

**IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 21-0123**

BRETT CAMEN,
Plaintiff / Appellant

v.

GLACIER EYE CLINIC, P.C. and
KALISPELL REGIONAL MEDICAL CENTER, INC.

Defendants / Appellees

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-15-2019-000361-PI
Honorable Judge Dan Wilson

APPELLANT BRETT CAMEN'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. The trial court abused its discretion when it refused to instruct the jury on the theory of Plaintiff Camen’s case, requiring reversal and remand for a new trial.
2. The trial court abused its discretion by allowing a defendant, Dr. Wheeler, to provide non-disclosed expert opinions and to testify beyond the bounds of lay witness testimony, requiring reversal and remand for a new trial.
3. The trial court erred in refusing to poll the jury in accordance with § 25-7-501, MCA, depriving Camen of a fair trial and requiring reversal.

STATEMENT OF THE CASE

On April 23, 2019, Plaintiff Brett Camen (“Brett” or “Camen”) filed suit alleging medical malpractice against Dr. Marcus Wheeler, a neurologist employed by Kalispell Regional Medical Center (“KRMC”) and Dr. August Stein, an ophthalmologist employed by Glacier Eye Clinic, P.C. (“GEC”).¹ (App. at 5). The case was tried to a 12-person jury, plus three alternates, from January 31, 2022 through February 9, 2022, the Honorable Dan Wilson presiding. (App. at 180).

¹For ease of reference and to coincide with the language employed in the testimony, arguments, and the instructions, the defendants will be referred to by the names of the individual employees (Dr. Wheeler and Dr. Stein) rather than by the named businesses (KRMC and GEC).

After eleven hours of deliberation over the course of two days, the jury returned a special verdict on February 9, 2022. (App. 176-179). The jury found that neither Dr. Stein nor Dr. Wheeler was negligent. (App. 176-177). Judgment was entered on February 17, 2022. (App. 180). Camen timely filed the notice of appeal from the judgment on March 10, 2022.

STATEMENT OF THE FACTS

Until the age of sixteen, Brett Camen had normal eyesight. Then, on Thanksgiving of 2017, Brett started having excruciating headaches – his head “felt like it was gonna explode.” (Trans. 521; App. 45). That was the beginning of a condition called idiopathic intracranial hypertension (“IIH”). A month later, Brett was permanently blind. Brett’s vision could have been saved had Dr. Wheeler and Dr. Stein timely referred Brett for surgical intervention to relieve the intracranial pressure on his optic nerves. (Lee Dep. 60; App. 110). Now 21 years old, Brett lives with his mother and brother in Libby, Montana.

When first afflicted in late November of 2017, Brett’s predominant symptom was debilitating headache. Brett’s condition changed on December 15, 2017. (Camen Trans. 522; App. 45). In addition to the intractable headache, Brett suddenly developed blurry double vision. (Trans. 522; App. 45). A CT scan at the emergency department on December 17, 2017, excluded brain abnormality. (PL 2-

11; App. 13). On December 18, 2017, Dr. Sorensen, an optometrist, dilated Brett's eyes and found severe papilledema – swelling of the optic nerve head at the back of the eyes. (Trans. 646; App. 50). Dr. Sorensen wanted Dr. Wheeler, a neurologist, to see Brett as quickly as possible. (Trans. 658; App. 51). Dr. Wheeler's office scheduled Brett's appointment sixteen days later, on January 3, 2018. (PL 2-55; App. 21).

On December 20, 2017, Dr. Sorensen performed visual field tests. They showed nearly complete blackouts in the lower half of both eyes. (PL 2-27, 28; App. 15, 16). On December 20, 2017, an MRI confirmed Brett's brain was normal. (PL 2-31, 32; App. 17-18). On December 21, 2017, a lumbar puncture showed Brett's cerebral spinal fluid ("CSF") pressure was extraordinarily high – over 55 cm. (PL 2-34, 35; App. 19-20). This was the highest CSF pressure Dr. Stein has ever seen. (Trans. 814; App. 53). Normal maximum CSF pressure is 25 cm. (Trans. 781; App. 52). When spinal fluid was removed during the lumbar puncture, Brett's spinal fluid overflowed the 55 cm tube. (PL 2-34; App. 19).

By 3:00 p.m. on December 21, 2017, Dr. Wheeler knew or should have known the following:

- Brett was 16 years old. (PL 2-34; App. 19).
- His debilitating headaches began at Thanksgiving. (Trans. 1118; App. 65).

- He had sudden vision changes on December 15, 2017. (*Id.*; App. 65).
- He had double vision. (Trans. 1123; App. 66).
- A CT scan excluded brain abnormality. (Trans. 1113; App. 64).
- He had papilledema (swelling of the optic nerve head) and restricted visual fields. (Trans. 1166; App. 69; PL2-31; App. 17).
- He had lost visual acuity. (Trans. 1166, App. 69).
- He had a normal MRI. (Trans. 1113; App. 64).
- His lumbar puncture (“LP”) pressure was in the 50s. (Trans. 1123; App. 66).

These are classic signs and symptoms of *fulminant* idiopathic intracranial hypertension (IIH). (Trans. 1210-1211; App. 71). Fulminant IIH differs from common IIH because it requires aggressive surgical intervention – on an emergency or urgent basis – to avert permanent and irreversible vision loss. (Dr. Lee Dep., p, 9; App. 94). Dr. Wheeler recognized Brett’s condition as IIH, but failed to recognize the emergency. He diagnosed *common* IIH and ordered Brett start taking a low dose of Diamox. (Trans. 1127; App. 67).

Brett underwent a lumbar puncture under deep sedation on December 21, 2017. (PL 2-34; App. 19). Dr. Wheeler was informed that Brett’s LP pressure was off the charts, but Dr. Wheeler did not ask Brett to come to his office and did not

refer him to another doctor. Instead, that afternoon Dr. Wheeler went on vacation. (Trans. 1100; App. 63).

Dr. Wheeler finally saw Brett on January 3, 2018. (PL 2-55, App. 21; Trans. 1330, App. 69). The records of that visit describe classic fulminant IIIH. Brett's visual acuity was down to 20/50 in the right eye and 20/100 in the left eye. Despite this information, Dr. Wheeler continued to treat Brett as if he had common IIIH. Dr. Wheeler recommended continuing the dose of Diamox and scheduled Brett to come "back in about 6 weeks' time." (PL 2-55, 56, 57; App. 21-23). Expert testimony established that had Dr. Wheeler complied with the standard of care on January 3, 2018, and referred Brett for surgical intervention, Brett's vision could have been saved. (Glass Dep. 52-54; 128-130).

