DA 20-0067

IN THE SUPREME COURT OF THE STATE OF MONTANA

DIANE WENGER,

Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant and Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the First Judicial District Court, Lewis and Clark County
Cause No. BDV-2017-23
The Honorable Michael McMahon, Presiding

Appearances:

James G. Hunt
Patrick T. Fox
HUNT & FOX, PLLP
111 N. Last Chance Gulch, Suite 3A
Helena, MT 59601
Tel: (406) 442-8552
Fax: (406) 495-1660
jhunt@huntlaw.com
pfox@huntlaw.com

Attorneys for Plaintiff/Appellant

Matthew B. Hayhurst
Natasha P. Jones
BOONE KARLBERG P.C.
201 West Main, Suite 300
Missoula, MT 59807-9199
Tel: (406) 543-6646
Fax: (406) 549-6804
mhayhurst@boonekarlberg.com
npjones@boonekarlberg.com

Attorneys for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

ISSUES FOR REVIEW

State Farm respectfully disagrees with Wenger's characterization of the issues on appeal. State Farm would reframe the issues as follows:

1. Whether the District Court abused its discretion in prohibiting counsel and witnesses from stating legal conclusions during opening statements and the presentation of the evidence at trial.
2. Whether the District Court abused its discretion when it admitted limited evidence of Wenger's preexisting medical problems to negate causation.
3. Whether the District Court abused its discretion in limiting counsel's comments during closing argument regarding deterrence and punishment, where no claim was alleged for bad faith or punitive damages and Plaintiff's own jury instruction on the point was given.

STATEMENT OF THE CASE

State Farm does not dispute the Statement of the Case set forth in Wenger's opening brief.

FACTUAL BACKGROUND

This case arises from a nighttime vehicle-vs-pedestrian accident on January 25, 2014. The pedestrian was Diane Wenger. She and her "highly intoxicated" friend had left a restaurant and were crossing Main Street in East Helena. (Transcript, p. 504.) They did not cross at an intersection or crosswalk.

Instead, although an intersection was less than 20 steps away (*Id.* at 806), they walked straight across the street approximately midway in the block. (*Id.* at 115.) Wenger made it almost all the way across Main Street before she noticed her intoxicated friend stumbling in the street. (*Id.*) Wenger turned back, at which time she was struck by a vehicle driven by Travis Elbert. (*Id.* at 116.) Elbert simply did not see her in time to stop his vehicle because it was dark and Wenger was wearing dark clothing and walking outside the unmarked crosswalk.[1] (*Id.* at 115, 390, 488, 755, 801.)

The investigating officer from Montana Highway Patrol, Trooper Michael Zufelt, determined that Elbert had no contributing action to the accident. (*Id.* at 756.) The Trooper also determined that Wenger crossed the roadway in the middle of the block, in a dark night, wearing dark clothing, while distracted by her intoxicated friend. (*Id.* at 755, 787-788.) Based on his investigation, the Trooper determined the accident was caused by Wenger. (*Id.* at 791.) And Wenger apparently agreed at the time—she asked the Trooper to pass along an apology to Elbert. (*Id.* at 792.)

Wenger originally filed this action against Elbert only, alleging he "did not have his headlights on and was not paying attention to the road in front of him."

[1] Under Montana law, a crosswalk exists at every intersection regardless of whether the intersection has sidewalks or markings. *Hanson v. Edwards*, 2000 MT 221, ¶ 25, 301 Mont. 185, 7 P.3d 419. The jury was instructed on this settled legal principle. (Transcript, p. 1133.)

(Doc. 1, ¶ 7.)[2] Elbert's liability insurer settled for its policy limits of $25,000. Wenger then amended her complaint to add a breach of contract claim against State Farm for underinsured motorist (UIM) benefits. Wenger continued to maintain that Elbert did not have his headlights on. (Doc. 3, ¶ 9.) Wenger also maintained that Elbert was speeding. (Doc. 20, p. 12.)

As it turns out, Wenger was wrong about Elbert's headlights. An East Helena Police officer happened to be driving down Main Street that night and his dashboard video camera captured the accident. The dash video proved Elbert's headlights were illuminated. (Transcript, pp. 381, 1106.) Despite this, Wenger continued to dispute the point until shortly before trial, when she finally conceded the headlights were, in fact, illuminated. The agreed facts in the Pretrial Order stated, "His headlights were turned on." (Doc. 59, p. 2.)

Wenger was also wrong about Elbert speeding. Wenger's own accident reconstruction expert calculated Elbert's speed *under* the 25 mph limit. (Doc. 38, Ex. D, p. 5; Transcript, p. 386.) Wenger ultimately conceded the point as well. The agreed facts in the Pretrial Order reflected this, stating, "He was driving under the 25 mph speed limit." (Doc. 59, p. 2.)

State Farm denied Elbert was negligent. State Farm also contested both causation and the scope and extent of the alleged damages. State Farm

[2] "Doc." refers to the docket number from the District Court Clerk's docket sheet, which is included in Appellee's Supplemental Appendix.

affirmatively alleged that the accident was caused by Wenger's own comparative negligence. (Doc. 59, pp. 5-6.)

Issues for the jury to decide were whether Wenger and/or Elbert breached their respective duties immediately before the accident, whether and to what extent the breach of these duties caused the accident, and the extent of Wenger's damages. (Doc. 59, p. 10.)

At trial, Wenger argued Elbert was driving in an inattentive manner. State Farm countered with evidence that Elbert's driving was reasonable—he was paying attention and it was undisputed he was driving under the speed limit. State Farm also elicited testimony that (a) Wenger did not see Elbert's headlights—which were illuminated and visible had she looked; (b) Wenger was wearing dark clothing on a dark night, but chose to cross midway in the block instead of walking less than 20 steps to the intersection; and (c) Wenger was distracted by her highly intoxicated friend.

After a five-day trial before Judge Michael McMahon, the jury unanimously returned a defense verdict. Deliberations lasted approximately one hour. Although the stipulated verdict form included several questions, the jury answered the first question "no," thereby ending the case.

1. Was Travis Elbert negligent with respect to the January 25, 2014 accident?

ANSWER: "Yes" ___ or "No" X

(Doc. 83.)

The jury never got to the questions on causation, comparative negligence, or damages.

STANDARD OF REVIEW

Wenger raises three issues on appeal—all of which are discretionary rulings of evidence or trial administration. *Jarvenpaa v. Glacier Elec. Coop.*, 1998 MT 306 ¶¶ 12, 33, 292 Mont. 118, 970 P.2d 84. This means Wenger must prove the District Court "acted arbitrarily without conscientious judgment or exceeded the bounds of reason and prejudiced a substantial right of the appellant." *Beehler v. E. Radiological Associates, P.C.*, 2012 MT 260, ¶ 17, 367 Mont. 21, 289 P.3d 131.

