

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0144

DANIEL P. KNUDSEN, ROSE E.
AYERS, ERIC DENNISON, LANCE
FRENCH, ERIK FARNHAM and KAILA JACOBSON
as Class Representatives,

Plaintiffs and Appellants,

v.

THE UNIVERSITY OF MONTANA, a unit of the
Montana University System,

Defendant and Appellee

APPELLANTS' REPLY BRIEF

On Appeal from Montana Fourth Judicial District Court
Missoula County, Cause No. DV-16-977
Honorable Shane A. Vanatta

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INTRODUCTION

There are several reasons that a new trial is required and UM's Response fails to adequately rebut the legitimate concerns raised by Plaintiffs' Appeal.

First, the importance of excluding legal conclusion testimony and summation cannot be understated. Well-established safeguards prevent oversteps and prohibit attorneys, and especially attorney witnesses, from providing legal conclusions during trial. Only the trial court may instruct the jury regarding the law and only the trial court can provide legal conclusions to the jury.

UM does not refute – or even discuss – the oversteps made during trial. Plaintiffs objected to allowing Dennis Cariello's testimony because his expert report disclosing anticipated testimony so blatantly exceeded the bounds of allowable testimony. The District Court allowed Mr. Cariello to testify, albeit with guardrails placed upon the testimony. UM failed to respect those guardrails, as evidenced by the several sustained objections made during trial. As the Montana Supreme Court

held in *Workman v. McIntyre Const. Co.*, 190 Mont. 5, 13, 617 P.2d 1281, 1285–86 (1980), violating a District Court’s order with respect to the scope of evidence is grounds for a new trial. Importantly, UM does not dispute that it violated the Court’s declarations made in advance of Mr. Cariello’s testimony or distinguish (or even discuss) the *Workman* decision.

Other grounds likewise exists requiring a new trial. For example, while UM claims that it respected the District Court’s pre-trial order prohibiting UM from introducing evidence or implying that the students were negligent, UM’s counsel began cross-examination of one student with the following question:

Q. From what I gather from your testimony, both at the deposition you gave back in April of 2018 and today, there was, at least, a period of time when you were pretty sloppy with your banking practices. Would you agree?

The District Court should have – at a minimum – given the jury the burden-shifting instructions proposed by Plaintiffs. Failure to do so compounded the error created by UM’s violation of the prohibition of a fiduciary (such as UM) accusing the beneficiaries (the students) of negligently causing their own harm.

While UM claims that the Montana Supreme Court licensed UM to accuse the students of negligence, as shown below UM’s argument is misleading. Plaintiffs carefully ensured that no fees charged or paid to any bank was sought as damages by Plaintiffs. Rather, Plaintiffs only sought third-party servicer fees

charged and collected by Higher One, who was not one of the banks involved in the scheme.

These errors, plus others such as allowing hearsay evidence to reach the jury, require a new trial in this matter.

ARGUMENT

1. **Defendant Does Not Dispute Creating Error by Eliciting and Summarizing Legal Conclusion Testimony from Its Attorney Expert in Contravention of the District Court's Order.**

UM's Response does not dispute, nor even acknowledge that UM's counsel and witness violated the District Court's ruling limiting the scope of allowable testimony from Attorney Cariello. Recall that, following lengthy argument regarding the scope of allowable testimony, the District Court warned UM:

I would caution the University to focus on facts and how requirements are being met, **rather than, again, broad opinions or statements about the law**.... I do agree and understand that it is the Court's prerogative to provide the law, and, obviously, it is the jury's function to determine the facts, and then apply the law as given by the Court.

(App. 224-226) (emphasis added).

UM repeatedly violated this limitation. For example, Attorney Cariello testified:

The obligation that universities have, first and foremost in this process, is to receive that money from the Federal Government and apply it in the manner as dictated by the Federal Government. They are the ones that set the terms of this.

And so long as the university fulfills that obligation, it has met its fiduciary duty. I think there is a lot of –

MR. STALPES: Objection, Your Honor. We are --

THE COURT: **Objection sustained.**

MS. FRANCE: I don't -- I don't know what the objection is.