Dr. Stein, an ophthalmologist, saw Brett on January 5, 2018. His records, like Dr. Wheeler's records, describe classic fulminant IIIH. Dr. Stein knew Brett's severe headaches began at Thanksgiving. He knew the visual impairments began 2 to 3 weeks after the headaches started. He knew CT and MRI scans excluded brain abnormality. He knew Brett's visual fields were awful. He knew the CSF pressure was at least 55 cm. (PL 2-63; App. 24).

When he examined Brett, Dr. Stein found hemorrhages throughout the retina in each eye. Visual acuity was down to 20/80 in the right eye and 20/100 in the left

eye. OCT tests that day showed “massive edema.” Dr. Stein did not test Brett’s visual field or order another lumbar puncture. He merely raised the Diamox dose and planned “to confer with Dr. Wheeler about a plan.” (PL 2-63; App. 24). As established by expert testimony, had Dr. Stein complied with the standard of care on January 5, which “demanded that definitive treatment be established with a practitioner [who] could perform that [treatment],” Brett ‘s vision could have been preserved. (Lefkowitz Dep. 32; App. 120).

After seeing Brett on January 5, 2018, Dr. Stein called – but did not reach – Dr. Wheeler. Dr. Stein simply left a message saying he wanted to talk with Dr. Wheeler about Brett. (Trans. 820; App. 54). He did not attempt to call Dr. Wheeler’s cell phone and did not inform Dr. Wheeler’s office of the emergency or urgency. (Trans. 820-821; App. 54-55).

Dr. Stein did not speak to Dr. Wheeler for four days. (Trans. 898; App. 57). On January 9, 2018, when they finally talked, Dr. Wheeler confirmed that Brett had IIIH and increased the Diamox. They agreed that Dr. Stein would order another lumbar puncture. (Trans. 972-973; App. 58-50). During the four days Dr. Stein waited to speak with Dr. Wheeler the intracranial pressure continued destroying Brett’s optic nerves. (Lee Dep. 39, 44, 55; App. 97, 99, 109).

The second lumbar puncture was done on January 10, 2018. (PL 2-92, 93; App. 25, 26). Again, the opening pressure was greater than the 55 cm tube could measure – confirming that Brett had severe, ongoing damage to his optic nerves. On January 14 Brett was admitted to KRMC. On January 15, in a surgery lasting 78 minutes, Dr. Schmidt inserted an indwelling shunt to relieve the pressure in Brett’s brain. (PL 2-117-119; App. 27-29). The shunt relieved the pressure, but too late. The high pressure in Brett’s head during the previous weeks had killed the tissue, leaving him permanently blind. (Lee Dep. 44-46; App. 99-101).

Brett’s theory of the case was two-pronged. First, Brett alleged that due to the great risk of blindness, the doctors owed a greater duty in determining how to treat IIH. The evidence at trial supported this theory. Three highly qualified medical experts testified that the main risk posed by fulminant IIH is blindness. Dr. Stephen Glass, a pediatric neurologist testified that “the key and most feared and most commonly seen complication of sustained increases in pressure is progressive damage to the optic nerve and visual function.” (Glass Dep. 43, App. 127); (*See also* Lefkowitz Dep. 11, App. 116; Lee Dep. 51, App. 105). Due to this risk of blindness, the standard of care “demanded definitive treatment,” surgery to be performed on an emergency or urgent basis. (Lefkowitz Dep. 32; App. 120).

Second, Brett alleged as the theory of his case that as a result of the doctors' failure to act, Brett lost the chance of preserving his eyesight. (Complaint, ¶ 20, App. 9). Dr. Lee testified that had the doctors referred Brett for surgery sooner, Brett more likely than not would have retained 20-40 vision. (Lee Dep. 43; App. 98). Dr. Lefkowitz and Dr. Glass also testified that Brett's vision could have been saved with timely surgical intervention. (Lefkowitz Dep. 11, App. 116; Glass Dep. 41, App. 125).

Despite hearing a week of evidence supporting Camen's theory of the case, the trial court refused Plaintiff's proposed jury instruction regarding Montana's longstanding rule regarding duty: the greater the risk, the greater the duty. (Proposed Instructions 9, App. 133). Similarly, the trial court refused Plaintiff's proposed jury instruction regarding causation based on loss of chance of recovery – an instruction approved by this Court in *Aasheim* and codified by the Montana Legislature in § 27-1-739, MCA. (Proposed Instruction 11, App. 136).

During the settling of instructions, the trial court *sua sponte* announced its planned method of polling the jury. (Trans. 1737-38; App. 82). Camen's counsel objected to the plan because the trial court refused to ask each juror if the verdict was his or hers, as required by statute. (Trans. 1738, 1744-5; App. 82, 85). The

trial court “appreciate[d] the objection,” but stated that the “poll will be conducted, if at all, according to the Court’s formulation.” (Trans. 1745; App. 84).

After the verdict was read, Camen requested a poll. (Trans. 1990; App. 89). Rather than ask each juror “if it is the juror’s verdict,” as required by § 25-7-501, MCA, the trial court asked each juror “is this the jury’s verdict” and whether “at least eight of the jurors agree?” (Trans. 1990-1995; App. 89-90). Camen again objected and asked that each juror be asked if it was his or her verdict. (Trans. 1995-1998; App. 90-91). The trial court overruled the objection and the special verdict was entered without ever determining the number of individual votes on each verdict. (Trans. 1998-1999; App. 91).

STANDARDS OF REVIEW

This Court reviews the giving or denial of jury instructions for abuse of discretion, “limited by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law.” *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904. To the extent the jury instructions involve conclusions of law, the rulings are reviewed *de novo* for correctness. *Kenser v. Premium Nail Concepts, Inc.*, 2014 MT 280, ¶ 22, 376 Mont. 482, 338 P.3d 37.

The admission and exclusion of testimony is reviewed for abuse of discretion. *Sharbono v. Cole*, 2015 MT 257, ¶ 10, 281 Mont. 13, 355 P.3d 782.

The Court reviews the interpretation of statutes, such as the jury polling statute, § 25-7-501, MCA, to determine whether the trial court's interpretation of the law is correct. *Pumphrey v. Empire Lath and Plaster*, 2006 MT 99, ¶ 17, 332 Mont. 116, 135 P.3d 797.

SUMMARY OF ARGUMENT

“A party has a right to jury instructions adaptable to his theory of the case when the theory is supported by credible evidence.” *Rix v. General Motors Corporation*, (1986), 222 Mont. 318, 323, 723 P.2d 195, 198, *citing Cremer v. Cremer Rodeo Land and Livestock Co.* (1981), 192 Mont. 208, 211, 627 P.2d 1199, 1200. “It is reversible error to refuse to instruct on an important part of a party's theory of the case.” *Id.*, *citing Northwestern Union Trust Co. v. Worm* (1983), 204 Mont. 184, 189, 663 P.2d 325, 327. Here, the trial court refused to instruct the jurors on two essential elements of Camen's theory: duty and causation.

