FILED
02/16/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0067

DA 20-0067

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 37

DIANE WENGER,

Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2017-23
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James G. Hunt, Patrick T. Fox, Hunt & Fox, PLLP, Helena, Montana

For Appellee:

Matthew B. Hayhurst, Natasha P. Jones, Boone, Karlberg P.C., Missoula, Montana

---

Submitted on Briefs: November 18, 2020

Decided: February 16, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Diane Wenger appeals a Lewis and Clark County jury's verdict that Travis Elbert was not negligent when he struck her with his vehicle as she was crossing Main Street in East Helena after dark. Wenger seeks a new trial because the District Court (1) improperly restricted her counsel and witnesses from discussing Montana's driving statutes; (2) unfairly prejudiced her when it admitted irrelevant medical records; and (3) prohibited her from arguing to the jury from an instruction the trial court had agreed to give. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the evening of January 25, 2014, Diane Wenger and her friend Toni Rickman ate dinner at Yat Son's restaurant in East Helena. Wenger did not drink any alcohol that night, but Rickman did and was intoxicated as the pair left the restaurant. After walking out of Yat Son's around 7:30 p.m., Wenger and Rickman crossed the road in front of the restaurant about mid-way between the two intersections abutting the block. There was no marked crosswalk. As Wenger neared the other side of the road, she noticed Rickman stumbling. Wenger then turned back in an attempt to help Rickman and was struck by a car driven by Travis Elbert. Elbert's headlights were on, and he was traveling at or below the posted twenty-five m.p.h. speed limit. The Montana Highway Patrol and East Helena Police responded to the accident and ultimately cited Wenger for violating § 61-8-503(3), MCA.[1]

[1] Section 61-8-503(3), MCA, reads: "Between adjacent intersections at which traffic control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk."

¶3 Wenger was injured in the accident. She eventually resolved her claims against Elbert, who did not admit fault or liability. Wenger then filed this action against her automobile insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), seeking recovery of underinsured motorist benefits. She alleged that Elbert's negligent driving caused the collision and her injuries.[2]

¶4 The First Judicial District Court tried the case before a jury. Wenger maintained that Elbert was inattentive and had enough time to stop his car once he saw her. State Farm defended on the primary theory that, once Wenger came into view of Elbert's headlights, he did not have enough time to see and fully stop before hitting her. State Farm claimed that Wenger was at fault because she was wearing dark clothing, did not cross at an intersection, and did not look for traffic before turning back to assist Rickman. The jury found Elbert not negligent. It did not reach issues of causation, comparative negligence, or damages.

STANDARD OF REVIEW

¶5 We review for an abuse of discretion a trial court's rulings related to trial administration, the scope of examination, opening statements, and closing arguments. *Konitz v. Claver*, 1998 MT 27, ¶ 32, 287 Mont. 301, 954 P.2d 1138; *see also State v. Harlson*, 2006 MT 312, ¶ 62, 335 Mont. 25, 150 P.3d 349 ("[w]e review a

There were no traffic control signals at the intersections between which Wenger crossed, and the citation was not admitted into evidence or discussed at trial.

[2] The complaint named Elbert as a party to the action; Wenger and State Farm stipulated to his dismissal prior to trial.

district court's ruling on the admissibility of testimony for abuse of discretion"); *Jacobs v. Laurel Volunteer Fire Dep't*, 2001 MT 98, ¶ 12, 305 Mont. 225, 26 P.3d 730 ("The authority to grant or deny a motion in limine is part of the inherent power of a court to admit or exclude evidence[;] we will not overturn a district court's order in limine absent an abuse of discretion."). We likewise review a district court's ruling on the admission of evidence for abuse of discretion. *Jarvenpaa v. Glacier Elec. Coop.*, 1998 MT 306, ¶ 12, 292 Mont. 118, 970 P.2d 84; *see also Daley v. Burlington N. Santa Fe Ry.,* 2018 MT 197, ¶ 3, 392 Mont. 311, 425 P.3d 669 ("The district court has broad discretion in determining the admissibility of evidence." (internal quotations omitted)). We review the trial court's legal conclusions for correctness. *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶ 14, 388 Mont. 347, 400 P.3d 735.

