IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 23-0200

MATTHEW "MATT" OLDS,

Plaintiff /Appellee/Cross-Appellant,

v.

MARK HUELSKAMP,

Defendant/Appellant/Cross-Appellee.

OPENING APPELLATE BRIEF

On Appeal from the Fourth Judicial District Court, Missoula County
Cause No. DV-19-1036
The Honorable Jason Marks, Presiding

Scott M. Stearns
Zach A. Franz
BOONE KARLBERG P.C.
201 West Main, Suite 300
P.O. Box 9199
Missoula, MT 59807-9199
Telephone: (406) 543-6646
sstearns@boonekarlberg.com
zfranz@boonekarlberg.com
Counsel for Defendant/Appellant/ Cross-Appellee

Carey B. Schmidt
David C. Berkoff
SCHMIDT BERKOFF, PLLC
1917 South Higgins Ave.
Missoula, MT 59801
Phone: (406) 552-1450
carey@blackfootlaw.com
david@blackfootlaw.com
Counsel for Plaintiff /Appellee/Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases **Page(s)**

State Statutes

Rules

Other

INTRODUCTION

In this lawsuit `arising from a neighbor dispute, the jury found Defendant-Appellant Mark Huelskamp ("Huelskamp") liable for assault and battery, but only after the District Court struck Huelskamp's justifiable use of force defense and excluded crucial evidence demonstrating his conduct was reasonable under the circumstances. The District Court then awarded Plaintiff-Appellee Matthew Olds ("Olds") all the attorney fees he asked for, and then some, on the basis of a civil immunity statute that did not apply and was never mentioned by either party until after trial, without considering a single billing record to substantiate the fee request. This Court should reverse the attorney fee award and remand the case for a new trial.

STATEMENT OF ISSUES

1. Did the District Court err by awarding attorney fees under Mont. Code Ann. § 27-1-722(4), a statute establishing a new kind of civil immunity that was not mentioned, much less "asserted under this section," until Plaintiff moved for fees after trial?

2. Did the District Court abuse its discretion by awarding $91,300 in attorney fees to Plaintiff based on the testimony of his counsel and fee expert, when these were the only individuals allowed to review the billing records?

3. Did the District Court err by acting as the factfinder and imposing its own interpretation of witness testimony to take Defendant's justifiable use of force defense from the jury?

4. Did the District Court abuse its discretion by reversing course on its pretrial rulings and excluding Defendant's expert witness on the second day of trial?

5. Did the District Court abuse its discretion by excluding the facts known to Defendant at the time of the underlying altercation that made Defendant reasonably fear for his safety?

STATEMENT OF THE CASE

Huelskamp confronted his neighbor Olds about his dangerous driving and—after Olds spat in Huelskamp's face, threatened to kill him, and started to push open his truck door to go after Huelskamp—Huelskamp reacted by throwing out his hand, ultimately striking Olds in the nose. Olds sued Huelskamp for negligence, assault and battery.

At trial, the District Court eliminated Huelskamp's justifiable use of force defense and excluded his expert witness. The jury found Huelskamp liable for assault and battery and awarded Olds $13,700 in compensatory damages and $75,000 in punitive damages.

Olds then moved for attorney fees under Mont. Code Ann. § 27-1-722, a civil immunity statute that—when applicable and expressly asserted as a defense—allows an award of fees to the prevailing party. Despite neither party having mentioned the statute before or during trial, the District Court used it to award Olds $91,300 in attorney fees.

The District Court denied Huelskamp's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for Rule 59 or Rule 60 Relief. It reduced the punitive damages award from $75,000 to $13,700 and entered final judgment in the amount of $115,500. Huelskamp appeals.

STATEMENT OF FACTS

A. The Incident

Huelskamp and Olds live in the same semi-rural subdivision in Missoula, Montana. (Transcript on Appeal (DA 22-0237) ("Appeal Tran. 1")., 331, 434.)

Access to the neighborhood is through a private, one-lane dirt road with a posted speed limit of 20 miles per hour. (Appeal Tran. 1, 242-243, 395, 436, 439-440; Trial Exs. 107, 108.) Since Olds moved in, neighbors have complained to the Homeowners' Association about Olds' driving too fast. (Doc. 40 at 6, Ex. C, p. 75; Appeal Tran. 1, 395-397; Trial Ex. 155.) Huelskamp had multiple experiences of his own with Olds' dangerous driving. (Doc. 40 at 2, Ex. A, 13-17, 30-31.) On one occasion, Huelskamp had to swerve his truck off the side of the road to avoid Olds. (Doc. 40 at 2, Ex. A, 13-17, 30-31.) On two other occasions, Olds sped by while Huelskamp was walking on the road, forcing Huelskamp to leap out of the way. (Doc. 40 at 2, Ex. A, 13-17, 30-31.)

Huelsksamp's partner, Marla (age 65), had her own encounter with Olds. (Doc. 40 at 2, Ex. A, 13-17, 30-31.) While walking to check her mail, Olds parked

his truck and glared at her. (Doc. 40 at 2, Ex. A, 13-17, 30-31.) She found it menacing, and told Huelskamp about Olds' intimidation. (Doc. 40 at 2, Ex. A, 13-17, 30-31.)

On July 18, 2018, Huelskamp was driving down the dirt road and Olds was driving in the opposite direction. (Doc. 26, p. 99.) Olds was again driving too fast, and did not move over so the vehicles could safely pass. (Doc. 40 at 2, Ex. A, 101.) The two men extended middle fingers toward one another, and both stopped their trucks. (Appeal Tran. 1, 339, 437.) Huelskamp got out to lecture Olds about his reckless driving. (Appeal Tran. 1, 443.) He approached Olds, who was sitting in his truck with the driver's side window open. (Appeal Tran. 1, 444.)

When Huelskamp neared the truck, Olds spat in his face and said "I'm going to kill you," or words to that effect. (Appeal Tran. 1, 445, 447-448.) Olds then went to push open his truck door. (Appeal Tran. 1, 447.) Huelskamp defensively jabbed out his left hand. (Appeal Tran. 1, 445-447.) He either hit Olds in the nose, or hit the truck door and forced the door into Olds' nose. (Appeal Tran. 1, 447.) The door then flung open and Huelskamp saw Olds reach for something. (Appeal Tran. 1, 448.) At that point, Huelskamp retreated to his truck. (Appeal Tran. 1, 448.)

Olds tells a different story. He says Huelskamp was holding a pistol in his left hand when he approached the vehicle, and used his right hand to punch Olds through the window. (Appeal Tran. 1, 336.)

Olds sustained a broken nose. (Appeal Tran. 1, 355.) He called 9-1-1, and the responding deputies interviewed both Olds and Huelskamp. (Appeal Tran. 1, 338.) Huelskamp acknowledged striking Olds, but denied having a pistol. (Appeal Tran. 1, 448.) Law enforcement searched Huelskamp's vehicle and found no weapon. (Appeal Tran. 1, 220, 257.)

Huelskamp pled "no contest" to misdemeanor assault under a deferred prosecution agreement. (Doc. 25 at 3.) Pursuant to the agreement, Huelskamp paid Olds' medical bills, withdrew his guilty plea, and the case was dismissed. (Doc. 25 at 3.)

B. Pretrial Litigation

Olds filed this civil case on September 20, 2019. (Doc. 1.) His complaint alleged negligence, assault and battery, malice, and negligent infliction of emotional distress (the latter claim was withdrawn) (Appeal Tran., 487-488.) Olds sought compensatory damages, punitive damages, attorney's fees and costs. (Doc. 1.)

Huelskamp answered the complaint on November 5, 2019. (Doc. 3.) The answer included the following affirmative defense:

> 4. Defendant's conduct was necessary for self-defense and was a justified use of force pursuant to Mont. Code Ann. § 45-3-101 et seq.

(Doc. 3 at 4.) Just as Plaintiff's complaint sought attorney fees, Huelskamp's answer asked "[t]hat Defendant be awarded his attorney fees as the prevailing party." (Doc. 3 at 7.)

