IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-24-0077

The ESTATE OF JEREMY NORBY through LORILEE NORBY, as Personal Representative,

Plaintiff/Appellant/ Cross-Appellee

vs.

ORIN PETE COUNCIL, M.D., and O. PETE COUNCIL, M.D., P.C.,

Defendants/Appellees/ Cross-Appellants

ANSWER BRIEF OF APPELLEES AND BRIEF OF CROSS-APPELLANTS ORIN PETE COUNCIL, M.D., AND O. PETE COUNCIL, M.D., P.C.

On Appeal from the Seventh Judicial District Court, Richland County, Montana
Cause No. DV-42-2022-0000092-PM
Honorable Olivia Rieger Presiding

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I. STATEMENT OF ISSUES

A. Response

Orin Pete Council, M.D. ("Dr. Council") accepts the issues as stated by The Estate of Jeremy Norby ("Estate") but points out that in form, the Estate's Second Issue is two substantively distinct issues. Regardless, the Estate presents more issues for review than the four encouraged by M.R.App.P., Rule 12(1)(b).

B. Conditional Cross-Appeal

Issue 1: Whether the District Court ("DC") erred in determining that the gross negligence standard articulated in § 27-1-1604, MCA, is a waivable affirmative defense. App. A – 1.

Issue 2: Whether the DC erred in allowing the Estate's expert cardiologist, Brian Stauffer, M.D. ("Dr. Stauffer"), to testify as to the standard of care for Dr. Council, a family practitioner. App. A – 2.

II. STATEMENT OF FACTS

This case arises out of a medical malpractice case against Dr. Council, filed by the Estate of his patient Jeremy Norby ("Jeremy").

Dr. Council was Jeremy's primary care physician from 2009-2021. App. B – 1 ("Tr"): Tr. 871:25, 874:23, 955:24-956:1. Dr. Council had concerns about Jeremy's cardiovascular health since the first appointment, and he discussed these concerns with Jeremy at every appointment. Tr. 878:25-879:9, 899:7-13, 907:2-13,

909:7-12, 911:1-8, 956:2-959:17, 963:24-966:13. Jeremy was overweight, had high blood pressure, high cholesterol, and experienced shortness of breath during physical activity. Tr. 891:1-892:5, 901:3-20, 910:2-4, 956:7-11. Over the years, Dr. Council recommended Jeremy lose weight by exercising, improving his nutrition, and monitoring his blood pressure. Tr. 891:10-894:24, 899:7-900:17, 906:7-909:2, 957:19-960:19. For various reasons, Jeremy declined to take medication and focused on "lifestyle modification," with mixed success. Tr. 894:20-24, 898:14-899:6, 902:5-11, 958:17-19.

Jeremy saw Dr. Council on April 9, 2018, and expressed concern about his weight and increased shortness of breath during physical activity. Tr. 909:22-910:4, 963:24-966:22; App. B – 2-3. Jeremy also stated he was experiencing intermittent chest pain. Tr. 912:3-15. Dr. Council performed a physical exam and "noted that [Jeremy's] chest wall was definitely tender over the left distal anterior rotator cuff." Tr. 912:16-913:5. Dr. Council suspected this was the source of Jeremy's chest pain based on his exam and Jeremy's known shoulder issues. Tr. 914:2-23. Dr. Council saw no indication for a cardiac workup or stress test based on his exam and conversation with Jeremy. Tr. 916:2-917:3, 964:12-966:19. Dr. Council encouraged Jeremy again regarding nutrition, exercise, and medication. Tr. 910:13-19, 925:14-17, 965:14-966:2. He referred Jeremy for a nutritionist consult with Shelby Stein, who made various recommendations to improve Jeremy's health. Tr. 925:14-20;

1272:8-1274:1. Jeremy did not return to see Dr. Council until 2021. Tr. 966:23-967:1.

On August 25, 2021, Jeremy saw Dr. Council and complained of shortness of breath, muscle aches, and diarrhea. Tr. 930:6-932:23, 968:4-19. Jeremy stated these symptoms began a couple of days earlier but had improved in the last day or so. Tr. 931:15-932:1. While Jeremy did not report chest pain at the time of the office visit, he told Dr. Council he had experienced chest pain after recent travel. Tr. 932:24-933:23, 968:4-10, 982:5-11. Jeremy reported a negative Covid-19 antigen test, had no fever, and complained of diarrhea. Tr. 932:7-23. Dr. Council performed a more accurate Covid-19 PCR test which returned negative a day later. Tr. 934:3-5, 936:13-17, 969:10-21.

On Thursday, August 26, 2021, Dr. Council spoke twice with Jeremy. First, to see how Jeremy was feeling, relay the negative Covid-19 test results, and request that Jeremy return for a chest x-ray and bloodwork to evaluate for possible pneumonia. Tr. 970:5-971:3. Those tests demonstrated that bacterial pneumonia was an unlikely source of Jeremy's complaints, but the bloodwork still suggested infection. Tr. 936:13-938:2, 971:4-972:7. Dr. Council spoke with Jeremy a second time following receipt of these test results. Tr. 972:8-20. Jeremy did not report any acute chest pain but had developed a runny nose. Tr. 939:4-5, 940:2-6. Because unconfirmable Covid-19 was still very prevalent, and because Jeremy's symptoms

were suggestive of some virus and his symptoms did not suggest an immediate cardiac problem, Dr. Council told Jeremy they would begin a cardiac workup the following week to further evaluate his heart and lungs unless he developed obvious signs of a viral illness. Tr. 938:24-939:8, 968:11-974:13. Dr. Council instructed Jeremy to go to the emergency room ("ER") if his symptoms worsened. Tr. 973:6-974:24.

Early on August 28, Jeremy collapsed at home. Tr. 1139:1-8. His wife, Lorilee Norby ("Lorilee"), called 911, and Jeremy was transported to the ER. Tr. 1139:13-1140:8. Lifesaving efforts proved unsuccessful, and Jeremy was pronounced dead. Tr. 1141:2-12.

An autopsy revealed Jeremy died from atherosclerosis and cardiomegaly—an enlarged heart. App. B – 3-7. The autopsy determined there was no evidence of an acute ischemic infarct. App. B – 3-3–3.5 at 118:11-120:23. A nurse at the hospital documented Lorilee told them Jeremy had been having more chest pain the last two days. App. B – 4-1. Dr. Council was never made aware Jeremy had chest pain in the days prior to his death. Tr. 1299:21-1301:7.

III. COURSE OF PROCEEDINGS

Jeremy's Estate filed a Complaint against Dr. Council alleging negligence in his treatment of Jeremy from 2009 to Jeremy's death on August 28, 2021. Doc. 1 ¶¶ 36-55.

A. DC Declines to Apply Gross Negligence Standard in § 27-1-1604, MCA

Dr. Council filed his Request for Jury Instructions containing a jury instruction applying the gross negligence standard in § 27-1-1604. Doc. 92 at 40 (Ds' No. 25). The Estate objected to this instruction, arguing § 27-1-1604 contains an immunity provision constituting an affirmative defense which Dr. Council was required to raise in his Answer. Doc. 111. Dr. Council responded the statute is not an affirmative defense but rather alters the applicable negligence standard. Doc. 112.