DISCUSSION

¶6 *1. Did the District Court improperly restrict counsel and witnesses from discussing Montana's driving statutes?*

¶7 Wenger maintained from the outset that Elbert was negligent for breaching his common-law duty of care and was negligent per se under § 61-8-504, MCA. Section 61-8-504, MCA, reads:

> Notwithstanding 61-8-501 through 61-8-503, an operator of a vehicle shall exercise due care to avoid colliding with a pedestrian or with a person propelling a human-powered vehicle or using an assistive mobility device upon a roadway, shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing a child or an obviously confused, incapacitated, or intoxicated person upon a roadway.

¶8 State Farm countered that Wenger was contributorily negligent per se for violating § 61-8-503(1), MCA; it filed a motion for partial summary judgment seeking a ruling on the matter. Section 61-8-503(1), MCA, reads: "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." Wenger objected to any characterization of this as a "jaywalking" statute, a term both law enforcement and State Farm had used. The District Court agreed with her that the term "jaywalking" does not appear in § 61-8-503, MCA. In its Order on Pending *Limine* and Pretrial Motions ("Order"), the court granted Wenger's motion to preclude State Farm from using the term "jaywalking" in the presence of the jury.

¶9 In the same Order, the District Court reserved ruling on any potential use of undisclosed evidence or hybrid witness opinion testimony by State Farm until such evidence was presented at trial. Relying on *Heltborg v. Modern Machinery*, 244 Mont. 24, 30-31, 795 P.2d 954, 957-58 (1990), the District Court additionally ordered that "neither Wenger nor State Farm shall be allowed to introduce testimony regarding Montana's driving statutes, laws, their interpretation, or apply the law to the facts in an answer." Finally, the District Court ordered that "neither Wenger nor State Farm shall seek to solicit testimony from any witness as to any ultimate legal issue or conclusions to be determined by the jury." Both parties agreed that §§ 61-8-503(1) and 61-8-504, MCA, controlled and should be given as jury instructions.

¶10 Wenger claims the District Court misapplied *Heltborg's* holding by prohibiting testimony or discussions regarding Montana statutes from voir dire through the close of evidence. Wenger argues that because of the court's Order she did not attempt to introduce to the jury a statutory standard of care. This put her at "a significant disadvantage" because she bore the burden of proof but could not "provide the framework for the jury to understand the applicable standards of care." Wenger maintains that the court's ruling unfairly hamstrung her ability to discuss driver and pedestrian duties.

¶11 In response, State Farm argues that Montana law generally prohibits counsel from making legal statements to the jury or arguing jury instructions outside of closing arguments and further prohibits witnesses from offering legal opinions or conclusions at trial. Additionally, State Farm points out Wenger's agreement that the given jury instructions correctly informed the jury on Montana law, and she does not dispute that the jury is presumed to have followed those instructions. State Farm concludes that the District Court acted within its discretion in limiting discussion of Montana statutory law; it argues alternatively that any error did not affect Wenger's substantial rights.

¶12 Wenger pleaded both common-law negligence and negligence per se theories against State Farm. "A negligence action has four elements: (1) duty; (2) breach of duty; (3) causation; and (4) damages." *Henricksen v. State*, 2004 MT 20, ¶ 20, 319 Mont. 307, 84 P.3d 38 (citation omitted). "Existence of a duty is a question of law determined by the court." *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 33, 375 Mont. 38, 324 P.3d 1167 (citation omitted). Once a duty is established, "the breach of that duty is a question of fact to be resolved by a jury." *Morrow*, ¶ 33 (citation omitted). In an ordinary negligence

matter, the jury determines if a person breached a duty by applying the standard of care to the facts of the matter. *Hanson v. Edwards*, 2000 MT 221, ¶ 31, 301 Mont. 185, 7 P.3d 419. The standard of care for ordinary negligence is "reasonable care"—how "an ordinarily prudent person would act under the circumstances." *Hanson*, ¶ 31; *see also Okland v. Wolf*, 258 Mont. 35, 40, 850 P.2d 302, 306 (1993).