Wenger argues the first appellate issue should be reviewed for correctness. State Farm strongly disagrees. The first issue involves the District Court's prohibiting counsel and witnesses from stating legal conclusions during opening statements and the presentation of the evidence at trial. "Trial administration issues and similar rulings"—including limitations on witness examinations and arguments of counsel—"lie within the district court's discretion and we will not disturb the rulings unless there is an abuse of discretion." *State v. Insua*, 2004 MT

14, ¶ 33, 319 Mont. 254, 84 P.3d 11. Likewise, "District courts 'are vested with great latitude in ruling on the admissibility of expert testimony,'" and such rulings are reviewed under the abuse of discretion standard. *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶¶ 14, 38, 47, 388 Mont. 347, 400 P.3d 735 (citation omitted); *accord Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs*, 2016 MT 256, ¶¶ 9, 18, 385 Mont. 156, 381 P.3d 555 (applying abuse of discretion standard to exclude expert testimony containing legal conclusions); *State v. Mills*, 2018 MT 254, ¶ 12, 393 Mont. 121, 428 P.3d 834 (articulating abuse of discretion standard in case involving inadmissible legal conclusion testimony). Thus, the first issue should be reviewed for an abuse of discretion.

Wenger properly acknowledges that the second issue on appeal should be reviewed for abuse of discretion. (Opening Brief, p. 4.)

The same is true of the third issue. Wenger acknowledges at the outset of her brief that "[t]he standard of review for issue 3 is abuse of discretion." (Opening Brief, p. 4.) Later, however, Wenger suggests that the issue should be reviewed for correctness. (*Id.* at 29.) The proper standard is abuse of discretion. The third issue involves the District Court's limiting of counsel's commentary regarding deterrence and punishment during closing arguments. This is another discretionary issue of trial administration that warrants deference and is reviewed

for an abuse of discretion. *Insua*, ¶ 33; *Harwood v. Glacier Elec. Coop.*, 285 Mont. 481, 492, 949 P.2d 651, 658 (1997).

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in prohibiting counsel and witnesses from stating legal conclusions during opening statements and the presentation of the evidence at trial. By statute, "all questions of law . . . are to be decided by the court" and "all discussions of law are to be addressed by the court," not by witnesses or counsel. Mont. Code Ann. § 25-7-102. Consistent with this directive, Montana law generally prohibits counsel from making legal statements to the jury or arguing jury instructions during opening statements or the presentation of evidence. *State v. Otto,* 2014 MT 20, ¶¶ 11-12, 373 Mont. 385, 317 P.3d 810; Mont. Code Ann. § 25-7-301(5). Montana law also prohibits witnesses from offering legal opinions or legal conclusions at trial. Abundant and recent case law supports this proposition. *See, e.g., Wittich*, ¶¶ 41-42; *Citizens for a Better Flathead*, ¶ 18; *Wicklund v. Sundheim*, 2016 MT 62, ¶¶ 15, 17, 383 Mont. 1, 367 P.3d 403; *Perdue v. Gagnon Farms, Inc*., 2003 MT 47, ¶ 28, 314 Mont. 303, 65 P.3d 570; *Heltborg v. Modern Mach.*, 244 Mont. 24, 30-31, 795 P.2d 954, 958-58 (1990).

Here, the District Court carefully followed these legal principles and prohibited improper legal conclusions at trial. Before closing arguments, the

District Court gave jury instructions that Wenger acknowledges were 100% correct, including complete and accurate instructions on the respective duties of pedestrians and drivers. The jury is presumed to have followed these instructions. *Malcolm v. Evenflo. Co.*, 2009 MT 285, ¶ 103, 352 Mont. 325, 217 P.3d 514. It determined that Elbert was not negligent. While Wenger may disagree with the jury's ultimate conclusion, there was simply no abuse of discretion. Alternatively, even if an error occurred (which State Farm disputes), it did not affect Wenger's substantial rights and, therefore, was harmless.

Second, the District Court did not abuse its discretion when it admitted limited evidence of Wenger's preexisting medical problems to negate causation. Indeed, this Court has repeatedly held that evidence of preexisting medical problems are relevant and admissible to negate causation. Specifically, "a defendant may submit evidence of other injuries to *negate* allegations that he or she is the *cause or sole cause* of the current injury," and this rule applies both to "subsequent injuries" and "preexisting injuries." *Clark v. Bell*, 2009 MT 390, ¶ 25, 353 Mont. 331, 220 P.3d 650 (emphasis added). "[O]nly where a defendant seeks to apportion an injury, as opposed to rebut causation, does he or she have to prove to a reasonable medical probability that the injury is divisible." *Howlett v. Chiropractic Ctr., P.C.*, 2020 MT 74, ¶ 31, 399 Mont. 401, 460 P.3d 942 (citation omitted).

Here, Wenger claimed the accident drastically affected her health and lifestyle, but the medical records told a different story—they showed that she struggled with a myriad of medical issues *for years* before the accident, including cognitive dysfunction, memory problems, migraines, fibromyalgia, chronic pain, sleep problems, depression, and anxiety. (Transcript, pp. 852, 859-860.) They also showed the severity of her preexisting problems and the concern her doctors had about them at the time. Thus, the records were not only admissible to negate causation, but also relevant to the scope and extent of the alleged damages. Since State Farm was challenging causation and not seeking an apportionment, it "was not required to prove causation to a reasonable degree of medical probability." *Howlett*, ¶ 32. Regardless, a neuropsychologist testified "to a reasonable degree of certainty" that "Wenger's experience of ongoing symptoms is related to her preexisting conditions. That is, her symptoms are due to conditions that she had prior to the accident in question." (*Id.* at 980-981.) Alternatively, to the extent an abuse of discretion occurred (which State Farm disputes), the error was harmless because the jury "did not reach the issue of causation." *Howlett*, ¶ 32.

Finally, the District Court did not abuse its discretion in limiting counsel's comments during closing argument regarding deterrence and punishment. Since this was a straightforward case for underinsured motorist (UIM) coverage, it arose in contract, not tort. *Reisbeck v. Farmers Ins. Exch.*, 2020 MT 171 ¶¶ 16-17, 23,

400 Mont. 345, 467 P.3d 557. The District Court had broad discretion to limit improper tort-related arguments, including so-called "Golden Rule" arguments. Moreover, the jury instruction that Wenger wanted to argue related to damages. Yet the jury never got to the issue of damages. Thus, any error was harmless.

The bottom line is that all of the appellate issues involve discretionary rulings of evidence or trial administration, and Wenger cannot prove the District Court "acted arbitrarily without conscientious judgment or exceeded the bounds of reason and prejudiced a substantial right of the appellant." *Beehler*, ¶ 17. As such, the jury's verdict and corresponding judgment should be affirmed.

ARGUMENT

I. The District Court did not abuse its discretion in prohibiting counsel and witnesses from stating legal conclusions during opening statements and the presentation of the evidence at trial.

Wenger's first issue involves the District Court prohibiting counsel and witnesses from stating legal conclusions during opening statements and the presentation of the evidence at trial. Despite Wenger's arguments to the contrary, the District Court properly exercised its broad discretion in prohibiting legal conclusions.

