DA 22-0062

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 242

JOHN BREUER,

Plaintiff and Appellee,

v.

STATE OF MONTANA,

Defendant and Appellant.

APPEAL FROM: District Court of the Third Judicial District,
In and For the County of Powell, Cause No. DV-16-23
Honorable Ray J. Dayton, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Andres N. Haladay, Risk Management & Tort Defense Division, Helena, Montana

Paul R. Haffeman, Davis, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana

For Appellee:

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Submitted on Briefs: November 2, 2022

Decided: December 19, 2023

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 Defendant State of Montana (State), by and through the University of Montana, appeals the 2021 final judgment of the Montana Third Judicial District Court, Powell County, on a $510,343.05 compensatory damages jury verdict in favor of Plaintiff John Breuer (Breuer) based on his negligence-based respondeat superior motor vehicle accident claim against the State. We address the following restated issue:

> *Whether the District Court erroneously excluded impeachment evidence in re Breuer's prior back injury and related pre-accident disabilities and pain as alternate cause evidence rebutting/negating his asserted sole cause evidence?*

Reversed and remand for a new trial on the causation and damages elements of Breuer's pain/suffering and loss of established course of life claims.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In July 2005, Breuer suffered a career-ending back injury (lumbar spine injury) when operating a heavy grinder while working as a railroad track section laborer. In 2007, he applied to the federal Railroad Retirement Board (RRB) for available railroad disability/retirement benefits based on his claim that he was permanently disabled as a result of his 2005 railroad injury. Upon review of his claim, supporting medical records, and a physician-conducted functional capacity evaluation (FCE), the RRB approved his claim based on its determination that he was "totally and permanently disabled" for purposes of performing "past relevant [railroad] work," to wit:

> [A July 2006] MRI showed degeneration and bulging L2-3-4-5 [discs]. . . . [A 2007 FCE indicated that Breuer] was limited to lifting or carrying up to 20 lbs. occasionally and up to 10 lbs. frequently. Other physical restrictions include: Unable to walk on uneven terrain, sitting at

> least 6 hours in an 8 hour workday, standing at lease 6 hours in an 8 hour workday, walking at least 6 hours in an 8 hour workday, balancing frequently, climbing ladders occasionally, climbing stairs frequently, crawling occasionally, crouching occasionally, kneeling frequently, [and] stooping occasionally. . . . [The employee's] regular *railroad occupation as a track laborer* as he describes the job calls for frequent more than medium lifting of at least 50 pounds, and walking on uneven terrain. [He] *cannot perform these tasks*. . . . The employee is *not able to do past relevant work* . . . [and] is . . . [*thus*] *totally and permanently disabled*.[1]

(Emphasis added.)

¶3 In January and May 2011, following extensive post-injury chiropractic treatment for "lower back" and "leg pain" in 2010-11, Breuer underwent two lumbar spine surgeries (L-4 through S-1), followed by post-op physical therapy. On a subsequent physical therapy intake form in 2011, Breuer reported that he was still completely "unable to" perform or engage in "walking long distances, hopping, jumping, running, lifting, [and] carrying." He reported that he could perform or engage in certain functions or activities (i.e., "lying flat, rolling over, sitting, squatting, bending/stooping, pushing, pulling, [and] reaching") only "with much difficulty." He further reported that he could perform or engage in certain other functions or activities (i.e., "moving lying to sitting, balancing, kneeling, walking short distances, walking outdoors, [and] climbing stairs") only "with moderate difficulty." On the intake form checklist, Breuer did not identify any daily activity that he could do either "with little difficulty" or "without any difficulty." Upon consideration of Breuer's

[1] At some point, after reporting his 2005 railroad injury, Breuer also confidentially settled a compensatory damages claim against his railroad employer under 45 U.S.C. § 51 (Federal Employers' Liability Act).

reported pain and functional limitations, and evaluative clinical examination, the physical therapist noted, *inter alia*, that Breuer had "very limited lumbar spine flexibility"; "pain with back extension," "symmetrical side bending," and "any rotation to either side"; was "unable to walk further than several hundred feet" and "unable to stand for more than 3 or 4 minutes without having back pain"; was "only able to reach his hands down just below his belt line"; had "trunk weakness, loss of flexibility of the extremities[] and low back"; and had "[d]egenerative joint disease" and "pain from damage to the sciatic nerve that will take a long time to heal." In addition to his earlier treatment for "lower back" and "leg pain," Breuer again sought and obtained chiropractic treatment in mid-2012 for reported "neck" and "mid-back" pain.

¶4 On January 11, 2013, the 61-year-old Breuer and his wife were driving on a highway outside Lincoln, Montana, when an oncoming vehicle slid across the center line on an icy curve and collided with the Breuer vehicle. The other driver was a student-employee of the University of Montana (UM) driving a state vehicle. Breuer later reported that his driver-side airbag deployed in the collision and violently wrenched his right arm backward. Upon ambulance transport to a Helena hospital, an emergency room physician diagnosed him with a "right shoulder sprain/strain."[2]

[2] Breuer's wife sustained three broken ribs in the accident, also received ambulance transport to a Helena hospital, and was originally a party-plaintiff in this action. She was later dismissed from the action in 2018 pursuant to a claim settlement with the State.

¶5 In late January 2013, Breuer sought treatment from his long-time primary care physician for upper body pain and muscle aches.[3] Upon examination, an attending physician's assistant diagnosed him with a "whiplash" injury of his cervical spine. In March 2013, Breuer obtained further chiropractic treatment for continuing headaches and neck, upper back, and shoulder pain. He also returned to his primary care physician and reported worsening shoulder pain associated with activity. Upon examination, the physician diagnosed him with a "right rotator cuff strain." He thereafter received additional chiropractic treatment into May 2013 for pain and range of motion limitations consistent with a shoulder "rotator cuff injury."

¶6 In September 2013, Breuer returned to his primary physician and reported continuing shoulder pain. Subsequent MRI imaging revealed, *inter alia*, a partial tear in his right rotator cuff.[4] The physician referred him to an orthopedic surgeon who upon examination treated him with interim steroid injections but ultimately recommended a reparative shoulder surgery. Seven months later, Breuer sought a second opinion from

[3] Prior to the accident, Breuer and his wife owned and operated a 998-acre hobby ranch near Dixon, Montana. While they sold their herd in 1991, and have since leased acreage to a family member for cattle grazing, the lease agreement requires them to maintain fences and irrigate their pasture land. Breuer testified that, prior to the accident, he manually irrigated up to 55 acres, but has since been able to irrigate only 15 acres, and then only with help from his wife.

