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IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0600

SALVATRICE MUSCLE,

Plaintiff and Appellant,

v.

ANTONIO SANTIN, M.D.,
Defendant and Appellee.

APPELLEE ANTONIO SANTIN, M.D.'S ANSWER BRIEF

On appeal from the Montana Eighth Judicial District Court,

County of Cascade,

Cause No. ADV-17-0728

Honorable David Grubich Presiding

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I. STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Salvatrice Muscle's ("Muscle") motion for new trial.

2. Whether Muscle is collaterally estopped from contesting the district court's summary judgment conclusions upon the sequencing-related claims if the order denying a new trial is affirmed.

3. Whether summary judgment upon Muscle's sequencing-related claims should be affirmed:

a. Because the district court's conclusions were correct; or

b. As the correct legal result based upon Dr. Sattler explicitly opining causation was a mere possibility.

II. STATEMENT OF THE CASE

After losing approximately one hundred pounds, Salvatrice Muscle consulted Antonio Santin, M.D. in March 2015 to surgically address her "excess thigh and stomach area skin." (Doc. 1, ¶ 4). Dr. Santin recommended a sequence of procedures to address those issues and successfully addressed the former (excess thigh skin a/k/a thigh laxity) via bilateral medial thighplasty in April 2015.

Post-surgery, Muscle, for the first time, expressed to Dr. Santin a desire to have her buttock laxity – laxity that existed, was plainly visible, and known to Muscle before the procedure – surgically removed. Merely two months after the

thighplasty, however, well before a procedure to remove buttock laxity could have been appropriately or safely performed, Muscle chose to leave Dr. Santin's care and seek treatment from another plastic surgeon, Emilia Ploplys, M.D. In early 2016, Dr. Ploplys performed a lower body lift procedure that successfully addressed Muscle's buttock laxity.

Muscle filed this medical malpractice action in November 2017 pleading various theories of recovery stemming from a principal claim that Dr. Santin allegedly failed to diagnose and discuss her buttock laxity at their initial consultation. In early 2022, after deposing Muscle's retained expert, Scott Sattler, M.D., Dr. Santin moved for summary judgment. The district court granted Dr. Santin's motion as to several derivative theories of recovery. Muscle's other theories, including the overarching failure to diagnose and informed consent claims, were tried in April 2022. The jury returned a verdict in favor of Dr. Santin. After her motion for a new trial was denied, Muscle filed the present appeal.

III. STATEMENT OF FACTS

Salvatrice Muscle began a weight loss program in 2009. Over the course of six years, Muscle lost more than one hundred pounds. (Docs. 78, ¶ 1; 85, ¶ 1).

On March 25, 2015, Muscle consulted Antonio Santin, M.D., to address "issues relating to excess thigh and stomach area skin" stemming from the weight

loss. (Docs. 1, ¶ 1; 78, ¶ 2; 85, ¶ 1).[1] Muscle expressly communicated to Dr. Santin and his staff that removal of the excess medial thigh skin (a/k/a medial thigh laxity) was her highest priority. (Tr. 201:8-202:5).[2] The excess thigh tissue was aesthetically displeasing to Muscle and was causing functional problems in her everyday life. (Tr. 203:7-204:9).

Based on the complaints and priorities communicated at the March 25, 2015, appointment, Dr. Santin and Muscle discussed the prospect of medial thighplasty. (Tr. 207:20-208:4). Medial thighplasty is a procedure intended to address laxity in the medial thigh area. (Tr. 175:11-15). Dr. Santin's consultation with Muscle included discussion of the procedure's purpose, risks, benefits, and realistic expectations about results. (Docs. 78, ¶ 3; 85, ¶ 1). During the discussion and examination, Dr. Santin physically showed Muscle what tissue the medial thighplasty would remove. (Tr. 206:6-17). Muscle signed an informed consent document agreeing to undergo "Bilateral Medial Thighplasties." (Docs. 78, ¶ 3; 85, ¶ 1). Muscle's signature on that document certified that the procedure's nature and purpose had been explained to her and that good results were expected but not

[1] Muscle has alleged this as fact from the outset, (Doc. 1, ¶ 1), and repeatedly conceded the same in pleadings. (Docs. 42, ¶ 1; 78, ¶ 2; 85, ¶ 1).

[2] The transcript supplied by Muscle omits the testimony of Dr. Santin and Nurse Pollington – the individuals to whom Muscle expressed her desires and priority thereof.

guaranteed. (Docs. 78, ¶ 3; 85, ¶ 1).

The bilateral medial thighplasty was performed for Muscle by Dr. Santin on April 16, 2015. (Docs. 78, ¶ 4; 85, ¶ 1). The procedure successfully addressed Muscle's medial thigh laxity. (Doc. 78, Ex. D:5; Tr. 175:11-15).

***

When she consulted Dr. Santin March 25, 2015, Muscle also had buttock laxity. (Tr. 88:4-20). Muscle's buttock laxity was "in plain sight," (Tr. 96:20-23), and was depicted in the pre-operative photographs taken by Dr. Santin. (Tr. 146:1-11). Muscle knew she had buttock laxity. (Tr. 139:6-140:25, 148:2-12, 208:9-22; Doc. 26, Ex. E).

Muscle understood the medial thighplasty recommended by Dr. Santin would not address the laxity in her buttock area. (Doc. 27, Ex. A:83:4-84:20). Muscle even understood her buttock laxity – in relation to tissue removed via the medial thighplasty – would look different. (Docs. 26-27, Ex. E:126 (Muscle stating to Emilia Ploplys, M.D., that she merely failed to appreciate the *degree* of relational difference)).[3] Muscle, however, communicated to Dr. Santin neither concerns about nor desire to address her buttock laxity before agreeing to undergo the bilateral medial thighplasty. (Tr. 205:21-206:5).

The jury heard competing expert opinions about whether Dr. Santin departed

[3] The transcript supplied by Muscle omits the testimony of Dr. Ploplys.

from the standard of care on March 25, 2015, by not diagnosing Muscle's buttock laxity, discussing that cosmetic condition with Muscle, and recommending a procedure to address it. Defense expert, Robert Grant, M.D. (board-certified plastic surgeon), opined Dr. Santin adhered to the standard of care in all respects. (Tr. 199:22-200:6). Dr. Grant testified that determining what cosmetic issue(s) to address begins with what the patient communicates as most concerning. (Tr. 203:2-204:9). Dr. Grant also opined Dr. Santin recommending a medial thighplasty for Muscle was appropriate, (*e.g.* Tr. 207:20-208:4), and a plastic surgeon has no duty to formally diagnose cosmetic conditions not complained about by the patient. (*e.g.* Tr. 209:15-210:13). Muscle's expert, Scott Sattler, M.D., opined Dr. Santin breached the standard of care by not informing Muscle she had buttock laxity and recommending a procedure to address it at their initial consultation. (Tr. 90:15-91:15, 97:15-98:1). Dr. Sattler conceded, however, that a plastic surgeon has no duty to act upon the uncommunicated desires of a patient. (Tr. 160:3-13).

