IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0600

IN THE MATTER OF: SALVATRICE MUSCLE, Plaintiff and Appellant, VS. ANTONIO SANTIN, M.D. Defendant and Appellee.	)))))))))	**APPELLANT'S REPLY 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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ARGUMENT

A. Reply to Dr. Santin's Issue One Arguments

1. Dr. Santin construes *Unmack* too narrowly in his attempt to distinguish it.

In *Unmack v. Deaconess Med. Ctr., 1998 MT 262, 291 Mont. 280, 967 P.2d 783,* this Court comprehensively addressed application of several of Montana's evidentiary rules to attempts to impeach a medical expert in a medical malpractice action. Dr. Santin, echoing the district court, distinguishes it on one simple basis: that it involved a prior act of misconduct by the expert in a different profession than he was offering expert opinion testimony on. *Dr. Santin's Appellate Brief, pp. 16, 20.*

Dr. Santin's argument ignores that this Court made three separate evidentiary findings in Unmack:

1. That the prior act of misconduct was not probative of the medical expert's truthfulness or untruthfulness as an expert under Rule 608(b)*;*
2. That the attorney character evidence was not relevant to the doctor's credibility as a medical expert witness under Rule 402; and
3. That the evidence was highly prejudicial and confusing under Rule 403.

(*Unmack at Par. 12-14, 291 Mont. at 284-285, 967 P.2d at 78-7865).* Dr. Santin has

ignored two of the three findings of this Court in *Unmack*, the seminal Montana case on the issue, making his attempt to distinguish the case infirm and incomplete.

Even on the point raised, by reducing this court's holding on the second issue to the statement that "evidence of misconduct as a lawyer is irrelevant to a medical expert's testimony as a physician", Dr. Santin is ignoring the spirit and logic of this Court's analysis. The expert at issue in *Unmack*, Dr. Blaylock, was subject to a disciplinary action, not for his professional competence as an attorney, but for his violation of an ethical rule relating to soliciting clients. *Id.* He was found to have done so, but negligently. Similarly, in this case, although there has been no disciplinary complaint or process or finding whatsoever, Dr. Santin is asserting that Dr. Sattler violated an ethical rule in his profession by the manner in which he advertised – i.e. solicited business from clients. Both cases involve an ancillary ethical issue about advertising – business conduct – rather than competency and skill as an attorney or physician. Such an incident of misconduct is wholly unrelated to the expert's professional opinions on appropriate surgical diagnosis, treatment, and care.

2. <u>The ASPS guideline was extrinsic evidence offered to prove a specific instance of misconduct to undermine Dr. Sattler's credibility in violation of Rule 608(b) and *Unmack*.</u>

Dr. Santin also argues that Unmack is different because while the disciplinary proceedings in that case were extrinsic evidence of wrongdoing, the ASPS guideline

here wasn't, because "it wasn't offered to prove . . . any instance of Dr. Sattler's conduct". *Dr. Santin's brief at 17, 19-21.* This is disingenuous. The purpose of the introduction of the ASPS guidelines was specifically intended to prove that Dr. Sattler committed an act of professional misconduct by violating advertising guidelines. Dr. Santin's attorney, Gary Kalkstein, specifically affirmed this during closing argument, stating that "**Dr. Sattler also chooses not to follow ethical guidelines that are promulgated by the organization he is a member of**". Document 143, Exhibit B, p.7, (emphasis added). This is exactly the kind of extrinsic evidence forbidden by Rule 608(b) and this Court in *Unmack.*

Attorney Kalkstein's other remarks surrounding this statement in his closing make clear that he was using the evidence of this specific instance of alleged misconduct to damage Dr. Sattler's credibility as a medical expert to the jury:

> "**I think, quite frankly, you can give [Dr. Sattler's] opinions the consideration you think they deserve.**"
>
> . . . .
>
> "**And when you are thinking about judging experts and their credibility, [**Dr. Santin's medical expert Dr. Grant] is somebody who . . . **needs to be aware of standards not in Seattle where 'everybody does what we do'. 'Everybody broke the rules so I'm okay.' He's teaching what it is that's required,** required not only with regard to medicine, **but responsible ethical behavior.**"

Id. at 7-8 (emphasis added). In arguing against Ms. Muscle's counsel's objection as

to this evidence of this alleged misconduct, attorney Kalkstein specifically argued to the District Court "**This goes to credibility**". Transcript, p. 157, l. 2.