A. The District Court properly exercised its discretion in prohibiting legal opinions at trial.

The topic of improper legal statements first arose before trial in the context of Wenger's accident reconstruction expert, Scott Swingley, who had included

statements in his expert report about legal duties and Montana's traffic statutes. (Doc. 38, pp. 5-6 & Ex. E, p. 1.) For example, Swingley's report stated, "All drivers of motor vehicles, I would opine, have a responsibility to pay close attention to both lanes in front of them." (*Id.*) State Farm filed a motion in limine to exclude these legal opinions. (Doc. 38, p. 14.) In response, Wenger agreed in pretrial briefing that "Swingley's reference to Montana statutory duties regarding headlights" was inadmissible[3] but argued that Swingley could opine on "the standard of care." (Doc. 45, p. 3.)

The District Court granted State Farm's motion. Relying on a pair of cases—*Heltborg* and *Perdue*—the District Court excluded witness testimony regarding "ultimate legal issues" or "Montana's driving statutes, laws, their interpretation, or apply the law to the facts in an answer." (Doc. 49, pp. 14, 22.)

This ruling was dead-on and fully supported by the law. In *Perdue*, this Court held that a Montana Highway Patrol officer could properly testify about "***factual*** conclusions" he reached as part of his investigation, including the vehicle's speed, the functionality of the headlights, and the vehicle not presenting an unusual hazard. *Perdue*, ¶¶ 30-31 (emphasis added). These opinions were permissible "factual conclusions." *Id*. ¶ 31. The same is true in *Heltborg*, where

[3] Wenger complains in passing about State Farm's expert testimony regarding headlight illumination, but it is undisputed that, unlike Wenger's expert, State Farm's expert did not attempt to testify about any legal standard, for headlights or otherwise.

the Court held that "an expert could testify to ***factual issues*** of whether the employer followed its own policies," but "the expert could ***not*** follow this testimony with a ***legal conclusion*** on whether the employer violated the covenant of good faith and fair dealing." *Heltborg*, at 30-31 (emphasis added).

This is fully consistent with statutory law. In Montana, trials involve two kinds of issues: factual and legal. Mont. Code Ann. § 25-7-101. Factual issues are decided by the jury. Mont. Code Ann. § 25-7-103. Legal issues, however, are addressed by the court:

> **Issues of law to be decided by court.** Except as provided in Article II, section 7, of the Montana constitution [i.e., libel or slander], all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the court unless they are referred upon consent, and all discussions of law are to be addressed to the court.

Mont. Code Ann. § 25-7-102.

This statutory language is crystal clear. Legal issues—including duties and other conclusions of law—are "decided by the court," not by counsel or any witness. *Id.* Indeed, "all discussions of law are to be addressed to the court," not to any witness. *Id.* After the close of the evidence, the court instructs the jury on the law when it reads the jury instructions. Mont. Code Ann. § 25-7-301(5). The parties are then permitted to argue how the law applies to the facts during closing arguments. Mont. Code Ann. § 25-7-301(6).

That is precisely what happened here. It is undisputed the District Court properly instructed the jury on the relevant statutes and laws, including instructions on the respective duties of drivers and pedestrians as well as an instruction on headlight illumination. (Transcript, pp. 1132-1134.) Then Wenger's counsel was permitted to argue—and *did* argue—how those laws should be applied in this case. (*Id.* at 1169-1171.) The jury listened to Wenger's counsel, weighed the evidence, and reached its own conclusion—which is exactly how the process is supposed to work. Wenger disagrees with the jury's verdict, but no error occurred. The District Court followed the statutes and case law to the "t."

B. Wenger's arguments lack merit and fail to show an abuse of discretion.

Wenger must prove not only the District Court erred, but that it committed an abuse of discretion, i.e. that it "acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Beehler*, ¶ 17. Wenger fails to meet this high standard.

First, Wenger relies on two statutes—Mont. Code Ann. §§ 26-1-401 and -402—to argue that she was "deprived of adducing evidence to help her meet the burden of proof." Brief, p. 6. This argument is flawed. These statutes expressly provide that Wenger had the burden to produce "evidence as to a particular ***fact***," and the burden of persuasion "as to each ***fact*** the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting." Mont.

Code Ann. §§ 26-1-401, -402 (emphases added). In other words, Wenger had the burden to prove the *facts* of her case. The District Court did nothing—zero—to interfere with Wenger proving *facts*.[4] Instead, the District Court simply declined to allow her to comment or elicit opinion testimony on the *law* during the presentation of evidence (though she was allowed to make appropriate legal arguments during closing statements). This makes complete sense because legal issues are exclusively for the court. Mont. Code Ann. § 25-7-102. Consequently, the statutes cited by Wenger simply illustrate the division of responsibilities between the parties (issues of fact) and the court (issues of law). The statutes therefore support the District Court's decision to prevent Wenger from eliciting testimony about legal issues. Legal issues were for the court, not for counsel or any witness.

Wenger next argues that legal duties were so important, she "should have had the opportunity to educate the jury on the standard of care throughout the trial starting with *voir dire*, then opening statement, and into trial testimony." (Opening Brief, p. 8.) She argues "[t]he District Court even recognized the importance of relying on jury instructions for opening statement." (*Id.*) She apparently wanted to

[4] Wenger claims "she could not question Elbert or the MHP trooper about the obviously intoxicated person and why Elbert did not see her, particularly on a Saturday night in East Helena." (Opening Brief, p. 14.) However, no citation or support is provided for this statement. Wenger did cross examine on this topic. (*E.g.,* Transcript, pp. 774-776, 815-828.) The District Court did not prevent Wenger from proving any *facts*.

argue to the jury, before closing arguments, that Montana law imposes a "heightened duty" on drivers like Elbert but only a "subordinate" duty on Wenger. (*Id.* at 14, 17.)

Montana law provides, however, that jury instructions should not ordinarily be used in opening statements or during the presentation of evidence. The order of trial in Montana is set by statute. It provides for opening statements and the presentation of evidence *before* jury instructions:

> **Order of Trial.** When the jury has been sworn, the trial must proceed in the following order unless the court, for good cause and special reason, otherwise directs:
>
> **(1)** The party who has the burden of proof may briefly state the party's case and the evidence by which the party expects to sustain it.
>
> **(2)** The adverse party may then, or at the opening of the adverse party's case, briefly state the defense and the evidence that the adverse party expects to offer in support of it.
>
> **(3)** The party who has the burden of proof shall first produce the party's evidence, and the adverse party shall then produce the adverse party's evidence.
>
> **(4)** The parties shall then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.
>
> **(5)** When the instructions have been passed upon and settled by the court and before the arguments of counsel to the jury have begun, the court shall charge the jury in writing, giving in the charge only the instructions that are passed upon and settled at the settlement. In charging the jury, the court shall give to the jury all matters of law that the court thinks necessary for the jury's information in rendering a verdict.
>
> **(6)** When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the party upon whom rests the burden of proof shall commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court shall determine their relative order in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment

> upon the law of the case as given in the instructions of the court, as well as upon the evidence in the case.

Mont. Code Ann. § 25-7-301.