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After the medial thighplasty, Muscle attended the first follow-up appointment with Dr. Santin on April 22, 2015. The procedure had successfully addressed Muscle's medial thigh laxity, (Doc. 78, Ex. D:5; Tr. 175:11-15), and Muscle's post-operative condition was otherwise normal. (Tr. 218:9-25). Muscle had additional post-operative visits with Dr. Santin over the following weeks. (Tr. 218:9-221:25).

During these post-operative visits, Muscle, for the first time, communicated to Dr. Santin her concern with buttock laxity. (Tr. 222:1-16). Dr. Santin informed Muscle the buttock laxity existed prior to the medial thighplasty. (*Id.*). Dr. Santin also indicated he would consider solutions should Muscle desire to remove it. (Tr. 222:1-224:22).

Muscle was still in the healing and recovery period from the medial thighplasty when she attended a follow-up appointment with Dr. Santin June 17, 2015. (Tr. 225:11-21). Muscle reiterated her concern with the buttock laxity. (Tr. 240:9-241:3). At that time, it would have been inappropriate, contraindicated, and/or unsafe to surgically remove Muscle's buttock laxity. (Tr. 194:2-14, 245:10-247:5). Accordingly, Dr. Santin recommended a follow-up visit, which Muscle scheduled. (Tr. 248:9-249:6). Muscle, however, later chose not to attend the scheduled follow-up. (*See e.g.* Muscle Br. 9:¶ 5).

Instead of returning for the scheduled follow-up with Dr. Santin, Muscle elected to seek treatment from another plastic surgeon, Emilia Ploplys, M.D. Pursuant to a request from (or authorized by) Muscle, her records were transmitted by Dr. Santin's office to Dr. Ploplys' office July 1, 2015. (Tr. 249:7-24). In early 2016, Dr. Ploplys performed a lower body lift that addressed Muscle's buttock laxity. (Tr. 254:19-24).

A. Summary Judgment Proceedings

Dr. Santin moved for summary judgment February 22, 2022. (Doc. 77). The motion was briefed, (Docs. 77-78, 84-85, 88), and oral argument was heard April 15, 2022. (Tr. 4 *et seq.*). The district court issued a preliminary order April 19, 2022, (Doc. 105), and a final order April 22, 2022. (Doc. 116). The order ruled on several discrete issues, partially granting and partially denying Dr. Santin's motion. (*Id.*, at 10 *et seq.*).

Muscle appeals only two conclusions made in the district court's summary judgment order. (Muscle Br. 5:¶ 2). Those conclusions concerned the standard of care and/or breach elements of Muscle's "sequencing-related"[4] claims:

> No genuine issue of material fact remains that [Dr. Santin's] choice to perform the medial thighplasty was not a departure from the standard of care.
>
> [***]
>
> No genuine issue of material fact remains that [Dr. Santin's] sequencing of procedures was not a departure from the standard of care.

(Doc. 116 at 10:¶1(c)-(d)).

The district court, however, did not reach Dr. Santin's argument that Muscle failed to establish *causation* of the sequencing-related claims. (*See e.g.* Tr. 4:18-22 (arguing Muscle lacked expert testimony establishing causation to a more likely than

[4] As the theory Dr. Santin allegedly should not have chosen to perform medial thighplasty as Muscle's first procedure is logically inseparable from the theory Dr. Santin allegedly should not have sequenced medial thighplasty as Muscle's first procedure, this brief uses the term "sequencing-related" in relation to both claims.

not degree of certainty); *see also* Docs. 77, 88). The facts underlying that argument included:

- Muscle specifically consulted Dr. Santin based on concern with thigh laxity. (Doc. 1, ¶ 4).
- Dr. Sattler conceded sequencing a lower body lift as Muscle's first procedure probably would not have addressed Muscle's concern with thigh laxity. (Docs. 77-78, Ex. E:106:24-107:12 ("won't correct medial thigh ptosis completely"), 221:5-18 ("may have partially corrected her thigh laxity as well")).
- Dr. Sattler conceded the aesthetic result Muscle ultimately wanted more likely than not required multiple surgeries. (Docs. 77-78, Ex. D:5). More specifically, Dr. Sattler conceded sequencing a lower body lift as Muscle's first procedure probably would not have obviated Muscle's desire to have medial thighplasty performed later. (Docs. 77-78, Ex. E: 221:5-18 (merely "might have" spared Muscle from wanting thighplasty)).
- Muscle conceded Dr. Sattler's causation opinion in this regard reflects mere possibility rather than probability. (Doc. 85 at 6:¶ 7 (alternative sequencing "may have" obviated Muscle's desire for medial thighplasty)).

Not reached by the district court, in sum, was the question of whether Dr. Sattler's opinion – an opinion Muscle has conceded reflects mere possibility – was legally

insufficient to establish causation of the sequencing-related claims.

B. Dr. Sattler's Website and the ASPS Guideline

At trial, Muscle had no objection to Dr. Sattler testifying he advertises his plastic surgery practice through a website, (Tr. 120:16-18), and personally selected most of the content to be displayed on that website. (Tr. 120:19-121:4, 152:12-19). Muscle had no objection to publishing exhibits depicting portions of Dr. Sattler's website. (Tr. 152:24-25 ("no objection, Your Honor, it's just the website")). Muscle had no objection to Dr. Sattler testifying the photos used on his website are "part of the marketing." (Tr. 153:10-22). Muscle had no objection to Dr. Sattler testifying he was a member of the American Society of Plastic Surgeons ("ASPS"), (Tr. 121:5-12), and endeavors to comply with the ASPS' ethical guidelines. (Tr. 121:13-15).

Dr. Sattler was then asked whether he was "aware" of an ASPS guideline concerning disclaimers when advertising with stock photographs. (Tr. 154:14-25). Dr. Sattler did not respond to the question posed. Instead, Dr. Sattler boasted his website purportedly complied with the ASPS advertising disclaimer guideline based on the standard in his local community. (Tr. 155:1-16). Muscle neither objected to that question nor objected to Dr. Sattler's non-responsive answer.

