effect).

The only prong SHL has ever seriously disputed is the second one—whether proton-beam therapy was "the most appropriate level of service which [could] safely be provided to" Bill. But, here too, there was ample evidence from which a reasonable juror could conclude that this requirement was satisfied. Multiple witnesses testified that "level of service" means the clinical setting of the treatment—for example, whether it is inpatient or outpatient. App-851–53, 1051–52, 1068, 1072; *see* Liao Dep. 84. They also testified—and SHL has never disputed—that the outpatient setting, in which Bill's proton therapy was to be performed, is "the most appropriate" clinical setting for his treatment. Liao Dep. 84; App-1068; *see also* App-853 (SHL witness testifying both IMRT and proton therapy are outpatient). A reasonable juror certainly could have agreed.

To be sure, SHL tried to convince the jury to adopt a different understanding of the phrase "level of service." Dr. Owens—an insurance-industry consultant that testified on SHL's behalf—asserted that the phrase refers not just to clinical setting, but to cost: that "an expensive treatment" is not "an appropriate level of service if there's a less expensive treatment that works just as well." App-2036. But the jury was not required to believe this testimony. In fact, Dr. Owens couldn't identify a single document that supports his definition. App-2093–92. And his testimony was contradicted not only by Ms. Eskew's insurance expert, but by SHL's own

director of preauthorization review, as well as the company's own internal documentation. App-852–53; Trial Ex. 13. At best, then, the phrase is ambiguous, so—as a matter of law—it must be construed in favor of coverage. *See Century Sur. Co.*, 130 Nev. at 398, 329 P.3d at 616; *see also Albert H. Wohlers & Co.*, 114 Nev. at 1259, 969 P.2d at 956–57 (holding that insurance companies cannot avoid bad-faith liability by drafting ambiguous contracts—or manufacturing ambiguity after the fact).

But even if the jury had accepted Dr. Owens's definition, there was sufficient evidence from which it could conclude the definition was satisfied: Both Dr. Liao and Dr. Chang testified that proton therapy would have delivered less radiation to Bill's esophagus than IMRT—and that had Bill received proton therapy rather than IMRT, he would not have suffered the Grade III esophagitis that caused him to spend his last months unable to eat or drink, vomiting daily, miserable and in pain. In other words, they testified that IMRT was *not* just as good as proton therapy—proton therapy was better. And there was documentary evidence to support their testimony: the comparative treatment plan. Thus, there was more than sufficient evidence for the jury to conclude not only that proton therapy satisfied the definition of "medically necessary" that was actually in Bill's insurance contract, but also that it satisfied the definition that SHL invented after the fact.

3. SHL's motion doesn't mention any of this evidence. Instead, it focuses entirely on its corporate proton policy: In denying Bill's treatment, the company says, Dr. Ahmad relied on SHL's corporate proton policy; and that policy, in turn, references scientific studies and evidence-based reports in support of its assertion that proton therapy is never "medically necessary" for lung cancer.[6] Therefore, the company concludes, the jury could not reasonably find that treating Bill with proton therapy met the definition of "medically necessary" in his contract.

[6] To the extent SHL asserts that Dr. Ahmad relied directly on scientific literature, that assertion cannot be credited here. At this stage, the evidence must be viewed most favorably to Bill, and there was ample evidence demonstrating that Dr. Ahmad did not, in fact, rely on anything besides the proton policy. *See supra* page 4–5.

