IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0123

BRETT CAMEN,
Plaintiff and Appellant,
v.

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

APPELLEE KALISPELL REGIONAL MEDICAL CENTER'S RESPONSE BRIEF

On Appeal from the Montana Eleventh Judicial District Court, Flathead County, the Hon. Dan Wilson Presiding

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1. Whether the District Court abused its discretion by declining to give proportional duty and loss of chance instructions when it found the instructions were not supported by the facts and would confuse the jury.
2. Whether the District Court abused its discretion in allowing a defendant doctor to testify as a hybrid fact/expert witness about the standard of care applicable to both his specialty and the specialty of another specialist.
3. Whether Appellee waived its argument that the District Court erred in polling the jury and, if not, whether the poll—which asked each juror individually to confirm it was the jury's verdict on which eight jurors agreed—complied with § 25-7-501, MCA and, if not, whether a new trial is an appropriate remedy where the error could not have affected the result of the case.

STATEMENT OF THE FACTS

Dr. Marcus Wheeler is a board-certified pediatric neurologist who has practiced at Kalispell Regional Medical Center (KRMC) since 2013. Tr. 1281:2-7. He received his medical degree from Dartmouth Medical School; completed a two-year pediatric residency at University of Minnesota, followed by a one-year adult neurology residency at University of Colorado, including a month in the neuro-ophthalmology program; and completed a two-year fellowship in pediatric neurology

at Denver Children's Hospital through University of Colorado. Tr. 1279:14–1280:24; KRMC App. 193–97. Dr. Wheeler sees patients at KRMC and outreach sites around Montana and, as one of only two pediatric neurologists in the state until recently, frequently consults with local providers via telephone. Tr. 1281:21–1283:4.

On December 19, 2017, Dr. Wheeler received two calls from providers treating Appellant Brett Camen in Libby, Montana. Tr. 1283:23-1284:2; KRMC App. 167. First, Dr. Steven Sorensen, an optometrist who had seen Camen the previous day, reported that Camen started experiencing headaches around Thanksgiving and recently had some vision loss and intermittent double vision. Tr. 1123:6–20; KRMC App. 79, 109–13. He also stated Camen had papilledema, or swelling of the optic nerve, which is associated with increased intracranial pressure. KRMC App. 109–13. Dr. Wheeler also spoke with Matthew Bauer, P.A., Camen's primary care provider. Tr. 1289:21-25; KRMC App. 79, 167.

Dr. Wheeler immediately recommended testing to assist with diagnosing Camen's condition so treatment could commence as soon as possible. KRMC App. 79. He advised arranging a lumbar puncture to measure intracranial pressure, labs to test cerebral spinal fluid, KRMC App. 79, and an MRI with and without contrast, KRMC App. 167. Together, these tests would confirm whether Camen had high intracranial pressure and identify or eliminate various possible causes of that

pressure, such as a brain tumor or infection. 2 Tr. 1099:9-18. The same day, Dr. Wheeler scheduled Camen for his first-available appointment on January 3, 2018. KRMC App. 78. Dr. Wheeler's office also booked the first available neurosurgery appointment in case medical treatment was ineffective. Tr. 1142:5-13, 1340:6-9; KRMC App. 74.

Bauer's office followed Dr. Wheeler's recommendations by scheduling an MRI at KRMC for December 20, followed by a lumbar puncture on December 21. Tr. 1288:20-1289:4; KRMC App. 167. Dr. Wheeler received and reviewed the MRI, pathology, and lumbar puncture results December 21. 2 Tr. 1289:8-14.

Dr. Wheeler discussed the results with Bauer the same day. Tr. 1289:8-14; KRMC App. 165. He advised that the MRI appeared normal, as did the pathology results, once the presence of blood cells was accounted for by the traumatic brain tap. Camen App. 21. But the lumbar puncture indicated high intracranial pressure. *Id.* These results and the negative CT Camen received at his local ER on December 17 supported a diagnosis of idiopathic intracranial hypertension (IIH). Camen App. 13; KRMC App. 165.

Dr. Wheeler recommended Bauer immediately initiate the first line of treatment for IIH, the medication Diamox, which reduces production of cerebrospinal fluid. KRMC App. 165. He recommended a low starting dose of 250

milligrams twice daily to balance Camen's sensitivity to a similar medication against his need for an effective dosage. Tr. 1121:1-11; App. 165. As always when consulting with other providers, Dr. Wheeler advised Bauer to contact him or, if he was not available, KRMC's on-call neurologist, if Camen's condition worsened or Diamox did not improve his symptoms. Tr. 1127:14-22.

Acting on Dr. Wheeler's recommendation, Bauer prescribed Diamox that same day. Tr. 1483:7-14; KRMC App. 165. Bauer scheduled a follow-up appointment with Camen and encouraged Camen's mother to contact him if concerns arose in the meantime. App. 165. Bauer also called Dr. Sorensen to confirm follow-up visual care plans. Tr. 1289:19–1290:9; KRMC App. 165.

On December 27, Bauer saw Camen for a follow-up appointment for "Management of pseudotumor cerebri," and Camen reported he "started seeing improvement 3 days" after initiating Diamox, including "significant improvement in his [headaches] and possibly a slight improvement in his vision, but he is unsure." KRMC App. 174. Bauer observed reduced swelling in both eyes compared to Camen's previous exam. KRMC App. 175. On January 2, Camen's mother called Bauer to report Camen was nauseous, a common side effect of Diamox, but was otherwise "doing well." KRMC App. 173.

No one—not Bauer, Dr. Sorensen, or Camen's mother—contacted Dr. Wheeler again prior to Camen's January 3 appointment. 2 Tr. 1284:25-1285:6. Nor did anyone contact the on-call neurologist. 2 Tr. 1127:23-1128:4, 1249:17–1250:4; 1329:23–1330:4. Rather, both Camen and his mother reported to Bauer that—consistent with most cases of IIH—Camen experienced relief from his headaches and improved vision after a few days on the Diamox. KRMC App. 173.

