No. 85369

In the Supreme Court of Nevada

SIERRA HEALTH AND LIFE INSURANCE CO., INC.,
Appellant,

Electronically Filed
Jun 26 2023 08:44 PM
Elizabeth A. Brown
Clerk of Supreme Court

v.

SANDRA L. ESKEW, as special administrator of the estate of William George Eskew,
Respondent.

On Appeal from the Eighth Judicial District Court,
Clark County, Case No. A-19-788630-C

RESPONDENT'S ANSWERING BRIEF

MATTHEW L. SHARP (SBN 4746)
MATTHEW L. SHARP, LTD.
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

DOUGLAS A. TERRY
(*admitted pro hac vice*)
DOUG TERRY LAW, PLLC
200 E. 10th Street Plaza, Suite 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

DEEPAK GUPTA
(*admitted pro hac vice*)
ROBERT D. FRIEDMAN
(*pro hac vice forthcoming*)
GUPTA WESSLER PLLC
2001 K Street NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
robert@guptawessler.com

Counsel for Respondent

June 26, 2023

NRAP 26.1 DISCLOSURE

In compliance with NRAP 26.1(a), the undersigned counsel of record states that Gupta Wessler PLLC, Matthew L. Sharp, Ltd., and Doug Terry Law, PLLC are the only law firms that have appeared on behalf of Sandra Eskew in this matter or are expected to appear in this Court.

Dated: June 26, 2023

<u>/s/ Deepak Gupta</u>
Deepak Gupta

TABLE OF CONTENTS

Table of authorities iv

Introduction 1

Statement 5

A. Legal background 5

B. Factual background 7

1. After Bill Eskew is diagnosed with lung cancer, he and his wife Sandra buy insurance from Sierra to cover proton-beam therapy 7

2. A top radiation oncologist and her team determine that Bill should receive proton therapy to treat his cancer while preserving his quality of life 8

3. Dr. Liao seeks coverage from Sierra 11

4. Sierra's summary "review" of Dr. Liao's request is conducted—in just minutes—by an unqualified physician with zero training in radiation oncology 12

5. Instead of conducting a meaningful medical review, Sierra relies on an undisclosed corporate policy to deny coverage 14

6. After receiving IMRT instead of proton therapy, Bill develops severe esophagitis, and his last months are spent in agony 16

Summary of argument 21

Argument 25

I. There's no basis in the record to disturb the jury's verdict that Sierra violated its duty of good faith and fair dealing 25

A. Abundant evidence supports the jury's conclusion that Sierra acted in bad faith 25

B. The jury considered and rejected Sierra's contrary evidence 29

C. The verdict cannot be set aside for lack of economic loss 37

II. Sierra's allegations of trial misconduct are contradicted by the district court's unchallenged findings 38

III. The trial court did not abuse its discretion in admitting evidence about a Sierra affiliate's proton-therapy center 41

IV. The compensatory damages award is supported by substantial evidence and untainted by passion or prejudice 43

V. The punitive-damages award is consistent with state and federal law...50

A. The trial court properly instructed the jury on punitive damages, and overwhelming evidence supports the verdict.........50

1. Sierra asked for instructions under the standard it challenges 51

2. The district court's instruction was correct.......................... 51

3. Abundant evidence supports the jury's finding that Sierra acted with conscious disregard 53

B. The federal Constitution does not require judicial revision of the punitive-damages award 55

Conclusion..61

TABLE OF AUTHORITIES

Cases

Ainsworth v. Combined Insurance Co. of America,
104 Nev. 587, 763 P.2d 673 (1988) 5, 52, 56, 59

Albert H. Wohlers & Co. v. Bartgis,
114 Nev. 1249, 969 P.2d 949 (1998) 6, 27, 59

Allstate Insurance Co. v. Miller,
125 Nev. 300, 212 P.3d 318 (2009) 6

Anglin v. State,
553 S.W.2d 616 (Tenn. Crim. App. 1977) 50

Baxter v. MBA Group Insurance Trust Health & Welfare Plan,
958 F. Supp. 2d 1223 (W.D. Wash. 2013) 35

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 55, 60, 61

Bongiovi v. Sullivan,
122 Nev. 556, 138 P.3d 433 (2006) 49

Broussard v. Hill,
100 Nev. 325, 682 9.2d 1376 (1984) 29

Brownfield v. F.W. Woolworth,
69 Nev. 294, 248 P.2d 1078 (1952) 44

Bullock v. Philip Morris USA, Inc.,
198 Cal. App. 4th 543 (2011) 60

Century Surety Co. v. Casino West, Inc.,
130 Nev. 395, 329 P.3d 614 (2014) 32

Century Surety v. Polisso,
139 Cal. App. 4th 922 (2006) 60

Continental Trend Resources, Inc. v. OXY USA Inc.,
101 F.3d 634 (10th Cir. 1996) 60, 61

Cortinas v. State,
124 Nev. 1013, 195 P.3d 315 (2008) 51

Cote v. Philip Morris USA, Inc.,
985 F.3d 840 (11th Cir. 2021) 60

Countrywide Home Loans, Inc. v. Thitchener,
124 Nev. 725, 192 P.2d 243 (2008) 52

Cox v. Copperfield,
138 Nev. Adv. Op. 27, 507 P.3d 1216 (2022) 40

Craigo v. Circus-Circus Enterprises,
106 Nev. 1, 786 P.2d 22 (1990) 55

Crowley v. State,
120 Nev. 30, 83 P.3d 282 (2004) 41

Day v. Humana Insurance Co.,
335 F.R.D. 181 (N.D. Ill. 2020) 27

DeJesus v. Flick,
116 Nev. 812, 7 P.3d 459 (2000) 49

Falline v. GNLV Corp.,
107 Nev. 1004, 823 P.2d 888 (1991) 5

Forrester v. Southern Pacific Co.,
36 Nev. 247, 134 P. 753 (1913) 43

Francis v. Wynn Las Vegas, LLC,
127 Nev. 657, 262 P.3d 705 (2011) 32

Gardner v. Group Health Plan,
2011 WL 1321403 (E.D.N.C. Apr. 4, 2011) 35

Goddard v. Farmers Insurance Co. of Oregon,
202 Or. App. 79 (2005) 58

Goodson v. American Standard Insurance Co. of Wisconsin,
89 P.3d 409 (Colo. 2004) 37, 38

Greenwell v. Group Health Plan for Employees of Sensus USA Inc.,
2022 WL 3134110 (E.D.N.C. Mar. 29, 2022) 27, 32

Grosjean v. Imperial Palace, Inc.,
125 Nev. 349, 212 P.3d 1068 (2009) 25

Gruenberg v. Aetna Insurance Co.,
9 Cal. 3d 566 (1973) 37

Guaranty National Insurance Co. v. Potter,
112 Nev. 199, 912 P.2d 267 (1996) 37, 58

Gunderson v. D.R. Horton, Inc.,
130 Nev. 67, 319 P.3d 606 (2014) 38

Illinois Central Railroad Co. v. Hawkins,
830 So. 2d 1162 (Miss. 2002) 50

Indiana Insurance Co. v. Demetre,
527 S.W.3d 12 (Ky. 2017) 37

Ingham v. Johnson & Johnson,
608 S.W.3d 663 (Mo. Ct. App. 2020) 46, 60

Krause Inc. v. Little,
117 Nev. 929, 34 P.3d 566 (2001) 48

M.C. Multi-Family Development, L.L.C. v. Crestdale Associates, Ltd.,
124 Nev. 901, 193 P.3d 536 (2008) 25

Mansfield v. Horner,
443 S.W.3d 627 (Mo. Ct. App. 2014) 49, 60

Matter of Estate of Garrett,
111 Nev. 1397, 906 P.2d 255 (1995) 42

Merrick v. Paul Revere Life Insurance Co.,
594 F.Supp.2d 1168 (D. Nev. 2008) 59, 61

Merrick v. Paul Revere Life Insurance, Co.,
500 F.3d 1007 (9th Cir. 2007) 54

Miller v. Hartford Life Insurance Co.,
268 P.3d 418 (Haw. 2011) 37

Moore v. Menges,
89 Ariz. 268, 361 P.2d 9 (1961) 50

Morga v. FedEx Ground Package System, Inc.,
2022-NMSC-013 .... 46, 49

Morris v. Paul Revere Life Insurance Co.,
109 Cal. App. 4th 966 (2003) 35

Pearson v. Pearson,
110 Nev. 293, 871 P.2d 343 (1994) 51

Pemberton v. Farmers Insurance Exchange,
109 Nev. 789, 858 P.2d 380 (1993) 5, 6, 33, 37

Philip Morris USA v. Williams,
549 U.S. 346 (2007) 57

Pitman v. Blue Cross & Blue Shield of Oklahoma,
217 F.3d 1291 (10th Cir. 2000) 33

Powers v. United Services Automobile Association,
114 Nev. 690, 962 P.2d 596 (1998) 28, 29

Prolow v. Aetna Life Insurance Co.,
584 F. Supp. 3d 1118 (S.D. Fla. Jan. 27, 2022) 27

Quintero v. McDonald,
116 Nev. 1181, 14 P.3d 522 (2000) 43

Republic Insurance Co. v. Hires,
107 Nev. 317, 810 P.2d 790 (1991) 59

Richardson v. Chapman,
175 Ill. 2d 98, 676 N.E.2d 621 (1997) 46

Ringle v. Bruton,
120 Nev. 82, 86 P.3d 1032 (2004) 39

Rives v. Farris,
138 Nev. Adv. Op. 17, 506 P.3d 1064 (2022) 42

Roard & Highway Builders v. Northern Nevada Rebar,
128 Nev. 384, 284 P.3d 377 (2012) 43

Roby v. McKesson,
219 P.3d 749 (Cal. 2009) 60

Salim v. Louisiana Health Service & Indemnity Co,
2023 WL 3222804 (5th Cir. May 3, 2023)..27

Smith v. Wade,
461 U.S. 30 (1983)... 52

State Farm Mutual Automobile Insurance Co. v. Campbell,
538 U.S. 408 (2003) 56, 59

Stemme v. Blue Cross Blue Shield of Kansas City,
2013 WL 12362335 (N.D. Tex. Feb. 25, 2013).. 35

U.S. Fidelity & Guaranty Co. v. Peterson,
91 Nev. 617, 540 P.2d 1070 (1975)... 5, 6, 37

United Fire Insurance Co. v. McClelland,
105 Nev. 504, 780 P.2d 193 (1989) 59

Village Development Co. v. Filice,
90 Nev. 305, 526 P.2d 83 (1974) 55

Wells, Inc. v. Shoemake,
64 Nev. 57, 177 P.2d 451 (1947).. 45, 46

Winchell v. Schiff,
124 Nev. 938, 193 P.3d 946 (2008)..29

Wyeth v. Rowatt,
126 Nev. 446, 244 P.3d 765 (2010) 43, 45, 59

Statutes

NRS 42.001..52

NRS 42.005 .... 4, 50, 51, 52, 56

NRS 48.035 41

NRS 695G.150 .... 2, 13, 28

Rules

Nev. R. Civ. P. 59 43

Other Authorities

Bad Faith Actions Liability & Damages § 2:2 6

Katelyn Newberg,
Woman with 'locked-in syndrome' awarded $47M in malpractice suit,
Las Vegas Review-Journal (Feb. 9, 2023) 46

Legislative Counsel Bureau, Summary, A.B. 307 (1989) 6, 7

Legislative Counsel Bureau, Summary, S.B. 474 (1995) 52

Restatement (Second) of Torts § 908 52

State Bar of Nevada, *Nevada Jury Instructions: Civil* (2018 ed.) 52

INTRODUCTION

Bill Eskew needed proton therapy. After a thorough evaluation by a team of experts, a world-renowned radiation oncologist concluded that, unlike other radiation options, proton therapy was necessary to target Bill's lung cancer while avoiding damage to his esophagus and other nearby organs. But Bill couldn't get the treatment he needed because his insurer, Sierra Health, denied coverage. Instead, he received a cheaper, less targeted form of radiation that caused severe and painful damage to his esophagus, just as his oncologist had feared. Bill spent the remainder of his life in pain—isolated, ill, unable to eat or drink, and vomiting constantly—a daily agony that was both predictable and entirely avoidable.