MR. STALPES: The objection is that we spent all morning talking about [how] the Judge said he's not allowed to say what you're having him say right now.

THE COURT: **Correct.**

(App. 234-235) (emphasis added).

UM's Response also completely ignores that its counsel doubled down and told the jury, in violation of the District Court's limitation:

“as you heard from Mr. Cariello, there was no violation of any State or Federal law in the University's arrangements or contract with Higher One. Nor did Mr. Brown tell you that there was any violation of an -- of law with UM's dealings with Higher One.

MR. STALPES: Your Honor, I would object. That -- that testimony is prohibited to be made. I mean, we've had this discussion.

THE COURT: Objection sustained.

(App. 244-245) (emphasis added).

UM also does not dispute that putting evidence, argument or suggestion of an excluded matter before the jury in contravention of a District Court's ruling is “prejudicial and reversible error.” *Workman v. McIntyre Const. Co.*, 190 Mont. 5, 13,

617 P.2d 1281, 1285–86 (1980). UM does not attempt to distinguish *Workman v. McIntyre Const. Co.*, and, instead, fails to even reference that case. UM does not argue that the District Court was wrong when it sustained Plaintiffs’ objections that UM had elicited testimony and made arguments that crossed the line and invaded the province of the fact finder. *See Wicklund v. Sundheim*, 2016 MT 62, ¶ 15, 383 Mont. 1, 367 P.3d 403 (Legal conclusions offered by an expert witness invade the province of the fact-finder, whose duty it is to apply the law as given to the facts in the case.”)

Regardless of whether the District Court should have allowed testimony from Attorney Cariello at all, the District Court did draw a line that UM failed to respect. That line was made clear to UM, when the District Court warned it “to focus on facts and how requirements are being met, rather than, again, broad opinions or statements about the law.” (App. 224-226). Just like in *Workman*, reversal is appropriate because UM told the jury:

“There was nothing illegal about this relationship....”

“[n]othing illegal, nothing improper about it...”

“[t]here was no violation of any State or Federal law in the University’s arrangements or contract with Higher One...”

App. 243-244 (emphasis added).

After these inappropriate statements, the “goose is []cooked.” *Workman* at 13, 617 P.2d at 1285–86. As was true in *Workman*, “the plaintiff, already overburdened with the cost of pretrial discovery and advance fees and transportation expenses of experts and other witnesses waiting to testify, cannot afford...to move for a mistrial. The defendants, on the other hand, could care less about the plaintiff’s additional expenses involved in the event of a mistrial.” *Workman* at 13, 617 P.2d at 1285–86. Therefore, the “tactic of putting the [excluded matter] before the jury after being ordered not to do so is prejudicial and reversible error.” *Id.*

2. UM, a Fiduciary, Attributed Harm to the Beneficiaries’ Own Negligence and Legal Error Occurred When the Burden Shifting Instruction Was Not Given.

UM’s Response contends that UM did not argue or present any evidence that students were negligent. In particular, and for example, UM’s Response declares:

The district court did not err in permitting the University to provide evidence of the various fees Higher One charged to allow the jury to determine whether such fees were “unauthorized.” At no time did the University argue or present evidence that students were negligent.

Appellee’s Br. at 25.

Contrary to this representation, the following occurred within the first minute of cross-examination of a UM student at trial:

1 BY MR. DAVIS:
2 Q. Mr. Dennison, how are you?
3 A. I'm doing well, Mr. Davis.
4 Q. Other than your --
5 A. With all -- all things considered.
6 Q. I understand. These colds this winter seem to
7 linger, don't they?
8 A. Yes, they do.
9 Q. All right. I'm sorry.
10 A. Well, thank you.
11 Q. From what I gather from your testimony, both
12 at the deposition you gave back in April of 2018 and
13 today, there was, at least, a period of time when you
14 were pretty sloppy with your banking practices. Would
15 you agree?

Day 4 Tr., at 141.

