IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 22–0123

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 REPLY BRIEF

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INTRODUCTION

Brett Camen is not entitled to an error-free trial, but he is entitled to a fair trial. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 43, 357 Mont. 293, 239 P.3d 904. That the district court committed errors in the trial of Brett's claim is really not debatable. The trial court failed to instruct on the theory of Camen's case; allowed an expert to testify beyond the scope of his qualifications and disclosed opinions; and violated Montana's statutory requirements in polling the jurors. The issue this Court confronts is whether those well-documented and well-preserved errors violated Brett's substantial right to a fair trial. *Id.* Based on the record of the case and this Court's precedent, there can be no question that Brett has been deprived of his right to a fair trial before a fully informed jury.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY WITH RESPECT TO DUTY AND CAUSATION.

A. The Trial Court Committed Reversible Error by Failing to Instruct the Jury On Camen's Theory of the Case.

There is no genuine dispute as to the theory of Camen's case. The trial court instructed the jury at the outset of the case, describing Camen's theory: "Specifically, the Plaintiff alleges that Dr. Wheeler and Dr. Stein delayed

necessary treatment of his medical condition, IIH, causing the Plaintiff to lose his eyesight." (App. 141). Fourteen months before trial, Camen provided the trial court and the parties with the proposed duty and causation instructions supporting the theory, Plaintiff's Proposed Instructions 9 and 11. (Dkt. 71; App. 133-136).

Camen introduced evidence which supported his theory that both doctors delayed necessary treatment, causing Brett's loss of vision. Camen established that by December 2017, he suffered from fulminant IIH. (App. 71). Independent experts testified that because fulminant IIH posed a foreseeable risk of blindness, any delay in surgery caused Brett to lose his only chance of preserving his vision. (App. 117-118, 120, 125). Camen's evidence consistently supported his theory of the case, yet the trial court refused to instruct the jury on *two* crucial parts of Camen's legal theory: duty and causation.

Despite Camen's fourteen-month notice to the parties of the proposed duty and causation instructions, at the time of settling the instructions the trial court entertained off-the-cuff objections from KRMC and GEC. (App. 76-80). Once the trial court rejected Camen's duty and causation instructions in their entirety, the trial court still had an "overriding" obligation "to ensure the jury is properly instructed" on Camen's theory of the case. *Peterson*, 2010 MT 187, ¶ 42.

KRMC urges this Court to ignore the instructional errors, asserting that Camen did not "adequately brief" prejudice from those errors. (KRMC Brief 17). KRMC completely ignores Camen's overwhelming authority establishing that the failure of a court to instruct on a party's theory of the case is not only prejudicial, it constitutes reversible error. *Chambers Through Chambers v. Pierson* (1994), 266 Mont. 436, 441, 880 P.2d 1350, 1353-4*; Rix v. General Motors Corporation*, (1986), 222 Mont. 318, 323, 723 P.2d 195, 198 (and cases cited therein). In its Response Brief, KRMC does not mention, much less refute, that failure to instruct on the theory of case is reversible error. KRMC's brief is devoid of any mention of the "theory of the case." GEC, on the other hand, merely argues in passing, and without any citation to authority, that Camen was not deprived of his theory of the case because his experts were allowed to testify as to that theory. (GEC Brief 23).

Whether the experts correctly applied the facts to reach their opinions "was a question for the jury to decide after cross-examination, presentation of contrary evidence, and **application of the law**." *Beehler v. Eastern Radiological Assoc.,* 2012 MT 260, ¶ 38, 367 Mont. 21, 299 P.3d 131 (emphasis added). Instructing the jury as to the applicable law is within the sole province of the trial court, not expert witnesses. *Kenser v. Premium Nail Concepts*, *Inc.*, 2014 MT 280, ¶ 22, 376 Mont. 482, 338 P.3d 37.

As will be shown below, the trial court improperly rejected Camen's proposed instructions regarding the duty and the causation components of his theory of negligence. KRMC and GEC did not address the trial court's glaring reversible error. The trial court's failure to instruct the jury on Camen's theory of the case, standing alone, requires reversal. *Rix*, 222 Mont. at 323, 723 P.2d at 198.