Dr. Wheeler saw Camen as planned on January 3, 2018, assessing his progress after approximately two weeks on Diamox. Camen App. 21-23. As Diamox can take "weeks to months" to manifest its full effects, Dr. Wheeler was pleased Camen's headaches had "improved significantly" and his vision had "improved a bit." Tr. 11:76:12-1177:2; Camen App. 21. Dr. Wheeler noted that Camen "continue[d] to have fairly impaired vision in his left eye, but his right eye ha[d] improved over the past couple of weeks." Camen App. 21. Because Camen's symptoms of impairment had improved significantly and "he [was] already having some nausea with the medication," even on a low dose, Dr. Wheeler continued the Diamox at the same dosage. *Id.* at 23. He advised Camen to return in six weeks "or sooner if new problems arise in the interim," and he encouraged him to "contact [him] with any further questions or concerns." *Id.*

Considering the improvements Camen reported, Dr. Wheeler was cautiously optimistic that Diamox would be an effective course of therapy. Tr. 1176:12–1178:1: 1185:6–19, 1330:6–24. IIH is a relatively rare condition, affecting only 1 to 3 in 100,000 people annually. KRMC App. 55. It is common enough, however, that Dr. Wheeler has successfully treated several other patients with IIH. Tr. 1087:20-23. Camen's presentation was typical of IIH patients. Tr. 1118:15-1119:21; 1324:2-14. He had severe headaches that were worse standing up than lying down, papilledema, some loss of visual acuity, and some loss of visual fields. Camen App. 21; KRMC App. 95. He had also responded positively to Diamox, Camen App. 21, which was consistent with Dr. Wheeler's experience that, over time, Diamox is generally effective at reducing intracranial pressure, resolving headaches, and, usually, improving vision, although permanent vision loss can still occur. Tr. 1119:11–16; 1121:10–18, 1139:16–20; 1176:18–1177:6; 1325:2-9. Dr. Wheeler aimed to provide the science-based treatment most likely to give Camen his best chance of recouping his vision while avoiding the life-time risks associated with a permanent shunt: abdominal pain and bowel perforation; CSF leak; general anesthesia risks; infections, including meningitis; injury to the brain; strokes; 48% – 86% chance of shunt failure; permanent restriction of contact sports and activities; revision brain shunt surgery; and death. Tr. 1098:4-1112:2, 1235:10-19, 1288:3-13.

Dr. Wheeler also knew that in rare cases, patients may present with "fulminant" IIH, which is characterized by its severity and speed of onset. 2 Tr. 1088:9-1090:7. At trial, the various medical experts, including Camen's own experts, disagreed as to when a case can be diagnosed as "fulminant." Tr. 810:8-812:13; Tr. 1088:901090:7; KRMC App. 4–3, 36, 41, 48-49. Dr. Wheeler understood that emergency surgical treatment is required when a patient presents with fulminant IIH. Tr. 1240:1-11. Camen, however, did not demonstrate "severe" vision loss at the time Dr. Wheeler was consulted December 19 or at his January 3 appointment. Camen App. 5, 21-23. Rather, Camen's moderate vision loss had stabilized or was improving, and his headaches improved significantly. Camen App. 21.

On January 4, which was the day after the appointment with Dr. Wheeler, Camen's mother told optometrist Sorensen that Camen's visual acuity was declining. KRMC App. 11. Dr. Wheeler was not informed of this change. Tr. 1331:1-7. Instead, Camen saw a pediatric ophthalmologist, Dr. Gus Stein, on January 5. Camen App. 24. Like neurologists, ophthalmologists regularly diagnose and treat IIH, but their specialty allows them to better measure and follow changes in the patient's visual acuity and visual fields. Tr. 1131:1-22; 1955:22-1956:15. Consistent with what he had told Dr. Wheeler on January 3, Camen told Dr. Stein that his headaches improved immediately with Diamox, but his head was "now hurting again

today." Camen App. 24. Dr. Stein increased the Diamox prescription to 500 milligrams twice a day and planned to confer with Dr. Wheeler. *Id.*

Dr. Stein saw Camen again January 9 and 12, conferring with Dr. Wheeler in the meantime. Tr. 967:14-18, 1006:21-24; 1331:21-1332:5. Dr. Wheeler concurred with Dr. Stein's decisions to increase and ultimately maximize the dosage of Diamox and to order a second lumbar puncture on January 10 for therapeutic and diagnostic purposes to test for leukemia. Camen App. 24; 1 Tr. 979:9-979:25. Simultaneously, Dr. Wheeler's office communicated with the neurosurgery department to ensure Camen had an appointment there if surgery became necessary. Tr. 1142:5-13, 1340:6-9; KRMC App. 174.

The second lumbar puncture ruled out leukemia (Camen App. 25-26), but on January 12, despite maximal medical treatment for IIH, Camen's visual acuity dropped significantly from 20/100 to 20/400 in the left eye. KRMC App. 150. Dr. Stein increased the Diamox dosage to 3000 milligrams per day and referred Camen emergently to neurosurgery for placement of a shunt. KRMC App. 149. A permanent shunt was placed in Camen's brain on January 15. KRMC App. 91. After placement of the shunt, Camen's visual acuity improved dramatically, measuring 20/60 in the right eye and 20/100 in the left eye on January 30. KRMC App. 148. But two weeks later—a month after the shunt was placed—his vision suddenly worsened, dropping

to 20/400 in the left eye by February 12 (KRMC App. 147, 68), and eventually worsened to the point that he is now legally blind, KRMC App. 12. As the jury heard, numerous doctors—including subsequent treating physicians and the experts in this case—have different, conflicting theories about why his vision improved only to worsen again weeks later. Tr. 906:2-11; 1872:24-1873:9; KRMC App. 12, 17-19, 30-31.

Camen sued KRMC (Dr. Wheeler's employer), and Glacier Eye Clinic (Dr. Stein's employer) (together, "the Doctors"), asserting negligence. After a week-long jury trial before the Honorable Dan Wilson, the jury returned a verdict finding neither of the Doctors negligent. Camen's appeal followed.

STANDARDS OF REVIEW

Whether the trial court properly instructed the jury is reviewed for abuse of discretion, *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶22, 357 Mont. 293, 239 P.3d 904, as is a trial court's ruling on the admissibility of expert testimony, *State v. Villanueva*, 2021 MT 277, ¶24, 406 Mont. 149, 497 P.3d 586. "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Peterson*, ¶22. A trial court's interpretation of a statute is a question of

law reviewed de novo. *See Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶19, 368 Mont. 101, 293 P.3d 817.

Ultimately, "[u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Mont. R. Civ. P. 61. "A party's substantial right is not affected unless the error is of such character to have affected the result of the case." *Steffensmier v. Huebner,* 2018 MT 173, ¶7, 392 Mont. 80, 422 P.3d 95 (quotation omitted). "This Court must exercise the greatest self-restraint in interfering with the constitutionally mandated process of jury decision." *Id.* (quotation omitted).

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in rejecting Camen's proposed proportionate duty and loss of chance instructions because they both were factually unsupported and would confuse the jury. As to the proportionate duty instruction, it is a bad fit for medical malpractice cases because it invites the jury, rather than experts, to establish the standard of care, and ignores that a doctor must navigate numerous competing risks, not just one. As to the loss of chance instruction, it was

based on case law that had been superseded by § 27-1-739, MCA, and was not supported by the facts. But even if the District Court erred in failing to give either instruction (it did not), any error was harmless.

