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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0517

SHERRI FROST,

Plaintiff/Appellee,

v.

KEVIN R. FROST and FROST RANGHING CORPORATION,

Defendants/Appellants.

APPELLANT/CROSS-APPELLEE KEVIN FROST'S OPENING BRIEF

On Appeal from the Montana Twenty-First Judicial District Court, Ravalli County, The Honorable Jason Marks Presiding

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Appellant Kevin Frost ("Kevin") submits the following Brief in his appeal of the District Court's order granting the motion for a new trial filed by Sherri Frost ("Ms. Frost") after a jury trial.

STATEMENT OF ISSUES

Did the District Court invade the province of the jury by speculating that it awarded no pain and suffering damages to Ms. Frost?

STATEMENT OF THE CASE

This matter arises out of Kevin's kidnapping of Ms. Frost, for which he served more than three years in prison. Ms. Frost filed suit on February 1, 2018. Compl. and Demand for Jury Trial (Doc. No. 1). In addition to Kevin, the complaint named as defendants Margot and Dean Allen, who own the property to which Kevin drove during the kidnapping; the Frost Ranching Corporation, which owns and operates Kevin's family ranch; the Frost Limited Partnership, which owns the land for the Frost Ranch; and a bevy of insurance companies. *Id*. After Kevin appeared, the parties fought over whether it was proper to have a scheduling conference as well as discovery. Mot. to Vacate R. 16(b) Order (Doc. No. 17); Mr. Frost's Resp. in Opp'n to Pl.'s Mot. to Vacate R. 16(b) Order (Doc. No. 18).

Ms. Frost filed her first amended complaint on August 5, 2020. First Am. Compl. (Doc. No. 30). The First Amended Complaint did not include claims against the insurance companies named in the Complaint. *Id*. The parties sought

approval from the Court to obtain and release confidential criminal justice information ("CCJI") related to Kevin's confession to aggravated kidnapping and partner/family member assault as well as his guilty plea. Unopposed Mot. to Release CCJI (Doc. No. 39); Stipulated Protective Order (Doc. No. 40). Discovery issues persisted. Ms. Frost objected to a Rule 35 examination. Mot. for R. 35 Examination (Doc. No. 46). The Court ultimately granted Kevin's motion and Ms. Frost participated in a Rule 35 examination by Dr. Craig McFarland. Order Granting R. 35 Examination (Doc. No. 93).

Margot and Dean Allen moved the Court for summary judgment, which the court granted. Allens' Mot. for Summ. J. (Doc. No. 58); Order of Dismissal with Prejudice Claims Against Allens (Doc. No. 91). The Frost Limited Partnership and Frost Ranching Corporation also moved the Court for summary judgment, which the Court granted in part, removing the Frost Limited Partnership. Mot. for Summ. J. for Frost Ranching Corp. and Frost Limited Partnership (Doc. No. 63); Order Granting in Part and Denying in Part Defs.' Mot. for Summ. J. (Doc. No. 101).

The parties tried the case to a jury, held in Ravalli County from March 11 through 20, 2024. Hon. Jason Marks presided. The Court provided the jury with a special verdict form. Special Verdict (Doc. No. 157). The jury found that, as he conceded, Kevin was liable for negligence, assault, battery, and false imprisonment. *Id.*. It found that he was not liable for intentional infliction of

emotional distress or punitive damages. *Id.* The jury found that Frost Limited Partnership and Frost Ranching Company were not liable. *Id.* The jury did not award punitive damages. *Id.*

The Special Verdict Form included a single line for damages, as opposed to other forms, which can include separate lines for different categories of damages, such as lost wages, pain and suffering, and the like. *Id.* The jury found that Kevin is liable to Ms. Frost for $20,000.00 in damages. *Id.* The verdict was "very unanimous," according to the jury's foreperson. Later, Kevin sought and was granted an offset to this amount for his criminal restitution payments. Unopposed Mot. to Set off J. (Doc. No. 160); Order Granting Set off of J. (Doc. No. 161).

Ms. Frost filed a motion pursuant to Rule 59 seeking a new trial against Kevin. Pl.'s Mot. for New Trial (Doc. No. 163). She contended that the jury did not award her past pain and suffering damages. *Id.* This contention was based on the argument that the entire $20,000 was for medical costs. *Id.* She did not seek a new trial against the Frost Limited Partnership or Frost Ranching Corporation. *Id.* Kevin opposed the motion, as did the other parties. Frost Ranching Corp.'s Resp. in Opp. to Pl.'s Mot. for New Trial (Doc. No. 166); Kevin Frost's Resp. in Opp. to Mot. for New Trial (Doc. No. 167). The Court granted this motion on August 2, 2024, indicating that the parties should file briefs related to the proper scope of the

new trial. Order Granting Pl.'s Mot for New Trial (Doc. No. 173). This appeal and cross-appeal followed.

STATEMENT OF FACTS

I. Kevin made a horrible decision.

This case is "not a who-done-it." Trial Tr. Vol I, at 180, March 11, 2024. On the morning of February 9, 2016, Kevin Frost drove to the home of his estranged wife Ms. Frost's new boyfriend, Brian Moore. Pretrial Order (Doc. No. 145) at 2-3, 10. He placed a garbage can in the driveway so she would have to stop, seized her, forced his way into her vehicle, and kidnapped her. *Id.* Kevin held her from 6:55 a.m. to 1:20 p.m. *Id.*

He quickly realized the gravity of his mistake. Kevin took Ms. Frost, who was severely intoxicated, to the emergency room and turned himself in to the Ravalli County Sheriff's Office. *Id*. at 2-3, 10; Trial Tr. Vol. I, at 278-79. He spoke to officers for two hours before eventually invoking his right to an attorney.

Kevin expressed regret, apologized, and pleaded guilty to partner family assault and kidnapping. He was sentenced to prison and served in Shelby from June 9, 2017, to September 16, 2020. Pretrial Order at 3, 10. He was also ordered to pay $8,991.03 in restitution. Trial Tr. Vol. I, at 1015.

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II. The evidence left substantial questions about what injuries Ms. Frost suffered.