[4] His physician later testified that the MRI revealed "a partial tear through the supraspinatus muscle," a "possible tear of the labrum," "tendon swelling," and swelling/inflammation of the "acromial clavicular joint" (AC joint), which would "make it more likely" that he sustained "a rotator cuff tear at the time of an injury." He further testified, however, that the MRI did not indicate the time of occurrence of those injuries, whether acute or chronic, because the imaging was not performed until eight months after the 2013 accident.

another orthopedic surgeon who similarly recommended reparative shoulder surgery upon review of a second MRI indicating partial rotator cuff and labral biceps tears.[5]

¶7 In March 2016, Breuer filed a negligence claim against the state employee, and a vicarious liability respondeat superior claim against the State, for compensatory damages (including past and future medical expenses, non-economic pain/suffering, and loss of established course of life) caused by the force of the 2013 accident. His second orthopedic surgeon later performed a right shoulder arthroscopic surgery to repair two tears, trim bone spurs, and remove related collarbone arthritis.[6] However, despite surgery and months of physical therapy, Breuer continued to complain of ongoing shoulder pain and stiffness. A third MRI revealed that one of his previously repaired shoulder tissue tears had yet to heal. He underwent a second arthroscopic shoulder surgery in December 2019 to address that residual issue.

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[5] "The shoulder is a ball-and-socket joint where" the upper end of the "arm bone (humerus) forms a ball" that fits in and is connected to a shoulder blade socket by ligaments. Source: https://www.hopkinsmedicine.org/health/conditions-and-diseases/shoulder-labrum-tear. The rotator cuff is a group of "muscles and tendons that hold [the] shoulder in place" and allow a person to "lift [the] arm and reach upward." Source: http: hopkinsmedicine.org/ health/conditions-and-diseases/rotator-cuff-injury. The labrum is thick cartilage lining that "is attached to the rim of the [shoulder] socket" and lines its interior surface to "essentially form[] a bumper that deepens the socket and helps keep the ball in place." A labral tear occurs when a portion of labral cartilage tears away from the socket bone structure. A labral biceps tear is a tear "in the area where the biceps tendon attached to the upper end of the [shoulder] socket." Source: https://www.hopkinsmedicine.org/health/conditions-and-diseases/shoulder-labrum-tear.

[6] The second orthopod later testified at trial that the surgery included suturing/repairing a "front" rotator cuff tear, repairing the labral/bicep tear, grinding off bone spurs, grinding off the "arthritic" end of Breuer's collar bone/"AC joint," and "smooth[ing] out" a partial "top" rotator cuff tear.

¶8 As the litigation progressed, the State admitted vicarious liability for the accident, but continued to deny that it was the cause of Breuer's claimed post-accident disabilities that were similar to those previously and since attributed by him to his back and leg pain related to his prior back injury. In a M. R. Civ. P. 26(b)(4) expert disclosure report, Breuer's primary care physician acknowledged his "chronic spine issues," and that he "[c]ertainly . . . had some physical problems prior to the . . . 2013 accident." He asserted, however, that Breuer's "*shoulder* was not a problem prior to" the accident. (Emphasis added.) The physician thus opined that the accident likely caused his ongoing shoulder issues and claimed physical disabilities.

¶9 Prior to trial, Breuer filed a motion in limine seeking, in pertinent part, court exclusion of any and all evidence or reference to his pre-accident back injury and preexisting conditions. Distinguishing what he characterized as prior "lower back" injuries and related conditions from the 2013 shoulder injury and related problems, he sought exclusion of "any mention" of his prior back injury, railroad work, or related preexisting physical condition or disability. He asserted that any reference to those matters would be irrelevant and/or unduly prejudicial to his claim of shoulder pain and disability caused by the 2013 accident because his claim "ha[d] nothing to do with [his] lower back," and he was making "no claim . . . for any damages relating to lower back issues." He further noted that the State in any event had no noticed expert medical opinion stating that any cause other than the 2013 accident was either the sole cause, or a quantifiable contributing cause, of his claimed pain and loss of established course of life. In the absence of any claim for

loss of income or future earning capacity, he asserted that any evidence or reference to the fact that he claimed or received RRB or other disability benefits would be similarly irrelevant and/or prejudicial.

¶10 In opposition, the State asserted that evidence of Breuer's pre-accident injury, and resulting pre-accident physical disability and causative pain, would be critically relevant and admissible at trial not for the purpose of inviting or allowing the jury to apportion causation of his claimed pain and disability between his preexisting injury/conditions and the 2013 accident, but for the sole purpose of negating/rebutting Breuer's assertion that the accident was the cause of his claimed post-accident disabilities, and causative pain, that were similar to those previously and since attributed by him to his back and leg pain related to his prior back injury.[7] The State thus asserted, *inter alia*, that the following medical record information was relevant to negate/rebut Breuer's assertion that the accident was the sole cause of his claimed post-accident disabilities and causative pain:[8]

(1) prior pain and permanent physical disability claims made to the RRB for disability benefits;

[7] In its opening statement at trial, the State acknowledged that Breuer sustained a right shoulder injury in the accident and was thus "entitled to fair compensation" for any "damages that flow from that."

[8] Pretrial, Breuer testified at deposition that, following the 2013 accident, he was no longer able to perform or assist with mechanical work on his pickup and farm tractor/equipment, rope from horseback and drag roped calves to the fire for branding, or lift or pull anything with his right hand as necessary to "get[] dressed," "pull on boots," "put[] on belt and suspenders," "button [his] pants," sleep on his right side, "open [his] shop door," saddle and ride horses, hunt, help with fencing, move and repair/set-up wheeled irrigation pipe, hitch trailers, crank lifting jacks, perform "farming" activities, play with/throw to/lift grandchildren, cast a fishing reel, or take out a fishing boat.

(2) the resulting RRB permanent total disability determination and underlying RRB findings; and

(3) an August 2011 St. Luke Community Healthcare physical therapy intake record stating that:

(A) Breuer reported: (i) impairment of his ability to "walk long distances, run, and carry items"; (ii) "pain with back extension, symmetrical side bending, and loss of mobility with pain near the end range" and "any rotation to either side"; (iii) inability "to walk further than several hundred feet" or "stand for more than 3 or 4 minutes without . . . back pain"; (iv) "[g]eneralized weakness . . . in the lower extremity"; (v) being "only able to reach . . . just below his belt line"; and (vi) being "stasis sensitive, pressure sensitive, weight sensitive, and position sensitive for end range flexion or extension";

(B) a "[p]hysical examination" of Breuer was "consistent with trunk weakness, loss of flexibility of the extremities[] and low back"; and

(C) Breuer had "residual radicular pain from damage to [his] sciatic nerve that will take a long time to heal."

In response to Breuer's later objection to the State's designation of the complete pretrial deposition testimonies of various medical providers who treated Breuer pre- and post-accident, the State asserted that court exclusion of Breuer's complete injury and disability history would allow him to present a "false narrative" at trial by "convey[ing] to the jury that he did not have [his]" earlier-claimed pre-accident disabilities, and that all of his claimed post-accident disabilities "were caused by the accident." The State thus asserted that it was entitled to cross-examine Breuer and his proffered medical experts regarding his pre- and post-accident back problems and related disability claims without requirement for expert opinion, rendered on a more probable than not basis, that his

reported back-related problems and disabilities were either the sole cause, or a quantifiable contributing cause, of his claimed post-accident disabilities and causative pain.