The DC ruled on this issue from the bench. Tr. 237:19-238:25. The DC, apparently relying on an incomplete reading of § 27-1-*1602*, MCA—rather than -1604, which Dr. Council relied upon in his arguments—ruled that the statute did not apply, and therefore only instructed the jury on ordinary negligence, rather than the gross negligence standard found in § 27-1-1604. Tr. 238:9-20; *see generally* Doc. 112. A written order was never provided. Tr. 238:19-25.

B. DC Allows Cardiologist to Testify Regarding Standard of Care for Family Medicine Physicians

Dr. Council moved to prohibit the Estate's cardiologist expert from offering standard of care testimony regarding Dr. Council's treatment of Jeremy. Doc. 55. Dr. Council acknowledged Dr. Stauffer was qualified to testify regarding causation but argued cardiologists with advanced training and practice in cardiac medicine are not qualified to opine as to the standard of care applicable to a family medicine physician providing care in a primary care setting. Doc. 55 at 7-10.

The DC ruled Dr. Stauffer met the statutory requirements for testifying as an expert witness regarding the standard of care. Doc. 107 at 12-13.

C. Trial

At trial, the jury was asked to determine whether Dr. Council was negligent in his treatment from April 9, 2018, to August 24, 2021, and on or after August 25, 2021. Doc. 148. These two timeframes were broken out so the defense could preserve its argument as to application of § 27-1-1604, MCA. Tr. 1576:6-18.

The jury found Dr. Council not negligent in his treatment of Jeremy during the first period of time but found that he negligently treated Jeremy during the second. Doc. 148. The jury also found Dr. Council's negligence on or after August 25 did not cause Jeremy's death. *Id.* The Estate now argues the following alleged trial errors warrant reversal.

D. DC Declines to Dismiss Prospective Juror

During *voir dire*, one prospective juror, William Urban ("Urban"), stated he "would struggle or have difficulty assessing damages for the fair trade for loss of life." Tr. 127:5-13. He indicated he "believe[d] in the sense of doctor bills during, after, the funeral costs, all that. I believe in that. I just don't believe in a lump sum." Tr. 127:10-13. The Estate continued to question Urban, though his responses are unclear from the transcript. Tr. 127:14-128:15. The Estate moved to dismiss Urban for cause. Tr. 128:17-18. Dr. Council and the DC then questioned Urban on whether

he would be willing and able to follow the law as instructed. Tr. 128:24-133:19. Much of this back-and-forth is marked as "inaudible" in the transcript. Tr. 128:6-132:20. But the questioning concluded with the DC asking directly whether Urban "can follow the law when it is instructed to you," and Urban responded affirmatively. Tr. 132:5-7. The DC denied the Estate's for cause challenge but allowed the Estate to renew its challenge "if something comes up during future questioning." Tr. 132:8-133:19. The Estate chose not to ask more questions of Urban. The Estate also chose not to correct or supplement the transcript to allow for meaningful review on appeal.

E. DC Denies Estate's Rule 50 Motion for Judgment as a Matter of Law

The Estate moved for judgment as a matter of law arguing Dr. Council had not presented sufficient evidence to sustain his comparative negligence defense. Tr. 1468:5-1480:11. The Estate argued it was no longer asserting Dr. Council was negligent before April 9, 2018, so "anything that Jeremy did or didn't do" with respect to his health before April 9, 2018, was "out." Tr. 1468:9-14. Dr. Council agreed Jeremy's behavior before April 9, 2018, would not be used to show comparative negligence but argued it was permissible to refute causation. Tr. 1469:5-1470:4.

The DC ruled Dr. Council could argue comparative negligence because Jeremy should have gone to the ER on or after August 25, 2021, if his symptoms worsened. Tr. 1472:4-1473:9. The DC agreed Dr. Council could not argue

comparative negligence for the period before April 9, 2018. Tr. 1473:10-14. But the DC ruled Dr. Council could use that timeframe to establish "knowledge and progression of these particular . . . diseases." Tr. 1474:6-11.

The Estate further argued Dr. Council should have "intervened" and prescribed medication during the 2018-2021 timeframe. Tr. 1475:20-1476:16. It argued "before 2021 all that evidence led to treatment in 2021." Tr. 1476:3-4. The DC asked "you're saying that there was a breach in 2018 and you're saying the defendant hasn't shown contributory negligence for any breach in 2018 related to the hypertension treatment. Is that right?" Tr. 1476:19-23. The Estate argued in response there was no testimony or evidence supporting a comparative negligence argument for the 2018-2021 timeframe. Tr. 1476:25-1477:7. Dr. Council responded there was "ample testimony" about Jeremy's failure to comply with medical recommendations. Tr. 1477:21-1478:8.

The DC agreed with Dr. Council, ruling based on the testimony of various witnesses, "a reasonable jury could find . . . that [Jeremy's] alleged failure to follow the recommendations regarding lifestyle changes between 2018 and 2021 contributed to his death." Tr. 1479:24-1480:6. The court denied the Estate's motion. Tr. 1480:8-9.

F. DC Instructs Jury Regarding Jeremy's Conduct

The Estate also takes issue with jury Instruction 20, which reads: "The conditions, behaviors, or actions of either party that furnish the need for Jeremy Norby's treatment with Dr. Council before April 9, 2018, may be considered for causation but cannot be considered for determining negligence in this matter." App. B – 5-24. The Estate argued this instruction was "redundant" and "confusing" because causation was addressed in a different instruction. Tr. 1519:23-1520:2. The Estate also suggested the instruction should prohibit the jury from considering either party's actions before April 9, 2018, to determine negligence. Tr. 1520:2-1521:13. Dr. Council rejected the Estate's suggestion, arguing the Estate's language did not "fit", as "Dr. Council's conduct does not furnish the need for treatment," and reiterated his position that "under existing case law [the jury has] the right to consider [Jeremy's] conduct prior to 2018 for purposes of causation." Tr. 1521:15-20.

G. DC Declines to Send Testimonial Evidence to Jury Room

Next, the Estate complains the DC allowed the "Code Blue" record to go to the jury during deliberations but not bodycam footage from first responders' interactions with Lorilee. The Code Blue is a medical record created when Jeremy was in the ER and has handwriting at the top that says, "had been having CP, chest pain, for about a week, was sent and tested for COVID, wife states had not been

feeling well for about a week, having chest pain more so the last two days." Tr. 519:14-520:9; App. B – 4-1. The Estate objected to its admission as compound hearsay. Tr. 522:9-11. The DC admitted it, concluding the record meets several hearsay exceptions. Tr. 524:13-17.

The DC admitted and played the bodycam footage (including audio) at trial. Tr. 1124:18-1125:6. The footage showed Lorilee telling first responders Jeremy's chest pains had been getting worse for "a few days." Tr. 1620:10-13. The issue at trial, however, was whether this footage should be available to the jury during its deliberations. Tr. 1116:2-1119:25. The Estate argued it should because the footage contradicted the Code Blue record, which indicated Lorilee said Jeremy's chest pains had increased over the last "two days." Tr. 1117:2-5; App. B – 4-1. Dr. Council only objected to the video "going back to the jury." Tr. 1116:6-8. The DC declined to send the footage to the jury room, concluding it was "testimonial." Tr. 1116:10-11178:1, 1484:1-1486:12.

H. DC Provides Jury with Oral and Written Instructions

Finally, the Estate claims the DC failed to give a hard copy of one of the jury instructions. The Estate is mistaken. The record on appeal confirms the jury received a copy of this instruction. It is labeled as Instruction 36 in the record. App. B – 5-42.