Nor did the District Court abuse its discretion in allowing Dr. Wheeler's testimony. Camen's counsel told the jury Dr. Wheeler was an expert in the case. Dr. Wheeler was properly disclosed as a hybrid fact/expert witness. Under § 26–2–601, MCA, he permissibly testified to the standard of care applicable to Dr. Stein because their relevant standard of care in their practice areas is the same, they jointly conferred about treatment, and because the testimony was offered to explain Dr. Wheeler's medical reasoning and interaction with Dr. Stein. Further, he was properly allowed to offer an explanation when a "yes" or "no" would not have accurately answered a question.

Finally, the District Court did not abuse its discretion in conducting the jury poll. Montana recognizes only one purpose for the statutory right to poll a jury: determining "whether the required number of jurors concur in the verdict." *Martello v. Darlow*, 151 Mont. 232, 236, 441 P.2d 175, 177 (Mont. 1968). A party claiming error in a trial court's polling method must prove that the error affected his substantial rights. *Id.* Here, Camen did not preserve his jury polling argument for appeal, and, even if he had, the District Court's polling method substantially complied with

statute and fulfilled the purpose of the poll. But even assuming the District Court erred, it was harmless because it did not affect the outcome of the case.

ARGUMENT

I. The District Court did not abuse its discretion in refusing Camen's proposed proportionate duty and loss of chance instructions.

The District Court correctly declined to give the proportionate duty and loss of chance instructions. The jury instructions fully and fairly instructed on the law applicable to this case, including the duty and causation elements. The jury received instructions on the four essential elements of a negligence claim, Camen App. 161; the requirement that the plaintiff establish the elements of duty, breach, and causation by expert testimony, *id.* 164; that the breach of the established duty is negligence, *id.* 165; and that the plaintiff must prove the defendant caused any injury, *id.* 167. Those instructions were adequate.

A. Camen was not entitled to the proportionate duty instruction.

The District Court properly rejected Camen's proposed instruction on proportionate duty, which stated:

> The care required of the Defendant 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.

Camen App. 133. The District Court instructed the jury to consider the reasonableness of how the Doctors weighed the risks in this case, *see* Camen App. 165 (instruction on breach of duty), but correctly concluded that the proportionate duty instruction risked confusing the jury and, if given, would constitute legal error because it would effectively allow the jury to determine the applicable standard of care.

> [B]y giving this proposed instruction, 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.

See Tr. 1640.

These concerns are well-founded. The plain language of the instruction addresses an "act" and the "danger" resulting from it. It applies to situations in which there is a single obvious danger that heightens the risk of an act. *See e.g.* Restatement (Second) Torts § 298 (examples involving firearms, explosives, poisons, railway crossings, etc.). While the instruction may be appropriate in some negligence cases, it is inappropriate in medical malpractice cases that involve multiple, competing risks and multiple medical decisions. These must be the subject of expert testimony, *Montana Deaconess Hospital v. Gratton*, 169 Mont. 185, 183, 545 P.2d 670, 672 (1976), which takes into consideration the risks of the specific

condition at issue, as well as the potential risks of alternative diagnoses and different treatment options. Here, for example, the Doctors had to consider the life-long risks of a permanent shunt, the risk Camen could have a different condition such as leukemia, as well as the possibility Camen could suffer vision loss. As the District Court correctly determined, the instruction would have encouraged the jury, independent of the experts' opinions, to determine the standard of care and inappropriately suggested that one danger—blindness—outweighed all the others considered by the Doctors.

Camen argues the District Court erred in refusing to offer this instruction because the evidence warranted "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." Op. Br. at 22. But under Camen's approach, this instruction would be required in every medical malpractice case because weighing varying degrees of danger and assessing likelihoods of risk is intrinsic to the exercise of physician judgment. Courts in other jurisdictions have explicitly rejected the instruction as improper in a medical malpractice case for similar reasons that the District Court rejected it here. *See, e.g. Sulton v. HealthSouth Corp.*, 734 S.E.2d 641, 644 (S.C. 2012); *Pittman v. Stevens,* 613 S.E. 2d 378, 343 (S.C. 2005); *Hinkle v. Cleveland Clinic Found.*, 823 N.E. 2d 945, 960 (Ohio App. 2004). *See also Robertson*

v. Richards, 769 P.2d 505, 510, 534 (Idaho 1987) (not error to decline general negligence instructions when court properly instructed jury on medical malpractice).

The cases Camen cites in support of his argument illustrate the distinction between malpractice cases requiring expert testimony and other negligence cases. In *Schuff v. Jackson*, 2002 MT 215, 311 Mont. 312, 55 P.3d 837, the plaintiffs were passengers in a boat driven by the defendant along a stretch of river that he knew required navigating an underwater rock formation, and his failure to do so injured the plaintiffs. ¶¶6–8. The Court held that the district court erred in failing to instruct on proportionate duty because "[the defendant's] knowledge of the rock formation's existence and its potential danger increased the duty of care imposed on him, and the jury should have been informed of that as a matter of law." *Id.* ¶37.

Similarly, in *Dale v. Three Rivers Telephone Cooperatives, Inc.*, 2004 MT 74, 320 Mont. 401, 87 P.3d 489, the plaintiffs asserted negligence against the defendant for plowing underground telephone lines in dry, hot conditions that gave rise to a wildfire. ¶8. The district court did not instruct on proportionate duty, and the Court held that this omission was error because "there [wa]s sufficient evidence to show that [the defendant] was aware of the danger involved in their activity." *Id.* ¶15.

Neither case required expert testimony to determine the standard of care, and in both cases the defendants undertook a commonplace activity made more

dangerous by unusual conditions of which the defendants were aware. By contrast, there was no discrete danger dichotomy here. *See Pittman*, 613 S.E. 2d at 343 ("Every medical decision encompasses varying degrees of danger."). Rather, Dr. Wheeler testified about using his best judgment to recover Camen's vision "without subjecting him to permanent lifetime risks of a shunt." Tr. 1235. That judgment also included treating Camen with Diamox, ruling out other risky conditions, assessing the risks associated with general anesthesia, and assessing the risk of blindness in the absence of surgery or even with surgery.

At base, unlike in *Schuff* and *Dale*, the underlying situation in this case was not a commonplace activity made more dangerous by a known, unusual circumstance. The Doctors were tasked with exercising their medical judgment to formulate a reasonable treatment plan for Camen while balancing the risks associated with every treatment choice against both known and unknown outcomes. Because such conduct is outside the ascertainment of a layperson, *see Gratton*, 169 Mont. at 183, 545 P.2d at 672, this jury was in a fundamentally different position than the juries in *Schuff* and *Dale.* The jury instruction placing determination of the standard of care in the hands of experts recognizes the complex dangers inherent in many medical malpractice cases, which appropriately allows the jury to consider whether the Doctors met that standard of care in approaching the multiple risks. Thus, any

proportionate duty instruction risked confusing that analysis, and it was properly rejected by the District Court.