Under well-established law, a fiduciary may not use the careless or negligent conduct of a beneficiary to defend itself. As Judge Molloy held:

it is consistent with existing Montana law to find that the defense of comparative negligence is unavailable in a claim for breach of fiduciary duty. The purpose of a fiduciary relationship would be completely undermined if a beneficiary's negligent conduct could be used by the fiduciary as a defense against the person he is supposed to protect, even though there is a nondelegable duty to protect that person. Such a holding is consistent with Montana case law that has held contributory negligence is inapplicable where the obligation scheme is intended for the protection of one class and expressly imposes the protective obligation on another. *See Steiner v. Department of Highways*, 269 Mont. 270, 887 P.2d 1228 (1994); *Wilson v. Vukasin*, 277

Mont. 423, 922 P.2d 531 (1996); *Pollard v. Todd*, 148 Mont. 171, 418 P.2d 869 (1966).

Bear Med. v. U.S., 192 F. Supp. 2d 1053, 1068–69 (D. Mont. 2002).

Because Defendant cross-examined Mr. Dennison by first attacking him for his own conduct in negligently causing himself to incur fees, Plaintiffs' proposed instruction No. 21 (Pl. Instruction No. 7) to make clear that the burden to prove negligence of Plaintiffs is borne by the University (rather than it being the Plaintiffs' burden to prove the absence of negligence). Instruction 21 (Pls. #7) stated:

INSTRUCTION NO. 21

To reduce the amount of money which will reasonably and fairly compensate Plaintiffs, the University of Montana bears the burden of proving that the Plaintiffs were negligent. As to this defense, the University of Montana's has the burden of proving the following:

- (1) That the Plaintiffs were negligent.
- (2) That the Plaintiffs' negligence was a cause of the Plaintiffs' injury.

Dkt. 178.

Ultimately, the District Court denied Plaintiffs' Proposed instruction to shift the burden to Defendant to prove comparative fault. Day 6 Tr., at 243:25-244:14. While the District Court agreed with Plaintiffs that the defense of comparative negligence is unavailable in a claim for breach of fiduciary duty, the Court erred by not giving a burden shifting instruction after UM attacked a beneficiary for alleged negligence. Not only was it improper for UM to attack the student beneficiary and

accuse him of comparative negligence, it was legal error for the Court to fail to instruct the jury that the Defendant bears the burden of proving comparative fault once that issue is injected into a fiduciary liability case such as this.

In sum, Defendant UM's response to Plaintiffs' argument is that "At no point did the University argue or present evidence that students were negligent." Appellee's Br. at 25. This is patently untrue, as UM's first cross-examination question demonstrates. Because UM injected evidence (which was excluded) of student negligence, at a minimum it was error not to instruct the jury that the University bore the burden to prove that negligence and the amount of damages, if any, caused by it. Instead, the jury was left uninstructed with respect to the appropriate burden of proof in a case in which the Defendant argued that a plaintiff was negligent.

3. Plaintiffs Sought Only Third-Party Servicer Fees, and Not Bank Fees or Anything Paid to or Charged by Any Bank.

In response to several of Plaintiffs' arguments, UM argues repeatedly that Plaintiffs sought to recover bank charges paid by the beneficiaries. Not so. The bank was dropped from the lawsuit¹ and Plaintiffs focused solely on the fees charged by Higher One, who is unequivocally and undisputedly not a bank and never charged any bank fees. Based upon voluminous evidence uncontroverted in the record, the

¹ See Doc. 104 (Rule 41 Notice of Dismissal of Customers Bank).

District Court concluded (in a Summary Judgment Order which UM does not appeal):

Higher One is not a bank, but instead is a third-party servicer. (Dkt # 114, Ex. 20, April 4, 2018, Rule 30(b)(6) Deposition of John McCormick, 89:18-22) (Dkt # 117.1, August 4, 2015, Affidavit of Kerry Hallin DV-14-1164, ¶ 9)1 (Dkt # 131, Ex. A, August 10, 2018, Rule 30(b)(6) Deposition of Andrew Crawford, 70:14-22)2. Higher One was acting as UM’s agent for the purposes of providing student loan refunds to UM students. (Dkt # 117.1, ¶ 2) (Dkt # 114, Ex. 6, Defendant’s Answers to Plaintiff’s Requests for Admission in DV-14-1164, Req. for Adm. No. 2).