¶13 Under a negligence per se theory, a person's breach of duty is established as a matter of law, generally through a statutory violation. *Giambra v. Kelsey*, 2007 MT 158, ¶ 46, 338 Mont. 19, 162 P.3d 134 (citing Black's Law Dictionary 1057 (Bryan A. Garner ed., 7th ed., West 1999)). The effect of a negligence per se finding "is to stamp the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect." *Giambra*, ¶ 46 (citing Keeton, *The Law of Torts* § 36, at 230). The plaintiff still must prove causation and damages. *See Giambra*, ¶ 46 (noting that the "causal relationship between the violation and the harm to the plaintiff" and "defenses of contributory negligence, and assumption of the risk" remain open (citing W. Page Keeton et al., *The Law of Torts* § 36, at 230 (5th ed., West 1984))).

A. Voir Dire

¶14 Wenger asserts that the District Court's Order limited her voir dire questioning of the jury on the laws governing driver and pedestrian responsibilities and prevented her from mentioning the same in her opening statement. She relies on a general statement in the Order that, "to the extent any portion of the *limine* motion is granted . . . any testimony, argument, or other references concerning the excluded evidence, at any stage of the trial in the jury's presence or during *voir dire*, is and shall be prohibited[.]" Wenger cites portions

of the trial transcript referencing her counsel's discussion with the court about evidence of statutory headlight illumination standards. But she points to no discussion at the final pretrial conference regarding voir dire examination concerning §§ 61-8-503 and -504, MCA, the statutes relevant to Wenger's negligence per se claims; she did not mention the issue in her trial brief; and there appears to have been no discussion of those statutes at any other time until settlement of instructions.

¶15 The purpose of voir dire is to determine whether any member of the venire is disqualified by law, has "an unqualified opinion or belief as to the merits of the action," or harbors a state of mind "evincing enmity against or bias in favor of either party" that could give rise to a challenge for cause. Section 25-7-223(6)–(7), MCA. There are legal principles that may be important to discuss with prospective jurors in a given case to determine whether they are qualified to serve, particularly with matters such as the presumption of innocence and burdens of proof in criminal cases. *See, e.g., State v. Anderson*, 2019 MT 190, ¶¶ 18-19, 397 Mont. 1, 446 P.3d 1134. Wenger cites no authority that a trial court errs as a matter of law if it limits questioning about statutes applicable to the case, and the record does not reveal that the court expressly prohibited all such discussion. Assuming from its Order, however, that the District Court's prohibition against offering testimony on statutory interpretation or application of the law extended to voir dire and opening statements, the record demonstrates that Wenger was able to question the jury adequately and to develop her theories in voir dire and in her opening statement. During voir dire, harkening to the requirements of § 61-8-504, MCA, Wenger questioned prospective jurors on the importance of drivers watching where they are going on the road;

all jurors responded it was of "10 out of 10" importance. Wenger further questioned prospective jurors on the importance of a jury in enforcing community safety rules. She also questioned the jurors on their willingness and ability to base their verdict on the law as instructed by the court and not on their own beliefs. Both parties were satisfied with the jury's answers and passed the venire for cause.

¶16 During her opening statement, Wenger mentioned general "safety rules" drivers must follow, such as watching the road ahead of them, avoiding pedestrians, and maintaining vigilance. In closing arguments, Wenger reminded the jury of the "10 out of 10" importance comment from voir dire and the necessity of drivers to remain vigilant; she urged the jury to interpret § 61-8-504, MCA, as taking priority over § 61-8-503(1), MCA, given its introductory phrase, "[n]otwithstanding . . . 61-8-503." Wenger argues on appeal that her citation under an improper subsection of § 61-8-503, MCA, for "jaywalking" illustrates a common misunderstanding of the applicable legal standards, suggesting that the jury likely also was confused on the laws and standards of care governing her and Elbert's respective responsibilities. She does not dispute, however, that Wenger's citation was not mentioned at trial, nor was the erroneously cited statute or the term "jaywalking."[3] Nor does Wenger argue any error in the jury instructions on the laws surrounding her negligence per se claim. Wenger's counsel used those instructions in closing arguments. This Court presumes the jury properly follows given jury instructions. *See State v. Schmidt*,

[3] The only exception came during Wenger's own direct examination, when she inadvertently mentioned she was cited for "jaywalking." The District Court admonished the jury to disregard that testimony, and Wenger does not argue on appeal that the jury failed to follow the court's admonishment.