B. The Trial Court Erred in Refusing the Proportionate Duty Instruction.

1. The Proportionate Duty Instruction is a correct statement of Montana law.

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 is "patterned after § 298 of the Restatement of Torts (1965), adopted by this Court in *Strever*, and pertains to the higher degree of care required of individuals in the face of a known danger." *Id.*, ¶ 35. As noted in *Estate of Strever v. Cline*, (1996), 278 Mont. 165, 174, 924 P.2d 666, 671, the Restatement applies the doctrine "in all cases where the reasonable character of an actor's conduct is in question."

As in the district court, KRMC and GEC assert that the proportionate duty instruction should never be used in medical malpractice cases, but offer no plausible explanation for exempting medical negligence cases from this key

negligence doctrine. Finding no support in Montana law for scuttling the *Schuff* precedent, KRMC and GEC cite to authority from two other jurisdictions – South Carolina and Ohio. (KRMC Brief 14). They fail to establish that those cases are applicable under Montana law. GEC also relies on a case which can only be described as moldy, *Utley v. Burns,* 70 Ill. 162 (Ill. 1873). Analysis of the physician's duty of care in Illinois in 1873 has no bearing here.

If looking to other jurisdictions to determine how to apply the "proportionate duty" doctrine in medical malpractice cases, the District of Columbia provides the most comprehensive guidance. In *Pannu v. Jacobson*, 909 A.2d 178 (D.C. App. 2006), a patient brought a medical malpractice claim against his neurosurgeon due to the loss of functions suffered when the surgeon severed nerves while performing back surgery. The court refused to instruct the jury as to proportionate duty – that as danger increased, a proportional change in the neurosurgeon's conduct was required. The appellate court held that these "fundamental principles of negligence law also are applicable in professional negligence cases." *Id.* at 194. Furthermore, "the context of a medical negligence action is critical to a determination of what constitutes 'reasonable care under the circumstances.'" *Id.* The appellate court noted that the offered proportionate duty instruction "contained confusing and improper wording given the conflicting

expert testimony," but determined that those imperfections "did not permit the trial court to reject its contents *in toto*. . . ." *Id.*

Pannu held that "the [trial] court bore the burden of tailoring the requested instruction (and the opposition thereto) to meet the demands of an accurate and fair statement of the law." *Id.* *Pannu* suggested the following proportionate duty instruction to be given, when appropriate, in medical malpractice cases:

> Negligence is a relative concept. A reasonable doctor under the standard of care conforms his conduct according to the danger he knows, or should know, exists. Therefore, as the danger increases, a reasonable doctor under the standard of care acts in accordance with those circumstances.

Id. at 199.

The *Schuff* instruction is a correct statement of duty's "reasonable care" component, and it has been given by other Montana trial courts in medical malpractice cases. (App.134-135). But if the trial court disagreed with this Court's approved proportionate duty instruction as applied to medical negligence, the trial court had an "overriding duty" to tailor an instruction which fully and fairly instructed the jury as to Camen's theory of the case. *Peterson,* 210 MT 187, ¶ 42. The trial court owes this "overriding duty" even if the law has not been settled by this Court; or if the parties are at fault; *id.*, and even if "there has been no request for an instruction or the instruction requested is defective." *Billings*

Leasing Co. v. Payne, (1978), 176 Mont. 217, 225, 577 P.2d 386, 391. The trial court abused its discretion in failing to instruct the jury as to Camen's theory of duty, either with the proportionate duty instruction or a tailored instruction.

2. The Proportionate Duty Instruction correctly stated the law regarding foreseeability.

In his Opening Brief (p. 22), Camen established that the proportionate duty instruction incorporated the longstanding law of foreseeability, an element of legal duty. In its response, KRMC does not address foreseeability at all. GEC, on the other hand, acknowledges that Camen "raises the concept of foreseeability as an aspect of legal duty," but next claims (without citation to authority) that "the public policy considerations applicable to the issue of duty have no bearing on this case." (GEC Brief, p. 26)

Camen does not assert that the jury needed instruction on public policy and, as directed by this Court, any public policy issues relating to foreseeability should be determined by the trial court as a matter of law. *Busta v. Columbus Hosp. Corp.* (1996), 276 Mont. 342, 372, 916 P.2d 122, 140. By contrast, when, as here, the evidence raises fact issues regarding foreseeability, the jury should be instructed. *Id.* Foreseeability was *the* central factual issue in the case, with Camen asserting that blindness was a foreseeable consequence of delay (App. 117-118),

and the defense countering that fulminant IIH is incredibly rare. (App. 86). The trial court tacitly acknowledged that the proportionate duty instruction addressed foreseeability, even referencing *Palsgraf v. Long Island R. Co.*, 162 N.E. 99 (1928). (App. 76, 1639:6-20).