Doc. 141 at pp. 5 (emphasis added).

This is important because, “regardless of how students receive their title IV credit balance funds, an institution, **and any third-party servicer, is prohibited from charging a fee** for delivering those title IV funds.” (App. 272) (emphasis added). Contrary to UM’s representation that Plaintiffs complained about “allegedly improper bank charges,” it was undisputed at trial that the fees charged by Higher One were, “fees charged by the third-party servicer hired by UM.” (App. 207). As everyone, including UM’s expert admits, Higher One was never a bank:

Q. [W]as Higher One a bank?

A. **Higher One was not a bank.**

Day 7, Tr., at pp. 49.

UM also confusingly maintains that the jury was not provided with information regarding the service fees collected by Higher One. UM tells this Court:

Plaintiffs presented no evidence of how many students elected the OneAccount option over those four years. If that number was 10,000 students each year, there would be 40,000 students in total over those four years. The total of allegedly improper bank charges which Plaintiffs presented for that same four-year period was \$1,045,628.66. (Day 3, Tr., at pp. 173). Simple math indicates that the bank charges per student average charge was between \$20.00 and \$30.00.

Appellee's Br. at 9.

Significant testimony from the trial contradicts UM's representation. As but one example, the following testimony was elicited by Appellants on Day 3 of the trial:

Q. [H]ow many students were charged fees by Higher One, based upon the information provided by Customers Bank?

A. 11,064 students.

Q. How many students were charged foreign ATM fees?

A. 7,749 students.

Q. What is the average amount of foreign ATM fees paid by students who were charged that fee?

A. It was \$43.39.

Q. How many students were charged monthly account fees?

A. 6,333 students.

Q. And what was the average monthly account fee paid?

A. \$16.40.

Q. How many students were charged NSF fees?

A. 725 students.

Q. And what was the average NSF charge to students, based on that information?

A. \$436.98.

Q. There are also other fees that were uncategorized by Higher One, correct?

A. Correct.

Q. How many students paid an uncategorized other fee?

- A. 6,779 students.
- Q. What was the average amount of other uncategorized fees paid to Higher One?
- A. \$29.39.
- Q. How many students were charged PIN fees, the P-I-N fees?
- A. 8,747 students.
- Q. What was the average amount of PIN fees paid by the University of Montana students?
- A. \$14.34.
- Q. How many students were assessed a wire fee?
- A. 1,158.
- Q. What was the average amount of wire fees paid by UM students?
- A. \$52.25.

Day 3, Tr., at pp 168-169.

UM also fails to acknowledge the misleading fashion in which the non-bank fees were charged. For example, even UM's own administrator, who opened a test account with Higher One, couldn't explain why she had been charged fees by Higher One. For example, Kerry Hallin, was UM's Finance Production Manager and UM called her as a witness in its case in chief. Day 4 Tr., at pp. 128-208. On cross-examination, Ms. Hallin could not explain why she had been charged fees by Higher One:

- Q. You mentioned that you had opened up a OneAccount.
- A. Correct.
- Q. And you told the jury that you had received, perhaps, one PIN fee. Do you recall that testimony?
- A. Yes.
- Q. Okay. What was the PIN fee?
- A. If I recall, I think it was .50 cents...

- Q. Okay. Were you told any reason for Higher One's arbitrary raise of its PIN fee by 50 percent just a few months into the contract?
- A. I -- I would not have been told that. I -- it's just an e-mail that was sent out to our office as an FYI...
- Q. Okay. Can you explain to the jury why you were charged \$4.88 in fees by Higher One?
- A. I don't recall.
- Q. Based on what you know about the Higher One fee structure, can you explain why you were charged \$4.88 in fees?
- A. (Indicating) I can't explain.

Day 4 Tr., at pp. 173: 5-16; 175:5-176:14.