¶11 In March 2019, following a hearing, the District Court issued a written decision granting Breuer's motion, thereby categorically excluding any and all evidence or mention of any prior injury or condition (including, *inter alia*, evidence or reference to any collateral RRB or other disability benefits). The court reasoned that "[s]uch evidence would be irrelevant and prejudicial" under M. R. Evid. 402-03 because Breuer "assert[ed] no claim" for compensatory damages caused by his prior "back problems," or for "lost income or impaired earning capacity" caused by the accident. Citing *McCormack v. Andres*, 2008 MT 182, 343 Mont. 424, 185 P.3d 973, the court concluded that a foundation showing of "a causal link between a prior injury" and the claimed injury and damages at issue is not "limited to affirmatively pled attempts at specific apportionment" of causation between the prior or subsequent injury or condition. Recognizing that many of the post-accident physical disabilities attributed by Breuer to his accident-related shoulder injury could similarly result from his prior back problems and resulting conditions, the court further concluded that any asserted "probative value" of Breuer's preexisting disabilities "to show similar limitations from [his] prior injuries to those claimed" is "overwhelmed by the danger of unfair prejudice."

¶12 Except as excluded by the prior evidentiary order in limine, Breuer subsequently noticed his intended trial use of various designated portions of the respective pretrial video deposition testimonies of his primary physician and treating chiropractor to support his

claim that his accident-related shoulder injury was the sole cause of his claimed pain and activities limitations and impairments.[9] Though seemingly within the intent, if not the letter, of the court's broad-scope exclusionary ruling in limine, the State noticed its intent to use portions of the testimonies of Breuer's deposed medical providers for the purpose of negating or rebutting Breuer's causation evidence at trial. In response to Breuer's objection to those aspects of the State's deposition designations, the State asserted that the following deposition testimony was relevant and admissible to negate or rebut Breuer's assertion that his accident-related shoulder injury was the sole cause of his claimed post-accident disabilities and causative pain:

(1) designated deposition cross-examination testimony of Breuer's longtime primary care physician (Dr. Jeffrey K. Lindley, MD) as to whether he was aware of the physically demanding nature of Breuer's prior railroad and ranch work;[10]

(2) designated deposition of his treating chiropractor (Eric Boughton, DC), *inter alia*, that:

[9] As a contingent measure in the event the court might allow the State to present evidence regarding his prior back injury, subsequent treatment, and ongoing pain and disability, Breuer also noticed designated portions of the video deposition testimony of his pre-2013 physical therapist regarding his post-surgery back therapy, and that he had fully recovered from his prior back injury upon completion of that therapy in August 2011.

[10] The State further asserted that its deposition cross-examination of Breuer's physician as to whether a degenerative acromioclavicular (AC) joint condition indicated in Breuer's initial post-accident MRI was "consistent with" Breuer's "age," work history, and "recreational activities" "directly undercut[] . . . [his] opinion that the accident caused [his] rotator cuff tear." The District Court overruled that aspect of Breuer's pretrial objection, however, thereby allowing the State to present that testimony at trial, along with Dr. Lindley's related testimony that "there's no way to know" whether Breuer's MRI-indicated supraspinatus and degenerative superior labrum shoulder tissue tears occurred pre- or post-accident.

(A) he treated Breuer in May-July 2010, prior to back surgery, for "lower back" and "leg pain," including "nerve pain that radiated down into his legs," and that Breuer sought treatment for "immediate relief and [to] help him become more functional";

(B) he described the "mechanism of [Breuer's] lower back pain" as "complicated" but that his medical history and imaging indicated "degenerative changes throughout his lower back in the lumbar spine," including "disk wear and tear" and "arthritis in the facet joints" that "had been progressing for a while"—Breuer "had one of the worst low backs" he had ever seen;

(C) Breuer reported on intake in 2010 that his lower back pain was "interfering with his activities of daily living, such as working and sleeping, and his daily routine," and that "he couldn't lift or bend" and "had that problem for five years";

(D) Breuer returned in May-June 2012 after "two major surgeries" (including a May 2011 lumbar fusion surgery where he had "rods [placed] in his spine") and, despite reporting that he was thereafter "healed up," reported pain in his "mid-back" and "neck" and that "his neck" was "out" after he recently "jammed" it "from banging his head";

(E) Breuer returned in August 2014 for post-accident treatment of "spinal-related conditions" which the chiropractor agreed was a "flare up" of his preexisting "lower back problem" (i.e., lower back pain "radiat[ing] down into the front of his" right thigh), and that Breuer reported that his back was "back to being bad enough that he was sleeping in a recliner because of his pain";

(F) Breuer returned in December 2014 for a "sudden onset of upper back pain," complained that his "low back continu[ed] to be sore down to into the right buttock," and then later reported at the end of December 2014 that his "lower back was doing better" but "that his mid back was sore"; and

(G) in August/December 2014, Breuer sought post-accident treatment for reported back/leg pain (with reference to similar low back pain treated in 2010), but did not report or seek treatment for accident-related shoulder pain.

In accordance with its prior ruling in limine, the District Court subsequently sustained Breuer's objections to the State's deposition designations regarding the above-enumerated matters, thereby precluding the State from presenting them at trial.

¶13 At trial, Breuer presented the previously noticed deposition testimonies of his primary physician and chiropractor, both of whom treated him before and after the 2013 accident. Both testified, *inter alia*, that the accident more likely than not caused his shoulder injury and claimed post-accident disabilities. He also presented the trial testimony of his treating orthopedic surgeon to the effect that, despite two post-accident shoulder surgeries and months of rehabilitation, his physical function continued to be limited by ongoing shoulder pain and stiffness which in turn inhibited his ability to perform "heavy-duty," "moderate," and even some "light duty" activities, including "anything where [he] has to extend [the] arm or raise it." The orthopod opined that the accident was more likely than not the cause of his shoulder tissue tears and "progressive" "traumatic" shoulder arthritis, which in turn caused his post-accident pain and physical activities limitations. He opined that Breuer's shoulder would likely remain "permanent[ly] dysfunctional," the dysfunction had caused "a significant change" in his prior "active" "lifestyle," and he would ultimately need a shoulder "replacement" surgery "at some point." The court's exclusionary ruling in limine precluded the State from cross-examining the surgeon's causation opinions with reference to Breuer's pre-accident medical records references to his pre-accident back injury, related pre-accident back and leg pain, and claimed pre-accident functional disabilities. But, pursuant to a morning-of-trial stipulation,

the State was able to cross-examine the orthopedic surgeon regarding Breuer's *post*-accident medical records references to reported *post*-accident low back pain and related radiating leg pain.[11]