Per usual trial procedure, the District Court in this case instructed the jury on the law after the close of evidence and before closing arguments. (Transcript, pp. 1127-1144.) This approach was entirely correct. It mirrored the statutory process.

Despite this, Wenger takes issue with the statutorily-mandated order of trial because she wanted to talk about the law during opening statements and use statutes during witness examinations. The District Court declined to allow this, however, and its reasons were sound.

The District Court may deviate from the statutorily-prescribed order of trial, but only "for good cause and special reason." Mont. Code Ann. § 25-7-301. Good cause and special reasons may exist in some "complex" cases, but not in simple or straightforward cases. *Otto,* ¶¶ 11-12 (affirming but finding error where District Court gave some jury instructions before opening statements). None of these exceptions apply where, as here, the case involves straightforward facts and legal principles.

Good cause and special reason to deviate from the mandatory order of trial also may include the parties' agreement that the Court give certain jury instructions before opening statements. This is consistent with the statutory provision that "all questions of law . . . are to be decided by the court *unless they are referred upon*

consent." Mont. Code Ann. § 25-7-102 (emphasis added). In other words, if the parties consent and the District Court finds good cause, jury instructions may be given before opening statements.

That is precisely what happened here. The District Court gave a short set of stipulated, agreed-upon jury instructions before opening statements. This is commonplace, and it provided the jury with a basic framework for the trial. (Transcript, pp. 114-119, 304-316.) At the same time, however, the District Court adhered to the statutorily-mandated "order of trial" in this case when it came to legal duties and arguments of counsel. The District Court ruled—quite appropriately—that neither counsel nor witnesses could testify or argue about the law during the presentation of the evidence. Then, once both parties had rested, the District Court gave jury instructions that are unchallenged by Wenger. This is critically important and bears repeating: *the jury instructions, in Wenger's view, were 100% correct.* Finally, arguments were reserved for closings. This approach was true to the statute and consistent with the division of responsibilities—the parties proving *facts*, and the court instructing on the *law*.

This approach is likewise endorsed by the Montana Pattern Jury Instructions. They contain a small number of preliminary instructions for use before the presentation of evidence, including one instruction that outlines the order of trial and provides, in part:

> After all the evidence has been presented, I will determine the applicable law after considering the views of counsel. This is called "settling instructions". We will then go back into session and the instructions will be read to you.

MPI2d 1.01 (entitled "General - Function of Judge and Jury").

Here, the District Court gave this exact preliminary instruction to the jury by agreement of the parties. (Doc. 64, Joint Proposed Instruction #6; Transcript, pp. 306-307.) There is no error—and certainly no abuse of discretion—when the District Court follows the order of trial not only mandated by statute but also set forth in one of the parties' agreed-upon preliminary jury instructions.

Next, Wenger argues that *Heltborg* and *Scofield*, among other cases, permitted her to "educat[e] the jury on the standard of care" using "different sources including Montana statutes." (Opening Brief, pp. 11-12.) As discussed above, however, *Heltborg* held that "an expert could testify to ***factual issues*** of whether the employer followed its own policies," but "the expert could ***not*** follow this testimony with a ***legal conclusion*** on whether the employer violated the covenant of good faith and fair dealing." *Heltborg v. Modern Mach*., 244 Mont. 24 at 30-31, 795 P.2d at 958 (emphasis added). *Heltborg* thus undermines Wenger's position. That case prohibits witnesses from testifying about legal conclusions, which is precisely what Wenger wanted to do but what Montana law forbids.[5]

[5] Another case cited by Wenger—*Schofield v. Estate of Wood*, 211 Mont. 59, 62-63, 683 P.2d 1300, 1301-1302 (1984)—illustrates the same principle. In that

More recent cases from this Court reaffirm this principle. *See, e.g., Wittich*, ¶¶ 41-42 ("Our case law demonstrates that even though testimony on an ultimate issue of fact may implicate legal issues, an expert's testimony is admissible so long as it does not reach a legal conclusion or apply the law to the facts. . . . the rules of evidence permitted the Commissioner to testify as to his opinions on those issues so long as he did not offer legal conclusions"); *Citizens for a Better Flathead*, ¶ 18 ("By applying the law to the facts of this case, the report [of an expert land use planner] impermissibly offers legal conclusions."); *Wicklund*, ¶¶ 15-17 (excluding English professor's testimony interpreting a deed because it constituted "a legal conclusion for the court").[6]

---

case, a law enforcement officer was permitted to testify about *factual* matters relating to an auto accident, including whether a vehicle was swerving, whether a vehicle was in control, whether a vehicle was over the centerline, and which vehicle caused the accident. This holding is fully consistent with *Heltborg* and the District Court's analysis in this case.

[6] The other cases cited by Wenger are inapposite. In *Fisher v. Swift Transp. Co.*, 2008 MT 105 ¶¶ 31-32, 342 Mont. 335, 181 P.3d 601, the Court merely held that "on remand, it will be necessary for the fact-finder to consider whether the Swift driver breached the duties of care he owed to Fisher." The case says nothing about counsel or witnesses testifying about legal standards. The same is true of *Cash v. Otis Elevator Co.*, 210 Mont. 319, 684 P.2d 1041 (1984). While it is true that law enforcement officers testified about their interpretation of a criminal statute in *Massee v. Thompson*, 2004 MT 121 ¶¶ 47, 52, 321 Mont. 210, 90 P.3d 394, there was apparently no objection to the testimony as an improper legal opinion and neither the District Court nor this Court analyzed that issue. The same is true of *Townsend v. State*, 227 Mont. 206, 738 P.2d 1274 (1987), where the jury heard deposition testimony about a statute requiring highway repair procedures, but the issue of whether the testimony was an improper legal conclusion was not addressed. Lastly, in *Foreman v. Minnie*, 211 Mont. 441, 447, 689 P.2d 1210,

Wenger speculates that the jury was confused about the legal duties applicable to pedestrians like Wenger. This speculation is directly undermined by the undisputed fact that the District Court properly instructed the jury on the duties applicable to both pedestrians and motorists, as set forth in the relevant statutes, Mont. Code Ann. §§ 61-8-503(1) and -504. (Transcript, pp. 1132-1133.) No one argues otherwise. No one is challenging those jury instructions. They were correct statements of the law and, of utmost importance, the jury is presumed to have followed them. *State v. Schmidt*, 2009 MT 450, ¶ 38, 354 Mont. 280, 224 P.3d 618 ("We must assume that the jury followed [the jury] instructions.") (citing *Malcolm*, ¶ 103)). In the face of these undisputedly correct jury instructions, Wenger's speculation about the jury confusion is just that—speculation.

Wenger also argues that State Farm was confused about the legal duties applicable to pedestrians like Wenger. The record does not support this. In its answer, State Farm specifically denied Elbert was negligent or negligent per se, and instead State Farm alleged that "liability for the accident is contested." (Doc. 8, pp. 3-5.) State Farm's answer also alleged that "Plaintiff was cited for and pled guilty to 'jaywalking,' in violation of Mont. Code Ann. § 61-8-503(3), which

---

1213 (1984), a law enforcement officer was asked about a legal violation by a driver and "testified as to what he considered the cause of the accident." The Court did not state whether the testimony was an improper legal opinion, and in any event, the case predates *Heltborg*, *Perdue*, and the more recent cases which conclusively hold that legal opinions are inadmissible.

constitutes negligence *per se*." (Doc. 8 at 6.) That statement is correct. Plaintiff pled guilty to that very statute in Justice Court. (Doc. 21, Ex. 1.)