In any event, the District Court did not abuse its discretion because it did not act "arbitrarily without employment of conscientious judgment or exceed[] the bounds of reason resulting in substantial injustice." *Peterson*, ¶22. The District Court articulated its reasons for rejecting Camen's proposed instruction—specifically, that it would confuse the jury and risk the jury establishing the standard of care, rather than the experts. Tr. 1640. Consideration of these risks constitutes the exercise of "conscientious judgment." And, while Camen alleges that the District Court failed to properly instruct the jury, he fails to articulate how this alleged failure prejudiced him. He argues that "[n]o element of a negligence claim is more important than duty," yet the jury was instructed on duty, Camen App. 165, and Camen makes no link between that conclusory statement and any prejudice. The necessary showing of prejudice is therefore inadequately briefed, and the Court therefore need not address the asserted instructional error. *State v. Gunderson*, 2010 MT 166, ¶12, 357 Mont. 142, 144, 237 P.3d 74.

In short, the jury was fully instructed on the Doctors' duty, the District Court did not abuse its discretion in rejecting the instruction, and Camen failed to

demonstrate prejudice even if the proportionate duty instruction had been appropriate under the facts of this case.

B. The District Court did not abuse its discretion in rejecting the loss of chance instruction, and, even if it had, any error was harmless.

The District Court properly instructed on the elements of negligence in a medical malpractice case and rejected the loss of chance instruction because the proposed loss of chance instruction was an incorrect statement of the law and factually unsupported.

First, Camen's proposed instruction was modeled after the pattern jury instruction and this Court's decision in *Aasheim v. Humberger*, 215 Mont. 127, 132, 695 P.2d 824, 827–28 (1985), which were both modified by § 27-1-739. Tr. 1641-42; 1644-45. The statute requires additional considerations and proof beyond that in the pattern instruction so that the pattern instruction is incomplete. *See* § 1–1–108, MCA ("[T]here is no common law in any case where the law is declared by statute."). In particular, the statute differentiates between recovery that is "more likely than not" and recovery that is "not more likely than not," *see* § 27–1–739(3), while the pattern instruction makes no such distinction. The District Court correctly concluded § 27–1–739(3) superseded the pattern jury instruction Camen offered. Tr. 1655. Instructing the jury with an instruction that misstated the law because its language predated the controlling statute would have been an abuse of discretion. *Schuff*, ¶ 38.

Second, the facts did not support an instruction under § 27-1-739 (had Camen offered it) because Camen's expert acknowledged contradictory support as to whether Camen's chance of some recovery would be more likely than not. *See* KRMC App. 23–24 (acknowledging chance of improved vision from shunt ranged between 50% and 80%). If it was more likely than not, § 27-1-739(3)(a) applies. If he did not meet the more likely than not threshold, the very different formulation under § 27-1-739(3)(b) applies. Here, the District Court found that "the evidence that's presented in testimony of the experts has been stated both in terms of the chances for maintaining the status quo and/or the chance of recovering some vision." Tr. 1656. Indeed, there was never any testimony indicating Camen would have fully "recovered" as expected by the statute, under any circumstance. Thus, the testimony did not support an instruction under the statute and refusing it was not an abuse of discretion.

But this Court need not resolve that question because, even if the District Court erred, it was harmless as a matter of law. In *Steffensmier*, the trial court rejected the plaintiff's proposed loss of chance instruction based on a misunderstanding of the law, but the trial court's error was nevertheless held harmless because the jury found the defendant not negligent, and so it never reached the issue of causation. *Id.* ¶12. That reasoning governs here.

"To prove negligence, a plaintiff must establish: (1) the defendant owed the plaintiff; (2) the defendant breached the duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) resulting damages." *Schuff*, ¶ 17. The "loss of chance" theory relates to the third element of negligence: causation. *Steffensmier*, ¶11.

The difference between breach of duty (negligence) and causation may be, as Camen states, "a highly technical legal distinction." Op. Br. 33. But this Court has fleshed out that distinction: "[t]he element of cause becomes operative only if a duty is breached and damages result, whereupon the defendant becomes liable for the damages directly caused by his breach of duty." *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 367, 916 P.2d 122, 137 (1996) (quoting 1 *Modern Tort Law* § 5.02 at 159–62). Put another way, the jury need address causation only if it first finds that the defendant was negligent—that is, if the jury finds that the defendant breached the duty of care.

Camen did not carry his burden of proving a breach of duty, and his failure to do so ended the negligence inquiry before causation became relevant. *Beehler v. E. Radiological Assocs.*, 2012 MT 260, ¶18, 367 Mont. 21, 289 P.3d 131. That is precisely the approach affirmed in *Steffensmier*, where a jury found the defendant-podiatrist not negligent. ¶6. The special verdict form in *Steffensmier* first "asked whether [the

defendant] was negligent in his treatment of [the patient]. The form instructed the jury not to answer further questions if it answered 'No.' The jury determined that [the defendant] was not negligent in his treatment and did not reach the questions pertaining to causation or damages." *Id.* On appeal the plaintiff argued the failure to instruct on loss of chance constituted reversible error. This Court nonetheless held the error harmless because the "jury found [the defendant] was not negligent. It did not reach the issue of causation." *Id.* ¶12. This Court "will not reverse for an alleged error when the outcome would have been the same had the error not been committed." *Id.*

There is no legitimate argument that *Steffensmier's* harmless error analysis is not equally applicable here. In a verdict form nearly identical to the verdict form in *Steffensmier*, ¶6—the difference being attributable to the fact that there were two defendants, rather than one, in this case—the jury was asked to determine whether the Doctors were negligent. The first question on the special verdict form states, "Was [Glacier Eye Clinic] (Dr. Stein) negligent? If you answered 'Yes,' you must answer Question 2. If you have answered 'No' to this question, go to Question 3." Camen App. 176. The jury marked "No" and proceeded to Question 3. *Id.* That question states, "Was [Kalispell Regional Medical Center] (Dr. Wheeler) negligent? If you answered 'Yes' to this question, you must answer Question 4. If you have

answered 'No' to this question, and 'No' to Question 1 or Question 2, you are done and please notify the Bailiff that you have reached a verdict." Camen App. 177.

Thus, like *Steffensmier*, the jury found the Doctors were not negligent—under the jury instructions, this meant the jury found that neither doctor violated his duty to "use that skill and learning ordinarily used in like cases by other doctors in good standing practicing in the same specialty and who hold the same national board certification." Camen App. 165. The jury therefore did not reach the causation question, and any error from the District Court in rejecting a causation instruction on the loss of chance was harmless. *Steffensmier*, ¶12.

