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.

REPLY 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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Comes now Appellees and Cross-Appellants Orin P. Council, M.D., and O. Pete Council, M.D., P.C. (collectively "Dr. Council") and respectfully submit this brief in Reply to Appellant the Estate of Jeremy Norby ("Mr. Norby") through Lorilee Norby, as Personal Representative's (the "Estate") Reply Brief and Cross-Appeal Answer Brief ("Cross-Appeal Answer").

I. THE ESTATE FAILS TO PROVE MONTANA CODE ANNOTATED § 27-1-1604 IS AN AFFIRMATIVE DEFENSE

The Estate does not make any effort in its Cross-Appeal Answer to refute Dr. Council's argument that Montana Code Annotated § 27-1-1604 is, by its plain language, not an affirmative defense as a matter of law. Answer Br. Appellees & Br. Cross-Appellants Orin Pete Council, M.D., & O. Pete Council, M.D., P.C. at 38–41, Feb. 7, 2025 ("Cross-Appeal Br."). It makes no effort to argue how § 27-1-1604 represents a defense "that, if true, would defeat the plaintiff's claim even if the allegations in the complaint are true." *Deschamps v. Treasure St. Trlr. Ct., Ltd.*, 2011 MT 115, ¶ 17, 360 Mont. 437, 254 P.3d 566 (citation omitted). It makes no argument that § 27-1-1604 "conceded[s] that while the plaintiff otherwise may have a good cause of action, the cause of action no longer exists." *Brown v. Ehlert*, 255 Mont. 140, 146, 841 P.2d 510, 514 (1992). Nor does the Estate make any effort to refute Dr. Council's numerous other arguments establishing that, based on a plain reading of § 27-1-1604, the statute is not an affirmative defense. Cross-Appeal Br. at 38–41.

Instead, the Estate argues in its Cross-Appeal Answer that the "procedural

posture of the case" was that the Estate "did not allege that this case arose out of Dr. Council's provision of health care in support of the response to [C]ovid-19; it alleged medical malpractice claims based on ordinary negligence." Appellant's Reply Br. & Cross-Appeal Answer Br. at 22, Apr. 8, 2025 ("Cross-Appeal Answer"). The Estate goes on to argue that Dr. Council denied it "notice that he was contending a higher standard of proof applied." Cross-Appeal Answer at 22. Of course, defendants are not required to provide notice of the applicable "standard of proof"—plaintiffs are charged with knowledge of the law applicable to their own claims. And Dr. Council did not seek to apply a "higher standard of proof" or even use that term—he argued the Estate was required to demonstrate gross negligence, a "higher degree of negligence." Cross-Appeal Br. at 39. The Estate's burden to prove either negligence or gross negligence—by the preponderance of the evidence standard—is unchanged by the statute.

The Cross-Appeal Answer is bereft of any caselaw supporting the Estate's position it is entitled to "notice" regarding the applicable "standard of proof." It appears, however, that the Estate's contention is based upon its erroneous interpretation and application of this Court's explanation of the justifications behind Montana Rule of Civil Procedure 8(c):

> The rationale for requiring that [affirmative] defenses be affirmatively pleaded 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, 255 Mont. at 146, 841 P.2d at 514. This explanation's rationale is explicitly premised upon the understanding that an affirmative defense is a defense which, if successful, "seeks to avoid liability" entirely regardless of the factual merits of this case. *Brown*, 255 Mont. at 146, 841 P.2d at 514. Nothing in § 27-1-1604's wording allows defendants to avoid liability. Indeed, the Estate tacitly admits as much when it now argues that it is Dr. Council's position that a "higher standard of proof applied"—but if some form of negligence can be found based on the facts alleged, liability can still attach. Cross-Appeal Answer at 22.