Ample evidence supported Camen's theory of the case, and this Court has approved the two offered instructions as accurate statements of Montana law. *Schuff v. Jackson*, 2002 MT 215, ¶ 34, 311 Mont. 312, 55 P.3d 387 (approving the “proportionate duty” instruction); *Steffensmier v. Huebner*, 2018 MT 173, ¶ 11,

392 Mont. 80, 422 P.3d 95 (approving “loss of chance” instruction). Refusal of either instruction, standing alone, constitutes reversible error requiring a new trial. *Tacke v. Vermeer Mfg. Co.* (1986), 220 Mont. 1, 12, 713 P.2d 527, 534; *Rix*, 222 Mont. at 323, 723 P.2d at 198.

Furthermore, when read as a whole, the instructions precluded the jurors from considering Camen’s theory of the case, and only allowed consideration of defense theories of the case. Applying the “overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law,” the trial court’s errors in instructing the jury require reversal and remand for a new trial. *Peterson*, 2010 MT 187, ¶ 22, ¶ 33.

The trial court also erred in the admission of testimony. Because evidence which is labeled “expert” may be accorded more weight by a jury, this Court holds that “it is critical for a court to allow the weight of such evidence to be attacked by cross-examination or refutation.” *Kenser*, 2014 MT 280, ¶ 32; *State v. Michaud*, 2008 MT 88, ¶ 40, 342 Mont. 244, 180 P.3d 636. Allowing Dr. Wheeler, a defendant in the action, to testify beyond his expert disclosure and beyond the questions asked denied Camen a fair trial.

Finally, though Camen’s counsel requested that the jury be polled, the method of “polling” used by the trial court violated § 25-7-501. The statute

requires that each juror affirm his or her individual vote. The trial court merely asked each juror “is this the jury’s verdict” and whether “at least eight of the jurors agree?” The “poll” did not elicit the most basic information required by the statute: the number of jurors voting for and against the verdict. The trial court committed reversible error in failing to ascertain each juror’s vote, depriving Camen of a fair trial and information needed to challenge the verdict on appeal.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON CAMEN’S THEORY OF THE CASE WITH RESPECT TO BOTH DUTY AND CAUSATION.

This Court has long held that “[i]t is reversible error to refuse to instruct on an important part of a party’s theory of the case.” *Tacke*, 220 Mont. at 12, 713 P.2d at 534. *See also Peterson*, 2010 MT 187, ¶ 33; *Smith v. Rorvik*, (1988), 231 Mont. 85, 93, 751 P.2d 1053, 1058. Indeed, Camen “has a right to jury instructions adaptable to his theory of the case when the theory is supported by credible evidence.” *Rix*, 222 Mont. at 323, 723 P.2d at 198.

All the evidence offered by Camen consistently supported the legal theory of his case. Camen established that by December of 2017, he suffered from fulminant IIIH. Three independent experts – Drs. Glass, Lee and Lefkowski – testified that because of the great risk of blindness posed by fulminant IIIH, any delay in surgery

resulted in Brett losing his only chance of preserving his vision. (Lefkowitz Dep. 20-21, 32; App. 117-118, 120; Glass Dep. 41; App. 125). This theory of negligence is well recognized under Montana law. Indisputably, the trial court committed reversible error when it refused to instruct the jury on *two* crucial parts of Camen’s legal theory: duty and causation.

A. The Trial Court Erred in Refusing Plaintiff’s Proposed Instruction 9, the Proportionate Duty Instruction.

1. *The “proportionate duty” instruction, previously approved by this Court, correctly states Montana law.*

Camen offered Proposed Instruction 9, a correct statement of Montana law regarding duty adapted to this case. The proposed instruction stated in full:

The care required of the defendant in a negligence claim is always reasonable care. This standard never varies but the care which it is reasonable to require of the defendant varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.

(App.133). This instruction accurately states Montana law, settled for a century.

In *Estate of Strever v. Cline* (1996), 278 Mont. 165, 924 P.2d 666, this Court noted that legal tenet of proportionate duty dates back to the “classic opinion” in *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928). In *Strever*, this Court adopted the Restatement (Second) of Torts, § 298, comment b, which states in part:

The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.

Id. at 174, 924 P.2d at 671.

The proportionate duty instruction offered by Camen is nearly identical to the instruction reviewed and approved by this Court in *Schuff v. Jackson*, 2002 MT 215, ¶¶ 34-37, 311 Mont. 312, 55 P.3d 387. The instruction as “patterned after § 298 of the Restatement of Torts (1965), adopted by this Court in *Strever* [full cite], and pertains to the higher degree of care required of individuals in the face of a known danger.” *Id.* at ¶ 35. The instruction incorporates the longstanding law regarding foreseeability, and element of legal duty. *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 21, 342 Mont. 335, 181 P.3d 601. The instruction correctly states the applicable law.

2. *The evidence supported and required the “proportionate duty” instruction.*

All the parties’ theories required the trial court to instruct the jury that with respect to determining duty, “the greater the danger, the greater the care which must be exercised.” (App. 133). All parties presented evidence asking the jury to determine if the doctors met the standard of care in weighing the risks of immediate surgery against the risk of blindness caused by delay.

Dr. Wheeler, in particular, relied upon the risk versus benefit analysis in seeking to establish that he met the duty of care. Dr. Wheeler testified that he was “explaining why I made the decisions that I made in order to provide Brett the greatest chance of recovery and to minimize the potential for risk.” (Trans. 1122; App. 66). Dr. Wheeler testified that he “would do everything again the same, to give Brett every chance of recovering his vision without having a permanent and dangerous shunt put into his body.” (Trans. 1141; App. 68). Dr. Wheeler’s counsel hammered this point home in closing argument:

Here’s what Dr. Wheeler shared with us. That he wanted to give Brett every chance of recovering his vision without a permanent and dangerous shunt put into his body. This is classic, classic physician judgment risk/benefit, risk/benefit.

(Trans. 1842; App. 85). Dr. Wheeler’s counsel argued in closing that the rarity of IIH must be considered when determining whether Dr. Wheeler met the standard of care:

So when we talk about the rarity of malignant or fulminant IIH, why is that important? And why does that enter into physician judgment? It is because if you are looking at something that is one in a million to one in 3 million, you know that that is not popping up every day, and it was not seen in Brett Camen.