At Judge Marks' suggestion, the parties agreed to the expedited pre-trial procedure under Montana's Uniform District Court Rule 6. (Appeal Tran., 1, 4.) The District Court issued a scheduling order setting trial for May 6, 2020. (Doc. 8.) The same order set a February 25, 2020 deadline for expert disclosures. (Doc. 8.) On that date, both parties served disclosures stating they had not hired experts.

The COVID-19 pandemic struck soon thereafter. On April 3, 2020, the parties moved to vacate the scheduling order. (Doc. 12.) Trial was rescheduled for November 18, 2020. (Appeal Tran. 1, p. 11.) In September the trial date was extended again, to December 4, 2020. (Doc. 15.)

After the parties' depositions, which had been delayed by the pandemic, it became evident the case was unlikely to resolve. (Appeal Tran. 1, p. 14.) Olds intended to seek emotional distress and punitive damages in the six figures. (Doc. 73 at 3.) Given this, and given the additional time granted under the new scheduling order, Huelskamp retained an expert. (Doc. 73 at 3-4.) He retained Shawn Paul, a former military police and law enforcement officer. (Doc. 22.)

Paul completed a detailed 11-page report that was provided to Olds on September 4, 2020, some 13 months before trial. (Doc. 22.) Paul's report disclosed

expert opinions about the defensive nature of Huelskamp's use of force, and that the blood spatter left on Olds' truck shows left-to-right momentum, disproving Olds' story that Huelskamp was holding a pistol in his left hand. (Doc. 22.)

Olds filed motions in limine to exclude "references to past interactions between the parties" and "opinion testimony by Shawn Paul." (Doc. 16 at 2.) On November 8, 2021, the District Court ruled on the motions as follows:

> 2. Plaintiff moves to preclude references to prior interactions between the parties including allegations of wrongful conduct prior to the interactions leading to this case. This motion is **GRANTED.**

(Doc. 47 at 1.)

> 3. Plaintiff moves to preclude opinion testimony from Shawn Paul regarding the July 18, 2018, incident that is the subject of this case. This motion is **DENIED** but Plaintiff may *voir dire* Mr. Paul outside the presence of the jury to allow the Court to determine the admissibility of any opinion testimony. Defendant should be aware that in the Court's view Mr. Paul's testimony, if allowed, may open the door to evidence that he was criminally charged for striking the Plaintiff.

(Doc. 47 at 2.)

On November 15, 2021, Olds filed a document entitled "Motions in Limine and Point Brief on Certain Evidentiary and Jury Instruction Issues." (Doc. 50.) He argued that Huelskamp's justifiable use of force defense should be stricken because a defense under Title 45 can only be brought in the criminal arena, not in a civil case.

(Doc. 50 at 2-3.) He argued "the proper defense in a civil assault or battery matter is 'self defense' as expressed in MPI.2d. 9.05. *See e.g. Wilson v. Bieber*, (Mont. 13th Jud. Dist., 4/26/2016)." (Doc. 50 at 2-3 (emphasis added).) Relatedly, Olds moved to exclude any criminal jury instructions on justifiable use of force because "[t]he proper Jury instruction is found at MPI.2d 9.05." (Doc. 50 at 6.) Olds argued "[t]he Court should not allow criminal jury instructions in this case and limit any self-defense instruction to the civil instructions." (Doc. 50 at 6.)

Olds also moved, again, to exclude and/or limit Paul's testimony on various grounds. (Doc. 50 at 2-5.) Notably, these grounds did not include the timeliness of his disclosure, as the Court had already denied Olds' motion on that ground. (Doc. 50 at 2-5.)

A hearing was held on November 16, 2021. The minute entry states "[t]he Court then advised that Shawn Paul may testify but his Report will not be allowed in." (Doc. 53 (emphasis added).)

Prior to trial, as directed by the Court, the parties prepared a pretrial order. (Appeal Tran. 1, 37-38.) Neither party included an attorney fee request in the pretrial order as it had become clear there was no statutory, contractual or equitable basis for fees. (Doc. 71, Ex. D.)

C. Trial

Trial commenced on November 17, 2021. (Appeal Tran. 1, p. 57.) Before opening statements, the District Court again informed counsel that Paul would be permitted to testify subject to establishing proper foundation. (Appeal Tran. 1, 157:15-158:16.) Accordingly, Huelskamp's counsel referred to Paul during his opening statement, and focused heavily on Huelskamp's justifiable use of force defense. (Appeal Tran. 1, 198.)

In the middle of the second day of trial, the District Court dramatically reversed course. (Appeal Tran. 1, 325:22-24.) It ruled that Paul would not be allowed to testify—not on the basis of a lack of foundation, but on Paul's alleged untimely disclosure. (Appeal Tran. 1 321:23-326:6; 384:25-386:18.)

The next day (the last day of trial), Olds moved for judgment as a matter of law on Huelskamp's justifiable use of force defense. (Appeal Tran. 1, 491:20-497:11.) Olds argued there was no factual support for the defense since Paul had been precluded from testifying. (Appeal Tran. 1, 493:5-9.) The District Court granted the Rule 50(a) motion, basing the decision on its interpretation of Huelskamp's testimony:

> [T]he testimony I heard does not support justifiable use of force. It was either an accident, he was trying to stop the door and popped him in the face or it was straight up retaliation, he got spit on an instinctively reached out and popped him in the nose. None of the testimony I heard from Mr. Huelskamp was that I believed I needed to hit him to prevent him from using force against me.

> In fact, his testimony was at the point he thought Mr. Olds was potentially going for a weapon, he in fact retreated to his truck. So his testimony does not establish the use of force was to prevent or defend himself against the use of force of Mr. Olds. It was either retaliation for being spit on, which is not justifiable use of force, or it was an accident. . .

(Appeal Tran. 1, 494:14-20.) Huelskamp's counsel pointed out the hit was defensive because it was part of Huelskamp's effort to prevent Olds from opening the truck door and to prevent him from escalating hostilities, but the District Court disagreed and took this disputed issue of fact from the jury. (Appeal Tran. 1, 494:7-497:11.)

The District Court refused to give any instructions on justifiable use of force. (Appeal Tran. 1, 527:25-528:10.) The case went to the jury without Huelskamp's primary defense, and without the benefit of Paul's testimony.

The jury returned a verdict finding Huelskamp committed assault and battery. (Appeal Tran. 1, 612:12-613:13.) It awarded $13,700 in compensatory damages and $75,000 in punitive damages. (Appeal Tran. 1, 613:5-9; 621:24-622:1.)

D. Post-Trial

On November 24, 2021, Huelskamp moved to reduce the punitive damages award under Mont. Code Ann. § 27-1-221(7)(c). (Doc. 64.) Olds responded with a motion to increase punitive damages. (Doc. 65.1.)

On November 30, 2021, Olds filed a motion for attorney fees, despite making no fee request in the pretrial order. (Doc. 68.) For the very first time, Olds argued he

was entitled to fees under Mont. Code Ann. § 27-1-722(4), a statute that neither party had mentioned throughout litigation or trial. (Doc. 69.) Olds' fee application included affidavits from counsel and paralegals attesting to their "total fees expended in this case," without itemized time entries or contemporaneous billing records. (Doc. 69 at 5-6, Exs. 1-4.)

That same day, Olds filed a premature Notice of Entry of Judgment. (Doc. 67.) Though advised the notice was premature, Olds refused to withdraw it. (Doc. 73 at 2.)

Huelskamp filed his post-trial motion on December 15, 2021, seeking, inter alia, a new trial given the erroneous mid-trial exclusion his justifiable use of force defense and expert witness. (Doc. 72.)

Because Olds refused to withdraw his premature Notice of Entry of Judgment, Huelskamp was compelled to file a notice of appeal to preserve his appellate rights. (Doc. 82.) Olds filed a cross appeal. (Doc. 86.)

On August 9, 2022, the District Court convened a status conference and advised the parties it did not believe it had jurisdiction to rule on the pending motions, given the filing of the notice of appeal. (Transcript on Appeal (DA 23-0200) ("Appeal Tran. 2"), 4-5.) The issue was briefed and this Court issued a ruling on September 27, 2022. (Doc. 94.) It held that Olds' Notice of Entry of Judgment

was premature and dismissed the appeal without prejudice, remanding to the District Court for rulings on the pending motions. (Doc. 94.)