2009 MT 450, ¶ 37, 354 Mont. 280, 224 P.3d 618. In light of this record, we cannot conclude that, even if the District Court erroneously prevented discussions of statutes at all stages of the trial until closing arguments, it put Wenger at a severe disadvantage or otherwise unfairly prevented her from presenting her case to the jury.

B. Headlight Illumination

¶17 Wenger argues that the District Court wrongly prohibited her from presenting evidence on the standards set by § 61-9-220, MCA, which requires that headlights on composite (low) beam be capable of revealing persons and vehicles at a distance of at least 100 feet ahead. At the final pretrial conference, Wenger's counsel raised concern that the court's pretrial ruling left her unable to cross-examine State Farm's expert on the headlight illumination distance that § 61-9-220, MCA, requires, when the defense expert would be allowed to testify that Ford's manufacturing specifications called for illumination of a darkly clothed person within sixty feet of the vehicle. The District Court commented that it was "apples to oranges" when comparing manufacturer specifications with illumination requirements under the statute, that the jury would be instructed on the statutory requirements for headlight illumination, and that Wenger had "no [expert] evidence to establish that Mr. Elbert violated 61-9-220." At the conclusion of its discussion, the court stated:

> If [Wenger's expert] Swingley comes up and says his headlights should be a 100 feet [sic] and thereafter says the manufacturer -- it says, "60 feet for a darkly clothed person," we're not -- we don't have an issue. But when he says that this truck didn't illuminate 100 feet --

Wenger's counsel cut in, saying that isn't what he planned to elicit from Swingley. The District Court observed that Wenger did not claim violation of § 61-9-220, MCA, as part of her negligence per se claim. It clarified:

> If [State Farm's expert] testifies that the manufacturer specifications are 60 feet for a dark -- for a darkly clothed person, you can certainly argue and ask him as to -- under Montana law he's got to have at least a distance of at least a 100 feet [sic] ahead.

State Farm raised concern about any such testimony. The court indicated it would "look at it" as the case was presented.

¶18 At trial, the parties' experts agreed that Elbert was traveling between 21 and 25 miles per hour before he saw Wenger. Wenger's expert Swingley testified that, based largely on dash-cam video of an East Helena police car that was on Main Street at the same time the crash occurred, Elbert's headlights should have provided enough illumination for him to see Wenger when she stepped into the road. After visiting the scene with Wenger, and based on the street lighting, Swingley determined, more likely than not, that Elbert had sufficient time to stop before impact. Swingley opined that, assuming Elbert was going 25 miles per hour, his stopping distance would have been approximately 89 feet, and he should have been able to see Wenger at that distance.

¶19 State Farm's expert Weaver testified, based on his accident reconstruction investigation, that Elbert was going about five miles per hour at the time of impact. From his calculation of the length of Elbert's skid marks, Weaver opined that it took Elbert "a total of 90 feet to perceive, react, and then stop" once he saw Wenger in the street. The final question Weaver examined was whether Elbert could or should have seen Wenger

sooner, which he determined based on what Wenger was wearing and how Elbert's headlamps would or would not have illuminated her. Weaver determined that Elbert's car would have to have been about 60 feet away to have cast a sufficient amount of light on Wenger for her to be detectable. "So that's 60 feet, and he needs 90," Weaver testified. "So he doesn't have enough distance in order to perceive her." He explained that headlights are designed to illumine what is in front of them, and "they don't shine really bright to the sides, and that's where Miss Wenger is coming from." He disagreed with Swingley's opinion that Elbert should have been able to see Wenger from a distance of 100 feet—right when she stepped across the fog line and in time for him to stop—because Swingley did not take into account the fact that headlights do not shine 100 feet to the left or right of the vehicle. He gave no testimony about manufacturer specifications. Neither expert mentioned the statutory headlight requirements, and both experts agreed that Elbert would have needed approximately 90 feet (which is within the 100-foot illumination requirement) to come to a stop.