IV. STANDARD OF REVIEW

Denial of for-cause challenges are reviewed for abuse of discretion. *Crail Creek Assocs., LLC v. Olson*, 2008 MT 209, ¶ 13, 344 Mont. 321, 187 P.3d 667.

Denial of motions for judgment as a matter of law are reviewed de novo. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727.

Jury instructions are reviewed for an abuse of discretion. *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, ¶ 16, 413 Mont. 277, 539 P.3d 1062.

District courts have broad discretion in making evidentiary rulings. *Henricksen v. State*, 2004 MT 20, ¶ 83, 319 Mont. 307, 84 P.3d 38. A trial court's decision on what evidence goes back with the jury is reviewed for manifest abuse of discretion. *Kyriss v. State*, 218 Mont. 162, 173, 707 P.2d 5, 12 (1985).

A. Conditional Cross-Appeal

The existence and availability of affirmative defenses are matters of law. *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648; *Lutz v. Nat'l Crane Corp.*, 267 Mont. 368, 377, 884 P.2d 455, 460 (1994).

The admissibility of expert testimony is reviewed for abuse of discretion. *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 17, 367 Mont. 21, 289 P.3d 131. The application of a statute is reviewed for correctness. *Id.*

V. SUMMARY OF ARGUMENT

The jury's verdict should be affirmed.

First, the Estate fails to provide this Court an adequate record to review the denial of the Estate's for-cause challenge and fails to establish Urban had any improper bias.

Second, the denial of the Estate's Rule 50 motion should be affirmed because that denial dealt only with sufficiency of evidence. Moreover, this Court has made clear while a patient's *pre-treatment* conduct cannot be considered for comparative negligence it can be considered for causation. Additionally a patient's conduct *during* the period of alleged negligent treatment can be considered for comparative negligence.

Third, the Estate has identified no manifest abuse of discretion in the DC's decision testimonial video evidence should not go to the jury room. The Estate instead merely argues this was unfair and inconsistent based on how objectively different evidence was treated.

Fourth, the DC provided the written causation instruction to the jury. The instruction was originally numbered 18A but appears in the record as Instruction 36.

Fifth, because the Estate fails to demonstrate any error, the cumulative error doctrine does not apply.

The conditional cross-appeal presents two issues, which this Court need address only if it reverses on the grounds articulated by the Estate:

First, the DC erred in ruling that the gross negligence standard articulated in § 27-1-1604, MCA, is a waivable affirmative defense because § 27-1-1604's plain language establishes it is not an affirmative defense but merely imposes a higher duty.

Second, the DC erred in allowing the Estate's expert cardiologist to testify as to the standard of care applicable to Dr. Council, a family practitioner, because Dr. Stauffer is not qualified to testify regarding the standard of care applicable to a family practitioner.

VI. ARGUMENT

A. DC Properly Exercised Its Discretion in Denying Estate's For-Cause Challenge of Prospective Juror Urban

If a "prospective juror has an unqualified opinion or belief as to the merits of the action," that juror may be "subject to a challenge for cause." *Mahan v. Farmers Union Cent. Exch., Inc.*, 235 Mont. 410, 417, 768 P.2d 850, 855 (1989); § 25-7-223, MCA. In determining whether a prospective juror is qualified, the district court "is in a better position to judge the prejudice of jurors" because it "has the advantage of observing the witness." *Mahan*, 768 P.2d at 855. "[T]he determination as to whether a prospective juror is qualified or unqualified is left to the sound discretion of the trial court" and "will not be set aside unless the error is manifest, or there is a clear

abuse of discretion, even where there has been a forced use of a peremptory challenge." *Id.* (citations omitted).

B. Estate Fails to Present this Court with an Adequate Record on Appeal

The Estate has failed to provide this Court with an adequate record to fairly review this issue on appeal. The transcript of Urban's *voir dire* testimony is fragmentary and marked with numerous insertions of "(inaudible)." Indeed, entire responses from Urban are simply transcribed as "(inaudible)." The Estate acknowledges this problem in passing but asserts the "import is clear from the context." Appellee's Opening Br. 26, Nov. 8, 2024 ("Op. Br.").

The Estate has the duty to present this Court "with a record sufficient to enable it to rule upon the issues raised." M.R.App.P. 8(2). Failure to do so "may result in dismissal of the appeal or affirmance of the district court on the basis the appellant has presented an insufficient record." *Id.* The appellate rules also provide the mechanism for an appellant to cure or correct a trial record when it is "not reported in whole or in part, or if a transcript is otherwise unavailable." M.R.App.P. 8(7)-(8).

The Estate failed to engage that curative process. Instead, it asks this Court to assume all the inaudible portions of the transcript support its abuse of discretion argument. But this Court "will not put a district court in error over speculation and lack of information." *State v. St. Dennis*, 2010 MT 229, ¶ 42, 358 Mont. 88, 244 P.3d 292. Nearly every one of Urban's responses is either entirely or partially inaudible.

Even the Estate's challenge regarding Urban is substantially inaudible, with the transcript reading Urban "has impressed a bias on (inaudible)." Tr. 127:5-133:20, 216:15-18.

Recognizing the record is inadequate for reversal, the Estate inserts self-serving speculation into missing portions of the *voir dire* testimony and therefore fails to demonstrate the DC abused its discretion.

C. Urban Was Not Reversibly Biased

Even were this Court to excuse the Estate's failure to provide an adequate record on appeal, the Estate still fails to demonstrate the DC abused its discretion.

Relying on a strained interpretation of caselaw, the Estate argues Urban expressed a "fixed scruple" against lump sum general or future damages that necessitated his dismissal. Op. Br. 24 (citing *Mahan*, 768 P.2d at 855). In *Mahan*, a prospective juror expressed he found punitive damages so offensive that he "would not award punitive damages in any case, no matter what instructions the Court might give [him]." 768 P.2d at 852. Questioning also revealed the juror had previously sat on another of counsel's cases and had refused to award punitive damages when all other jurors voted to award them. *Id.* This Court emphasized the juror "obviously had a fixed scruple against punitive damages," *and* "had followed his scruple in a previous jury trial." *Mahan*, 768 P.2d at 855. Moreover, while the district court may "supplement the voir dire examination by [its] further inquiry," the court's inquiry

"was of a general nature, and not pointedly directed" at the juror's potential bias. *Id.* Indeed, both opposing counsel and the court asked only one follow-up question. *Mahan*, 768 P.2d at 852.

Here, however, Urban's responses were more general, and the DC and counsel engaged in a lengthy *voir dire*, which failed to demonstrate bias warranting dismissal. The Estate turned its attention to Urban after he responded "yes" to the question "Anybody else that would struggle or have difficulty assessing damages for the fair trade for loss of life?" Tr. 127:5-7. But "fair trade for loss of life" is not a recoverable type of damage, and thus does not implicate § 25-7-223(6)-(7), MCA. It is a catchphrase used by the Estate's counsel to persuade and argue. It is completely reasonable an individual would "struggle or have difficulty assessing" such damages as it is unclear how one would quantify "fair trade for loss of life." Tr. 127:5-7. This is especially true when "fair trade" contemplates a deliberate decision to "trade for loss of life," and this case involved no such deliberate decision to trade for a life. Urban's initial acknowledgement of that uncertainty was reasonable and did not evidence a bias sufficient for dismissal under § 25-7-223, but rather—at most—evidenced uncertainty regarding the question's premise.