On October 13, 2022, the District Court granted Plaintiff's Motion for Attorney's Fees. (Doc. 95.) Despite neither party having raised Mont. Code Ann. § 27-1-722(4) before trial, the District Court found Huelskamp had nonetheless "asserted" the statute because "there is no other justifiable use of force defense for civil actions in Montana." (Doc. 95 at 5.)

A hearing on the reasonableness of fees was held on December 28, 2022. (Doc. 98.) Halfway through the hearing, and for the first time, Olds attempted to submit billing entries purportedly substantiating his fee request. (Appeal Tran. 2, 47:10-11.) Huelskamp objected, as this would have left his attorneys and expert witness without a meaningful opportunity to analyze the billing records. (Appeal Tran. 2, 47:12-19.) The District Court sustained the objection. (Appeal Tran. 2, 48:2-10.)

On January 25, 2023, the District Court awarded fees in the amount of $91,300. (Doc. 104.) This amount included the time of two attorneys in what was supposed to be straightforward Rule 6 case. (Doc. 104 at 17.) Presumably, it included the fees incurred in filing and defending Olds' premature notice of entry of judgment, and in preparing the pretrial order Olds neglected to file. (Appeal Tran. 2, 83.) The District Court based its decision entirely on the testimony of Old's attorneys

and expert, who rendered conclusions about the billing records Huelskamp and his expert were never allowed to see and which were excluded as evidence from the hearing. (Doc. 104.)

Also on January 25, 2023, the District Court granted Huelskamp's motion to reduce punitive damages. (Doc. 105.) Punitive damages were reduced from $75,000 to $13,700. (Doc. 105.)

The District Court entered a final judgment on March 3, 2023, in the amount of $115,500. (Doc. 109.) This appeal followed.

STANDARDS OF REVIEW

The interpretation and construction of a statute is a matter of law which the Court reviews de novo. *Cascade Cnty. v. Mont. Petro. Tank Release Comp. Bd.*, 2022 MT 202, ¶ 9, 410 Mont. 325, 518 P.3d 1280. Although an attorney fee award is reviewed for an abuse of discretion "where legal authority exists to award attorney fees," *Ferdig Oil Co. v. ROC Gathering, Ltd. Liab. P'ship*, 2018 MT 307, ¶ 13, 393 Mont. 500, 432 P.3d 118, the issue is reviewed for correctness when the District Court's legal authority to award fees under a particular statute is in question, *Mont. Petro. Tank Release*, ¶ 9.

A District Court's decision to grant or deny judgment as a matter of law is reviewed de novo. *Thermal Design, Inc. v. Duffy*, 2022 MT 191, ¶ 20, 410 Mont. 211, 518 P.3d 467. Judgment as a matter of law is properly granted only when there

is a complete absence of any evidence that would justify submitting an issue to a jury. *Id*.

Evidentiary rulings are reviewed for abuse of discretion. The abuse of discretion standard also applies to a district court's decision to deny a motion for a new trial based on evidentiary rulings. *Humes v. Farmers Ins. Exch.*, 2022 MT 148, ¶ 1, 409 Mont. 295, 514 P.3d 417.

SUMMARY OF ARGUMENT

After the District Court took away Huelskamp's only liability defense and the jury returned an all-but-assured verdict against him, it went on to award Olds all the attorney fees he asked for (even adding $49.50 more) despite lacking a statutory and evidentiary basis to do so. This Court should reverse the award of attorney fees and remand the case for a new trial that affords Huelskamp an opportunity to present his justifiable use of force defense to the jury.

The award of attorney fees—the bulk of the entire judgment amount—should be reversed for two independent reasons. First, the District Court erred by awarding fees under a civil immunity statute that did not apply and that neither party raised until after trial. Second, the District Court abused its discretion by awarding fees based on counsel's *ipse dixit* without considernig a single contemporaneous billing record, particularly where Olds' attorneys and expert were allowed to review and

testify about the billing records Huelskamp's attorneys and expert were never allowed to see.

Additionally, a new trial is warranted because Huelskamp was precluded, in this civil assault and battery case, from asserting self-defense. The District Court erroneously granted judgment as a matter of law to Olds on the defense, invading the province of the jury by imposing its own interpretation of the trial testimony, despite sufficient evidence to support other reasonable interpretations. The District Court also abused its discretion in excluding Huelskamp's expert—midway through trial and contrary to its prior rulings—and by excluding evidence of the parties' past interactions, which would have further shown Huelskamp's use of force was reasonable.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES UNDER MONT. CODE ANN. § 27-1-722(4).

The bulk of the judgment against Huelskamp is comprised of attorney fees. The District Court awarded fees under a relatively new civil immunity statute, Mont. Code Ann. § 27-1-722, that was never asserted, or even mentioned, until Olds raised it after trial. This was error.

This Court has repeatedly endorsed the American Rule, holding that attorney fees are generally not recoverable in a civil action unless a contract or statute expressly provides for the award of fees. *See, e.g.*, *Schuff v. A.T. Klemens & Son*,

2000 MT 357, ¶ 97, 202 Mont. 274, 16 P.3d 1002 ("Montana's common law has followed the American Rule that attorney fees are not an element of damages unless expressly provided for by statute or contract."). This case involves an alleged statutory basis for fees, but one that requires a defendant to first "assert" statutory immunity during the litigation. Mont. Code Ann. § 27-1-722. Here, statutory immunity was first raised by the plaintiff, and only after trial and after the plaintiff had foregone his request for fees in the pretrial order.

The subject statute provides for "[c]ivil damages immunity for injury caused by legal use of force." *Id*. Fees are awardable to the prevailing party in an action where § 27-1-722 immunity is "asserted under this section":

> **27-1-722. Civil damages immunity for injury caused by legal use of force.** (1) A use of force allowable under the provisions of Title 45, chapter 3, part 1 [criminal statutes on justifiable use of force], provides immunity to the person using the force from civil damages for injury to any person or property arising from injury to the person, or damage to the property of the person, against whom the force was used.
>
> (2) Conviction of a crime committed by the person who was injured or whose property was damaged by the use of force is not a prerequisite to a defense under subsection (1), but it is evidence that the act or omission to which the use of force was a response occurred.
>
> (3) The reasonableness of the use of force must be determined in light of the circumstances at the time that the force was used.
>
> (4) <u>The prevailing party in an action in which a defense is asserted under this section is entitled to costs and reasonable attorney fees</u>.

Id. (emphasis added).

Although Huelskamp never so much as mentioned § 27-1-722 in this lawsuit—from the date of his first appearance through the conclusion of trial—the District Court nonetheless found he had "asserted" immunity under § 27-1-722. (Doc. 95 at 5.) Its conclusion was premised on the notion that "there is no other justifiable use of force defense for civil actions in Montana." (Doc. 95 at 5.) This is incorrect.

Justifiable use of force is a well-established defense in Montana to the civil torts of assault and battery. *See, e.g.*, Montana Pattern Instructions, Civil (Second) 9.05 (use of force in self-defense is not tortious). This affirmative defense existed long before the Montana Legislature passed § 27-1-722 in 2001. *See id*. Likewise, self-defense has been defined in the Restatements for decades. *See* Restatement (Second) of Torts §§ 63-66; Restatement (Third), Intentional Torts to Persons, TD 5-21 ("An actor is privileged to use force against another for the purpose of defending the actor or a third person against the other's unprivileged use of force, if the actor reasonably believes that the force is both necessary and proportionate to the force that the other is intentionally inflicting or about to inflict."). To claim the Montana Legislature supplanted this common law defense when it passed § 27-1-722 has no support in the statutory language itself, its legislative history, or in case law.

Montana's rules of statutory construction specifically instruct that "[w]hen a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted." Mont. Code Ann. § 1-2-104. The

District Court determined the 2001 Montana Legislature, with its adoption of a new kind of statutory immunity, had effectively eliminated the right to self-defense in civil actions that existed previously—that immunity under § 27-1-722 had become the only "use of force defense for civil actions in Montana." (Doc. 95 at 5.) But in making this important determination, the District Court made no attempt to harmonize the new statute with the existing common law, much less explain why harmonization was not possible. (Doc. 95 at 5.) The fact is, there is nothing inconsistent between the common law defense of justifiable use of force that has existed for years and civil immunity under § 27-1-722.