(Trans. 1858-1859; App. 86). The defense theory – weighing risks as part of physician judgment – required that the jury be instructed as to the law of proportionate duty: the greater the risk, the greater the duty.

Brett, in turn, relied on the “greater risk, greater duty” legal tenet as his theory of the case. Camen elicited key admissions regarding the doctors’ knowledge of the greater risk of blindness created by IIH. The evidence established that both Dr. Stein and Dr. Wheeler knew Brett Camen was diagnosed with IIH in December of 2018. (PL 2-57, App. 23; PL 2-92, App. 25; Trans. 1127; App. 67). Both doctors knew that Brett presented from the outset with incredibly high intracranial pressure. (PL 2-34, App. 19; PL 2-92, App. 25). They knew of the risk of blindness and the possibility of sight-saving surgery. (Trans. 833, App. 56).

Camen also provided copious evidence supporting the proportionate duty instruction. Dr. Lee testified that brain shunt surgery carries risks. (Lee Dep. 69-71; App. 111-113). However, he testified that “the main thing we’re afraid of is vision loss. . . . the main risk is going blind.” (Lee Dep. 51; App. 105). Dr. Lee testified that had the surgery been performed timely, Brett more likely than not would have retained his vision. (Lee Dep. 43:20-1; App. 98). Similarly, Dr. Glass, a pediatric neurologist, testified that “the key and most feared and most commonly seen complication of sustained increased pressure is progressive damage to the optic nerve and visual function.” (Glass Dep. 43; App. 127).

Plaintiffs' three experts provided the only independent expert testimony concerning adherence to the standard of care, and this testimony focused on weighing the great risk of blindness against the doctors' failure to act. Dr. Lee opined that both Dr. Stein and Dr. Wheeler breached the standard of care when the doctors failed to promptly refer Brett for surgery to relieve the pressure on Brett's optic nerves. (Lee Dep. 37-38; App. 95-98). The failure to refer to surgery "blinded the patient." (Lee Dep. 60; App. 110). Dr. Lefkowitz testified that the standard of care applicable to ophthalmologists "demanded that definitive treatment be established with a practitioner [who] could perform that [treatment]," and opined that Dr. Stein violated the standard of care when he failed to refer for definitive treatment on January 5, 2017. (Lefkowitz Dep. 20-21, 32; App. 117-8, 120). Dr. Glass opined that Dr. Wheeler "absolutely" violated the standard of care. (Glass Dep. 40; App. 125).

Brett Camen himself offered testimony supporting the proportionate duty theory. Brett testified that had the doctors informed him of the availability of surgery, and informed him of these risks, he would have chosen surgery to avoid blindness at all cost. "In the beginning, if something could have been done to give me a chance to save my vision, or some of it, I would have did anything to do that, whether it was surgery or not." (Trans. 555; App. 47).

The weighing of risks and benefits was placed squarely before the jury by the doctors in their defense, and by Camen as his theory of the duty owed. Whether the doctors met the duty of care was the central issue in this case. The evidence not only supported, but required, an instruction informing the jury on the application of the proportionate duty.

3. *As a matter of law, the trial court committed reversible error in failing to instruct the jury on proportionate duty.*

The trial court did not reject the proportionate jury instruction based on inapplicability; no serious dispute exists that all parties' evidence supported an instruction on the theory. Instead, the trial court refused the proportionate duty instruction based on mistaken legal conclusions. To the extent a jury instruction involves a conclusion of law, this Court reviews the ruling *de novo*. *Kenser*, 2014 MT 280, ¶ 22.

The trial court stated two reasons for rejecting the instruction, both of which are legally incorrect. First, the trial court posited that the jury should only be instructed on proportionality in common negligence claims, and not in medical malpractice claims. (Trans. 1639; App. 76). Camen's counsel provided the trial court with examples of the instruction given by other trial courts in medical malpractice claims (App. 134-135), refuting defense counsel's argument that

“there is no medical malpractice case that has appropriately given this instruction.”
(Trans. 1638; App. 76).

Moreover, Montana law refutes the trial court’s legal conclusion that the proportionate duty instruction should not be given in medical malpractice claims. As adopted by this Court in *Strever*, the Restatement (Second) of Torts, § 298, comment b: “As in **all cases** where the reasonable character of the actor's conduct is in question, its utility is to be weighed against the magnitude of the risk which it involves. The amount of attention and caution required varies with the magnitude of the harm likely to be done if care is not exercised, and with the utility of the act.” *Strever*, 278 Mont. at 174, 924 P.2d at 671 (emphasis added). The rule of proportionality applies in “all cases,” and the jury required instruction on this basic legal concept in this case. *Id.*

The trial court also refused to instruct that under the law, greater risk requires a greater duty of care for a second legally incorrect reason:

It’s the Court’s concern that not only will it encourage the jury to exercise what, in its discretion or belief, is the appropriate standard or how to apply it, how vigorously to apply the standard of care given by the experts, when it really must be defined, if at all, by the experts.

(Trans. 1640; App. 77). The trial court impermissibly and incorrectly conflated the admission of evidence (expert testimony) with the court’s duty to instruct on the law. Determining the law, and instructing the jury on that law, is within the

sole province of the trial court, not expert witnesses. *Kenser*, 2014 MT 280, ¶ 22.

The purpose of instructing the jury is to “assure a decision consistent with the evidence **and the law**. *Peterson*, 2010 MT 187, ¶ 33 (emphasis added).

“It is well established in Montana that a trial court commits reversible error by refusing to instruct the jury on an important part of a party’s theory in the case.” *Chambers Through Chambers v. Pierson* (1994), 266 Mont. 436, 441, 880 P.2d 1350, 1353-4. No element of a negligence claim is more important than duty. Duty is a question of law, and as such, the trial judge – not the defendants/experts – must instruct the jury as to the applicable law. *Kenser* at ¶ 22. Just as in *Schuff*, 2002 MT 215, ¶ 39, the trial court committed reversible error when it rejected the proportionate duty instruction tailored to Camen’s theory of the case. Standing alone, the failure to instruct on proportionate duty requires reversal and a new trial.

B. The Trial Court Erred in Refusing Plaintiff’s Proposed “Loss of Chance of Recovery” Instruction, Which Correctly Stated the Law as Applied to Causation.

1. *The “loss of chance of recovery” instruction correctly states Montana law and has been approved by this Court.*

Camen offered Proposed Instruction 11, Montana Pattern Jury Instruction (Second) 3.08, Professional Negligence – Loss of Chance. The instruction

provides a concise and correct statement of the law supporting Camen’s theory of the case:

A doctor’s negligence is a cause of damage to the plaintiff if it increases risk of harm to the plaintiff or reduces the plaintiff’s chance for obtaining a better result.