The jury heard extensive testimony on medical costs, had access to medical bills, and received suggestions from attorneys for both Kevin and Ms. Frost. In her opening statement, Ms. Frost's attorney said that physical injuries were not "the largest part of the case at all." Trial Tr. Vol. I, at 67. In closing, she argued for $25,392.15 in medical costs related to the kidnapping. Trial Tr. Vol II, at 1308. Kevin's attorney said, "If you take out . . . the physical therapy that occurred after the surgery, and also you discount half of the counseling sessions which were about her children, the number is not $25,000. The number is closer to $20,000." *Id*. at 1343. As detailed below, the jury knew that they did not have to accept either of these figures.

A. *Ms. Frost's shoulder injury.*

Kevin agreed that he caused pain to Ms. Frost's shoulder doing the kidnapping, but otherwise, her injuries were hotly contested. The parties agreed that Ms. Frost had shoulder pain before the kidnapping. Ms. Frost had been going to physical therapy for her shoulder prior to the kidnapping. Trial Tr. Vol. I, at 344. In her interview with the police, Ms. Frost could move her arm freely behind her back and over her head. Ms. Frost even brought up her existing shoulder pain, saying, "And [Kevin] knows my shoulder hurts so bad anyway. And he knows I, I can have a hard time working anyway." Trial Ex. 16 (police interview with Ms.

Frost), 48:30. Ms. Frost and her boyfriend Brian Moore both testified to Ms. Frost's preexisting shoulder pain at trial. Trial Tr. Vol. 1, at 330, 923.

The only medical doctor who testified on the link between the kidnapping and Ms. Frost's physical injuries at trial was Dr. Timothy Woods. Dr. Woods is a practicing orthopedic surgeon at Bitterroot Health in Hamilton, Montana. Deposition of Dr. Timothy Woods, attached as Exhibit A, p. 5, March 1, 2024. Ms. Frost visited Dr. Woods on July 18, 2016, complaining of injury to her right shoulder and elbow. Woods Dep. at 8; Trial Ex. 102 (December 27, 2019 Office and Clinic Notes). At this visit, Dr. Woods reviewed an MRI of her right shoulder and elbow taken six weeks after the kidnapping. Trial Ex. 102.

Dr. Woods expressed doubt about the connection between her shoulder and elbow injuries and the kidnapping. In his office and clinic notes, Dr. Woods found "mild impingement," "no atrophy about the shoulder," and "no tenderness" at the AC joint. *Id*. The MRI showed no tear in the right shoulder. Woods Dep. at 9.

The MRI did show a partial tear of the ligament of the right elbow. Dr. Woods wrote that he found this injury "a little confounding" because it was not tender upon examination and showed no sign of a fresh injury. Woods Dep. at 9-10. He opined, "I would be astonished that the ulnar collateral ligament was injured six weeks prior [in the kidnapping] and has absolutely no reactive edema around it" Trial Ex. 102, p. 6.

Dr. Woods recommended against surgery to her elbow and shoulder and instead suggested continued physical therapy, use of over-the-counter anti-inflammatories, and follow-up in "a couple of months" if the symptoms did not resolve. Trial Tr. Vol I, at 344-45; Trial Ex. 102, p. 7. Ms. Frost did not follow up with Dr. Woods.

At trial Dr. Woods testified that he could not say with a "reasonable degree of medical certainty" that "[Ms. Frost's] limitations were a result of the traumatic event she experienced in February of 2016." Woods Dep. at 21. He further testified that the rotator cuff injury that was repaired surgically in 2018 could have been caused by repetitive stress like the movements Ms. Frost routinely engaged in in her practice as a dental hygienist. *Id.* at 34.

Notwithstanding Dr. Woods' opinion, Ms. Frost had shoulder surgery in March 2018. Trial Tr. Vol I, at 346. Because Ms. Frost could not proffer a doctor to testify to the requisite standard on causation, the Court ruled that there was not competent medical evidence that the kidnapping caused the rotator cuff tear. Trial Tr. Vol II, at 1267. In instruction 49 the jury was told:

> [T]here is insufficient evidence to establish that the kidnapping caused the Plaintiff's rotator cuff tear and shoulder surgery. You are instructed not to award the Plaintiff damages for the rotator cuff tear or surgery to her right shoulder.

Jury Instruction No. 49 (Doc. No. 156), p. 51. Ms. Frost did not obtain any testimony from a medical doctor that any treatment for her shoulder injury was necessary, let alone reasonable.

The exclusion of the shoulder left open the question of *which* physical therapy costs were directly related to the kidnapping. In their calculations of past medical costs, all attorneys included some of Ms. Frost's physical therapy costs; however, the jury did not have to rely on the attorneys' numbers. The jury had an Itemization of Charges from Hamilton Physical Therapy, P.C. detailing the procedure and cost for visits from March 8, 2016, to September 13, 2018. *See* Trial Ex. 51 (Hamilton Physical Therapy Itemization of Charges), p. 2941-46.

B. *Ms. Frost's counseling visits and PTSD.*

The other past medical costs relating to the kidnapping centered on Ms. Frost's counseling visits. Here, too, causation was highly questionable. As with physical therapy, Ms. Frost was in counseling before the kidnapping and continued after the kidnapping. Trial Tr. Vol I, at 885. Prior to the kidnapping, Ms. Frost's counseling focused on the divorce and her strained relationship with her children. Attorneys for Kevin and Frost Ranch disputed many of the counseling costs after the kidnapping as not related to the kidnapping itself but rather to other family issues.

Ms. Frost was diagnosed with generalized anxiety disorder prior to the kidnapping. *Id*. at 449. On November 20, 2015, Ms. Frost told her counselor that she was experiencing stress due to the divorce and her alienation from her children. Her counselor, Kristin Stoehr, LCPC, noted that Ms. Frost was "having trouble going to sleep, experiencing early morning awakening, inability to concentrate, having muscle tension, is keyed up and on edge, and easily tired." Trial Ex. 54 (Turtle Gap Mental Health Assessment), p. SF00069. In June 2016, four months after the kidnapping, Ms. Frost told her primary care provider that she would not have a "mental breather" until after her divorce was over." Trial Tr. Vol I, at 927. At trial Ms. Frost admitted that she was having "a hard time" with the divorce at the time of the kidnapping. *Id*. at 886, 923. She changed divorce lawyers several times during the proceedings and the divorce was ongoing at the time of trial. *Id*. at 923.