Regardless of the above, the Estate's "notice" argument (that the Estate did not allege this matter arose out of health care provided in response to Covid-19) is belied by the Complaint and Demand for Jury Trial ("Complaint") the Estate filed with the District Court[1]. Doc. 1. In the Complaint, the Estate puts directly at issue Dr. Council's decision to test Mr. Norby for Covid-19 in order to conclusively rule

[1] Throughout its briefing, the Estate frequently ignores the *actual record* in this appeal and attempts, both explicitly (i.e. basing its Cross-Appeal Answer arguments upon alleged emails to Plaintiff's counsel with no proof of the email in the actual District Court or appellate record, let alone any evidence of what was allegedly included with the email) (Cross-Appeal Answer at 20) and implicitly (i.e. arguing COVID-19 was not at issue while blatantly ignoring the allegations found in its own Complaint), to meet its burden based on facts the Estate wishes the record contains as opposed to facts in the actual record before the Court.

out the disease as the cause of his symptoms. Doc. 1 ¶¶ 15–21. The Complaint goes on to explicitly accuse Dr. Council of "failing to timely or accurately diagnose and treat [Mr. Norby's] acute cardiac symptoms" (or some variation thereof) in its medical malpractice causes of action. Doc. 1 ¶¶ 39, 46, 52.

While Dr. Council acknowledges affirmative defenses—as defined under Montana law—must be pleaded pursuant to Montana Rule of Civil Procedure 8(c), the Rule does not require a defendant to educate a plaintiff on the law controlling the allegations she pleads. A defendant need not plead as an affirmative defense, for example that "the plaintiff is alleging fact amounting to negligence based upon the provision of medical services by a doctor and therefore needs expert testimony to establish the standard of care pursuant to Montana Code Annotated § 26-2-601 and *Beehler v. Eastern Radiological Associates, P.C.*, 2012 MT 260, ¶¶ 18, 23–24, 367 Mont. 21, 289 P.3d 131." Or, put differently under the specific facts here, the Rule does not require Dr. Council to plead as a defense "the Estate is alleging negligence arising, at least in part, out of Dr. Council's provision of health care responding to a suspected case of Covid-19 and it therefore must prove at trial gross negligence pursuant to § 27-1-1604." Such a hypothetical pleading does not amount to an attempt to avoid liability, nor does it even attempt to controvert the Estate's factual allegations—on the contrary, it takes them at face value. Thus, the affirmative pleading the Estate argues is required here has no bearing whatsoever on Rule 8(c)

or the justifications behind the same set forth in *Brown*. *Brown*, 255 Mont. at 146, 841 P.2d at 514. And, because it does not implicate the affirmative defense notice provision of Rule 8, it need not be affirmatively pleaded by a defendant.

Lastly, the Estate argues that Dr. Council "will likely argue that because [Mr. Norby] was tested for [C]ovid-19, this case falls under one of the enumerated subsections of § 27-1-1604, MCA." Cross-Appeal Answer at 22. That is, of course, Dr. Council's ultimate contention. Indeed, it is difficult to see how a doctor examining a patient with symptoms consistent with Covid-19 during the Covid-19 pandemic, testing that patient for Covid-19, and then attempting to rule out Covid-19 as a cause of the symptoms, is not "providing or arranging health care in support of the response to [C]ovid-19." Mont. Code Ann. § 27-1-1604. It is also difficult to see how a subsequent lawsuit alleging those actions were negligent because the physician allegedly pursued testing attempting to rule out the "wrong" diagnosis of Covid-19, which damaged the patient, is not alleging "injury or death resulting from screening, assessing, diagnosing, caring for, or treating individuals with a suspected or confirmed case of [C]ovid-19." Mont. Code Ann. § 27-1-1604(1). But that is an issue for the District Court to decide should the matter be remanded. The District Court's oral order on this issue simply concluded that Montana Code Annotated § 27-1-1604 is an affirmative defense unavailable to Dr. Council because he failed to plead it. App. B to Cross-Appeal Br., Feb. 7, 2025, B –1 at 1-10 – 1-11: Tr.

237:19–238:20 ("Tr."). The District Court never examined, let alone ruled upon, whether the facts of this matter actually implicated § 27-1-1604. That issue is therefore not properly before the Court and is irrelevant to the narrow question of law of whether or not the statute is an affirmative defense that must be pleaded.