The fact that civil immunity under § 27-1-722 does not comprise the exclusive justifiable use of force defense in Montana is demonstrated in a number of ways. First, the statute explicitly requires that the defense be asserted "under this section." *Id*. (emphasis added). The Legislature could easily have said attorney fees are awardable whenever a civil defendant asserts "justifiable use of force" or "self-defense," but it did not do so. Instead, it specifically required a defense be asserted "under this section." *Id*. The District Court's role in construing the statute was "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. It went outside its designated role by expanding the statute's

application to any civil action where "justifiable use of force" is asserted. (Doc. 95 at 5.)

Second, § 27-1-722 includes a prerequisite that, for immunity to apply, the use of force must be "allowable" under the criminal justifiable use of force statutes. Mont. Code Ann. § 27-1-722(1). No such requirement exists in the common law defense. The criminal justifiable use of force defense, set forth in Title 45, chapter 3, part 1, is distinct from the civil defense set forth in MPI.2d 9.05. Indeed, Olds argued as much to the District Court, insisting the criminal self-defense statutes should not be considered and that "the proper defense in a civil assault or battery matter is 'self defense' as expressed in MPI.2d 9.05." (Doc. 50 at 2.) By arguing the criminal statutes were irrelevant, Olds conceded that § 27-1-722 did not apply to this lawsuit. He only changed his position after trial.

The distinct nature of the criminal defense is also demonstrated by the applicable burden of proof. A use of force "allowable" under the criminal statutes requires the defendant to first produce sufficient evidence to raise a reasonable doubt of his guilt, and then withstand the State's attempt to prove an absence of justification beyond a reasonable doubt. *State v. Daniels*, 2011 MT 278, ¶ 14, 362 Mont. 426, 265 P.3d 623. The standard in the civil arena is preponderance of the evidence. Mont. Code Ann. § 26-1-403. This underscores the true purpose of the new immunity created by the Montana Legislature in 2001: to shield those who had established a

justifiable use of force in a criminal proceeding from liability in a follow-on civil lawsuit. The statute did not replace the common law defense or become the only justifiable use of force defense for civil actions in Montana.

Additionally, to have effectively "asserted" § 27-1-722, Huelskamp would have had to comply with Montana's pleading standards. In this regard, immunity in Montana is a matter of avoidance that must be affirmatively pleaded at the outset of the case. Mont. R. Civ. P. 8(c); *see also Orr v. State*, 2004 MT 354, ¶ 55, 324 Mont. 391, 106 P.3d 100 ("Immunity is a matter of avoidance, an affirmative defense."); *Brown v. Ehlert*, 255 Mont. 140, 146, 841 P.2d 510, 514 (1992) ("We conclude that Workers' Compensation exclusivity and co-employee immunity are matters of avoidance which, pursuant to Rule 8(c), M. R. Civ. P., must be pleaded affirmatively.").

Asserting an affirmative defense requires a party to "affirmatively state any avoidance or affirmative defense. . . . ." Mont. R. Civ. P. 8(c)(1) (emphasis added). This is so, of course, because the purpose of raising an affirmative defense is to provide notice of the matter to be litigated. *Brown*, 255 Mont. at 146-47, 841 P.2d at 514-15. For this same reason, an affirmative defense is generally waived if not set forth in the answer. *Masters Grp. Int'l, Inc. v. Comerica Bank*, 2015 MT 192, ¶ 47, 380 Mont. 1, 352 P.3d 1101. As amply demonstrated here, neither party had notice

that an immunity defense under § 27-1-722 was at issue because that defense was never "affirmatively stated." Mont. R. Civ. P. 8(c)(1).

Huelskamp did not raise § 27-1-722 as an affirmative defense in his answer, or at any point during the litigation. Both parties included a general request for attorney fees in their initial prayers for relief, but made no mention of Mont. Code Ann. § 27-1-722. (Docs. 1, 3.) Furthermore, by the time the parties were ready to try the case, neither was requesting fees. (Doc. 71, Ex. D.) The parties prepared a pretrial order that was finalized and agreed to on November 17, 2021, and it made no mention of any fee request. (Doc. 71, Ex. D.) It is well established that a pretrial order supersedes the pleadings. *MacKay v. State*, 2003 MT 274, ¶ 18, 317 Mont. 467, 79 P.3d 236; *see also* U.D.C.R. 5.[1]

Olds was the only party to "assert" § 27-1-722, but he asserted it on behalf of an opposing party and only after the trial had concluded. This worked a gross injustice on Huelskamp and amounted to reversible error. The award of attorney fees should be reversed.

[1] When the pretrial order was finalized, Olds' counsel represented they would bring the pretrial order to the judge, but failed to do so. (Appeal Tran. 1, 52.) Regardless, the pretrial order was circulated and agreed to by the parties and reflects the parties' positions after discovery and on the eve of trial.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES DESPITE OLDS' FAILURE TO PROVIDE CONTEMPORANEOUS BILING RECORDS.

It was Olds' burden to support his claim for fees with competent evidence. *Tacke v. Energy West*, 2010 MT 39, ¶ 32, 355 Mont. 243, 227 P.3d 601. This included proving the "reasonableness of the hours billed," and demonstrating that the claimed hours were not "unproductive, excessive, or redundant." *Id.* This Court has made clear that "competent evidence" of reasonable attorney fees means contemporaneous billing records. *Id*., ¶ 38.

The failure to provide billing records will typically warrant denial of a fee application. *Id*. In *Tacke*, as here, the trial court's fee award was based on attorney affidavits that were not supported by billing records. *Id*. The Court first rejected the argument—made by Olds here—that billing records need not be produced unless specifically requested by the other side. *Id*., ¶ 33. The Court pointed out "[i]t was Tacke's burden, not Energy West's, to provide evidence demonstrating that her claimed attorneys' fees were reasonable" and "[t]o hold otherwise would shift Tacke's burden to Energy West." *Id*.

The Court went on to reject the argument—made by Olds here—that billing records are shielded by the attorney-client privilege or work-product doctrine. *Id.*, ¶ 36-37. It found that when such records contain potentially privileged information, *in camera* review and redaction "will accommodate the need for such records in order to

demonstrate the reasonableness of fee awards in fee-shifting cases while also protecting the attorney client privilege." *Id*. The Court concluded, "while we do not adopt a per se rule as some courts have done, we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases, and we encourage district courts to look askance at requests not so supported." *Id*., ¶ 38 (emphasis added).

Despite *Tacke's* clear expression of the governing standard, Olds did not support his fee request with contemporaneous time records. Instead, he submitted attorney affidavits that simply stated the number of hours spent on the case in general and their hourly rate. (Doc. 69, Exs. 1-4.) This failure of proof was surprising not only in light of *Tacke,* but because the amounts billed were substantial. Even though the parties originally deemed the dispute appropriate for the simplified Rule 6 procedure, Olds claimed over $105,000 in fees for two attorneys and two purported paralegals. (Doc. 69.)

Huelskamp promptly identified the lack of supporting documentation and brought it to Olds' attorneys attention, but Olds steadfastly persisted in his refusal to turn over any billing records. (Doc. 71 at 7; Doc. 74 at 14-15.) On October 13, 2022, the District Court scheduled the fee hearing, specifically quoting Huelskamp's reference to the necessity of "supporting documentation" and giving Olds another

two months to research his burden and produce any supporting evidence. (Doc. 95.00, p. 10.) Olds refused.

The fee hearing took place on December 28, 2022. Both of Olds' attorneys testified, as did the parties' expert witnesses. (Doc. 98.) For much of the hearing, Olds maintained he did not need to turn over billing records—even with redactions—because they were not specifically requested and were privileged and/or protected work product. (Appeal Tran. 2, 22.) These were the same arguments rejected in *Tacke*. *Id*., ¶¶ 33, 36-37. Halfway through the hearing, after extensive discussion of *Tacke*, Olds apparently realized the position he had maintained for the past year was untenable. For the first time, he offered to submit his billing records. (Appeal Tran. 2, 47.)