Only when the question was asked again did Muscle's counsel object. (Tr. 155:17-156:20). Despite the objection being overruled, no additional testimony was given by Dr. Sattler. (Tr. 156:21-157:13).

On re-direct examination, Muscle's counsel allowed Dr. Sattler to expand upon his website's relationship to the ASPS advertising guideline. (Tr. 179:7-181:11). Dr. Sattler opined: there was a clear difference between the stock and patient photographs; his advertising practices were consistent with other plastic surgeons in his geographic area; his web advertising complied with the ASPS guideline; and no patient had ever been misled. (*Id.*). Muscle's counsel also elicited Dr. Sattler's opinion about a different ASPS guideline. (Tr. 182:2-9). This curative testimony was not attacked during re-cross examination by Dr. Santin's counsel. (Tr. 192:17-196:15).

On direct examination, Dr. Santin's expert, Robert Grant, M.D., was asked to opine about options provided to Muscle at the initial March 2015 consultation. (Tr. 212:2 *et seq.*). Dr. Grant opined the standard of care did not require Dr. Santin recommend options to address the existing buttock laxity because Muscle had raised neither aesthetic nor functional concerns therewith. (Tr. 214:4-10). Part of the basis for that opinion, as explained by Dr. Grant, was ethical concern with "upselling." (Tr. 214:11-215:3). Muscle had no objection to that line of inquiry.

Nor did Muscle have any objection to Dr. Grant testifying he was familiar with the ASPS advertising disclaimer guideline and opining it applied to any member of the ASPS. (Tr. 233:22-234:9). Dr. Grant also testified the ASPS advertising disclaimer guideline related "back to the discussion . . . about upselling,"

(Tr. 237:20-238:5); a discussion, which Muscle did not object to, factoring into at least one of Dr. Grant's standard of care opinions, (*e.g.* Tr. 214:11-215:3). The ASPS advertising disclaimer guideline was admitted as Exhibit 505. (Tr. 234:10 *et seq.*).

IV. STANDARD OF REVIEW

A district court's decision on a motion for summary judgment is reviewed de novo. *Butler v. Domin*, 2000 MT 312, ¶ 19, 302 Mont. 452, 15 P.3d 1189. Evidentiary determinations underlying a summary judgment decision, however, are reviewed for an abuse of discretion. *Butler*, ¶¶ 10-17; *see also McClue v. Safeco Inc. Co. of Illinois*, 2015 MT 222, ¶¶ 7-14, 380 Mont. 204, 354 P.3d 604.

A district court's denial of a motion for new trial is generally reviewed for an abuse of discretion, *State v. Parrish*, 2010 MT 212, ¶ 14, 357 Mont. 477, 241 P.3d 1041, and "will not be disturbed absent a . . . manifest abuse of that discretion," *Baxter v. Archie Cochrane Motors, Inc.*, 271 Mont. 286, 287-88, 895 P.2d 631, 632 (1995).

V. SUMMARY OF THE ARGUMENT

The district court was within its discretion to deny Muscle's motion for new trial. Dr. Sattler voluntarily bolstered – i.e., gave self-serving testimony non-responsive to the question posed – that his website complied with the ASPS advertising disclaimer guideline. Upon this basis alone, the single follow-up question designed to elicit a responsive answer and the ASPS guideline were

relevant and admissible. Rather than an abuse of discretion, as Muscle contends, admission of the ASPS guideline was necessary for the jury to assess the veracity of Dr. Sattler's bolstering. Regardless, Muscle had no objection to the foundational aspects of this topic and affirmatively solicited opinions from Dr. Sattler about the same thing.

Within its four corners, the ASPS guideline proved no instance of Dr. Sattler's conduct. Contrary to Muscle's position, therefore, Montana Rule of Evidence 608(b) provided no basis to exclude it. This is true even if the ASPS guideline was offered purely for purposes of attacking Dr. Sattler's veracity. The ASPS guideline, however, was also offered to undermine the basis of Dr. Sattler's substantive opinions. In context with Dr. Sattler's justification by reference to his local colleagues and Dr. Grant relating upselling concerns to the standard of care, the ASPS guideline was probative of the biases in and quality of Dr. Sattler's substantive opinions.

Even if admission was error, however, it was harmless error. Alleged evidentiary error is reviewed qualitatively for prejudice. Muscle failed to object to and affirmatively solicited evidence of substantially identical character. This dispositively demonstrates harmlessness. Regardless, Muscle has failed to supply a transcript sufficient to facilitate the necessary review for relative prejudice and, for that reason, the district court's determination of harmlessness should be affirmed

without inquiry.

If denial of the motion for new trial is affirmed, Muscle should be collaterally estopped from challenging the district court's summary judgment conclusions upon the sequencing-related claims. As Muscle has specifically represented, the sequencing-related claims flowed from and depended upon the overarching failure to diagnose claim. The failure to diagnose claim was presented to a jury and resolved in Dr. Santin's favor. Muscle should be estopped from reviving claims that flow from and depend on factual issues a jury has resolved.

If the issue is reached, however, summary judgment should nevertheless be affirmed. The district court correctly concluded the sequencing-related claims failed as a matter of law because Dr. Sattler's opinions failed to establish alternative sequencing was required by a national standard of care. Even if the district court's rationale was erroneous, Dr. Sattler's causation opinion reflected mere possibility and Muscle has conceded the same.

VI. ARGUMENT

Beauty is in the eye of the beholder.
-Margaret Wolfe Hungerford (1878)

This timeless expression lends context and corollary to the present plastic surgery case. If perception of beauty is subjective, desires communicated by the patient should matter. The relative import of desires communicated by the patient should matter. A plastic surgeon should listen to the patient and formulate a plan

incorporating what the patient communicates. The theory presented to the jury by Dr. Santin reflected these ideas.

Muscle's case, on the other hand, asked the jury to reject the idea of patient autonomy and elevate a plastic surgeon's personal preference over the patient's communicated desires. Refusing to acknowledge this mountainous defect, Muscle seeks to overturn the jury verdict with a molehill her own expert created.

