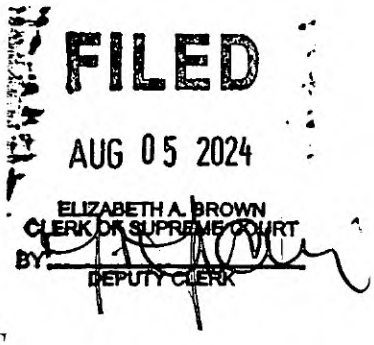
IN THE SUPREME COURT OF THE STATE OF NEVADA

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,
Appellant,
vs.
SANDRA ESKEW, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM GEORGE ESKEW,
Respondent.

No. 85369



ORDER OF AFFIRMANCE

This is an appeal from a final judgment, post-judgment order awarding costs, and post-judgment order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Nadia Krall, Judge.

Respondent Sandra Eskew, as administrator of her deceased husband Bill's estate, sued appellant Sierra Health and Life Insurance Company, LLC (SHL), for insurance bad faith after SHL determined that Bill's preferred lung cancer treatment—proton beam radiation therapy—was not covered by his health insurance plan. Proton therapy is a targeted form of cancer treatment, and Bill's doctors agreed that proton therapy was necessary to limit the risk of damage to the organs surrounding Bill's lungs. Because SHL refused to cover proton therapy, Bill received an alternative treatment which damaged his esophagus, causing pain and suffering for the remainder of his life. Following trial, the jury awarded the estate $40 million in compensatory damages. After a second phase of trial on punitive damages, the jury awarded $160 million in punitive damages. SHL renewed a motion for judgment as a matter of law and filed a motion for a new trial or remittitur. The district court denied the motions.

SHL now appeals, arguing that the district court erred by denying its motion for judgment as a matter of law because Sandra failed to prove the elements of an insurance bad faith claim. SHL also asserts that the district court erred by denying its motion for a new trial or remittitur because attorney misconduct and the erroneous admission of prejudicial evidence caused the jury to return a verdict based on passion and prejudice.

"It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993). To establish insurance bad faith, a plaintiff must show "that the insurer had no reasonable basis for disputing coverage, and that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for disputing coverage." *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 702-03, 962 P.2d 596, 604 (1998). "A judgment will not be overturned if the jury's verdict that an insurer acted in bad faith is supported by substantial evidence." *Id.* at 702, 962 P.2d at 604.

Here, SHL asserts that it is entitled to judgment as a matter of law because there was insufficient evidence to prove the elements of a bad faith claim. The Eskews' health insurance plan stated that it only covered therapeutic services that were "Medically Necessary." SHL determined proton therapy was not medically necessary for Bill, relying primarily on the medical policy of its parent company, UnitedHealthcare, which stated that proton therapy was not medically necessary to treat lung cancer. SHL argues that the medical policy provided a reasonable basis on which to deny coverage because it was based on scientific data establishing that proton

therapy was not medically necessary to treat lung cancer. They also argue that their policy was reasonable because it was consistent with the policies of other major U.S. insurers, and there is no Nevada caselaw stating that proton therapy must be covered. Even if the denial was unreasonable, SHL claims it cannot be subject to bad faith liability because whether the treatment should have been covered under the contract was subject to reasonable disagreement. Therefore, they argue, Sandra could not establish that SHL was aware it lacked a reasonable basis for the denial or that it recklessly disregarded whether it lacked a reasonable basis for denial.

In *Albert H. Wohlers & Co. v. Bartgis*, we faced a similar situation wherein an insurance company argued that the evidence was insufficient to support a finding of bad faith because its obligation under the insurance contract was subject to reasonable disagreement. 114 Nev. 1249, 1257-59, 969 P.2d 949, 955-57 (1999). In rejecting the insurance company's argument, we agreed with the Arizona Supreme Court's characterization of this type of defense and a jury's role in determining its validity in *Sparks v. Republic National Life Insurance Co.*, 647 P.2d 1127, 1137 (Ariz. 1982):

> We disagree with the [insurance company's] contention that an insurer's belief that a portion of its insurance contract precludes coverage raises an absolute defense to a claim of bad faith. . . . Although the insurer's belief that the validity of the insured's claim was fairly debatable is a defense to a charge of bad faith, such a belief is a question of fact to be determined by the jury.

Similarly, we reject SHL's argument that the medical necessity limitation in the Eskews' policy provided grounds for reasonable disagreement over whether proton therapy should be covered, thereby

sheltering it from bad faith liability as a matter of law. To the contrary, it is the role of the jury to decide whether coverage under Bill's contract was subject to reasonable disagreement. Substantial evidence was presented to the jury from which it could conclude that SHL engaged in bad faith by denying Bill's claim as not medically necessary when it *was* medically necessary and SHL knew or recklessly disregarded this fact.

Specifically, the jury was instructed that an "insurer may not reasonably and in good faith deny a prior authorization claim without thoroughly investigating the claim." The jury was provided with evidence showing that SHL relied primarily on the medical policy, and not a thorough investigation of Bill's specific needs, in determining that proton therapy was not medically necessary for Bill. SHL argues that it was reasonable to rely on the medical policy, but the jury was provided with substantial evidence from which it could determine that the medical policy was contrary to then-existing medical research and SHL knew it was not reasonable to deny a claim for proton therapy for lung cancer based on the policy. Overall, there was substantial evidence supporting the jury's verdict that SHL knowingly or recklessly denied coverage without a reasonable basis. Accordingly, we conclude that the jury's finding of bad faith is supported by substantial evidence, and the district court did not err in denying the renewed motion for judgment as a matter of law.[1]

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[1]SHL also argues that it should be granted judgment as a matter of law because Sandra failed to prove economic loss as a prerequisite to obtaining noneconomic damages. Nevada has never recognized the rule that a plaintiff cannot receive noneconomic damages without first proving economic loss, and we decline to do so today.

SHL also argues that the evidence at trial was insufficient to support an award of punitive damages and that the district court's punitive damages instruction was based on an incorrect legal standard. This court will uphold a jury's decision to award punitive damages if it is "supported by substantial clear and convincing evidence of malice" or oppression. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000); NRS 42.005(1). We conclude that the jury was properly instructed on the type of conduct which may expose a party to liability for punitive damages, and there was substantial clear and convincing evidence from which the jury could find that SHL acted with oppression. Particularly, the prior authorization request submitted to SHL noted Bill's medical history and the probable health complications he could face in the event of a denial. The jury was provided with substantial evidence from which it could find that SHL consciously disregarded those consequences in denying the claim. *See Ainsworth v. Combined Ins. Co. of Am.*, 105 Nev. 237, 248, 774 P.2d 1003, 1012 (1989) (noting that where "the insurer not only knew the claimant was in dire need of . . . benefits, but also had reason to know that it was probable that the claimant would suffer unjust hardship if deprived of those benefits, in our view, a finding of oppression is amply justified"), *abrogated on other grounds by Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596 (1998). Thus, we conclude SHL was not entitled to judgment as a matter of law on the issue of punitive damages.

Next, SHL claims that attorney misconduct and the erroneous admission of prejudicial evidence led the jury to return a verdict based on passion and prejudice rather than on the law and the facts, as evidenced by the high compensatory and punitive damages awards. Thus, it argues the district court erred by denying its motion for a new trial or remittitur.

"We review a district court's decision to deny a new trial motion for an abuse of discretion." *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010). Relevant to this case, the court may grant a new trial based on "any abuse of discretion by which either party was prevented from having a fair trial," "misconduct of the . . . prevailing party," or "excessive damages appearing to have been given under the influence of passion or prejudice." NRCP 59(a)(1)(A), (B), & (F).

SHL argues that it was unfairly prejudiced by the district court's abuse of discretion in admitting evidence related to investment by a corporate relative of SHL in a proton therapy center. The evidence was used as part of Sandra's overall strategy to prove that the effectiveness of proton therapy was widely accepted, not only by doctors and insurers unassociated with SHL, but by SHL's parent company upon whose policy SHL based its denial of coverage. Thus, it was relevant to SHL's subjective knowledge of the reasonableness of its policy excluding proton therapy for lung cancer from coverage. SHL has not persuasively shown how the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. *See* NRS 48.035(1). We conclude the district court did not abuse its discretion in admitting this evidence.

Next, SHL points to several instances of what it believes to be misconduct on the part of Sandra's counsel, arguing that counsel (1) launched a barrage of ad hominem attacks on SHL's counsel, (2) deluged the jury with their personal opinions, and (3) commanded SHL's witness to admit the company's guilt. Upon review of the trial transcript and the district court's findings, we agree with the district court and conclude that the attorney conduct at issue does not rise to a level of misconduct which may have impacted the jury's verdict.