Nor does Urban's further explanation of his response trigger § 25-7-223(6)-(7). The first portion of his explanation is inaudible. Tr. 127:10. The remaining portion makes clear he "believe[s] in the sense of doctor bills during, after, the

funeral costs, all that. I believe in that. I just don't believe in a lump sum." Tr. 127:10-13. The Estate responded in agreement, noting "a lot of people that feel that way." Tr. 127:14-15. This, again, is an entirely appropriate answer that does not evidence any inability to award a category of damages as the Estate now argues. The actual verdict form does not ask the jury to award a "lump sum" but rather sets out six types of damages with another question pertaining to whether those damages are present value or based on future loss. Doc. 148 at 2-3.

Finally, Urban's responses indicate his apprehension involved awarding damages without sufficient evidentiary support, not a categorical adversity toward certain damage categories. In response to Urban's uncertainty about "what we're trying to prove," defense counsel acknowledged, "it's hard because here's the problem, we get into these discussions all the time and nobody knows anything about proof." Tr. 129:13-17. The DC similarly echoed this concern as part of its reasoning for overruling the Estate's challenge. Tr. 133:8-19.

Unlike in *Mahan*, the DC and counsel supplemented Urban's *voir dire* examination by further inquiry directly targeting his potential bias. 768 P.2d at 855. For example, after the Estate moved to dismiss Urban, defense counsel conducted additional questioning, though much of Urban's responses were inaudible. Tr. 128:23-130:15.

The DC likewise appropriately questioned Urban on his beliefs. Tr. 130:23-132:7. It concluded Urban "indicated he can follow the law, even when he doesn't like it." The DC allowed the Estate to renew the challenge again should "something come[] up during future questioning," but the Estate chose not to further question Urban. Tr. 133:9-12.

The Estate relies on *State v. Johnson* to argue Dr. Council and the DC improperly rehabilitated Urban. Op. Br. 25-27. But *Johnson* is a criminal case governed by the rules of criminal procedure, which provide different bases for for-cause challenges than do the rules of civil procedure. 2019 MT 68, ¶ 9, 395 Mont. 169, 437 P.3d 147; *compare* § 46-16-115, MCA, *with* § 25-7-223. Moreover, the questioning at issue in *Johnson* is significantly different than the questioning posed to Urban. In *Johnson*, the potential juror "spontaneously" and "emphatically" asserted, during several lines of questioning, that she could not agree with *essential elements* of the charge and would convict even if the State could not prove all elements. *Johnson*, ¶¶ 3-4, 14. In response, the "State made no attempt to use open-ended questions to allow the prospective juror to clarify or allay the obvious problem with her patently biased responses." *Id.* ¶ 16. Unlike in *Johnson*, and to a lesser extent *Mahan*, Urban's initial statement about damages was not spontaneous, nor about the merits of any cause of action or specific type of recoverable damage. *See* § 25-7-223(6), MCA. It was in response to an ambiguous question about

counsel's catch-phrase "fair trade for the loss of life"—a question that does not accurately characterize a "category" of damages recoverable under Montana law. Tr. 127:6-7. Nor were any of his responses "consistent, clear, unequivocal, [or] emphatic." *Johnson*, ¶ 15.

Further distinguishing both *Johnson* and *Mahan*, the DC repeatedly made clear the Estate could continue its questioning; the Estate failed to seek additional information about what it viewed as Urban's potential bias. Tr. 132:15-133:20. When invited by the DC to "explore more" about Urban's potential bias, the Estate asked only one follow up question, the answer to which is marked "inaudible" in the transcript. Tr. 132:15-20.

The Estate failed to demonstrate the DC abused its discretion.

D. *Reff-Conlin's* is Distinguishable and Ripe for Reconsideration

The Estate never made clear to the DC which of the § 25-7-223, MCA, categories were implicated by its challenge. Attempting to now bootstrap § 25-7-223(6)-(7) as justification does not cure the fact that "no specific grounds for challenge for cause" were argued before the DC. *Henricksen*, ¶ 89. *Reff-Conlin's* is therefore distinguishable. 2002 MT 60, 309 Mont. 142, 45 P.3d 863. Regardless, if the Court applies *Reff-Conlin's*, reconsideration of its holding is warranted here under the *Crail Creek* contingency. The jury poll proves that even if the Estate retained the peremptory challenge used to remove Urban and was able to get an

additional "pro Estate" juror, the jury's findings and verdict would be unchanged, particularly given the issue of damages was not reached. Tr. 1704:13-1708:22. The DC's denial therefore lacked "any reasonable possibility" of contributing to the verdict. *Crail Creek*, ¶ 23 (citing *Reff-Conlin's*, ¶¶ 37-38). This shows a lack of prejudice. However, should the Court reach this issue and require more argument, Dr. Council respectfully requests it solicit supplemental briefing in light of the fact that word-length constraints borne from responding to the numerous issues the Estate raises limit Dr. Council's argument on this point.

E. No "Causation" Errors Warrant Reversal

The Estate next argues "a series of errors on causation require reversal." Op. Br. 29. While the Estate cabins these arguments under the heading of "causation," the central arguments have a tenuous relationship to causation, with none demonstrating reversible error.

F. Estate's Arguments Misapply *Harding*

The Estate first challenges the DC's ruling on its Rule 50 motion as well as the court's comparative negligence instruction. The Estate's Rule 50 motion argued Dr. Council failed to present sufficient evidence establishing Jeremy did anything that could be considered comparatively negligent during the 2018-2021 and 2021-death timeframes. On appeal, the Estate does not present a sufficiency challenge but rather asserts the jury should not have been permitted to hear evidence

of Jeremy's pre-2018 behavior. *Schuff v. Jackson*, 2002 MT 215, ¶ 13, 311 Mont. 312, 317, 55 P.3d 387, 390 (Rule 50 motion granted only where "it appears as a matter of law that a party cannot prevail upon any view of the evidence including legitimate inferences therefrom") (citation omitted). This argument does not engage with the DC's actual Rule 50 ruling and therefore fails.

But even were this Court to overlook that flaw, the Estate's argument relies on an expansive, erroneous interpretation of *Harding v. Deiss*, which mistakenly contends (1) *Harding* limits causation defenses, and (2) the time a particular instance of negligence occurs controls what a jury can consider for comparative negligence. 2000 MT 169, 300 Mont. 312, 3 P.3d 1286.

1. *Harding* Does Not Limit Causation Defenses

As the Estate recognizes, "'contributory and comparative negligence, proximate cause, and avoidable consequences' are all 'interwoven doctrines.'" Op. Br. 31 (citing *Harding*, ¶ 13). Yet "interwoven" does not mean "inseparable."

Indeed, as *Harding* explains, where a patient's fault has been presented as a defense to medical malpractice, "it is necessary to first clarify the sequence of events in relation to the interwoven doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences." *Harding*, ¶¶ 13-15. *Harding* identified three distinct timeframes to consider in determining "whether the patient shares any fault" and what legal principles apply—"1) the pre-treatment period

2) the treatment period during which the alleged malpractice occurred, and 3) the post-malpractice period." *Id.* ¶ 13-14 (citing *Bryant v. Calantone*, 669 A.2d 286, 288 (N.J. Super. Ct. App. Div. 1996)).

The first timeframe, "pre-treatment conduct," should not "be considered as evidence of fault which may offset any negligent conduct." *Id.* ¶ 16. Rather, the patient's pre-treatment conduct is "germane to the issue of proximate cause exclusively." *Id.* ¶¶ 14, 16 (citation omitted).