State Farm later filed a motion for partial summary judgment on Wenger's comparative negligence. In particular, State Farm argued that Wenger violated the statute requiring pedestrians outside a crosswalk to yield the right of way to all vehicles, Mont. Code Ann. § 61-8-503(1)—the same statute cited by Wenger on appeal—because she was crossing the street outside a crosswalk and failed to yield the right of way. (Doc. 16, pp. 3-4.)

The District Court ultimately denied the motion and ruled that the issues of Elbert's negligence and Wenger's contributory negligence involved disputed issues of fact and, therefore, were for the jury to decide. (Doc. 27, p. 7.)

At trial, State Farm maintained the same position. It argued to the jury that Elbert was not negligent because he was driving safely and paying attention, whereas Wenger was comparatively negligent for violating the statute requiring pedestrians outside a crosswalk to yield the right of way to all vehicles—again, the same statute cited by Wenger on appeal—because (a) she did not see Elbert's headlights—which were illuminated and visible had she looked; (b) she was wearing dark clothing on a dark night, but chose to cross midway in the block instead of walking less than 20 steps to the intersection; and (c) she was distracted by her highly intoxicated friend. (Transcript, pp. 1180-1194.)

After receiving jury instructions that Wenger acknowledges were 100% correct—including complete and accurate instructions on the respective duties of pedestrians and drivers—the jury deliberated and determined that Elbert was not negligent. Wenger may disagree with the jury's ultimate conclusion, but that is no justification for reversing the verdict.

C. Even if an error occurred and rose to the level of abuse of discretion, it was harmless.

When it comes to evidentiary issues, including issues involving testimony regarding legal duties, proving an error that rose to the level of an abuse of discretion is merely the first step. The second step requires a showing that the error affected substantial rights, meaning it was "of such character to have affected the result of the case." *Wittich*, ¶ 45 (citation omitted).

Here, even if the District Court abused its discretion in prohibiting legal opinions at trial, Wenger has not shown that the error affected the result of the case. After all, the jury instructions included complete and accurate statements of the law on the respective duties of pedestrians and drivers. (Transcript, pp. 1132-1133.) Wenger was permitted to introduce evidence as to any pertinent factual matters and was then permitted to make proper arguments on the law in closing. "We must trust that the jury will heed the court's instructions as to how to evaluate the evidence presented." *Malcolm* ¶ 103; *accord Schmidt*, ¶ 38. Under these circumstances, any error was harmless.

II. The District Court properly exercised its broad discretion in admitting medical records and evidence of preexisting conditions.

Wenger's second issue involves the admission of medical records and evidence of preexisting conditions to negate causation. Here, the District Court properly exercised its broad discretion in allowing some—but not all—evidence of preexisting conditions to challenge causation.

A. The District Court properly exercised its discretion in allowing some—but not all—evidence of pre-existing medical conditions.

1. State Farm was entitled to negate causation and challenge damages.

Wenger had the burden of establishing, among other things, the elements of causation and damages. (Doc. 59, p. 10.) State Farm, in turn, had the right to challenge both causation and damages. (Doc. 59, p. 5.) Evidence of Wenger's prior medical conditions was properly admitted for these purposes.

This Court has repeatedly held that evidence of prior medical issues or accidents are relevant and admissible to negate causation. Specifically, "a defendant may submit evidence of other injuries to ***negate*** allegations that he or she is the ***cause or sole cause*** of the current injury," and this rule applies both to "subsequent injuries" and "preexisting injuries." *Clark*, ¶ 25 (emphasis added). Alternatively, "a defendant may attempt to prove he or she is liable only for a portion of the plaintiff's damages by proving to a reasonable medical probability that the injury is divisible." *Howlett*, ¶ 31.

Here, State Farm did not contend Wenger's injury was divisible, nor did it seek an apportionment. (Doc. 44, p. 38 ("State Farm is not arguing for apportionment").) Instead, State Farm challenged causation. (Doc. 59, p. 5.) Wenger had a long history of serious and chronic medical problems, and State Farm argued that the jury was entitled to consider that evidence in determining causation and damages. Wenger disagreed, and the issue was thoroughly briefed and argued before trial.

The District Court carefully considered the arguments and correctly ruled "Wenger's pre-accident health is relevant and admissible since this evidence is used to challenge Wenger's damages claims, her credibility and causation in this proceeding." (Doc. 49, p. 15.)

The District Court's analysis was spot-on. Wenger sought damages for lost course of life based on the theory that the accident drastically affected her health and lifestyle (Doc. 59, p. 4), but the medical records told a different story. They showed that she struggled with a myriad of medical issues, for years, before the accident. And they showed the severity of her preexisting problems and the concern her doctors had about them at the time. Thus, the records were not only admissible to negate causation, but also relevant to the scope and extent of the alleged damages.

At trial, State Farm introduced evidence of the preexisting conditions through Wenger herself, through her medical records, and through the testimony of both treating and consulting doctors. (*See, e.g.,* Transcript, pp. 403, 538-539, 546-547.) Wenger complains a "mass" of medical records was admitted into evidence, but that is simply not the case. State Farm offered, and the District Court allowed, only a handful of records among *more than a thousand pages* of records marked as exhibits. To be precise, Wenger's medical records spanned over 1,200 pages, and exactly 60 pages were moved and admitted into evidence. (Transcript, pp. 14, 979; Doc. 77, 81; *see also* Minute Entry on 11/21/19.)

This Court's recent decision in *Howlett v. Chiropractic Center, P.C.* illustrates that the District Court's ruling in this case was well within its discretion. In *Howlett*, the plaintiff claimed a chiropractor's negligence caused a spinal compression injury. *Howlett,* ¶¶ 4-5. The chiropractor disputed liability and "further submitted at trial evidence of possible alternate causes of Howlett's injury, including her smoking habit, genetics, and repetitive work habits as an ophthalmology technician." *Id.* ¶ 12. The trial judge in *Howlett*, who was the same judge in this case (Hon. Michael McMahon), admitted the medical evidence. On appeal, the plaintiff argued (as Wenger argues here) that Judge McMahon abused his discretion by admitting "evidence of possible alternate causes of

Howlett's injury that were not proven to a reasonable degree of medical probability to be a cause." *Id.* ¶ 30.

The *Howlett* Court rejected the plaintiff's argument and affirmed Judge McMahon in all respects. The Court emphasized that a defendant must prove causation to a reasonable medical probability "only where a defendant seeks to apportion an injury, as opposed to rebut causation . . . ." *Id.* ¶ 31. That constraint did not apply in *Howlett*, however, because the defendant was simply challenging causation:

> Morris has argued from the outset of the case that he did not cause any of the injury claimed by Howlett. Accordingly, in introducing at trial potential alternate causes of Howett's injury, including her health history and smoking habit, Morris was not required to prove causation to a reasonable degree of medical probability. . . . The District Court did not abuse its discretion in admitting Morris's alternate cause evidence.