This argument is difficult to follow. It seems to rely on the premise that Bill's insurance "plan specifically provides that SHL may determine that a service is not 'medically necessary' based on peer-reviewed studies and reports of expert organizations." JMOL 7. But that premise is incorrect. The contract says the company may "*give consideration*" to studies and reports in determining whether a particular treatment for which a policyholder seeks coverage satisfies the *contract's* definition of "medically necessary." App-64 (emphasis added). On SHL's own account, it never even attempted to determine whether treating Bill with proton therapy satisfied *his contract's* definition of "medically necessary." Dr. Ahmad didn't read the contract; he relied entirely on the proton policy. And, as SHL's director of preauthorization review testified at trial, the definition of "medically necessary" upon which the proton policy was based differs from the definition in Bill's contact in a crucial respect: the proton-policy definition requires the company to consider cost, while Bill's contract does not even permit it to do so. *See* App-857, 1052, 1071–74; *see also* Trial Ex. 13. SHL does not explain how the proton policy could even shed light on whether Bill's treatment met the definition of "medically necessary" in his contract—let alone justify overturning the jury's decision that it does.

Ultimately, SHL's real argument seems to be that it doesn't matter whether proton therapy, in fact, meets the contract's definition of "medically necessary"; a treatment is covered only if SHL "*determines*" that it meets that definition, and SHL did not do so here. JMOL 7–8 (emphasis added). On that view, SHL's insurance policy is worthless: The company can avoid paying for treatment just by refusing to determine that it's medically necessary—regardless of whether it meets the contractual definition. That cannot possibly accord with Bill's "reasonable expectations"—or the requirement that insurance coverage be interpreted broadly. *See Powell*, 127 Nev. at 162, 252 P.3d at 673; App-2494. Indeed, interpreting the insurance policy in this way is almost certainly itself bad faith. *See Albert H. Wohlers & Co.*, 114 Nev. at 1259, 969 P.2d at 956–57 (unreasonable interpretation of insurance policy constitutes bad faith); App-1008–09, 1043, 1059, 1066–74, 2493–95 (insurers must fairly interpret insurance policy).

Perhaps recognizing this problem, SHL briefly argues that proton therapy was, in fact, not medically necessary because it was "unproven." JMOL 7. But there was substantial evidence at

trial to the contrary. Dr. Liao testified otherwise; Dr. Chang testified otherwise. Liao Dep. 43–44, 90–91; App-659. Again, Dr. Chang testified that the studies SHL itself referenced in the proton policy's section on lung cancer "show that [proton therapy] *is* proven and medically necessary." App-660 (emphasis added). SHL's assertion to the contrary, he told the jury, "was inaccurate." *Id.* SHL may wish that the jury had taken its word over that of the world's leading radiation oncologists, but that is not a basis on which the verdict may be overturned.

C. The evidence at trial was more than sufficient for a reasonable juror to conclude that SHL caused Bill's injuries.

1. SHL halfheartedly argues that there was insufficient evidence that the company's bad-faith denial of Bill's claim caused his injury. As this Court instructed the jury, SHL's misconduct was a proximate cause of Bill's injuries if it was a "substantial factor in bringing" them about. App-2497; *see Holcomb v. Georgia Pac., LLC*, 128 Nev. 614, 627, 289 P.3d 188, 196–97 (2012). And "a substantial factor is a factor that a reasonable person would consider to have contributed to [the] harm"—it need not be "the only cause." App-2497–98. There was more than enough evidence for a reasonable juror to conclude that SHL's bad-faith denial of Bill's claim "contributed to" his harm.

Both Dr. Liao and Dr. Chang testified "to a reasonable degree of medical probability" that had Bill received proton therapy rather than IMRT, he would not have developed Grade III esophagitis. Liao Dep. 155; App-184–85. This testimony was supported by the comparative plan Dr. Liao's team created when evaluating Bill's treatment options, which showed that IMRT would subject Bill's esophagus to a dangerous level of radiation, while proton therapy would not. And both doctors testified that it was his Grade III esophagitis that—by definition—prevented him from eating and drinking, which caused his extreme weight loss, weakness, fatigue, pain, and anger.