Camen's attempt to distinguish *Steffensmier* by asserting that the jury was improperly "instructed that proof of 'negligence' included causation," Op. Br. 33, ignores the extensive and proper instructions on negligence, and the Court's clear delineation between breach of duty (negligence) and causation. Consistent with *Schuff*, ¶ 17, Instruction No. 17 states Camen had the burden of proving "(1) That the Defendant was negligent; (2) That the Plaintiff was injured; (3) That the Defendant's negligence was a cause of the injury to the Plaintiff; (4) The amount of money that will compensate the Plaintiff for his injury." Camen App. 161. And consistent with *Beehler*, Instruction No. 21 explains that negligence is the violation of "the duty of a board certified doctor to use that skill and learning ordinarily used

in like cases by other doctors in good standing practicing in that same specialty and who hold the same national board certification. **The violation of this duty is negligence**." Camen App. 165 (emphasis added). Likewise, Instruction 22 properly instructed the jury that "whether the doctor was negligent in performing professional services the proper test is whether the doctor's performance met the accepted standards of skill and care at the time the services were provided." Camen App. 166.

The Court then properly instructed the jury on causation. Instruction No. 23 informs the jury the fact of an injury does not, per se, constitute negligence in a medical malpractice case, but rather the law "only imposes liability for a breach of a legal duty by a physician proximately causing injury to the plaintiff." Camen App. 167. Instruction No. 24 correctly explains that "[a] defendant is liable if his negligence was a cause of plaintiff's injury. A defendant's conduct is a cause of the plaintiff's injury if it is a substantial factor in bringing it about." Camen App. 168.

Camen evidently takes issue with Instruction 20, but his criticism is unfounded. Instruction No. 20 explains that medical malpractice cases require expert testimony to establish negligence. Camen App. 164. It instructs that a Plaintiff must present expert testimony on three elements: "1) the standard of care applicable to each defendant physician; 2) a departure from the applicable standard of care by

each defendant physician; 3) that the departure from the standard of care caused injury to Plaintiff." *Id.* This is a correct statement of the law. A plaintiff may recover for negligence only if he proves all required elements, one of which is causation. *Schuff*, ¶17. Reading the instructions in their entirety, *Peterson*, ¶22, it is beyond reasonable dispute that the instructions draw the correct distinction between breach of duty and causation.

Camen's attempt to distinguish *Steffensmier* is unavailing, and this Court's conclusion that any potential error in instructing the jury on loss of chance is harmless applies with equal force here.

II. Dr. Wheeler's testimony did not exceed his hybrid disclosure, was responsive to questioning, and was helpful to the jury.

Camen incorrectly argues that allowing Dr. Wheeler's testimony on the duty of care was an abuse of discretion because it gave the jury the impression that Dr. Wheeler, rather the court, was instructing on that duty.

As noted, Camen had the burden of establishing the standard of care by expert testimony "unless the conduct is readily ascertainable to a layman." *Gratton*, 169 Mont. at 189. Defendants may rebut such evidence on cross examination of a plaintiff's experts and may also present their own expert testimony on the standard of care. Contrary to Camen's assertion that this reliance on expert witness testimony impermissibly removes the burden of defining duty from the trial court to the expert

witnesses, Op. Br. at 39, expert testimony is required in most medical malpractice cases because the medical conditions, treatment options, and risks associated with each alternative are not "readily ascertainable" to a lay jury (or most judges).

KRMC elected not to present any retained experts at trial, but instead relied on its cross-examination of Camen's experts and Dr. Wheeler's testimony. KRMC disclosed Dr. Wheeler as a hybrid fact/expert witness "due to [his] contemporaneous knowledge and involvement" in Camen's treatment, "as well as [his] education, training, and experience, which give [him] the medical, technical, or otherwise specialized knowledge that will assist the trier of fact to understand the evidence or determine a fact in issue." KRMC Expert Witness Disclosure, 6 (June 12, 2020).

In Montana, hybrid expert/fact witnesses such as treating providers must be disclosed in the expert disclosure process, but parties need not provide a separate Rule 26(b)(4)(A)(i) disclosure of the substance and bases of their opinions if the opposing party has "adequate notice" of the providers' testimony. *Norris v. Fritz*, 2012 MT 27, ¶¶ 31–35, 364 Mont. 63, 270 P.3d 79. Generally, an opposing party has adequate notice of a treating provider's opinions about the standard of care applicable to his treatment of a patient: such opinions are "fairly predictable" based on the medical records, the provider's actions, and the fact a treating provider's

understanding of the standard of care is expected to "conform to his medical training, current medical literature, and to national practice." *Id.* ¶¶37–38, 42. The opposing party may depose the treating provider and cannot avoid basic standard of care questions at a deposition to claim surprise at trial. *Id.* ¶42.

Camen makes several blanket statements that Dr. Wheeler was allowed to testify outside the scope of his disclosure as a treating physician. But the Court should not allow Camen's generalizations to enlarge his arguments. Out of 254 pages of testimony, Camen challenges Dr. Wheeler's testimony on only two responses. Tr. 1087–1341.[1] The Court need only consider the following testimony:

> Q: We know, from testimony in this case, that there was follow-up after your visit, in fact, two days afterwards, by Dr. Stein. Was that, in your view, reasonable and appropriate for Dr. Stein to then begin, for the first time, his evaluation and assessment of the patient?
>
> . . .
>
> A: Yes, I feel that was reasonable.
>
> Q: There was a conference between you and Dr. Stein on January 9th with respect to the lumbar puncture. And I think you touched on this. Was that conversation and that joining of two specialties, you from

[1] Notably, at trial Camen successfully objected to Dr. Wheeler offering opinions on the cause of Camen's blindness. Tr. 1305–13. Camen also objected to Dr. Wheeler testimony on post-injury nerve function. Tr. 1316. But the District Court explained its inclination that any neurologist would have that knowledge, and Camen agreed and withdrew his objection, acknowledging Dr. Wheeler was not a retained expert, but "a treating expert. . . . [h]e is a hybrid." Tr. 1316–20.

pediatric neurology, Dr. Stein from pediatric ophthalmology, was that reasonable, under the circumstances?

A: Yes, absolutely.

Tr. 1331–32.

These limited statements—that it was appropriate (i) for Dr. Stein to assess Camen on January 5 and (ii) for Dr. Wheeler and Dr. Stein to confer about a lumbar puncture on January 9—is not testimony, as Camen characterizes it, that "Dr. Stein . . . satisfied the standard of care in treating Brett Camen" or testimony constituting impermissible bolstering of Dr. Stein's defense. Op. Br. 37–38. In the context of the entire trial, which included five days of testimony, allowing these two statements was not an abuse of discretion, did not confuse the jury, and did not unfairly tilt the scales in Dr. Stein's favor.

