No. DA 24-0077

IN THE

Supreme Court of the State of Montana

The ESTATE OF JEREMY NORBY through LORILEE NORBY, as personal representative,

Plaintiff / Appellant / Cross-Appellee,

v.

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

Defendants / Appellees / Cross-Appellants,

ON APPEAL FROM THE MONTANA SEVENTH JUDICIAL DISTRICT COURT,
RICHLAND COUNTY, HON. OLIVIA RIEGER
CASE NO. DV-42-2022-92

APPELLANT'S REPLY BRIEF AND CROSS-APPEAL ANSWER BRIEF

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INTRODUCTION

Dr. Council wants this Court to first overlook a blatant voir dire error and then interpret *Harding v. Deiss*, 2000 MT 169, 300 Mont. 312, 3 P.3d 1286 to allow a physician—knowing full well his patient had a high risk of cardiac complications—to negligently ignore the patient's acute signs of cardiac distress for days, yet escape liability by blaming the patient's pre-treatment lifestyle choices for his preventable death. Additionally, he wants the Court to find the issue waived notwithstanding that it was raised in summary judgment proceedings, at the close of evidence during trial, and in objections to jury instructions and the verdict form.

On cross-appeal, Dr. Council asks the Court to endorse a doctor raising for the first time in the final pretrial order that an ordinary medical malpractice claim is actually a covid-19 claim subject to a significantly higher standard of proof. Black letter law, however, requires avoidance defenses to be pled at the outset, particularly where general denials do not give the plaintiff notice of the defense. Finally, Dr. Council would have the Court hold that a cardiologist who both works regularly in conjunction with family medicine practitioners and teaches medical students is unqualified to opine as to the standard of

care for identifying cardiac-related symptoms and referring patients to specialists.

ARGUMENT

I. The District Court's Denial of the Estate's Challenge for Cause Was Reversible Error.

A. The Record Is Adequate for Review.

Dr. Council's attempt to sidestep the district court's voir dire error is meritless. The Estate is not asking the Court to *assume* the inaudible portions of the transcript support reversal. *See* Answer Br., 14. Rather, the Estate contends there is more than enough surrounding context for the Court to understand and review the denial of the Estate's challenge for cause.[1]

That concept is hardly novel. The rules do not require a perfect record, only one sufficient to enable the Court to rule on the issues presented. *See* Mont. R. App. P. 8(2); *see also, e.g.*, *State v. Palmer*, 687 N.E.2d 685, 696 (Ohio 1997). Even in criminal cases where liberty interests are at stake, courts routinely conclude that inaudible

[1] Dr. Council's criticism about curing the record is unfounded. The court reporter—working from an audio recording—was not able to perfectly capture voir dire because it was conducted at the Richland Event Center—a large, arena-like setting—due to the number of jurors called. *See, e.g.*, Trans. 12, 14. The Estate's trial counsel understood from the court reporter that the transcript is as complete as possible.

designations in a transcript do not preclude appellate review where the surrounding context allows the court to determine what was said. *See, e.g.*, *State v. Harry*, 823 So.2d 987, 992 (La. Ct. App. 2002) ("short phrases, statements, series of words, or single words" designated inaudible, but "[a]s a whole . . . the trial transcript [was] coherent and understandable"); *Leone v. Unemployment Compensation Bd. of Review*, 885 A.2d 76, 80 (Pa. Commw. Ct. 2005) (inaudible testimony did not affect "the meaning, context or import of the testimony inasmuch as it can be clearly understood for purposes of appellate review"); *In re V.A.M.*, 2004 WL 955712, at *1 (N.C. Ct. App. May 4, 2004).

Really, it is Dr. Council who is assuming. He jumps from the fact portions of the voir dire transcript are inaudible to the unsupported conclusion that the record is inadequate. The inaudible portions, however, are limited to short phrases, statements, or words, and the majority of Juror Urban's voir dire was transcribed. As a whole, the transcript easily permits the Court to determine the import of the questions posed and Juror Urban's answers.