Attorney Kalkstein's own words rise like ghosts from the page to refute Dr. Santin's argument that this evidence was not intended to prejudice Ms. Muscle by improperly attacking the credibility of Dr. Sattler and specifically his character for truthfulness.

Further, in making this argument, Dr. Santin ignores the scope of permitted inquiry under Rule 608(b), M.R.E. This Court has established a very narrow scope of conduct that maybe inquired into. "By definition, specific instances of prior conduct probative of a witness's character for truthfulness narrowly include prior instances where the witness lied, made false reports or accusation, or otherwise acted dishonestly, untruthfully, deceitfully, or fraudulently." *State v. Quinlan, 2021 MT 15, 403 Mont. 91, 100, 479 P.3d 982, 988, citing State v. Pelletier, 2020 MT 249, 401 Mont. 454, 473 P.3d 991.* An alleged violation of an advertising guideline does not fall within this narrow purview. There was no lie, no false report, no dishonesty, no fraud, in the advertising photos. And as previously noted, the tenuousness of whether this was actually an ethical violation mars the entirety of the alleged bases for admitting the evidence. Appellant's Opening Brief, pp 20-21.

3. <u>Dr. Grant's testimony attacking Dr. Sattler as unethical based on Dr. Sattler's website and his sequencing of surgical procedures is forbidden by Rule 608(b), M.R.E.</u>

Dr. Santin's counsel elicited opinions from Dr. Grant **on direct examination** of specific instances of conduct by Dr. Sattler that he alleges were unethical: Dr. Sattler's method of sequencing operations which Dr. Grant characterized as upselling, and Dr. Sattler's use of stock photos on part of his website, which he characterized as a breach of the ASPS guidelines. Trial Transcript, p. 236, l. 22 to p. 239, l. 15. The District Court erred in overruling Ms. Muscle's objection to this testimony. Under Rule 608(b), M.R.E., "**reference to specific instances of a witness' conduct for the purpose of proving his character for truthfulness or untruthfulness is *never* permitted on direct examination.**" *State v. Bonamarte, 2009 MT 243, 351 Mont. 419, 423, 213 P.3d 457, 460 (italics in original, bolding emphasis added)(holding that it would have been error for the trial court to permit Bonamarte to offer third party testimony on direct examination of specific instances of lying by another witness as beyond the scope of Rule 608(b), M.R.E.), citing State v. McLean, 179 Mont 178, 185, 587 P.2d 20, 23 (1978).*

4. <u>There is no other legitimate basis for the conduct evidence.</u>

Dr. Santin argues that there were other, legitimate purposes for admitting the evidence independent of Rules 608(b) and 403, M.R.E.

Specifically, he refers to Rule 705, which states that the expert may be

required to disclose the underlying facts or data supporting his opinions on cross-examination, and *Reese v. Stanton, 2015 MT 293, 381 Mont. 241, 358 P.3d 208,* which discusses the application of that statute to medical expert testimony. These authorities are largely inapposite here, as the evidence of Dr. Sattler's advertising practices were not facts or data relied upon by Dr. Sattler in performing his professional opinions in this case.

Dr. Santin mischaracterizes the scope of evidence allowed under Rule 705, M.R.E., claiming that he is entitled to present evidence undermining the competence of Dr. Sattler's opinions, by exposing their weaknesses and biases. What *Reese* actually says is that "Rule 705 allows the cross-examiner to 'determine the underlying facts on which the expert bases [her] opinion and **expose the weakness if any of the underlying facts**". There is no nexus between Dr. Sattler's advertising website and the facts underlying his expert opinions in this case.

Such evidence, even where permissible, is not admitted as independent substantive evidence. *Reese, 2015 MT 293, 381 Mont. at 247, 358 P.3d at 213.* In *Reese,* the defense sought to discredit plaintiff's medical expert by questioning her as to opinions contained in the reports of doctors who did not testify. This Court noted that this was an improper attempt to introduce unreliable substantive evidence through cross-examination which affected the outcome of the trial, requiring reversal and remand of the action for a new trial.