A. The District Court Was Within Its Discretion To Deny Muscle's Motion For New Trial.

Montana law affords wide latitude for cross-examination of opposing experts to "test the[ir] skill and reliability," including inquiries that "would [otherwise] be wholly irrelevant." *Green v. Hagele*, 182 Mont. 155, 159, 595 P.2d 1159, 1161 (1979). The preliminary determination of whether an adverse expert is qualified falls to the court. Mont. R. E. 702; 104(a). Assessing the strength of an adverse expert's competence, however, falls to the jury. *Comm'r Political Practices for State through Mangan v. Wittich*, 2017 MT 210, ¶ 51, 388 Mont. 347, 400 P.3d 735. An adverse expert's competence is "open for attack" on cross-examination. *Wittich*, 51; *see also Anderson v. Hauck*, 230 Mont. 63, 74, 748 P.2d 937, 943-44 (1988).

At the threshold, Muscle waived the right to predicate error upon *most* of the evidentiary issues referenced in her opening brief by failing to timely object at trial. Mont. R. E. 103(a)(1), (d); *Neal v. Nelson*, 2008 MT 426, ¶ 29, 347 Mont. 431, 198 P.3d 819. Despite now contending Dr. Sattler's website, contents thereof, and its

relationship to the ASPS advertising guideline were irrelevant, Muscle had no objection to Dr. Sattler testifying about those matters at trial. (*See e.g.* Tr. 120:16-121:15, 152:12-153:22). Similarly, Muscle had no objection to the question regarding Dr. Sattler's awareness of an ASPS advertising disclaimer guideline and no objection to his non-responsive answer. (Tr. 154:14-155:16). Muscle also had no objection to Dr. Grant's testimony relating ethical concerns with upselling to the standard of care in plastic surgery. (Tr. 212:2-215:3).

The evidence Muscle objected to, contrary to her argument, was relevant and admissible for *multiple* purposes. (*See infra* § I.A). Regardless, even assuming admission of the ASPS guideline and related testimony was error, it was harmless error. (*See infra* § I.B). The district court, therefore, was within its discretion to deny Muscle's motion for new trial.

1. <u>The ASPS guideline and related testimony were admissible as relevant to Dr. Sattler's veracity and professional competence; neither Rule 608(b) nor Rule 403 required exclusion</u>.

Evidence with "any" probative tendency toward "any" consequential fact is relevant. Mont. R. E. 401. The liberal definition of relevance permits "wide admissibility of circumstantial evidence." Cmt. to Rule 401. In terms of cross-examining opposing experts, even the smallest shred of probative tendency is sufficient. *See Green,* 595 P.2d at 1161.

Neglecting this liberal standard and analytical foundation, Muscle

pigeonholes the issue as one of credibility and reasons backward from that conclusion. (*See* Muscle Br. 16-17). Evidence, however, may be relevant for multiple purposes. *See e.g., State v. McGhee*, 2021 MT 193, ¶ 15, 405 Mont. 121, 492 P.3d 518 (noting the "doctrine of multiple admissibility"). Failing to consider this principle is a dispositive flaw in Muscle's position.

a) The *Unmack* decision is fundamentally distinguishable from the present issue.

Relying heavily on *Unmack v. Deaconess Med. Ctr.,* 1998 MT 262, 291 Mont. 280, 967 P.2d 783, is a crucial flaw in Muscle's appeal. The nature and type of evidence at issue in *Unmack* is distinguishable; the purpose for which it was offered is distinguishable; and the degree of prejudice and confusion posed is distinguishable. Muscle's argument, as concisely and correctly concluded by the district court, is hitched to the wrong wagon:

> The Court finds *Unmack* is distinguishable. This case does not involve a witness with expertise in multiple professions.

(Doc. 146 at 4).

Indeed, a vital distinction between this matter and *Unmack* concerns the nature of evidence offered. In *Unmack*, the expert witness was testifying in his capacity as a physician, yet the evidence offered concerned findings of misconduct in his capacity as a lawyer. *Unmack*, ¶ 7. Having no conceivable relevance to his competence and/or biases as a physician, the evidence fell entirely within the

purview of Rule 608(b). Here, on the other hand, Dr. Sattler testified in his capacity as a plastic surgeon, and the evidence at issue was relevant to his competence and biases in plastic surgery.

Another fundamental distinction between this matter and *Unmack* concerns *how* the evidence came to be offered. In *Unmack*, there is no indication the expert witness voluntarily opened the door. Here, on the other hand, after foundational questioning to which Muscle failed to object, (*see e.g.* Tr. 120:16-121:15, 152:12-153:2), Dr. Sattler was asked whether he was *aware* of a certain ASPS advertising guideline. (Tr. 154:14-25). Dr. Sattler chose not to answer the specific question posed and, instead, voluntarily bolstered that his website complied with the ASPS advertising guideline. (Tr. 154:14-155:16). Accordingly, unlike the circumstances of *Unmack*, Dr. Sattler opened the door.

A final important distinction between this matter and *Unmack* concerns the type of evidence at issue. In *Unmack*, the disciplinary board's findings were extrinsic evidence that, in and of itself, tended to prove the witness had committed a prior (bad) act. That type of evidence – i.e., extrinsic evidence proving a prior act – is prohibited by Rule 608(b). Here, on the other hand, the ASPS guideline was neither offered to prove, nor in fact proved, any instance of Dr. Sattler's conduct. The ASPS guideline, rather, was offered to prove and proves only what it says. (*See* Tr. Ex. 505).

b) The ASPS guideline and related questions were relevant and admissible to attack the competence of and biases in Dr. Sattler's substantive opinions.

Muscle erroneously analyzes the admissibility question exclusively in terms of character evidence. Evidence, however, can be and often is relevant for multiple purposes. *McGhee*, ¶ 15. In addition to credibility, the ASPS guideline and follow-up question were relevant to the substantive quality of Dr. Sattler's opinions, bases thereof, and biases therein. Ignoring the multiple admissibility principle, Muscle's Rule 608(b) argument and Rule 403 argument are fundamentally flawed.

Montana law entitled Dr. Santin to present evidence undermining the competence of Dr. Sattler's opinions, including by exposing their weaknesses and biases. Mont. R. E. 705; *Reese v. Stanton*, 2015 MT 293, ¶ 21, 381 Mont. 241, 358 P.3d 208; *Holloway v. Univ. of Mont.*, 178 Mont. 198, 201, 582 P.2d 1265, 1267 (1978) (any bias a witness has may be considered).[5] The record demonstrates the ASPS guideline and Dr. Sattler's related testimony were relevant and admissible for those purposes. Muscle makes no genuine attempt to show otherwise.