The jury heard abundant evidence that, in denying needed medical treatment, Sierra acted in bad faith. After an eleven-day trial, the jury awarded substantial compensatory and punitive damages to Bill's widow. Sierra doesn't deny that the jury was properly instructed on the law of bad faith. Nor does it challenge the admission of the mountain of scientific, medical, and insurance-industry evidence heard by the jury.

Instead, Sierra seeks to retry its case on appeal, claiming there wasn't enough evidence of bad faith. But this case *exemplifies* bad faith. Bill and his wife asked for an insurance plan that would cover proton therapy to treat lung cancer. In response, Sierra sold them a "platinum" plan that, on its face, covered the therapy. But, unbeknownst

to them, Sierra's parent, UnitedHealthcare, had an undisclosed policy of categorically barring coverage. Sierra denied Bill's claim without even looking at his contract. As the district court observed, the evidence of bad faith was "overwhelming." 18-JA-3570.

At trial, Sierra tried to persuade the jury that its decisionmaker, Dr. Ahmad, "did not rely solely" on the undisclosed policy but instead conducted his own investigation. 5-JA-921. As Sierra pitched the case, it was "fundamentally about the substantive reasonableness of a decision that was made by a trained physician." 5-JA-918. This strategy backfired. The trial revealed that Dr. Ahmad had zero relevant training, lacked even rudimentary knowledge of radiation treatments, and spent mere minutes before stamping Bill's claim denied. He admitted he did "not have the expertise" to evaluate the therapy or to say "what kind of radiation to use." 5-JA-963, 1101. Nevada law required this decision to be made by a physician with the relevant "training and expertise" who has evaluated the "medical records." NRS 695G.150. And, as the jury was instructed, an insurer must "thoroughly investigat[e] the claim." 14-JA-2693. None of that happened here.

On appeal, Sierra switches gears. It makes little effort to defend Dr. Ahmad's investigation, arguing instead that it was entitled to rely on its hidden corporate policy to declare proton therapy not "medically necessary" under Bill's contract. But, as both sides' experts agreed, automatic reliance on a non-contractual policy to deny coverage

is *proof* of bad faith—not a defense to it. And at trial, Sierra's *own witnesses* admitted that the contract's definition of medical necessity was satisfied here. Sierra's brief never once offers a contrary interpretation. As a backup, Sierra claims it was entitled to exclude proton therapy as "unproven." This argument—which Sierra never raised in its post-trial motions—is both waived and baseless.

Sierra has no answer to the authoritative evidence presented at trial, including the testimony of two eminent oncologists who explained why proton therapy was both proven and necessary in Bill Eskew's case. Dr. Liao, one the world's leading radiation oncologists, left no doubt about the grave consequences of wrongfully denying Bill coverage: Because Bill's cancerous cells were "adjacent" to "a lot of critical structures," 6-JA-1162, Dr. Liao told Sierra that he needed proton therapy to avoid "serious . . . complications"—"especially" to his "esophagus." 15-JA-3021. The jury also learned that, at the time that Bill's claim was denied by Sierra in 2016, proton therapy had been approved by the FDA and covered by Medicare for years, was supported by hundreds of studies demonstrating its efficacy and value, had helped hundreds of thousands of patients, and was in use by the nation's most prestigious cancer-treatment facilities. That includes MD Anderson—the highest-ranked oncology center in the nation—where Bill was evaluated. It was the carefully considered consensus of Dr. Liao and her MD Anderson colleagues that Sierra rejected within minutes.

Unable to contest the evidence at trial, Sierra tries to undermine the verdict by critiquing the courtroom style of the lawyers who tried the case. But the district court made detailed factual findings rejecting every one of Sierra's allegations of trial misconduct—findings Sierra never once addresses on appeal.

Finally, Sierra takes aim at the size of compensatory and punitive damages. It argues that the jury's compensatory verdict is 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). And the district court here, at Sierra's urging, instructed the jury to ensure that its compensatory damages did not include any damages designed to punish Sierra. 14-JA-2857-58. The jury must be trusted to have adhered to this instruction.

Nor does the jury's award of punitive damages offend Sierra's right, under the Due Process Clause of the U.S. Constitution, to "fair notice" of potential damages. Nevada law gave Sierra all the notice it needed when it exempted bad-faith claims like this one from the statutory 3:1 punitive-damages cap. NRS 42.005(2)(b). The legislature could not have been clearer that insurers could face punitive-damages awards like this one, just barely above that cap. Neither this Court nor the U.S. Supreme Court has ever struck down a single-digit punitive-damages ratio on due-process grounds.

This is a textbook case for why our system has punitive damages. It involved conduct that was both extremely profitable and capable of causing egregious, but avoidable, harm. One federal judge went so far as to describe UnitedHealthcare's practice of denying proton-therapy coverage as "immoral and barbaric." And, as Nevada's legislature has repeatedly recognized, punitive damages are necessary to deter insurers from engaging in conduct that values corporate profits over the health of patients at their most vulnerable. This Court should affirm the jury's judgment.

STATEMENT

A. Legal background

Nevada law allows "recovery of consequential damages where there has been a showing of bad faith by [an] insurer." *U.S. Fidelity v. Peterson*, 91 Nev. 617, 619-20, 540 P.2d 1070, 1071 (1975). A plaintiff has a claim against an insurer that (1) denies a covered benefit (2) without any reasonable basis (3) and with knowledge or reckless disregard. *Falline v. GNLV*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991).[1]

This special tort duty—"imposed by law," not contract, *Peterson*, 91 Nev. at 620, 540 P.2d at 1071—exists because insurance "is not an ordinary contract." *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 793-94, 858 P.2d 380, 382 (1993). People depend on insurance for "security, protection, and peace of mind," *Ainsworth v. Combined Ins.*, 104

[1] Unless otherwise specified, internal quotation marks, citations, emphases, and alterations are omitted.

Nev. 587, 592, 763 P.2d 673, 676 (1988), and claims arise when they are at their most vulnerable. *See, e.g.*, *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1262, 969 P.2d 949, 958 (1998). If limited to ordinary contract damages, an insurer would have an incentive to exploit that vulnerability, lowballing or even denying legitimate claims. Bad Faith Actions Liability & Damages § 2:2. Even if the policyholder sued, the insurer would only be liable for what it owed anyway. *Id.*

To avoid that outcome, this Court imposes a duty akin to that of "a fiduciary relationship," a violation of which makes the insurer liable for full consequential damages. *Allstate Ins. v. Miller*, 125 Nev. 300, 311, 212 P.3d 318, 325 (2009); *Peterson*, 91 Nev. at 619-20, 540 P.2d at 1071. The insurer must treat policyholders' interests as equal to their own and thoroughly investigate each claim. *Allstate*, 125 Nev. at 311, 212 P.3d at 326. An insurer may not misrepresent the scope of coverage, deny coverage based on ambiguities, *id.*, or "ignore its insured and then seek refuge in the fine print," *Pemberton*, 109 Nev. at 794, 858 P.2d at 382.

The legislature has also determined that punitive damages play a special role in enforcing these obligations. *See Peterson*, 91 Nev. at 620, 540 P.2d at 1071. In recognition of the "compelling public interest" in the deterrence that punitive damages provide, the legislature exempts bad-faith claims from the usual statutory limits on punitive awards. Legislative Counsel Bureau, Summary, A.B. 307 (1989), https://perma.cc/V4T4-ML4R.

As one of the drafting legislators explained, robust punitive damages are necessary to ensure that "insurance companies who do business in this state cannot make an economic decision to treat a Nevada insured oppressively." *Id.*

B. Factual background

1. After Bill Eskew is diagnosed with lung cancer, he and his wife Sandra buy insurance from Sierra to cover proton-beam therapy.

On a July morning in 2015, as Bill Eskew took his first swing on the golf course, he broke his arm. The force of the swing fractured the bone above the elbow. 6-JA-1161, 9-JA-1777. Bill—known for his reluctance to complain about anything—thought he had dislocated his shoulder and tried popping it back in himself. 9-JA-1778. But his son BJ saw the look of distress on his father's face and knew something was wrong. *Id.* BJ got his truck, drove it onto the course, and took his father to the hospital. *Id*. There, they discovered that Bill had lung cancer that had metastasized to his arm. 7-JA-1496.

When Bill's wife of 35 years, Sandra, learned about his diagnosis, she began doing everything she could to ensure the best care possible. 9-JA-1819. She identified MD Anderson Cancer Center in Houston, one of the top cancer treatment facilities in the world, as the best place for his treatment. 5-JA-968, 7-JA-1420, 9-JA-1896, 1900. And she identified one type of established treatment as particularly promising for lung-cancer patients: proton-beam therapy. 9-JA-1839.

So Sandra searched for insurance that would cover proton therapy. She contacted an authorized agent of Sierra, explaining that Bill was seeking lung-cancer treatment at MD Anderson where he would be evaluated for proton therapy, and asked whether Sierra had an insurance plan that would cover that treatment. 9-JA-1846-48. In response, the agent proposed the "platinum," "top of the level," and "most expensive" plan. 8-JA-1610. Sandra reviewed it carefully. JA-1850. The plan expressly stated that it covered "therapeutic radiology"—a term that includes proton therapy—when medically necessary. 5-JA-971, 15-JA-2951, 2955-58. Although the contract included dozens of excluded services, proton therapy wasn't among them. 15-JA-2955-58. Bill and Sandra purchased the plan. 15-JA-2909.

2. A top radiation oncologist and her team determine that Bill should receive proton therapy to treat his cancer while preserving his quality of life.

At MD Anderson, Bill consulted with Dr. Zhongxing Liao, Professor of Radiation Oncology at the University of Texas and Director of Clinical Research for MD Anderson's Division of Radiation Oncology, a "world renowned group." 6-JA-1160, 7-JA-1420, 9-JA-1910. Dr. Liao is "an expert in the field of treatment of lung cancer with radiation"—"widely published," "well-known," and possibly "the top" radiation oncology expert on lung cancer "in the world." 6-JA-1161.

Dr. Liao followed MD Anderson's standard—and rigorous—process for assessing treatment options. 7-JA-1423-24. As the nation's premier cancer center, MD Anderson relied only on proven techniques. If a treatment option was only "investigational or experimental" or "not proven," neither Dr. Liao nor her colleagues would use it for a patient outside a clinical trial. 7-JA-1435. To select which treatment plan was best for Bill, Dr. Liao, working with two other radiation experts and using a specialized computer model, performed a comparative analysis between two commonly used radiation treatment methods: intensity-modulated radiation therapy (IMRT) and proton therapy. 7-JA-1439-40, 1442.

IMRT is a form of radiation that uses photons to kill cancer cells. 5-JA-1027. Although photons release energy sufficient to kill cancer cells, they do so constantly while traveling through the body—damaging not just the targeted cancer cells but also healthy cells nearby. 7-JA-1429. So when the cancerous cells are surrounded by critical organs, IMRT threatens serious collateral damage. 7-JA-1429. Even though IMRT is an advanced form of radiation therapy, it is still like treating the cancer with a "shotgun." 6-JA-1155-56.