The jury requires instruction because "the duty element of negligence turns primarily on foreseeability." *Newman v. Lichfield*, 2012 MT 47, ¶ 29, 364 Mont. 243, 272 P.3d 625. Indeed, in accord with *Palsgraf* this Court holds that "the risk reasonably to be perceived defines the duty to be obeyed." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶21, 342 Mont. 335, 181 P.3d 601. Neither KRMC nor GEC argues that the jury received instruction on foreseeability; they both merely argue that the proportionate duty instruction should not be given in malpractice cases. (KRMC Brief 12; GEC Brief 26).

In ordinary negligence cases, this Court holds that foreseeability "is adequately addressed by the definition of negligence included in Montana Pattern Instruction 2.00.1," which defines negligence as "the failure to use reasonable care." *Busta*, 276 Mont. at 372, 916 P.2d at 140. The trial court refused the only offered instruction to incorporate the foreseeability language identified in *Busta* – the proportionate duty instruction. In the first sentence, the instruction correctly

states the foreseeability standard set forth in *Busta*: "The care required of the defendant in a negligence claim is always reasonable care." (App. 133).

The second part of Plaintiff's Proposed Instruction 9 also correctly states the law of duty. "Foreseeability as it relates to the duty element of negligence is measured on a scale of reasonableness dependent on the foreseeability of the risk involved with the conduct alleged to be negligent." *Newman,* ¶ 31. The proposed instruction advised of that "scale of reasonableness:"

> This standard [of reasonable care] 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). With the rejection of this instruction *in toto*, the trial court failed to instruct the jury in any manner regarding foreseeability.

3. The given instructions, read as a whole, did not fully or fairly inform the jury of the law applying to duty.

Jury instructions must be reviewed as a whole to determine if they "fully and fairly inform the jury of the applicable law." *Peterson,* 2010 MT 187, ¶ 43. The trial court instructed the jury as to the duty/breach element of negligence in Instructions 17 through 24. (App. 161-168). None of the given instructions addressed foreseeability. None of the given instructions even mentioned "reasonableness" – a key requirement for foreseeability. *Busta*, 276 Mont. at 372.

KRMC and GEC assert that Instruction 21, which defines the duty of care owed by a specialist, adequately informed the jury of "reasonableness," though the instruction as given contains no mention of reasonableness. (KRMC Brief 13; GEC Brief 21; App. 165). Informing the jury of the standard of care does not inform the jury as to the role of foreseeability in applying that standard. As noted in *Pannu*, 909 A.2d at 194, "the context of a medical negligence action is critical to a determination of what constitutes 'reasonable care under the circumstances.'" This jury received no instruction with which to measure the "scale or reasonableness dependent upon the foreseeability of the risk involved with the conduct alleged to be negligent." *Newman*, 2012 MT 47, ¶ 31.

The trial court compounded the lack of proper instruction regarding reasonable care by explicitly instructing the jury on what *does not* constitute a foreseeable, compensable injury. Over Camen's objection, the jury was instructed that "the mere fact of an injury, standing alone, is not proof of negligence against a physician in a medical malpractice action." (Instruction 23, App.167; Trans. 1691:15-1692:1). This instruction only told the doctors' half of the story, encapsulating the defense's theory of the case with respect to foreseeability. It set the legal floor, establishing that blindness alone is not sufficiently foreseeable to constitute proof of negligence. The trial court failed to instruct the jury as to the

ceiling – Camen's theory, supported by the evidence, that his loss of vision is compensable, even if rare, when resulting from the lack of reasonable care.