The ASPS guideline and related testimony were relevant and admissible to show Dr. Sattler's opinions were founded in and biased toward profit over pure medicine. Dr. Sattler opined a posterior thigh lift, circumferential lift, or buttock lift

[5] Even if the ASPS guideline and Dr. Sattler's testimony could be considered together as prior act evidence, Rule 404(b) explicitly contemplates their admissibility for purposes other than attacking character.

should have been the first procedure offered to Muscle. (Tr. 137:7-13). Dr. Grant, however, opined that to have recommended one of those procedures first would have been an upselling technique. (Tr. 212:2-215:3). Those conflicting opinions make Dr. Sattler's awareness of and compliance with industry advertising guidelines directly relevant to the quality of his opinions from a medical standpoint. The district court was within its discretion to admit such evidence. Rule 401-402, 705; *Reese*, ¶ 21.

The ASPS guideline and related testimony were also relevant and admissible to show Dr. Sattler's opinions may have been founded in and biased toward practices of local colleagues. When asked whether he was aware of the pertinent ASPS guideline, Dr. Sattler touted compliance therewith because his Seattle colleagues advertised the same way. (Tr. 154:14-155:16). This testimony raised the question of whether Dr. Sattler's standard of care opinions were founded in and biased toward the practices of his locality, rather than a national standard as required by Montana law. *Norris v. Fritz*, 2012 MT 27, ¶ 44, 364 Mont. 63, 270 P.3d 79.

c) Rule 608(b) did not apply to the ASPS guideline or, alternatively, provided no basis to exclude it in toto.

Neither of two conditions required to entirely exclude the ASPS guideline under Rule 608(b) were satisfied. The ASPS guideline was extrinsic evidence, (Tr. Ex. 505), and Rule 608(b) in pertinent part provides:

> Specific instances of the conduct of a witness, ***for the purpose of*** attacking or supporting the witness' credibility, ***may not be proved*** by

extrinsic evidence.

(Emphasis added). Accordingly, the ASPS guideline was excludable under Rule 608(b) if it [1] proved a specific instance of Dr. Sattler's conduct and [2] was offered for the purpose of attacking Dr. Sattler's credibility. The ASPS guideline, however, proved no instance of conduct and was offered for purposes beyond attacking credibility.

As the ASPS guideline did not prove any instance of Dr. Sattler's conduct, Rule 608(b) provided no basis to exclude it. Rule 608(b) prohibits "specific instances of the [witness'] conduct" from being "proved by extrinsic evidence." Extrinsic evidence that does not prove a specific instance of the witness' conduct, however, falls outside the scope of Rule 608(b). Unlike the disciplinary board findings in *Unmack*, which tended to prove the witness committed professional misconduct, here, the ASPS guideline proves no instance of Dr. Sattler's conduct. (Tr. Ex. 505). The ASPS guideline, rather, proves only what it says. (*Id.*).

Regardless, Rule 608(b) would have provided no basis to entirely exclude the ASPS guideline because it was also offered for purposes of undermining the professional competence and quality of Dr. Sattler's opinions. *See e.g., McGhee*, ¶ 15 (evidence may be relevant and/or admissible for multiple purposes). In *Unmack*, the extrinsic evidence concerned the witness' conduct in a different profession and, thus, had no conceivable relevance to the witness' competence as a medical doctor.

Here, on the other hand, the ASPS guideline had substantive relevance to the professional competence of Dr. Sattler's opinions, bases thereof, and biases therein. Even if the ASPS guideline had proved an instance of Dr. Sattler's conduct, therefore, Rule 608(b) provided no basis to entirely exclude it. To the extent Rule 608(b) could have provided a basis to limit the jury from considering the ASPS guideline for purposes of assessing credibility, Muscle failed to request a limiting instruction as required for operation of Rule 105 (contemplating a limiting instruction only "upon request").

d) The related testimonial evidence was admissible under Rule 608(b).

Dr. Sattler's testimony regarding the relationship between his website and the ASPS guideline was admissible under Rule 608(b). If probative of a witness' veracity ("truthfulness or untruthfulness"), specific instances of conduct are a proper subject of cross-examination. Rule 608(b). The testimony at issue was demonstrably probative of Dr. Sattler's veracity. Dr. Sattler is a member of the ASPS and testified he tries hard to comply with ASPS guidelines. (Tr. 121:5-15). Asked whether he was *aware* of the ASPS guideline at issue, however, Dr. Sattler gave an avoidant answer. (Tr. 154:14-155:16). The avoidant answer reasonably supports multiple inferences bearing on Dr. Sattler's veracity – e.g., Dr. Sattler was previously unaware of the guideline and, thus, made no attempt to comply therewith.

This testimony was also relevant to the competence and quality of Dr. Sattler's

opinions. Even if irrelevant to veracity, therefore, Rule 608(b) provided no basis to entirely exclude such testimony. *McGhee*, ¶ 15 (evidence may be relevant and/or admissible for multiple purposes). And, again, even if warranted, Muscle failed to request a limiting instruction. Rule 105 (contemplating a limiting instruction only "upon request").

e) Rule 403 balancing favored admission of the ASPS guideline and related testimony.

The premise of Muscle's Rule 403 argument is fundamentally flawed. Muscle contends prejudicial or confusing evidence should be excluded under Rule 403. (Muscle Br. 17:¶c). By its plain language, however, Rule 403 turns on a discretionary balancing inquiry. The enumerated dangers must substantially outweigh probative tendency before exclusion is permitted under Rule 403. Even if permitted, exclusion is not mandatory under Rule 403.

Balancing favored admission of the ASPS guideline and related testimony. As noted by the district court, (Doc. 146 at 5), Muscle failed to object to most of the evidence in this regard, including Dr. Sattler's evasive answer to an innocuous question placing his own website's compliance with the ASPS guideline at issue. Considering Muscle had no objection to Dr. Sattler voluntarily bolstering his website's purported compliance with the ASPS guideline, it was within the district court's discretion to allow exploration of that opinion as a matter of pragmatic balancing under Rule 403 or otherwise. *See e.g. Green,* 595 P.2d at 1161 (cross-

examination of experts allows inquiries that "would [otherwise] be wholly irrelevant"). The similarities noted by the district court between the present matter and *State v. Cunningham*, 2018 MT 56, 390 Mont. 408, 414 P.3d 289, also supported admission, as a function of Rule 403 balancing or otherwise.