SHL takes aim at Dr. Chang's testimony, but its criticism confuses the likelihood that a patient will develop Grade III esophagitis from IMRT in the first place with the likelihood that a patient—like Bill—who *did* develop Grade III esophagitis would have developed the same injury had they been treated with proton therapy instead. Dr. Chang testified that he was "above

95 percent" certain that Bill would not have developed Grade III esophagitis had he been treated with proton therapy. App-637–38. Perhaps SHL disagrees with his reasoning, but the jury was entitled to credit his testimony. And, in any event, even absent Dr. Chang's testimony, the jury would still have heard from Dr. Liao and seen her comparative plan—evidence with which SHL takes no issue. That evidence, standing alone, is sufficient for a reasonable jury to conclude that SHL's denial of Bill's claim was a substantial factor in causing his injuries.[7]

2. Most of SHL's argument on causation is not actually about causation at all, but damages. SHL raises two damages issues, both of which are easily dispatched. *First*, SHL asserts that Bill's estate cannot recover emotional distress damages absent proof of economic loss. SHL raised this argument in its motion to dismiss, and Judge Cory rejected it—three years ago. Court Minutes, June 18, 2019; SHL Mot. Dismiss, at 9–12 (May 10, 2019). SHL has not asked this Court's permission to seek reconsideration. Nev. R. P. 2.24 ("No motions once heard and disposed of may be renewed in the same cause, *nor may the same matters therein embraced be reheard*, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties." (emphasis added)). Nor has it even attempted to demonstrate that new facts have come to light or that this Court's prior decision was clearly erroneous. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). It simply repeats the same argument this Court rejected.

[7] SHL briefly suggests that there were intervening factors, but the company doesn't even argue the point. And, in any event, its denial need not be the sole cause of Bill's harm—just a substantial factor in bringing it about. SHL did not ask for an intervening-cause instruction for good reason: It was entirely foreseeable that a stage IV cancer patient would proceed with whatever treatment his insurance company would approve rather than attempt to pay for treatment out of pocket or delay all treatment in an effort to appeal—especially when, as here, the company virtually never grants appeals. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491–92, 215 P.3d 709, 724 (2009) ("An intervening act will only be superseding and cut off liability if it is unforeseeable."). Moreover, where, as here, an "actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Restatement (Second) of Torts §435.

Reconsideration should be granted "only in very rare instances." *N. Main, LLC v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 128 Nev. 922, 381 P.3d 646 (2012). Here, SHL seeks reconsideration without seeking leave to do so, without meeting—or even setting forth—the standard, and following a jury trial in which the plaintiff relied on this Court's ruling in determining what evidence need to be presented. That is not the kind of "rare" circumstance in which reconsideration is warranted.

And even if this Court were to grant reconsideration, SHL's argument fails for the same reasons it did three years ago. *See* Opp'n Mot. Dismiss (May 24, 2019). Nevada has never adopted the rule that a plaintiff seeking emotional damages on a bad-faith insurance claim must also prove economic loss. In fact, the Supreme Court approved a damages award purely for emotional distress in a bad-faith insurance case. *Guar. Nat. Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996).

Rather than take the lead of the Nevada Supreme Court, SHL asks this Court to follow California courts. But California also lacks the rigid rule that SHL seeks. Although California courts have held that plaintiffs in bad-faith insurance cases may not seek emotional distress damages without economic loss, every case in which they have done so is a case in which the relevant loss would, in fact, be economic.[8] These cases simply reflect an (increasingly outmoded) principle in California law that, ordinarily, compensation for emotional harm may be sought only either where it is tied to a physical or economic injury or where the emotional harm is severe. *See, e.g.*, *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 578–81 (1973). Bad-faith cases tend to cause economic injury (*e.g.*, having to pay for treatment out of pocket), so the case law describes the requirement in those terms. *See, e.g.*, *id.* But the purpose of the rule, where it applies at all, is to address "the fear of fictitious or trivial claims," *id.* at 580—a fear that is equally allayed by physical harm as by economic. *See also* 4A American Law of Torts § 16:2 ("There appears to be no dissent from the general proposition in the American law of damages

[8] This includes the case SHL argues shows otherwise. *See Maxwell v. Fire Ins. Exch.*, 60 Cal. App. 4th 1446, 1451 (1998). The plaintiff there was physically injured, but not by the insurance company. *See id.* at 1447–48.

recoverable for tort that mental suffering or anguish actually accompanying a physical bodily injury is compensable.").