Dr. Santin *cites Holloway v. University of Montana, 178 Mont. 198, 582 P.2d 1265 (1978)* for the proposition that bias may be properly considered by the finder of fact. There is no support in that case for the idea that bias allows inquiry into otherwise proscribed areas of testimony or that the elicitation of such testimony overrides either Rule 608(b) or Rule 403 in evidentiary determinations.

Given that the evidence at issue was not admissible for any other purpose and the District Court overruled Ms. Muscle's objections to the testimony in their entirety, Ms. Muscle could not, and did not need to, request a Rule 105, M.R.E. limiting instruction.

5. <u>The District Court did not properly balance the probative nature of the testimony against its prejudicial affect as required by Rule 403.</u>

Dr. Santin asserts that the district court properly balanced the prejudicial effect of the advertising injury against its probative value. When Ms. Muscle's counsel objected at trial to the cross-examination as prejudicial, the District Court overruled the objections without making any Rule 403 balancing findings. Trial Transcript, P. 156, l. 9 to p. 157, l. 11; p. 238, l. 11 to 15, p. 239, l. 19 to p. 240, l. 3.

In its Order denying Plaintiff's Motion for New Trial, given a new opportunity to make detailed Rule 403 balancing findings addressing the concerns raised by this Court in *Unmack,* the District Court failed to do so. Rather, the District Court relied upon *State v. Cunningham, 2018 MT 56, 390 Mont. 408, 414 P.3d 289*, asserting that the ethical conduct in the nature of "mishandling child and infant autopsies" in that

case was generally analogous to the stock photos testimony and evidence in this case, as both address ethical questions regarding the expert witness, and asserted that the Montana Supreme Court in *Cunningham* held that evidence of a prior ethical violation was admissible and that Rule 403 did not require its exclusion.

Unfortunately, the District Court's view isn't a complete or accurate statement of this Court's ruling in *Cunningham*. In that case, the district court granted a motion in limine precluding cross-examination of Dr. Bennett regarding allegations that he lied in criminal cases; that he mishandled child and infant autopsies relating to shaken baby syndrome; and that he was about be terminated from his position as a forensic pathologist as a result. The district court also precluded the offering as evidence of letter from the State Medical Examiner detailing these facts.

The Montana Supreme Court upheld the prohibition of the letter into evidence, which was clearly extrinsic evidence. This Court held that evidence of Dr. Bennett's previous lying was relevant and admissible under Rule 608(b), *absent a determination of inadmissibility pursuant to Rule 403*. Finally, this Court determined that the district court abused its discretion in refusing to allow *a limited inquiry* into the issues set forth in the letter, paying particular attention to the allegation of lying on the stand. *State v. Cunningham, 2018 MT 56, 390 Mont. 408, 417-18, 414 P.3d 289, 296-297.*

The District Court's analogizing the *Cunningham* circumstances to those in

this case was error. The allegations of misconduct were much more serious in Cunningham than those in this case, and specifically included false statements under oath in the courtroom. The lying appears to have been conclusively determined. The mishandling of autopsies was a core activity directly related to the testimony Dr. Bennett was giving and his professional competence, unlike ancillary advertising activities unrelated to the direct provision of medical treatment, that is under attack in this case.

Unlike *Cunningham*, which was a criminal case, *Unmack* was a professional medical negligence case just like this one. This Court's decision in *Unmack* was specifically tailored to the unique nature of medical malpractice actions, stressing the fundamental importance of the parties' required expert witnesses to resolution of the case. The District Court in this case erred in arbitrarily dismissing *Unmack* as distinguishable on the Rule 403 issue, and ignoring this Court's broader language of the inherently prejudicial nature of such evidence.

6. <u>The error was not harmless.</u>

In *Unmack*, this Court held that character evidence of a previous instance of unrelated misconduct was not probative of the expert's truthfulness as an expert witness under Rule 608(b), was irrelevant under Rule 402, and was highly prejudicial and confusing under Rule 403 and that the district court abused its discretion in allowing it. *Unmack v. Deaconess Med. Ctr., 1998 MT 262, 291 Mont.*

280, 285, 967 P.2d 783, 786. This Court then determined that the admission of the instance of alleged misconduct was not harmless error, given that Dr, Blaylock was the only witness the Unmacks offered regarding the standard of care and there was great danger that the jury would confuse the evidence with Dr. Blaylock's credibility as an expert medical witness.