2. Assuming arguendo admission of the ASPS guideline and/or related evidence was error, it was harmless error.

Trial error is not presumptively prejudicial. *State v. Stewart,* 2012 MT 317, ¶ 45, 367 Mont. 503, 291 P.3d 1187; *see also In re A.N.*, 2000 MT 35, ¶ 55, 298 Mont. 237, 995 P.2d 427 (abusing discretion by admitting evidence "does not necessarily constitute reversible error"). An evidentiary ruling is harmless "unless the challenged evidence is of such character to have affected the result of the case." *Wittich*, ¶ 45. In civil cases, the doctrine of cumulative error does not apply. *Baxter*, 895 P.2d at 633. Each alleged evidentiary error, therefore, should be "reviewed ***qualitatively*** for prejudice ***relative to other evidence*** introduced at trial." *Stewart*, ¶ 45 (emphasis added).

Viewed independently, none of the evidence Muscle may be entitled to predicate error upon independently affected the result of this case. Any error attributable to admission of such evidence, therefore, was harmless. Muscle's position (a) omits portions of the transcript necessary for a proper review, (b) ignores her non-objection to – and affirmative solicitation of – evidence of a nearly identical character, and (c) neglects the myriad reasonable inferences supporting the jury

verdict from the standpoint of relative review.

a) The alleged error should be deemed harmless because Muscle has failed to supply a sufficient record.

An appellant has the burden of providing "a record sufficient to enable [this Court] to rule upon the issues raised." *Heidt v. Argani*, 2009 MT 267, ¶ 19, 352 Mont. 86, 214 P.3d 1255 (quoting Mont. R. App. P. 8(2)); *see also Giambra v. Kelsey*, 2007 MT 158, ¶ 36, 338 Mont. 19, 162 P.3d 134. "***Failure to supply a sufficient record may result in dismissal***[.]" *Heidt*, ¶ 19 (emphasis added); *see also Giambra*, ¶ 36. Similarly, this Court may decline to consider any issue for which the record supplied by the appellant is insufficient. *See e.g. Gentry Mont. Enterpr., Inc. v. McDonald*, 2004 MT 322, ¶¶ 35-39, 324 Mont. 67, 101 P.3d 767; *see also* Mont. R. App. P. 8(2) (presentation of an insufficient record is a basis to affirm the district court's determinations).

An appellant is burdened with ensuring a complete record with respect to any error claimed. *Miller v. Frasure*, 264 Mont. 354, 362, 871 P.2d 1302, 1307 (1994). The appellant must provide a transcript that "affirmatively shows the occurrence of the matters upon which he relies." *Yetter v. Kennedy*, 175 Mont. 1, 7, 571 P.2d 1152, 1156 (1977). Some issues require the "entire transcript of the trial court proceedings." *Yetter*, 571 P.2d at 1155.

Here, the district court's determination the alleged evidentiary error was

harmless should be affirmed without question because Muscle has failed to supply a sufficient record.[6] Mont. R. App. P. 8(2); *Heidt*, ¶ 19; *Gentry*, ¶¶ 35-39. The record supplied is deficient in that it fails to affirmatively reflect several aspects of error and prejudice alleged by Muscle. The record is also deficient because it precludes qualitative review for prejudice and omits crucial testimony that likely affected the jury's verdict.

The transcript provided by Muscle fails to "affirmatively show[] the occurrence of" matters Muscle relies upon. *Yetter*, 571 P.2d at 1156. For example, Muscle ascribes error and/or prejudice to closing argument made by Dr. Santin's counsel. (*See e.g.* Muscle Br. 7, 10, 11, 15, 21, 25). The transcript provided by Muscle, however, fails to reflect the closing argument of Dr. Santin's counsel. Muscle also contends the gestalt of the issue at hand was a strategy pursued "deliberately, consistently, and unfairly . . . throughout the trial." (Muscle Br. 23). The transcript provided by Muscle, however, reflects merely a fraction of the trial proceedings.

Whether Muscle is at fault for omission of closing arguments[7] from the

[6] As no cross-appeal was filed, Dr. Santin had no obligation to move the district court to require a sufficient transcript. *See* Mont. R. App. P. 8(3)(b).

[7] Muscle has represented that audio from the final day of trial is missing or unavailable. (Status Rpt. Re Tr. (June 1, 2023)); (Resp. Mot. Temp. Stay & Rule 10(h)(ii) Relief (Sept. 25, 2023)). However, Muscle offered no affidavits from the

supplied transcript is immaterial. In *Yetter*, for example, this Court first determined what aspects of the trial transcript were necessary. 571 P.2d at 1155. Then, without considering fault in any way, *Yetter* stated the rule that appeal may be predicated only upon matters affirmatively shown in the record provided. 571 P.2d at 1156. Accordingly, notwithstanding reason for omission, Muscle cannot predicate error or prejudice upon aspects of the trial not affirmatively reflected in the supplied transcript.

The transcript provided by Muscle precludes the necessary review. *Stewart*, ¶ 45 (alleged evidentiary error is reviewed for prejudice relative to other evidence introduced at trail); *Sandman v. Farmers Ins. Exch.*, 1998 MT 286, ¶ 41, 291 Mont. 456, 969 P.2d 277 (prevailing party entitled to all reasonable inferences from facts proved). The transcript provided lacks the testimony of the parties to this case (Muscle and Dr. Santin), two plastic surgeons (Dr. Santin and Dr. Ploplys), and all individuals with personal knowledge of any pertinent appointment (Muscle, Dr. Santin, Nurse Pollington, James Muscle, Dr. Ploplys). Without that testimony, a relative review for prejudice cannot properly be undertaken. *Stewart*, ¶ 45.

It should be noted that Muscle chose not to request the trial testimony of herself, Dr. Santin, Dr. Ploplys, and Nurse Pollington. (Doc. 147). In *Yetter*, the

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court reporters involved – i.e., Anne Perron who transcribed the trial or Michael Raffell who prepared the supplied transcript – to verify the representation.

appellant chose not to provide a trial transcript on appeal, contending it was unnecessary to resolve the issues being appealed. That choice influenced this Court's decision regarding severity of recourse warranted. 571 P.2d at 1156 (complete dismissal of appeal). Similarly, here, Muscle chose not to request aspects of the trial transcript that are, contrary to Muscle's contention, necessary to review the alleged evidentiary error for prejudice. Accordingly, this Court should decline to consider the issue and affirm without inquiry the district court's determination that any error in admitting the ASPS guideline and related testimony was harmless.

b) Muscle failing to object to evidence of the same character and affirmatively soliciting evidence of the same character demonstrates the absence of prejudice.