On top of a contentious, drawn-out divorce, Ms. Frost was dealing with ongoing estrangement from her children. The estrangement pre-dated the kidnapping. In a December 24, 2015 note, her counselor noted, "The client's anger with her children was explored. The client appears frustrated and angry with her children's responses to her in the present." *Id*. at 922; Trial Ex. 54, p. SF00119. Ms. Frost admitted at trial, "I might be angry because I can't have the relationship with them that I should be able to have." Trial Tr. Vol. I, at 969.

Brian Moore was a family friend, and Ms. Frost was engaged in an affair with him when she decided to divorce Kevin Frost. Trial Ex. 16, 12:56. Mr. Moore testified at trial that the children were upset by the affair. Trial Tr. Vol. I, at 331. During the kidnapping, Kevin and Ms. Frost discussed the impact this had on their children. Ms. Frost told police that her husband wanted her to apologize to the children for disrupting their lives. Trial Ex. 16, 12:29. Ms. Frost expressed repeatedly that she was upset because her children wouldn't talk to her. *Id.*, 13:24, 56:10.

Dr. Katelyn Frost, Kevin and Ms. Frost's daughter, testified at trial and shed further light on her relationship with her mother. She said that they were estranged prior to the kidnapping and that the affair contributed to that estrangement. Trial Tr. Vol I, at 972. Even before the affair, Dr. Frost said that her mother was so angry that "my brother and I would hide from her" when she came home. *Id*. at 976. After the affair began, Dr. Frost tried going to counseling with her mother but "felt slightly attacked." *Id*. at 973. Dr. Frost described her stress at her mom's constant attempts at communication, which often involved Mr. Moore and her maternal grandparents. *Id*. at 974-75. She said that she also felt that her brother Traedyn was "mistreated by her [Ms. Frost] and her parents in so many ways." *Id*. at 975.

Ms. Frost's state of distress about her divorce and her relationship with her children both before and after the kidnapping raised specific questions about which of her counseling costs should be attributed to the kidnapping. Kevin's attorney asked the jury to exclude half of her counseling sessions, but as with the other medical costs, it was ultimately the jury's decision. Trial Tr. Vol II, at 1343.

The additional medical testimony dealt with whether Ms. Frost had PTSD from the kidnapping. Doctor of Psychology Craig McFarland testified for Kevin. Dr. McFarland is an expert in PTSD. He worked with the National Center for PTSD while he was employed at the Veteran's Affairs Boston Healthcare System, and he has published on the topic of memory and PTSD. *Id*. at 1126-1129. He found that Ms. Frost does not have PTSD. *Id*. at 1132. In addition, Dr. McFarland found evidence that Ms. Frost was exaggerating her symptoms. *Id*. at 1132-1133. He testified that 25% to 50% of people tested while suing fail "validity index" tests, which indicates overreporting of psychological symptoms. *Id.* at 1134.

Ms. Frost's test results indicated that she was overreporting or exaggerating her symptoms. Ms. Frost's expert, Dr. Jordan Scotti, administered this test. In the test, the subject is informed that people with PTSD often have a hard time evaluating the emotions shown on people's faces. Trial Tr. Vol. I, at 409. The tester then shows photos of people's faces contorted in obvious emotions such as anger. *Id.* If a subject is exaggerating their symptoms, they will believe that they

need to answer questions on the tests incorrectly. Trial Tr. Vol. II, at 1134-36. Ms. Frost fell for this ruse, which indicates that she is exaggerating her symptoms and attempting to convince doctors she is more ill than she really is. *Id.*

Dr. McFarland employed additional validity indexes. First, he gave Ms. Frost the Trauma Symptom Indicator-2 ("TSI-2") test. That test includes an Atypical Response Scale ("ATR"). *Id.* at 1140-1142. This measures whether a test subject indicates they have symptoms that are exceedingly rare in patients taking the test. *Id.* Dr. McFarland opined on new research published by Drs. Henry and Gorbein which put Ms. Frost's ATR score outside of the valid range, once again indicating that she was exaggerating her symptoms. *Id*. 1142-1144.

Finally, Dr. McFarland gave Ms. Frost the Minnesota Multiphasic Personality Inventory ("MMPI"). *Id.* at 1144. Over 14,000 published papers have studied this test. *Id.* Ms. Frost failed three validity indexes on the MMPI. *Id*. at 1145. They are general physical functioning complaints, somatic complaints, and cognitive complaints indexes. *Id*. at 1145-1147. On somatic complaints, Ms. Frost's score of 115 was far above the accepted cutoff score and nearly at the maximum (120) of the test. Each of these indicators strongly suggested that Ms. Frost was exaggerating in her symptoms. *Id*

Ms. Frost's attorney asked for future medical costs based on Dr. Scotti's estimation of the future cost of treating her PTSD, which she placed at $500,184.

Id. at 1308. Kevin's attorney urged the jury to "[g]o with the expert that has the experience dealing with the subject matter, the man who worked on the front lines of this PTSD problem that we have in our country" and not award future medical costs.

III. Ms. Frost's emotional distress damages were minimal.

On the specific issue of pain and suffering, the jurors knew that if they found Kevin liable, their "award should include reasonable compensation for any pain and suffering experienced and reasonably probable to be experienced in the future." Jury Instruction No. 36, p. 38. In closing, Ms. Frost's attorney specifically defined pain and suffering as, "those things are the pain that Sherri felt in her shoulder, the headaches, the elbow pain, the bruise on her butt, the cut on her lip, the mark on her ear. Some of those healed quickly. Some healed slowly. Some she still has trouble with. And it also—It says here it also can include mental . . . pain and suffering." Trial Tr. Vol II, at 1313-14.

Ms. Frost's attorney asked the jury for $500 for each of the 2961 days since the kidnapping. *Id*. at 1314. Even so, she acknowledged that the jury had the ultimate authority to decide the pain and suffering amount, saying, "You can go up. You can go down on that." *Id*. Kevin's attorney urged the jury not to focus on a daily number at all because it "doesn't really address the justice of the situation." *Id*. at 1346-47.