Huelskamp objected to the late attempt to substantiate the fee application. (Appeal Tran. 2, 47.) Allowing Olds to submit previously undisclosed evidence for the first time mid-hearing would have deprived Huelskamp's counsel and expert of the ability to meaningfully review and analyze the evidence, and to effectively cross examine Olds' witnesses. The District Court agreed. It sustained Huelskamp's objection and did not allow introduction of the billing records. (Appeal Tran. 2, 48.) Still, it went on to hear testimony from Olds' witnesses characterizing and opining about the billing records Huelskamp was never able to review. (Appeal Tran. 2, 12-74.)

After the hearing, Olds attempted to remedy his error by filing another motion, this time asking to file his billing records under seal for *in camera* review. (Doc. 99.) Huelskamp objected. The District Court made the billing records part of the record on appeal, but expressly declined to consider them in its reasonableness evaluation. (Doc. 103.) The District Court awarded Olds' two attorneys all the fees they requested, and even added a bit more, apparently to achieve a round number. (Doc. 104 at 16.) It concluded "the Court has no reason to believe that the hours testified to and averred by both attorneys, as well as what those hours were comprised of, are inaccurate or unreasonable." (Doc. 104 at 14, 15.) Of course, the District Court had no reason to doubt counsel's *ipse dixit* because it did not consider billing records. Only Olds' counsel and his expert were permitted to review that documentation.

Even so, the District Court found Olds' counsel's characterization of the unproduced documentation was sufficient: "Both Mr. Schmidt and Mr. Berkoff testified that they used CLIO software to record their time contemporaneously, and the hours listed in that system—as reflected in their affidavits—were true and accurate, and that no hours were duplicative between them." (Doc. 104 at 14.) The District Court likewise relied on the testimony of Olds' expert about what the billing records allegedly said. (Doc. 104 at 16.) Respectfully, the District Court's blind faith was no substitute for the competent evidence required by Montana law. *See Tacke*, ¶ 38. The District Court was supposed to "look askance" at any fee request

unsupported by billing records, *id*., ¶ 38, but it instead adopted counsel's it's-true-because-we-say-it's-true testimony wholesale. By relying on conclusory testimony in the absence of contemporary billing records—testimony Huelskamp had no opportunity to meaningfully challenge—the District Court abused its discretion. The award of attorney fees should be reversed for this additional, independent reason.

III. THE DISTRICT COURT ERRED IN DISMISSING HUELSKAMP'S JUSTIFIABLE USE OF FORCE DEFENSE.

There being no dispute that Huelskamp struck Olds and broke his nose, justifiable use of force was the linchpin of Huelskamp's liability defense. Huelskamp testified at trial about the defensive nature of his conduct:

> Q. Okay. So the two of you are talking at his truck; what are you guys talking about?
>
> A. Well, there wasn't a whole lot of talking that went on. I got up there. And I don't know that I said really anything right away. But I was going to talk to him. I came up to the window and as soon as I came up to the window he spit in my face as he was pushing the door open towards me.
>
> Q. How did you react to that?
>
> A. I acted defensively. You know, I thought I was going to -- first of all, I got spit in the face but when the door came towards me I reached out and threw my left hand out.

(Appeal Tran. 1, 445:10-16.) Huelskamp further testified that he did not intend to hit Olds. (Appeal Tran. 1, 445:23-25.) But whether the specific consequence of his

force was accidental or not, Huelskamp's testimony was consistent: The act of throwing out his hand was a defensive response to Olds' pushing open the truck door to go after Huelskamp. (Appeal Tran. 1, 445:10-16.)

The District Court took this issue from the jury. (Appeal Tran. 1, 494:7-497:11.) It eliminated Huelskamp's justifiable use of force defense on the second day of trial, after Olds moved for judgment as a matter of law. (Appeal Tran. 1, 497:1-10.) The District Court found Huelskamp's testimony permitted only two inferences: that his use of force was either an accident, or it was retaliation. (Appeal Tran. 1, 496:2-17.) It was error for the District Court to make this call for the factfinder.

Although a juror could reasonably interpret Huelskamp's testimony the same way as the District Court, a juror could just as reasonably conclude Huelskamp's conduct was defensive, as Huelskamp testified. Contrary to the District Court's conclusion, the mere fact that Huelskamp did not intend the specific consequence of his use of force did not render his conduct non-defensive or "accidental." *See, e.g., State v. King*, 2013 MT 139, ¶¶ 23-24, 370 Mont. 277, 304 P.3d 1. For example, if one defends oneself from an armed assailant by trying to shoot the assailant in the leg, the conduct becomes no less defensive if the shot hits him in the chest. Shooting the chest instead of the leg may have been an accident, but firing the shot in self-defense was not. Stated differently, the question for the jury is whether the use of

force was justifiable, not whether the person defending himself/herself achieved the precise result he/she intended. *See King*, ¶¶ 23-24.

Many courts have determined "[i]t is entirely plausible that a person could act intentionally in self-defense and at the same time achieve an unintended result." *State v. Gallegos*, 22 P.3d 689, 692 (N.M. Ct. App. Apr. 3, 2021) (collecting cases); *People v. Robinson*, 516 N.E.2d 1292, 1304-05 (Ill. 1st Dist. Ct. App. Nov. 3, 1987) ("[T]he allegedly accidental nature of the ultimate gunshot does not vitiate the self-defense evidence as to the struggle that immediately preceded it."); *State v. Fondren*, 701 P.2d 810, 813-14 (Wa. Ct. App. 1985) (defendant's intentional use of force preceding accidental shooting provided sufficient grounds for a self-defense instruction in addition to accident instruction); *State v. Callahan*, 943 P.2d 676, 680 (Wa. Ct. App. 1997) (finding "the defenses of accident and self-defense are not invariably inconsistent and mutually exclusive"). The same rationale applies here.

Although this Court does not appear to have addressed this precise question, it has implicitly acknowledged that a defendant claiming an injury was accidental will not necessarily preclude a justifiable use of force defense in all cases. *King*, ¶¶ 23-24. The District Court cited this case for the proposition that "[i]n order to advance a justifiable use of force defense, a defendant must concede that the use of force was done purposely or knowingly." (Doc. 80 at 4.) But in *King*, a deliberate homicide case, the Court found the defendant was not precluded from pursuing a use of force

defense while also claiming the death was accidental. *Id*., ¶ 24. Rather, the defendant "did not pursue a claim of self-defense at trial," instead maintaining the decedent had been accidentally killed in a struggle to prevent his suicide attempt. *Id*., ¶ 19. In other words, the defendant claimed he had been trying to protect the decedent. *Id*.

No such claim is made here. Huelskamp was not trying to protect Olds, he was trying to protect himself from what he believed was Olds' attempt to injure him. Moreover, to establish self-defense in the civil context, Olds only needed to demonstrate: (1) he was "unlawfully attacked or reasonably believe[d] he [was] about to be wrongfully attacked," and (2) he "use[d] such force in self-defense to protect himself[] as reasonably appear[ed] necessary under the existing circumstances." MPI.2d 9.05. Contrary to the District Court's suggestion, Huelskamp was not required to admit he intended the specific injury caused. *Id*.

Huelskamp testified he intentionally used force in self-defense, despite the fact that the specific injury he caused was not intended. The District Court should have allowed the jury to decide whether this use of force was justified under the circumstances. When a trial judge deprives a party of the opportunity to present a claim or defense during a jury trial, the scope of the Court's review is particularly broad, with no special deference given to the district court:

> We conclude that this standard of review is proper for the following reasons. First appellate review of the trial court's decision to grant or

> deny a motion for judgment as a matter of law involves not only the assessment of the sufficiency of the evidence but also the application of the aforementioned settled principles of law to that quantum of evidence. Both involve questions of law: The legally required quantum of evidence sufficient to sustain submitting an issue to the jury either exists or it does not. In other words, is there a complete absence of any evidence which would justify submitting the issue to a jury, considering all the evidence and any legitimate inferences that might be drawn from the evidence in the light most favorable to the party opposing the motion? Could reasonable persons differ regarding conclusions that could be drawn from evidence? If, applying these legal rules, the evidence is legally insufficient, the trial court does not have discretion to submit the issue to the jury. However, if the evidence is legally sufficient then the trial court does not have discretion to grant a motion for judgment as a matter of law and, thus, deprive the opposing party of a jury trial. Since the assessment of the sufficiency of the evidence and the application of the law to that assessment cannot involve discretion--i.e., since no deference is given to the trial court--the question is one of law to which the *de novo* or plenary standard of review applies.