Initially, Juror Urban volunteered he would have difficulty assessing damages "for the fair trade for loss of life," elaborating that he believed in damages like doctor bills and funeral costs, but not in "lump

sum" damages. Trans. 127:1–12. After being asked whether he could follow the judge's instructions and sign off on a verdict including damages for which there were no receipts, Urban plainly confirmed he could not, as evidenced by the Estate's counsel thanking him for his candor and moving to dismiss him for cause. *Id*., 127:10–128:19. Responding to defense counsel's questions, Urban continued to express that (1) he could not follow the law regarding "what facts prove damages;" (2) he did not believe it possible to predict future damages, and (3) he was "very against" giving them. *Id*.,128:23–130:12. The district court followed up with questions unrelated to damages, leading Urban into generically conceding he could follow the law as instructed. *Id*., 130:23–132:11.

All of that comes directly from the transcript, meaning the Court has an adequate record to review the voir dire issue.

B. The District Court Should Have Granted the Estate's Challenge for Cause.

Dr. Council's attempts to justify the denial of the Estate's challenge for cause widely miss the mark. *First*, regardless how the initial question was phrased, Juror Urban indisputably expressed he did not believe in "lump sum" damages. Trans. 127:1–13. Dr. Council

cannot dismiss that answer as "not spontaneous;" Urban volunteered his bias in response to an open-ended question. *Id.* Likewise, it is irrelevant that the verdict form did not use the phrase "lump sum." Damages like pain and suffering, grief, loss of care, companionship, support and distress—all expressly identified on the verdict form—necessarily require a jury to award damages in the form of a lump sum for which there are no specific receipts. And that is precisely what Urban expressed he would not do.

Second, Dr. Council cannot distinguish Juror Urban's bias from *Mahan v. Farmers Union Cent. Exch., Inc.*, 235 Mont. 410, 417–418, 768 P.2d 850, 855 (1989), where this Court held it is manifest error to force a plaintiff to use a preemptory challenge on a juror who expresses a "fixed scruple" against certain damages that are otherwise awardable. While Dr. Council characterizes Urban's answers as more general than those in *Mahan*, the record is to the contrary. Urban disclosed he did not believe in lump sum damages, he would not sign off on a verdict awarding them, he could not follow the law, and he was very against giving them. Trans., 127:1–130:12. None of that is equivalent to general uncertainty about the ability to be fair and impartial. Urban

expressed a fixed scruple against lump sum or future damages and, under *Mahan*, that type of bias implicates § 25-7-223(6)–(7), MCA.

Third, the district court did not question Juror Urban about his specific bias. It began by asking Urban whether he ever sped in his car or whether he had ever broken any law. Trans. 130:23–131:5. When Urban disclosed he lost his father to a speeding driver, the court shifted gears to jaywalking, but continued the same basic inquiry, seeking to discover only whether Urban disagreed with certain laws. *Id.*, 131:6–20. The court concluded by asking several leading questions about whether Urban could follow the law as instructed even if he disagreed with it. *Id.*, 131:21–132:7.

Fourth, Dr. Council cannot escape *State v. Johnson*, 2019 MT 68, ¶ 12, 395 Mont. 169, 437 P.3d 147 just because it was a criminal case. *Johnson*'s discussion was premised on a basic principle that applies equally in criminal and civil proceedings: "it is improper for counsel or the court to attempt to rehabilitate the juror through the use of leading or loaded questions, such as whether the juror will follow the law, jury instructions, or an order of the court." *Id.* The reason is reflected by the result here. Juror Urban recanted his expressed bias only after the court asked him leading questions—specifically, the court sought an

agreement that some laws are ludicrous but must be followed because people in Helena enacted them—which placed him the "untenable position" of "having to publicly disagree with the court . . . on generally accepted legal principles in order to reiterate" his bias. *See id*; Trans. 131:22–132:3. Thus, as in *Johnson*, his recantation is unreliable.