(App. 136). See *Aasheim v. Humberger*, (1985), 215 Mont. 127, 695 P.2d 824, 827-27. Defense counsel objected to this instruction, incorrectly implying that the enactment of § 27-1-739, MCA, superseded *Aasheim*. (Trans. 1643-1644; App. 77-78). Section 27-1-739 codified – not superseded – the loss of chance doctrine enunciated in *Aasheim*. *Steffensmier*, 2018 MT 173, ¶ 11 (“A loss of chance theory allows the jury to determine that a provider's negligence denied a patient ‘the opportunity to recover.’ . . .”) and is “[n]ow codified in § 27-1-739, MCA. . . .”). The *Aasheim* instruction offered by Camen has remained a pattern instruction for over fifteen years since the enactment of § 27-1-739 in 2005.

The “loss of chance of recovery” instruction proposed by Camen to instruct the jury on the theory of his case correctly states the law.

2. *The evidence supported and required the “loss of chance of recovery” instruction.*

Brett’s theory of the case required – and credible evidence supported – Proposed Instruction 11, loss of chance of recovery. From the outset of this litigation, Brett asserted his primary theory that the doctors’ negligence reduced

his chance of retaining his eyesight. The Complaint alleges that “the delay in referring Brett for urgent neurosurgical evaluation allowed his markedly high CSF pressure to continue damaging his optic nerves and reduced his chance for more successful treatment.” (App. 9, Complaint, ¶ 20). In the Pretrial Order Camen continued to rely on this core contention of his case: “The delay in properly treating Brett or referring him for further treatment caused him to lose the chance for a better outcome from his malignant IHH.” (See Docket #62).

As contemplated by § 27-1-739, Camen provided specific expert testimony through Dr. Andrew G. Lee to support his loss-of-chance theory of the case:

Q. And had surgery been done in that time frame, December 18, 19 or 20, do you have an opinion as to what Brett’s vision would be for the rest of his life or what Brett’s vision would be?

A. To a more likely than not standard, it would have been 20/40. That was the better vision in the better eye. 80 percent chance. (Lee Dep. 43: 20-1; App. 98-99).

A. If you don’t relieve the pressure on the optic nerve one day, two day, three day, five day, a week, the sick fibers will die, and if you leave it there even longer, they’ll all die, and that is what happened in this case. (Lee Dep. 44: 2-11; App. 99).

Dr. Lee’s expert testimony established that with prompt surgery, rather than 27 days of delay, the chance of Camen retaining his vision was more likely than not. (Lee Dep. 43-44; App. 98-99). Dr. Glass testified that had Dr. Wheeler

complied with the standard of care, Brett’s vision would have been saved. (Glass Dep. 41; App. 125). The evidence unequivocally supported an instruction on “loss of chance of recovery.”

Even the trial court acknowledged that Camen’s “loss of chance” of recovery constituted Camen’s theory of the case:

COURT: But – yeah, it seems in this case, has not the theory been that it would have been a – an appropriate and better outcome for Mr. Camen had he been able to preserve the degree of visual loss that he had already suffered by the time he first encountered the care and treatment of either of these physicians?

(Trans.1652-16533; App. 77).

Indisputably, loss of chance of recovery was the cornerstone of Camen’s theory of the case. Credible evidence supported an instruction on that theory.

3. *The trial court’s refusal to instruct the jury on “loss of chance of recovery” requires reversal and a new trial.*

Camen established that the doctors’ negligence in delaying treatment reduced Brett’s chance of retaining 20-40 vision to zero. Thus, failure to instruct the jury with the instruction crafted by this Court in *Aasheim* constitutes error.

Steffensmier, 2018 MT 173, ¶ 11. In *Steffensmier*, this Court found that error to be harmless based on the unique facts of that case. This Court reasoned:

Bushong's jury found that Dr. Huebner was not negligent. It did not reach the issue of causation. In light of the jury's finding that Dr. Huebner was not negligent, the District Court's instructional error, if

any, did not affect Plaintiffs' substantial rights and was harmless. M. R. Civ. P. 61. We will not reverse for an alleged error when the outcome would have been the same had the error not been committed.

Id., ¶ 12. This reason does not apply in this case. Although the jury did not reach the issue of whether negligence caused liability for damages, the record of the case establishes that the jury, as instructed, considered the issue of causation in determining whether each doctor was negligent for the purposes of the special verdict form.

The trial court emphatically instructed the jurors to include causation in determining whether the doctors were negligent. The jury was instructed that “**to establish negligence** in a medical malpractice action . . . Plaintiff **must** present qualified expert medical testimony establishing the following elements: 1) the standard of care applicable to each defendant physician; 2) a departure from the applicable standard of care by each defendant physician; and 3) that **the departure from the standard of care caused injury to Plaintiff.**” (Instruction No. 20, emphasis added; App. 164).

The special verdict form merely queried whether each doctor “was negligent.” (App. 176-177). The special verdict form must be reviewed in light of the instructions. *Busta v. Columbus Hosp. Corp.* (1996), 276 Mont. 342, 359, 916 P.2d 122, 132 (“we consider instructions in their entirety, as well as in connection

with the other instructions given and the evidence at trial”). The jurors were instructed that in determining negligence, they must consider not only whether Dr. Stein and Dr. Wheeler departed from the standards of care, but must also consider whether the departure from the standards of care **caused injury** to Plaintiff. (Instruction No. 20; App. 164).

The distinction between breach of duty (negligence) and causation is a highly technical legal distinction, often lost on even seasoned attorneys and judges.² Based on the instructions given in this case, the jurors were completely incapable of making that keen legal distinction. The jurors were provided no information regarding the distinction between negligence and causation, and were instead instructed that proof of “negligence” included causation. (App. 164).

Given the manner in which the jury was instructed, this Court cannot reach the same conclusion reached in *Steffensmier* – that the error of refusing to instruct the jury on loss-of-chance was harmless because the jury did not reach the issue of causation. If the jury followed the instructions, which we must assume, then the jury certainly considered causation during the two days of deliberations in

²See *Busta*, 276 Mont. at 360, 916 P.2d at 133, discussing the “tortuous history” of foreseeability arising from *Palsgraf*, the case that forms the basis for this Court’s approval of Plaintiff’s Proposed Instruction No. 9. *Strever*, 278 Mont. at 174, 924 P.2d at 671.

determining whether to mark “yes” or “no” in response to the query regarding negligence. (Instruction 20, App. 164).