UM argues that Higher One's conduct should be judged against banks, and that this Court should ignore the fact that Higher One charged fees to UM students. However, everyone agreed at trial that Higher One must abide by different standards because it is third-party servicer, who was foisted upon students by UM. For example, UM's expert testified:

- Q. Okay. When the student goes through the [Higher One] website and clicks the recommended account, right, and puts it in the OneAccount, where is that student's money?
- A. At that point, I don't know.
- Q. Okay. And you understand, right, that there are different rules that apply to third-party servicers and universities with respect to credit -- credit refunds than applied to banks? That's a different sort of relationship, and different rules apply. You understand that, right?
- A. Yes, I do.

Day 5 Tr., at 176:12-23.

Even UM's own witnesses agree Higher One is not a bank, but rather is UM's agent and the rules that apply to UM apply to Higher One. Ms. Neilson, who was UM's manager of student accounts in business services, testified:

- Q. Is [] Higher One a bank?
A. At that time, no, based on when we did our contract.
Q. And they've never been a bank; right?
A. As far as I know, no.
Q. Rather, they were UM's agent to perform a service that UM contracted out for it to do; right?
A. To deliver a refund.
Q. And it stood in the same shoes as UM; correct?
A. Correct.
Q. Okay. And it had the same obligations as UM; correct?
A. Correct.

Day 1 Tr., at 94-95.

At the time of her testimony, Ms. Neilson was under the impression that the fees which Plaintiffs litigated at trial were appropriate because they were not charged or collected by Higher One, but rather were fees charged by actual banks. Ms. Neilson testified:

- Q. The reason we're going down this road is that you are -- you have stated that certain fees are appropriate because they were not charged by the third-party servicer, but rather were charged by the bank as a bank fee; correct?
A. Yes.
Q. And I've demonstrated to you here that, in fact, Higher One charges and keeps the fees. And if you look on to the next paragraph, it states, According to partner -- According to Higher One, the partner banks retained the fees earned on direct deposits, and Higher One retained the fees charged to students or merchants, based on account activity; do you see that?
A. Yes.

Day 1 Tr., at 91:15-92:6.

As admitted by UM's expert, unlike a real bank, Higher One avoided governmental oversight and audits (Day 5 Tr., at 186:23-187:1) FDIC approval (*Id.*

at 187:7-8) approval by the Montana Division of Banking and Financial Institutions

(*Id.* at 187:10-12). As admitted by UM’s expert:

Q. And Higher One got to skip all of that with this contract with the University of Montana, and they automatically had access to 40,000 kids without having to go through any of those hurdles to open a local branch here and advertise for services, right?

A. I don’t think they opened a local branch.

Q. Well, no doubt there. They did not. But, nevertheless, they got a bunch of customers who were going to pay them all of these fees without having to go through all of those hurdles, the regulatory levels of approval, that a real bank would.

A. (Shrugs shoulders) Okay.

Day 5 Tr., at 187:20-188:6.

In sum, despite UM’s efforts to re-characterize Plaintiffs’ claims throughout its Response brief, Plaintiffs did not seek to recover any money either charged by or paid to any bank. Plaintiffs did not seek to recoup any “bank fees.” It is inappropriate for UM to maintain in this appeal that Plaintiffs sought “bank fees” or, in disregard of the evidence presented at trial, tell this Court that “Plaintiffs presented no evidence of how many students elected the OneAccount option over those four years....Simple math indicates that the bank charges per student average charge was between \$20.00 and \$30.00.”

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4. Defendant Fails to Dispute That a Fiduciary has the Obligation to Prove Losses Which Would Have Occurred Absent Breach.

UM does not dispute that the law squarely places the obligation upon the fiduciary trustee (which is UM) to establish any amount of loss which may have occurred in the absence of breach. The Restatement (Third) of Trusts states:

when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach of duty.

Restatement (Third) of Trusts § 100 comment f (App. 417); *See also Estate of Stetson*, 463 Pa. 64, 345 A.2d 679, 690 (Pa. 1975) (“[W]hen a beneficiary has succeeded in proving that the trustee has committed a breach of duty and that a related loss has occurred, we believe that the burden of persuasion ought to shift to the trustee to prove, as a matter of defense, that the loss would have occurred in the absence of a breach of duty.”)