Fifth, the Estate had no obligation to further explore Juror Urban's bias. Having already been led by the district court into conceding he would follow the law as instructed, additional questioning by the Estate would have placed Urban back in the same untenable position *Johnson* seeks to avoid. Dr. Council suggests that unless the Estate convinced Urban to publicly emphasize his bias in the face of the court's loaded questions about following the law, no error can exist. *Johnson* emphatically disagrees.

C. Reversal Is Required.

In *Crail Creek Associates, LLC v. Olson*, 2008 MT 209, ¶ 23, 344 Mont. 321, 187 P.3d 667, this Court declined to reconsider the automatic reversal rule from *Reff-Conlin's Inc. v. Fireman's Fund Ins. Co.*, 2002 MT 60, 309 Mont. 142, 45 P.3d 863 because the plaintiff had not attempted to meet the test for an alternative "rebuttal" standard, under which "the prevailing party must demonstrate the lack of any

reasonable possibility that the denial of the challenge for cause contributed to the verdict." Dr. Council tries to avoid that mistake by pointing to the jury poll, arguing that one additional juror in the Estate's favor would not have changed the outcome. Answer Br., 19–20. But his position just underscores the rationale for Montana's automatic reversal rule. He also misapplies the rebuttal test other jurisdictions have adopted.

Dr. Council advocates for a rule under which the party erroneously deprived of a preemptory challenge must prove the jury's verdict would have been favorable but for the error. That's not how it works. This Court has long recognized two core truths—that "[t]he side with the greater number of peremptory challenges clearly has a tactical advantage created by its ability to eliminate potentially unfavorable jurors without cause" and proving actual prejudice from a grant of additional peremptory challenges to the opposing party is "an almost impossible burden." *King v. Special Res. Mgmt., Inc.*, 256 Mont. 367, 371–74, 846 P.2d 1038, 1041–42 (1993).

As *King* explained, an actual prejudice standard would require the Court to "invad[e] the internal processes of a jury." *Id.* at 374, 846 P.2d at 1042. There is no telling how one juror or another may impact

deliberations or sway the view of other jurors in a given case, and it certainly is not as easy as vote counting from a jury poll. If that were true, the standard would become a nearly automatic *non-reversal* rule. In any case where the jury favored one party by more than the bare minimum two-thirds threshold, *see* Mont. R. Civ. P. 48, it would *always* be true that the non-objecting party could make the same argument as Dr. Council, insisting that even if one more juror had found in favor of the other side, the result would not have changed. Not only does that logic ignore the nuances of jury deliberations, Dr. Council offers no justifiable reason for overruling *Reff-Conlin's* despite *King*'s instruction that courts "should not disregard the advantages bestowed upon one side by having additional preemptory challenges granted to them." *King*, 256 Mont. at 374, 846 P.2d at 1042.

Finally, Dr. Council could not meet his burden under the rebuttal standard anyway. *See Crail Creek*, ¶ 23. Other courts applying that standard hold that where an objecting party is forced to use a preemptory challenge on another *subjectively* objectional juror, there is a reasonable possibility that the denial of the challenge for cause contributed to the verdict. *See, e.g.*, *Seadler v. Marina Bay Resort Condo. Assoc.*, 376 So.3d 659, 666 (Fla. 2023). Analyzing the issue in

detail, *Seadler* rejected Dr. Council's theory that jurors are fungible, reasoning that simply assuming there is no difference between two objectional jurors "does not account for the tactical latitude afforded to parties in exercising peremptory challenges." *Id.*

As in *Seadler*, the Estate had a subjective objection to another juror who was eventually seated. Before trial, the Estate moved to exclude jurors who were either patients of Dr. Council or had close family members who were patients. Doc. 110. Among the objectionable jurors was Cody Levi Smith, who identified Dr. Council as his spouse's or child's doctor. Doc. 119. The district court denied the Estate's motion as to Smith, who was then seated and found for Dr. Council in all respects. *See* Doc. 117; Trans. 1704:11–1708:25. Had the district court correctly excused Juror Urban for cause, the Estate could have used a preemptory challenge on Smith instead. Consequently, even absent *Reff-Conlin's*, reversal would still be required here because Dr. Council cannot demonstrate the error had no possibility of affecting the verdict.