Proton therapy, by contrast, is akin to a "target rifle." 6-JA-1155. Rather than constant, high-dose energy release, as in IMRT, protons release most of their energy once they've reached their destination. 6-JA-1149-50. Thus, by directing protons to stop

at a tumor site, proton therapy focuses the release of cell-killing energy on cancerous cells and avoids collateral damage to surrounding healthy cells and organs. 5-JA-1029, 1150-51. It does so with astounding accuracy; doctors can "describe [the target location] to within about a tenth of an inch, 2 millimeters." 6-JA-1150.

Given these benefits, proton therapy is widely used. For years, it has been a covered service under both Medicare and Tricare (the healthcare plan for the military). 6-JA-1154. And "[h]undreds of studies" "show that proton therapy is an effective and valuable tool." 6-JA-1159. Proton therapy is offered at dozens of facilities in the country—including preeminent cancer-treatment centers like the Mayo Clinic and Harvard. 6-JA-1122, 12-JA-2516-17. Since its approval by the FDA in 1989, proton therapy has been used to treat hundreds of thousands of patients. 5-JA-974, 6-JA-1153.

Under MD Anderson's standards, all doctors in Dr. Liao's thoracic-cancer treatment group "need[] to agree on th[e] plan" for each patient. 7-JA-1425. In Bill's case, everyone agreed: He needed proton therapy. Either treatment option would effectively attack the cancer, but only proton therapy would effectively limit damage to Bill's surrounding organs—a critical need given that Bill's tumors were positioned next to his heart, lungs, and esophagus. 6-JA-1162, 7-JA-1440, 1443. The difference between the two therapies was significant: The risk of "severe esophagitis" "is highly correlated" with radiation dosage. 7-JA-1452. With proton therapy, Bill's esophagus would be

spared 4.1 grays (the relevant measurement unit) of radiation, the equivalent of an additional 41,000 regular x-rays; with IMRT, the comparison showed, Bill was five times more likely to develop grade III esophagitis. 6-JA-1140; 1201, 7-JA-1452.

Proton therapy would better protect other organs, too. IMRT entailed a "significantly increase[d]" risk of pneumonitis. 5-JA-1053, 7-JA-1450. And IMRT presented the greatest increased risk to Bill's heart—the equivalent of more than 70,000 additional x-rays than with proton therapy. 6-JA-1140, 7-JA-1450-51. That was particularly important because Bill had a preexisting heart condition—serious enough that he needed bypass surgery—and "[w]ith every gray of the minimum dose increase, you have [a] seven percent increase in [a] cardiac event." 7-JA-1443, 1451.

Proton therapy, Dr. Liao concluded, could cure Bill's cancer. 7-JA-1515. And, by avoiding the likely and painful complications of IMRT, it would lead to a higher quality of life. 6-JA-1162, 7-JA-1440, 1443.

3. Dr. Liao seeks coverage from Sierra.

In February 2016, with the findings of her comparative analysis in hand, Dr. Liao submitted an "urgent" claim for proton therapy to Bill's insurer, Sierra. 5-JA-985, 15-JA-3021, 3023. Under Sierra's "prior authorization" regime, a policyholder must make a request for coverage before obtaining care. 7-JA-1332-33, 15-JA-2946, 2962. Sierra is a

managed-care insurer, meaning that, before it pays for healthcare, it reviews, and sometimes even overrules, treating physicians' recommendations. 15-JA-2946.

On the first page, Dr. Liao laid out the stakes. Using a "proton beam instead of photons" (i.e., IMRT) would "provide the optimum dose to the targeted area without causing potentially serious . . . complications, especially" to the "heart," "esophagus," and "lungs." 15-JA-3021. To support that conclusion, Dr. Liao attached 15 pages of medical records discussing the tests performed on Bill, and noting that she had compared the different outcomes of IMRT and proton therapy. 5-JA-1004, 15-JA-3023-37.

Two days later, Sierra denied the claim. 15-JA-3043.

4. Sierra's summary "review" of Dr. Liao's request is conducted—in just minutes—by an unqualified physician with zero training in radiation oncology.

Insurance-industry practices, and a special statutory mandate, ensure that health insurers that administer managed-care contracts treat policyholders in good faith. The insurer's reviewers must "work[] in part" for the policyholder, not "adversarial[ly], look for reasons to accept (not deny) the claim, and consider the policyholder's interest equal to its own." 7-JA-1334, 8-JA-1584, 1591. Only a qualified physician can deny a claim and only after a "full, fair, and thorough evaluation" that seeks out relevant information and

gives the treating physician's opinion serious consideration. 8-JA-1587-91, 1596-97; NRS 695G.150.

Despite those safeguards, Sierra was now telling Bill that it wouldn't cover the exact service for which he had purchased insurance. Sierra delivered the message through Dr. Shamoon Ahmad, an independent contractor hired by Sierra to review claims for cancer treatment. 5-JA-959. Dr. Ahmad is known by radiation oncologists for denying legitimate claims for proton therapy. 6-JA-1137. But his track record isn't based on any specialized knowledge or insight: Dr. Ahmad had never treated anyone with radiation, proton or otherwise. 5-JA-961, 5-JA-1036. He admitted he did "not have the expertise" to explain proton therapy's benefits or to "try to tell a radiation oncologist what kind of radiation to use to treat a patient's cancer." 5-JA-963, 1101.

In fact, Dr. Ahmad lacked even rudimentary knowledge of radiation treatments. When asked to examine Bill's records, for example, Dr. Ahmad could not identify how far Bill's tumor was from his esophagus. 5-JA-963, 1031. His knowledge fell short of a first-year resident just one month into training. 6-JA-1180, 1197; *see also* 5-JA-1000, 6-JA-1096, 1098, 1178, 1180. Yet Dr. Ahmad made no effort to make up for these shortcomings. He averaged just 12 minutes reviewing each claim for potentially life-saving cancer treatment. 5-JA-942, 1013-14. And before denying Bill's claim, Dr. Ahmad

did not attempt to contact Dr. Liao to understand why she had made her recommendation. 5-JA-990.

Finally, Dr. Ahmad denied Bill's request automatically, without reviewing the document that controlled the scope of coverage: Bill's contract. 5-JA-980-81.

5. Instead of conducting a meaningful medical review, Sierra relies on an undisclosed corporate policy to deny coverage.

The reason why Dr. Ahmad conducted no investigation was the same reason that Sierra was untroubled by his sparse knowledge: Sierra had actually pre-decided Bill's claim and all others like it. UnitedHealthcare, Sierra's parent company, had an undisclosed policy—which Sierra did not attach to or incorporate into Bill's contract—that functioned as a hidden exclusion. It instructed reviewers like Dr. Ahmad to deny coverage for proton therapy to people suffering from lung cancer. 15-JA-3106. Unlike other Sierra policies, the proton-therapy policy did not contemplate discretionary overrides. *Compare* 15-JA-3131, 16-JA-3201.

And, it turned out, this extra-contractual exclusion was no aberration. Filed away in a "denial library" were pre-judgments of 358 different services—all to be denied without conducting any individualized medical-necessity review and without regard to the fact that the service was not actually listed as an exclusion in the contract. 7-JA-1380.

Sierra prejudged Bill's claim even though it recognized proton therapy's benefits. The corporate medical policy itself explained that proton therapy "may be useful" in the

exact circumstance Bill faced: "when the target volume is in close proximity to one or more critical structures and sparing the surrounding normal tissue cannot be adequately achieved" otherwise. 15-JA-3108. Sierra thus approved proton-therapy coverage for patients under 19 and for some other forms of adult cancer. 15-JA-3105-06.

Sierra's corporate policy also recognized that multiple studies had established the benefits of proton therapy for lung cancer in particular. The policy cited one peer-reviewed clinical study finding that proton therapy, when used on lung-cancer patients, resulted in only a 5% rate of severe esophagitis, versus a 44% rate for IMRT. 15-JA-3118. Another cited study found that the "[f]ive-year overall survival" was "statistically significantly lower" for conventional photon-based therapy than proton therapy. 15-JA-3118. The most recent publication cited in the policy, from 2015, concluded that proton therapy "is appropriate when needed to deliver curative radiation therapy safely in patients with non-small-cell lung cancer"—exactly Bill's condition. 15-JA-3119. And those were just the studies mentioned in the policy. A then-recent study the policy didn't discuss concluded that proton therapy was "safe to use" for lung cancer, with only 6% of patients contracting "[g]rade 3 acute esophagitis." 16-JA-3141. Though a few cited papers expressed a desire for further study, none said that proton therapy was ineffective at treating cancer or more harmful than alternatives. 15-JA-3118.

Despite all this evidence, Sierra's internal policy summarily deemed proton therapy "not medically necessary" and "unproven." 15-JA-3106. It asserted that there were no "definitive conclusions" regarding proton therapy because of limited clinical evidence. 15-JA-3106. It pointed to the lack of "randomized controlled trials" substantiating that proton therapy worked for lung (and other) cancers, 15-JA-3106, 3109, but failed to reconcile that supposed flaw with the reality of clinical cancer research: "95 percent of [cancer] treatment decisions are based upon non-randomized studies." 6-JA-1243.

At the same time that Sierra enforced this undisclosed prohibition, a sister company—also owned by UnitedHealthcare—invested $15 million in, and later operated, a proton therapy center in New York. 7-JA-1525-26, 10-JA-2192. The center predicted that 86 percent of its patients would have cancers excluded by Sierra's proton-therapy policy: of that 86 percent, one-sixth would have lung cancer. 15-JA-3088.

6. After receiving IMRT instead of proton therapy, Bill develops severe esophagitis, and his last months are spent in agony.

The letter that denied Bill coverage was cursory. 8-JA-1653-54. It applied the company's blanket prohibition, parroting the medical policy's "unproven and not medically necessary" conclusion, without reference to Bill's particular circumstances, Bill's contract, or Dr. Liao's recommendation. 15-JA-3043.

When Dr. Liao received Sierra's denial, she knew that going through Sierra's "appeal" process would waste time and further endanger Bill. Appeals rarely worked across the industry. 10-JA-2159. And in Dr. Liao's experience, Sierra's appeal process was among the worst: She had never successfully appealed Sierra's denial of coverage, and although Bill's contract claimed that Sierra would resolve appeals within 72 hours, the company "never" met that timeline. 7-JA-1490-92, 10-JA-2159. Because time was of the essence, 15-JA-3026, Dr. Liao concluded that an appeal would not be "good practice." 7-JA-1471, 1491-92.

Faced with no other viable option, Dr. Liao sought Sierra's authorization for IMRT. As with proton therapy, there are no randomized clinical trials establishing IMRT's efficacy for treating lung cancer. 6-JA-1104-05, 1244. But IMRT is much less expensive than proton therapy. 5-JA-1036, 10-JA-2202, 2049. Sierra promptly approved coverage without any analysis as to why IMRT was "medically necessary" under the insurance contract. 6-JA-1102-03.

Within days, Bill began treatment. 6-JA-1277. Fortunately, he avoided serious collateral damage to his heart and lungs, but as Dr. Liao feared—and the studies had predicted—the treatment decimated Bill's esophagus, the "critical" organ responsible for channeling food to the stomach and keeping it out of the windpipe. 6-JA-1162, 1185.

Bill developed "grade III" esophagitis, meaning that his ability to swallow was "severely altered." 10-JA-2106, 2108-09. The odds of developing debilitating grade III esophagitis are slim for those treated with proton therapy—only three percent—but those odds escalate to at least five times, and possibly 14 times, as high for people treated with IMRT. 6-JA-1201, 15-JA-3118. With proton therapy, Bill would have avoided even the side effects associated with grade II esophagitis, characterized by "altered" ability to eat. 7-JA-1455-56.

Bill experienced both stages of grade III esophagitis: acute and chronic, each with life-threatening and cascading risks. The acute stage lasts around 90 days, causes the esophagus to become "inflamed and swollen," and leaves patients feeling as if their esophagus has been "sunburn[t]," with every swallow dragging food across the burn. 6-JA-1204, 1281. Because of the pain caused by eating during the acute stage, patients suffer from extreme weight loss, which interferes with the body's ability to fight cancer. 6-JA-1207.