IV. The Court properly instructed on the standard of proof for damages and the parties indicated that they should calculate damages on their own.

The jury received detailed instructions in both the Jury Instructions and Jury Verdict form. They were instructed that the party bringing the claim had the burden of proof based on the preponderance of evidence. Jury Instruction No. 3, p. 5; Jury Instruction No. 12, p. 14. If the jury found Kevin liable, Instruction 36 covered the requirement for pain and suffering:

> Your award should include reasonable compensation for any pain and suffering experienced and reasonably probable to be experienced in the future. The law does not set a definite standard by which to calculate compensation for mental and physical pain and suffering. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for this kind of loss. The law does require, however, that when making an award for pain and suffering, you shall exercise calm and reasonable judgment. The compensation must be just and reasonable.

Jury Instruction No. 36, p. 38.

The jury Verdict Form laid out the considerations for question 8, "what is the total amount of damages sustained by Sherri Frost?":

> In considering Sherri Frost's damages, you may consider the following categories: Past medical care, treatment and services; future medical care, treatment and services; lost earning capacity to date; future lost earning capacity; reasonable value of services; past emotional distress; future emotional distress; pain and suffering; future pain and suffering; loss of established course of life.

Trial Tr. Vol. II, at 1389.

Throughout the trial, the jury was told to act independently, and it is unsurprising that the jury award did not match the suggestions given by attorneys for Kevin or Ms. Frost. Jurors were told that they would be hearing competing testimony and would have to decide for themselves which information to value. Trial Tr. Vol. I, at 120-23. Ms. Frost's attorney, for example, told potential jurors in voir dire, "I will be suggesting numbers, but they're suggestions. You can thumb up or thumb down or go somewhere in the middle, go higher or go lower, you can do whatever you want." *Id*. at 96. In closing arguments, Kevin's attorney said, "I would urge you, Ladies and Gentlemen, not to start talking about this case in terms of my number, which I'll tell you next, or talk about their number. *Put pen to paper yourself and see what you think the number should be*." Trial Tr. Vol II, at 1348.[1]

STATEMENT OF THE STANDARD OF REVIEW

The Court "review[s] *de novo* a Rule 59 motion where the alleged insufficiency of the evidence provides the basis for the motion." *Barile v. Butte High Sch.*, 2013 MT 263, ¶ 16, 372 Mont. 1, 309 P.3d 1009 (emphasis added);

[1] Additionally, in voir dire, Ms. Frost's attorney told potential jurors, "[U]ltimately it's your decision. . . . [A]ll the parties try to give you all the information that we think that you need in order to determine values, but ultimately that's going to be your call." Attorney for Frost Ranch told jurors, "what we ask you to do is so hard. You don't have to be worried about it. You have a right to consider all the evidence in light of your own general knowledge, experience, and, from my point of view, most importantly, common sense." Trial Tr. Vol II, at 1355-56. And jury instructions emphasized that they were "the sole judges of the facts in this case" Jury Instruction No. 2, p. 3. They were instructed that they would weigh witness testimony but that "the witness is not the trier of fact. You are the trier of fact" Jury Instruction No. 13, p. 15.

citing Stubblefield v. Town of W. Yellowstone, 2013 MT 78, ¶ 14, 369 Mont. 322, 298 P.3d 419. *See also Carestia v. Robey*, 2013 MT 335, ¶ 7, 372 Mont. 438, 313 P.3d 169 (same). "There either is, or is not, sufficient evidence to support the verdict, and this determination is not a matter of discretion." *Giambra v. Kelsey*, 2007 MT 158, ¶ 26, 338 Mont. 19, 162 P.3d 134.

"When sufficiency of the evidence is challenged, it is [the court's] job . . . to probe the record for evidence to support the fact-finder's determination." *State v. Dineen*, 2020 MT 193, ¶ 14, 400 Mont. 46, 469 P.3d 122 (citing *Murray v. Whitcraft*, 2012 MT 298, ¶ 26, 367 Mont. 364, 291 P.3d 587). "It is within the province of the jury to determine the weight and credibility of evidence, therefore this Court must view the evidence in the light most favorable to the prevailing party." *Moore v. Beye*, 2005 MT 266, ¶ 8, 329 Mont. 109, 122 P.3d 1212 (citation omitted). Thus, the evidence must be viewed in the light most favorable to Kevin.

SUMMARY OF ARGUMENT

The jury reviewed eight days of evidence and found that Ms. Frost had failed to prove that she was significantly injured in the kidnapping. It is impossible to know precisely what the jury intended collectively, let alone what individual jurors thought. However, the evidence was sufficient to permit the jury to find that Ms. Frost needed only care after the kidnapping and a modest amount of physical

therapy for her already-injured shoulder. Under this evidence, the jury would have awarded a significant amount for pain and suffering.

Montana law requires Courts faced with motions for a new trial to carefully review evidence to support the jury's verdict. The District Court, unfortunately, did not engage in this pursuit. Instead, it guessed the jury's intent based on a single comment in closing that was taken out of context. This is contrary to current Montana law.

When the Court reviews the evidence most favorably to Kevin, it will find that Ms. Frost's shoulder injuries were preexisting and only mildly exacerbated by the kidnapping. Her mental health issues also preexisted the kidnapping, and Ms. Frost exaggerated them for secondary gain. Although Kevin's actions were serious, the jury clearly had evidence to find that its effect on Ms. Frost was not as substantial as she claimed. The Court should reverse and remand with instructions to enter judgment without a new trial so this matter, which has been ongoing for nearly nine years, can be put to bed.

ARGUMENT

I. The District Court erred by guessing about the jury's thinking. The jury could have—and did—find that Ms. Frost was owed less in medical expenses than either party suggested and awarded a small amount of pain and suffering damages.

The parties should not be required to retry this matter, which has already been in the Courts for nearly nine years, because the jury exercised its rights to

reject the positions advanced by both parties. Instead of listening to the plaintiff or defendants, the jury could have calculated the amount of medical expenses it found were reasonable and necessary and awarded pain and suffering damages. Because the Special Verdict Form did not include separate line items for these damages categories, it is impossible to tell what the jury was thinking. Therefore, the District Court erred by failing to interpret the verdict and evidence in Kevin's favor and by failing to analyze whether the myriad causation issues related to Ms. Frost's medical and emotional claims could have led to a low verdict. Instead, the Court impermissibly sided with Ms. Frost's version of the case and invaded the province of the jury.