In a case which turned on whether Camen's vision loss was a foreseeable consequence of the delay of treatment, the failure to provide the jury with full and fair instructions regarding duty deprived Camen of a fair trial. *Peterson*, ¶ 42. In rejecting the proportionate duty instruction, and failing to instruct the jury regarding foreseeability and reasonable care at all, the trial court deprived Camen of the theory of his case, requiring reversal. *Id.*

C. The Trial Court Erred in Refusing the Loss-of-Chance-of-Recovery Instruction.

1. The instruction correctly states Montana law and has been approved by this Court.

As established in the opening brief, the trial court rejected Camen's offered instruction on a crucial theory of Camen's case, the loss-of-chance-of-recovery instruction, which reads:

> 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). This pattern instruction was approved by this Court in *Aasheim v. Humberger,* (1985), 215 Mont. 127, 695 P.2d 824, 827-27. Both KRMC and GEC attempt to convince this Court that the instruction is no longer valid, claiming the

enactment of § 27-1-739 superseded *Aasheim*. (KRMC Brief 18; GEC Brief 31-32). This Court has already determined that § 27-1-739 codified – not superseded – the loss-of-chance doctrine enunciated in *Aasheim. Steffensmier v. Huebner*, 2018 MT 173, ¶ 11, 392 Mont. 80, 442 P.3d 35.

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 instruction correctly enunciated the law underlying Camen's theory of the case.

2. The evidence supported and required the instruction.

In the Opening Brief, Camen established that his theory of the case required – and credible evidence supported – the instruction regarding loss of chance of recovery. As contemplated by § 27-1-739, Camen provided expert testimony that delay in the treatment of Brett's fulminant IIH resulted in his loss of any chance of preserving his vision. (App. 117-118, 120, 125). The evidence also established that with prompt surgery, rather than 27 days of delay, the chance of Camen retaining his vision was more likely than not. (App. 98-99). The trial court acknowledged that this was the theory of Camen's case. (App. 80; App. 77).

KRMC and GEC assert that the loss-of-chance instruction was not triggered, relying upon their mutual faulty reading of § 27-1-739. Both argue that the statute only applies (and the instruction is only warranted) when the patient has

a chance of full recovery. (KRMC Brief 19; GEC Brief 31). The statute specifically states that "for purposes of a malpractice claim," damages may be awarded if the physician's negligence results in "no recovery" **or** "a recovery that is of lesser extent or quality or that takes longer to occur." § 27-1-739(1), MCA.

Oddly, GEC also asserts that Camen waived its objection to denial of the loss-of-chance instruction by not objecting to a negligence instruction or the special verdict form. (GEC Brief 30-31). Those instructions were correct statements of the law, but were incomplete without the loss-of-chance instruction and any appropriate instruction addressing foreseeability. The instructions, read as a whole, must fully and fairly inform the jury. *Peterson*, 2010 MT 187, ¶ 33.

3. The trial court's refusal to instruct the jury on "loss of chance of recovery" requires reversal and a new trial.

There can be no doubt that failure to instruct the jury with the loss-of-chance instruction constitutes error. The only question reasonably presented here is whether that error is harmless. *See, e.g., Steffensmier*, 2018 MT 173, ¶ 11. Defendants rely upon *Steffensmier*, where this Court found that error to be harmless "in light of the jury's finding that [the doctor] was not negligent." This ruling was based on the Court's determination that "the outcome would have been the same had the error not been committed." *Id.*, ¶ 12.

The record of this case does not establish that the "outcome would have been the same had the error not been committed." This jury deliberated for two days. Absent both the duty instruction and the loss-of-chance instruction, the jury had no basis to analyze the main thrust of Camen's evidence – that he lost the chance of recovering some eyesight. Just as in *Peterson*, the jury could not make an informed determination of liability with respect to the claim. *Id.,* ¶ 33. This is especially true here, where the jury was specifically instructed to consider causation as part of determining "negligence." (App. 164).

The loss-of-chance-of-recovery instruction provides the jury with the legal information necessary to determine *whether* to reach the issue of causation. The murky line between breach of duty (negligence) and causation is a highly technical legal distinction, easily confused. *See Busta*, 276 Mont. at 360, 916 P.2d at 133. The jurors were provided inadequate information regarding the distinction between negligence and causation, no instruction as to foreseeability, 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 of recovery 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 determining whether to mark "yes" or "no" in response to the query regarding negligence. (App. 164). The failure to instruct on loss of chance of recovery requires reversal and a new trial. *Rix*, 222 Mont. at 323, 723 P.2d at 198.