Bill was no exception. Even by the time he returned to Nevada from his treatment in Texas, Bill "looked horrible," "was weak," and "could barely walk through the airport"—so transformed that Sandra "almost didn't recognize him." 9-JA-1857. He dropped 30 pounds, fifteen percent of his total weight. RA-19, 80. He "fe[lt] like something [was] stuck halfway down in his esophagus" and vomited regularly. 9-JA-

1859. Things got so bad that he experienced bouts of shortness of breath, had to take pain medication, and was eventually hospitalized. RA-19-20. The pain took a toll psychologically, too, as he became withdrawn even around family. 10-JA-2001.

Although Bill fought back and was able to put on some weight as the acute stage waned, the chronic stage then set in. 6-JA-1207. During this stage, which is permanent, the once "sunburn[t]" lining of the esophagus transforms into scar tissue, incapable of "stretch[ing] and mov[ing]." 6-JA-1203.

This decimated Bill's ability to sustain himself nutritionally and, in many ways, to function at all. His weight dropped even further, to 45 pounds below his pre-cancer weight. 6-JA-1274. Eventually, he had to undergo "total parenteral nutrition," a method of delivering caloric intake "straight into the blood vessels" in "extreme circumstances." 6-JA-1206.

Even when not dependent on forced caloric intake, Bill's esophagitis still affected every minute of his life. The pain was "excruciating" and radiated across the chest "like a heart attack." 7-JA-1463. In severe cases, food felt "like it[] [was] stuck in [the] throat," causing reflexive vomiting. 6-JA-1204.

Bill was a textbook case. He threw up so frequently that even his five-year-old granddaughter "knew" to bring over his "puke bucket" if he moved rooms. 8-JA-1740. Bill couldn't keep water down, and he resorted to constant dry heaving. 8-JA-1740-42.

"Every day. All day . . . From the time he woke. Even when he was sleeping at night, he would cough." 8-JA-1740. To fend off another round of total parenteral nutrition, his family forced him to drink Ensures. 8-JA-1758.

This painful esophagitis dominated the end of Bill's life. Physically, he became so frail that previously routine tasks became daunting and sometimes dangerous endeavors. He had to use a specialized lift chair just to get to his feet from a sitting position. 9-JA-1780. Once moving, he couldn't make it far, forcing Sandra to leave chairs scattered throughout their house in case he needed to sit when walking from room to room. 9-JA-1869. He couldn't lift himself from the toilet without help, depended on family to drive him to the doctor, and was so weak he fell trying to get in his car, leading to broken ribs. 9-JA-1781, 1791, 1796, 1804, 1869.

Bill fared just as bad emotionally. Before his illness, Bill was happy and outgoing. 8-JA-1735, 1781. He served as a "father figure" for his granddaughter, whom Bill's daughter raised alone; went golfing and off-road racing; explored Las Vegas with his son; and surrounded himself with family and friends whenever possible. 8-JA-1727, 1730, 1747, 1773-74, 9-JA-1827, 1829, 1830, 1999.

But after so much time unable to eat and vomiting constantly, Bill became "hopeless." 8-JA-1735. Sunday dinners were once "mandatory" for his kids; now, Bill was in so much pain and endured such "ruined . . . self-esteem" that he refused to even

come out of his room on Thanksgiving. 8-JA-1725, 9-JA-1782. He skipped longstanding plans to spend time with his granddaughter, resisted seeing friends altogether, and was unable to even celebrate his grandson's first birthday. 8-JA-1737, 9-JA-1870. As his daughter put it: "He got angry, which wasn't my dad"—angry at family for trying to get him to eat when he couldn't and angry at Sierra for denying the treatment he needed. 8-JA-1735, 1758, 9-JA-1866, 1870. Incredulous, he asked at one point: "[W]hen did the insurance company know more than the doctors?" 9-JA-1782. After thirteen months of agony, Bill died. 6-JA-1277, 9-JA-1885.

In 2019, Sandra filed this bad-faith lawsuit on behalf of Bill's estate "to make sure this never happens again to anybody else." 9-JA-1973. The trial court split the compensatory and punitive damages stages of the trial. At the close of the first phase, the jury awarded Bill's estate $40 million in compensatory damages. 14-JA-2838, 15-JA-3310. After additional evidence and deliberation, the jury awarded $160 million in punitive damages to punish Sierra's actions and deter future misconduct. 16-JA-3353.

SUMMARY OF ARGUMENT

I. Bad Faith. Sierra doesn't deny that the jury was properly instructed on the law of bad faith. Instead, it challenges only the sufficiency of the evidence supporting the verdict. That challenge faces a high hurdle on appeal. Sierra can't meet it.

A. Abundant evidence supports the jury's verdict. Sierra lacked a reasonable basis to conclude that proton therapy wasn't "medically necessary" for Bill. Its own witnesses admitted that proton therapy was medically necessary. That was backed by robust evidence: testimony from two proton-therapy experts, use by the nation's top cancer facilities, FDA approval and Medicare coverage over many years, and countless publications.

Bill's insurance contract, Sierra concedes, covered proton therapy when "medically necessary." But Sierra nonetheless maintained an undisclosed, extra-contractual exclusion. Misrepresenting the scope of coverage is paradigmatic bad faith. Sierra knowingly or recklessly denied coverage without a reasonable basis.

Still more evidence of bad faith came from Sierra's use of Dr. Ahmad, who was wholly unqualified to make coverage decisions for radiation treatments. The jury was instructed that an "insurer may not reasonably and in good faith deny a prior authorization claim without thoroughly investigating the claim." 14-JA-2693. There's no doubt that the evidence satisfied that instruction, which Sierra doesn't challenge.

B.1 Sierra asserts that it had a reasonable basis to conclude that proton therapy wasn't "medically necessary" because it wrote a self-serving policy saying so. But, as both sides' experts agreed, automatic reliance on a corporate policy proves—not precludes—bad faith. All the more so here: Sierra's corporate policy employed a different definition

of "medically necessary" than Bill's contract. Indeed, Sierra's argument never even *mentions* the definition in Bill's contract.

2. As a backup, Sierra claims it had a reasonable basis to apply an exclusion for "unproven" treatments. This argument is waived. Regardless, Sierra lacked any reasonable basis to reach that after-the-fact conclusion, which arbitrarily disregarded abundant evidence of proton therapy's established effectiveness.

3. Sierra also leans on the practices of other insurers to claim it acted reasonably. But there's no evidence in the record that any of those insurers had the same contracts or policies. And regardless, bad faith on the part of multiple insurers wouldn't negate bad faith.

C. Without challenging a jury instruction, Sierra asks this Court to add a new element to bad-faith claims: economic loss. That's contrary to case law in Nevada and other states and at odds with the purpose of the tort.

II. Misconduct Allegations. The district court made detailed factual findings rejecting each allegation of misconduct Sierra levies. Because Sierra fails to confront those findings, its misconduct challenge fails.

III. Admission of Evidence. Sierra didn't preserve its evidentiary challenge. Regardless, evidence of a proton center's (like the Mayo Clinic's) use of the therapy was

relevant to establish its effectiveness, and Sierra identifies nothing *unfairly* prejudicial about that evidence, let alone an abuse of discretion.

IV. Compensatory Damages. Bill's agonizing injuries amply support the compensatory award, a decision committed to the jury. To argue otherwise, Sierra challenges an instruction that it requested, credits its own characterization of Bill's injuries, recycles its failed misconduct argument, and points to considerations (the verdict's size and speed of deliberations) that this Court has held don't warrant infringing on the jury's special role determining damages.

V. Punitive Damages.

A. Sierra's challenge to the district court's "conscious disregard" instruction contradicts Sierra's own request, and in any event, the court properly instructed the jury under this standard. The evidence amply supported a verdict under that instruction: page one of Dr. Liao's coverage request identified the severe risks Bill faced, but Dr. Ahmad didn't hesitate to apply Sierra's extra-contractual exclusion anyway.

B. Sierra's constitutional due-process rights aren't infringed by the four-to-one punitive-damages award. Applying a corporate policy that denies needed cancer treatment to force customers to accept a cheaper but more dangerous alternative is reprehensible. The single-digit ratio comports with historical remedies as well as jury awards in Nevada and nationwide. And Sierra had fair notice: The legislature exempted

bad-faith cases from a three-to-one cap, putting insurers on notice that they would face four-to-one awards—a legislative choice entitled to deference.

ARGUMENT

I. There's no basis in the record to disturb the jury's verdict that Sierra violated its duty of good faith and fair dealing.

A. Abundant evidence supports the jury's conclusion that Sierra acted in bad faith.

Sierra's appeal turns on the facts, not the law. Its lead argument is that there was insufficient evidence at trial for any rational jury to conclude that Sierra lacked a reasonable basis to deny coverage. There's no challenge to the jury instructions, to the expert testimony, or to the admission of vast scientific and medical evidence.

A purely factual argument like Sierra's faces a demanding standard of review. This Court "must view the evidence and all inferences most favorably" to the prevailing party at trial. *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008). Sierra can prevail only if "the evidence is so overwhelming" in *its* favor "that any other verdict would be contrary to the law." *Grosjean v. Imperial Palace*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009).

Here, the opposite is true. As the district court concluded in denying Sierra's post-trial motions, "the evidence at trial, viewed in the light most favorable to Mrs. Eskew, was overwhelming." 18-JA-3570. Sierra acted not only without any reasonable basis, but also knowingly or recklessly.

1. There was abundant evidence from which the jury could conclude that proton therapy was "medically necessary" to treat Bill's lung cancer. Under the terms of Bill's contract, medical necessity is determined on a case-by-case basis, requiring that the treatment be (1) "consistent" with the insured's illness, (2) the most appropriate level of service, and (3) not solely for the insured's or physician's convenience. 15-JA-2972. At trial, Sierra's own employees and experts conceded that proton therapy satisfied each prong. *See* 12-JA-2595 ("I don't have evidence" to dispute prong one); 8-JA-1632 (explaining that prong two refers to the setting of care); 7-JA-1372 (agreeing that proton therapy, as Dr. Liao requested, is properly performed in an outpatient setting); 11-JA-2331 ("very obvious" that prong three is satisfied).

Other evidence confirms what Sierra's employees and experts conceded at trial: that the contractual definition is easily met. Dr. Liao testified that proton therapy is "widely accepted" in "the radiation oncology community around the world" and that its use "to treat lung cancer has been proven to be safe and effective." 7-JA-1435. As a world-renowned radiation oncologist who specializes in researching and treating lung cancer through radiation, including proton-beam therapy, Dr. Liao's testimony is itself sufficient to support the jury's verdict that Sierra had no reasonable basis to deny coverage. 6-JA-1161, 7-JA-1408.

But Dr. Liao's testimony hardly stands alone. Her colleagues at MD Anderson—the highest-ranked oncology center in the country—agreed. 7-JA-1424, 1439-42. As did Dr. Andrew Chang, a leading radiation oncologist who has treated patients with proton therapy for almost 20 years and also testified at trial. 6-JA-1116-23, 1161, 1224. Further, when Bill sought treatment, proton therapy had been FDA-approved for three decades and was covered by Medicare and Tricare. 6-JA-1153-54. And the most prestigious cancer-treatment institutions in the country routinely used proton therapy to treat patients. 5-JA-970, 1122, 12-JA-2517. Based on this and other evidence, a growing consensus of courts has found that insurers have acted unreasonably in denying coverage for proton therapy. *See, e.g.*, *Salim v. La. Health Serv. & Indem.*, 2023 WL 3222804 (5th Cir. May 3, 2023); *Greenwell v. Grp. Health Plan for Emps. of Sensus USA Inc.*, 2022 WL 3134110 (E.D.N.C. Mar. 29, 2022); *Prolow v. Aetna Life Ins.*, 584 F. Supp. 3d 1118 (S.D. Fla. Jan. 27, 2022); *Day v. Humana Ins.*, 335 F.R.D. 181 (N.D. Ill. 2020).