II. The Causation-Related Errors Also Require Reversal.

A. Dr. Council's Reading Renders *Harding* Meaningless.

Harding v. Deiss is highly instructive. Both it and many of the cases it cites are directly analogous. There, the plaintiff's daughter went horseback riding despite her long history of asthma and an allergy to horses. 2000 MT 169, ¶ 3, 300 Mont. 312, 3 P.3d 1286. During the ride, she had trouble breathing and collapsed, and was transferred by ambulance to the emergency room, where she was treated by Dr. Deiss. *Id*. Following the daughter's death, her mother brought a medical malpractice suit, with the central issue being whether the daughter's irreversible brain injury was caused by oxygen deprivation due to her asthma attack (*i.e.*, her own negligence), or Dr. Deiss's failure to immediately intubate her when she arrived at the hospital. *Id.*, ¶ 6.

Those facts parallel those here, where Estate claims that Dr. Council's negligent failure to evaluate cardiac issues on or after August 25, 2021 caused Jeremy's death, while the defense blamed Jeremy's lifestyle choices leading up to that date. And just like Dr. Council, the doctor in *Harding* argued that a comparative negligence instruction was appropriate because it was the daughter's "negligence that *caused* her injury," while also arguing the issue was

moot because the jury never reached comparative negligence. *Id*., ¶¶ 8–9 (emphasis added).

Recognizing that negligence, comparative negligence, and causation all intertwine in medical malpractice cases, *Harding* analyzed pre-treatment conduct at length. Specifically, *Harding* discussed multiple cases from other jurisdictions, stating that the Court agreed with them, and held that "comparative negligence as a defense does not apply where a patient's pre-treatment behavior merely furnishes the need for care or treatment which later becomes the subject of a malpractice claim." *Id*., ¶¶ 10–16.

Contrary to Dr. Council's assertion, however, *Harding* did not provide that its "limitation on considering pre-treatment conduct does not apply to causation." Answer Br., 22. *Harding*'s discussion of *Whitehead v. Linkous, M.D.*, 404 So.2d 377 (Fla. Dist. Ct. App. 1981) is telling. In *Whitehead*, a patient ingested drugs and alcohol while trying to commit suicide and was subsequently given medicine by a nurse to induce vomiting, which allegedly caused him to die. *See Harding*, ¶ 15. Not surprisingly, the hospital asserted that the patient's acts in attempting to commit suicide were "a contributing *cause* of his death and thus, were subject to a jury instruction on comparative negligence."

Id. (emphasis added). But as *Harding* recognized, *Whitehead* held instead that any conduct by the patient "before he entered the hospital was not a proximate, legal *cause* of the damages he sought, and the trial court erred in submitting the instruction on comparative negligence." *Id.* (emphasis added). *Harding* also cited *Spence v. Aspen Skiing Co.*, 820 F. Supp. 542 (D. Colo. 1993) for proposition that "it would be inconsistent with the reasonable and normal expectations of both parties for the court to excuse or reduce the provider's liability simply because it was the patient's own *fault* that she required care in the first place." *Id.* Fault, by definition, equates to causation.

In other words, *Harding* firmly establishes the district court's error in this case. Even assuming Jeremy's weight, high blood pressure, high cholesterol and any other health problems *before* August 25, 2021 were his own fault and led him to seek treatment on that day, they were not a proximate, legal cause of the damages he sought for Dr. Council's failure to provide appropriate treatment on or after August 25, 2021. Just as Dr. Deiss could not escape liability for his own negligence in *Harding* by blaming the daughter for riding a horse knowing she had allergies and asthma, and the hospital in *Whitefield* could not blame the patient's attempted suicide to excuse its

negligent administration of a vomiting medicine, the district court should not have instructed the jury that it could consider pre-treatment conduct for purposes of causation and then let the defense tell the jury that Jeremy's death was his own fault.