SHL's argument is also contrary to the weight of authority in other states. Several state supreme courts have held that a plaintiff in a bad-faith case can recover emotional-distress damages without any showing of additional harm—physical or economic. *See, e.g.*, *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 40 n.30 (Ky. 2017); *Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 432 (Haw. 2011); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409 (Colo. 2004). After all, requiring physical or economic loss would mean that, in many cases, insurers could unreasonably refuse the payment of valid claims unless and until a policyholder sued, at which point it could pay just that claim and dismiss the lawsuit on the ground that there was no loss. And "the jury system itself serves as a safeguard against fictitious claims of, and unlimited liability for, emotional distress damages allegedly resulting from an insurer's bad faith." *Miller*, 268 P.3d at 431. Especially given that it's already approved an award solely for emotional distress, there is no reason to believe the Nevada Supreme Court would undermine its bad-faith doctrine by grafting onto it a requirement of physical or economic harm. This Court should not do so either.

In any case, any such requirement would be satisfied. Bill suffered physical harm, the injury to his esophagus, and economic harm—SHL's refusal to pay for proton therapy, the need for Bill and his family to "get out" of their auto-care franchise because Bill could no longer handle the work, App-1253, and the cost of the lawsuit itself. *Cf. Delos v. Farmers Grp., Inc.*, 93 Cal. App. 3d 642, 659 (1979) (legal costs are sufficient).

Second, SHL argues (at 14) that there was insufficient evidence that Bill's emotional distress caused him physical harm. But as just explained, a plaintiff in a bad-faith insurance case can recover for emotional distress unaccompanied by any physical or economic harm. And even if that weren't the case, there was substantial evidence introduced at trial—which SHL does not attempt to dispute—that Bill suffered physical harm. As both Dr. Liao and Dr. Chang testified, esophagitis is a physical injury, the burning and scarring of the esophagus. *See, e.g.*, App-595–96; Liao Dep. 80. Bill's emotional distress was incident to that physical impact. He need not,

therefore, prove that it caused additional physical harm. *See, e.g.*, *Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 166, 232 P.3d 433, 436 (2010) (requirement that emotional distress cause physical harm applies—if at all—only in cases "where emotional distress damages are not secondary to physical injuries" in the first place).

II. This Court did not err in allowing the jury to determine punitive damages under a "conscious disregard" standard.

A. As this Court has already held, the correct standard for instructing the jury was "conscious disregard of the plaintiffs' rights"—not "hatred and ill will or intent to injure."

SHL next contends that this Court erred in instructing the jury on punitive damages. But SHL's argument rests on the wrong legal standard. Under Nevada law, the correct question for the jury, as this Court explained when it rejected SHL's previous directed-verdict motion during trial, was whether "the defendant acted in conscious disregard of the plaintiffs' rights." App-1881; *see* Jury Instruction 32. SHL, by contrast, urged the Court to adopt a much higher standard: whether "the insurer acted with *hatred and ill will*, or manifested *an intent to injure*" the plaintiff. JMOL 16 (emphasis added). That is not Nevada law. And if it were, it would be virtually impossible for anyone to obtain punitive damages for reprehensible and harmful corporate policies.