2. Sierra also acted in bad faith because no reasonable insurer would believe that it could mislead policyholders about the scope of coverage. *See* 8-JA-1595-96; *Wohlers*, 114 Nev. at 1259-60, 969 P.2d at 957 (insurer acted in bad faith by failing to notify insured of coverage limitation). The contract here expressly covers "therapeutic radiology services"—a category that includes proton therapy—when "medically necessary." 5-JA-973, 1050, 15-JA-2972. Sierra doesn't dispute that. Indeed, the evidence

shows that the contract's coverage of proton therapy was the reason that Sierra's authorized agent offered Bill the most expensive plan that Sierra offered. 8-JA-1609-10, 9-JA-1850. Nonetheless it maintained a categorical prohibition on proton-therapy coverage for policyholders with all but the rarest cancers. "[M]isrepresenting or concealing facts to gain an advantage over the insured" is unquestionably "a breach of [an insurer's] fiduciary responsibility." *Powers v. United Servs. Auto.*, 114 Nev. 690, 701, 962 P.2d 596, 603 (1998).

3. There was also evidence that Sierra acted in bad faith by assigning the coverage determination to a physician wholly unqualified to evaluate Bill's medical records. Dr. Ahmad conceded he lacked the expertise to determine appropriate radiation treatment and was unable to understand medical records that would have been critical to a legitimate investigation. *See supra* 13. By statute, an insurer like Sierra "*shall* authorize coverage" of a recommended treatment like proton therapy "unless" the "decision not to authorize coverage" is made by a physician with the relevant "education, training and expertise." NRS 695G.150 (emphasis added). Nevada law prohibits putting someone like Dr. Ahmad in a position to deny claims.

More, Sierra's own records show that he conducted no actual investigation of Bill's claim. As the jury was instructed, an "insurer may not reasonably and in good faith deny a prior authorization claim without thoroughly investigating the claim." 14-

JA-2693. Sierra hasn't challenged this instruction, and it's dispositive. And yet, Dr. Ahmad never actually investigated Bill's claim: he didn't attempt to speak with Dr. Liao before denying coverage; didn't review Bill's contract before deciding on what it meant; and likely took all of 12 minutes (or less) before rejecting the claim. 2-JA-316-20, 5-JA-942, 980-81, 990, 1013-14; *see also, e.g.*, *Powers*, 114 Nev. at 703, 962 P.2d at 604 (improper investigation constituted bad faith).

B. The jury considered and rejected Sierra's contrary evidence.

When a plaintiff "present[s] sufficient evidence such that the jury could grant relief," the jury's verdict must be affirmed. *Winchell v. Schiff*, 124 Nev. 938, 946, 193 P.3d 946, 952 (2008). Ignoring this rule, Sierra relies on self-serving descriptions of its own evidence that it claims shows that it acted reasonably. But the mere existence of "conflicting evidence on a material issue" is not reason enough to overturn a verdict; that conflict is "one of fact for the jury and not one of law for the court." *Broussard v. Hill*, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984). Because Sierra ignores not just unfavorable evidence but also its own contract, it cannot prevail under this standard.

1. Sierra first points (at 16) to its undisclosed corporate policy, which categorically "provid[ed] that proton therapy is an unproven and not medically necessary treatment for lung cancer." Given the existence of this internal policy, Sierra claims, no reasonable

juror could conclude that Sierra lacked a reasonable basis to conclude that proton therapy for lung cancer wasn't "medically necessary."

a. Sierra asserts (at 26) that its "interpretation of the contract . . . was not unreasonable." But Sierra never articulates what its interpretation is or was. It never addresses the three-pronged contractual definition of "medically necessary" at all, let alone identifies a prong that proton therapy does not satisfy. It never explains how the literature discussed in the corporate policy that asked for further study fits into that unidentified prong or why, if it does, it's actually *dispositive* so that it was unnecessary for Dr. Ahmad to investigate Bill's individual circumstances.

And, even if all Sierra's unexplained assumptions were ignored, the company never attempts to answer the most fundamental question: Why couldn't the jury determine, based on all the evidence at trial, that it was unreasonable for Sierra to view the contents of the corporate medical policy as establishing that proton therapy wasn't medically necessary? The answer, though, is clear: the jury could—especially when no one at Sierra responsible for the policy's creation testified to explain its arbitrary rejection of supportive literature.

Sierra's failure to address the contract's definition of medical necessity alone dooms its appeal. And Sierra should not be permitted to come up with a new theory for the first time on reply.

b. At any rate, Sierra's corporate policy of denying otherwise valid claims doesn't absolve the company of bad faith; it *is* bad faith. Both sides' experts agreed that, although non-contractual policies may be used to guide the exercise of reviewer discretion, the "standard within the insurance industry" is that an insurer cannot make its corporate policy the "sole determiner" of a coverage denial. 8-JA-1669, 11-JA-2341. That makes sense. If an insurer adopts a blanket-denial policy before a contract is signed and without regard to the insured's individual circumstances, the treatment should be listed as an exclusion in the contract, not set out only in a separate, undisclosed document. 8-JA-1594, 1627, 1639.

Moreover, Sierra's undisclosed exclusion could not have resolved the scope of Bill's coverage because it rested on a different definition of "medically necessary": Whereas the definition in Sierra's corporate policy requires Sierra to consider cost, the definition in Bill's contract does not permit it to do so. *See* 7-JA-1375-76, 8-JA-1636, 11-JA-2343-44, 15-JA-2972, 3101. This matters because, although you wouldn't know it from reading Sierra's brief on appeal, the company tried to convince the jury that it could exclude proton therapy because it was more expensive than IMRT. *See, e.g.*, 5-JA-1049-51, 11-JA-2301. The jury was well within its right to find that Sierra did not have a reasonable basis to apply exclusionary language from a definition of "medically necessary" that conflicted with the express contractual terms. *Cf. Greenwell*, 2022 WL

3134110, at *12 (health insurer acted unreasonably by denying coverage for proton therapy based on policy that used a different definition of "medically necessary" than the contract).[2]

2. As a backup, Sierra suggests that its corporate policy gave it a reasonable basis to deny coverage under the "experimental, investigational or unproven" exclusion in Bill's contract. This argument fares no better.

To begin, Sierra waived the argument. Sierra never mentioned that exclusion in its original or renewed motion for judgment as a matter of law. Instead, Sierra staked its case on the "medical necessity" requirement. It can't change course on appeal.[3]

And Sierra was right to forgo the argument below. Insurance "clauses excluding coverage are interpreted narrowly against the insurer." *Century Sur. v. Casino W.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014). Here, the plain language of the "experimental, investigational or unproven" exclusion, undefined in the contract, governs novel treatments—not those, like proton therapy, in common use and FDA-approved for decades. This Court has cautioned that an "insurance company may not ignore its

---

[2] Even the corporate medical policy's definition of "medically necessary" would not preclude coverage here because it considered cost only for "equivalent" treatments. 15-JA-3101. IMRT and proton therapy weren't.

[3] Although Sierra's reply in support of its renewed motion briefly mentioned the clause, that was too little, too late to preserve the issue for appeal. *See, e.g.*, *Francis v. Wynn Las Vegas*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 (2011).

insured and then seek refuge in the fine print." *Pemberton*, 109 Nev. at 793-94, 858 P.2d at 382. And when, as here, a category of treatment is "expressly included as a covered service," this bar is even higher. *Pitman v. Blue Cross & Blue Shield*, 217 F.3d 1291, 1298 (10th Cir. 2000). "[I]t would take a very clear exclusion of a particular application of [that type of treatment] to remove that application as a covered service." *Id.*

Nor was the jury required to believe the self-serving assertions in Sierra's policy. Dr. Chang testified that, contrary to Sierra's claims, the studies referenced in the policy "show that [proton therapy] *[i]s* proven and medically necessary" for treating lung cancer. 6-JA-1255 (emphasis added). The policy's contrary interpretation, he told the jury, "was inaccurate." *Id.* The jury was entitled to credit that testimony—especially given the policy's internal contradictions. Indeed, the most recent study discussed by the policy, a 2015 paper from the National Comprehensive Cancer Network (which represents over 20 cancer-treatment facilities nationwide) concluded that treating lung-cancer patients with proton therapy is "appropriate" and demonstrated both "reduced toxicity and improved survival." 11-JA-2294, 15-JA-3119. That conclusion, in turn, was backed by the only two clinical studies reviewed. 15-JA-3118. And not one study found proton therapy ineffective at treating cancer or more harmful than alternatives. 15-JA-3117-19.

To be sure, some earlier literature reviews cited by Sierra's policy remarked that additional study would be useful or that comparative advantages were unclear at the time of publication. But that will always be the case for complex treatments. It was for IMRT, which Sierra covered. 16-JA-3204 (describing a 2008 paper reporting "generally positive findings" for IMRT and a 2012 paper stating: "[F]urther studies are needed"). And it was for other cancers for which Sierra approved proton therapy. Indeed, the ASTRO paper on which Sierra relies (at 23) also stated that "current data do not provide sufficient evidence to recommend proton beam therapy" for certain pediatric cancers, which Sierra covered anyway. 15-JA-3109.[4] The company's diametrically opposite treatment of adult lung-cancer patients demonstrates an inconsistent application of contract terms. So the jury didn't act irrationally in finding that older scientific papers wanting more study didn't supply a reasonable basis.

3. Finally, Sierra tries (at 26, 28) to manufacture a reasonable basis for denying Bill's claim by pointing to the practices of other insurers. These arguments, untethered to the contract's language, cannot save Sierra.

[4] Sierra claims (at 24) that Dr. Liao doubted the efficacy of proton therapy two years after she sought coverage from Sierra, but she explained to the jury how her writings had been misconstrued. 7-JA-1476, 1509-10.

a. For starters, Sierra waived the argument that case law on other insurers' proton-therapy coverage supplied a reasonable basis for its decision. It didn't raise this contention below and can't try it for the first time now.

In any event, Sierra cites cases involving different contracts and cancers. As Sierra's own authority explains, case law may support an insurer's claim to a reasonable basis only when it addresses a "substantially identical" contract in the same circumstances. *Morris v. Paul Revere Life Ins.*, 109 Cal. App. 4th 966, 970 (2003). None of Sierra's cases do. For instance, one relied on an exclusion defining "experimental" treatments as those "subject to Investigational Review Board (IRB) review"—a definition absent from Bill's contract. *Gardner v. Grp. Health Plan*, 2011 WL 1321403, at *5 (E.D.N.C. Apr. 4, 2011); *see also Baxter v. MBA Grp. Ins. Tr. Health & Welfare Plan*, 958 F. Supp. 2d 1223, 1228 (W.D. Wash. 2013) (different definition of medically necessary; prostate, not lung, cancer); *Stemme v. Blue Cross Blue Shield*, 2013 WL 12362335, at *1, *3 (N.D. Tex. Feb. 25, 2013) (same plus no categorical prohibition).

b. Sierra's reliance on a purported "industry custom" is just as weak. Sierra itself concedes (at 27) that industry custom "is not determinative." Thus, by definition, its argument cannot overcome the uphill standard of review.

At any rate, Sierra's other-insurer evidence fails to establish an industry custom. Sierra presented no evidence that other insurers also relied on hidden corporate policies

to deny coverage automatically—regardless of what the contract says, and without any reasonable investigation. To the contrary, Sierra's own expert testified that it would be "inconsistent with industry standards" for a corporate policy to be the "sole basis" for a denial—exactly what Sierra did. 11-JA-2342.