A. Dr. Wheeler's limited comments about Dr. Stein were offered for a permissible purpose.

The testimony Camen challenges was most relevant not to Dr. Stein's standard of care, but to Dr. Wheeler's, and it was therefore offered for a proper purpose. Throughout trial, Camen's counsel suggested that Dr. Wheeler violated the standard of care when he did not see Camen again after January 3. Indeed, the sole question Camen asked on Dr. Wheeler's redirect sought to underscore that point: "[I]n fact, let's take it through the end of January, did you see him at any point, other than that January 3rd visit? Or was that the only time that you saw this

patient?" Tr. 1341. A critical piece of Dr. Wheeler's defense was that, from information provided to him about Camen's condition and treatment after January 3, he determined Camen was receiving appropriate treatment, concurred with Dr. Stein's decisions, and concluded there was no need for him to also see Camen again. Tr. 1143:23-1146:16; 1331:21-1332:5; 1340:15–20.

If Dr. Wheeler disagreed with Dr. Stein's treatment of Camen, he might have had a different duty. It was therefore highly relevant to his own standard of care that he believed Camen was reasonably and appropriately treated by Dr. Stein. Dr. Wheeler knew Dr. Stein saw Camen on January 5, 9, and 12; that a second lumbar puncture was performed for diagnostic and therapeutic purposes on January 10 and Camen's Diamox dosage was increased to address his worsening condition; and he participated in and concurred with many of these treatment decisions. He also recognized, as did Camen's expert Dr. Glass, that an ophthalmologist has better equipment than a neurologist to reliably and accurately measure an IIH patient's visual acuity and visual fields. KRMC App. 59–60, 63–64. Thus, Dr. Wheeler's testimony concerning the reasonableness of Dr. Stein's January 5 evaluation and the appropriateness for the two specialists to confer on the January 9 lumbar puncture was most relevant to *Dr. Wheeler*'s own standard of care, which is well within the scope of his disclosure as a treating provider. There was no prejudice to Camen in

Dr. Wheeler explaining why he did not see Camen again after the January 3 appointment.

B. If the two statements are read as expert testimony that Dr. Stein satisfied the standard of care, Dr. Wheeler was qualified to so opine.

Even if the statements are interpreted as expansively as Camen asserts, the record establishes Dr. Wheeler's qualifications to provide expert opinions on the standard of care for diagnosing and treating IIH, which ophthalmologists and neurologists diagnose and treat in substantially similar ways. § 26-2-601(3), MCA (permitting a specialist to testify as to the standard of care in another specialty upon a showing that the standards of care and practice are substantially similar).

This Court's decision in *Beehler* is instructive. There, the plaintiffs sued the defendant-radiologist after the patient-plaintiff was seen by the defendant for a spinal injection and subsequently died. ¶¶2–3. The plaintiffs attempted to introduce testimony from an expert witness on the topics of negligence and the standard of care, but the district court excluded that witness under § 26–2–601(3) because he was not a radiologist. *Id.* ¶7. This Court reversed, explaining that "Defendants and the court too narrowly conceive of the subject matter of Plaintiffs' claim and, as a result, incorrectly excluded [the] testimony." *Id.* ¶25. So, while the expert was not a radiologist, he was nonetheless qualified to testify on the standard of care because

the plaintiffs' claim involved subject matter not exclusive to radiology, and the expert's experience with that subject matter was "substantially similar." *Id.* ¶26.

Like in *Beehler*, Dr. Wheeler's experience and practice qualified him to testify regarding the standard of care for treating IIH. Camen's retained neuro-ophthalmologist, who is certified in both specialties, did not distinguish between the two when describing his opinions about the standard of care, and he opined it was appropriate for Dr. Wheeler and Dr. Stein to "exercise their collective clinical judgments as to what's appropriate for this patient based on the information they had." KRMC App. 25. Likewise, Dr. Glass, Camen's retained pediatric neurologist, testified that through his education and experience as a neurologist, he is familiar with IIH and fulminant IIH and the standard of care for treating these conditions. KRMC App. 47–48. And all experts—including Plaintiff's neuro-ophthalmologist, neurologist, and ophthalmologist, Dr. Wheeler, and Dr. Stein—testified about substantially similar subject matter: the signs and symptoms of high intracranial pressure, the need to eliminate various causes of that pressure to diagnose IIH, the standard for determining when IIH is "fulminant," treating IIH with Diamox, the appropriateness of a neurosurgery referral for a shunt, and the effects of high intracranial pressure on the optic nerve. What is more, Camen's trial counsel explicitly admitted that the standard of care for IIH treatment decisions is the same

for ophthalmologists and neurologists: "Whether you're a . . . pediatric neurologist or an ophthalmologist, or this, this is the standard of care." Tr. 47.

In sum, Dr. Wheeler was qualified to testify to the standard of care for Dr. Stein's treatment of IIH because there was ample showing that the standards of care and practice for both specialties are substantially similar when treating IIH or fulminant IIH. § 26-2-601(3;) *Beehler*, ¶26. To the extent the jury considered Dr. Wheeler's opinions to reflect on the claim against Dr. Stein, the jury was properly instructed that it could determine the weight to be given to any opinion based on the witness's qualifications and credibility. Camen App. 158.

C. The District Court was within its discretion to allow Dr. Wheeler to explain his answers where accuracy so required.

Camen asserts the District Court erred in allowing Dr. Wheeler to offer "narrative non-responsive answers" to his questions. Op. Br. at 38. A party is entitled to a responsive answer to its questions. *State v. Jones*, 48 Mont. 505, 139 P. 441, 445 (1914). Furthermore, leading questions are permitted, in the court's discretion, when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. Mont. R. Evid. 611(c). But the Rules of Evidence do not require the court to order a hostile witness to limit his answer to "yes" or "no" if such a response does not assist the "ascertainment of truth." Mont. R. Evid. 611(a). A court may allow a witness to "answer fully" or "explain his answer" if

doing so will assist the jury. *Clark v. Norris*, 226 Mont. 43, 52–53, 734 P.2d 182, 187–88 (1987); *see also Hunsaker v. Bozeman Deaconess Found.*, 179 Mont. 305, 322–326, 588 P.2d 493, 503–05 (1978).

Here, Camen called Dr. Wheeler in his case-in-chief, and he then conducted his examinations of him with both leading and open-ended questions. *See, e.g.,* Tr. 1098–99 (asking leading questions regarding Camen's condition, which Dr. Wheeler answered with "Yes" responses, then inviting Dr. Wheeler to "[n]ame the 20 conditions" that could cause those symptoms). The record demonstrates that Dr. Wheeler's answers were responsive to Camen's questions and, indeed, Camen specifically complains of Dr. Wheeler's responses only to questions about when, if ever, Camen's IIH became "fulminant," asserting Dr. Wheeler "hedged repeatedly." Op. Br. at 39. But as the District Court recognized, Dr. Wheeler disagreed with the various definitions of "fulminant IIH" previously discussed during the trial and was explaining his understanding of the precise criteria required for a fulminant IIH diagnosis and the difference between fulminant IIH and regular IIH that later evolves into a serious condition. Tr. 1088–97. Dr. Wheeler permissibly refused to concede to the incorrect definitions implicit in Camen's questions. Tr. 1088–90.