The District Court's conclusion that § 27-1-1604 is an affirmative defense that must be affirmatively plead is erroneous as a matter of law, and the Estate has failed to demonstrate otherwise. *State v. Leprowse*, 2009 MT 387, ¶ 11, 353 Mont. 312, 221 P.3d 648 (Whether a statute constitutes an affirmative defense is a matter of law, and a district court's conclusions of law on that issue are reviewed for correctness.) (citations omitted). Should this issue be reached by this Court, this Court should reverse and remand for proceedings consistent with its opinion.

II. THE ESTATE FAILS TO PROVE THE DISTRICT COURT CORRECTLY APPLIED MONTANA CODE ANNOTATED § 26-2-601

This Court reviews a district court's evidentiary rulings for abuse of discretion and considers a district court's incorrect application of an evidentiary statute a *per se* abuse of discretion. *Beehler*, ¶¶ 17, 27 (citations omitted). A district court's application of a statute is reviewed for correctness. *Beehler*, ¶ 17 (citation omitted).

The Estate complains that Dr. Council unduly focuses on Montana Code Annotated § 26-2-601(3) "as if that subsection contains an absolute prohibition on a doctor with one specialty testifying about the standard of care for another." Cross-Appeal Answer at 23. That is not Dr. Council's contention on appeal. Rather, Dr.

Council's argument is that the District Court necessarily abused its discretion by failing to analyze § 26-2-601(3) despite making a finding that Brian Stauffer, M.D. ("Dr. Stauffer") and Dr. Council are board-certified to practice in different specialties. App. A to Cross-Appeal Br., Feb. 7, 2025, A – 2 at 2-10, Doc. 107 ("Doc. 107"). The Estate does not attempt to argue otherwise. Instead, it argues only that the District Court appropriately based its ruling on its findings and application of Montana Rule of Evidence 702 and § 26-2-601(1). Cross-Appeal Answer at 23; Doc. 107 at 10–11.

But § 26-2-601(3) contains a different standard than the ones found in Montana Code Annotated § 601(1)(a)–(b). The latter two subsections focus on the proposed expert's training and education and on the expert's knowledge of the "standards of care and practice as they related to the act or omission that is the subject matter of the malpractice claim." § 26-2-601(1)(a)–(b). Thus, the focal point of the inquiry under those subsections is the proposed expert's actual knowledge of the standards applicable to the discrete acts alleged to constitute the malpractice. Section 26-2-601(3), on the other hand, requires a different showing—whether, when the proposed expert is qualified in a different specialty than the defendant, "the standards of care and practice in the two specialty or subspecialty fields are substantially similar." Mont. Code Ann. § 26-2-601(3).

Here, the District Court found that Dr. Stauffer is board certified in cardiology and chief of a cardiology division at a hospital and that Dr. Council is board certified in family medicine. Doc. 107 at 10–11. Upon such a finding, regardless of its findings and conclusions under § 26-2-601(1)(a)–(b), the District Court was required to conduct the inquiry found in -601(3). It failed to do so, and the Estate makes no attempts to argue otherwise. The closest the District Court *arguably* gets to such an analysis is its conclusory statement that "familiarity with the standard of care for patients seeking medical advice is knowledge required by both Dr. Council and Dr. Stauffer and the standard of care provided is the subject of the malpractice claim." Doc. 107 at 11. But "the standard of care provided" is *necessarily* the subject matter of *every* malpractice claim, and "familiarity with the standard of care for patients seeking medical advice" does not speak to whether "the standards of care *and* practice in the two specialty or subspecialty fields are substantially similar." Doc. 107 at 11; Mont. Code Ann. § 26-2-601(3) (emphasis added).

Further, the District Court ignores completely the difference in the standard of practice between Dr. Stauffer and Dr. Council. Dr. Stauffer deals *only* with cardiological issues at a tertiary care university and teaching hospital. He sees patients *specifically* seeking cardiac care and his practice is based upon the assumption that a cardiac etiology is already present—indeed, he even testified that his is a "cardiology practice." *See* Cross-Appeal Br. at 42; Tr. 409:10–21. Dr.