Sierra also never established that other insurers used the same contract. Instead, Sierra offered generalized testimony about the policies (not the contracts) that existed around the time of trial. 11-JA-2301-08. That renders the comparison meaningless. To take one example, Sierra's expert noted that Aetna's policy deemed proton therapy "experimental and investigational."15-JA-2303. And while he speculated that those exclusions are equivalent to "unproven" in Bill's contract, 11-JA-2303, *Gardner* shows that contracts can, in fact, have highly divergent definitions.

* * *

The point here isn't that Sierra was required to cover proton therapy. It was free to exclude it. The point is that Sierra denied coverage under a contract that promised it—based on an undisclosed policy, without any investigation. Sierra hasn't shown that conduct like this was a prevailing industry custom. And, even if it did, there's no rule that bad faith by all means bad faith by none.

C. The verdict cannot be set aside for lack of economic loss.

Sierra next contends (at 37) that the verdict should be thrown out because there was no proof of "economic loss." But Sierra never proposed jury instructions that would have imposed this purported requirement. And Nevada law has never imposed this requirement. In Nevada, an insured is entitled to "consequential damages"—including for physical pain or emotional distress—upon a "showing of bad faith by the insurer." *Peterson*, 91 Nev. at 620, 540 P.2d at 1071. That's all. *See Guar. Nat'l Ins. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996) (upholding verdict against claim that plaintiff "suffered no economic injury"); *Pemberton*, 109 Nev. at 792, 858 P.2d at 381-82 (allowing claim where insurer paid policy limits).

The weight of authority in other states likewise rejects Sierra's proposed rule. *See, e.g.*, *Ind. Ins. v. Demetre*, 527 S.W.3d 12, 40 n.30 (Ky. 2017); *Miller v. Hartford Life Ins.,* 268 P.3d 418, 432 (Haw. 2011); *Goodson v. Am. Standard Ins.*, 89 P.3d 409 (Colo. 2004). Even California doesn't apply the harsh rule Sierra advocates. In the California cases requiring economic loss, the relevant losses were, in fact, economic. *See, e.g.*, *Gruenberg v. Aetna*, 9 Cal. 3d 566, 578-81 (1973). Those cases address "the fear of fictitious or trivial claims," *id.* at 580—a fear that's allayed by the real physical harm here.

The whole point of the bad-faith tort is to incentivize insurers to treat customers fairly. *See Miller*, 268 P.3d at 427. People purchase insurance to avoid "anxiety, fear,

stress, and uncertainty. The fact that an insurer finally pays in full does not erase the distress caused by the bad faith conduct." *Goodson*, 89 P.3d at 417. Sierra's proposed rule "would encourage insurance companies to delay payments owed"; if the insured refuses, the insurer could get off scot-free by paying what it owed. *See id.* at 417. To avoid this, courts focus on "the insurer's conduct," not the "insured's ultimate financial liability," i.e., economic loss. *Id.* at 416.

In any case, Sierra's rule would be satisfied here. Bill paid premiums for a covered service he was denied; his family was forced to sell a profitable franchise; he purchased special food (Ensure); and he bought a special chair to ease his physical ailments. 8-JA-1737, 9-JA-1780, 1865-66, 1884. That's all "economic loss."

II. Sierra's allegations of trial misconduct are contradicted by the district court's unchallenged findings.

Sierra's misconduct arguments (at 46-53) are foreclosed by findings it doesn't challenge. The district court issued an order with 14 pages of detailed findings rejecting every one of the allegations Sierra advanced in its motion for new trial. 18-JA-3639-58. Because only the trial judge observes counsel firsthand—with an eye to the jury and the whole trial—this Court "give[s] deference to the district court's factual findings and application of the standards to the facts." *Gunderson v. D.R. Horton*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). Yet Sierra never once addresses the findings.

The court found no misconduct. From its vantage point, "counsel for both parties conducted themselves with exemplary professionalism throughout the trial." 18-JA-3644; *see* 14-JA-290. Sierra "raised only a few objections" to counsel's conduct and "did not seek a single curative admonishment," suggesting its complaint is a post-verdict "afterthought." 18-JA-3644 (quoting *Ringle v. Bruton*, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004)). It was "[o]nly *after* the jury returned a verdict against it" that Sierra cried misconduct. 18-JA-3644 (emphasis added). And the "smattering of rhetorical and hyperbolic comments" identified "pale in comparison to the extensive evidence marshaled at trial." 18-JA-3655-56.

A. Sierra first complains (at 48-49) that "Plaintiff's counsel falsely accused SHL's counsel of calling Ms. Eskew a liar." But the district court found this was *true*: The "company's strategy at trial was to impugn the Eskews' motivations and to cast doubt on the truthfulness of their testimony." 18-JA-3653. Among other things, Sierra's counsel asked Sandra to "agree" that money was "an incentive for you to say what you're saying." 9-JA-1978. And Sierra's counsel admitted, "[O]bviously it's my client's position that . . . Mrs. Eskew is embellishing on her husband's condition." 9-JA-1904. Accurately describing the other side's questioning—an unchallenged factual finding—isn't an "ad hominem" attack.

B. Sierra's next mischaracterization (at 51-52) is that counsel "commanded" a witness to admit guilt. The court likewise found this description inaccurate. 18-JA-3644 (rejecting factual characterization that "the question was given as a 'command' and was therefore 'demeaning' and necessarily improper"). As the court observed, it's "not misconduct to phrase a question as a statement rather than a question, especially in the context in which this exchange arose." 18-JA-3655. The court also found Sierra didn't properly object, didn't seek an admonishment, and any error was harmless. 18-JA-3655.

C. Finally, Sierra's complaint (at 52-54) about counsel's "personal opinions" runs into the district court's findings, too. Counsel did state that a verdict for Bill was "the right thing to do," but as the trial court found, "viewed in context," this could mean "the right thing to do according to the law as embodied in the Court's instructions and the evidence at trial." 18-JA-3652. Moreover, after a sustained objection, counsel "promptly corrected any impression that they were conveying a personal opinion" and "emphasized that the argument was about what the jury should do, not what counsel thought." 18-JA-3563. Nor was there anything improper about references to hypocrisy or credibility. The trial court found that this merely "invit[ed] the jury to consider the contradiction" in Sierra's conduct; that's "advocacy, not misconduct." 18-JA-3650-365 (quoting *Cox v. Copperfield*, 138 Nev. Adv. Op. 27, 507 P.3d 1216, 1227 (2022)).

D. Finally, Sierra hasn't argued that the court abused its discretion in concluding that any misconduct, if real, wouldn't warrant a new trial. That's fatal, too.

III. The trial court did not abuse its discretion in admitting evidence about a Sierra affiliate's proton-therapy center.

Throughout trial, Bill's estate put on evidence to establish the pervasive acceptance of proton therapy's effectiveness. Part of that proof came from Sierra's own corporate affiliate, which invested $15 million in, and later operated, a proton-therapy center. Sierra complains that this evidence should have been excluded as substantially more unfairly prejudicial than probative under NRS 48.035(1). But there was no "clear abuse" of discretion in its admission. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

First, Sierra didn't preserve this argument. Sierra filed its motion in limine when its (and the affiliate's) ultimate parent company, UnitedHealthcare, was still a defendant. Much of plaintiff's briefing thus focused on the affiliate's relationship to United. RA-1-8. The argument now, however, centers only on Sierra being a "distant" corporate relative. The district court never had an opportunity to weigh that supposed prejudicial value when United was out of the case. Sierra asserts (at 54) that it objected at trial, but that objection was only about a specific exhibit and was for relevance, not prejudice. 10-JA-2198.

Second, the premise of Sierra's argument—that the evidence is irrelevant—is wrong. The evidence is relevant because it shows that even institutions Sierra would admit are reputable understood proton therapy was proven and effective. Plus, recall that the corporate medical policy Sierra applied bears United's name. 15-JA-3105. That the creator of the policy was the ultimate parent of a company investing in and selling proton therapy casts legitimate doubt on the conclusions in the corporate medical policy.

It doesn't matter if the affiliate was a "distant corporate relative," just as it doesn't matter that the Mayo Clinic wasn't a relative at all. Nor does it matter that the center didn't open until 2019. The investment was in 2015. 10-JA-2192 15-JA-3079, 3093. And because Sierra was still declaring proton therapy unproven at trial, the 2019 operation of its affiliate was relevant to disprove that, too.

Third, Sierra doesn't explain how the *evidence* is unfairly prejudicial, let alone so prejudicial that its admission was an abuse of discretion. Nor could it. This isn't propensity evidence, *Rives v. Farris*, 138 Nev. Adv. Op. 17, 506 P.3d 1064, 1071 (2022), drug-use evidence, *Matter of Est. of Garrett*, 111 Nev. 1397, 1398, 906 P.2d 254, 255 (1995), or a similar inflammatory matter. So instead, Sierra largely (at 55-56) complains about counsel's commentary on the evidence. But that's not an evidentiary challenge; it's a misconduct argument—and, as just explained, a failed one.

IV. The compensatory damages award is supported by substantial evidence and untainted by passion or prejudice.

"A jury is permitted wide latitude in awarding tort damages." *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). For over a century this Court has repeatedly admonished that courts cannot meddle with a damages award "on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice, or corruption in the jury." *Forrester v. S. Pac.*, 36 Nev. 247, 134 P. 753, 768 (1913). That deeply rooted principle is now embodied in the Rules of Civil Procedure, which allow a court to grant a new trial on damages on this narrow basis alone. Nev. R. Civ. P. 59(a)(1)(F).

This Court reviews the district court's decision to deny a remittitur request or a new trial based on excessive damages for abuse of discretion. *Wyeth v. Rowatt*, 126 Nev. 446, 473, 244 P.3d 765, 783 (2010). In recognition of the jury's role, this Court views all evidence in the light most favorable to the jury's award. *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. 384, 391, 284 P.3d 377, 381-82 (2012). Under this doubly deferential standard—deferential to the trial judge and the jury—the verdict must stand.

1. To start, the jury was properly instructed. Sierra complains (at 66) that the jury "was not given sufficient instruction" because the district court told it that there is "no definite standard" for assessing damages. But *Sierra* requested the instruction that "[n]o

fixed standard exists for deciding [damages]" so jurors must use "your common sense." 16-JA-3291. Sierra can't seek reversal based on its own instructions.

Sierra's instructions were correct. As this Court has long held, awards for pain and suffering are "wholly subjective." *Brownfield v. F.W. Woolworth*, 69 Nev. 294, 296, 248 P.2d 1078, 1079 (1952). Thus, the ordinary judicial reluctance to infringe on the jury's award is, if anything, heightened in cases involving injuries of this nature. *Id.*

2. The evidence and common-sense inferences available to the jury amply support its award. As discussed, IMRT treatment immediately inflicted on Bill severe acute esophagitis, leaving his esophagus scorched and a "sunburn" in his throat that made every swallow excruciating. 6-JA-1204, 1281. He lost dozens of pounds in just weeks, was hospitalized, and put on pain medication. 9-JA-1857; RA-19-20. At the chronic stage, his weight plummeted again. 6-JA-1274. He vomited and dry heaved constantly, pain radiated through his body like a "heart attack," and the esophagitis left him so weak he could barely stand on his own—all for months. 8-JA-1740-42, 9-JA-1780.

IMRT didn't just transform Bill physically; it wrecked him emotionally, too. Sierra belittles (at 64) Bill's psychological injuries as nothing more than a few adjectives. But Bill's struggle with the reality that permanent scarring of his esophagus would prevent him from eating and force him to dry heave daily cannot be reduced to the word "hopeless." Bill's knowledge that his insurer had denied him the very coverage for

which he purchased his plan, against his world-renowned doctor's recommendation, and had thereby stolen from him the ability to enjoy his last months, cannot be trivialized as merely being "angry." Bill's inability to spend time with his son or to allow his wife to live her own life rather than constantly care for him was not simply "frustrating." And Bill's knowledge that, in the time he had left, he was in too much pain to continue to be the "father figure" missing from his granddaughter's life or bond with his newly born grandson cannot be written off as just "devastating." The jury evidently agreed.