A. *Motions for new trials are disfavored because of the discretion given to juries.*

A motion for a new trial is a "rather lofty proposition" and should not be granted lightly. *Giambra*, ¶ 32. The court may grant a new trial on all or some of the issues for any reason for which a new trial has heretofore been granted in an action at law in Montana state court. Mont. R. Civ. P. 59(a). Specifically, a court may grant a motion for a new trial if insufficient evidence justifies the jury's verdict. *Delaware v. K-Decorators*, *Inc.*, 1999 MT 13, ¶ 43, 293 Mont. 97, 973 P.2d 818.

All motions to retry a jury trial implicate the importance of the jury system and the work of jurors. The modern jury represents a millennium of evolution and

innovation, and its guarantee and independence is a cornerstone of American democracy. In the eleventh century, William the Conqueror implemented the antecedent of the jury to evaluate property disputes. Juries offered a more civilized alternative to duels, and the practice spread to include civil and criminal cases. Stephan Landsman and James F. Holderman, "The Evolution of the Jury Trial in America," *Litigation*, Fall 2010, vol. 37, no. 1, pp. 32-33. As they evolved in England, juries served as a powerful counterbalance to monarchic overreach, and the 1215 Magna Carta codified this right by guaranteeing free men the "lawful judgement of their peers." Magna Carta, Clause 39. In his *Commentaries on the Laws of England* of 1768, legal scholar William Blackstone effused, "trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." (Reprinted online at https://press-pubs.uchicago.edu/founders/documents/amendVIIs2.html (accessed 1 Dec 2024). Blackstone specifically praised juries for their independence and ability to check the potential biases of judges.

Trial by jury serves as an important check to consolidated power in the American legal tradition as well. The Declaration of Independence lists the abrogation of the right to trial by jury as one of King George's actions that justified revolution. The Declaration's primary author, Thomas Jefferson, wrote to Thomas Paine, "I consider the trial by jury as the only anchor ever yet imagined by man by which a government can be held to the principles of its constitution." U.S. District

Court Judge Jack Zouhary, "Jury Duty: A Founding Principle of American Democracy" n.d. available online at https://civiljuryproject.law.nyu.edu/jury-duty-a-founding-principal-of-american-democracy/ (accessed 1 Dec 2024). Fellow revolutionary John Adams dramatically wrote, "[R]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hogs." *Id.* This fervent belief in the centrality of juries to democracy resulted in the right being codified in Article III of the U.S. Constitution and the Sixth and Seventh amendments. The Montana constitutions of 1889 and 1972 both extended these rights, with some exceptions for civil juries.

Based on this history, Courts attempt to sustain jury verdicts. "When sufficiency of the evidence is challenged, it is our job as an appellate court to probe the record for evidence to support the fact-finder's determination." *Murray,* ¶ 26. The function of Courts "is not to agree or disagree with a jury's verdict. . . . If conflicting evidence exists, we do not retry a case because the jury chose to believe one party over another." *Renville v. Taylor*, 2000 MT 217, ¶ 14, 301 Mont. 99, 7 P.3d 400 (citations omitted). The Court must also review the facts in the light most favorable to the party opposing retrial. *Magart v. Schank*, 2000 MT 279, ¶ 4, 302 Mont. 151, 13 P.3d 390. The burden of showing error is on the party seeking a new trial. *Giambra*, ¶ 36.

Ms. Frost correctly argues that juries cannot ignore undisputed, direct, non-opinion evidence. However, they may wholly reject expert opinion testimony:

> . . . this does not mean that where there is direct testimony in the record, uncontradicted by other direct testimony, that the court or jury is bound thereby or cannot render a decision contrary to such direct testimony. A jury is entitled to weigh the testimony against adverse circumstantial evidence and other factors which may affect the credibility of the witness.

Magart, ¶ 15, *see also Ele v. Ehnes*, 2003 MT 131, ¶ 32, 316 Mont. 69, 68 P.3d 835 ("even if uncontradicted direct testimony is admitted, the jury is entitled to weigh that testimony against adverse circumstantial evidence and other factors which may affect the credibility of the witness"). Additionally, "[t]his general rule . . . applies only to nonopinion lay witness testimony. Expert testimony is opinion evidence a jury is entitled to disregard." *Margart*, ¶10, citing *Barnes v. United Industry, Inc.* 1996), 275 Mont. 25, 33-34, 909 P.2d 700, 705; *Holenstein v. Andrews* (1975), 166 Mont. 60, 65, 530 P.2d 476, 479; *Putman v. Pollei* (1969), 153 Mont. 406, 411, 457 P.2d 776, 779. The Court agreed to instruct the jury on this point, noting that the jury was not required to give expert testimony "any weight at all." Jury Instruction No. 12, p. 14.

Pain and suffering damages are subjective. "In personal injury actions there is no fixed measuring stick by which to determine the amount of damages, other than the intelligence of the jury." *Strong v. Williams* (1969), 154 Mont. 65, 71,

460 P.2d 90, 93. Courts therefore must give juries "wide latitude" in these cases. *Id.* A Court should not replace a jury's opinion on the value of claims.

"It is generally difficult to find fault with a jury's decision on pain and suffering damages because there is no objective standard by which to measure them." *Rozar v. R.J. Reynolds Tobacco Co.*, 292 So. 3d 1202, 1207 (Fla. Dist. Ct. App. 2020) (citations and internal quotations omitted). If a Court finds that some portion of a jury's verdict is not supported by substantial evidence, it should retry only that portion of the case and leave the jury's remaining conclusions unaltered. *Carestia*, ¶ 18[2]; *Renville*, ¶ 28 (ordering a new trial limited to the issue of damages).