¶20 This review of the record illustrates that the trial court's order in limine did not incorrectly apply the law or prejudice Wenger's case. In *Heltborg*, we recounted longstanding precedent that an expert witness may testify to an ultimate issue of fact. *Heltborg*, 244 Mont. at 30, 795 P.2d at 958. We emphasized, however, the critical distinction between testimony regarding an ultimate factual issue and testimony regarding an ultimate legal issue. *Heltborg*, 244 Mont. at 31, 795 P.2d at 958. An expert witness properly may testify, for example, whether a plaintiff followed the guidelines of her own employee handbook; the expert may not testify whether a plaintiff was negligent or not

negligent or whether statutes were expressly violated. *See Heltborg*, 244 Mont. at 31, 795 P.2d at 958 (citing *Hart-Anderson v. Hauck*, 230 Mont. 63, 72, 748 P.2d 937, 942-43 (1988)). Because it is the province of the jury to apply the applicable law to the facts of the case, "it is therefore erroneous for a witness to state his opinion on the law of the forum." *Heltborg*, 244 Mont. at 31, 795 P.2d at 958 (internal quotations and citations omitted). *See also Perdue v. Gagnon Farms, Inc*., 2003 MT 47, ¶ 28, 314 Mont. 303, 65 P.3d 570 (noting that "an expert witness may properly testify as to an ultimate issue of fact" but may not offer testimony "that states a legal conclusion or applies the law to the facts"); *Wittich*, ¶¶ 38-41 (discussing the difference between an ultimate issue of fact, which is a proper subject of expert testimony, and an ultimate issue of law, which is not).

¶21 The District Court's Order correctly applied our precedent. It prohibited both parties from eliciting expert testimony on statutory interpretation or applying the law to the facts of the case and prohibited testimony on any ultimate legal issues. The testimony that the parties offered—opinions regarding the cause of the accident, and the basis for those opinions—was within the scope the law permits and appropriately informed the jury of the facts supporting each party's claim. *See Perdue*, ¶ 31. Finally, the headlight illumination statute was presented to the jury as Instruction No. 24, allowing its consideration in light of the testimony presented at trial.

C. Driver and Pedestrian Duties

¶22 Wenger finally argues that the District Court's Order prohibited her from effectively cross-examining Elbert and other witnesses, particularly the Montana Highway Patrol Trooper who initially cited Wenger under the improper subsection of § 61-8-503, MCA,

and later testified that Wenger in fact caused the collision. The trooper testified that, based on his investigation, the accident was caused when "Wenger entered the roadway in the middle of the block . . . [in] an area where it was dark, wearing dark clothes, and was struck by the vehicle that [Elbert] was driving." In accordance with the District Court's Order and *Heltborg*, the trooper properly testified to his observations regarding an issue of fact, not to any statutory violation or negligence on the part of Wenger.[4] *Heltborg*, 244 Mont. at 30-31, 795 P.2d at 958. Any mistake of law the trooper made when he cited Wenger under § 61-8-503(3), MCA, and not § 61-8-503(1), MCA, was irrelevant; the citation was not before the jury, and the trooper's interpretation of the statute did not matter. Wenger also effectively cross-examined Elbert on what may have prevented him from seeing her sooner and on inconsistencies in his recollections. She does not explain what relevant or admissible testimony she could have elicited from Elbert regarding his or Wenger's statutory obligations or how she was prejudiced by its exclusion. The District Court did not abuse its discretion.

¶23 *2. Did the District Court prejudice Wenger's substantial rights when it admitted irrelevant medical records?*

¶24 State Farm offered approximately 60 pages of medical records into evidence to demonstrate that many of Wenger's alleged injuries existed before the accident. Wenger argues that the District Court abused its discretion in admitting unredacted versions of these

[4] Tellingly, the trooper's testimony almost exactly mirrors the stipulated facts presented to the jury before opening statements. Specifically: "4. Wenger did not cross Main Street at an intersection or crosswalk. 5. Wenger was wearing dark clothing. 6. Wenger almost made it across Main Street before she noticed her friend stumbling in the street. 7. Wenger turned back. 8. Elbert's vehicle struck Wenger . . . ."

medical records. Acknowledging that some of these records contained information relevant to the cause and extent of her injuries, she argues that they also included information on conditions unrelated to her claimed injuries from the collision. Because the records were unredacted, she maintains the jury was exposed to irrelevant and unfairly prejudicial information regarding her medical history. Wenger argues that this information was so prejudicial that it "cannot be characterized as a 'damages issue' that is irrelevant in the context of a defense verdict on liability."