As in *Clark*, Dr. Wheeler was a physician explaining his care and treatment of a patient. 226 Mont. at 53, 734 P.2d at 188. It was helpful to the jury for Dr. Wheeler to fully and accurately answer the questions posed to him—particularly when answering the questions with only a "yes" or "no" would have left the jury with an inaccurate understanding. Moreover, Dr. Wheeler was disclosed as a hybrid expert, and KRMC had informed the District Court it intended to offer Dr. Wheeler's testimony during Camen's case-in-chief rather than recalling him later. This was Dr. Wheeler's opportunity to explain his care and limiting his testimony further would have deprived the jury of valuable evidence. *Hunsaker*, 179 Mont. at 322–326, 588 P.2d at 503–05. No evidence suggests Camen could not elicit from Dr. Wheeler the facts he considered relevant, even if the examination did not proceed exactly as he would have preferred. *Clark*, 226 Mont. at 53, 734 P.2d at 188.

D. The Court properly instructed the jury concerning Dr. Wheeler's deposition transcript, and Camen waived any argument otherwise.

Camen argues the District Court "grievously prejudiced" him with its response to a jury request for Dr. Wheeler's deposition during deliberations. Op. Br. at 40–41. The District Court provided to trial counsel a copy of the jury's request and the proposed response, giving each party the opportunity to comment. Tr. 1979–80. After Camen's counsel reviewed the request and had an opportunity to offer a different response, Camen's counsel stated, "Plaintiff agrees with the Court's

proposed answer." Tr. 1980. Ultimately, with the approval of all parties, the District Court instructed 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." Camen App. 173. Thus, Camen waived any argument concerning this instruction because he not only failed to object to the instruction but explicitly endorsed it. Tr. 1980; *Turk v. Turk*, 2008 MT 45, ¶16, 341 Mont. 386, 177 P.3d 1013.

Moreover, the instruction was proper. The jury was instructed it would not have access to transcripts or excerpts of transcripts of witness testimony. Tr. 1771. Although Plaintiff baselessly asserts that the instruction "implied" the jury could not consider the deposition "testimony," the instruction explicitly referred only to the deposition "transcript." Further, Dr. Wheeler testified at length concerning his deposition testimony, *see, e.g.*, Tr. 1101, 1115–16, 1158–60, 1170–72, 1266–67, and the instruction cannot be read to imply all such testimony should be disregarded. Plaintiff did not object to the instruction, affirmatively approved it, and was not harmed by it. His argument otherwise is unpersuasive.

III. The District Court properly polled the jury, but even if it was in error, it was not preserved for appeal and was harmless.

Under § 25–7–501(2), a party may request the clerk or the court to poll the jury by "asking each juror if it is the juror's verdict. If upon the inquiry or polling more than one-third of the jurors disagree to the verdict, the jury must be sent out

again," and in the absence of such disagreement the verdict is complete. Here, the District Court asked each individual juror to affirm it was the jury's verdict and whether eight members agreed. Tr. 1991. Camen ultimately consented to the District Court's method of jury polling, and later objected only *after* the jury was polled. He thus waived any objection. Regardless, the District Court's jury polling method complied with § 25-7-501. But even if the method was erroneous, Camen offers no evidence whatsoever that it substantially prejudiced his rights.

A. Camen did not preserve his untimely objection to the jury poll.

Camen failed to preserve his objection to the District Court's jury polling method because he ultimately abandoned any objection and consented. The night before closing arguments, the District Court indicated it planned to ask each member of the jury two questions. The court stated, "I would say two questions. 'First, is this the jury's verdict?' and wait for an answer. And then would say, 'Second, on the issue—on each issue, did at least eight of the jurors agree?'" Tr. 1737–38. The Court then asked each party, "does that strike you as acceptable, appropriate, inappropriate?" Tr. 1378.

Camen's counsel responded:

> It does, up to that point. But if we – if there are three jurors that didn't agree, or two jurors that didn't agree on different questions, we want to know who they are and what their position was on each question. I think the defense probably does also. So how do we do that?

Id. The court explained its proposed polling method would further the purpose of the poll, which "is merely to establish, if necessary, that all of the jurors agree that the verdict as recorded is an accurate reflection of the verdict form that is reported and read by the clerk in open court." *Id.*

Camen's counsel raised concern that jurors would not have the opportunity to say "yes or no" on whether the verdict reflected the juror's vote. Tr. 1741. "[I]f we're asking one person, the foreperson, did eight out of 12 agree, that person's speaking for everybody." *Id.* The Court clarified that each juror would be polled individually, which appeared to resolve the concern:

> The Court: Everyone has to answer that same question—
>
> Mr. Rowley: Okay.
>
> The Court: —under the poll. The first question—
>
> Mr. Rowley: That was my confusion.
>
> The Court: —to every juror individually is, "First, is this the jury's verdict?" and they answer. And "Second, on each issue did at least eight of the jurors agree?"
>
> And it seems to me that you'll get confirmation. And if there is a dissent, then it may prompt the need for further inquiry. And so—okay.
>
> I appreciate the objection. The poll will be conducted, if at all, according to the Court's formulation.

Tr. 1745.

After the jury returned its verdict, the District Court again explained that it planned to ask each individual juror "First, is this the jury's verdict?" followed by, "Second, on each question did at least eight of the jurors agree on the answer?" Tr. 1991. Camen did not object, and the court polled each juror individually in the manner it said it would. *Id.*

Only *after* the entire jury was polled did Camen object. Tr. 1996. At sidebar, the District Court summarized Camen's objection from the night before closings, then stated, "[F]ollowing the discussion [counsel] withdrew his objection or indicated that he was satisfied with the poll that the Court suggested it should conduct. And therefore, I am a bit mystified that we are hearing this again." Tr. 1997.

The District Court overruled the objection, providing three reasons for its ruling:

> First, the Court conducted a full hearing on the question of how the poll should be conducted the night before closing arguments occurred.
>
> Secondly, the parties aired all their argument and Mr. Rowley, on behalf of the Plaintiff, as the Court recalls now, was satisfied with the Court's reasoning or rationale for conducting the poll in this matter. Therefore, I consider the objection to be either withdrawn or to have been waived.
>
> And third, the poll is sufficient. And so the objection is overruled.

Tr. 1998–99.