Johnson v. Costco Wholesale, 2007 MT 43, ¶¶ 18-19, 336 Mont. 105, 152 P.3d 727 (emphasis added).

This was not a case with "a complete absence of any evidence" that Huelskamp acted in self-defense. *See id*. It was not a case in which no legitimate inferences could be drawn in favor of that defense. *See id*. Huelskamp testified he threw his hand out in a defensive manner when Olds tried to push open the truck door, after spitting in Huelskamp's face and threatening to kill him. It was error to take the issue of justifiable use of force from the jury. The case should be remanded for a new trial.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REVERSING COURSE ON ITS PRETRIAL RULINGS AND EXCLUDING HUELSKAMP'S EXPERT WITNESS ON THE SECOND DAY OF TRIAL.

Huelskamp retained an expert witness, Shawn Paul, to testify on two distinct issues: (1) that Huelskamp's use of force was defensive and justified under the circumstances, and (2) that the blood spatter left on Olds' truck showed left-to-right momentum, which supported Huelskamp's version of events and disproved Olds' story. (Appeal Tran. 1, 482:25-483:17.) Both opinions were crucial to Huelskamp's liability defense. Nevertheless, after repeatedly stating that Paul would be allowed to testify with adequate foundation, and after rejecting Olds' argument that Paul's disclosure was untimely, the District Court changed its mind on the second day of trial. It excluded Paul on grounds of an untimely disclosure. (Appeal Tran. 1, 325:22-25.) This was an abuse of discretion.

First, Paul was timely disclosed. His detailed report was served on Olds 13 months before trial. (Appeal Tran. 1, 482:2-10.) Olds' late disclosure theory is based exclusively on the District Court's original scheduling order, which was vacated early in the proceedings. (Docs. 13-15, 34, 42, 44, 45.) That scheduling order was based on the erroneous expectation—shared by the parties and the District Court at the time—that the matter would be straightforward to litigate. Judge Marks suggested utilizing the new expedited pre-trial procedure under Montana Uniform District Court Rule 6, and the parties agreed. Trial was anticipated within six months. UCDR

6(c)(1). An expert disclosure deadline was set for February 25, 2020. The parties served disclosures on that date, stating they had retained no experts. (Appeal Tran. 1, 385:5-17.) Soon thereafter, the scheduling order was vacated due to the COVID pandemic. (Appeal Tran. 1, 9:5-8.)

Based on the anticipated compressed timeline under Rule 6, Huelskamp initially did not intend to retain an expert witness. However, the pandemic rendered the six-month timeline impossible. In light of that change in circumstances, Huelskamp moved the Court to extend pretrial deadlines. (Docs. 10, 12.) With the additional time—and as it became evident that Plaintiff intended to pursue emotional distress and punitive damages in the six figures—Huelskamp determined it was necessary to retain an expert witness on justifiable use of force.

After the delays occasioned by the pandemic, the depositions of Huelskamp and Olds were completed on July 17, 2020 and July 28, 2020, respectively. (Doc. 73 at 3.) Huelskamp's counsel received transcripts of those depositions on August 11, 2020 and August 13, 2020, and immediately forwarded those transcripts to expert Shawn Paul. (Doc. 73 at 3.) Mr. Paul completed his 11-page expert disclosure within two weeks of receiving the transcripts. (Doc. 73 at 3.) Huelskamp provided the disclosure to Plaintiff's counsel just two days later. (Doc. 73 at 4.) Although Rule 6 contemplates serving expert disclosures three months before trial, Huelskamp

served Shawn Paul's expert disclosure more than 13 months before trial. (Doc. 73 at 4.)

On October 21, 2020, Olds moved to exclude Paul based on the alleged late disclosure. (Doc. 16.) The motion was fully briefed, including thorough analysis of the timeliness issue. (Docs. 17, 18, 35.) The District Court first addressed the motion in a pretrial hearing in March 2021—still months before trial—and advised that Plaintiff's motion was likely to be denied:

> MR. SCHMIDT: Okay. Judge Marks, with regard to the expert witness, currently there is a Motion to Exclude. Do you have any thoughts, at least initial thoughts whether that's going to be granted or denied?
>
> THE COURT: I think that is probably going to be denied. But I actually -- that's one I have to sit down and work through a little bit more but I'm leaning toward denying that.

(Appeal Tran. 1, 30:23-31:5.)[2]

Later, the District Court did deny Plaintiff's motion to exclude Shawn Paul in a written order:

> Plaintiff moves to preclude opinion testimony from Shawn Paul regarding the July 18, 2018, incident that is the subject of this case. This motion is **DENIED**

[2] A year before trial, Huelskamp extended an open invitation to Olds to take Paul's deposition and/or to disclose his own expert. (Appeal Tran. 1, 386:5-10.) Olds did not accept.

(Doc. 47.) Although it cautioned that Paul would be subject to voir dire and his testimony might open the door to other evidence (warnings that could apply to any expert witness), the District Court declined to adopt Olds' late disclosure theory. (Doc. 47.)

The day before trial, the District Court again reaffirmed that "Shawn Paul may testify":

> Upon inquiry by Mr. Schmidt, the Court advised the parties to use the Court's regular Law and Motion ZOOM link for video appearances. Upon inquiry by Mr. Schmidt, the Court advised that Dr. Taylor may testify to the treatment he provided. There is open court discussion regarding testimony by other treating physicians. The Court advised that it will take the issue under advisement. There is further discussion regarding jury instructions. Upon inquiry by Mr. Berkoff, the Court advised that counter jury instructions may be introduced. The Court then advised that Shawn Paul may testify but his Report will not be allowed in.

(Doc. 53.)

Before opening statements, the District Court again informed counsel that Paul would be permitted to testify, subject to establishing proper foundation. (Appeal Tran. 1, 157:15-158:16.) Accordingly, Huelskamp's counsel told the jury during opening statement they would hear from Paul. (Appeal Tran. 1, 198:9-199:17.)

In the middle of the second day of trial, the District Court excluded Paul. (Appeal Tran. 1, 321:23-326:6; 384:25-386:18.) The decision was not based on any alleged lack of foundation, which was an issue the District Court had reserved but which Huelskamp was not afforded the opportunity to present. The decision was based instead on the alleged untimeliness of Paul's expert disclosure, the very issue the parties briefed months prior, and which the District Court had previously decided.

The District Court's reversal was prompted by a limitation it imposed on the testimony of one of Olds' treating doctors, Dr. Clark Taylor. (Appeal Tran. 1, 386:16-18.) The District Court found Paul to be "the exact equivalent of Dr. Taylor and future medicals. So Mr. Paul is out." (Appeal Tran. 1, 386:16-18.) But there was nothing "equivalent" about these two expert witnesses, and nothing "equivalent" in the District Court's treatment of the parties on these evidentiary matters.

Olds had disclosed Dr. Taylor to testify about his care and treatment. (Appeal Tran. 1, 38:23-39:5.) Nothing in that disclosure suggested Dr. Taylor would testify that Olds would require future medical care, yet that is exactly what Dr. Taylor attempted to do. (Appeal Tran. 1, 39:12-14.) Huelskamp objected on the basis that this opinion testimony was never disclosed. (Appeal Tran. 1, 41:2-42:6.) Ultimately, the Court imposed a largely meaningless limitation on Dr. Taylor's testimony, allowing him to testify that Olds would have ongoing medical needs, but not about the specific future procedures, treatment or costs. (Appeal Tran. 1, 159:21-160:7.) This slight limitation, based on a complete failure to disclose, is hardly comparable to the total exclusion of an expert witness who had provided a detailed disclosure many months before trial, and whom Olds had the opportunity to depose and rebut with his own expert.[3]

[3] As reflected the District Court's Minute Entry, the day before trial the District Court confirmed Paul "may testify" at the same time it addressed the permissible scope of Dr. Taylor's testimony. (Doc. 53.) Its mid-trial reversal was not based on any new information.