As alleged evidentiary error is reviewed from a qualitative standpoint, *Stewart*, ¶ 45, Muscle's non-objection to evidence of the same character demonstrates the absence of prejudice, (*see e.g.* Tr. 120:16-121:15, 152:12-153:22, 212:2-215:3); (Doc. 146 at 5 ("the jury was provided without objection most of the testimony on this issue")). Muscle also affirmatively elicited evidence of substantially identical character upon re-direct examination of Dr. Sattler. (Tr. 179:7-182:9). This, too, demonstrates the alleged error was harmless.

c) Relative to other evidence introduced at trial, it is unreasonable to conclude the ASPS guideline or related testimony affected the jury's verdict.

If unnecessary to the fact finder's determinations, erroneously admitted

evidence is less likely to have affected the result of a case. *See e.g. In re A.N.*, ¶¶ 55 *et seq.* Similarly, erroneously admitted evidence is less likely to have affected the result of a case where the objecting party was not precluded from presenting their case theory. *See e.g. S & P Brake Supply, Inc. v. STEMCO LP*, 2016 MT 324, ¶ 54, 385 Mont. 488, 385 P.3d 567. The existence of independent evidence to the same point also supports concluding an evidentiary error was harmless. *See e.g., Shors v. Branch*, 221 Mont. 390, 398-99, 720 P.2d 239, 244 (1986) (admission was harmless error, "given the other independent evidence of malice"); *DeLeon v. McNinch*, 146 Mont. 287, 289-90, 407 P.2d 45, 46-47 (1965) (admission of non-witness expert's report, over objection of the plaintiff, constituted harmless error where independent evidence supported defendant's causation and/or damages theory).

This matter has commonality with the above-cited cases holding the challenged evidentiary ruling was harmless error. Akin to *In re A.N.*, the ASPS guideline was unnecessary to resolve any question on the special verdict form. Like the plaintiff in *S & P Brake Supply*, Muscle was not precluded from presenting her case theory. Similarly to *Shors* and *DeLeon*, independent evidence to the same and/or substantially similar points was presented, including Muscle affirmatively presenting evidence of identical character on re-direct examination of Dr. Sattler.

Dr. Santin is entitled to all reasonable inferences from the evidence offered, *Sandman*, ¶ 41, and it is unreasonable to conclude an unanswered follow-up

question, the ASPS guideline Dr. Sattler voluntarily touted compliance with, or Dr. Grant's opinions about the same guideline, independently affected the result of this case. Again, deficiencies in the transcript provided by Muscle render it impossible to engage in the review necessary to assess relative prejudice. Even confined to the transcript provided, however, it is simply unreasonable to infer the jury verdict was affected by the ASPS guideline rather than the fundamental inconsistencies with Dr. Sattler's testimony.

Rather than his website advertising practices, it is far more reasonable to infer the jury was influenced by the fundamental defects with Dr. Sattler's testimony. For example, contradicting the claims concerning alleged failure to diagnose and discuss buttock laxity, Dr. Sattler conceded Muscle's buttock laxity was in plain sight to anyone, (Tr. 96:20-23), and that a plastic surgeon has no duty to act upon the uncommunicated desires of a patient. (Tr. 160:3-13). Contradicting the loss of opportunity claim, Dr. Sattler conceded the alleged failure to diagnose buttock laxity did not deprive Muscle the opportunity of having it addressed later via lower body lift. (Tr. 194:2-14). Undermining his other substantive opinions, Dr. Sattler told the jury the "crux" of his opinions was the sequence (order) in which the procedures were performed.[8] (Tr. 137 7-13). Contradicting the failure to refer claim, Dr. Sattler

[8] The transcript provided by Muscle omits the district court's instruction precluding the jury from returning a finding of liability upon the issue of sequencing.

conceded he would not have performed an operation to remove Muscle's buttock laxity within the two-month period before she elected to leave Dr. Santin's care, (Tr. 194:2-14), and conceded his referral opinion was formed ignorant of the fact Dr. Santin was contemporaneously aware – via the request to transmit record – Muscle had chosen to consult another plastic surgeon, Dr. Ploplys. (Tr. 160:14-161:22). Even the scant transcript Muscle provided, in other words, contains myriad facts reasonably and independently supporting why the jury reached the verdict it reached.

B. If The Order Denying A New Trial Is Affirmed, Muscle Should Be Collaterally Estopped From Challenging The District Court's Summary Judgment Rulings Upon The Sequencing-Related Claims.

Collateral estoppel bars re-litigation of questions essential to a prior judgment. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 18, 331 Mont. 281, 130 P.3d 1267. Traditionally requiring three elements, *Baltrusch* added a fourth requirement to trigger application of the doctrine:

> (1) the identical issue raised was previously decided in a prior adjudication;
> (2) a final judgment on the merits was issued in the prior adjudication; and
> (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication.
>
> [***]
>
> (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.

Baltrusch, ¶ 18. The party asserting collateral estoppel, however, is **not** required to

affirmatively prove the fourth element. Instead, the party opposing application of collateral estoppel is burdened with establishing lack of opportunity to litigate the pertinent issue(s). *Baltrusch*, ¶ 15.

Here, the sequencing-related claims upon which summary judgment was granted flow from and are dependent upon Muscle's overarching claim that Dr. Santin departed from the standard of care by allegedly failing to diagnose and discuss her buttock laxity at the initial consultation on March 25, 2015. (Docs. 99 at 2-4; 104 at 2-4). This is undisputable. Muscle specifically represented the sequencing-related claims flowed from and were contingent upon the failure to diagnose claim.

> 2. Dr. Santin breached the professional standard of care in failing to identify and diagnose Sara Muscle's buttock ptosis ***and as a result***, Dr. Santin ***further breached*** the professional standard of care by:
>
> [***]
>
> b. Failing to identify the surgeries necessary . . .
> c. Failing to properly sequence the surgeries . . .
>
> [***]
>
> e. Performing a medial thighplasty . . . [.]

(Doc. 99 at 2-3 (emphasis added)). The dependent nature of the sequencing-related claims is, likewise, conceded in Muscle's current argument. (*See e.g.* Muscle Br. at 29 (arguing standard of care required Dr. Santin identify the buttock ptosis, bring it to Muscle's attention, then sequence a lower body lift first)).