The District Court correctly concluded Camen had withdrawn or waived his initial objection after being satisfied with the District Court's jury poll formulation. Tr. 1745. When Camen objected and secured a definitive ruling on his new objection, it was no longer timely because the grounds for the objection were evident during the settling of jury instructions and before the court conducted the poll. A party's failure to object to jury instructions when they are given waives the objection. *Vader v. Fleetwood Enters.*, 2009 MT 6, ¶16, 348 Mont. 344, 201 P.3d 139. And if Camen claims his objection was sufficient the night before closing arguments, despite his consent, and he simply renewed it on the day of the poll, that raises the question of why Camen failed to object before the jury was polled when the District Court explained its polling method—in terms identical to those from the night before closing.

Had Camen truly been concerned that he would suffer prejudice if the District Court conducted its poll as suggested, he should have secured a definitive ruling on the objection the night before closing arguments. He also should have objected and obtained a definitive ruling before the poll was implemented. Because Camen failed to do either, his objection is waived.

B. Assuming a valid objection, the District Court complied with the purpose of the polling statute so that Camen's substantial rights were unaffected.

Montana precedent confirms the District Court properly carried out the statutory jury polling requirements. "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*, 151 Mont. at 236, 441 P.2d at 177. "That being the only purpose of the poll and each juror only being asked individually whether that is his verdict," *Martello* concluded it was harmless error that the district court refused to poll the jury given that the appellant provided no evidence raising questions as to the legitimacy of the verdict below. *Id.* In particular, the Court emphasized that "[o]n appeal, prejudice is never presumed but it must affirmatively appear that the error has affected a substantial right of the party on the merits of the case." *Id.*

Camen's argument that the District Court's polling method "did not establish whether, and how many, jurors voted for the verdict on each question" is wrong. *See* Op. Br. 45. The District Court asked two questions of each individual juror: first, whether the verdict that was read was the jury's verdict, and second, whether "on each question [] at least eight of the jurors agree[d] on the answer." Tr. 1991. The second question precisely established that at least eight jurors agreed on the verdict

on each issue, which is all that is required under the law. *See Martello*, 151 Mont. at 236, 441 P.2d at 177.

Camen relies on a few out-of-state cases that are both factually distinct and involve jurisdictions with a different jury poll requirement than § 25–7–501(2). For instance, in *Duffy v. Vogel*, 905 N.E.2d 1175 (N.Y. 2009), the trial court refused to poll the jury entirely. Moreover, unlike Montana, in New York "the absolute right of a party to have a jury polled is rooted in the common law, and not in a statutory or constitutional enactment," *Id.* at 1778, so "in [New York] courts the failure to poll a jury may never be deemed harmless." *Id.* at 1177. Likewise, in *Verser v. Barfield*, 741 F.3d 734, 737-38 (7th Cir. 2013), the district court wholly eliminated the opportunity for the losing party to request a jury poll. And in *Connecticut v. Pare*, 755 A.2d 180, 193–95 (Conn. 2000), a criminal case, the Connecticut Supreme Court found the district court's refusal to poll the jury was structural error and thus not subject to harmless error analysis. Notably, however, the Connecticut Supreme Court rejected *Pare*'s holding in the civil context, electing like most courts to apply harmless error analysis where a poll is not conducted or is conducted improperly. *Wiseman v. Armstrong*, 989 A.2d 1027, 1036–1042 (Conn. 2010) (citing and analyzing cases).

Here, the District Court did not prohibit Camen from requesting a jury poll altogether, but rather polled the jury in a manner consistent with the only recognized

statutory purpose—to "determine whether the required number of jurors concur[ed] in the verdict." *Martello*, 151 Mont. at 236, 441 P.2d at 177; 2 Tr. 1739–40. Moreover, this Court has established that failure to properly poll the jury is harmless. *Martello*, 151 Mont. at 236; 441 P.2d at 177; *Pumphrey v. Empire Lath Plaster*, 2006 MT 99, ¶¶36-37, 332 Mont. 116, 135 P.3d 797.

Camen has no valid argument that this jury poll affected his substantial rights. Camen speculates that the polling method left open the possibility of juror coercion and confusion, but the argument is baseless. This Court's decision in *Pumphrey* is instructive. After the *Pumphrey* jury was discharged, "some jurors told the bailiff that they had misunderstood the polling question." ¶13. "According to the foreperson, some of the jurors thought that they were being asked whether the verdict, as read in court, correctly reflected the verdict that the entire jury had reached, rather than whether they personally agreed with the verdict." *Id.* Over the plaintiff's objection, the District Court reconvened the jurors who remained and polled them, then the next day polled the two jurors who had left at the close of trial, then reconvened and polled the entire jury. *Id.* ¶¶13–15. This Court ultimately held that while the District Court erred in its method of polling the jury because it conducted polls after the jury was discharged, that error did not require reversal. *Id.* ¶37.

The jury confusion expressed in *Pumphrey* is the specter that Camen raises—but presents no evidence of—here. Unlike *Pumphrey*, where jurors expressed genuine confusion about the District Court's questions, Camen presents no evidence to suggest jurors were confused or that the poll in this case did not accurately reflect a verdict freely reached by the requisite number of jurors. There is no indication here that any juror was "induced to assent" to the special verdict or any finding. Mont. R. Civ. 60(b). Nor is there any indication that all twelve jurors made a mathematical error in calculating that at least eight jurors agreed with the verdict. Moreover, the poll confirmed that at least 8 jurors agreed on each question, making the verdict legally sufficient. That the poll did not provide Camen the information in the format most desirable to him does not amount to the sort of prejudice required to change a jury's verdict. *Steffensmier*, ¶7. Accordingly, any error in polling the jury here was harmless, because it could not have affected the outcome of the case.

IV. The cumulative error doctrine does not obviate the jury's verdict.

Camen's closing argument that "[e]ach error, and the accumulation of error, substantially prejudiced Camen's right to a fair trial" deserves short shrift. Op. Br. 48. This statement is essentially an iteration of the cumulative error doctrine, which "concerns prejudice resulting from the cumulative effect of two or more individually

harmless errors that, combined, have the same prejudicial effect as a single reversible error." *Est. of Frazier v. Miller*, 2021 MT 85, ¶38, 404 Mont. 1, 484 P.3d 912. First, this Court has declined to extend the cumulative error doctrine outside the criminal context. *Id.*; *see also Baxter v. Archie Cochrane Motors, Inc.*, 271 Mont. 286, 895 P.2d 631 (1995). Second, Camen's vague and disparate collection of purported errors do not even involve the same subject matter, and he articulates no basis that they constituted "a single reversible error." *Id.* Thus, even if this Court determines the District Court harmlessly erred, any "accumulation" of such errors does not warrant a new trial.

CONCLUSION

For the foregoing reasons, this Court should deny Camen's request to interfere with the jury's verdict and it should affirm the judgment.

Dated: December 21, 2022.

CROWLEY FLECK PLLP

/s/ Dale Schowengerdt
Dale Schowengerdt

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 9,974 words including footnotes. Rule 11(4).

/s/Dale Schowengerdt
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CERTIFICATE OF SERVICE

I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-21-2022:

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