In this case, the transcript makes clear that Dr. Santin deliberately used the advertising and ASPS guideline evidence for the express purpose of convincing the jury that Dr. Sattler was not credible as an expert medical witness. The prejudice was intended. The material affect on Ms. Muscle's rights was intended.

In *Unmack*, this Court concluded that the District Court's error *was so significant* that it materially affected the substantial right of the Unmacks to a fair trial. *Id.* Nevertheless, Dr. Santin argues that the evidence did not independently affect the result of the case and therefore was harmless. To the extent Dr Santin's argument argues that independent evidence existed to the same point or that Ms. Muscle could still present her theory of the case so the admission of evidence was harmless or that other evidence supports the jury's verdict (Appellee's brief, pp. 27-28), Dr. Santin is making a fundamental analytical error by ignoring what this Court has so cogently recognized and stated – that unfair attacks on a medical expert's credibility in a medical malpractice case denies a fair trial to the party retaining the expert because the jury's determination of the claim hinges significantly on the

jury's assessment of the credibility and professional opinions of each parties' medical expert.

Dr. Santin makes two procedural arguments supporting his position that the error was harmless, one relating to the transcript and the other to timeliness of objections.

a. <u>The lack of part of the transcript does not warrant a finding for Dr. Santin on appeal on any issue.</u>

Dr. Santin argues that the appeal should be dismissed because the transcript was incomplete, both because of a recording omission and because not all relevant parts of the transcript were ordered.

It is true that there was an electronic error and the recording for the trial transcript for the closing arguments held on the last day of trial is not available, except for the relevant excerpt of Attorney Kalkstein's closing argument obtained from Court Reporter Anne Perron shortly before she retired. This is neither parties' fault, and Ms. Muscle respectfully suggests that the existing portions of the transcripts, as well as the documentary record, are sufficient for this Court to rule on the appeal in an informed manner which provides justice to both parties in conformance with exiting principles of Montana law, statutory and precedential, on the issues before the Court. This is not a substantial and significant omission from the record presenting resolution of the issues. *See State v. Caswell, 2013 MT 39, 369 Mont. 70, 295 P.3d 39.* Further, if Dr. Santin believed additional reference to/record

of the proceedings of the fifth day was important to this Court's review, he could have requested a reconstructed record, which satisfies constitutional requirements and can afford effective appellate review. *State v. Deshon, 2004 MT 32, 320 Mont. 1, 85 P.3d 756.*

Second, Dr. Santin asserts that Ms. Muscle did not request certain portions of the record necessary to determine whether the error was harmless. This argument incorrectly shifts the burden of proof on appeal. Ms. Muscle's position is that the holding in *Unmack*, applied to this case, establishes such prejudice as a matter of law and further that the portions of the transcript showing attorney Kalkstein's cross-examination of Dr. Sattler, statements to the court, examination of Dr. Grant, and closing arguments, also establish the harmful nature of the error. Since Dr. Santin is arguing that the evidence presented in the case as a whole somehow established that the admission of the evidence at issue constituted harmless error, it was incumbent upon Dr. Santin to request the portions of the transcript supporting that argument.

b. Ms. Muscle's objections were timely, clearly stated, frequent, and continuing.

Dr. Santin argues briefly that Ms. Muscle waived her objections by failing to timely object at trial.

However, the record shows that Ms. Muscle's counsel objected appropriately and in detail when Dr. Santin's counsel attempted to cross-examine Dr. Sattler on the exact issue of whether his advertising website use of stock photos consituted a

specific instance of misconduct relating to his character for truthfulness or untruthfulness. Trial Transcript at 156, l. 9-20. That was the point that attorney Kalkstein crossed the lines forbidden by Rules 402, 403, and 608(b).

The record shows that Ms. Muscle's counsel objected appropriately and in detail when Dr. Santin's counsel sought admission of the document stating the ethical guideline at issue and when he sought testimony from Dr. Grant about it. Document 143, Exhibit B, in which the District Court sustained the objection Ms. Muscle's objection to admission of the document on April 26, 2022; Trial Transcript, p. 234, l. 20 to 235, l. 3, and p. 236, l. 11-16, p. 239, l. 20 to p. 240 l.2 in which the District Court overruled the objection of Ms. Muscle's counsel to the admission of the document on April 28, 2022. That was the point at which attorney Kalkstein again crossed a line forbidden by Rules 402, 403, and 608(b).