Paul's improper exclusion was then used by Olds to seek dismissal of Huelskamp's justifiable use of force defense: "[T]heir whole defense of justifiable use of force was premised upon the testimony of Mr. Paul. He didn't testify. We know why. But he didn't testify and there is no evidence that justifiable use of force was appropriate in this case." (Appeal Tran. 1, 493:5-9.)

The exclusion of Paul requires a new trial for two reasons. First, it was an abuse of discretion to exclude Paul on the basis of an alleged untimely disclosure. Second, it was an abuse of discretion to do so midway through trial.

The District Court initially got it right when it ruled that Paul would not be excluded on the basis of an untimely disclosure. Uniform District Court Rule 6 provides that "it is expected" that expert disclosures will be filed within three months, but the rule also provides that trial will occur within six months. The language of the Rule thus provides flexibility for the disclosure deadline, and the pandemic-induced trial delays more than justified flexibility. As Chief Justice McGrath relayed to Montana's district court judges during the pandemic: "This is, and will remain, a fluid situation and will require a great deal of flexibility moving forward." (Doc. 73, Ex. C.)

Indeed, the District Court appeared to later acknowledge that an untimely disclosure was not a sufficient basis to exclude Paul. In its order denying

Huelskamp's motion for new trial, the District Court attempted to recast its trial ruling as one based on other evidentiary considerations, rather than a late disclosure:

> The remainder of the Defendant's motions center around his dissatisfaction with rulings the Court made regarding testimony from his expert and a potential justifiable use of force defense. Defendant hangs his hat on a minute entry in which the Court ruled that a report authored by Mr. Paul, Defendant's expert on justifiable use of force, would not be admitted at trial. He believes that the Court ruled that Mr. Paul himself would be allowed to testify and that there was a mid-trial reversal. That is not accurate. In the minute entry cited in the Defendant's brief the Court was ruling on an evidentiary issue. Mr. Paul's report contained hearsay and hearsay within hearsay. It was flatly inadmissible for that reason. The Court was very clear that the issue of Mr. Paul being allowed to testify would be decided at trial. This was specifically laid out in the Court's Combined Order on Motions *in Limine*. (Doc. No. 47.)

(Doc. 80 at 3.)

Respectfully, this characterization is not accurate. Huelskamp never contended the District Court's pretrial rulings allowed Paul to testify without limitation or regard to other evidentiary considerations. Huelskamp never contended Paul's report was admissible in evidence. Huelskamp argued, and the District Court agreed, that the timeliness of Paul's report could not be the basis for exclusion. Yet that is exactly the reason the District Court excluded Paul at trial.

Even if the exclusion of Paul was otherwise supportable (and it is not), reversing an evidentiary ruling mid-trial is a sufficient basis in itself to grant a new trial when the affected party is prejudiced by the change. *See Clark v. Bell*, 2009 MT 390, ¶ 39, 353 Mont. 331, 220 P.3d 650. In *Clark*, the district court issued a written order on a motion *in limine* "[l]ong before trial." *Id*, ¶¶ 31-32. In that order, the district court precluded evidence or argument regarding the plaintiff's preexisting conditions. *Id.*, ¶ 33. During trial, the district court revised its ruling to allow such evidence. *Id.*, ¶ 35. This Court held that the revised evidentiary ruling on the first morning of trial was a surprise within the meaning of Mont. Code Ann. § 25-11-102, and that the affected party "was substantially disadvantaged in trying a case she had not prepared for." *Id.*, ¶ 38. The Court reversed and remanded for a new trial on this basis. *Id. See also, e.g.*, *Garcia v. Emerson Elec. Co.*, 677 So. 2d 20, 21 (Fla. Dist. Ct. App. 1996) ("We conclude that the trial court abused its discretion when it reversed its pretrial ruling midway through the trial…"); *see also Willson v. Big Lake Partners, LLC*, 211 So. 3d 360, 364-65 (Fla. 4th DCA 2017) (The trial court abuses its discretion when it enters "a mid-or post-trial change in the admission of evidence" and "the affected party is prejudiced."); *John Hancock Mut. Life Ins. Co. v. Zalay*, 522 So. 2d 944, 946 (Fla. Dist. Ct. App. 1988) ("A party who relies on a favorable trial court ruling should not be placed at risk of being worse off than had the ruling been unfavorable in the first instance.").

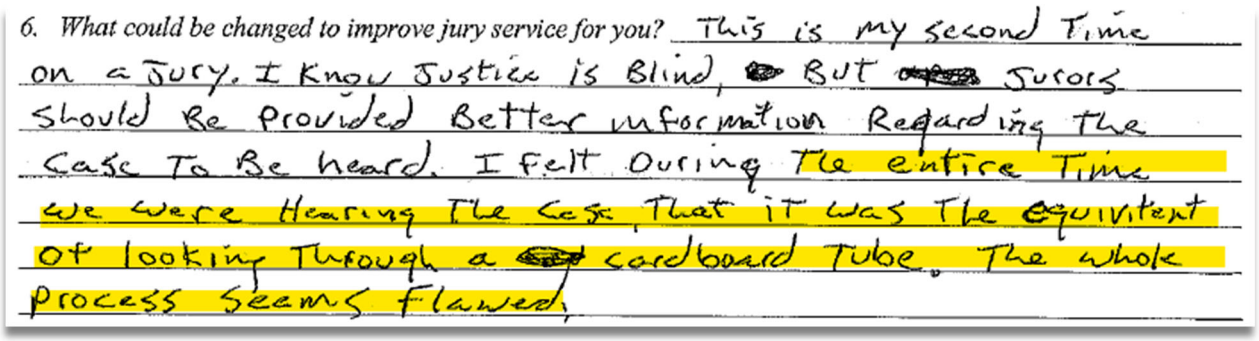
Here, the factors relevant to unfair surprise all weigh in favor of a new trial. *See Clark*, ¶ 30-39. There can be no dispute Huelskamp was surprised by the District Court's reversal on the expert disclosure issue, that the surprise did not result from Huelskamp's inattention or negligence, that he acted promptly at the earliest opportunity, and that the surprise had a material bearing on the case that likely effected the result. *Id*. Paul's testimony could have disproved liability altogether, or at least would have prevented or mitigated the punitive damages award. It would have also shown that, based on the blood spatter evidence, Huelskamp's testimony was more credible than Olds' testimony.

Huelskamp relied on the District Court's prior rulings that Paul would be allowed to testify with adequate foundation, and could not revamp his strategy immediately before the jury was called back into court for the final two witnesses of the trial. Huelskamp prepared for trial in reliance on the Court's discussion with counsel (months before trial), written order (a week before trial), and verbal statement (the day before trial) that Mr. Paul would be allowed to testify, subject to other evidentiary considerations, and certainly would not be excluded on the basis of his alleged untimely disclosure. Defense counsel made an opening statement based on the expectation that Paul would testify, and prepared for the direct examination of Huelskamp with the same expectation. At the last minute, all those plans went up in smoke.

Had Huelskamp known before trial that Paul would not be allowed to testify, he and his attorneys might have adjusted their approach by, for example, further developing Huelskamp's testimony or calling additional fact witnesses. But when the District Court determined in the afternoon of the second day (immediately prior to the final two witnesses) that "Paul is out," it was too late for Huelskamp to make any commensurate strategic adjustments. Not only did Huelskamp lose the benefit of Paul's opinions, he lost his justifiable use of force defense entirely. As a result, he was unable to meaningfully defend against the liability claims and the punitive damages request. The only remedy sufficient to cure this prejudice is a new trial.

V. THE DISTRICT COURT ERRED BY EXCLUDING THE FACTS KNOWN TO HUELSKAMP AT THE TIME OF THE ALTERCATION THAT MADE HIM REASONABLY FEAR FOR HIS SAFETY.

The District Court excluded evidence of what had previously transpired between the parties, and what Huelskamp knew of Olds at the time of the underlying incident. (Doc. 47 at 1.) This highly-sanitized version of events left the false impression that Huelskamp's conduct was completely random and unjustified. As one juror aptly commented after trial, the jury was essentially asked to view the evidence "through a cardboard tube":



6. *What could be changed to improve jury service for you?* This is my second Time on a Jury. I Know Justice is Blind, but Jurors Should Be Provided Better information Regarding the Case To Be heard. I Felt During The entire Time we were Hearing The Case, That it was The equivitent of looking Through a cardboard Tube. The whole process Seems Flawed.