Unlike in *Steffensmier*, the trial court’s error in refusing to instruct the jury on loss of chance of recovery was not harmless. The usual rule applies: “It is reversible error to refuse to instruct on an important part of a party’s theory of the case.” *Tacke*, 220 Mont. at 12, 713 P.2d at 534. *See also Peterson*, 2010 MT 187, ¶ 33; *Smith*, 231 Mont. at 93, 751 P.2d at 1058; *Rix*, 222 Mont. at 323, 723 P.2d at 198. Standing alone, the failure to instruct on loss of chance of recovery requires reversal and a new trial.

C. The Trial Court’s Instructions, Taken as a Whole, Failed to Properly Instruct the Jury on Camen’s Theory of the Case and Require Reversal and a New Trial.

When determining whether a trial court abused its discretion in instructing the jury, this Court considers each “instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial.” *Harding v. Deiss*, 2000 MT 169, ¶ 10, 300 Mont. 312, 3 P.3d 1286. “*The [trial] court must instruct the jury properly on the controlling issues in the case.*” *Peterson*, 2010 MT 187, ¶42, quoting *Schuff*, 2002 MT 215, ¶¶ 38-39 (italicized in original). The trial court committed reversible error in refusing to instruct the jury on two key – and legally correct – aspects of Camen’s theory of the case,

duty and causation. Those two errors were compounded when considered in connection with the other instructions.

The error in refusing to instruct as to proportionate duty was exacerbated by other instructions given to the jury. At the outset of the trial, the court informed the jury that the trial court “will decide the questions of law that arise during the course of the trial,” and that at the end of the trial the court will provide “instructions on the law that you are bound to follow and apply in reaching your verdict.” (Instruction 2; App. 143). Further, the trial court admonished the jury to “take the law in this case from my instructions alone. You should not accept anyone else’s version as to what the law is in this case.” (Instruction 11; App. 155). Thus, in the absence of the proportionality instruction, the jurors *were not allowed* to consider the legal theory upon which Camen based his case: the greater the risk of harm, the greater the duty to avoid that harm.

Much of the evidence in this case focused on the weighing of risks. The two rejected instructions directly addressed the concept of risk. Proposed Instruction 9 would have informed the jury that “the greater the danger, the greater the duty of care” – a concept of foreseeability long recognized in the law. *Fisher*, 2008 MT 105, ¶ 21. Proposed Instruction 11 also addressed foreseeability when informing the jury of the legal effect of an “increase[d] risk of harm” to Brett. In rejecting

both instructions, the trial court failed to inform the jurors regarding a central issue of the case: the weighing of risks. Not only were the jurors not allowed to consider the theory of Brett's case; the jurors were deprived of any legal framework to process the evidence put forth by all parties.

A trial court commits reversible error if the refusal of an instruction "affects the substantial rights of the party proposing the instruction, thereby prejudicing him." *Busta*, 276 Mont. at 360, 916 P.2d at 132. This Court examines jury instructions "to determine whether they fully and fairly informed the jury of the applicable law." *Peterson*, 2010 MT 187, ¶ 40. The trial court failed to instruct the jury on two of the four elements of Camen's theory of the case: duty and causation. Prejudice and harm are manifest.

"A party has a right to jury instructions adaptable to his theory of the case when the theory is supported by credible evidence." *Rix*, 222 Mont. at 323, 723 P.2d at 198. When read as a whole, the jury was not fully and fairly informed of the applicable law as supported by credible evidence. Rather, the jury was precluded from considering Camen's theory of the case, and only allowed consideration of the defense theories of the case. That this affected Camen's substantial rights and deprived him of a fair trial is not debatable; Brett was deprived of the legal theory of his case, which constitutes reversible error. *Tacke*,

220 Mont. at 12, 713 P.2d at 534; *Peterson*, 2010 MT 187, ¶ 33; *Smith*, 231 Mont. at 93, 751 P.2d at 1058; *Rix*, 222 Mont. at 323, 723 P.2d at 198. The judgment must be vacated and the case remanded for retrial.

II. THE TRIAL COURT ERRED IN ALLOWING DEFENDANT AND TREATING PHYSICIAN WHEELER’S UNDISCLOSED EXPERT TESTIMONY AND UNCONTROLLED LAY TESTIMONY.

Defendants provided no independent expert testimony. Instead, the treating physicians/defendants testified themselves as to the standard of care. Defendants disclosed that Dr. Wheeler would offer expert opinions as a neurologist, and disclosed his opinions regarding neurology. At trial, Dr. Wheeler was allowed to expand his expert opinions beyond the disclosure. Over Camen’s objection, Dr. Wheeler was permitted to testify that Dr. Stein, a pediatric ophthalmologist, satisfied the standard of care in treating Brett Camen. (Trans. 1331-2; App. 72-73). The trial court abused its discretion in allowing Dr. Wheeler to offer undisclosed expert testimony on a critical issue in the case – standard of care – on behalf of his co-defendant, Dr. Stein.

Not only was Dr. Wheeler’s testimony undisclosed, but the defense never established that Dr. Wheeler possessed the necessary qualifications to offer opinions regarding ophthalmology. Montana law requires that an expert witness be “thoroughly familiar with the standard of care and practice.” § 26-2-601(1)(b),

MCA. More to the point, Montana law prohibits the very abuse of discretion which occurred in this case:

(3) A person qualified as an expert in one medical specialty or subspecialty is not qualified to testify with respect to a malpractice claim against a health care provider in another medical specialty or subspecialty unless there is a showing that the standards of care and practice in the two specialty or subspecialty fields are substantially similar. This subsection (3) does not apply if the subject matter of the malpractice claim against the health care provider is unrelated to the relevant specialty or subspecialty.

§ 26-2-601(3), MCA. Dr. Wheeler testified as a pediatric neurologist. He admitted he is not an ophthalmologist: “I’m not an eye doctor, so I couldn’t comment on the specific cause of the vision loss in these cases and whether or not its correctible.” (Trans. 1210; App. 71). As a matter of law, Dr. Wheeler’s qualifications to offer opinion testimony regarding neurology do not qualify Dr. Wheeler to testify with respect to the malpractice claim against Dr. Stein, an ophthalmologist. No testimony or disclosure qualified him as an expert in the field of ophthalmology. The trial court erred in allowing Dr. Wheeler to testify as to whether Dr. Stein breached his duty of care. The error impermissibly bolstered Dr. Stein’s defense with inadmissible, undisclosed expert testimony.

The trial court further erred by allowing Dr. Wheeler to testify beyond the scope of the cross-examination questioning. Both doctors refused to respond directly, and instead offered narrative non-responsive answers. This was

particularly true with respect to a central factual issue in the case: when Brett's condition was fulminant. Dr. Wheeler hedged repeatedly. Over objection, the trial court then allowed Dr. Wheeler to testify beyond the scope of the questioning. (Trans. 1087; App. 60). Camen's counsel moved to strike the responses and asked the trial court to order proper responses, and the trial court refused. (Trans. 1090-1095; App. 61-62).