The record shows that Ms. Muscle's counsel objected appropriately and in detail when Dr. Santin's counsel specifically questioned Dr. Grant on direct examination about Dr. Santin's alleged instances of unethical misconduct. Id., Trial Transcript, p. 238, l. 11-14. This was the third time that attorney Kalkstein crossed a line forbidden by Rules 402, 403, and 608(b).

Dr. Santin criticizes Ms. Muscle's counsel for asking questions of Dr. Santin about the admitted evidence on redirect. But once the objeciton is overruled, such examination is necessary to attempt to ameliorate the admitted testimony and is not

a waiver of a party's objection.

B. Reply to Dr. Santin's Issue Two Arguments

1. Collateral Estoppel does not apply to prevent Ms. Muscle from challenging the District Court's Summary Judgment rulings.

Dr. Santin argues that Ms. Muscle is collaterally estopped from challenging the District Court's grant of summary judgment on the sequencing-related claims because the alleged "overarching claim" of failure to diagnose was presented to the jury and resolved in Dr. Santin's favor.

This argument ignores the practical fact that Ms. Muscle was prevented from offering testimony, expert opinion, documentary evidence, and argument on the claims that Dr. Santin improperly sequenced the surgeries and improperly performed a medial thighplasty first. This is the exact opposite of the full and fair opportunity to litigate these issues required by *Baltrusch v. Baltrusch, 2006 MT 51, 331 Mont. 281, 140 P.3d 1267* in satisfying the fourth element necessary to trigger activation of the doctrine of collateral estoppel. None of the other three elements are met in this case. The trial is not a prior adjudication. This is the same case, and the District Court's granting of summary judgment directly and decisively eliminated Ms. Muscle's ability to present these claims at trial.

2. Application of *Kipfinger* to the Motion for Summary Judgment on the Standard of Care mandates reversal.

Dr. Santin tries very hard to cast Dr. Sattler's standard of care opinions as

"personal preferences" insufficient to establish a national standard of care. These efforts to squeeze Dr. Sattler's testimony into a box marked insufficient must be rejected in light of this Court's recent decision of *Kipfinger v. Great Falls Obstetrical and Gynecological Assocs., 2023 MT 44, 411 Mont. 269, 525 P.3d 1183.* It is telling that Dr. Santin does not address the broader standard enunciated in *Kipfinger* and how it applies to this case.

Finally, Dr. Santin engages in misdirection in arguing that the sequencing claims do not provide a sufficient causation opinion because there was only a possibility that a circumferential lower body lift might have obviated the need for a medial thighplasty. The nature of the harm caused by the sequencing failure was the existence of protruding, unsightly buttock flaps which had painful scars on them and required an unusual second surgery to fix. That surgery, of necessity and despite Dr. Ploplys' brilliant surgical decision and masterful surgical performance, left additional painful scars that have caused Ms. Muscle ongoing disability and pain. These scars would not have been present from the circumferential lower body lift. Appellant's Brief, pp 8-9, Facts 4 & 5.

CONCLUSION

The record establishes genuine issues of material fact as to the claims for sequencing and medial thighplasty performance on which the District Court granted summary judgment. The District Court adopted a narrow, strict analysis of standard

of care testimony that has been replaced by the more just and broad analysis of sufficiency set forth in the recent *Kipfinger* case. The summary judgment on these issues should be reversed.

Dr. Santin's counsel engaged in a calculated course of conduct designed to destroy the credibility of Ms. Muscle's expert witness, Dr. Scott Sattler, in a manner which is specifically forbidden by Montana's Rules of Evidence, depriving Ms. Muscle of a fair and just trial. The District Court's evidentiary rulings were an abuse of discretion and should be reversed, with the case remanded for a new trial.

Dated this 14th day of November, 2023.

Allen P. Lanning

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief is proportionately spaced, has a 14-point typeface, and consists of 3,697 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Montana Supreme Court and that I served true and correct copies upon each attorney of record and unrepresented party by first class mail, postage prepaid, or by hand delivery addressed as follows:

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