¶25 "A defendant is permitted to submit relevant evidence of subsequent accidents or preexisting conditions to negate allegations that he is the cause or sole cause of an injury, subject to the trial court's application of traditional evidentiary considerations." *Howlett v. Chiropractic Ctr., P.C.*, 2020 MT 74, ¶ 31, 399 Mont. 401, 460 P.3d 942 (citing *Clark v. Bell*, 2009 MT 390, ¶¶ 23, 25, 353 Mont. 331, 220 P.3d 650). Among headaches and other effects, Wenger claimed that the accident caused neurologic and cognitive issues and worsened her prior health conditions. State Farm used the medical records to dispute causation and the extent of Wenger's damages, pointing out that Wenger had suffered from numbness, tingling, and coordination problems in her hands before the accident. The jury found Elbert not negligent, never reaching the issue of causation.

¶26 "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." M. R. Civ. P. 61. "This Court will not reverse for an alleged error when the outcome would have been the same had the error not been committed." *Howlett*, ¶ 32 (citation omitted). Wenger points to discussion of a potential Multiple Sclerosis ("M.S.") diagnosis mentioned in the records as being unfairly

prejudicial. State Farm argues that Wenger's neurological condition legitimately was at issue, and there was no prejudice from the explanation the records offered.

¶27 In the context of discussing her head injury from the accident and how it had affected Wenger, her treating physician testified that Wenger told her another doctor had mentioned M.S. at some point before the crash because of numbness and tingling in her hands. The doctor said that Wenger was never diagnosed with M.S. Other medical witnesses did not dispute the evidence on this point, and there was only brief additional mention of it. We agree with State Farm that the mention of M.S. did not unfairly prejudice Wenger before the jury.

¶28 We agree with Wenger, though, that information in the records plainly unrelated to the crash was irrelevant and should have been redacted or excluded. As Wenger points out, a good portion of information in the admitted records was sensitive and private personal health information that had absolutely nothing to do with the accident, and State Farm never claimed that it did. We have held that "medical records fall within the zone of privacy protected by Article II, Section 10[,] of the Montana Constitution." *State v. Nelson*, 283 Mont. 231, 242, 941 P.2d 441, 448 (1997).

> As the Montana Legislature has recognized, "health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests." Section 50-16-502(1), MCA. Medical records are quintessentially "private" and deserve the utmost constitutional protection.

Nelson, 283 Mont. at 242, 941 P.2d at 448. *See also Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 19, 393 Mont. 178, 430 P.3d 69 (noting that "[t]his Court has long recognized that 'the privacy interests concerning a person's medical information implicate

Article II, Section 10, of the Montana Constitution'" (quoting *Malcomson v. Liberty Nw.*, 2014 MT 242, ¶ 23, 376 Mont. 306, 339 P.3d 1235)). Claiming damages for personal injury in a negligence case legitimately subjects a plaintiff to examination of relevant pre-existing conditions to "the extent of [the] physical or mental injury at issue[.]" *Henricksen*, ¶ 36. But a plaintiff's waiver of her privacy interest "is not unlimited." *Henricksen*, ¶ 36. Publication of Wenger's irrelevant, private health information to the jury was improper in this case, and the District Court should not have allowed it.

¶29 On the other hand, to the extent the information did not reflect on relevant pre-existing conditions, the testimony of Wenger's treating physician confirms that they referred to health matters that can be routine issues for many people; those records did not, as Wenger alleges, tend to show that she was "so broken to begin with that she was unworthy of a plaintiff's verdict." None of the witnesses referred during their testimony to any of the private, irrelevant information Wenger points to on appeal. And to be fair to the District Court, Wenger did not argue a privacy infringement or highlight the specific information she emphasizes on appeal as sensitive and prejudicial medical information.[5] Considering the other evidence presented at trial, we cannot conclude that the erroneously admitted medical evidence was so prejudicial to Wenger that it unfairly could have affected the jury's decision on whether Elbert was driving in a negligent manner when he struck her. Wenger is not entitled to a new trial on that basis. *See* M. R. Civ. P. 61; *Howlett*, ¶ 32.