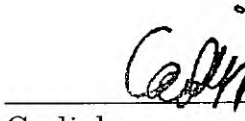
Finally, SHL argues that the district court should have granted a new trial because the high level of damages indicates passion and prejudice. SHL also argues that the court erred by failing to remit compensatory and punitive damages because they were based on passion and prejudice. We review a district court's decision regarding remittitur for an abuse of discretion. *Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971).

"This court will affirm a damages award that is supported by substantial evidence." *Wyeth*, 126 Nev. at 470, 244 P.3d at 782. A jury is given wide latitude in awarding general damages, and damages for pain and suffering are particularly within the jury's province. *Stackiewicz v. Nissan Motor Corp. in U.S.A*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984). And "[p]unitive damages are designed to punish and deter a defendant's culpable conduct and act as a means for the community to express outrage and distaste for such conduct." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008).

Here, the jury was provided with substantial evidence demonstrating the extent of Bill's pain and suffering and the effect it had on the final months of his life. The jury was also provided with substantial evidence of SHL's conduct in mishandling the claim. We conclude that the high compensatory and punitive damages award does not evince a verdict based on passion and prejudice; it merely reflects the jury's valuation of the extensive pain and suffering experienced by Bill due to the denial of coverage and the level of blameworthiness of SHL's conduct. Therefore, we conclude the district court did not abuse its discretion by denying the motion

for a new trial, nor did it abuse its discretion by declining to remit compensatory and punitive damages.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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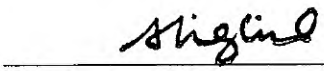
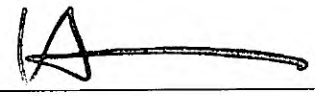
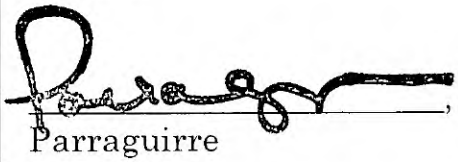


_____, J.
Stiglich



_____, J.
Herndon



_____, J.
Parraguirre

_____, J.
Bell

PICKERING, J., with whom LEE, J., agrees, concurring in part and dissenting in part:

The jury awarded $40,000,000 in damages for pain and suffering—$10,000,000 more than it was asked to award—to which it added

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[2]SHL also argues the high punitive damages award violates its constitutional right to due process because it lacked fair notice of the severity of the punishment that could be imposed. We are not persuaded by this argument as SHL had ample notice that it could be subject to such a punishment for dealing in bad faith. *See* NRS 42.005(2)(b) (exempting insurance bad faith claims from the statutory limit on the punitive-to-compensatory damages ratio).

$160,000,000 in punitive damages, for a total of $200,000,000. In my view, this verdict represents "excessive damages appearing to have been given under the influence of passion or prejudice," such that the district court should have ordered a new trial. NRCP 59(a)(1)(F); *see also* NRCP 59(a)(1)(A) (providing that a new trial may be granted when "the substantial rights of the moving party" are materially affected by "irregularity in the proceedings of the court . . . or adverse party").

Three errors appear especially serious. First, the district court prejudicially erred in admitting evidence that a several-times-removed SHL affiliate invested in proton therapy research, and it doubled down on that error when it allowed counsel to argue that this evidence demonstrated SHL's hypocrisy in approving IMRT but not proton therapy treatment for Mr. Eskew. Second, the district court did not adequately address the attorney misconduct that occurred—as an example, consider this exhortation by counsel in closing to the jury:

> Check yes on . . . the verdict form. Write in $30 million and do it with your chest stuck out and proud. And don't hesitate. It's the right thing to do. We wouldn't ask you to do it if we weren't convinced it was the right thing to do.

Third, the punitive damages, which are four times the amount of the special damages, are excessive and should have been substantially remitted by the district court. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S 408, 416-18 (2003).

For these reasons, I would reverse and remand for a new trial or order a substantial remittitur of the damages award which, if not accepted, would lead to a new trial. While I agree with my colleagues in

declining to direct entry of judgment in SHL's favor, I otherwise respectfully dissent.

Pickering, J.

I concur.

Lee, J.

cc: Hon. Nadia Krall, District Judge
Paul M. Haire, Settlement Judge
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC/Las Vegas
Matthew L. Sharp, Ltd.
Gibson, Dunn & Crutcher LLP/Washington DC
Gupta Wessler PLLC
Doug Terry Law, PLLC
Beverly PLLC
Snell & Wilmer, LLP/Las Vegas
Bradley Drendel & Jeanney
Eighth District Court Clerk