Id. ¶ 32.

The same analysis applies here. State Farm was not seeking apportionment or arguing divisibility of injuries. (Doc. 44, p. 38; Doc. 59, p. 5; Transcript, p. 909.) Instead, as in *Howlett*, State Farm argued from the outset that Elbert's alleged negligence did not cause the injuries alleged by Wenger, and State Farm challenged causation by introducing evidence of Wenger's preexisting medical conditions. (Doc. 59, p. 5; Transcript, pp. 1197-1199.) Consequently, like the defendant in *Howlett*, State Farm "was not required to prove causation to a

reasonable degree of medical probability." *Howlett,* ¶ 32. Rather, the jury was entitled to weigh and consider the evidence of preexisting conditions, along with all of the other evidence, in evaluating the disputed issues of causation and damages.

Wenger argues that State Farm was required to establish a "more probable than not causal link" before presenting alternate causation evidence. (Opening Brief, p. 22.) This argument is contrary to *Howlett*, ¶ 32. Moreover, Wenger's own doctor (Dr. Jay Larson), who treated her for approximately 20 years, testified that she had extensive, chronic and ongoing medical problems—including cognitive dysfunction, memory problems, migraines, fibromyalgia, chronic pain, sleep problems, depression, and anxiety—during the entire time he treated her. (Transcript, pp. 852, 859-860.) Dr. Larson described Wenger as "one of my more complicated patients," with problems significant enough to warrant opiate narcotic pain medication. (*Id.* at 883-884, 873; *see also id.* at 549.) She had three prior head injuries. (*Id.* at 876.) Wenger characterized herself as "disabled" long before the accident, and her doctor not only determined she had "significant cognitive dysfunction from previous motor vehicle accidents," but also independently opined "her cognitive problems prevented her from working." (*Id.* at 862-863, 866, 884.) All of this was *before* the subject accident in January 2014. It directly contradicted

the characterization of Wenger being in "reasonable medical health" before the accident. (*Id.* at 425, 543-545.)

Given Wenger's medical background and his own independent testing, neuropsychologist Craig McFarland, Ph.D. testified "to a reasonable degree of certainty" that, among other things, "Wenger's experience of ongoing symptoms is related to her preexisting conditions. That is, her symptoms are due to conditions that she had prior to the accident in question." (*Id.* at 980-981; *see also id.* at 1080 ("Her ongoing problems now are due to the preexisting conditions".) The prior medical records reflected that Wenger "often reported limitations in her ability to function in different ways on a daily basis" (*Id.* at 1020), and Dr. McFarland found "no reduction in her ability to function post-accident in comparison to medical records that predate the accident." (*Id.* at 1015-1016.)

Wenger takes issue with the references in her medical records to multiple sclerosis (MS), but the evidence was relevant and admissible. Wenger claimed the accident caused neurologic issues and made her medical problems "a lot worse" (Transcript, pp. 690, 688; *see also id.* at 414-415), but the medical records revealed her neurologic problems—including numbness, tingling, weakness, and coordination problems in the hands—pre-dated the accident. (Transcript, pp. 429-430, 439-441, 552-553, 880.) MS was a possible cause of some of her neurologic symptoms, and her physician was concerned enough at the time to refer her to a

neurologist. (Transcript, pp. 439-441, 553, 880.) These records thus contradicted the testimony of Wenger's primary care physician, Dr. Cathy Lay, that Wenger was not neurologically challenged before the accident. (*Id.* at 427-428.) Moreover, the discussion of MS was contained in the same record from Dr. Lay that was reviewed, considered and relied upon by Wenger's neuropsychology expert, Dr. James English, and was thus relevant to his testimony that her "sense of touch" and "sensory awareness for the non-dominant hand was reduced" after the accident. (Doc. 69, English Perpetuation, pp. 124-25.)

The District Court considered the arguments of both parties and conducted a proper balancing of the evidence under *Clark v. Bell* and Mont. R. Evid. 403. (Transcript, pp. 90-93; Doc. 65, pp. 4-8.) Judge McMahon then ruled that the evidence was admissible, explaining "this is the patient telling another physician, going in and having concerns about issues with her hands. So 803(4) clearly applies. I do think it's relevant. It's probably prejudicial. But everything that is bad evidence to a plaintiff's case or a defense case is deemed prejudicial." (Transcript, p. 93.)

2. The medical records were not hearsay.

Wenger argues some of the medical records were hearsay—namely, the ambulance records, ER records, and neurology records from Dr. Nicole Clark.

Wenger claims the records were "ushered in through the evidentiary back door." Opening Brief, p. 27. She is incorrect.

"Medical testimony must of necessity in many instances be based on information acquired from outside sources, examinations by other doctors, nurses notes and observation, X-rays, and other tools of the profession used in the making of a diagnosis." *Klaus v. Hillberry*, 157 Mont. 277, 286, 485 P.2d 54, 59 (1971). The Montana Rules of Evidence acknowledge this and contain a hearsay exception for "Statements made for purposes of medical diagnoses or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Mont. R. Evid. 803(4).

Here, it can hardly be argued that the statements in Wenger's ambulance and ER records were not made for purposes of medical diagnoses or treatment. They clearly were. The same is true of Dr. Clark's treating neurology records. As such, the records fall squarely within the hearsay exception for medical records.

Wenger admits "Rule 803(4) has been interpreted to allow an attending physician to testify about records of other doctors when reviewed for the purpose of managing the patient's care." Opening Brief, p. 27. That is precisely the situation with Dr. Clark's treating neurology records. Dr. Lay testified at trial that she referred Wenger to Dr. Clark, and then Dr. Lay received and reviewed

Dr. Clark's records "[f]or treatment purposes." (Transcript, p. 525.) This fits squarely within the scope of the hearsay exception in Rule 803(4).

A similar analysis applies to the ambulance and ER records. Dr. Lay testified on direct she had reviewed Wenger's medical records from the date of the accident. Indeed, she explained "they said she had lost consciousness, and she was in a lot of pain when she presented to the ER, so that's certainly suggestive that – that she had a pretty severe injury." (Transcript p. 427; see also *id*. at 425) Wenger cannot have it both ways—she cannot have Dr. Lay testify about the severity of the acute injuries from the accident based on her review of the records, yet keep those same records from the jury under the guise of hearsay.