The District Court did not give Plaintiffs’ requested instruction to the jury consistent with the Restatement (Third) of Trusts § 100 that UM bears the burden of proving what amount of the loss would have occurred in the absence of the breach. (App. 238). When this was rejected, Plaintiffs’ counsel suggested instructing the jury with language taken directly from the Restatement (Third) of Trusts § 100 comment f. (App. 238).

UM's Response Brief argues that this Court need not address the error, because the jury found there was no breach of a fiduciary obligation. However, UM fails to address how failing to appropriately instruct the jury led to the inappropriate appearance that Plaintiffs failed to satisfy their own burden of proof. UM's Counsel took direct and unfair advantage of the District Court's failure to appropriately instruct the jury on the burden of proof. Counsel stated:

[H]ow much of that money is -- is -- would have been incurred regardless of where he or she banked?...

I'm sure Mr. Stalpes will get up here and say, well, it's our obligation to show what it would be. No. No, it's not. It's your [pointing at Mr. Stalpes] obligation to prove your case. You -- under the instructions from Judge [Vanatta], you, plaintiffs, have the burden of proving your [pointing at Mr. Stalpes] case.

(App. 246-247).

In addition, like in *Camen v. Glacier Eye Clinic, P.C.*, it was error to fail to adequately instruct on causation even though the jury did not reach the causation question. 2023 MT 174, ¶ 37, 413 Mont. 277, 293, 539 P.3d 1062, 1072. In *Camen*, defendants argued that the failure to properly instruct on causation by failing to give the loss of chance instruction was harmless because the jury found the defendants were not negligent. *Id.* This Court wisely rejected that argument, noting "the instructions given at trial wrapped causation concepts into its negligence instructions." *Id.* The same is true here. For example, the District Court's instructions mixed breach and causation elements:

You must decide whether the University of Montana breached its fiduciary duty to Plaintiffs.

The University of Montana breached its fiduciary duty if you find that it failed to act in the best interests of Plaintiffs or acted in a manner which would result in harm or loss to Plaintiffs.

Plaintiffs have the burden to prove that the University (1) breached its fiduciary duty it owed to Plaintiffs; (2) that such breach was the cause of damages to Plaintiffs; and (3) that Plaintiffs suffered damages.

Dkt. 200, at Instruction 19.

In sum, the Court abused its discretion by improperly instructing the jury regarding comparative negligence and failed to properly instruct the jury on the burden shifting language from Restatement (Third) of Trusts § 100. This error of law requires reversal and a new trial.

5. The District Court Abused Its Discretion By Allowing Hearsay Evidence to Bolster Defendant’s Claims of Due Diligence.

UM argues that the inappropriately admitted 2011 email was a “business record” relying upon Mont. R. Evid. 803(6) and 803(8). Those exceptions to the exclusion of hearsay evidence allow for the admission of documents that record “regularly conducted” and “regularly recorded” activities. Mont. R. Evid. 803(6) and 803(8). UM fails to cite any evidence or make any argument that anything within Mr. Hlynosky’s email was anything other than a one-off. There is no evidence that

Mr. Hlynosky had ever done this or anything like it before, much less done this sort of analysis regularly. Rather, as Mr. Hlynosky admitted, he only completed Exhibit J to respond to UM students complaining about Higher One.

UM contends that Exhibit J is part of the “due diligence” Mr. Hlynosky undertook to determine if the Higher One services offered to students were reasonable. Notably, all of the testimony relied upon by UM was elicited after the document was already admitted. And, UM misrepresents Mr. Hlynosky’s testimony. In fact, Mr. Hlynosky admitted that he drafted Exhibit J not as part of any due diligence effort but after the contract with Higher One was up and running and after students began complaining about Higher One fees:

- Q. [S]o -- so [compiling Exhibit J] was after the contract was up and running. You didn’t do that before?
- A. This -- I -- I believe, I started it before the contract -- or, **yes, after the contract was up and running**. Sorry, I apologize how --
- Q. Right.
- A. . -- I answered that.
- Q. **Yeah, nobody did anything before the contract started?**
- A. **Correct.**
- Q. Then there [were] some complaints from ASUM about the fees, right?
- A. Correct.
- Q. So, then, you did this comparison of seven of the 30 different fees, right?
- A. But I wasn’t allowed to sign the contract. **I wasn’t involved until after the contract was signed**. So, my analysis was when I became involved.
- Q. Right. But my point is here, you did this analysis after those ASUM respo- -- complaints about the fees, right?
- A. If the timing is correct, yes.