B. *The Supreme Court requires damages to be awarded for pain and suffering, but this does not permit a district court to guess what the jury intended with its verdict.*

The Supreme Court has previously held that "where a jury fails to award any damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside." *Thompson v. City of Bozeman* (1997), 284 Mont. 440, 446, 945 P.2d 48, 52; *but see Miller v. San Diego Gas & Electric Co.*, 28 Cal. Rptr. 126, 212 Cal. App. 2d 555, 558 (1963) ("It cannot be said, however, that because a verdict is rendered for the amount of

[2] "Accordingly, we conclude that the jury's damage award was not supported by substantial credible evidence. For that reason, we set aside the jury's verdict on damages and remand to the District Court for a new trial limited to the issue of damages. We note that Taylor has not appealed the jury's finding that Maria was injured as a result of the parties' collision. Therefore, upon retrial that fact need not be re-established."

medical expenses [without an award for pain and suffering] the verdict is inadequate as a matter of law. Every case depends upon the facts involved."). Two cases typify the Court's application of this principle in personal injury cases: *Renville v. Taylor* and *Murry v. Whitcraft.* Although *Renville* initially appears analogous to this case, *Murray* matches the facts better. Moreover, *Murray*, decided twelve years after *Renville*, abrogated *Renville*'s holding and logic. As such, this Court should apply *Murray* and find that a new trial is inappropriate in this case.

Renville arose out of a car accident. *Renville*, ¶ 5. Renville was parked on a street in Great Falls when Taylor rear-ended her car. *Id*. "Following the accident, Maria was treated for cervicothoracic and lumbosacral strain injuries, myofascial pain syndrome, and a major depressive disorder with mood and anxiety disturbance affecting her myofascial pain syndrome and muscle contraction headaches." *Id*. at ¶ 6. Critically, she had accrued $17,357 in medical expenses and trips to the emergency room and client shortly before trial. *Id*. The jury heard evidence that such a trip normally costs $130 for the emergency room and $69 for the clinic. *Id*. at ¶ 27. The jury also heard testimony from medical providers that Renville suffered from pain. *See generally id.*

The jury awarded Renville $17,553. *Id.* at ¶ 1. Renville moved the Court for a new trial, arguing in part that the jury had awarded her nothing for undisputed

pain and suffering. *Id*. The District Court denied the motion, but the Supreme Court reversed and granted a new trial on damages. *Id*. It concluded that liability was undisputed and that Renville had ample evidence to show that she had suffered at least some pain and suffering. *Id*. at ¶ 26-27.

The Court rejected Taylor's contention that the verdict for $197 more than Renville's claimed expenses could have accounted for pain and suffering. It found:

> Taylor's assertion that the jury awarded other types of damages in addition to past medical expenses because the jury award was approximately $200 more than the amount of past medical expenses listed on Maria's trial exhibit is without merit. The jury had heard testimony from Maria that she had visited the emergency room and the clinic the week before trial. The expense of these visits was not included on her trial exhibit, however, the jury was presented with evidence that the cost of Maria's emergency room and clinic visits averaged about $130 per emergency visit and $69 per clinic visit. Therefore, the additional $200 appears to cover those medical expenses, rather than any other element of damages on which the jury was instructed.

Id. at ¶ 27.

The Court revisited the issue of new trials for allegedly unawarded emotional distress damages twelve years later in *Murray*. There, it reached the opposite result. In *Murray*, plaintiff was a college student who played baseball for Jamestown College. *Murray*, ¶ 2. Murray was a passenger in Whitcraft's car when he lost control of his vehicle and struck a guardrail several times.

Murray was seen in the emergency room after the accident and diagnosed with a probable shoulder contusion or strain. *Id*. Murray engaged in sports

rehabilitation after he returned to college. *Id*. at ¶ 3. However, he contended that his shoulder continued to give in trouble, and he dropped out of school. *Id*. He underwent chiropractic care when he returned to Montana. *Id*. In October of 2008, however, he reinjured his shoulder bowhunting and returned to treatment. *Id*. at ¶ 4. Murray eventually sued Whitcraft, and the matter proceeded to trial.

Murray presented evidence of past medical expenses totaling $35,030.19, as well as pain and suffering. *Id*. at ¶ 5. His attorney argued for a large recovery, while counsel for Whitcraft suggested an award of $26,000 for medical expenses. *Id*. ¶. 18. The jury awarded $27,000. Whitcraft moved the Court for a new trial, and the Court denied that motion. *Id.* at ¶ 1. He appealed to the Supreme Court, which affirmed the District Court's decision not to retry the case. *Id*.

Murray argued that, upon determining that Whitcraft's negligence caused Murray's injury, the jury was required to award the full amount of uncontested damages he alleged for past and future medical expenses, past and future pain and suffering, past and future emotional distress, and loss of established course of life. *Id*. at ¶ 10. He contended that, "[t]he jury failed to award full damages encompassing the past medicals, and simply did not follow the law given in Jury Instruction No. 15." *Id.* Whitcraft countered that "the jury was not obligated to award all four types of damages and points out that the verdict does not specify the

precise nature of the injury the jury found to be accident-related." *Id*. (internal quotations omitted).

Despite Murray's evidence that he suffered more than $35,000 in past medical expenses, the Court found that it could not find that the jury's award must have been lacking. First, it noted that damages were only appropriate if they were caused by the accident. *Id*. at ¶ 11. There was evidence Murray's injuries were less serious than he alleged. *Id*. at ¶ 15. Specifically, he was initially only diagnosed with a cervical strain and a shoulder strain or contusion. *Id*. However, Murray also received an MRI after the accident which "indicated labral degeneration, which Dr. Tierney agreed generally indicates an "aging" or "wearing away" process." *Id*. Murray also underwent arthroscopic surgery, which found that his shoulder was "normal" other than wear and tear which could have been age related. *Id.* at ¶ 16. Murray also received an injury while bow hunting after the accident.

Thus, the Court reasoned, the jury could have found that Murray's shoulder injuries were mild and resolved soon after the accident. *Id*.; *see also Neal v. Nelson*, 2008 MT 426, ¶ 24, 347 Mont. 431, 198 P.3d 819 (courts should determine whether jury's verdict was "conceivable"). Evidence would support the finding that Murray's arthroscopic surgery was unnecessary or not caused by car accident. *Murray*, ¶ 16.