The *Palmer* case cited by Wenger provides another basis for admitting these medical records. In *Palmer*, the trial judge admitted the ER and ambulance reports offered by the plaintiff under the business records exception to the hearsay rule, Mont. R. Evid. 803(6). *See Palmer v. Farmers Ins. Exch*., 233 Mont. 515, 521, 761 P.2d 401, 405 (1988). This Court affirmed and noted, in particular, that the parties had stipulated to the authenticity of the medical records and agreed there would be no need to call a records custodian. *Id.* at 521, 761 P.2d at 405. This "opened the door" and eliminated any harm, since the other party was "unable to identify any specific portion of the reports as inaccurate." *Id.*

Here, as in *Palmer*, Wenger stipulated that her medical records were "genuine and authentic," and that a records custodian or similar witness was not needed to lay basic foundation. (Doc. 59, pp. 12-13.) There was simply no dispute in this case that Wenger's medical records were exactly what they appeared to be—true, accurate, and genuine medical records from her own treating doctors. As in *Palmer*, Wenger has not identified any portion of the records that are inaccurate. Under these circumstances, the records were not excluded by the hearsay rule.

Alternatively, even if these records somehow fell outside hearsay exceptions for medical and business records, the residual hearsay exception would still apply because the records have "comparable circumstantial guarantees of trustworthiness." Mont. R. Evid. 803(24). After all, Wenger's own testifying neuropsychology expert, Dr. James English, testified that he reviewed and relied upon those very records in reaching his opinions. (Doc. 69, English Perpetuation, pp. 24, 70-71.) So did the neuropsychologist called by State Farm. (Transcript, pp. 979, 999-1000) Since both parties' experts reviewed and relied upon the records, and since the parties themselves stipulated to the basic foundation of the records as well, the records qualify for the residual hearsay exception. *See generally State v. English*, 2006 MT 177, ¶¶ 45-48, 333 Mont. 23, 140 P.3d 454 (no abuse of discretion in admitting victim's statements to medical personnel under several hearsay exceptions, including residual exception).

3. The medical records were admissible because they were used to refresh recollection.

Since Wenger's counsel used medical records to refresh Dr. Lay's recollection during her direct examination (Transcript, pp. 410-411), this provides an alternative and independent basis for admitting the records.

Dr. Lay testified on direct that she would not have remembered Wenger unless she had refreshed her recollection with Wenger's medical records. When asked "whether you can recall the treatment you gave to Diane Wenger without those records," Dr. Lay responded: "No, not in a million years. I see thousands of patients, so this is, you know, necessary." (Transcript, pp. 516-517.)

Dr. Lay testified that she had reviewed Wenger's medical records from the date of the accident as well. Indeed, although Wenger's counsel did not give her the ER record on the witness stand (Transcript, p. 422), Dr. Lay had already reviewed the records and testified that "they said she had lost consciousness, and she was in a lot of pain when she presented to the ER, so that's certainly suggestive that – that she had a pretty severe injury." (Transcript, pp. 425-427.)

Dr. Lay further testified that she had reviewed some of Wenger's prior records, including the "long list" of preexisting medical problems. (Transcript, p. 428.) Dr. Lay nonetheless testified Wenger was in "reasonable medical health" before the accident (Transcript, p. 425), which allegedly changed for the worse afterwards.

Since Dr. Lay's recollection was refreshed by medical records, it was proper to "introduce into evidence those portions which relate to the testimony of the witness." Mont. R. Evid. 612. This "promote[d] the search of credibility and memory," which is the purpose of Rule 612. Commission Comments, Mont. R. Evid. 612. By having Dr. Lay testify not only about the severity of the injury from this accident, but also about changes to Wenger's baseline condition after the accident, Wenger opened the door for the introduction of her pre- and post-accident records.

4. The medical records were not unfairly prejudicial.

Lastly, Wenger argues the medical records were irrelevant and prejudicial. The fact that the medical records were not favorable to her case is beside the point—the standard is whether their probative value was "*substantially outweighed* by the danger of *unfair* prejudice . . . ." Mont. R. Evid. 403 (emphasis added).

Judge McMahon conducted the proper analysis under *Clark v. Bell* and determined the records were admissible. This ruling fell well within the bounds of his broad discretion. This Court's recent decision in *Howlett* reaffirms this conclusion.

B. Even if an error occurred and rose to the level of abuse of discretion, it was harmless.

"If an appellant demonstrates a district court abused its discretion in rendering an evidentiary ruling, we then determine whether the abuse constitutes

reversible error." *Howlett*, ¶ 15. This Court's recent decision in *Howlett* illustrates how this two-step process applies here.

In *Howlett*, Judge McMahon allowed evidence of alternative causes of the plaintiff's injury, including the plaintiff's health history and smoking habit. After first finding no abuse of discretion in allowing the evidence, this Court then determined that, regardless, any error was harmless:

> What's more, the jury found that Morris was not negligent. It did not reach the issue of causation. Any error by the District Court in denying Howlett's motion in limine and allowing Morris to introduce at trial evidence of potential alternate causes of Howlett's injury did not affect her substantial rights and was therefore harmless. M. R. Civ. P. 61.

Id. ¶ 32.

The same analysis applies here. The jury determined Elbert was not negligent. (Doc. 83.) As in *Howlett*, the jury simply did not reach the issue of causation. Therefore, any error did affect Wenger's substantial rights and was harmless.

III. The Court did not abuse its discretion in limiting counsel's arguments during closing argument regarding deterrence and punishment.

The District Court gave a jury instruction, over State Farm's objection, defining "compensation" as "the relief or remedy provided by the law of this State for the violation of a private right and the means of securing their observance." (Transcript, p. 1137.) Although Wenger got the very instruction she requested, she

now contends the District Court committed reversible error by limiting her counsel's comments on that instruction during closing arguments. State Farm respectfully disagrees, as the District Court properly exercised its broad discretion to protect the jury from otherwise confusing, misleading and unfairly prejudicial arguments.

A. The District Court properly exercised its broad discretion in limiting improper commentary during closing argument.

By way of background, the issue of jury arguments first arose before trial, when Plaintiff moved in limine to exclude references regarding the effect or impact of an adverse verdict upon State Farm, including arguments that "the jury should put itself into the shoes of State Farm or analyze the case from its perspective." (Doc. 37, p. 4.) In response, State Farm did not oppose a ruling that applied equally to both parties. (Doc. 44, pp. 4-5.)

The District Court granted the motion, emphasized the restriction applied to both parties, and further excluded impermissible "Golden Rule" arguments that "invite jurors to award or not award damages based on subjective personal feelings rather than rendering a true verdict on the evidence." (Doc. 49, pp. 5-6.)

Like "Golden Rule" arguments, the "Reptile Theory" is an argument having the effect of asking the jurors how they would feel if placed in the plaintiff's position, and inviting the jurors to find liability and award damages based on subjective feelings about personal or community safety. *See* Louis J. Sirico, *The*

Trial Lawyer and the Reptilian Brain: A Critique, 65 Clev. St. L. Rev. 411 (2017). The creators of the Reptile Theory "summarize their argument with this axiom: 'When the reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.'" *Id.* at 413 (quoting David Ball & Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 19 (2009)).