3. Beyond its complaint about the instruction, Sierra attacks the jury's verdict on several grounds. Each runs headlong into the standard of review or this Court's precedent, and none shows an abuse of discretion.

a. Sierra argues that the size of verdict, on its own and relative to other awards, warrants overturning the jury's decision. But this Court has repeatedly rejected these arguments. "The mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood v. Harrah's*, 109 Nev. at 1010, 862 P.2d at 1192; *Wells v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947). And in Nevada, a "compar[ison] to damages awards in similar cases"—let alone the factually inapposite ones to which Sierra points—constitutes "an abuse of discretion," because prior juries do not bind future juries. *Wyeth*, 126 Nev. at 472 n.10, 244 P.2d at 783 n.10; *see also Wells*, 64 Nev. at 74,

177 P.2d at 460.[5] That rule is consistent with what Sierra asked the jury to be instructed: that it may evaluate the evidence and use its *own* "common sense" to determine an appropriate award. Put another way: Prior juries do not bind future juries. Nevada is not alone on this score. *See, e.g.*, *Morga v. FedEx Ground Package Sys.*, 2022-NMSC-013, ¶ 26; *Richardson v. Chapman*, 175 Ill. 2d 98, 114, 676 N.E.2d 621, 628-29 (1997).

Anyway, the verdict here isn't the outlier Sierra suggests. *See, e.g.*, *Morga*, 2022-NMSC-013, ¶ 26 ($40 million noneconomic award for husband not present when wife died in car accident; wife's estate separately awarded $32 million for wrongful death); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 680 (Mo. Ct. App. 2020) ($25 million each for cancer survivors); *Cruz v. Allied Aviation*, No. 2019-81830 (Tex. Dist. Ct. Oct. 25, 2021) ($85 million in "mental anguish" for surviving accident victim; $20 million loss of consortium for adult child)[6]; Katelyn Newberg, *Woman with 'locked-in syndrome' awarded $47M in malpractice suit*, Las Vegas Review-Journal, https://perma.cc/YD5W-ACTT (Feb. 9, 2023).

---

[5] Sierra asserts (at 65) that—notwithstanding the clear direction from cases like *Wyeth* and *Wells*—*Nevada Independent Broadcasting v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983), endorses tethering each new damages award to the awards in prior cases. But *Allen*, a slander case, was motivated by First Amendment concerns, and this Court has already rejected that it can be read to mean prior verdicts can cap future verdicts. *See Bongiovi v. Sullivan*, 122 Nev. 556, 578, 138 P.3d 433, 449 (2006).

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

b. When Sierra finally turns to the evidence, the company downplays Bill's injuries and argues that, on the record it would've preferred the jury accepted, the verdict is too high. That defies the standard of review and doesn't justify overturning the verdict.

Consider Sierra's argument about pain-and-suffering damages. Sierra argues (at 63) that the only injuries that count are those from November 2016 until Bill's death, an argument apparently based on Dr. Chang's testimony that Bill receiving "total parenteral nutrition" in November was an "objective" indication he had grade III esophagitis. 6-JA-206-07. But Dr. Chang also testified that any "severe" impairment of the ability to eat, which Bill had in February 2016, qualified as grade III, 6-JA-1208-09, which Bill had in February 2016, 9-JA-1857. Sierra also attributes (at 63) "much of [Bill's] pain-and-suffering" to his lung-cancer immunotherapy and antibiotics, not esophagitis, based on Dr. Chang agreeing that those things could theoretically cause a lack of appetite or nausea. 6-JA-1276. But Dr. Chang and Dr. Liao testified that esophagitis could, too, and Bill's wife, who "lived with him every day," testified to the devastating effects the ailment had on him. 9-JA-1965.The jury was entitled to credit that.[7]

[7] Sierra also tries (at 63) to knock out pain attributable to grade II esophagitis based on the claim that Bill's estate "conceded" he would have gotten it with proton therapy. Sufficient evidence supports the award even without injuries attributable to grade II, but this argument suffers from the same flaw. All Sierra's citations show is that Dr. Chang did not offer an opinion (one way or the other) about grade II. There was

What Sierra has not done is offer any argument that the full scope of Bill's injuries that the jury could have credited—and that this Court assumes that it did—fails to support the verdict. No more is needed to reject the company's argument.

d. Finally, Sierra recycles (at 60) its attorney-misconduct argument, contending that counsel's purportedly improper statements must have led the jury to act with passion or prejudice. We have already explained that there was no misconduct, which is enough to reject Sierra's argument.

But the claim has particularly little purchase when it comes to damages. This Court presumes that the jury follows all instructions. *See Krause v. Little*, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001). The jury here was not just instructed to limit the phase-one award to compensatory damages. 16-JA-3345-46. In addition, after the jury awarded compensatory damages, Sierra, speculating that the jury had awarded punitive damages during the liability phase of the trial, persuaded the district court to issue a special instruction: "If you have already awarded punitive damages within your $40 million award, no further award should be made." 14-JA-2876. When the jury then awarded punitive damages in the second phase of the trial, it made abundantly clear that it had not improperly punished Sierra in the first phase.

---

no "concession." To the contrary, Dr. Liao testified that Bill could've avoided side effects with proton therapy. 7-JA-1455-56, 1510. The jury could credit that testimony, which encompasses grade II.

The essence of what Sierra argues, however, is that the jury did the opposite—that it punished Sierra with compensatory damages and then deliberately defied the trial court's supplemental instruction to punish Sierra some more. There is no basis to conclude that the jury acted in such a rogue fashion—especially given the substantial evidence supporting the award. *See Morga*, 2022-NMSC-013, ¶ 43 (rejecting passion-or-prejudice argument where trial court conducted special poll to confirm that an award was strictly for compensatory damages).

Nor can Sierra salvage its passion-or-prejudice claim by observing that the jury awarded more damages than counsel suggested and reached a verdict quickly. The award here was only one-third more than counsel requested, a deviation that shows the jury acted independently, not that it hung on counsel's every suggestion. Courts, including this one, have found substantial departures from the requested award "permissible." *See Bongiovi v. Sullivan*, 122 Nev. 556, 583, 138 P.3d 433, 452 (2006) (deviation of 50 percent); *see also, e.g.*, *Morga*, 2022-NMSC-013, ¶ 8, 44 ($32 million award; $12 million requested); *Mansfield v. Horner*, 443 S.W.3d 627, 642 (Mo. Ct. App. 2014) ($108 million award; $88 million requested). Sierra points to *DeJesus v. Flick*, but it involved an award twice as large as requested and, critically, attorney misconduct. 116 Nev. 812, 819, 7 P.3d 459, 464 (2000).

Courts have just as often rejected efforts to overturn verdicts based on how long a jury takes to return a verdict. "The length of time that a jury deliberates has no bearing on the strength or correctness of their conclusions or the validity of their verdict." *Anglin v. State*, 553 S.W.2d 616, 620 (Tenn. Crim. App. 1977); *see also, e.g. Ill., Cent. R.R. v. Hawkins*, 830 So. 2d 1162, 1180 (Miss. 2002) (12 minutes to return liability verdict and 56 minutes to return award of $4.8 million). What it shows here, as the "record disclose[s]," is that this is simply "one of those cases wherein '[t]he jurors find themselves in immediate accord." *Moore v. Menges*, 89 Ariz. 268, 269-70, 361 P.2d 9, 10 (1961) (40 minutes).[8]

V. The punitive-damages award is consistent with state and federal law.

A. The trial court properly instructed the jury on punitive damages, and overwhelming evidence supports the verdict.

A plaintiff in a bad-faith case may recover punitive damages if the defendant is "guilty of oppression . . . or malice, express or implied." NRS 42.005.1. When submitting its proposed instructions, Sierra asked the court to instruct the jury that "oppression" requires "conscious disregard" of a plaintiff's rights. But Sierra now backtracks, contending that bad-faith plaintiffs (and no one else) must also prove "evil motive" or "intent to injure." Sierra's argument is both belated and wrong.

[8] To the extent that Sierra intends to argue that the punitive damages award was also tainted by passion or prejudice, that argument fails for all the same reasons.

1. Sierra asked for instructions under the standard it challenges.

Sierra's first problem is the "invited error" doctrine, which holds that a party may not "complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). Sierra itself requested an instruction that allowed a finding of "oppression" if the jury found that Sierra acted with "conscious disregard of the rights of [a] person." 16-JA-3293. The court gave the "oppression" instruction that Sierra requested, 16-JA-3345, and its challenge on appeal is thus barred.

It does not matter that Sierra challenged the separate instruction on malice. JA-2262-66. The court instructed (again, as Sierra requested) that the jury could award punitive damages based on oppression "*or*" malice, and the jury then returned a general verdict. 16-JA-3293, 3345. Thus, so long as the evidence is sufficient to support the jury's verdict under the oppression standard—and, as explained below, it is—any purported error in the malice instruction is harmless. *See Cortinas v. State*, 124 Nev. 1013, 1025, 195 P.3d 315, 323 (2008).

2. The district court's instruction was correct.

Invited error aside, the district court didn't err in giving a "conscious disregard" instruction. NRS 42.005(1) authorizes punitive damages based on "oppression" or "malice, express or implied." Implied malice encompasses conduct that is "engaged in with a conscious disregard of the rights or safety of others." *Countrywide Home Loans 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; State Bar of Nevada, *Nevada Jury Instructions: Civil* 12.1 (2018 ed.) (defining malice as "conduct which is engaged in with a conscious disregard of the rights or safety of others").

In 1995, Nevada's legislature relieved bad-faith plaintiffs of a "limitation" it imposed on punitive damages. Legislative Counsel Bureau, Summary, S.B. 474 (1995), https://perma.cc/8FZ3-NJP8. All other plaintiffs must prove not just "conscious disregard" but also "despicable conduct." NRS 42.001. This exemption continued the legislature's special protection for bad-faith plaintiffs. Just six years earlier, a newly enacted three-to-one punitive-to-compensatory damages cap exempted bad-faith plaintiffs, too. NRS 42.005(2). Thus, for bad-faith claims, under 1995 amendments to NRS 42.005, the "common law" supplies the definition of these terms. NRS 42.005.5. And the common law allows punitive damages upon a showing of "conscious disregard." *Smith v. Wade*, 461 U.S. 30, 41, 48 & n.11 (1983); *see also* Restatement (Second) of Torts § 908(2).

Sierra draws the wrong lesson from the legislature's actions, suggesting that it somehow meant to apply a stricter standard to bad-faith cases. That gets things backwards. Indeed, at trial, Sierra's counsel admitted "I have no idea" why the legislative exemption would enhance the burden on bad-faith plaintiffs. 13-JA-2664. Regardless, Sierra has not shown that the common law imposed its intent-to-injure standard. Its cases (*Warmbrodt, Caple, Davis, and Schwarz*) address the pre-1995 law, California law, or malice in defamation. None comes close to showing any error. And if Sierra were correct, it would be virtually impossible for anyone to obtain punitive damages for reprehensible and harmful corporate policies.

3. Abundant evidence supports the jury's finding that Sierra acted with conscious disregard.

Under the conscious-disregard standard, ample evidence supports the verdict.