> The jury was not obligated to award all of Murray's proposed damages after it found that the accident caused injury to Murray. While Murray argues that Whitcraft did not introduce evidence to support his suggested lower damages award, it was Murray who had the burden of proving by a preponderance of the evidence that he was entitled to all of his proposed damages. Whitcraft points out that "Murray did not call any medical expert to testify as to the amount of his medical expenses, and the extent to which those expenses could be considered accident-related. Instead, he simply admitted into evidence a summary of all of his expenses, which totaled $35,040.19.

Id. at ¶ 20. The jury was also free to disregard Murray's experts' opinions regarding causation and necessity of care. *Id*. at ¶ 21.

The jury was presented with a form that asked whether the accident caused Murray's damages and provided a single line for damages. *Id*. at ¶ 20. The Court specifically differentiated the verdict form "does not permit us to ascertain the individual categories of damages from which the jury derived its total award." *Id.*, *citing Horn v. Bull River Country Store Props*., 2012 MT 245, ¶ 25, 366 Mont. 491, 288 P.3d 218 ("[W]e certainly will not speculate when the verdict form does not explain the jury's thought process.") (quoting *Seltzer v. Morton*, 2007 MT 62, ¶ 97, 336 Mont. 225, 154 P.3d 561) (internal quotation marks omitted).

The *Murray* Court went to specific lengths to distinguish its case from *Renville.* First, although *Renville* used a general verdict form, "the damages in that case had not been disputed by evidence supporting a possible subsequent injury and the defense did not controvert evidence that established the plaintiff's significant pain following the negligently caused accident." *Id*. at ¶ 23. Second,

"[i]n this case, in contrast, the jury considered conflicting evidence as to whether Murray suffered any significant injury from the car crash." *Id*. at ¶ 24. Third, unlike in *Renville*, Murray was able to carry on with his activities after the accident. *Id.*

Most importantly, however, the Court found that it could not glean from the verdict whether emotional distress damages were awarded:

> The jury's verdict leaves room for interpretation about what it reasonably believed constituted the medical expenses from the collision, the amount of pain and suffering, the potential loss of Murray's $500 scholarship, and other losses. When sufficiency of the evidence is challenged, it is our job as an appellate court to probe the record for evidence to support the fact-finder's determination. The function of this Court is not to agree or disagree with the jury's verdict.

Id. at ¶ 25 (citations and internal quotations omitted); *see also Romo v. Shirley,* 2022 MT 249, ¶ 20, 411 Mont. 111, 522 P.3d 401 (a court's function when faced with a motion for a new trial is not to agree or disagree with the jury).

C. *The Court should apply Murray and find that the District Court impermissibly guessed about the jury's intent.*

This case is analogous to *Murray*, not *Renville.* Like *Murray*, the trial was suffused with questions regarding the actual severity of Ms. Frost's injuries. Dr. Woods was the only medical doctor who testified about Ms. Frost's physical injuries. He found:

> Those MRIs … show very subtle findings in the shoulder, <u>maybe some mild tendinosis but no joint effusion, no evidence of tear</u>. The tendinosis, if it is even there, is <u>so mild that I would not have noticed it</u> but the radiologist did

> comment on it… Physical therapy has been quite helpful. She was originally taking some narcotic, subsequently weaned to prescription NSAIDS, and more recently has been tapered down to just over-the-counter ibuprofen and/or Tylenol. I have reviewed the MRI report as well as the images and gone over the report with the patient describing to her the very minimal findings.

Trial Ex. 102, (emphasis added). He further remarked that he would be "astonished" if the tear in Ms. Frost's elbow was caused during the timeframe of the kidnapping. Trial Ex. 102; Woods Dep. at 9-11.

Evidence also proved that Ms. Frost was exaggerating her claims of PTSD. She failed multiple psychological tests, indicating that she was exaggerating her symptoms. Notably, she failed the MENT test by attempting to mislead her own expert by indicating that she could no longer determine which facial expressions correlated to which emotion.

Second, as in *Murray*, the jury was presented with substantial evidence that Ms. Frost's alleged physical and mental conditions preexisted the kidnapping. Regarding her shoulder and elbow, Ms. Frost had been going to physical therapy for her shoulder prior to the kidnapping. Trail Tr. Vol. I, at 344. Both she and Mr. Moore testified that she had issues prior to the kidnapping. *Id*. at 330, 923. Ms. Frost disclosed her arm issues in her interview with police, saying, "And [Kevin] knows my shoulder hurts so bad anyway. And he knows I, I can have a hard time working anyway." Trial Ex. 16 starting 48:30.

As with physical therapy, Ms. Frost was in counseling before the kidnapping and continued after the kidnapping. Trial Tr. Vol I, at 885. Prior to the kidnapping, Ms. Frost's counseling focused on the divorce and her strained relationship with her children. Attorneys for Kevin and Frost Ranch disputed many of the counseling costs after the kidnapping as not related to the kidnapping itself but rather to other family issues.

Ms. Frost was diagnosed with generalized anxiety disorder prior to the kidnapping. *Id*. at 449. On November 20, 2015—months before the kidnapping—she disclosed to Kristen Stoehr, LCPC, that she experienced stress due to the divorce and her alienation from her children. Ms. Stoehr stated Ms. Frost was "having trouble going to sleep, experiencing early morning awakening, inability to concentrate, having muscle tension, is keyed up and on edge, and easily tired." Trial Ex. 54, p. SF00069. In a note dated December 24, 2015, Ms. Stoehr noted, "[t]he client's anger with her children was explored. The client appears frustrated and angry with her children's responses to her in the present." *Id*., p. SF00119; Trial Tr. Vol. I, at 922. Ms. Frost admitted at trial, "I might be angry because I can't have the relationship with them that I should be able to have." Trial Tr. Vol. I, at 969. Each of these issues arose prior to the kidnapping.

She also had mental health issues caused by the stress of a contentious divorce litigation. In June 2016, four months after the kidnapping, Ms. Frost told

her primary care provider that she would not have a "mental breather" until after her divorce was over." *Id*. at 927. At trial Ms. Frost admitted at that she was having "a hard time" with the divorce at the time of the kidnapping. *Id*. at 886, 923. She changed divorce lawyers several times during the proceedings and the divorce was ongoing at the time of trial. *Id*. at 923.