Like more traditional "Golden Rule" arguments, Reptile arguments are improper and unfairly prejudicial. *See, e.g., Brooks v. Caterpillar Glob. Mining Am.,* 2017 U.S. Dist. LEXIS 125095, *24-25 (W.D. Ky. Aug. 8, 2017) (excluding reptile arguments because the theory "encourages jurors to decide a lawsuit based upon fear, generated by plaintiff's counsel, that a verdict in favor of the defendant will harm the safety of the community, and, thus, the juror"). *See also Wertheimer H., Inc. v. Ridley USA, Inc.*, 2020 U.S. Dist. LEXIS 34846, at *8 (D. Mont. Feb. 28, 2020) (granting motion in limine to exclude Golden Rule/Reptile arguments asking the jury put itself "in the shoes of" the plaintiff).

After the District Court had excluded "Golden Rule" arguments in its pretrial ruling, Wenger then proposed a jury instruction for use at trial which stated: "Compensation is the relief or remedy provided by the law of this State for the violation of a private right and the means of securing their observance." State Farm objected to this non-pattern instruction for several reasons: "Since this is a

contact case and not a tort case, *see Dill v. District Court,* 1999 MT 85 ¶12, and since there is no claim for punitive damages, the instruction is not proper. It would be confusing and unfairly prejudicial. Additionally, the instruction is inconsistent with Court's Instruction #34 (Defendant's Proposed #7), which properly states that '[t]he purpose of an award of damages is to compensate a party for his or her actual loss or injury caused by another party, no more and no less.'" (Doc. 63, p. 2.)

The District Court gave the instruction over State Farm's objections but, consistent with its pretrial ruling, restricted "Golden Rule" arguments referencing the voice or conscience of the community. (Transcript, p. 917.) The Court explained, "We've already talked about reptile, we've already talked about the golden rule. Those arguments aren't going to be presented the jury." (*Id.*) Wenger's counsel acknowledged his opening statement had referenced voice in the community (*id.*), and the District Court stated, "Well, that's the whole reptile thing . . . . Those are improper arguments, in my view, in front of a jury in Montana. [Jury Instruction] 33 is going to be given. If arguments are made on community, I'll stop, we'll go into chambers." (*Id.*)

This ruling was not an error, much less an abuse of discretion. First, the District Court has latitude to limit improper statements during closing argument. *See, e.g., Harwood*, 285 Mont. at 492-93, 949 P.2d at 658 (finding no abuse of

discretion where District Court interrupted closing argument to prevent improper arguments); *Insua*, ¶¶ 32-33 (same).

Wenger ignores this principle and instead suggests she had an absolute right to comment on the jury instruction, citing Mont. Code Ann. § 25-7-301. She is mistaken. That statute provides, in part: "Counsel, in arguing the case to the jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence in the case." *Id.* Nothing about the statutory language is absolute. Instead, it is permissive. It provides that counsel *may* comment upon the law. If the Legislature had intended for counsel's legal commentary to be mandatory, unfettered or otherwise absolute, it would have used different language. After all, the same statute uses mandatory "shall" language in no less than 7 different places. *See* Mont. Code Ann. § 25-7-301(3)-(6). Yet, when it comes to counsel's legal commentary, the statute uses the permissive "may."

Additionally, the opening sentence of the statute expressly provides the District Court with discretion to control the trial and deviate from the statute "for good cause and special reason." Mont. Code Ann. § 25-7-301. That is precisely what happened here. The District Court exercised its discretion to limit what it considered to be "improper arguments . . . in front of a jury in Montana." (Transcript, p. 917.)

Moreover, Wenger acknowledges, as she must, that the District Court did not restrict all argument on the jury instruction. Rather, the District Court only limited those arguments which violated the pretrial ruling prohibiting "Golden Rule"-type arguments. Tellingly, Wenger does not contend such arguments would have been proper. Arguments having the effect of asking the jurors how they would feel if placed in the plaintiff's position—whether called "Golden Rule" arguments, "Reptile" arguments, or something else—are improper. That point is undisputed.

Undaunted, Wenger nonetheless maintains that it was her "impression" she faced the risk of mistrial "if she argued or commented on the instruction in any way." (Opening Brief, p. 30.) But Wenger's subjective "impression" is irrelevant. She never shared that impression with, or requested clarification from, the District Court. Nor did she express any confusion about the scope or meaning of the District Court's limitation, including its reference to Reptile arguments. (Transcript, p. 917.)[7]

Furthermore, Wenger fails to identify with particularity the legal commentary she wished to make, but was prevented from making, by the District

[7] The District Court's reference to Reptile arguments was apt. The Reptile Theory appeals to a juror's sense of "survival danger" and the desire "to protect himself and the community." 65 Clev. St. L. Rev. at 413 (quoting the *Reptile*, 19). Here, the District Court explained that Wenger's counsel's references to "the voice in the community" is equivalent to "the whole reptile thing." (Transcript, p. 917.)

Court's ruling. This is a critical flaw in her argument. The District Court gave the exact jury instruction she requested. She cannot establish error—much less an abuse of discretion—without clearly articulating what she was prevented from arguing and why it was important.

The most Wenger says is that she had the right to argue deterrence and encourage the jury—as the "conscience of the community"—to award Wenger damages. "Compensation or redress," Wenger argues, "is one of two foundational pillars of tort law." (Opening Brief, p. 34.)

While such arguments might be proper in certain tort cases involving bad faith, malice or punitive damages, none of those factors was present here. This was a straightforward case for underinsured motorist (UIM) benefits. As this Court emphasized in an opinion issued just a few months ago, UIM cases arise in contract, not tort. *Reisbeck,* ¶¶ 16-17, 23. Tort-related arguments regarding deterrence and punishment have no place in cases like this. Since the jury instruction itself was unnecessary, if not erroneous, the District Court did not abuse its discretion in limiting certain arguments relating to the jury instruction.

B. Even if an error occurred and rose to the level of abuse of discretion, it was harmless.

The jury instruction related to damages. It defined "compensation" using the terms "relief" and "remedy." These are damage concepts. But critically, the jury never got to damages. Instead, the jury ended its deliberations —in

accordance with the agreed-upon verdict form—after finding Elbert was not negligent. Therefore, any error did affect Wenger's substantial rights and was harmless. *Howlett*, ¶ 32.

CONCLUSION

Wenger has not proven an abuse of discretion, much less one that affected her substantial rights. Therefore, State Farm respectfully asks the Court to affirm in all respects.

DATED: September 14, 2020

BOONE KARLBERG P.C.

/s/ Matthew Hayhurst
Matthew Hayhurst
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing APPELLEE'S ANSWER BRIEF is proportionately spaced, printed with the typeface Times New Roman, 14 point font, is double spaced, and contains approximately 9995 words, excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED: September 14, 2020

BOONE KARLBERG P.C.

/s/ Matthew Hayhurst
Matthew Hayhurst
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Matthew B. Hayhurst, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-14-2020:

James G. Hunt (Attorney)
310 E. Broadway St.
Helena MT 59601
Representing: Diane Wenger
Service Method: eService

Patrick T. Fox (Attorney)
Hunt & Fox PLLP
111 N. Last Chance Gulch, Ste. 3A
Helena MT 59601
Representing: Diane Wenger
Service Method: eService

Electronically signed by Rita Agin on behalf of Matthew B. Hayhurst
Dated: 09-14-2020