The overarching failure to diagnose claim was presented to the jury and resolved in Dr. Santin's favor. (Doc. 127 at 1). So, too, was Muscle's informed consent (e.g., failure to discuss) claim. (*Id.*, at 2). The jury verdict, therefore,

resolved the factual issues upon which the sequencing-related claims depend.

Accordingly, if the order denying a new trial is affirmed, Muscle is collaterally estopped from challenging the district court's summary judgment conclusions upon the sequencing-related claims. Muscle cannot establish the dependent sequencing-related claims without relitigating the failure to diagnose and discuss claims. Collaterally estopped from relitigating those overarching claims, Muscle should also be estopped from attempting to revive the sequencing-related claims that flow from and depend on the same factual issues.

C. If Not Resolved By Estoppel, Summary Judgment Upon Muscle's Sequencing-Related Claims Should Be Affirmed.

In Montana, it is "well settled" that a medical malpractice plaintiff must proffer expert testimony prima facie establishing (i) the applicable standard of care, (ii) that the defendant departed from the applicable standard of care, and (iii) the defendant's departure from the standard of care caused injury. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410.

Here, summary judgment upon Muscle's sequencing-related claims should be affirmed. The district court correctly concluded Dr. Sattler failed to offer an opinion establishing Dr. Santin departed from a nationally-applicable standard of care in that regard. Even if the district court's rationale was incorrect, summary judgment should be affirmed as the correct legal result based on Dr. Sattler's legally insufficient opinion reflecting mere possibility of causation.

1. The district court correctly granted summary judgment upon the sequencing-related claims because Dr. Sattler's testimony does not establish Dr. Santin departed from a national standard of care.

The district court correctly granted summary judgment upon Muscle's sequencing-related claims because Dr. Sattler's testimony failed to establish Dr. Santin departed from a nationally-applicable standard of care. (Doc. 116 10:¶1(c)-(d)). A medical malpractice plaintiff must proffer expert testimony establishing the defendant departed from a nationally applicable standard of care. *Estate of Willson*, ¶ 17; *Norris*, ¶ 44. An expert's personal practices and preferences are largely irrelevant and legally insufficient to establish a national standard. *Norris*, ¶ 44. This is true, regardless of whether the physician is otherwise qualified to testify as an expert. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.,* 2023 MT 44, ¶ 18, 411 Mont. 269, 525 P.3d 1183.

Here, Dr. Sattler expressed a personal preference for sequencing lift procedures before thighplasties but did not opine Dr. Santin's alternative choice in Muscle's case was a departure from a national standard of care. (Docs. 77-78, Ex. E:114:20-117:3). Accordingly, the district court correctly concluded Dr. Sattler's opinions were insufficient to prima facie establish the standard of care and/or breach elements of Muscle's sequencing-related claims. *Estate of Willson*, ¶ 17; *Norris*, ¶ 44. That Dr. Sattler may have been otherwise qualified as an expert in plastic surgery is immaterial, *Kipfinger*, ¶ 18 ("an otherwise qualified physician's testimony as to

his or her personal practice is insufficient"), because his opinions in this regard unambiguously reflected personal practice or preference.

2. Summary judgment on the sequencing-related claims should be affirmed as the correct legal result because Dr. Sattler's testimony reflects mere possibility of causation, which is insufficient as a matter of law.

A correct legal result, even if reached for the wrong reason, should be affirmed. *N. Star Dev., LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶ 17, 408 Mont. 498, 510 P.3d 1232. Here, the district court's summary judgment conclusions upon the sequencing-related claims concerned the standard of care and/or departure elements. (Doc. 116 10:¶1(c)-(d)). Even if those conclusions were erroneous, summary judgment upon the sequencing-related claims should be affirmed as the correct legal result.

To avoid summary judgment, Muscle was required to proffer admissible expert testimony establishing all three essential elements of this medical malpractice claim, including causation. *Estate of Willson*, ¶ 17. Dr. Santin's motion for summary judgment targeted Muscle's failure to establish the element of causation:

> Ms. Muscle has not offered admissible expert testimony establishing that a departure . . . more likely than not caused her injury.

(Doc. 77 at 3); (*see also* Doc. 88); Tr. 4:18-22).

Muscle expressly conceded Dr. Sattler's causation opinions concerning the sequencing-related claims reflect mere possibility, rather than probability:

> Dr. Sattler testified that performing [a circumferential lower body lift first] ***may have*** obviated the need for a medial thighplasty or reduced its scope.

(Doc. 85 at 6:¶ 7) (emphasis added). Muscle's concession accurately encompasses the dispositive reality: Dr. Sattler's causation opinions concerning the sequencing-related claims were explicitly premised on mere possibility, which is insufficient as a matter of law. *Butler*, ¶¶ 13, 15.

According to Dr. Sattler, had Dr. Santin chosen to sequence a lower body lift as Muscle's first procedure, it "***might have*** spared [Muscle] from [] wanting a medial thigh lift" and "***may have*** partially corrected her thigh laxity." (Docs. 77-78, Ex. E:221:5-18 (emphasis added)). Those opinions undeniably reflect mere possibility, rather than the requisite probability. *Butler*, ¶¶ 13, 15. Distinguishably from *Kipfinger,* where a genuine dispute regarding causation stemmed from the aggregated opinions of five expert witnesses disclosed by the plaintiffs, ¶¶ 45-48, here, Muscle's only expert offered a causation opinion in explicit terms of mere possibility. Accordingly, this matter is directly on par with *Butler* where the expert's opinion that an injection 'could have' caused the injury was insufficient as a matter of law. Under Montana law, a medical malpractice plaintiff cannot survive summary judgment when their only expert's causation opinion is undisputedly and explicitly premised on mere possibility.

VII. CONCLUSION

The jury verdict should not be disturbed, and the order denying Muscle's motion for new trial should be affirmed. Muscle should be estopped from challenging the grant of summary judgment upon her sequencing-related claims because they flow from and depend upon factual issues presented to and resolved by the jury. If the issue need be addressed, summary judgment upon the sequencing-related claims should nevertheless be affirmed as correctly decided by the district court or as the correct legal result based on Dr. Sattler's patently insufficient causation opinion.

Respectfully submitted this 31st day of October, 2023.

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VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this brief is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 360 is 8,099 words, excluding caption, table of contents, table of authorities, certificate of compliance, and certificate of service.

Dated this 31st day of October, 2023.

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CERTIFICATE OF SERVICE

I, Gary Darling Kalkstein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-31-2023:

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