Trial courts are permitted wide discretion in the admission of expert and lay testimony. However, because evidence which is labeled "expert" may be accorded more weight by a jury, "it is critical for a court to allow the weight of such evidence to be attacked by cross-examination or refutation." *Kenser*, 2014 MT 280, ¶ 32; *Michaud*, 2008 MT 88, ¶ 40. Allowing Dr. Wheeler, a defendant in the action, to testify beyond his expert disclosure and beyond the questioning denied Camen a fair trial.

The trial court gave Dr. Wheeler impermissible leeway in his testimony as an expert and a lay witness, and then instructed the jury in a manner which allowed the witnesses, not the court, to define duty. (Trans. 1640; App. 77). That this prejudiced Camen is evident. The jury struggled for eleven hours over the course of two days to reach a verdict. On the first day of deliberations, the jury asked the court to provide "Dr. Wheelers (sic) Deposition." (App. 173-174).

Dr. Wheeler's deposition had been used at trial twice. First, Camen's attorney impeached Dr. Wheeler with his deposition testimony, establishing that Wheeler had previously testified that Brett developed fulminant IIH between January 5 and 9, 2018, perhaps as late as the January 12. (Trans. 1116; App. 65). This admission was crucial because the experts agreed – even Dr. Wheeler – that once Brett's condition was fulminant, the standard of care “requires prompt surgery.” (Trans. 1211; App. 71).

Second, after Dr. Wheeler's testimony, a single portion of Dr. Wheeler's prior deposition testimony was read to the jury:

- Q. How much visual acuity loss would there need to be to be within four weeks for you to consider a patient with IIH to have malignant IIH?
- A. [By Dr. Wheeler]: I would say moderate to severe loss of visual acuity.
- Q. And in terms of acuity, what would that be, from 20/20 to what?
- A. I don't feel necessarily qualified to answer that as a neurologist. I would have to defer to ophthalmology.”

(Trans.1401-1402; App. 74). Both of Wheeler's deposition passages presented to the jury involved prior testimony on the key question of when Brett's IIH became fulminant.

The trial court rejected the jury's request for Wheeler's deposition, informing the jury that “the transcript of Dr. Wheeler's deposition was not

admitted in evidence and is not available to the jury during its deliberations.” (App. 173). The communication misinformed the jury, suggesting that the deposition *testimony* is not admissible evidence and “is not available to the jury during its deliberations.” Camen was grievously prejudiced by the implied exclusion of the impeachment testimony which established the date upon which Camen’s IIH became fulminant and required immediate surgery.

Allowing Dr. Wheeler to offer undisclosed expert testimony, coupled with refusing to require Dr. Wheeler to answer the questions posed, deprived Brett of a fair trial.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO POLL THE JURY IN THE MANNER REQUIRED BY STATUTE.

A. The Trial Court’s “Poll” of the Jury Violated § 25-7-501, MCA.

The right to have the jurors polled upon announcement of the verdict “is of ancient origin and of basic importance.” *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir. 1958). In Montana, the right is statutorily conferred. Section 25-7-501(2), MCA, allows either party to request a polling of the jury. Once that request is made, the Montana statute prescribes a very specific process that trial courts are required to follow. Polling of the jurors “is done by the court or clerk

asking each juror if it is the **juror's** verdict.” *Id.* (emphasis added). Clearly, each juror must be asked individually his or her verdict.

The trial court in this case ignored the statutory requirement of individual inquiry into each juror's verdict, even after being asked twice to do so by Camen's counsel. (Trans. 1737-1741; 1998; App. 82-83; 91). The trial court merely asked each juror “is this the jury's verdict” and whether “at least eight of the jurors agree?” (Trans. 1991-1995; App. 89-102). The method of “polling” used by the trial court violated § 25-7-501, which requires that each juror affirm his or her vote.

“In Montana the polling of the jury is a statutory right the purpose of which is to determine whether the required number of jurors concur in the verdict.” *Martello v. Darlow* (1968), 151 Mont. 232, 236, 441 P.2d 175, 177. Here, the trial court did not actually “poll” the jury. “Polling,” as used in § 25-7-501(2), is commonly understood to mean “to call on each member of (as a jury) to answer individually as to his concurrence in the verdict rendered.” *Webster's Third New International Dictionary*. *Black's Law Dictionary* defines “jury polling” as “the practice or an instance of asking individual jurors about their votes, usually after a verdict is returned but before the jurors are discharged.” *See also Audette v. Isaksen Fishing Corp.*, 789 F.2d 956, 961 (1st Cir. 1986) (“individual questioning

is consonant with etymological derivation of “poll” and with trend of authority,” quoting *Turner v. Kelly*, 262 F.2d 207, 211 (4th Cir. 1958)).

Even absent the explicit statutory requirement set forth in § 25-7-501, the majority of courts considering the issue agree that each juror must confirm his or her individual vote. In *Ragusa v. Lau*, 575 A.2d 8 (N.J. 1990), the New Jersey Supreme Court “explored the appropriate method for polling a jury in a civil case.” The trial court asked each juror whether the foreman correctly announced that the jury voted “no” on proximate cause “by a five to one vote.” *Id.* at 278, 575 A.2d at 9. Each juror responded affirmatively. *Id.* The New Jersey Supreme Court held that the district court’s inquiry rendered the process “meaningless” because the individual votes were not confirmed. See also *Acosta v. Pendleton Memorial Methodist Hosp.*, 545 So.2d 1053, 1059 (La. App. 1989) (poll asks each juror “Is this your verdict?”); *White v. Seaboard Coast Line R.R. Co.*, 229 S.E.2d 775, 778 (Ga. App. 1976) (poll must ascertain whether a juror agrees or disagrees with verdict); *Ferry v. Checker Taxi Co.*, 520 N.E.2d 733, 739 (N.Y. 1987) (poll asks each juror whether verdict is his or her verdict); *Highfield v. Liberty Christian Academy*, 518 N.E.2d 592, 596 (Ohio 1987) (same); *State v. Milton*, A.2d 835 (N.J. 2004) (“a procedure whereby the jurors are asked individually the finding [at which] they have arrived”); *State v. Pare*, 755 A.2d 180, 193 (Conn.

2000) (polling requires juror “to confirm, on his or her own, that the collectively reported verdict is truly his or hers.”).