(Doc. 77 at 7.)

Huelskamp's prior knowledge at the time of the altercation was critical not only to his justifiable use of force defense, but also to counter Olds' claim that Huelskamp acted with malice. Viewing the evidence through a "cardboard tube," the jury was deprived of important background facts that explained Huelskamp's actions. More specifically, Huelskamp sought to introduce evidence of the following:

- Prior instances in which Olds had been driving too fast and ran Huelskamp off the road, including Huelskamp's calls to the Sheriff to address Olds' dangerous behavior. (Doc. 18, 8 and Ex. B.)

- Huelskamp's knowledge of a prior incident in which Olds sat in his parked truck glaring menacingly at Huelskamp's 65-year-old girlfriend while she was walking to retrieve her mail. (Doc. 18 at 6.)

- Huelskamp's pre-existing knowledge of Olds' reputation in the neighborhood as "volatile," a "hothead" and a "lunatic." (Doc. 18 at 7.)

By excluding this evidence, the District Court allowed Olds to portray Huelskamp's conduct as "out of the blue," when nothing could have been further from the truth. Huelskamp's counsel sought to inform the jury Huelskamp was not simply lashing out at a neighbor he had no prior history with, but the District Court

persisted in keeping this important context from the jury, going so far as to say an impression that "[w]e all know [is] inaccurate" was "exactly the impression the jury is supposed to be left with":

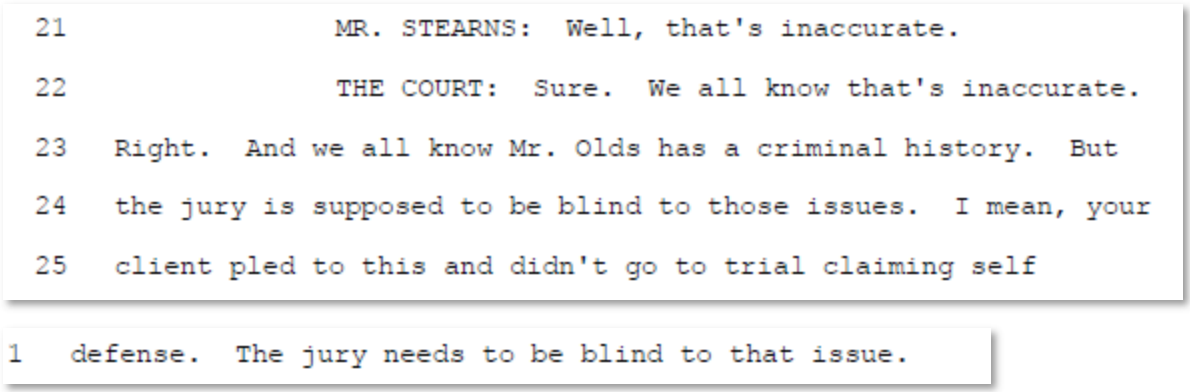
THE COURT: And that's -- I mean, if there was a relevant prior incident I could see where perhaps the door has been at least cracked but unless, Mr. Stearns, you can refresh my recollection from prior discussion of this issue, I'm hard pressed to come up with a relevant prior incident that would go to what happened on this occasion.

MR. STEARNS: Well, Mr. Huelskamp can testify to plenty of incidents with him on the road in the lead up to this and since. Where he's doing scary stuff to Mr. Huelskamp and his partner Marla Wimmer both before and after. And so right now it's have there ever been any other incidents? Answer: No. Edit. And that's just simply inaccurate.

THE COURT: Right. But since I precluded any other incidents from the jury, I'm having a hard time seeing what the problem is with them not hearing about it.

MR. STEARNS: The prejudice to my client is it just makes it feel to the jury that, oh, my gosh, out of the blue they had this incident on this day and that's inaccurate.

THE COURT: That's supposed to be how it feels when we preclude other incidents. That is exactly the impression the jury is supposed to be left with.



MR. STEARNS: Well, that's inaccurate.
THE COURT: Sure. We all know that's inaccurate. Right. And we all know Mr. Olds has a criminal history. But the jury is supposed to be blind to those issues. I mean, your client pled to this and didn't go to trial claiming self defense. The jury needs to be blind to that issue.

(Appeal Tran. 1, 376:25-378:1.)

First, as set forth above, Huelskamp did proffer evidence of self-defense. "Where the character of the victim relates to the reasonableness of force used by the accused in self-defense, proof may also be made by specific instances of that person's conduct." Mont. R. Evid. 405. This rule is particularly applicable where the defendant establishes a foundation that his knowledge of the victim's prior conduct led him to the use the level of force employed. *See State v. Daniels*, 2011 MT 278, ¶¶ 27-28, 362 Mont. 426, 265 P.3d 623; *State v. Montgomery*, 2005 MT 120, ¶ 10, 327 Mont. 138, 112 P.3d 1014. Indeed, "[t]he primary issue in the affirmative defense of justifiable use of force is the reasonableness of the defendant's belief that the use of force is necessary." *State v. Branham*, 2012 MT 1, ¶ 10, 363 Mont. 281, 269 P.3d 891. To assess whether a party's use of force is justifiable, "the jury is entitled to know . . . all the facts and circumstances which tend to throw light upon the parties and their relations and feelings toward each other." *State v. Weinberger*, 204 Mont. 278, 292, 655 P.2d 202, 210 (1983) (emphasis added). Here, the jury should have

been given the facts and circumstances of the relations between Olds and Huelskamp and their feelings toward one another, which were necessary to show Huelskamp was not acting on an angry whim but, rather, reasonably believed Olds had the intent and physical ability to inflict physical harm.

Moreover, not only were these facts relevant to self-defense, they were also relevant to Olds' claim that Huelskamp's conduct was malicious. Since the jury was led to believe Huelskamp stopped his vehicle to confront some random young person, without the benefit of the parties' prior history, the jury awarded punitive damages. Huelskamp was effectively precluded from demonstrating his actions were far from malicious, and were instead motivated by legitimate and informed concerns about his personal safety, as well as concerns about the safety of his significant other and his neighbors, which he had previously attempted to address through law enforcement.

Whereas a district court certainly has discretion to limit evidence at trial to that which is relevant and not unfairly prejudicial, that discretion does not extend to leaving impressions with the jury it knows to be inaccurate. This is particularly so when a false impression has such dire consequences for one of the parties. Removing all context from the underlying incident prompted the jury to find Huelskamp not only acted unreasonably, but maliciously. This was an abuse of discretion that requires a new trial.

CONCLUSION

This Court should reverse the District Court's attorney fees award because no contractual, statutory, or equitable basis exists to award fees, and because Olds' fee request was not supported by sufficient evidence in any case. Additionally, the Court should remand the case for a new trial, allowing Huelskamp a fair opportunity to present his justifiable use of force defense, with his expert witness, and to prove he did not act unreasonably or maliciously.

Dated: July 21, 2023

BOONE KARLBERG P.C.

/s/ Scott M. Stearns
Scott M. Stearns
Zach A. Franz
Counsel for Appellant/Defendant Mark Huelskamp

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Opening Appellate Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for quoted and indented material, and contains approximately 9,883 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

Dated: July 21, 2023

BOONE KARLBERG P.C.

/s/ Scott M. Stearns
Scott M. Stearns
Zach A. Franz
Counsel for Appellant/Defendant Mark Huelskamp

CERTIFICATE OF SERVICE

I, Scott M. Stearns, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-21-2023:

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: Mark Huelskamp
Service Method: eService

Carey Schmidt (Attorney)
1917 S. Higgins
Missoula MT 59801
Representing: Matthew Paul Olds
Service Method: eService

David C. Berkoff (Attorney)
1917 S. Higgins
Missoula MT 59801
Representing: Matthew Paul Olds
Service Method: eService

Electronically signed by Kate Palmer on behalf of Scott M. Stearns
Dated: 07-21-2023