Council, on the other hand, provides frontline care as a first point of contact for patients with a wide range of symptoms with unknown etiology. *See* Cross-Appeal Br. at 42. Given these factual circumstances, if the District Court's order constitutes a sufficient "showing" under § 26-2-601(3), then that subsection is effectively rendered meaningless. Mont. Code Ann. § 1-3-232 ("An interpretation which gives effect is preferred to one which makes void.").

Beehler v. Eastern Radiological Associates supports such a conclusion. Contrary to the Estate's argument, *Beehler* did not reject a "narrow" application of § 26-2-601(3). Cross-Appeal Answer at 23. Rather, the Court simply concluded that because the claim did not involve "technical details particular to either radiology or myelograms" but only general "infection control procedures," an infectious disease specialist could testify against a radiologist. *Beehler*, ¶¶ 25–27.

Here, the "technical details" particular to family medicine are front and center—this matter involves a family medicine physician treating a patient with a host of generalized symptoms, including but not limited to mild cardiac symptoms, and attempting to form a diagnosis and differential diagnosis in a pandemic setting. *See* Cross-Appeal Br. at 3–4; Doc. 1 ¶¶ 9–31[2]. Indeed, in its Complaint, the Estate

[2] Notably, the Estate's pleadings and own argument to this Court contradict its assertion in its Cross-Appeal Answer that "[f]undamentally, this case is about when a doctor should seek a cardiologist's input for a patient exhibiting symptoms of cardiac distress." Cross-Appeal Answer at 24; Appellant's Opening Br. at 2–3, Nov. 8, 2024.

alleges Dr. Council specifically deviated from the standards of care applicable to family practitioners. Doc. 1 ¶ 37 (Dr. Council "owed [Mr.] Norby the duty to provide care consistent with the skill and learning ordinarily used in like cases by board certified family practice physicians in good standing with the same board certification."). Applying the same analysis conducted in *Beehler* therefore only supports Dr. Council's argument that the District Court abused its discretion. *Beehler*, ¶¶ 25–27. Put simply, the standards of care *and practice* for cardiologists identifying and treating exclusively cardiac conditions upon referral from other medical providers is necessarily distinct from the standard of care for family practitioners diagnosing and treating conditions across all ranges of specialties.

Finally, as a practical matter, affirming the District Court's ruling would unfairly prejudice Montana family medicine physicians. Family medicine providers must base their treatment decisions on what symptoms are known when the patient presents to them, and on what host of potential diagnoses are most and least likely present based on those symptoms. This is an actual medical practice with its own, specific, actual standards. Family medicine is not, as the Estate would have it, merely a referral mill to hand-off patients to specialists absent a medically necessary, diagnosis supported, reason. Affirming the District Court's order would green-light medical specialists to provide after the fact testimony on how family practitioners should have handled a then unknown medical situation. The later-retained specialist

would then present this second guess to the jury with the benefit of their specialized training and hindsight knowledge of what actually medically occurred. The potential for unfair prejudice before the jury under this situation is obvious, but avoidable through a genuine inquiry conducted pursuant to § 26-2-601(3).

The District Court abused its discretion by failing to conduct the appropriate inquiry under § 26-2-601(3), and the Estate has failed to demonstrate otherwise. *Beehler*, ¶ 17(citations omitted). This Court should therefore reverse the District Court's order permitting Dr. Stauffer to testify on the standard of care applicable to family practitioners. Doc. 107.

III. CONCLUSION

For the foregoing reasons, the Estate has failed to meet its burden answering Dr. Council's cross-appeal. If the Court reaches the issues presented in Dr. Council's cross-appeal, it should reverse on both issues and remand for further proceedings in accordance with its opinion here.

Respectfully submitted this 16th day of May 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this brief is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 360 is 2,779 words, excluding caption, certificate of compliance and certificate of service.

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