Nevada sets out the requirements for punitive damages by statute. The statute permits punitive damages where plaintiffs can prove, among other things, that the defendant's conduct was characterized by implied malice or oppression. *See* NRS 42.005.1. Implied malice encompasses conduct that is "engaged in with a *conscious disregard* of the rights or safety of others." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.2d 243, 252 (2008). Similarly, "oppression" encompasses conduct that "subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." *Id.* Thus, both implied malice and oppression turn on "conscious disregard of a person's rights as a common mental element." *Id.* That standard is reflected in longstanding Nevada case law and standard jury instructions. *See, e.g., Ainsworth*, 104 Nev. at 593, 763 P.2d at 677; *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 512–13, 789 P.2d 193, 198 (1989); State Bar of Nevada, *Nevada Jury Instructions:*

Civil (2018 ed.), 12.1 (defining malice as "conduct which is engaged in with a conscious disregard of the rights or safety of others" and "oppression" as "conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of that person").

SHL doesn't dispute that both oppression and implied malice are valid bases for punitive damages under this statute. And it doesn't dispute that this statute applies to insurance bad-faith cases. Indeed, the statute reflects that the Legislature took special steps to protect Nevadans from insurance-company misconduct by specifically encouraging punitive damages in bad-faith cases. *First*, the Legislature exempted bad-faith cases from the statutory damages cap and 1:3 ratio that otherwise apply across the board. NRS 42.005.2(b). *Second*, the Legislature provided that, in bad-faith cases, the strict definitions cabining punitive damages under NRS 42.001 "are not applicable and the corresponding provisions of the common law apply." NRS 42.005(5). This means that a plaintiff in a bad-faith case, unlike plaintiffs in ordinary tort cases, need not prove "despicable conduct" on the part of the insurer to obtain punitive damages. NRS 42.001. The legislative history reflects this intent to ensure that "claims of bad faith against an insurer are exempt from these punitive damage limitations." Legislative Counsel Bureau, Summary, S.B. 474 (1995), https://perma.cc/8FZ3-NJP8.

SHL draws the wrong lesson from these provisions, suggesting that the Legislature somehow meant to apply a *stricter* standard to bad-faith cases. That gets things backwards.

In making this argument, SHL first ignores that "oppression" is an independent basis for the jury's award. SHL never objected to the definition of oppression and does not offer any independent argument for why the Court should adopt a heightened standard for oppression in bad-faith cases. That issue is therefore waived. That alone is sufficient reason to reject SHL's motion and uphold the jury's punitive-damages award.[9]

[9] In any event, SHL is wrong. In *Powers v. United Services Automobile Association*, 114 Nev. 690, 962 P.2d 596 (1998), the Nevada Supreme Court upheld a punitive-damages award in an insurance bad-faith case, holding that the insurer "made numerous critical omissions in its investigative process; these omissions support a finding of oppression." *Id.* at 704. The holding that insurer omissions can constitute oppression is incompatible with a hatred or ill-will requirement. And *Powers* was decided in 1998—three years after the enactment of the statutory language on which SHL relies.

As for malice, SHL fundamentally misunderstands the common-law distinction between express and implied malice. The older cases on which SHL relies, *see* JMOL 15–16, all concern express malice or malice-in-fact (or malice in unrelated fields of law such as defamation). But Nevada has since made clear that "implied malice"—which doesn't require hatred or ill-will—"is a discrete basis for assessing punitive damages where conscious disregard can be demonstrated." *Thitchener*, 124 Nev. at 742–43; 192 P.2d at 254–55 & n.49 (repudiating the contrary view and explaining how Nevada's jurisprudence evolved). Again, there's no dispute that this statute applies here. *See* NRS 42.005.1 (allowing punitive damages on the basis of "oppression, fraud or malice, express or implied").

Even in the nineteenth century, under the common law, "the rule in a large majority of jurisdictions was that punitive damages … could be awarded without a showing of actual ill will, spite, or intent to injure." *Smith v. Wade*, 461 U.S. 30, 41 (1983). To be sure, explicit "malice" or "malice in fact" meant exactly what SHL says: "actual ill will, spite or intent to injure." *Id.* at 39 n.8. But "implied malice" meant something very different. This was "a purely fictional malice that was conclusively presumed to exist whenever a tort resulted from a voluntary act, even if no harm was intended." *Id.* It often encompassed only "an intent to do the act that caused the injury, as opposed to cause the injury itself." *Id.* In the punitive-damages context, then, implied malice encompassed conduct that was "recklessly negligent" or "wantonly indifferent to another's rights." *Id.* In other words, even under the common law one hundred years ago, implied malice was a basis for recovering punitive damages for conduct reflecting a conscious disregard of the plaintiff's rights.