Harding's limitation on considering pre-treatment conduct does not apply to causation. Indeed, the *Harding* court specifically determined pre-treatment conduct was germane to causation. As the DC noted, several post-*Harding* opinions reaffirm defendants' ability to dispute causation with relevant evidence. Doc. 114 at 7-8.

A medical malpractice defendant "is permitted to submit relevant evidence of subsequent accidents or preexisting conditions to negate allegations that he is the cause or sole cause of an injury." *Howlett v. Chiropractic Ctr., P.C.*, 2020 MT 74, ¶ 31, 399 Mont. 401, 460 P.3d 942. The "district court's discretionary admission or exclusion of evidence of preexisting injuries" is subject only to "traditional evidentiary considerations such as prejudice and relevancy." *Clark v. Bell*, 2009 MT 390, ¶¶ 23, 25, 353 Mont. 331, 220 P.3d 650 (citing *Truman v. Mont. 11th Jud. Dist. Ct.*, 2003 MT 91, ¶ 31, 315 Mont. 165, 68 P.3d 654). *Harding* in no way limits a defendant's ability to dispute causation.

2. Treatment Period Controls Availability of Comparative Negligence Under *Harding*

The lynchpin of many of the Estate's arguments on appeal—particularly its argument the DC did not "appropriately distinguish between the 2018 and 2021 negligence claims"—is its inaccurate notion the alleged negligence's timing controls and partitions the availability of the defense, and any patient conduct, preceding each discreet instance of medical negligence, cannot be considered for *any* later occurring negligence claim. Op. Br. 33-37.

The first two temporal periods identified in *Harding* are based on the time of *treatment*, not the negligent act. A comparative negligence defense is available "where the patient's negligent conduct occurs contemporaneous with or subsequent to *treatment*." *Harding*, ¶ 16 (emphasis added). For the treatment period during which the alleged malpractice occurred, comparative negligence "comes into action when the injured party's carelessness occurs *before* defendant's wrong has been committed or concurrently with it." *Bryant*, 669 A.2d at 289. The Estate's erroneous argument effectively replaces "treatment" with "each instance of negligence." *Harding*, ¶ 16.

The Estate withdrawing its 2009-2018 negligence claim mid-trial does not change the fact Jeremy began treatment with Dr. Council in 2009 and continued through 2021. Op. Br. 9-10. During many of these visits, Jeremy's weight, high blood pressure, and their potential cardiovascular impact were addressed. Op. Br. 2;

App. B – 2-1–2-3. As acknowledged in the summary judgment order ("Order"), any negligence by Jeremy regarding failure to follow Dr. Council's weight/ cardiovascular management instructions necessarily occurred concurrent to *treatment*, supporting a comparative negligence defense under *Harding*. Doc. 114 at 10.

In other words, all of Jeremy's conduct was appropriate for the jury to consider for causation, while all of Jeremy's conduct during the treatment period was appropriate for the jury to consider for comparative negligence.

G. Reversal Not Warranted on DC's Rule 50 Decision or Instruction 20

The Estate's argument is also procedurally flawed. The Estate challenges the DC's denial of its Rule 50 motion, which challenged the sufficiency of the evidence supporting Dr. Council's comparative negligence defense. Op. Br. 29-37. The Estate's argument centers around its assertion the jury should not have been permitted to consider Jeremy's pre-2018 conduct for causation. But that was not the basis of its motion, nor the DC's Rule 50 ruling. Most important, the jury never reached the issue of comparative negligence.

1. Estate Ignores DC's Actual Rule 50 Ruling

From the outset of this case, the Estate alleged Dr. Council was negligent in several respects from 2009 to Jeremy's death on August 28, 2021. Doc. 100 at 2. Before trial, the Estate moved for partial summary judgment on Dr. Council's

comparative negligence defense. Doc. 39 at 6-9. The motion relied heavily on the Estate's interpretation of *Harding*, emphasizing "a patient's pre-treatment conduct cannot be the basis for a comparative negligence defense." *Id.* at 7.

The DC denied the motion. Doc. 117 at 7-8. The DC explained while *Harding* prevents the defense of comparative negligence regarding a patient's *pre-treatment* negligence, it permits the defense for any negligence the patient may have committed concurrent with or after treatment. *Id.* at 7-10 The DC also noted *Harding*'s prohibition relates solely to comparative negligence and does not limit the ability of the defense to use a patient's pre-treatment history to refute causation. *Id.* at 8. The DC therefore denied the motion and allowed Dr. Council to maintain a *Harding*-compliant comparative negligence defense. *Id.* at 7-10.

After this ruling, and after most of its own presentation of evidence at trial, the Estate abandoned its claim of negligence from 2009-2018. Tr. 1195:6-1197:6. At the close of Dr. Council's case, the Estate made the Rule 50 motion it now appeals. Tr. 1463:1-2, 1468:5-18. In that motion, the Estate did not ask the DC to revisit its interpretation and application of *Harding*; rather, it argued Dr. Council failed to present sufficient evidence establishing Jeremy did anything that could be considered comparatively negligent during the 2018-2021 and 2021-death timeframes. Tr. 1468:20-1480:11. The Estate's Rule 50 motion was about the *sufficiency of the evidence* regarding Jeremy's alleged post-2018 comparative

negligence—not whether pre-2018 evidence could be used to show causation. The DC ruled sufficient evidence had been introduced by which a reasonable jury could conclude Jeremy was in some way comparatively negligent during both the 2018-2021 and 2021-death timeframes. Tr. 1472:11-1473:9, 1478:25-1480:6.

Harding was referenced only in the context of prohibiting comparative negligence arguments from 2009-2018, which everyone agreed was now irrelevant with the claim for that timeframe withdrawn. Tr. 1469:5-16, 1473:10-1474:11. Contrary to the Estate's argument on appeal, the DC never commented on "causation" during the 2009-2018 timeframe in its Rule 50 decision. Op. Br. 5-6, 31. Rather, the DC noted "the knowledge or evidence of what the doctors have said to show the progression of these diseases"—which "*Mrs. Norby in her presentation of evidence*" introduced—is relevant to what Dr. Council should have known in treating Jeremy. Tr. 1473:10-1474:11 (emphasis added). The DC allowed *both* parties to comment on that evidence for that purpose. The DC ruling on the actual Rule 50 motion, therefore, was solely that sufficient admitted evidence existed by which a reasonable jury could find comparative negligence for the two time periods remaining at issue. Tr. 1472:11-1473:9 (2021-death), 1479:17–1480:6 (2018-2021).

2. Estate Has Identified No Error in DC's Rule 50 Decision or Instruction 20

The DC's Rule 50 decision did not and could not have misapplied *Harding*, as it did not apply *Harding* at all. The Rule 50 decision concerned the sufficiency of

evidence. The DC had decided in its prior Order that *Harding* permitted pre-treatment causation defenses. *However, the Estate does not challenge that prior Order*. The Estate explicitly limits its arguments to the Rule 50 decision and Instruction 20. Op. Br. 30-33.

Further, the Estate's argument ignores the distinctions between negligence and causation. It asserts incorrectly there is "no practical difference between labeling Jeremy's lifestyle choices 'negligent' or carefully avoiding that term and using 'causation' instead." Op. Br. 32. But those words represent distinct concepts, and the jury was instructed on what "causation" and "negligence" mean for the purposes of its decision, instructions the Estate does not challenge on appeal. Doc. 147 at 26-27, 42 (Instr. 22, 23, 36). This Court presumes the jury follows the instructions as given. *Wenger v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 37, ¶ 16, 403 Mont. 210, 483 P.3d 480 (citation omitted). The Estate's concern is therefore obviated as the jury had instructions defining these terms and could apply each definition to the evidence and verdict form.