¶14 Apart from the causation testimony of his treating medical providers, Breuer testified on direct examination that, "since the wreck," his shoulder does not "function at" all and he thus cannot "reach out and do anything." He testified that the shoulder injury has caused and continues to cause constant shoulder/arm pain and dysfunction which in turn have rendered him unable to perform a wide variety of farm/ranch work (including tasks necessary to irrigate a field by flooding, move/relocate/realign wheeled irrigation lines and sprinklers, irrigation ditch maintenance, fence and gate maintenance and repair, and maintenance and repair of various farm vehicles and heavy equipment), horse saddling and riding, cattle roping and branding, hunting, fishing, and playing with his grandchildren. He testified that his constant shoulder pain and dysfunction has further rendered him unable to comfortably drive, sleep, or sit for any significant duration, walk any significant distance, shift his body position, independently put-on/remove a shirt or button his pants,

[11] In response, the surgeon mentioned in passing, *inter alia*, that medical records generated by Breuer's prior orthopedic surgeon indicated that he had a prior "back fusion" procedure, but didn't "take that to mean that [he] was actually treating his lumbar spine" at the time. Breuer cites that colloquy on appeal as an illustrative "violation of the [c]ourt's order in limine," but made no contemporaneous objection or motion to strike below. We note further that it was Breuer who first made general reference to his back problems when he noted in his opening statement "the possibility of [him] having a surgery on his lower back." He also cites his surgeon's cross-examination response reference to his prior "back fusion" as an example supporting his assertion that the State "was in no way prevented from presenting evidence and argument that [his] back pain was the primary cause of his pain and suffering and loss of established course of life."

or perform or engage in any other activity that requires reaching-out, lifting, or pulling with his right arm. He testified that, before the accident, he could independently and comfortably perform or engage in all of those activities without pain or impairment and has since suffered constant mental anguish and distress as a result of his post-accident pain and resulting inability to perform or engage in the noted activities.[12] In questioning him on direct examination, Breuer's counsel acknowledged that Breuer sought chiropractic treatment for back pain in 2020, but characterized it as a temporary "flare up" that fully resolved in two months after chiropractic treatment and physical therapy. Breuer concurred with that characterization.

¶15 Pursuant to the parties' morning-of-trial stipulation, the State was able to narrowly cross-examine Breuer regarding the nature and sources of reported *post*-accident back pain and reported related disabilities as referenced in his *post*-accident medical records. The State thus questioned him regarding his May 2020 chiropractic record indicating that he sought treatment for reported back pain that was adversely affecting his daily activities such as, for example, walking, lying, or sleeping. On re-direct, Breuer agreed with his counsel's minimization of his 2020 back pain as a temporary "flare-up" that fully resolved after treatment. The State similarly focused on a July 2021 record indicating that Breuer began seeing a new primary care physician for reported back-related problems and for a referral for another back surgery. The physician's note stated that Breuer reported

[12] Breuer's wife similarly testified to her observation of his post-accident shoulder/arm pain, dysfunction, and resulting anguish and distress.

continued back pain and downward-radiating pain in both legs, and that the continued back pain was his "primary limiting issue." On cross-examination, Breuer asserted that the 2021 physician's note was "misleading" because his shoulder—not his back—was his "major problem," and that he would characterize his "back problems" as merely "off and on" but not "significant." The court's exclusionary ruling in limine precluded the State from cross-examining Breuer about references in his pre-accident medical records regarding the nature or occurrence of his pre-accident back injury, his reports of related pre-accident back and leg pain, and his reported back/leg pain-related pre-accident disabilities.[13]

¶16 On closing argument, Breuer's counsel anticipatorily addressed his post-accident back and related leg pain as a State-asserted alternate cause of his claimed post-accident disabilities, causative pain, and related mental distress, to wit:

> And back pain . . . , I hate to even talk about it because it's dumb, but so what. So, he has back pain. Nobody [is] trying to hide from back pain. [Breuer] testified he had the flare up in 2020 so, what eight years after the accident. Who cares? He had a flare up. He went to physical therapy. He got better. Back's bugging him still. Maybe he's going to have to have it looked at down the road. Who cares? What [does] that have to do with his shoulder? Not a dang thing. Not a dang thing. They keep bringing it up and bringing it up. Why do they do that? They just want to change the subject.

[13] Implying an earlier pre-accident back surgery, the State's cross-examination included, *inter alia*, the question, "you're looking at *another* surgery in the future because of those back problems, right?" (Emphasis added.) As when his orthopedic surgeon referenced on cross-examination his prior "back fusion" and "possible" future back surgery, Breuer did not contemporaneously object, but cites that question as another example supporting his argument on appeal that the State had adequate opportunity to cross-examine Breuer and his testifying medical providers regarding his pre- and post-accident back/leg pain as the alternate causes of his claimed accident-related disabilities and causative pain.

Under shield of the broad-scope ruling in limine precluding the State from referencing or presenting evidence regarding Breuer's pre-accident back injury, related pre-accident back and leg pain, and claimed resulting pre-accident physical disabilities, counsel taunted:

> *They didn't bring you any evidence*. All you've heard is *unsupported speculation and attorney arguments*. . . . [A]ll we've heard are hints, innuendo and speculation about these things. . . . A [c]ourt of law is not a time for hinting, *either show your evidence or keep your mouth closed*. They brought you *no evidence of any of those things* let alone that they have anything to do with this case or [Breuer's] damages.
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> . . .
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> [If such existed,] they could've brought in . . . some of [his] doctors if they thought there was anything to do with [his claimed accident-caused pain, disability, and resulting activities limitations]. That's how trials work. . . . [Y]ou heard from [Breuer's physician] who's been seeing [him] *for years before the crash*. *If there was anything to . . . any of this* wouldn't you think that [he] would be the guy to ask? [But] *they didn't . . . because none* of *these* [prior injuries and conditions] to the extent they're even a thing *have anything to do with this case.*

(Emphasis added.) The jury returned a $510,343.05 compensatory damages verdict in favor of Breuer which included prior medical expenses ($76,843.05), related travel expenses ($3,500), future medical expenses ($40,000), prior pain/suffering and loss of established course of life ($200,000), and future pain/suffering and loss of established course of life ($190,000). The State timely appeals.

STANDARD OF REVIEW

¶17 Trial courts have broad discretion to determine the admissibility of evidence in accordance with the Montana Rules of Evidence and related statutory and jurisprudential rules. *Vincelette v. Metro. Life Ins. Co.*, 1998 MT 259, ¶ 12, 291 Mont. 261, 968 P.2d 275.

Except for related interpretations or applications of law reviewed de novo for correctness, we review evidentiary rulings only for an abuse of discretion. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894; *Maier v. Wilson*, 2017 MT 316, ¶ 17, 390 Mont. 43, 409 P.3d 878. An abuse of discretion occurs when a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Bessette*, ¶ 13; *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241.

DISCUSSION

¶18 *Whether the District Court erroneously excluded impeachment evidence in re Breuer's prior back injury and related pre-accident disabilities and pain as alternate cause evidence rebutting/negating his asserted sole causation evidence?*

¶19 A tort claimant has the burden of proving by a preponderance of the evidence[14] that the alleged negligent conduct in fact caused the alleged injury and resulting physical and/or mental harm at issue. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶¶ 16 and 20, 411 Mont. 269, 525 P.3d 1183; *Faulconbridge v. State*, 2006 MT 198, ¶ 77, 333 Mont. 186, 142 P.3d 777; *Allers v. Willis*, 197 Mont. 499, 505, 643 P.2d

[14] The preponderance of the evidence standard merely requires proof sufficient to support a conclusion that the asserted existence, non-existence, occurrence, or non-occurrence of the subject fact or factual occurrence was, is, or will be more probable than not, i.e., more likely than not. *Mont. State Univ.-N. v. Bachmeier*, 2021 MT 26, ¶ 61, 403 Mont. 136, 480 P.3d 233; *Hohenlohe v. Mont. Dep't of Nat. Res. & Conservation*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628. *Accord Merkel v. Internal Rev. Comm'r*, 192 F.3d 844, 852 (9th Cir. 1999); *Tannehill v. Finch*, 232 Cal. Rptr. 749, 751 (Cal. Ct. App. 1986); *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979) (quoting McCormick, *The Law of Evidence* § 339 (2d ed. 1972)).

592, 595-96 (1982).[15] Except under circumstances not applicable here,[16] the tortious conduct at issue caused an alleged injury and/or resulting harm if it was the cause-in-fact of that injury and/or harm. *Kipfinger*, ¶ 20 (*inter alia* citing *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139 (1996)).

¶20 Except under circumstances not at issue here,[17] the tortious act or conduct at issue was the cause-in-fact of the alleged injury/harm and resulting damages if it "helped

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[15] *See similarly Neal v. Nelson*, 2008 MT 426, ¶¶ 30-34, 347 Mont. 431, 198 P.3d 819 (noting distinction between causation of "event or injury" and causation of "certain damages"); *Young v. Flathead Cty.*, 232 Mont. 274, 281-82, 757 P.2d 772, 777 (1988) (noting claimant's burden to prove "first that defendant's act is a cause in fact of injury and then that the injury is the direct or indirect result" of the negligent act), *partially overruled on other grounds by Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 370, 916 P.2d 122, 139 (1996); *Burk Ranches v. State*, 242 Mont. 300, 307-09, 790 P.2d 443, 447-48 (1990) (noting distinction between "the *cause* of the damage and the amount of the damages caused" as "different facets of the same concept"—emphasis added).

[16] See independent intervening cause doctrine narrowly applicable in cases involving a defense assertion that, regardless of any earlier or antecedent defendant negligence, some other independent event or tortious act later occurred and was the direct and primary cause-in-fact of the injury/harm and resulting damages at issue. *Busta*, 276 Mont. at 371-72, 916 P.2d at 139-40 (confining amorphous reasonable foreseeability of harm based "proximate cause" test to narrow application in re an asserted independent intervening cause); *United States Fid. & Guar. Co. v. Camp*, 253 Mont. 64, 69-70, 831 P.2d 586, 589-90 (1992); *Sizemore v. Mont. Power Co.*, 246 Mont. 37, 46-47, 803 P.2d 629, 635-36 (1990); *Kitchen Krafters, Inc. v. Eastside Bank of Mont.*, 242 Mont. 155, 169-70, 789 P.2d 567, 576 (1990), *overruled in part by Busta*, 276 Mont. at 364-70, 916 P.2d at 135-39; *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 532-33, 100 P. 971, 973-74 (1909) (construing § 6068 Rev. Codes (1907), now § 27-1-317, MCA, in accord with common law proximate cause standard stated in *Reino v. Mont. Min. Land Dev. Co.*, 38 Mont. 291, 295-96, 99 P. 853, 854-55 (1909)); W. Prosser, et al., *Prosser and Keeton on Torts*, §§ 43-45 (5th ed. 1984).

[17] See the alternative "substantial factor" causation-in-fact test narrowly applicable in cases involving evidence and assertion that multiple causes "concur[red] to bring about" the alleged injury/harm and resulting damage, *and* "either . . . of them alone would have been sufficient to cause the [same] result." *Kitchen Krafters*, 242 Mont. at 167-68, 789 P.2d at 574 (citing *Young*, 232 Mont. at 281-82, 757 P.2d at 777 (citing *Prosser and Keeton*, § 41, and *Juedeman v. Mont. Deaconess Med. Ctr.*, 223 Mont. 311, 318-19, 726 P.2d 301, 305-06 (1986)); *Juedeman*, 223 Mont. at 318-19, 726 P.2d at 305-06 (citing *Kyriss v. State*, 218 Mont. 162, 167, 707 P.2d 5, 8 (1985)

produce" the alleged injury, harm, and/or resulting damages and that such injury/harm/damages "would not have occurred without it." *Busta*, 276 Mont. at 371, 916 P.2d at 139 (traditional "but for" causation-in-fact test as restated in Montana Pattern Jury Instruction (MPI) 2.08 (Nov. 1, 1989)).[18] Except in rare cases where the cause of an alleged injury, resulting physical harm or disability, and related pecuniary damages is plainly obvious without need for specialized knowledge or expertise, the claimant's proof of the occurrence, nature, cause, or prognosis of an alleged bodily or mental injury, disease process, or other medical condition or disability generally requires qualified medical expert opinion. *See, e.g.*, *McCormack*, ¶¶ 45-46; *Hinkle v. Shepherd Sch. Dist. No. 37*, 2004 MT 175, ¶¶ 35-38, 322 Mont. 80, 93 P.3d 1239 (qualified expert testimony generally required for proof of causation of alleged bodily and mental injury); *Henricksen v. State*, 2004 MT

(quoting *Rudeck v. Wright*, 218 Mont. 41, 53, 709 P.2d 621, 628 (1985)), in holding that alternative substantial factor causation-in-fact test did not apply to the "two possible concurring causes" at issue (defendant's alleged negligence and "decedent's preexisting condition") where "either . . . operating alone would [not] have been sufficient to cause the identical result"). *See similarly Busta*, 276 Mont. at 371, 916 P.2d at 139-40 ("substantial factor" causation-in-fact test applies in cases involving evidence and assertion that multiple causes "combined to produce [the] result" at issue (e.g., cases involving assertions of "negligence and . . . contributory negligence, or when there are multiple defendants")—citing *Rudeck* and *Kyriss*, *supra*).

[18] Under the traditional "but for" test, the subject tortious conduct was "a cause-in-fact" of the alleged injury and resulting damages if the injury and resulting damages "would not have occurred but for that conduct." *Busta*, 276 Mont. at 371, 916 P.2d at 139 (citing *Prosser and Keeton*, § 41); *Kitchen Krafters*, 242 Mont. at 166-67, 789 P.2d at 574. Conversely, the subject tortious conduct was *not* "a cause" of the injury and resulting damage at issue if that injury or damage "would have occurred without it." *Busta*, 276 Mont. at 371, 916 P.2d at 139; *Kitchen Krafters*, 242 Mont. at 167, 789 P.2d at 574 (citing *Prosser and Keeton*, § 41). The traditional "but for" test applies and "serves" as the causation-in-fact test in "the great majority of cases." *Kitchen Krafters*, 242 Mont. at 167, 789 P.2d at 574.

20, ¶ 70, 319 Mont. 307, 84 P.3d 38 (expert testimony required to establish causal connection between subject injury and preexisting injury or independent cause); *Christofferson v. City of Great Falls*, 2003 MT 189, ¶¶ 35-49, 316 Mont. 469, 74 P.3d 1021 (expert medical testimony required to assess viability of treatment options and prognosis); *Busta*, 276 Mont. at 354-57, 916 P.2d at 129-31 (lay opinion not competent evidence of medical diagnosis and causation); *Cain v. Stevenson*, 218 Mont. 101, 105-06, 706 P.2d 128, 131 (1985) (expert medical testimony generally required for injury causation diagnosis and prognosis except where obvious without need for specialized expertise). *See also* M. R. Evid. 701 and 702 (limiting permissible scope of non-expert testimony and authorizing qualified expert testimony).

1. Rules 401-02 Relevance—Alternative Causation by Impeachment on Cross-Examination.

¶21 Beyond simple argument that the plaintiff's evidence is insufficient alone to satisfy his or burden of proof, a defendant may contest a claimant's proof of causation of injury and resulting harm by proving that the defendant's conduct caused only a portion of the alleged injury or resulting harm at issue. *Cheff v. BNSF Ry. Co.*, 2010 MT 235, ¶ 36, 358 Mont. 144, 243 P.3d 1115 (citing *Truman v. Mont. Eleventh Judicial Dist. Ct.*, 2003 MT 91, ¶¶ 25-33, 315 Mont. 165, 68 P.3d 654). Under this divisible injury/apportionment of causation theory, the defendant is seeking a pro rata/proportional jury apportionment of the cause of the claimed injury or harm at issue between the claimed injury or harm at issue and a prior or subsequent injury or condition. *See Truman*, ¶¶ 25-33. In such case, the defendant has the burden of proving that the causation of injury or resulting harm at issue

is distinctly divisible or apportionable between the subject injury or harm and the asserted prior or subsequent injury or condition. *Truman*, ¶¶ 27 and 32-33; *Priest v. Taylor*, 227 Mont. 370, 375, 740 P.2d 648, 651 (1987). In that regard, except where determination of the causes of the subject injuries, conditions, or claimed disabilities at issue do not require specialized medical knowledge or expertise, proof of a distinctly divisible or apportionable injury, condition, or disability requires a qualified expert opinion rendered on a non-speculative basis (i.e., a more probable than not basis) that the cause of the injury, condition, or disability at issue is distinctly divisible between a portion caused-in-fact by the defendant's tortious conduct and a portion caused-in-fact by a prior or subsequent injury, condition, or disability. *Clark v. Bell*, 2009 MT 390, ¶ 23, 353 Mont. 331, 220 P.3d 650 (citing *Truman*, ¶¶ 31-33); *Truman*, ¶¶ 25-33 (citations omitted).[19] *Accord Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 2008 MT 378, ¶ 37, 347 Mont. 1, 196 P.3d 1265 (citing *Truman*, ¶ 32). Absent proof of a distinctly divisible or apportionable injury or resulting harm, the defendant is liable for the entirety of the injury and resulting harm caused-in-fact by his or her tortious conduct, regardless of whether a preexisting condition may have helped bring it about, or increased the claimant's susceptibility to such injury or harm, to some degree not distinctly apportionable on a more probable than not

[19] "An 'indivisible injury' occurs when more than one incident contributes to a single injury" and resulting damage and "there is no logical or rational basis for [distinctly] dividing that injury" between the contributing causes. *Truman*, ¶ 25 (citing Restatement (Second) of Torts § 433A (Am. Law Inst. 1965)). An injury or resulting damage may be indivisible "either because the harm caused cannot theoretically be divided," or because the injury and resulting damage is not distinctly divisible as a practical matter. *Azure v. City of Billings*, 182 Mont. 234, 251, 596 P.2d 460, 470 (1979).

basis. *Clark*, ¶ 23 (citing *Truman*, ¶¶ 31-33); *Truman*, ¶¶ 25, 27, and 32-33 (citations omitted); W. Prosser, et al., *Prosser and Keeton on Torts*, § 43 (5th ed. 1984); Restatement (Second) of Torts § 433A cmts. a and i (Am. Law Inst. 1965).

¶22 Alternatively, without seeking apportionment of causation of injury or harm, and subject to pertinent generally applicable rules of evidence, a defendant who denies *any* liability for the asserted injury or harm at issue in a particular case may attempt to negate or rebut a plaintiff's proffered causation evidence by presenting evidence that some other cause, such as a prior injury or preexisting physical or mental condition, was the cause-in-fact of the injury or harm at issue. *Cheff*, ¶¶ 31-43 (citing *Clark*, ¶¶ 23 and 25); *Clark*, ¶¶ 23-26 (noting that *Truman*, ¶ 31, discussion of alternate causation evidence offered to negate/rebut plaintiff's causation evidence "involved subsequent injuries" but "the same rule would apply to evidence of preexisting injuries"). The particular injury or harm at issue in a particular case will of course vary due to the various facets of the causation question that may be in dispute in a particular case, such as, for example, what caused the injury at issue or, as here, whether the injury caused by the defendant's tortious conduct or, alternatively, a prior or subsequent injury or condition, was the cause of the claimed physical harm or disability at issue. Subject to generally applicable rules of evidence, one permissible means of presenting alternate causation evidence is cross-examination of the claimant and/or his or her proffered medical causation experts regarding a relevant prior or subsequent injury and/or physical or mental condition or disability. *Cheff*, ¶¶ 31-37; *Clark*, ¶¶ 23-26.

¶23 For example, in *Clark*, a negligence claimant alleged that a rear-end traffic collision caused her to suffer various physical injuries (i.e., head, neck, shoulder, back, wrist, arm, and knee injuries, abdominal pain, and a cracked tooth). *Clark*, ¶¶ 6-7. As here, the defendant admitted negligence, but asserted that many of the plaintiff's claimed injuries and conditions did not result from the accident, but rather, were caused by the plaintiff's prior injuries and preexisting conditions. *Clark*, ¶ 8. At trial, the plaintiff presented testimony from her treating osteopathic surgeon, neuropsychologist, and dentist that the force of the traffic collision caused her claimed injuries, pain, and resulting disabilities. *Clark*, ¶¶ 7 and 12. Over objection that the defendant neither could prove a distinctly divisible injury for purposes of causation apportionment, nor had any nonspeculative expert opinion attributing any of the plaintiff's claimed injuries and conditions to any other cause, the district court allowed the defendant to cross-examine the plaintiff's testifying medical providers regarding similar preexisting conditions or impairments resulting from prior "head, cervical, and lumbar injuries" referenced in her medical records, and to what extent those prior injuries and resulting conditions affected or were consistent with their respective causation opinions. *Clark*, ¶¶ 12-13, 26, and 36. In response, the plaintiff's treating osteopathic surgeon:

> conceded that the [medical] history provided by [plaintiff] was not accurate in many respects and that he [thus] did not have a full picture when he had diagnosed her and formed his opinions that the accident caused her injuries. [He] testified that, while [plaintiff] had initially told him she developed various physical injuries soon after the accident, the symptoms did not appear to develop until much later. He acknowledged that, although told by [plaintiff] she suffered from "no residuals" from previous traumas, her

> medical records established a history of multiple complaints to medical doctors relating to prior traumas.

Clark, ¶ 12. After testifying on direct that the plaintiff "suffered an accident-related head injury" based on "the assumption that she had suffered a concussion," her neuropsychologist similarly conceded on cross-examination that: (1) the plaintiff "did not satisfy most of the criteria" required for a concussion diagnosis because "she had no loss of consciousness, post-traumatic amnesia, or a skull fracture"; (2) "he was not provided all of [plaintiff's] medical records when he . . . formulated his [causation] opinions"; and (3) "he had not been told about some of [plaintiffs] preexisting injuries." *Clark*, ¶ 13. Upon closing arguments, including defense argument that the impeaching cross-examination of the plaintiff's causation experts negated or rebutted her causation evidence, the jury returned a unanimous defense verdict with no damages award. *Clark*, ¶¶ 15 and 26-27.

¶24 On appeal, we noted that the apportionment of divisible injury doctrine recognized in *Truman*, and its attendant defense burden of proof, "did not disturb" a tort defendant's "basic right to challenge causation" under the rules of evidence by, *inter alia*:

> testing the opinions of the plaintiff's experts by reference to relevant evidence on cross-examination. . . . [M. R. Evid. 705] affords a party an essential right to cross-examine the plaintiff's expert witness regarding the basis of that expert's opinion. . . . [A] defendant may [thus] submit evidence of other injuries to negate allegations that he or she is the cause or sole cause of the current injury, subject to the trial court's application of traditional evidentiary considerations. While the evidence at issue in *Truman* involved subsequent injuries, the same rule would apply to evidence of preexisting injuries.

Clark, ¶¶ 22-23 and 25. We thus held that, pursuant to M. R. Evid. 402 and 705, the district court properly allowed the defendant to cross-examine the plaintiff's medical causation experts regarding preexisting medical conditions and disabilities referenced in her medical records because: (1) those conditions or disabilities were similar to those she claimed were caused by the accident at issue; (2) the defendant was not seeking jury apportionment of causation of injuries and resulting conditions/disability; and (3) the proffered purpose of the alternate cause evidence was to rebut or negate the plaintiff's proffered causation evidence. *Clark*, ¶¶ 22-23 and 25-26. Because such evidence was independently relevant for impeachment purposes under M. R. Evid. 705, we rejected the plaintiff's assertion that evidence of a prior injury or preexisting condition was not admissible on cross-examination as alternative causation evidence to rebut or negate a plaintiff's causation evidence absent qualified expert opinion that the other injury or condition was more probably than not the cause-in-fact of the injury or resulting condition at issue:

> [Plaintiff] also argues that because [Defendant] presented no direct evidence from lay or expert witnesses, her causation evidence was unchallenged and she was entitled to judgment as a matter of law. However, . . . [Defendant] challenged [plaintiff's] evidence through cross-examination. The jury was entitled to weigh that evidence and determine its credibility against [plaintiff's] evidence. . . . [T]he jury was entitled to weigh [the otherwise uncontradicted direct testimony of a plaintiff's witness] against adverse circumstantial evidence and other factors which may affect the credibility of [that] witness. Thus, the District Court properly denied [plaintiff's] motion for judgment as a matter of law on causation, [thus] leaving the question to the jury.

Clark, ¶ 27 (internal punctuation and citation omitted).[20]

[20] While we affirmed the evidentiary rulings in *Clark*, we ultimately reversed and remanded for a new trial on the grounds that the trial court's initial ruling granting the plaintiff's motion in limine

¶25 In *Ele v. Ehnes*, 2003 MT 131, 316 Mont. 69, 68 P.3d 835, the tort claim defendant similarly admitted that she negligently caused the rear-end traffic accident at issue, but asserted that it did not cause the physical disability, pain, and mental distress attributed to the accident by the plaintiff. *Ele*, ¶¶ 5 and 7. As here, the defendant presented no expert medical testimony contradicting the plaintiff's causation evidence at trial, but instead cross-examined the plaintiff regarding various post-accident activities inconsistent with his claimed physical disabilities, and his failure to disclose his prior history of depression, back injury, and resulting physical disability/pain to his physician. *Ele*, ¶¶ 9-12, 14-15, and 30. On cross-examination, the defendant similarly challenged the medical causation opinion of the plaintiff's physician based on the physician's prior unawareness of the plaintiff's preexisting "chronic back pain," and the preexisting injury-related and naturally-occurring spinal conditions manifest in the post-accident diagnostic imaging of the plaintiff's spine. *Ele*, ¶¶ 12-13. The jury found that the subject accident was not "the cause" of the claimed physical pain, resulting disability, and mental distress at issue. *Ele*, ¶¶ 16 and 21. On appeal, the plaintiff asserted that the jury finding was not supported by the evidence in light of the defendant's failure to present any independent evidence refuting his physician's medical causation opinion. *Ele*, ¶ 30. We held, however, that the defendant's

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asserting the insufficiency of the defendant's Rule 26(b)(4) expert disclosures regarding the anticipated *direct testimony* of the defendant's independent medical examiners regarding alternate causation evidence was subject to two interpretations, and that the plaintiff was "unfairly surprised" by the limiting clarification on the morning of trial that the ruling did not preclude Rule 705 cross-examination of the plaintiff's medical experts regarding those matters. *Clark*, ¶¶ 29, 32-35, and 37.

cross-examinations of the plaintiff and his physician regarding his subsequent activities and undisclosed preexisting conditions were sufficient to "undermine[]" their respective causation testimonies on direct examination, and thus supported conceivable jury findings that the physician's causation opinion was flawed without consideration of his "prior back problems," and that the plaintiff had more functional ability than claimed. *Ele*, ¶¶ 30 and 33-34.