B. This Court did not err in finding sufficient evidence that SHL had acted in conscious disregard of Bill's rights and his health.

Aside from trying to change the relevant legal standard, SHL makes only a halfhearted attempt to show that the jury's damages award should be overturned for insufficient evidence. But the Nevada Supreme Court will not disturb an award of punitive damages unless it is "not supported by substantial evidence" in the trial record. *First Interstate Bank v. Jafbros Auto Body*, 106 Nev. 54, 56, 787 P.2d 265, 766 (1990). Substantial evidence is "evidence that a

reasonable mind might accept as adequate to support a conclusion." *Thitchener*, 124 Nev. at 739. In reviewing the jury's award, the Nevada Supreme Court will "assume that the jury believed all of the evidence favorable to the prevailing party and drew all reasonable inferences in that party's favor." *Id.*

SHL's motion entirely ignores this Court's reasoning for denying its previous motion for a directed verdict. It should be denied again for that reason alone. This Court singled out three facts in concluding that the evidence was sufficient. *First*, "the insurance policy states that therapeutic radiation was a covered service, and proton therapy is a form of therapeutic radiation." App-1881. In other words, SHL denied Bill coverage for medically necessary cancer treatment that was plainly covered by his insurance policy—treatment that was the very basis for his decision to buy SHL's expensive platinum insurance policy in the first place. *Second*, "no one at the insurance company reviewed the insurance policy when this decision to deny coverage was made." *Id. Third,* "Dr. Chang clearly testified in his direct examination on the stand that within a 95 percent degree of medical probability," Bill "sustained Grade III esophagitis" as a result of undergoing IMRT treatment instead of the recommended proton therapy treatment. *Id.*

This Court was amply justified in relying on this and other evidence in denying SHL's motion for a directed verdict. *See Powers*, 114 Nev. P.2d at 704 (holding that an insurer's "numerous critical omissions" in denying a claim supported punitive damages); *Thitchener*, 124 Nev. at 744, 92 P.2d at 255–56 (holding that a mortgage company's failure to review foreclosure documents despite "warning signs" of "imminent, as opposed to merely a theoretical risk of harm," warranted punitive damages); *Wyeth v. Rowatt*, 126 Nev. 446, 474, 244 P.2d 765, 784 (2010) (holding that a drug company's conduct in disregarding the risk of cancer showed that it "acted with malice when it had knowledge of the probable harmful consequences of its wrongful acts"). Consequently, there should be little question that "the jury could have logically concluded that" SHL "consciously disregarded" Bill's rights, as well as his health, safety, and well-being. *Thitchener*, 124 Nev. at 744, 192 P.2d at 255–56.

Ignoring the evidence cited by the Court, SHL argues, first, that when it denied Bill's claim for proton therapy, it was just following its own "standard procedures," and, second, that the categorical denial of proton-therapy coverage was scientifically justified. JMOL 16–19. Far from showing that the jury's award of punitive damages should be overturned, these arguments demonstrate *exactly why* the award was justified. SHL's conduct in this case, even on the company's own account, was not an example of one-off negligence or a casual human mistake. It was instead the predictable result of a categorical, reckless corporate policy—a "standard" policy that was kept hidden from Bill and Sandy Eskew and others in their position who depend on their insurer to provide coverage in a moment of acute medical need. A "standard" policy that contradicted the very scientific studies it cited. A "standard" policy that placed the company's profits over the health and well-being of those who pay its premiums. It is precisely for egregious situations like this that punitive damages exist.

CONCLUSION

The renewed motion for judgment as a matter of law should be denied.

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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