To escape *Harding*, Dr. Council tries to conflate the general doctor-patient relationship between Jeremy and Dr. Council with the specific negligent treatment periods submitted to the jury. Answer Br., 23–24. Because Dr. Council began seeing Jeremy on a semi-regular basis in 2009, he posits that any negligence on Jeremy's part was fair game because it occurred contemporaneously with his treatment. *Id*. That analysis leads to the same absurd result rejected in *Harding*. It would mean that in any case where the patient saw the same doctor over a course of years—even sporadically—the doctor could avoid or reduce liability for a specific instance of negligence by arguing that the patient was treating the entire time, thus opening the door to asserting comparative negligence on the patient's part for acts preceding the negligent treatment.

The bottom line is that *Harding* is clear. For each period of allegedly negligent treatment submitted to the jury, Jeremy's "conduct before seeking medical treatment [was] merely a factor [Dr. Council]

should [have] consider[ed] in treating [him]." *Harding*, ¶ 16. For the period on or after August 25, 2021, all the lifestyle choices Jeremy made before that date were "clearly pre-treatment conduct and as such [were] not to be considered as evidence of *fault* which may offset any negligent conduct by [Dr. Council]." *Id*. (emphasis added). Indeed, Dr. Council's negligent treatment was an intervening cause as a matter of law. *Id*., ¶ 14. By instructing the jury otherwise and allowing the defense to blame Jeremy for his pre-treatment conduct, the district court abused its discretion.

B. The Estate's Arguments Are Well-Preserved and Ripe.

Dr. Council also makes a series of avoidance arguments. *See* Answer Br., 24–31. Each is demonstrably incorrect.

First, the Estate repeatedly raised its causation arguments both before and during trial. It moved for summary judgment—which the district court denied—on the same comparative negligence and causation arguments it is making on appeal, *see* Doc. 114, and expressly identified in its opening brief that the Rule 50 arguments it made at trial were a renewal of the summary judgment issues. *See* Open Br., at 4–5.

Then, at trial, the Estate argued that its Rule 50 motion was related to the "causation component" of its summary judgment argument. Trans. 1468. Dr. Council is flatly wrong that the Estate did not revisit *Harding* in that argument. *See* Answer Br., 25. The Estate's argument was that with only the 2018 and 2021 timeframes at issue, "pursuant to the *Harding* case all [Jeremy's] conduct before that is out," meaning the only fact relevant to comparative negligence was whether Jeremy should have gone to the emergency room if his symptoms were worsening after August 25. *See* Trans. 1468. The Estate then argued that there was insufficient evidence to find Jeremy negligent on that narrow point. The discussion included the 2018–2021 timeframe as well, with multiple additional references to *Harding*. *Id*., 1468–80.

Later, the Estate objected to inserting causation into Jury Instruction No. 20 because it wrongly allowed consideration of Jeremy's pre-2018 actions. *Id*., 1519–22. The Estate also argued that breaking out the verdict into separate periods of alleged negligence would cause issues with both contributory negligence and how the jury should be instructed about consideration of Jeremy's pre-treatment conduct. *Id*., 1571–75. In short, there is no supportable way to argue the Estate did not preserve the arguments its now making.

Second, *Harding* is dispositive as to Dr. Council's mootness argument. The fact that the jury did not reach comparative negligence on the verdict form does not alleviate the error caused by Jury Instruction No. 20 and the defense's argument about Jeremy's lifestyle choices. That is exactly the same argument the doctor raised in *Harding* and that this Court rejected. *See Harding*, ¶¶ 9, 16.

Lastly, Dr. Council's argument about the verdict form begs the question. He asserts that because the jury found Dr. Council was negligent in his care of Jeremy on or after August 25, 2021, but did not find causation, it necessarily never considered Jeremy's conduct. That makes no sense. It is the *possibility* that the jury considered Jeremy's pre-2021 lifestyle choices in rendering its causation verdict—which the district court allowed via Jury Instruction No. 20—that creates the error. Again, the same was true in *Harding*, where the Court reversed due to the possibility the jury considered the daughter's allergies and asthma even though it ultimately found the doctor was not negligent.