[5] Had Wenger highlighted some of the specific information to the District Court, as she does on appeal, the District Court would have had the opportunity to specifically consider her privacy interests and the prejudicial effect of this information, and to order its redaction. And had it refused, we may be harder pressed to conclude the error was harmless.

¶30 *3. Did the District Court unfairly prohibit Wenger from arguing an approved jury instruction in closing?*

¶31 Wenger finally argues the District Court improperly prohibited her from arguing Instruction No. 32 to the jury. Instruction No. 32 stated: "[c]ompensation 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." When settling jury instructions, State Farm objected to this instruction on the grounds that it was confusing and could be construed by the jury as permitting punitive damages, which Wenger did not request. Wenger's counsel responded that the jury was "entitled to, as the voice of the community, award Diane Wenger damages as a means of securing her private right." The District Court ultimately allowed the instruction but prohibited any "voice of the community" or "Reptile" arguments in closing.[6] The District Court stated, "[Instruction No. 32] is going to be given. If arguments are made on community, I'll stop, we'll go into chambers," to which Wenger agreed.

¶32 Wenger now argues that she felt she risked a "grave risk of mistrial" if she argued or commented on Instruction No. 32 in any way in closing. She claims that the

[6] "Reptile" is a reference to what is known as "Reptile Theory" which is "a litigation strategy based on a book titled *Reptile: The 2009 Manual of the Plaintiff's Revolution*." *J.B. v. Mo. Baptist Hosp. of Sullivan*, No. 4:16CV01394 ERW, 2018 U.S. Dist. LEXIS 19689, at *6-7 (E.D. Mo. Feb. 7, 2018). The litigation strategy is derived from a 1960s neuroscience theory suggesting that the human brain consists of three parts, each building on top of the other and each more specialized than the last. Louis Sirico Jr., *The Trial Lawyer and the Reptilian Brain: A Critique*, 65 Clev. St. L. Rev. 411, 414. The most basal of these parts, the reptile brain, allegedly controls a person's instinctive fight-or-flight, fear, safety, and survival responses. Sirico, *supra* at 414. The "Reptile Theory" litigation strategy adopts this concept and "instruct[s] lawyers to appeal to the juror's own sense of self-protection in order to persuade jurors to render a verdict for plaintiffs that will, in the collective, effectively reduce or eliminate allegedly 'dangerous' or 'unsafe' conduct and thereby improve the safety of themselves, their family members, and their community." *Mo. Baptist Hosp. of Sullivan*, No. 4:16CV01394 ERW, 2018 U.S. Dist. LEXIS 19689, at *6-7. Wenger does not claim that she intended to offer such an argument in this case.

District Court's prohibition violated § 25-7-301(6), MCA, which states in relevant 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." Alternatively, Wenger argues the District Court abused its discretion in limiting her argument.

¶33 Whatever the merits of a "voice of the community" argument before a jury, it is plain from the discussion between the court and counsel that the instruction and any related arguments would be directed to the amount of damages the jury should award Wenger. The special verdict form specifically directed the jury to first determine if Elbert was negligent; if he was not, the form instructed the jury that its deliberations were finished. The jury did not find Elbert negligent and thus never considered the issue of damages or the arguments surrounding it. Any potential error by the District Court was harmless, and we decline to reverse. *See Howlett*, ¶ 32; M. R. Civ. P. 61; *Harris v. Hanson*, 2009 MT 13, ¶ 42, 349 Mont. 29, 201 P.3d 151 (where this Court found harmless and did not assign error to potentially erroneous damages instructions when the jury never reached the issue of damages).

CONCLUSION

¶34 The District Court did not abuse its discretion in ruling in limine to limit witness testimony on Montana statutes or on ultimate legal conclusions. Additionally, because the jury never reached causation or damages, Wenger's claimed errors in the District Court's admission of medical evidence or limiting argument on a damage instruction do not warrant reversal. The judgment is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE