

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

NO. DA 25-0148

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**SUMMER STRICKER, Personal Representative of the Estate of ALLEN J.  
LONGSOLDIER, JR.,**

Plaintiff-Appellant,

v.

**BLAINE COUNTY and HILL COUNTY,**

Defendants-Appellees,

**THE STATE OF MONTANA,**

Defendant.

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**APPELLEE BLAINE COUNTY'S RESPONSE BRIEF**

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On appeal from the Eighth Judicial District Court, Cascade County, Cause No.  
DV-7-2012-0937, the Honorable Robert Olson, Presiding

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## **STATEMENT OF THE ISSUES**

1. Whether the District Court abused its discretion in allowing Blaine and Hill Counties' (collectively "the Counties") physician expert witness to testify pursuant to § 26-2-601, MCA, when he retired more than five years prior to his trial testimony but was practicing in the relevant area on the date of injury.

2. Whether the District Court correctly denied Appellant, the Estate of Allen J. Longsoldier's ("Longsoldier Estate" or "the Estate"), motion to dismiss and/or motion for judgment as a matter of law concerning claims regarding settled and released party, Northern Montana Hospital ("NMH").

3. Whether wrongful death damages should have been considered by the jury.

4. Whether the District Court abused its discretion in not instructing on medical malpractice standards.

## **STATEMENT OF THE CASE**

This case arises out of a suit filed by the Longsoldier Estate following the death of A.J. Longsoldier on November 23, 2009. Longsoldier died at NMH in Havre, Montana of alcohol withdrawal syndrome after being incarcerated in the Hill County Detention Center ("HCDC").

The Longsoldier Estate initially filed discrimination claims before the Montana Human Rights Bureau (“HRB”) which, after exhausting all processes, were denied. The Estate then filed the instant tort action bringing only a survival action.

Longsoldier was a Blaine County detainee being held at the HCDC. The Estate alleged that the Counties failed to provide medical assistance to Longsoldier, resulting in his death. NMH settled with the Estate prior to trial. The Counties provided notice to NMH pursuant to § 27-1-703(6), MCA, that they would put on a settled party defense that Longsoldier’s alleged damages were caused in full or in part by NMH. NMH elected not to intervene or defend against the Counties’ defense in this action. Therefore, NMH was included in the verdict form.

Trial of the matter was held November 12-19, 2024. After deliberation, the jury issued its verdict awarding the Estate \$681,000 for survival damages, attributing 44% fault to NMH, 41% fault to Hill County, and 15% fault to Hill County. Appellant’s Appendix (“App.”) 2. Judgment was entered on December 12, 2024. Appellant’s App. 3.

### **STATEMENT OF FACTS**

Longsoldier was a teenage alcoholic who was on supervised probation under the Montana Youth Court until age 19. Final Pretrial Or. (“FPTO”) (Doc. 256)<sup>1</sup>

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<sup>1</sup> “Doc.” references the “Filing #” of a document as contained on the District Court’s case register transmitted to the Court on March 26, 2025.

(**Appendix A**) at 2, ¶ 1. Longsoldier was on Youth Court probation pursuant to a “consent decree” based on various misdemeanor and status offenses committed before he was 18 years-old. *Id.*, ¶ 2. On or about November 10, 2009, Longsoldier’s juvenile probation officer issued a Youth Court “pick-up and hold order” based on various alleged violations of the conditions of his consent decree. *Id.*, ¶ 3. Blaine County was requested to locate Longsoldier and execute the “pick-up” order, and subsequently located Longsoldier in Blaine County on November 19, arrested him, and transported him to the HCDC for detention pending further proceedings before the Youth Court. *Id.*, ¶ 4. At that time, Blaine County did not operate a county jail. Rather it contracted with Hill County by interlocal agreement for the detention of Blaine County detainees at HCDC. *Id.*, ¶ 5.

On the evening of November 21, 2009, HCDC personnel notified Blaine County that Longsoldier required transportation to NMH for evaluation. *Id.*, ¶ 6. At NMH, the attending emergency room physician failed to diagnose or treat Longsoldier with acute alcohol withdrawal syndrome. The physician instead: (1) misdiagnosed Longsoldier as suffering from depression and anxiety; (2) prescribed medication to treat those misdiagnosed conditions; and (3) released him from the hospital for return to HCDC. *Id.* at 3, ¶ 7. Blaine County accordingly transported Longsoldier back to HCDC for continued incarceration. *Id.*, ¶ 8.

When Longsoldier's condition continued to decline, approximately 6 hours later, Blaine County's dispatcher, Debbie Cornell, again contacted NMH, and NMH's nurse on duty, Neil Wiken, Ms. Cornell that Longsoldier was "playing them" and that Longsoldier was not physically ill. Trial Tr. (**Appendix B**) at 391:18-392:24; 1115:6-8.

Longsoldier's condition continued to worsen and on November 22, 2009, Longsoldier was taken back to NMH by ambulance where he died from acute alcohol withdrawal syndrome.

The Estate first filed a discrimination claim against the Counties and NMH in 2010. NMH settled with the Estate prior to the HRB contested case hearing in September of 2011. The decision of the hearing officer, finding no discrimination, was appealed and ultimately this Court upheld the finding of no discrimination. *Blaine Cnty. v. Stricker*, 2017 MT 80, 387 Mont. 202, 394 P3d. 159.

The Estate then filed this action against the State of Montana and Blaine and Hill Counties asserting claims of negligence. Pursuant to § 27-1-703(6)(f), in the Counties' Answers, they asserted the appropriate settled and released party defense. *See* Doc. 13 at 15; Doc. 14 at 9. Additionally, both Counties brought third-party claims against NMH for contribution and/or indemnity. *See* Doc. 13 at 18; Doc. 14 at 10.

The Estate moved for partial summary judgment against the Counties and the State of Montana asserting each Defendant had a non-delegable duty to provide Longsoldier with reasonable medical care and were vicariously liable for the medical negligence committed by NMH. *Stricker v. Blaine Cnty.* (“*Stricker II*”), 2019 MT 280, ¶ 7, 398 Mont. 43, 453 P.3d 897. The District Court granted the Estate’s motion as to Hill County, finding that Hill County was vicariously liable for NMH’s actions. The District Court also granted summary judgment to the State on liability and NMH on the Counties’ third-party claims. An interlocutory appeal by Hill County was taken and this Court reversed, finding that the District Court erred in finding Hill County vicariously liable for NMH’s actions. *Id.*, ¶ 1. Notably, no party appealed the rulings on summary judgment in favor of NMH or the State. *Id.*, ¶ 7 n. 2.

On remand, the Estate filed a motion for summary judgment against the Counties, and the Counties filed cross-motions. The District Court granted summary judgment for the Counties and the Estate again appealed. In the third appeal, this Court reversed the determination that the Estate’s negligence claim against Hill County was barred by principles of issue preclusion and reversed the decision that the Estate may not pursue a negligence claim against Blaine County but affirmed the District Court’s denial of the Estate’s motion for partial summary judgment on liability. The case was again remanded for further proceedings. *Stricker v. Blaine Cnty*, 2023 MT 209, ¶ 1, 414 Mont. 30, 538 P.3d 394. Specific to Blaine County,

the matter was remanded as to the narrow issue of whether Blaine County failed to transport Longsoldier. *Id.*, ¶ 42.

Following remand, according to § 27-1-703(6)(g), MCA, the Counties provided the requisite notice of their intent to pursue their settled and released party defense against NMH. *See* Doc. 259, Exhibit A.

In advance of trial, on November 4, 2024, the Estate submitted its proposed Jury Instructions. Doc. 254. The Estate proposed twenty-four instructions for the Court’s consideration. At issue here is the Estate’s proposal of instruction numbers 20 and 21, which while labeled as “Personal Injury” instructions, were actually Montana Pattern Instructions (“MPI2d”) 25.21 and 25.22 for wrongful death.

Trial was finally held in this case beginning on November 12, 2024. During the reading of preliminary jury instructions, the jury was instructed on the parties agreed facts, including the following:

13	“7. Upon emergency room examination at
14	the hospital, the attending ER physician
15	failed to diagnose or treat Acute Alcohol
16	Withdrawal Syndrome. The physician instead,
17	(1) misdiagnosed him as suffering from
18	depression and anxiety; (2) prescribed
19	medication to treat those misdiagnosed
20	conditions; and released him from the
21	hospital for return to the Hill County
22	Detention Center.

App. B at 203:13-22. During opening statements, Longsoldier's counsel told the jury that NMH "took responsibility" and paid a settlement to Longsoldier's Estate for NMH's role in his death. *Id.* at 214:20-23.

Additionally, NMH's witnesses who testified at trial admitted to NMH's negligence and conceded that NMH chose not to participate in the trial as a settled party. For example, Dr. Ronald Peterson, the emergency room physician who treated Longsoldier, admitted that his medical examination and notes of Longsoldier were incomplete. App. B at 1410:1-1412:21. Dr. Peterson further conceded that Nurse Wiken violated NMH policy in his care of Longsoldier and that Nurse Wiken's advice to the Counties was inadequate. *Id.* at 1412:22-1413:23. Dr. Peterson also testified that it was appropriate for the Counties to rely on the advice of NMH staff, and he did not disagree with the Counties' expert, Dr. Thomas Bulger's, opinion on this topic. *Id.* at 1413:24-1414:14; 1446:11-1447:5. Dr. Peterson also admitted that he read the Counties' disclosure of Dr. Bulger's opinions regarding NMH's negligent care and **did not disagree**. *Id.* at 1444:24-1445:10.

Dave Henry, CEO of NMH, also admitted during his testimony that NMH's settlement covered the conduct of Dr. Peterson and Nurse Wiken. *Id.* at 1080:21-1081:12. Mr. Henry acknowledged that NMH was given notice of the settled party defense and that NMH had the opportunity to participate in the trial but chose not to because NMH had settled its claim. *Id.* at 1078:22-1080:2.

NMH Nurse Wiken admitted breach of NMH’s policies by giving medical advice over the phone, admitted NMH’s failure to dispense medications when Longsoldier was discharged from the hospital, and admitted that his advice that Longsoldier was “playing them” and his statement that Longsoldier was not ill were wrong. In fact, Nurse Wiken admitted that at that time he saw Longsoldier he considered 50% of jail inmates brought to the ER to be “crying wolf”—and were simply attempting to get out of their cell. Nurse Wiken conceded that was his mindset when he saw Longsoldier. *See generally*, App. B at 1100-1116.

During trial, on November 15, 2024, the Counties presented the testimony of expert witness Dr. Tom Bulger. At the time of Longsoldier’s November 2009 death, Dr. Bulger was a board-certified emergency physician, with board certifications in emergency medicine, internal medicine, and addiction medicine. Dr. Bulger practiced medicine for 35 years. Dr. Bulger served as the head of the Addiction Treatment Program at St. Patrick’s Hospital in Missoula, and as part of his practice, was familiar with patients that came in with alcohol withdrawal syndrome. App. B at 1160:18-1161:3, 1162:6-21.

The Estate’s counsel objected to Dr. Bulger’s testimony because by the time this case finally was tried, Dr. Bulger was retired, had not been practicing in the past five years, and it was the Estate’s position he was unqualified under § 26-2-601, MCA. *See* Tr. Expert Witness Argument (Nov. 15, 2024) (**Appendix C**) at 2:19-

4:5.<sup>2</sup> During a sidebar, the District Court overruled the Estate’s objection. *Id.* at 5:20-6:3.

During his testimony, Dr. Bulger testified that when Longsoldier was seen at NMH he was demonstrating “significant alcohol withdrawal problems” and was “surprised” that Dr. Peterson did not recognize Longsoldier’s symptoms as someone being in alcohol withdrawal, as it was “not a difficult diagnosis.” Dr. Bulger noted that Longsoldier’s symptoms “were much more severe than ... the average person you see in the emergency room.” It was Dr. Bulger’s opinion that Dr. Peterson breached the standard of care when he failed to diagnose Longsoldier in alcohol withdrawal syndrome and treat him accordingly. It was also Dr. Bulger’s opinion that it was error for NMH to return Longsoldier to HCDC. App. B at 1169:19-1172:7, 1178:14-16.

Dr. Bulger also testified that Nurse Wiken’s communication with Blaine County’s dispatcher was “catastrophic” because Longsoldier needed more intense medical care and Nurse Wiken discouraged the Counties from properly assessing and bringing Longsoldier in for treatment. Dr. Burger further opined that Nurse Wiken’s statement that there was nothing medically or physically wrong with

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<sup>2</sup> This transcript was filed separate from the trial transcript as the audio recording of the sidebar was not provided to Court Reporter Rachael Parra by the trial Court Reporter Karie Cuellar and was thus not included in the Transcript of Proceedings on Appeal. App. B at 1163:16-20. Thus, Ms. Cuellar prepared a separate transcript of this audio recording which is attached for easy reference at App. C.

Longsoldier was “very harmful” and it was problematic that Nurse Wiken was giving medical instructions over the phone. He noted NMH’s failure to diagnose and properly treat Longsoldier “set the chain of dominos.” Dr. Bulger further took issue with NMH’s failure to diagnose Longsoldier with alcohol withdrawal when he was brought in the second time, and in fact noted that NMH never diagnosed Longsoldier with alcohol withdrawal, which in his opinion was a “surprising miss.” *Id.* at 1181:9-1185:25. In fact, it was Dr. Bulger’s opinion that Longsoldier was never properly diagnosed at NMH up until the time of his death. *Id.* at 1236:12-16.

It was also Dr. Bulger’s opinion that Dr. Peterson’s prescription of Ativan to treat Longsoldier “was grossly inadequate”. *Id.* at 1186:13-18. It was Dr. Bulger’s opinion that Nurse Wiken breached the standard of care in treating Longsoldier. Dr. Bulger also testified that it was his opinion Nurse Wiken had been given sufficient information by the dispatcher of Longsoldier’s condition to make the recommendation to bring Longsoldier back to the hospital. *Id.* at 1194:7-19.

A day after Dr. Bulger completed his testimony, on November 16, 2024, the Estate filed its Motion to Exclude Dr. Bulger and Dismiss Claims Against NMH. Doc. 272. On November 17, the Estate also filed a Motion for Judgment as a Matter of Law Regarding NMH. Doc. 274. Following briefing by the parties, the District Court denied both motions. App. B at 1495:15-1496:13.

The parties settled jury instructions and the verdict form on November 18. During the settling of instructions, the Estate’s counsel withdrew many of its proposed instructions, including two wrongful death instructions. App. B at 1477:9-11. Additionally, the Estate asserted a generic objection the Court’s intent to adopt the Counties’ jointly proposed special verdict form, because the Estate “would rather the court submit Plaintiff’s proposed verdict form.” App. B at 1489:7-10. The Estate’s counsel then proceeded to generally argue that the order in which the questions were asked about individual parties should be reorganized and damages should be itemized. *Id.* at 1489:11-9.

As noted above, following six days of trial and three hours of deliberation (App. B 1613:20-22), the jury issued its verdict awarding the Estate \$681,000 for survival damages, attributing 44% fault to NMH, 41% fault to Hill County, and 15% fault to Hill County. Appellant App. 2. Judgment was entered on December 12, 2024, awarding the Estate \$102,150 against Blaine County and \$279,210 against Hill County. Appellant’s App. 3.

### **STANDARDS OF REVIEW**

District courts are vested with great latitude in ruling on the admissibility of expert testimony. Absent a showing of an abuse of discretion, this Court will not overturn a district court’s determinations on evidentiary matters. *State v. Hocevar*, 2000 MT 157, ¶ 54, 300 Mont. 167, 7 P.3d 329 (citation and quotation marks

omitted). “A court abuses its discretion if it acts arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *State v. Derbyshire*, 2009 MT 27, ¶ 19, 349 Mont. 114, 201 P.3d 911. However, to the extent an evidentiary ruling is based on interpretation of an evidentiary rule or statute, the review is de novo. *Id.*

The District Court’s decision to grant or deny a motion for judgment as a matter of law is a question of law and therefore is reviewed de novo. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727. Judgment as a matter of law is proper only when there is a complete absence of any evidence justifying submission of an issue to the jury; all such evidence and any legitimate inferences that might be drawn from the evidence must be considered in the light most favorable to the party opposing the motion. *Id.*, ¶ 13.

Use of a special verdict form is left to the discretion of the trial court. “While it is within the trial court’s discretion to structure the form and frame the questions of a special verdict, the interrogatories must be adequate to enable the jury to determine the factual issues essential to judgment.” *Baldauf v. Arrow Tank & Eng’g Co.*, 1999 MT 81, ¶ 49, 294 Mont. 107, 979 P.2d 166 (citations omitted).

Decisions on jury instructions are within the trial court’s discretion; decisions of the trial court will be reversed only if the lower court has abused its discretion. *Chechovic v. Hardin & Assocs.*, 273 Mont. 104, 116, 902 P.2d 520, 527 (1995).

When reviewing a trial court’s decision on jury instructions, this Court considers the “instructions in their entirety and in connection with other instructions given and the evidence introduced at trial.” *Story v. City of Bozeman*, 259 Mont. 207, 222, 856 P.2d 202, 211 (1993) (overruled on other grounds).

### **SUMMARY OF THE ARGUMENT**

This fourth appeal is yet another effort by the Estate for the Court to reconsider and exclude the testimony of Dr. Bulger, while at the same time argue there was no evidence of negligence by an expert to support the settled and released party defense claims against NMH. The District Court’s rulings at trial and post-trial, under the facts and law, were appropriate and should not be overturned on appeal.

First, the District Court properly ruled that Dr. Bulger was qualified to testify because he met the five-year requirement under § 26-2-601(1)(a), MCA. Furthermore, the Estate raises for the first time on appeal the argument that Dr. Bulger’s testimony should have been excluded under § 26-2-601(1)(b), MCA. Even if such an argument was proper to raise now, the Estate’s argument is solely based on Dr. Bulger’s lack of using two words—“thoroughly familiar”, a complete lack of legal support, and a factual record which directly contradicts the unsupported argument of counsel.

Furthermore, the claims against NMH, which were presented as a settled party defense (and not a medical malpractice claim) were properly submitted to the jury

for consideration. The Estate inaccurately asserts that the claim against NMH should have been dismissed from the case by arguing that expert testimony was required to establish medical malpractice—which is a clear failure of the Estate to recognize that the medical malpractice claim had been dismissed long before trial when Longsoldier settled with NMH. The Counties, after the settlement between Longsoldier and NMH, sent notice of their settled and released party defense in compliance with the statute.

Substantively, the Estate’s argument regarding NMH is also flawed for additional reasons. First, the Estate agreed that the care of NMH was deficient and negligent; second, the Estate’s counsel told the jury that NMH took responsibility for its care and settled; third, all of NMH’s witnesses admitted the negligence of NMH; fourth, Dr. Bulger was well qualified and testified that NMH’s care was “catastrophic” and that NMH failed to diagnose and properly treat Longsoldier.

The Estate also claims error for the failure of the District Court to instruct the jury on wrongful death. Importantly, the Estate: (1) did not plead a claim of wrongful death; (2) admitted in responses to discovery that it was not seeking wrongful death damages, (3) did not assert a claim of wrongful death in the FPTO; (4) admitted in argument during trial this was a survival action; and (5) withdrew proposed wrongful death instructions during the settling of jury instructions.

Furthermore, this appeal fails because there was no medical malpractice case before the jury and because the Estate never included any medical malpractice instructions in Plaintiff's Proposed Jury Instructions. During settling of instructions, Longsoldier's counsel only verbally inquired with the District Court about submitting two medical malpractice instructions but failed to consult opposing counsel as required by the Court and never raised the issue the next morning nor offered any medical malpractice instruction thereby abandoning the request.

### **ARGUMENT**

#### **I. THE DISTRICT COURT CORRECTLY ALLOWED DR. BULGER TO TESTIFY.**

The Estate mistakenly asserts that the District Court erred in not striking Dr. Bulger's testimony because he was not qualified under § 26-2-601(1)(a), MCA and -601(1)(b).

##### **A. Dr. Bulger was Actively Practicing as a Board-Certified Emergency Physician at the Time of NMH's Negligent Care and Longsoldier's Death.**

The Estate challenges the testimony of Dr. Bulger and the District Court's decision to allow his testimony under § 26-2-601(1)(a), MCA. Specifically, the Estate argues that the court's interpretation of this statute is incorrect because it improperly added words to the statutory language requiring that the witness testifying in a medical negligence case must have been in practice during the five years before the incident giving rise to the lawsuit.

Section 26-2-601(1)(a), MCA provides that a person may not testify as an expert witness on issues relating to negligence and standard of care in medical malpractice claims unless he, *inter alia*:

[I]s licensed as a health care provider in at least one state and routinely treats or has routinely treated **within the previous 5 years the diagnosis or condition** or provides the type of treatment that is the subject matter of the malpractice claim or is or was within the previous 5 years an instructor of students in an accredited health professional school or accredited residency or clinical research program relating to the diagnosis or condition or the type of treatment that is the subject matter of the malpractice claim . . .

(emphasis added). In Montana, courts should:

[I]nterpret a statute first by looking to the statute's plain language, and if the language is clear and unambiguous, no further representation is required. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.

*State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.2d 1288. Adopting the Estate's argument here would lead to "absurd results."

The plain language of § 26-2-601(1)(a), MCA, provides that the practice requirement is within the five years preceding the diagnosis or condition—not within five years prior to the expert's testimony at the time of trial. Importantly, the plain language of the statute refers to the diagnosis or condition and does not reference the time of trial. The District Court correctly interpreted this requirement.

It is illogical to require Dr. Bulger to have practiced within five years of the trial rather than five years of Longsoldier's death. The relevant standard of care that

must be proven is the one existing at the time of NMH’s negligence. *See Dalton v. Kalispell Reg. Hosp.*, 256 Mont. 243, 247, 846 P.3d 960, 962 (1993) (policies enacted four months after the alleged breach do not establish the standard of care at the time of the injury); *Hall v. Rocky Mtn. Emergency Physicians, LLC*, 312 P.3d 313, 326 (Idaho 2013) (standard of care is determined at the time of breach). It logically follows that § 26-1-601, MCA demands expert witnesses with professional experience based upon and tied to the time of the treatment in question. *See Petrou v. S. Coast Emer. Grp.*, 119 Cal. App. 4th 1090, 1094 (Cal. Ct. App. 2004); *see also Roukounakis v. Messer*, 826 N.Ed.2d 777, 780 (Mass. 2005) (finding that when submitting a medical negligence claim to the jury in a case against a radiologist, the patient needed an opinion from a radiology expert practicing in the specialty at the time of defendant radiologist's alleged negligence).<sup>3</sup>

The obvious purpose of § 26-2-601, MCA is for a qualified expert to have knowledge of the standard of care during the time of the injury. Montana’s own pattern jury instruction regarding medical malpractice—that the Estate argues the District Court erred in not giving (MPI2d 3.07)—supports this position as it specifically instructs that: “In determining whether the doctor was negligent in performing professional services the **proper test** is whether the doctor's performance

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<sup>3</sup> As addressed in Hill County’s response briefing, many other states addressing the period in which expert witnesses must have been engaged in practice define the period in reference to the time of the alleged negligent act.

met the accepted standards of skill and care **at the time the services were provided.**” (emphasis added).

In many instances, such as here, the acts which are the subject of the lawsuit will have occurred more than five years before a case is tried. If this Court were to interpret the statute to require use of the trial date as the controlling deadline, as the Estate maintains, it is possible that an expert who has been providing services in an emergency room for five years preceding trial would not have even worked in an emergency room at the time of the injury. This would defy logic that an expert would be qualified to opine on the standard of care applicable to the injury in question based upon a period of time in which they did not work.

The time of the injury and applicable standard of care, unlike the time of the filing of an expert report or the time of trial, is a fixed point and not subject to change over the course of the litigation; particularly since the present trial was delayed several years by the Estate’s unsuccessful HRB action and the multiple appeals. Using the time of the injury as a focal point avoids the specious situation which could arise where an expert who met the statutory requirements as of the time of the alleged negligence and who provided an expert report before retirement and was prepared to testify at trial could become “unqualified” if the trial were postponed to a date more than five years after his retirement. *Spotts v. Small*, No. CI-98-00700, 2003 WL 22212060 at \*237 (Pa. Commw. Ct. Apr. 2, 2003).

Dr. Bulger was practicing as a board-certified emergency, internal, and addiction medicine physician at the time of the negligence of NMH and Longsoldier's death in 2009. Emergency medicine was the focus of his practice. He treated patients suffering from alcohol withdrawal in the ER. App. B at 1160:18-1162:21. Dr. Bulger clearly met the requirements of being a licensed health care provider who routinely treated "within the previous 5 years the diagnosis or condition." *See* Mont. Code Ann. § 26-2-601(1)(a).

**B. Dr. Bulger was Qualified and Familiar with the Standards of Care and Practice at the Time of NMH's Negligent Care and Longsoldier's Death.**

For the first time on appeal, the Estate now raises § 26-2-601(1)(b), MCA, and argues, that at trial, Dr. Bulger did not testify that he was "thoroughly familiar" with the standards of care and practices as they existed in November 2009. The Estate did not, and cannot, cite any authority supporting this argument. While, Dr. Bulger may not have used the magic words of "thoroughly familiar" in his testimony, the record is clear from his testimony that he was competent and familiar with the standards of care and practice as they related to NMH's omissions in November 2009. Furthermore, it is disingenuous for the Estate to now argue this when the Estate itself identified Dr. Bulger as a witness that it would present and have testify. App. A at 17, ¶ 9.

Moreover, the Estate did not object on this basis,<sup>4</sup> therefore it did not preserve the issue for appeal. *State v. Lewis*, 2012 MT 157, ¶ 22, 365 Mont. 431, 282 P.3d 679 (“It is well settled that ‘[a] party may not ... raise an argument for the first time on appeal.’”) (citations omitted). It would be unfair to the District Court for this Court to now entertain the Estate’s objection when the District Court was not given the opportunity to weigh in at the time of trial. *State v. Dewitz*, 2009 MT 202, ¶ 30, 351 Mont. 182, 212 P.3d 1040 (“[I]t is unfair to fault the trial court on an issue it never had the opportunity to consider.”). Review of the transcript of the sidebar in which the Estate’s counsel raised his objection to Dr. Bulger’s testimony (App. C) and the Estate’s subsequent motion to dismiss (Doc. 272) demonstrate that the Estate never took issue with Dr. Bulger’s testimony and its alleged failure to satisfy § 26-2-601(1)(b), MCA. To entertain this argument now would be improper.

**C. Even For the Sake of Argument if Dr. Bulger was Not Qualified to Testify, The Estate Was Not Harmed.**

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<sup>4</sup> It is no surprise that the Estate once again attempts to raise new issues, as it has been its practice to remain silent regarding objections to Dr. Bulger. The Estate was aware that the Counties intended to call Dr. Bulger as an expert witness in this matter since May 8, 2013, when he was disclosed in Blaine County’s discovery responses. What’s more, Dr. Bulger testified live as an expert at the September 2011 HRB contested case hearing and was deposed in April 2018 following his disclosure in the civil case. The Estate was given the opportunity on two separate occasions to cross-examine him. Dr. Bulger was also named as a witness when this case was set to go to trial in 2018. The Estate had years prior to the November 2024 trial to object to Dr. Bulger.

Further, in advance of trial, Dr. Bulger was named as an expert witness in the FPTO, and notably, the Estate itself named Dr. Bulger as one of its witnesses and confirmed with Defendants that “[t]hey will bring Dr. Bulger as their witness.” App. A at 17-18. Yet, not in the FPTO, nor pretrial briefing, did the Estate ever claim that Dr. Bulger was not qualified to testify as an expert witness in this matter.

In this case, the Estate admitted on numerous occasions that NMH was negligent. App. A at 3, ¶ 7; App. B at 214:19-25 (“At the ED-- you heard the stipulation that the hospital settled. And what that means is **the hospital took responsibility and the Plaintiff, the Estate, and the hospital made a settlement for their role in this timeline.**” (emphasis added)). NMH’s own witnesses’ admissions of their improper conduct further confirmed NMH’s negligence. Thus, it was unnecessary for the Counties to even call a standard of care expert to establish the negligence of NMH. NMH’s negligence was established even without Dr. Bulger’s testimony and it would be error for the Court to reverse this case and remand for another time.

## **II. THE COURT CORRECTLY DENIED THE ESTATE’S MOTIONS REGARDING NMH.**

The Estate also argues the District Court erred in denying its motion to dismiss and motion for judgment as a matter of law on the claims against NMH. This argument is in error for several reasons. First, the Estate incorrectly argues that the Counties filed third-party medical malpractice claims against NMH. Appellant’s Br. at 4. This is not true—the Counties filed third-party contribution and indemnity claims against NHM. Doc. 13 at 18; Doc. 14 at 10. Moreover, on February 2, 2015, NMH was granted summary judgment on the third-party contribution and indemnity claims respectively asserted by the Counties. *See* Doc. 39 at 65-68. No party appealed this ruling. *See Stricker II*, ¶ 7 n. 2 (NMH third party and indemnity not at

issue before the Court). Accordingly, the third-party complaints the Estate is critical of ended over ten years ago when NMH was granted summary judgment. There was no need for the District Court to consider whether to dismiss NMH as a party to the third-party complaints because they were not pursued in this matter after 2015. Thus, the District Court could not have erred in not dismissing claims that did not exist at the time of the motion.

### **III. THE DISTRICT COURT DID NOT SUBMIT A FLAWED SPECIAL VERDICT FORM**

The Estate argues the District Court erred in submitting a special verdict form to the jury which “failed to ask for the amount of damages arising from Longsoldier’s wrongful death, including damages for lost course of life.” Appellant’s Br. at 17. Importantly, the Estate misstates the record – wrongful death damages were never sought.

First, the Estate made no claim of wrongful death in its Complaint and Demand for a Jury Trial. *See* Doc. 1. Moreover, in discovery, the Estate admitted that they are not seeking wrongful death damages and that the only damages they sought were survival damages. Specifically, more than six years before trial in the Estate’s July 5, 2018, Responses to Hill County’s First Discovery Requests, Interrogatory No. 3, the Estate:

**INTERROGATORY NO. 3:** Please identify every living person you claim is entitled to damages because of the death of Allen John Longsoldier, Jr. and state in detail and with particularity damages you allege each person suffered as a result of the death of Allen John Longsoldier, Jr.

**ANSWER:** Although Mr. Longsoldier is survived by his mother, Dayna Bear, and siblings, we are not claiming damages for the loss of consortium; comfort; guidance; loss of aid and those types of damages that inure to the surviving heirs. The Estate is entitled to damages for the loss of earnings and pain and suffering.

Doc. 302 at 3. The Estate also made no claim of wrongful death damages in the FPTO, instead the Estate made clear that it only sought damages that the Estate is entitled to, not other individuals. App. A at 7.

Wrongful death damages were also the topic of discussion outside of the jury following antics by Longsoldier's family members. During discussion with the court, the Estate's counsel specifically confirmed "this is a survival action." App. B at 935:19-20. Furthermore, while the Estate initially proposed wrongful death damage jury instructions<sup>5</sup>, the Estate later withdrew these instructions during the settling of instructions. App. B at 1477:9-11. Putting aside the fact that a claim for wrongful death was never made, the Estate's withdrawal of said jury instructions, further waives its right to challenge the issue now on appeal. *Turk v. Turk*, 2008 MT

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<sup>5</sup> See Doc. 254, proposed Jury Instructions 20 and 21.

45, ¶ 17, 341 Mont. 386, 177 P.3d 1013 (the defendants withdraw of proposed jury instructions prevented defendant from challenging the issue on appeal).

The Estate’s briefing also cites the *Hern* decision for the position that the verdict form should have allowed for the award of loss of established course of life damages. The Estate, however, overlooks the fact that “damages of loss of established course of living are not recoverable in survivor actions.” *Hern v. Safeco Ins. Co. of Ill.*, 2005 MT 301, ¶ 39, 329 Mont. 347, 125 P.3d 597.<sup>6</sup>

Lastly, this Court has made it clear that objections to special verdict forms “must be specific, and must state with particularity the grounds upon which they are made.” *Turk*, ¶ 16 (citing Mont.R.Civ. P. 51; other citations omitted). The Estate’s failure to object to the verdict form on the issue of damages waives its right to challenge it on appeal. *Id.* (citation omitted). As addressed above, the Estate’s opposition to the verdict form does not meet this specific and particularity requirement. Rather, the only specific objection the Estate made was as to the order of how the parties were listed on the verdict form, which the Court granted over the Counties’ objection. App. B at 1489:12-15, 1490:6-1491:3. Following that, the Estate only generically asserted damages should be itemized (*id.*, 1489:15-19), but

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<sup>6</sup> It is important to note that the Estate did not even propose as a jury instruction the pattern instruction on established course of life – MPI2d 25.08. *See* Doc. 254. Thus, if the jury was not instructed on this as a damage, how could they have been expected to address it on the verdict form.

provided no specificity on the grounds for such objection. This is improper and the District Court did not abuse its discretion in rejecting such request.

#### **IV. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY.**

The Estate also argues the District Court erred when it failed to instruct the jury regarding “the counties’ allegations of medical malpractice against NMH.” Appellant’s Br. at 24. First, this appeal issue relies entirely on the incorrect premise that the Counties sued NMH for malpractice. As discussed above, that is incorrect, NMH was on the special verdict form as a settled and released party pursuant to notice given under § 27-1-703(6), MCA. NMH had been dismissed years earlier when it settled the medical malpractice claim brought by Longsoldier. Therefore, medical malpractice instructions would have been improper.

Nor could the Counties have brought a medical malpractice action. The law is clear that medical malpractice is brought by a patient against a health care provider. *See* § 27-6-103(6) (defining medical “malpractice claim” as “a claim or potential claim **of a claimant** against a health care provider for medical or dental treatment, lack of medical or dental treatment, or other alleged departure from accepted standards of health care that proximately results in damage to the claimant, whether the claimant's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.” (emphasis added)). The Counties were not damaged by NMH’s medical treatment—

Longsoldier was the claimant. Rather, the Counties asserted that NMH's negligence caused Longsoldier's injuries for which the Estate sought compensation.

Moreover, the Estate's briefing misrepresents the record before the Court that the Estate offered medical malpractice instructions. This is incorrect. First, the Estate's proposed Jury Instructions submitted to the District Court did **not** contain any medical malpractice instructions. *See* Doc. 254. Instead during the settling of instructions, the Estate's counsel<sup>7</sup> requested the District Court include Montana pattern instruction 3.01 and 3.07,<sup>8</sup> and the Court reserved ruling on this proposal until the next morning:

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<sup>7</sup> Mr. Potts was not trial counsel and did not attend the hearings on motions or settling of instructions.

<sup>8</sup> The irony cannot be lost here that the Estate believes it was error for the District Court to not instruct on MPI2d 3.07 which provides: "In determining whether the doctor was negligent in performing professional services the proper test is whether the doctor's performance met the accepted standards of skill and care **at the time the services were provided.**" (emphasis added). This very instruction goes against the Estate's entire argument seeking to exclude Dr. Bulger.

20 THE COURT: Okay. The Court is  
21 giving. For the Court will not rule on the  
22 additional requested instructions you want  
23 at this time, it's my understanding that the  
24 parties are going to discuss it tonight and  
25 we may have a stipulation. If not, I think

1 it's a good idea for us all to be here at  
2 nine o'clock in the morning and talk about  
3 any issues that may come up.

4 But we can argue that, and the Court will  
5 make a decision tomorrow morning on just  
6 those two additional instructions if I need  
7 to.

8 MS. CROSBY: Okay. Your Honor,  
9 we'll talk and see if we can come to a  
10 stipulation on those.

App. B at 1481:4-1482:10.

The Counties counsel exchanged a proposed stipulated instruction with the Estate's counsel that evening as requested by the Court, but there was no response from the Estate's counsel, nor did the Estate's counsel offer any medical malpractice instruction the morning of November 19, 2019. *See generally*, App. B at 1495:11-1496:25. Because the Estate never followed through, and never properly requested these instructions, there can be no error on the part of the District Court. *See* Mont.R.Civ.P. 51(d)(1) (For jury instructions, a party may assign as error (a) "an

error in an instruction actually given, if that party properly objected;” or (b) “a failure to give an instruction, if that party **properly requested** it **and** – unless the court rejected the request in a definitive ruling on the record – also **properly objected.**” (emphasis added)).

Additionally, even if the Court finds that the Estate properly requested the District Court give the malpractice instructions, there was no prejudice to the Estate when said instructions were not given. “In reviewing whether a particular jury instruction was properly given or refused, this Court must consider the instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial.” *TCF Enters., Inc. v. Rames, Inc.*, 2024 MT 38, ¶ 49, 415 Mont. 306, 544 P.3d 206 (citation omitted). It is the Estate’s burden to demonstrate “prejudice from the erroneous instruction.” *Id.* (citation omitted). “An erroneous instruction is not prejudicial where it appears that, even without the instruction, the same verdict would have been reached.” *Id.* (citations and quotations omitted).

Here, proper instructions on settled party, negligence, burden of proof, and how to apportion any negligence were given to the jury. *See* Doc. 281 (Instruction Nos. 17, 18, 23, 34). In fact, the Counties even proposed a jury instruction<sup>9</sup> clearly outlining their burden of proof as it relates to proving NMH’s negligence, which was

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<sup>9</sup> *See* Doc. 257, proposed Jury Instruction No. 4.

not objected to by the Estate. App. B at 1481:4-11. The pattern instructions on medical negligence are not materially different than the instructions given to the jury, in which a verdict in favor of the Estate resulted, and thus there was no prejudice to the Estate.

### CONCLUSION

The issues raised on appeal by the Estate are not supported by the facts, the record, or the law. The rulings by the District Court during trial were supported, were appropriate, and clearly withstand appellate review under applicable standards of review. The November 19, verdict rendered by the jury and the December 12, 2024, Judgment entered should not be overturned. The Estate has been afforded substantial due process over the fifteen years of this litigation. This matter should be put to bed, and the Judgment should be affirmed.

DATED this 8<sup>th</sup> day of December, 2025.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, using proportionately spaced 14-point of Times New Roman font that the foregoing brief contains 6648 words excluding the caption and Certificate of Compliance as required by M.R.App.P. 11(4)(a).

DATED this 8<sup>th</sup> day of December, 2025.

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