II. THE TRIAL COURT ERRED IN ALLOWING DR. WHEELER'S UNDISCLOSED EXPERT TESTIMONY.

A crucial issue presented to the jury was whether Dr. Wheeler, a neurologist, and Dr. Stein, an ophthalmologist, met the standard of care in treating Brett Camen's fulminant IIH. Much of the testimony involved whether each doctor referred Camen for surgery in a timely manner given the known risk of blindness. Dr. Wheeler, a neurologist, saw Camen on January 3, 2018. (PL 2-55; App. 21; App. 72, App. 69). Camen established that the record of that visit describes classic fulminant IIH. (App. 21-23). Expert testimony further established that the standard of care required referral for surgical intervention on that date. (Glass, App. 128-130).

Defendants disclosed Dr. Wheeler as a hybrid expert, and disclosed his opinions regarding neurology. Yet at trial, Dr. Wheeler testified beyond his expert disclosure and provided testimony stating that Dr. Stein's evaluation and assessment of the Camen on January 5 was reasonable. (App. 72). Further, when

asked if "the joining of the two specialties, you from pediatric neurology, Dr. Stein from pediatric ophthalmology, was that reasonable, under the circumstances?" Dr. Wheeler replied "Yes, absolutely." (App. 73).

Neither KRMC nor GEC dispute that Dr. Wheeler's testimony exceeded his disclosure. When deposed, Dr. Wheeler declined to cross the line into opining regarding ophthalmology, deferring to ophthalmology to answer such questions. (App. 74). Plaintiff had no opportunity to prepare for these undisclosed opinions in discovery or in the pretrial process. At trial, Dr. Wheeler testified as the last witness on the penultimate day of evidence presentation, and offered these new opinions *after* the direct exam by Camen. (App. 72). Camen's counsel objected to the testimony, and also indicated a need to re-direct for five minutes, to which the trial court responded "I don't think so." (App. 73). Camen's counsel was finally allowed to ask just one question on re-direct. (Trans. 1340-1).

That Dr. Wheeler's undisclosed opinion testimony prejudiced Camen is evident. On the first day of deliberations, the jury asked the court to provide Dr. Wheeler's deposition. (App. 173-174). The deposition had been used at trial only twice, both times to impeach Dr. Wheeler. One impeachment dealt specifically with this crucial time frame of the first week of January, establishing that Wheeler had previously testified that Brett developed fulminant IIH between January 5 and

9, 2018, perhaps as late as the January 12. (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." (App. 71). The trial court rejected the jury's request. (App. 173). The jury confusion evidenced by the jury question was not resolved.

KRMC argues that Dr. Wheeler was qualified to give the opinions regarding Dr. Stein's compliance with the standard of care required of an ophthalmologist, asserting that the specialities are "substantially similar" when treating IIH. (KRMC Brief 31). However, Dr. Wheeler's own testimony disqualifies his expertise. He admitted: "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." (App. 71). He also admitted he lacked the expertise to opine on visual acuity: "I don't feel necessarily qualified to answer that as a neurologist. I would have to defer to ophthalmology." (App. 74).

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. § 26-2-601, MCA. The trial court abused its discretion in allowing Dr. Wheeler to testify beyond his disclosure.

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

A. Camen Preserved the Objection to the Polling Method.

Both KRMC and GEC inexplicably argue that Camen did not preserve his objection to the polling method. An objection is preserved for appeal when an attorney states specific objections on the record at the time the grounds for the objection become apparent and obtains a definitive ruling. *Evans v. Scanson*, 2017 MT 15, ¶ 79, 388 Mont. 69, 396 P.3d 1284. Both elements of preservation occurred here.

During the settling of instructions, the trial court *sua sponte* declared the manner in which the jury would be polled. (App. 82, 1737). In a lengthy colloquy with the trial court, Camen's counsel raised numerous specific objections. (App. 83). After Camen's lengthy objection, the trial court inquired of KRMC's and GEC's counsel, and both agreed with the court's planned method of polling. (App. 83). Camen's counsel then asked a question indicating confusion as to the court's method, and the trial court responded that each juror would be asked whether eight jurors agreed, to which Camen's counsel commented, "Okay, that was my confusion." (App. 84, 1745:7-13). Having listened to all parties, the trial court acknowledged Camen's objection before specifically overruling it, stating "I

appreciate the objection. The poll will be conducted, if at all, according to the Court's formulation." (App. 84, 1745:23-25). At no point did Camen's counsel withdraw or waive his multiple objections to the trial court's polling method.