If, as the Estate suggests, Dr. Council attempted to "Trojan Horse" in an improper comparative negligence defense during closing, the Estate had the duty to object, state its grounds, and let the DC determine whether any part of Dr. Council's argument had disregarded the law. *Anderson v. BNSF Ry.*, 2015 MT 240, ¶ 77, 380 Mont. 319, 354 P.3d 1248; Op. Br. 32. The Estate made no such objection. Tr.

1636:12-1644:21. Any "Trojan Horse" accusation is unfounded and unpreserved; the Court may not address it. *Evans v. Scanson*, 2017 MT 157, ¶ 23, 388 Mont. 69, 396 P.3d 1284.

Finally, because the Estate presents no argument about how the DC erred in its Order, and this Court will not make such an argument for it, the Estate cannot meet its burden on appeal. *McCulley v. Am. Land Title Co.*, 2013 MT 89, ¶ 20, 369 Mont. 433, 300 P.3d 679. Regardless, the DC did not err. The DC correctly recognized *Harding's* narrow holding that "in medical malpractice actions, jury instructions on a patient's comparative negligence are appropriate only where the patient's negligent conduct occurs contemporaneous with or subsequent to treatment." Doc. 114 at 8, 10; *Harding*, ¶ 16.

Likewise, Instruction 20 did not prejudice the Estate's rights. Nothing in *Harding* precludes the jury from considering causation as permitted by Instruction 20. *Harding*, ¶ 16; Doc. 147 at 24 (Instr. 20). Moreover, to the extent there is *any* error to be found in Instruction 20, it is an error in the Estate's favor. Because Dr. Council began treating Jeremy in 2009, it would be permissible for the jury to consider Jeremy's negligence in following Dr. Council's recommendations from that point onwards, as it would necessarily be concurrent with his ongoing treatment. *Harding*, ¶ 16. Instruction 20 precludes this consideration—to the Estate's benefit. The Estate has not shown an error impacting its rights.

3. Jury Never Reached Comparative Negligence

The Estate's arguments independently fail because the jury never reached the issue of comparative negligence. While the Estate labels its arguments under the heading of "causation," its substantive premise is the jury was invited to consider improper facts when determining comparative negligence. Op. Br. 29-49.

Even if an error exists, this Court will not reverse where the jury would have reached the same result absent that error. *Pula v. State*, 2002 MT 9, ¶ 35, 308 Mont. 122, 40 P.3d 364 (citations omitted). That includes errors involving questions not reached by the jury. Thus, even if the DC committed some error regarding comparative negligence, the error could not have caused prejudice because the jury never reached that issue. Doc. 148 at 2.

The Estate has therefore not demonstrated the DC committed any error in its Rule 50 decision or in Instruction 20, nor in applying *Harding*. And even when *Harding* is considered via the DC's Order—which the Estate neither assigns error to nor requests reversal of—a plain reading of *Harding* indicates the DC correctly interpreted that case. Further, by conflating "comparative negligence" with "causation," the Estate's entire argument is based on an issue the jury never reached.

4. Jury's Verdict Precludes Estate's Hypothetical Error

Finally, ignoring the Estate's misapplication of *Harding*, the jury's verdict forecloses the alleged error. The Estate notes that while the verdict form separately

asked whether Dr. Council was negligent "on or after August 25, 2021" and "between April 9, 2018, and August 24, 2021," the form presented only one question on whether Dr. Council's negligence caused Jeremy's death and damages. Op. Br. 35-36.

The Estate asserts because there was only one causation question, there is no way to be sure whether "the jury's causation finding held Jeremy responsible for his pre-treatment conduct and lifestyle choices between April 9, 2018, and August 24, 2021, even though Dr. Council's August 2021 treatment was an intervening cause under *Harding*." Op. Br. 36-37. The Estate admits it cannot prove this happened—arguing only the verdict form leaves this open as a possibility. *Id.*

Even under the Estate's own interpretation of *Harding*, it cannot demonstrate the error it alleges. The jury answered only the first three questions on the verdict form:

- Was *Dr. Council negligent* in his care of Jeremy Norby on or after August 25, 2021? **Yes**
- Was *Dr. Council negligent* in his care of Jeremy Norby between April 9, 2018 and August 24, 2021? **No**
- Did *Dr. Council's negligence* cause Jeremy Norby's death and damages to Plaintiff? **No**

Doc. 148 at 1-2 (emphasis added).

The jury was given explicit instructions defining "negligence" in Instructions 22 and 23. Doc. 147 at 26-27. It was further instructed that Dr. Council's

"conduct is a cause of Jeremy Norby's death if it is a substantial factor in bringing it about." *Id.* at 42. Each question the jury answered pertained solely to Dr. Council's actions—it never considered Jeremy's negligence or whether any such negligence was a cause of his death. Doc. 148 at 2. Moreover, because the Jury only found Dr. Council negligent on the later date, there is no question that its causation finding can relate only to that instance of negligence. The Estate's contrary reading of the verdict questions and answers on appeal inserts words and meaning where none exist.

In sum, the Estate's verdict form argument simply does not hold water.

H. DC Properly Declined to Send Testimonial Evidence to Jury Room

The Estate next takes issue with what it asserts were "inconsistent evidentiary rulings" regarding the Code Blue record and the bodycam footage ("footage"). Op. Br. 37.[1]

But the Estate does not identify an error in the DC's decision admitting the Code Blue record and admits it is "not pursuing hearsay arguments on appeal." Op. Br. 38 n.4. Nor is there an *evidentiary* ruling for the Estate to challenge regarding the footage. The footage, including audio, was admitted and played without

[1] To avoid confusion, Dr. Council points out that much of the transcript the Estate cites in support of this argument includes the DC's decision regarding playing 911 calls regarding Jeremy's collapse. *See*, Op. Br. 38 (citing Tr. 1116-1120). The DC's ruling on the 911 calls is distinct from the video issue and not appealed by the Estate.

objection and was referenced by both sides during closing arguments. Tr. 1124:17-1125:6, 1620:10-11, 1689:9-10.

Next, the Estate does not identify an error, let alone a preserved error, in the DC's decision not to replay the footage during closing. The DC correctly noted "that'd be like calling a witness" to "come up and re-give their testimony. . . . I'm not going to allow that either." Tr. 1487:7-9. The Estate made no objection to the DC's ruling. Tr. 1487:6-22. The Estate makes no argument on appeal that the DC's determination was erroneous or an abuse of discretion, only that it was vaguely unfair.

The Estate's argument is, in truth, aimed at the DC's decision regarding what admitted evidence was appropriate to go back during jury deliberations.

"A district court's decision under § 46-16-504, MCA, on evidence that may be taken by the jury during deliberations is reviewed for abuse of discretion." *State v. Stout*, 2010 MT 137, ¶ 29, 356 Mont. 468, 237 P.3d 37. In determining "what items of evidence may initially go into the jury room," the "threshold question for advance consideration by the court in consultation with the parties is whether the subject item is either testimony or testimonial in nature." *State v. Hoover*, 2021 MT 276, ¶ 18, 406 Mont. 132, 497 P.3d 598. Both common law and statute "generally disallow[] unsupervised or unrestricted jury review or replay of witness testimony or other evidence that is 'testimonial in nature' during deliberations." *State v. Green*,

2022 MT 218, ¶ 14, 410 Mont. 415, 519 P.3d 811. This includes, among other things, "police body camera videos." *Id.* (citations omitted).