C. The District Court Wrongly Admitted the Bodycam Video for Demonstrative Purposes Only.

By allowing the jury to view the bodycam video only a single time, while admitting the Code Blue record for all purposes, the district court

wrongly favored one piece of evidence over another on a potentially dispositive issue. While Dr. Council insists the Estate never explained how the court's ruling potentially impacted the trial, that simply is not true. As the Estate argued in its opening brief, if the district court had correctly applied *Harding*, the only permissible comparative negligence issue for purposes of Dr. Council's treatment in August 2021 was whether Jeremy should have gone to the emergency room for worsening symptoms. And the bodycam video and Code Blue record were the only two exhibits admitted on that issue. Accordingly, the district court should have treated them the same.

Dr. Council has no real justification for the district court's failure to do so. He just assumes that the bodycam footage was testimonial and should not have been sent to the jury room. But he cites no case for that proposition. Nor does he attempt to apply or distinguish *Davis v. Washington*, 547 U.S. 813, 822 (2006), which establishes that "[s]tatements are nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." And he ignores *Hughes v. Rodriguez*, 31 F. 4th 1211, 1218 (9th Cir. 2022), which counsels that bodycam

videos are often a more reliable source of evidence than written statements.

This is yet another issue that is not nearly as complicated as Dr. Council makes it seem. There is no legally supportable basis for excluding the bodycam footage from the jury room. It contained non-testimonial statements on a key issue—a "few days" versus "two days"—from the only witness with any real knowledge, and which at least arguably contradicted written records made by third parties containing statements attributed to the same witness. The district court's decision was thus arbitrary and constituted an abuse of discretion.

D. The Final Jury Instructions Read to the Jury Differ from the Instructions Filed in the Docket.

The Estate stands by its argument that the jury did not receive a written instruction on the causation standard, which was particularly prejudicial given that Dr. Council's only expert on causation testified to the wrong standard. While the Estate agrees that Jury Instruction No. 36 was included in Docket No. 147, that inclusion occurred only after the jurors were discharged. As the docket entry itself reflects, Instruction No. 36 was read separately from the others

and the set of instructions including it was filed after the verdict and after the instruction releasing the jurors. The e-mailed version of the final jury instructions the Estate's trial counsel received from the district court before the verdict *omitted* Jury Instruction No. 36, which strongly suggests that the jury did not receive a written copy of that instruction even though it was later filed.

That said, Instruction No. 36 does not cure the district court's other causation-related errors anyway. Even with that instruction, it is still true that the jury was wrongly allowed to consider Jeremy's pre-treatment conduct to relieve Dr. Council of liability, the district court abused its discretion by treating the bodycam video differently than the Code Blue record, and Dr. Council's expert did not testify to the appropriate standard of care.

CROSS-APPEAL ARGUMENT

I. Dr. Council Was Required to Plead Application of the Covid-19 Statutes as an Affirmative Defense.

Under Montana Rule of Civil Procedure 8(c), a party "must affirmatively state any avoidance or affirmative defense." "The rationale [for the rule] is simple: the same principles of fairness and notice which require a plaintiff to set forth the basis of the claim require a defendant to shoulder a corresponding duty to set out not merely

general denials as appropriate, but also those specific defenses not raised by general denials by which a defendant seeks to avoid liability, rather than merely to controvert plaintiff's factual allegations." *Brown v. Ehlert*, 255 Mont. 140, 146, 841 P.2d 510, 514 (1992). It is also "well settled in Montana that affirmative defenses are waived if not raised timely." *Id*.