Day 5, Tr. At 60:9-61:6 (emphasis added).

This isn't proper foundation for regularly conducted business activity or due diligence. Exhibit J was completed after the contract was in place, and not as part of due diligence to investigate Higher One as UM contends in its brief. By definition, due diligence happens before a contract is entered into. Exhibit J is merely a response to student complaints, admitted as evidence. *Anderson v. Hobbs*, 1981, 196 Mont. 31, 637 P.2d 817 (Since the account statement was not made in ordinary course of business, it was not excepted from hearsay rule and was inadmissible.)

Nor is this foundation of a public record under Exception 803(8). In fact, the rule specifically prohibits admission of Exhibit J. Exception 803(8) provides:

To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its **regularly conducted and regularly recorded activities**, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. **The following are not within this exception to the hearsay rule:** (i) investigative reports by police and other law enforcement personnel; (ii) **investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party**; (iii) factual findings offered by the government in criminal cases; (iv) **factual findings resulting from special investigation of a particular complaint, case, or incident**; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

Mont. R. Evid. 803(8) (emphasis added).

Here, the sole foundation laid for this hearsay document was:

BY MR. DAVIS:

Q. Is this your product?

A. Yes.

THE COURT: Objection overruled.

(Exhibit J was admitted.)

(App. 216-218).

UM argues that because another witness, Anne Hesel, testified generally to the basic premise that Higher One charged fees in line with real banks, admission was harmless. However, Anne Hesel did not testify that the Higher One fees were not excessive, or reasonable, as compared to fees charged by banks. To the contrary, Anne Hesel specifically avoided an opinion on whether the fees were excessive:

Q. I'm looking at the report that you drafted in this case.

A. Okay.

Q. And is it fair to say that you are not opining in this case as to whether or not the fees were excessive?

A. Correct.

Q. Okay.

A. Yes.

Day 5 Tr., at 180.

Exhibit J – admitted into evidence – was sent back with the jury for its deliberations, pursuant to Section 46-16-504, MCA. This effectively circumvents “the common law rule against submission of testimonial materials to the jury for unsupervised and unrestricted review” and mandates reversal. *State v. Nordholm*, 2019 MT 165, ¶ 10, 396 Mont. 384, 387, 445 P.3d 799, 802 (internal citation omitted). The jury should be prohibited from “re-hear[ing] testimony as provided in

§ 46-16-503(2)” except in the most unusual of circumstances and only when supervised by the district court. *Id.* at ¶14. “Adherence to this rule prevents the jury from giving undue weight to one witness’s statements.” *Id.* By ignoring the prohibition of admission of prior consistent statements, and admitting hearsay, the jury is encouraged to give undue weight to that evidence.

The Court allowed a written document into evidence that purported to prove Higher One fees were reasonable by demonstrating “proof” that fees charged by real banks were comparable. That document was authored by a party witness and was hearsay. It was certainly offered to prove the truth of the matter asserted, and contrary to UM’s position on appeal, its expert, Ms. Hesper, did not opine one way or the other that the fees charged by Higher One were excessive. Admission was error and prejudicial to Plaintiffs.

CONCLUSION

Appellants respectfully urge the Court to reverse and remand because significant errors and oversteps require retrial of claims brought by Class I.

RESPECTFULLY SUBMITTED this 21st day February 2025.

/s/ Justin Stalpes
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 4,838 words is less than the 5,000 word limit, exclusive of table and certificates.

RESPECTFULLY SUBMITTED this 21st day February 2025.

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Attorney for Appellants

CERTIFICATE OF SERVICE

I, Justin P. Stalpes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-21-2025:

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