The following day, after improperly "polling" the jury, the trial court inquired, "Does the Plaintiff accept the jury's poll?" and counsel accepted the poll "subject to our earlier objection." (App. 90, 1995:24-1996:1). In a side-bar, Camen's counsel then enunciated the objection again. (App. 90, 1996:10-20). The jury had not been discharged; the trial court had the opportunity to correct its error by conducting the poll required by the statute – a process that would take less than five minutes.

Camen objected to the poll at great length, twice, and obtained two adverse rulings. Camen properly preserved the issue for appeal. *Id.*, ¶ 79.

B. The Trial Court's "Poll" of the Jury Violated § 25-7-501.

Section 25-7-501, MCA, requires that polling "is done by the court or the clerk asking each juror it is the juror's verdict." The trial court merely asked each juror "is this the jury's verdict" and whether "at least eight of the jurors agree?" (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 own individual vote.

KRMC's and GEC's lukewarm attempts to square the trial court's "poll" of the jury with the statute fail. The trial court did not ascertain the individual juror's votes and did not ascertain the number of jurors concurring to each question. KRMC and GEC cannot refute that the statute requires – and the majority of courts considering the issue agree – that each juror must confirm his or her individual vote. (See authorities, Opening Brief, 43-44).

C. The Error Was Not Harmless.

An error is harmless "if there is no showing of substantial injustice." *Kulstad v. Maniaci*, 2010 MT 248, ¶ 43, 358 Mont. 230, 244 P.3d 722. 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). Here, Camen was unjustly deprived of a "substantial right." *United States v. Randle*, 966 F.2d 1209, 1214 (7th Cir. 1992).

In asserting harmless error, KRMC and GEC rely primarily upon this Court's holding in *Martello v. Darlow*, (1968), 151 Mont. 232, 441 P.2d 175. In *Martello*, although the trial court questioned the jurors *en masse*, the record reflected that all twelve jurors answered in the affirmative. *Id.* at 234, 441 P.2d at 176. This Court determined that the polling error was harmless because the purpose of the statute "is to determine whether the required number of jurors

concur in the verdict," and "[n]ot only [did] the record affirmatively show the required concurrence to render a legal verdict, but it [was] entirely barren of any indication to the contrary." *Id.*

Unlike in *Martello*, the record in this case does not reflect the number of jurors affirmatively supporting the verdict. More importantly, KRMC and GEC rely on *dicta* in *Martello* decision to argue that determining whether the required number of jurors concur in the verdict is the "only purpose" of § 25-7-501. While that determination may have been the only purpose at issue in *Martello* fifty years ago, it is not the only purpose of polling. As recognized for over a century by the United States Supreme Court, juror polling serves the important purpose of providing a remedy for potential juror intimidation. *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Through proper individual 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). Moreover, "the purpose of the jury poll is to uncover doubt or confusion of individual juror." *Lumpkin v. United States*, 586 A.2d 701, 704 (D.C. 1991).

Camen objected to the "polling" method based on this very right – the need to ferret out intimidation and confusion. (App. 82-83). KRMC and GEC now

argue that there is no record of intimidation. (GEC Brief 41). That is exactly the point of the substantial injustice created by the improper "poll." In failing to allow each juror to state the individual juror's vote, the trial court deprived Camen of the only identified method to establish coercion. *Humphries* 174 U.S. at 194. The individual inquiry into each juror's vote is designed to determine whether any juror 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 (2d Dist. 2013).

Also, in contrast to *Martello*, the record is replete with indicia of a troubled jury. The jurors asked to review testimony which could not be provided. That testimony dealt directly with the impeachment of Dr. Wheeler on the breach of duty. Moreover, the twelve members deliberated at length over the course of two days, yet answered only the questions concerning negligence.

KRMC's and GEC's analysis of § 25-7-501 render the statutory requirements "meaningless." *Ragusa v. Lau*, 575 A.2d 8, 9 (N.J. 1990). *Martello* cannot, and should not, be extended to excuse as "harmless" every violation of § 25-7-501. The prejudice to Camen from the denial of his statutory substantial right to proper jury polling requires reversal and remand for a new trial.

CONCLUSION

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 25th day of January, 2023.

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