Here, Dr. Council disclosed for the first time in the final pretrial order his theory that the Estate's claims were subject to the provisions of Montana Code Annotated § 27-1-1604. *See* Doc. 100. Under that statute, "[a] health care provider is not liable for civil damages for causing or contributing, directly or indirectly, to the death or injury of an individual as a result of the health care provider's acts or omissions while providing or arranging health care in support of the response to covid-19 unless the health care provider caused the death or injury of an individual through an act or omission that constitutes gross negligence, willful and wanton misconduct, or an intentional tort." § 27-1-1604, MCA. Section 27-1-1604 is part of a larger statutory scheme allowing health care providers to avoid liability "for injuries or death from or relating to exposure or potential exposure of covid-19 unless the civil action involves an act or omission that constitutes gross

negligence, willful and wanton misconduct, or intentional tort." § 27-1-1602, MCA.

Dr. Council asserts he was not required to plead § 27-1-1604 as an affirmative defense because ordinary and gross negligence are simply different standards, not different causes of action. But he completely ignores the procedural posture of the case. The Estate did not allege that this case arose out of Dr. Council's provision of health care in support of the response to covid-19; it alleged medical malpractice claims based on ordinary negligence. *See* Doc. 1. By including only general denials to those claims in his Answer—along with a laundry list of affirmative defenses that made no mention of § 27-1-1604 or gross negligence—Dr. Council provided the Estate no notice that he was contending a higher standard of proof applied.

In reply, Dr. Council will likely argue that because Jeremy was tested for covid-19, this case falls under one of the enumerated subsections of § 27-1-1604, MCA. The Estate disagrees. By the time Jeremy sought treatment from Dr. Council on August 1, 2021, he had already tested negative for covid-19, and part of Dr. Council's negligence was continuing to investigate respiratory viruses rather than cardiac problems knowing Jeremy did *not* have covid-19.

Regardless, that dispute is exactly why affirmative and avoidance defenses must be pled. Had Dr. Council given the Estate notice of his theory, the parties could have litigated whether the facts bring this case within the covid-19 statutes such that proof of gross negligence was necessary. Because he did not, the Estate had no reason to litigate anything other than the ordinary medical malpractice case it alleged in the Complaint. Consequently, the district court correctly found Dr. Council's defense waived.

II. Dr. Stauffer's Standard of Care Testimony Was Admissible and Appropriate.

Dr. Council's analysis of § 26-2-601, MCA focuses almost exclusively on subsection (3), as if that subsection contains an absolute prohibition on a doctor with one specialty testifying about the standard of care for another. But this Court rejected such a narrow view of the statute in *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 25, 367 Mont. 21, 289 P.3d 131, holding that an infectious disease specialist could testify about the standard of care required by a radiologist with respect to wearing a mask because wearing a mask to prevent disease is within the infectious disease specialist's expertise.

Although Dr. Council cherry picks portions of Dr. Stauffer's testimony to paint the picture that he is solely a highly specialized cardiologist, the district court's analysis was far more accurate. *See* Doc. 107, at 10–11. Fundamentally, this case is about when a doctor should seek a cardiologist's input for a patient exhibiting symptoms of cardiac distress, and part of Dr. Stauffer's current practice is providing consultative care for family practice physicians and working with them as a team, including regularly fielding calls from colleagues about cardiac symptoms. Trans. 409:8–21, 415:17–417:25. Moreover, Dr. Stauffer is a professor at the University of Colorado School of Medicine, teaching medical students. *Id.*, 412–13.

As the district court found, those qualifications fit squarely within the requirements of both Montana Rule of Evidence 702 and § 26-2-601(1), MCA. Simply put, Dr. Stauffer's clinical practice and academic experience make him highly qualified to testify about the standard of care for treating patients who present with Jeremy's symptoms. *See* Doc. 107. Under *Beecher*, Dr. Council cannot escape that reality simply because Dr. Stauffer is board certified in cardiology rather than family medicine.

CONCLUSION

The Estate respectfully requests that the Court reverse and remand in the main appeal and affirm in the cross-appeal.

Dated: April 8, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,998 words, as determined by the undersigned's word processing program.

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