Third, just as in *Murray*, the jury needed to decide what medical expenses were causally related to the kidnapping, as opposed to being unnecessary or caused by preexisting conditions. The jury easily could have concluded that Ms. Frost's shoulder and elbow issues, as well as her anxiety, were pre-existing conditions that were only mildly exacerbated by the kidnapping.

The jury could have believed Dr. Woods and found that Ms. Frost suffered only a mild exacerbation of her shoulder injury. If that was the case, and it found that three months of physical therapy was appropriate for her shoulder issue, it could have awarded only $1,586.47 for treatment. *See* Trial Ex. 61 (medical expense calculations shown to the jury). Ms. Frost claimed nearly $5,800 in medical expenses for radiographical studies, but no one testified that those studies were reasonable and necessary and caused by the kidnapping, especially considering Ms. Frost's scientifically proven proclivity to exaggerate her symptoms. Obviously, the jury agreed with the Court that Ms. Frost failed to prove that Kevin caused her to need surgery.

Ms. Frost was already seeing her counselor before the kidnapping. The jury could have found that the need for that counseling was primarily caused by Ms. Frost's ongoing estrangement from her children and divorce. They could have awarded nothing for those sessions if that was the case.

If the jury awarded these amounts plus Ms. Frost's costs from the day of the kidnapping, it could have awarded $3,178.16 in medical expenses. This would allow for an additional $16.821.16 for her pain and suffering. The evidence supports that outcome based on the hotly disputed issues of causation and severity of Ms. Frost's claimed physical and mental injuries.

The District Court failed to adequately analyze such a scenario, even though both Kevin and the Frost Ranching Corporation raised the issue. Instead, it focused on the fact that Kevin's counsel had suggested "around $20,000" for medical expenses in closing arguments. Order Granting Pl.'s Mot. for New Trial, pp. 12-14. First, the Court's focus on that section of closing is misleading. Counsel also advised the jury to "not to start talking about this case in terms of my number, which I'll tell you next, or talk about their number. *Put pen to paper yourself and see what you think the number should be*." Trial Tr. Vol. II, at 1348. (emphasis added). Therefore, even the Court presumes that the jury intended to follow counsel's instructions, it must concede that those instructions were to come

up with a damages award independent of either plaintiff or defendants' suggestions.

Second, and more importantly, the jury is obviously not bound by closing arguments. It was properly instructed that those arguments were not evidence and that they could reject them in whole or part. In addition, they were properly instructed on the standard for damages. Courts should not engage in speculation and guesswork about verdicts when they could have reached a verdict in another way. The fact is, the District Court cannot know what the collective jury was thinking, let alone what lead individual jurors to their "very unanimous" verdict. It sees that the verdict matched a number in closing, and it draws a connection.

However, that is not the standard. The Court is not engaged in making its best guess at what the jury did; "it[s] job . . .is to probe the record for evidence to support the fact-finder's determination." *Murray*, ¶ 26. The District Court did not engage in this necessary search. Had it done so, it would have found that, despite the seriousness of Kevin's conduct, Ms. Frost's damages case was shoddy at best. The fact that Kevin's counsel made a suggestion to the jury was not an acknowledgment of responsibility so much as a tactical choice to guess at a number the jury might accept. That choice in no way limits the jury's discretion.

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D. *The Court should not apply* Renville.

The District Court based its holding on *Renville.* That decision was erroneous because that case is distinguishable and abrogated by *Murray. Renville* related to a case in which the plaintiff's medical expenses were not questioned. *Murray*, ¶ 24. Because there was no significant discussion about which expenses were caused by the accident, the Court believed it was able to discern that the award given was only for past medical expenses, with nothing for pain and suffering.

That is not the case here. Ms. Frost's medical expenses were extensively discussed and contested. First, as discussed above, and as in *Murray*, here, the entire trial was about determining which expenses were related to the accident, reasonable and necessary, and not caused by Ms. Frost's pre-existing conditions. The Court cannot draw the same straight line as the Court in *Renville*. It does not and cannot know what medical expenses the jury awarded without guessing, and because of that, it cannot deduce that the jury awarded nothing for pain and suffering.

Second, unlike *Renville*, there was also a significant question of whether Ms. Frost was seriously affected by the kidnapping. *See Murray*, ¶ 24. As discussed above, Ms. Frost had minor shoulder issues that could easily have been attributed to her demanding dental hygienist job or simply aging. Even after the kidnapping,

her therapy sessions focused on her estrangement from her children and the divorce as opposed to the kidnapping. The jury could have found that her issues were related to her life circumstances as opposed to what happened one morning.

Third, *Renville* did not include evidence that plaintiff's symptoms were exaggerated or manufactured. Ms. Frost failed five separate measurements across three commonly used psychological tests. Trial Tr. Vol II, at 1120-1145. These failures show that, at the very least, she is exaggerating her symptoms. That, of course, calls into question the credibility of all of Ms. Frost's subjective complaints to her doctors and to the jury.

Fourth, the Court should find that *Renville* is no longer good law. *Murray*, decided twelve years after *Renville*, specifically held that Court should not guess about the jury's intentions in awarding a general verdict. That holding is inherently inconsistent with *Renville*. If nothing else, the *Renville* court understood that the jury awarded more money than plaintiff claimed in their trial exhibits. The Court's conclusion that the additional money must have been for medical appointments immediately before trial was inherently speculative.

Moreover, *Renville* undertook no effort to support the jury's verdict. Like the District Court, it made a guess about the meaning of the verdict and deduced that the jury had not awarded necessary pain and suffering damages. *Murray* clarifies that is inappropriate. Even when counsel utters a suggestion near what the

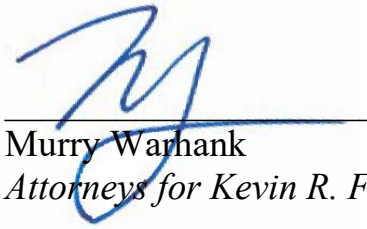
jury finds, the Court must determine whether underlying causation issues could support what the jury found. The Court should therefore find that *Renville* was abrogated by *Murray*.

CONCLUSION

For the reasons stated above, Kevin respectfully requests that this Court reverse the district court's decision to grant a new trial.

Dated this 2nd day of December 2024.

JACKSON, MURDO & GRANT, P.C.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 8,967 words, excluding certificates of service and compliance.

By: 
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