The Estate faults the DC for "treat[ing] two pieces of evidence on the same subject differently." Op. Br. 37. However, that is not only within a court's discretion, it is the court's obligation to do so. As the DC explained, "you're talking about two different things." Tr. 1484:2-14. That two pieces of evidence deal with the same subject matter is irrelevant to whether they each should be sent to the jury room during deliberations.

The Estate does not challenge the DC's determination that the footage was testimonial. Rather, it asserts that the DC's reasoning regarding testimonial evidence "does not make sense in a civil case," because there is no Confrontation Clause problem in a civil case. Op. Br. 38-41.

While the DC noted the testimonial nature of the footage, it never mentioned the Confrontation Clause. Tr. 1116:10-1118:1. Moreover, the general prohibition against providing the jury testimonial material is not primarily based in Confrontation Clause concerns. Rather, the "rule serves to prevent a jury from placing 'undue emphasis' on testimonial evidence reviewed during deliberation 'to the exclusion of the evidence presented by other witnesses' for which the jury must rely upon its collective memory during deliberations." *Green*, ¶ 14.

The Estate, in passing, asserts if Lorilee's footage statement was testimonial, "so too was any statement about that subject recorded on paper by the emergency room nurse." Op. Br. 39. The Estate does not develop this argument further. Regardless, Montana law provides that in deliberation, "the jurors may take with them *all papers* which have been received as evidence." *Kyriss*, 707 P.2d at 13; § 25-7-404, MCA. In *Kyriss*, for example, this Court affirmed the district court's decision to allow copies of a patient's medical records, which were highlighted during a witness's testimony, to go with the jury during deliberation. 707 P.2d at 13. Here, there is no dispute that the medical records—including the Code Blue record—are "papers" that were properly admitted as evidence. The Estate cites no case where this Court has concluded that statements in medical records are prohibited from going back to the jury.

The Estate contends the DC's rulings "potentially affected the outcome of the trial," without explaining how. Op. Br. 40-41. Asserting that the outcome was "potentially affected" by a particular ruling is not sufficient to warrant a new trial—only an error affecting a party's substantial rights does. *Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49; M.R.Civ.P. 61. "Harmless error is not reversible." *In re S.R.*, 2019 MT 47, ¶ 26, 394 Mont. 362, 436 P.3d 696; § 25-11-102(1), MCA.

Even had the Estate identified an error in the DC's decision, that error would be harmless for at least two reasons. First, the jury heard all available evidence on this issue—the Code Blue record, the footage, and Lorilee's testimony. While the Estate contends the defense was free to highlight the Code Blue record in closing, the Estate was similarly free to highlight the footage and Lorilee's testimony in closing. Indeed, it did exactly that. Tr. 1620:6-20. Second, although this issue falls under the heading of "causation errors" both the Code Blue record and the footage addressed possible comparative negligence of Jeremy not reporting to the hospital when his symptoms worsened—not causation. In arguing for the footage to be sent back with the jury, counsel for the Estate noted "I think it is really important when we have this contributory negligence ruling from the court." Tr. 1485:5-7. But, again, the jury never reached the issue of comparative negligence, which makes this issue moot.

There was no error, let alone a reversible one.

I. DC Provided Jury with All Written Instructions

The Estate next asserts the DC erred by failing to provide the jury with the written instruction on the causation standard, proposed Instruction 18A. Op. Br. 8, 41. The fatal flaw in this argument is that the DC provided the jury with the exact instruction the Estate claims was omitted—numbered as Instruction 36.

Doc. 147 at 42. A review of Docket 147, as transmitted to the Court from the DC, proves this. *Id.*

The jury had a complete set of instructions during its deliberations—there was no error. The Estate's remaining arguments about expert testimony—to the extent they are even relevant to this issue—are therefore moot as the error underpinning them never occurred. Op. Br. 43-46. [2]

J. Cumulative Error is Inapplicable

Finally, the Estate argues that the DC's "causation" errors cumulatively warrant reversal. Op. Br. 46-49.

As the Estate admits, this Court has never applied this doctrine in a civil case. Op. Br. 47 n.7; *see also Estate of Frazier*, 2021 MT 85, ¶ 38, 404 Mont. 1, 484 P.3d 912. Nor did this Court adopt the doctrine in *Frazier*—noting only that "[e]ven if it were to consider" the doctrine, the plaintiff there could not prevail. *Id.* ¶ 39. Even assuming the doctrine's applicability in civil cases, it has no application here.

The cumulative error doctrine "concerns prejudice resulting from the cumulative effect of two or more individually harmless errors that, combined, have the same prejudicial effect as a single reversible error." *Frazier*, ¶ 38 (citation omitted). Cumulative error requires both error and prejudice; a "mere allegation of

[2] In footnote six the Estate notes its objection to the DC allowing closing argument to reference Dr. Felo's opinion, but does not raise this as an issue nor develop this argument. The Court need not address it.

error without proof of prejudice is inadequate to satisfy the doctrine." *Id.* (citation omitted). Here, the Estate has not established any error, let alone prejudicial error. Rather than being based on demonstrable prejudice, the Estate's arguments are largely speculation regarding what the jury may or may not have decided and that there is "no way to be sure" the jury applied the correct legal standard. Op. Br. 23. But uncertainty as to the jury's deliberative process is not proof of prejudice, and is somewhat unavoidable in closed deliberations. *See generally Suzor v. Int'l Paper Co.*, 2016 MT 344, ¶ 40, 386 Mont. 54, 386 P.3d 584.

Further, cumulative error requires more than one single harmless error. *Frazier*, ¶ 38. The Estate limits its cumulative error argument to the alleged "causation-related errors." Op. Br. 46-49. As detailed above, however, the Estate has not shown the DC erred in any of those rulings. And even if the Court determines a single harmless error exits, that is insufficient to satisfy the *cumulative* error doctrine, if it applies in civil trials.

This Court should affirm.

VI. CONDITIONAL CROSS-APPEAL

A. Gross Negligence Standard of § 27-1-1604, MCA, Applies Here

Dr. Council appeals the DC's decision that the gross negligence standard articulated in § 27-1-1604 is not applicable. App. A – 1; Tr. 237:19-238:20. Although a written order was not issued, it determined § 27-1-1604 constitutes an

affirmative defense which Dr. Council failed to plead. *Id.* But the statute itself makes clear the gross negligence standard is not an affirmative defense. Rather, it is a heightened liability standard applicable in circumstances related to evaluating or treating Covid-19. Because those circumstances are present here, this Court should reverse.

1. Section 27-1-1604, MCA, is not an affirmative defense

"The starting point for statutory interpretation is the plain language of the statute itself." *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 22, 344 Mont. 278, 187 P.3d 639.

An affirmative defense is "an assertion or argument that, if true, would defeat the plaintiff's claim even if the allegations in the complaint are true." *Deschamps v. Treasure State Trailer Ct., Ltd.*, 2011 MT 115, ¶ 17, 360 Mont. 437, 254 P.3d 566. Said differently, "[t]he essence of affirmative defenses is to concede that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists because some statute or rule permits defendant to avoid liability for the acts alleged." *Brown v. Ehlert*, 255 Mont. 140, 146, 841 P.2d 510, 514 (1992).