1. The evidence shows that when Dr. Liao submitted her pre-service claim to Sierra, she left no doubt about the grave consequences of wrongfully denying Bill coverage: He needed proton therapy to avoid "serious . . . complications" to his "heart, esophagus, spinal cord, and normal lungs." 15-JA-3021. If anyone at Sierra had bothered to read the full request, they would also have seen that Bill had a history of "heart disease" and a "peripheral artery bypass," making the need for proton therapy even greater. 15-JA-3028. Yet Sierra ignored this information—applying its hidden blanket exclusion without any investigation. That is knowledge of "probable harmful

consequences" and a "willful and deliberate failure" to avoid them—the definition of conscious disregard the jury was given (and Sierra doesn't challenge). 16-JA-3345.

Sierra also displayed a conscious disregard simply by putting Dr. Ahmad in a position to review claims for proton therapy to begin with. Anyone making a claim for radiation therapy—life-saving and costly treatment—faces enormous risks if coverage is denied. Yet Sierra installed as its gatekeeper someone with so little knowledge of radiation oncology that he couldn't comprehend critical records even at the level of a first-year resident. *See supra* at 13. That decision speaks for itself.

2. Against this abundant evidence, Sierra makes four arguments. Each fails.

First, Sierra contends (at 42) that the denial was based on the "contract's plain language." The evidence discussed above—and Sierra's failure to even argue the definition of "medically necessary" on appeal—shows the opposite.

Second, Sierra touts (at 43) that Dr. Ahmad followed its standard procedures. Making unlawful conduct a policy, however, doesn't shield an insurer from punitive damages; it *supports* punitive damages. *See Merrick v. Paul Revere Life Ins.*, 500 F.3d 1007, 1013 (9th Cir. 2007) (punitive damages for "claim-scrubbing procedures"). Sierra invokes (at 44) *U.S. Fidelity & Guaranty v. Peterson*, but the case doesn't even mention the insurer's standard procedures.

Third, again misreading *Peterson*, Sierra asserts (at 44) that the case—by finding punitive damages unwarranted when the insurer refused to pay a claim known to be due—establishes a particularly high bar. But as shown from the cases it cited, *Peterson* applied a "malice in fact" (or, intent to injure) standard—that is, the standard before the 1995 amendments. *See Vill. Dev. v. Filice*, 90 Nev. 305, 315, 526 P.2d 83, 89 (1974) (applying "malice in fact"); *see also Craigo v. Circus-Circus Enters.*, 106 Nev. 1, 7, 786 P.2d 22, 25 (1990) (plurality) (explaining Nevada's pre-1995 use of a "malice in fact" standard requiring "purposeful intent to injure").

Fourth, Sierra argues (at 44-45) that punitive damages are improper because it followed industry standards in denying proton therapy. But again, it submitted no evidence that other insurers had the same contract, applied the same blanket non-contractual policy, or conducted no individualized review.

Sierra's scattershot arguments fall far short of showing that no rational jury could find conscious disregard.

B. The federal Constitution does not require judicial revision of the punitive-damages award.

There's no federal constitutional problem with the jury's award either. States have a "legitimate interest[]" in imposing punitive damages to "punish[] unlawful conduct and deter[] its repetition." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). The U.S. Constitution's Due Process Clause limits that broad authority only when an award is so

"grossly excessive" that it "furthers no legitimate purpose." *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 417 (2003). This limitation affords defendants "fair notice" to prevent the "arbitrary deprivation of property." *Id.*

Here, Nevada law gave Sierra all the notice it needed. Although Nevada generally limits punitive damages to three times the size of any substantial verdict ($100,000 or more), the law contains an express exemption for bad-faith claims like this one. NRS 42.005(2)(b). The legislature crafted that exemption just one year after this Court sustained a punitive-damages award that was nearly 30 times the amount of compensatory damages. *See Ainsworth*, 104 Nev. at 590, 763 P.2d at 674-75. The legislature could hardly have been clearer that insurers could face punitive-damages awards like this one, just barely above the cap.

Applying due process's three guideposts—reprehensibility, ratio, and comparable penalties—makes clear that there's no constitutional violation.

Reprehensibility. The "most important" guidepost is the "reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419. This factor considers whether the defendant inflicted a physical injury; the conduct "evinced an indifference to or a reckless disregard of the health or safety of others"; the victim was financially vulnerable; the conduct was an isolated incident; and the harm was the result of intentional "malice, trickery, or deceit." *Id.*

This case checks all those boxes. Sierra sold a health-insurance plan that included coverage of the most serious type of healthcare—cancer treatment—while, at the same time, maintaining a non-contractual exclusion of that coverage. The result was financial gain at policyholders' expense. It also meant devastating injuries to Bill Eskew's esophagus. But it could have been cardiac arrest or death, as the IMRT treatment left Bill with a 50 percent greater chances of a heart event. It's not surprising that a federal judge declared UnitedHealthcare's practice of denying proton-therapy coverage to be "immoral and barbaric." *Cole v. United HealthCare*, 19-21258, Dkt. 6 (S.D. Fla. Apr. 29, 2019). So was Sierra's.

Worse still, this pernicious corporate policy extends well beyond Bill Eskew. Dr. Ahmad is known, even to out-of-state doctors like Dr. Chang, to deny legitimate claims for proton therapy. 6-JA-1137. And the company employed similar non-contractual exclusions across 358 treatments. "[C]onduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007).

Sierra's effort to downplay its egregious conduct fails. First, Sierra's argument (at 69) rests on a version of the facts at odds with the verdict. Sierra appears to think that de novo review of whether the record shows "reprehensible" conduct allows this Court, on a cold record, to find facts inconsistent with the verdict. That's wrong. *See, e.g.*,

Goddard v. Farmers Ins., 202 Or. App. 79, 112 (2005). But regardless, even a fresh review would confirm that Sierra's actions were reprehensible.

Second, Sierra's so-called mitigation efforts do not address the harm already done, which is what matters. *See, e.g.*, *Potter*, 112 Nev. at 209, 912 P.2d at 274. After the verdict, *Sierra* merely "authorized"—not, as it argues (at 69) "implemented"—some undefined training. 14-JA-2865. That won't alleviate the damage done. Nor will the forward-looking proton-therapy specific changes that Sierra mentions (but has offered no evidence to establish have actually resulted in coverage for proton-therapy claims).

Equally important, Sierra has remained steadfast that it did nothing wrong. So there is little reason to think that, in the absence of a meaningful award, Sierra will be deterred from returning to its prior practices. Indeed, Sierra has not only made Dr. Ahmad (previously an independent contractor) a permanent employee, but also has promoted him to a bonus-eligible appeals reviewer. A defendant's "lack of repentance" demonstrates a "need for greater punishment and deterrence and add[s] to the sense that [the] conduct is highly reprehensible." *Merrick*, 594 F. Supp. 2d at 1188.

Finally, the Nevada cases Sierra cites offer it no support. *Wyeth* upheld an award. And the other two—*Wohlers* and *Potter*—bear no resemblance to the facts here. The misconduct in those cases wasn't part of a categorical policy (in *Potter,* it was a once-in-25-years event), and there was meaningful mitigation.

Ratio. The second due-process guidepost looks to the ratio "between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. Although there are no "rigid benchmark[s], "[s]ingle-digit multipliers are more likely to comport with due process." *Id.* at 425. That reflects the "history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.*

The award here fits comfortably within the range of permissible ratios. It is consistent with the historical availability of quadruple damages; barely above the 3:1 statutory cap that doesn't even apply, *see Wyeth*, 126 Nev. at 475, 244 P.3d at 785; and comports with a slew of punitive damages awards in Nevada bad faith cases, *see Ainsworth*, 104 Nev. at 589, 594, 763 P.2d at 677 (29.6:1 permissible); *Wohlers,* 114 Nev. at 1268–69, 969 P.2d at 962-63 (13:1 permissible); *Republic Ins. v. Hires*, 107 Nev. 317, 321, 810 P.2d 790, 793 (1991) (12.1:1 permissible); *Merrick v. Paul Revere Life Ins.*, 594 F.Supp.2d 1168, 1191 (D. Nev. 2008) (9:1 permissible); *United Fire Ins. v. McClelland*, 105 Nev. 504, 514, 780 P.2d 193, 199 (1989) (3.5:1 permissible).

Sierra, cherry-picking a sentence from *State Farm*, nonetheless argues (at 71) that, when the compensatory award is "substantial," then the Constitution permits no more than a 1:1 ratio in "noneconomic" cases. But "the very next sentence of *State Farm* says the precise award in each case 'must be based upon the facts and circumstances of the

defendant's conduct and the harm to the plaintiff.'" *Cote v. Philip Morris USA*, 985 F.3d 840, 849 (11th Cir. 2021). This Court and others have heeded that instruction. *See Wyeth*, 126 Nev. at 475, 244 P.3d at 785 ($57 million award at 2.5:1 ratio); *Ingham*, 608 S.W.3d at 722 *cert. denied* 141 S.Ct. 2716 (2021) ($715 million award at 5.72:1 ratio); *Cote*, 985 F.3d at 849 ($20.7 million award at 3.3:1 ratio); *Mansfield*, 443 S.W.3d at 645 (11:1 ratio permissible in case with "just over $8 million of non-economic damages"); *see also Bullock v. Philip Morris USA*, 198 Cal. App. 4th 543, 566-67 (2011) (rejecting Sierra's reading of the sole case on which it relies, *Roby v. McKesson*, 219 P.3d 749 (Cal. 2009)).

Courts have also rejected Sierra's claim (at 71) that noneconomic damages under these circumstances "duplicate" the punitive award. *See Century Sur. v. Polisso*, 139 Cal. App. 4th 922, 966 & n.23 (2006) (punitive award upheld where—as here—the jury was warned "not to duplicate an amount awarded as part of the compensatory damages").

Comparable penalties. The final guidepost looks to "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575. "[V]iolation[s] of common law tort duties," however, "do not lend themselves to a comparison with statutory penalties," *Cont'l Trend Res. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996), which are often much lower. *See Gore*, 517 U.S. at 583. Recognizing this, courts "accord[] less weight" to this factor. *Ingham*, 608 S.W.3d at 724; *Polisso*, 139 Cal. App. 4th at 967 (statutory-penalty amount case "not particularly useful" in insurance bad faith).

But the "fundamental question" this guidepost is trying to answer goes back to the purpose of the due process analysis to begin with: "reasonable notice." *OXY*, 101 F.3d at 641. Nevada's legislative treatment of bad faith claims and decision to lean on juries to curb misconduct provided Sierra with that notice—a decision entitled to "substantial deference," *Gore*, 517 U.S. at 583, just as much as the choice to do so through statutory damages, *see Merrick*, 594 F. Supp. 2d at 1191.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

<u>/s/ Deepak Gupta</u>
DEEPAK GUPTA
(*admitted pro hac vice*)
ROBERT D. FRIEDMAN
(*pro hac vice forthcoming*)
GUPTA WESSLER PLLC
2001 K Street NW, Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com
robert@guptawessler.com

MATTHEW L. SHARP (SBN 4746)
MATTHEW L. SHARP, LTD.
432 Ridge Street
Reno, NV 89501
(775) 324-1500
matt@mattsharplaw.com

DOUGLAS A. TERRY
(*admitted pro hac vice*)
DOUG TERRY LAW, PLLC
200 E. 10th Street Plaza, Suite 200
Edmond, OK 73013
(405) 463-6362
doug@dougterrylaw.com

June 26, 2023

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 16.37 in 14-point Baskerville font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,994 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that if it does not, I may be subject to sanctions.

Dated: June 26, 2023

/s/ Matthew L. Sharp
Matthew L. Sharp

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that on June 26, 2023, I submitted the foregoing brief for filing via the Nevada Supreme Court's eFlex electronic filing system. Electronic notification will be sent to the following:

D. Lee Roberts, Jr.
Phillip N. Smith
Ryan T. Gormley
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Boulevard, Suite 400
Las Vegas, NV 89118
(702) 938-3838

Thomas H. Dupree Jr.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500

<u>/s/ Deepak Gupta</u>
Deepak Gupta