Montana law is clear. Section 25-7-501(2) requires the court or the clerk to “ask[] each juror if it is the **juror’s** verdict.” (Emphasis added). There is no ambiguity in this statutory command; the statute requires an individual inquiry as to each juror’s verdict. The omission of the statutorily mandated inquiry into each juror’s vote constitutes error. This is evident because the trial court failed to elicit the number of votes cast in favor and against the verdicts. No “poll” was taken, no votes were recorded. The parties do not know the number of jurors agreeing with each verdict and opposed to each verdict. The polling method used by the trial court violated § 25-7-501, MCA.

B. The Failure to Properly Poll the Jurors Requires Reversal.

Though statutorily (and not constitutionally) created, the right to poll the jurors is a substantial right. *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992). In *Martello*, this Court determined that the polling error was harmless. The same conclusion cannot be reached here because the trial court’s error defeated not just one, but all three recognized purposes underlying Camen’s substantial right to the polling of individual jurors.

The purpose of the polling of the jurors is “to determine whether the required number of jurors concur in the verdict.” *Martello*, 151 Mont. at 236, 441 P.2d at 177. The trial court’s serial questioning of jurors with a question as to how other jurors voted (“on each question did at least eight of the jurors agree on the answer?”) did not establish whether, and how many, jurors voted for the verdict on each question. At most the trial court’s questions established that each juror thought they understood the other jurors’ votes. The deprivation of the right to know the number of votes cast in favor and against the verdict is not harmless.

Second, the trial court’s faulty inquiry of the jury defeated the second purpose of § 25-7-501(2): revealing and remedying juror coercion or exhaustion. Through polling, the parties and the court are able to ascertain “that no one has been coerced or induced to sign a verdict to which he does not fully assent.” *Verser v. Barfield*, 741 F.3d 734, 738 (7th Cir. 2013). Juror coercion – and the need for individual inquiry of each juror’s vote – has been a concern for over a century. The United States Supreme Court first identified individual juror polling as a remedy for potential juror intimidation in 1899. *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). As explained by the New York Court of Appeals:

That jurors “should be enabled to avail themselves of the *locus penitentiae*, and correct a verdict which they have mistaken, or about which, upon further reflection, they have doubt” (*Blackley v. Sheldon*, 7 Johns 32, 33-34 (1810)) has been recognized in the vast majority of jurisdictions, and the polling of jurors in open court has been viewed as essential to the provision of such locus, since, without the device, the reservations of individual jurors about a verdict to which they may have assented in the enforced privacy of the jury room under misapprehension, pressure from fellow jurors or out of sheer exhaustion, would likely never gain timely expression.

Duffy v. Vogel, 905 N.E.2d 1175, 1176 12 N.Y. 3d 169, 173 (N.Y. 2009).

In this case, the jury deliberated for eleven hours over the course of two days. On the first day of deliberations, the jury heard evidence, arguments, and then deliberated until 10:17 p.m. The jury returned the next day at 8:45 a.m. The possibility of coercion is a very real concern in such circumstances. Whether such coercion existed cannot be established through juror affidavits. *See Sandman v. Farmers Ins. Exchange*, 1998 MT 286, ¶ 28, 291 Mont. 456, 969 P.2d 277 (a jury’s verdict may not be impeached by affidavits concerning internal influences). The incorrect “polling” conducted by the trial court deprived Camen of the only method of determining whether any juror felt coerced.

Finally, a correct polling of jurors ensures each juror’s “accountability for the verdict, ‘creating individual responsibility’ and ferreting out any dissent that, for whatever reason, was not reflected in the verdict as announced.” *Verser*, 741 F.3d at 738, quoting *United States v. Shepherd*, 576 F.2d 719, 725 (7th Cir. 1978).

The process is designed to determine ‘that one or more jurors [agreed] to [the] verdict in the jury room[,] but [is] unwilling to stand by it in open court.’ ”

Montoya v. Barragan, 220 Cal App. 4th 1214, 14 Cal. Rptr. 3d 100 (2d Dist. 2013), quoting *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 256, 92 Cal.Rptr.3d 862, 206 P.3d 403.) Indeed, a juror “may declare at the last minute that such verdict is not the verdict of that juror.” *Id.*

The trial court’s “poll” of the jury violated § 25-7-501, MCA. The error was not harmless. Camen was deprived of his substantial right to know the vote count on each verdict and to ascertain whether the proper number of jurors agreed. He was deprived of the only method of testing juror coercion. He was deprived of establishing each juror’s accountability for the verdict. The prejudice incurred requires reversal and remand for a new trial.

CONCLUSION

The trial court abused its discretion in refusing to instruct the jury on the theory of the case presented by Camen and supported by substantial evidence. The failure to instruct on the theory of Camen’s case constitutes reversible error. The trial court also abused its discretion in allowing Dr. Wheeler to testify to non-disclosed expert opinions and beyond the appropriate scope of the examination.

Finally, the trial court erred in polling the jury in a manner which conflicts with clear statutory authority.

Each error, and the accumulation of error, substantially prejudiced Camen's right to a fair trial. Any one of the trial court's errors, standing alone, requires reversal and remand for a new trial.

Plaintiff Brett Camen respectfully requests that the judgment of the trial court be reversed, and that the matter be remanded for a new trial.

DATED this 21st day of September, 2022.

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Karen Zahka
TRAIL LAWYERS FOR JUSTICE

Martha Sheehy
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BY /s/Martha Sheehy
Martha Sheehy

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 9,209 words is less than the 10,000 word limit, exclusive of table and certificates.

/s/Martha Sheehy
Martha Sheehy

Judgment

District Court Docket # 141

Hon. Dan Wilson
District Court Judge, Dept. 4
Flathead County Justice Center
920 South Main Street, Suite 310
Kalispell, Montana 59901
406-758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

<p>BRETT CAMEN, Plaintiff, vs. GLACIER EYE CLINIC, P.C., AND KALISPELL REGIONAL MEDICAL CENTER, INC., Defendants.</p>	<p>Cause No.: DV-15-2019-361 (D)</p> <p style="text-align: center;">JUDGMENT</p>
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This action was tried before the Court and a jury January 31 – February 8, 2022. The issues were tried, and the jury rendered its verdict on February 9, 2022, in favor of the Defendants and against the Plaintiff.

In accordance with the jury’s verdict, a copy of which is attached hereto, Judgment is hereby entered in favor of Defendants Glacier Eye Clinic, P.C. and Kalispell Regional Medical Center, Inc. and against Plaintiff. Plaintiff shall take nothing by way of his Complaint.

SO ORDERED.

DATED: February 17, 2022.



Hon. Dan Wilson
District Court Judge

cc: Craig Daue, Nick Rowley, Ben Novotny, Karen Zahka
Jori L. Quinlan, Kevin J. Kuhn
Sean Goicoechea, Katrina Feller, J. Kent Mathewson

CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-21-2022:

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