Section 27-1-1604, by its plain language, establishes no affirmative defense because it does not allow a defendant to avoid liability for all acts alleged by a plaintiff—it does not absolve a defendant of liability for the acts described therein.

Instead, the statute provides that under certain, specific facts related to the Covid-19 pandemic, a higher degree of negligence—gross negligence—must be proven.

Ordinary negligence and gross negligence are not distinct causes of action; they are descriptors of the conduct that must be proven in a negligence action. Gross negligence differs from ordinary negligence "only in degree, not in kind." *State v. Bier*, 181 Mont. 27, 32, 591 P.2d 1115, 1118 (1979). "[O]rdinary negligence is the failure to use reasonable care," while "gross negligence is the failure to use slight care." *S.W. v. State*, 2024 MT 55, ¶ 25, 415 Mont. 437, ___ P.3d ___ (quotation simplified). Thus, § 27-1-1604 does not immunize a defendant from negligence but specifies a different (higher) standard of negligence that must be proven. Section 27-1-1604 still imposes a duty on health care providers, and plaintiffs may still prove a set of facts where liability exists. Contrary to the DC's assertion, the statute does not "relieve[] a defendant . . . of liability." Tr. 238:3-4.

This plain language interpretation of § 27-1-1604 is consistent with the broader Covid-19 statutory scheme. Section 27-1-1606, MCA, titled "Affirmative defense—reasonable measures consistent with regulations, orders, and public health guidance," specifically identifies the affirmative defenses governing Covid-19 related care:

> [A] person may assert as an affirmative defense that the person took reasonable measures consistent with a federal or state statute, regulation, order, or public health guidance related to covid-19 that was

> applicable to the person or activity at issue at the time of the alleged injury.

Section 27-1-1606(1), MCA. This is a true affirmative defense—"a complete bar to any action related to covid-19." § 27-1-1606(3), MCA.

This Court "interpret[s] statutes in the context of the statutory scheme as a whole." *State v. Lodahl*, 2021 MT 156, ¶ 16, 404 Mont. 362, 491 P.3d 661. It is instructive that -1606 expressly states it is an affirmative defense. If -1604 was also intended to operate as an affirmative defense, the Legislature could have labeled it as such or referenced it in -1606. But it did neither.

The legislative history confirms this analysis. During a committee hearing on the proposed bill, its primary sponsor discussed section two (now codified as § 27-1-1602, MCA, which, like -1604, provides a gross negligence standard for civil liability for injury or death related to exposure to Covid-19). *Revise Civil Liability Laws, Hearing on S.65 Before the S. Bus., Labor, and Econ. Comm.*, 67th Leg. Reg. Sess., at 9:01:43 (Mont. Jan. 8, 2021) (statement of Sen. Steve Fitzpatrick, Committee Chair).[3] He explained that § 27-1-1602 and therefore, -1604 which shares the same relevant language, only increases the threshold of what must be proven from ordinary negligence to gross negligence. He categorically rejected the notion these statutes provided immunity. *Id*. at 9:03:46-9:04:27; 10:06:27-10:08:58.

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[3]https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20210108/41/40455#agenda_

This Court should reverse and conclude § 27-1-1604 is not an affirmative defense that Dr. Council was required to plead.

B. Dr. Stauffer's Standard of Care Testimony Should Be Excluded

In addition to Montana Rule of Evidence 702, § 26-2-601, MCA, also governs and prohibits a witness from testifying as an expert in a medical malpractice case unless the two conditions found in § 26-2-601(1)(a)-(b), MCA are met.

Importantly, even if the conditions in -601(1)(a)–(b) are met, § 26-2-601(3), MCA, contains an overriding limitation: "A person qualified as an expert in one medical specialty or subspecialty is not qualified to testify with respect to a malpractice claim against a health care provider in another medical specialty or subspecialty unless there is a showing that the standards of care and practice in the two specialty or subspecialty fields are substantially similar."

Here, Dr. Stauffer's specialty as a cardiologist renders him unqualified under § 26-2-601(3) to testify regarding the standard of care applicable to a family medicine physician. Dr. Stauffer is board certified in cardiovascular disease. App. A – 2-4 (Doc. 107). He is chief of cardiology at Denver Health Medical Center and a professor of medicine at the University of Colorado. *Id.* at 10. The DC concluded Dr. Stauffer satisfied subsection (1)(a) because of his position as a professor. *Id.* at 11.

The DC also found subsection (1)(b) was satisfied because Dr. Stauffer, "is thoroughly familiar with the standards of care and practice as they related to the act or omission that is the subject matter of" the claim at issue here. *Id.*

The DC abused its discretion by neglecting subsection (3). The DC found the two doctors work in different specialties but found the standard of care was the same because of Dr. Stauffer's "experience." *Id.* The opposite is true. The "experience" of doctors in these two markedly different specialties illustrates precisely why the standards of care are not "substantially similar."

As a family medicine physician in a rural area, Dr. Council is a general practitioner that is a patient's first contact for a wide variety of health concerns. Doc. 55 at 12. Following medical school, Dr. Council completed a three-year rural family medicine specific residency. *Id.* at 10; App. B – 6-2, 6-5.

In contrast, Dr. Stauffer, a cardiologist and professor, works and teaches at a tertiary care/university teaching hospital. A cardiologist completes more intensive cardiology specific training than a family medicine physician: Dr. Stauffer completed a three-year internal medicine residency, followed by a six-year cardiology fellowship. App. B – 7-3; App. B – 8 at 27:7-28:2. Thus, rather than being a patient's primary contact for general health concerns, he engages in highly specialized cardiac care for patients who come to him seeking only cardiology care. Tr. 409:13-14.

The standard of care applicable to Dr. Stauffer, a cardiologist at a major Denver medical center, is far different from the standard of care applicable to Dr. Council, a general practitioner in rural Montana. Dr. Stauffer treats only patients with known or suspected cardiovascular issues. Tr. 409:8-19. Dr. Staufer's practice does not involve the initial clinical determination about whether the patient's presentation involves cardiac issues or something else. Conversely, Dr. Council determines—from symptoms that could indicate any number of causes—a diagnosis, how to properly treat that condition, or whether to refer the patient to a specialist. Thus, the standards of care applicable to cardiology and family medicine are not "substantially similar." *See, e.g.*, *Beehler*, ¶ 27.

This Court should reverse and exclude Dr. Stauffer's testimony on the standard of care applicable to Dr. Council.

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VII. CONCLUSION

For the reasons stated above, this Court should affirm. If this Court reverses, it should do so with instructions that (1) the gross negligence standard articulated in § 27-1-1604, MCA, applies to Dr. Council's treatment of Jeremy in August 2021, and (2) Dr. Stauffer is not permitted to testify regarding the standard of care.

Respectfully submitted this 7th day of February, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that the *ANSWER BRIEF OF APPELLEES AND BRIEF OF CROSS-APPELLANTS ORIN PETE COUNCIL, M.D., AND O. PETE COUNCIL, M.D., P.C.*, is printed with a proportionately spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words. The exact word count is 9,782 words as calculated by my Microsoft Word software, excluding the Tables of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

DATED this 7th day of February, 2025.

/s/ Britton J. Fraser
Britton J. Fraser

CERTIFICATE OF SERVICE

I, Britton Joseph Fraser, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 02-07-2025:

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