¶26 In *Cheff*, in the context of a negligence-based FELA[21] claim involving a back injury and resulting damages allegedly caused by a slip-and-fall while performing railroad work, the defendant sought admission of the plaintiff's medical records referencing that he told: (1) his treating orthopedic surgeon that he had been having back problems for about three weeks (a period encompassing the week before and two weeks after the railroad injury) following which the orthopod noted personal weightlifting as a "potential cause" of the subject back injury; (2) a post-accident MRI technician that he had intermittent radiating low back pain for years which increased after the personal weightlifting incident a week before the railroad slip and fall; and (3) his physical therapist that he had substantial back pain approximately two weeks before the railroad slip and fall which the therapist then noted as "insidious onset from [personal] weightlifting without a belt on." *Cheff*, ¶¶ 3-4, 11, and 31. In response to the plaintiff's motion in limine seeking exclusion of those records, the defendant asserted that the plaintiff's noted statements to his medical providers

[21] Federal Employers' Liability Act, 45 U.S.C. § 51 (1939), et seq.

and their resulting notations were highly relevant as alternate cause evidence rebutting the testimonial assertions of both the plaintiff and his medical provider that the railroad slip and fall was the sole cause of his back injury. *Cheff*, ¶¶ 4-5, 11, 31, and 33-34. At trial, the defendant renewed its prior medical records proffer as alternative cause evidence for independent admission through the plaintiff on cross-examination to impeach his account of the injury and for M. R. Evid. 705 cross-examination of the medical causation opinion of his treating neurosurgeon. *Cheff*, ¶¶ 31, 34, 38, and 42.[22] The plaintiff objected that, in the manner offered, the subject medical records lacked evidentiary competence under M. R. Evid. 602, 801-04, and 901-02, and were in any event not relevant and unduly prejudicial under M. R. Evid. 401-03 without supporting expert medical opinion that the asserted alternate cause was more probably than not the sole cause of the asserted back injury and resulting condition. *Cheff*, ¶¶ 11 and 38. Without comment on the competence objection, the district court sustained the Rule 401-03 objection, and thus excluded the proffered medical records as independent alternate cause evidence in the absence of a supporting nonspeculative expert medical opinion that the asserted alternate cause was the sole cause of the subject back injury and resulting harm. *Cheff*, ¶ 11.

¶27 We held on appeal, however, that the district court erroneously excluded the subject medical records because the defendant offered them as "alternate cause" evidence *by*

[22] In a pretrial deposition, the treating neurosurgeon testified that he was not aware of the weightlifting notations in the plaintiff's medical records but that, without having the opportunity to discuss them with the plaintiff, they would not have changed his railroad-related causation opinion in any event. *Cheff*, ¶ 34.

"*impeachment*" which, in contrast to apportionment of medical causation evidence under *Truman*, does not require expert medical opinion attributing the subject injury and resulting conditions to the asserted alternative sole cause. *See Cheff*, ¶¶ 11 and 37-38 (emphasis added). *See similarly Maurer v. Clausen Distrib. Co.*, 275 Mont. 229, 237-39, 912 P.2d 195, 199-200 (1996) (evidence of his prior assaultive injury of girlfriend, resulting civil claim, and related criminal prosecution admissible as alternative cause evidence to rebut plaintiff's claim that accident at issue was the cause of the claimed depression that diminished his established course of life).[23] We nonetheless affirmed on a right-result/wrong-reason basis, however, on the stated ground that, as offered through the plaintiff on cross-examination, the proffered medical records lacked evidentiary competence under M. R. Evid. 801-04 and 901-02 (hearsay rule and foundation authenticity requirement). *Cheff*, ¶¶ 11, 34, 36, and 38-43.[24]

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[23] *See also Neal*, ¶¶ 8-11, 23, and 25-28 (defense medical expert's reference to prior work-related knee injury and chronic lower back pain noted in plaintiff's medical records not erroneously admitted as alternate causation evidence where noted on direct incident to ultimate opinion that the neck/upper back injury at issue was not sufficiently severe to preclude continued work as firefighter).

[24] Neither *Cheff*, nor *Howlett v. Chiropractic Ctr., P.C.*, 2020 MT 74, ¶ 31, 399 Mont. 401, 460 P.3d 942, support the broader defense proposition here that a defendant's offer of alternate causation evidence for *any* purpose other than for apportionment of causation of injury does *not* generally require nonspeculative expert medical causation testimony for admission under M. R. Evid. 401-03. By express reference to a "divisible" injury, our statement in *Cheff*, ¶ 36, as repeated in *Howlett*, ¶ 31, that "only where a defendant seeks to apportion an injury, as opposed to rebut causation, does he or she have to prove to a reasonable medical probability that the injury is divisible," was limited to the distinction between other medical cause evidence offered on sufficient expert opinion for purposes of causation apportionment under *Truman*, as distinct from alternate cause evidence offered for impeachment purposes on cross-examination to negate or rebut the causation testimony of the claimant and/or his or her medical causation expert. *See Cheff*, ¶¶ 31, 33-35, and 37 (narrowly focusing on defendant's intended use of prior injury/preexisting

¶28 In pertinent part, *Cheff*, *Clark*, *Ele*, and *Maurer* are simply applications of generally applicable rules of evidentiary relevance and witness impeachment under M. R. Evid. 401-03, 607, and 705. "All relevant evidence is admissible" except as otherwise provided by the Rules of Evidence and related statutory and jurisprudential rules. M. R. Evid. 402. "Relevant evidence means evidence having any tendency to make the existence of any fact . . . of consequence to the determination of the action more . . . or less probable." M. R. Evid. 401. "Relevant evidence may include," *inter alia*, "evidence bearing [on] the credibility of a witness." M. R. Evid. 401. Credibility is "[t]he quality that makes [witness testimony or other evidence] worthy of belief." *Credibility*, *Black's Law Dictionary* (11th ed. 2019). "Impeachment evidence is 'evidence tending to cast doubt' on the credibility of a witness" or witness testimony. *State v. Pelletier*, 2020 MT 249, ¶ 14, 401 Mont. 454, 473 P.3d 991 (citation omitted). A party may thus generally challenge or attack the credibility of any witness. M. R. Evid. 607(a); *State v. Zimmerman*, 2018 MT 94, ¶ 23, 391 Mont. 210, 417 P.3d 289 (citing Rules 401 and 607(a), *inter alia*). *See also* § 26-1-302(7) and (9), MCA (presumption that a witness speaks the truth "may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of [the] witness's testimony" including "inconsistent statements of the witness" or "other evidence

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condition for cross-examination of plaintiff and his neurosurgeon); *compare Cheff*, ¶¶ 11 and 32 (manifesting originally broader defense proffer beyond impeachment on cross-examination as apparently abandoned on appeal, and correspondingly broad district court ruling). *Howlett* is further distinguishable insofar that the appellant's omission of the pertinent trial record precluded us from identifying, much less analyzing, the manner and extent to which the plaintiff's prior smoking and health history was both relevant and competent for admission vis-à-vis the plaintiff's causation evidence. *See Howlett*, ¶¶ 30-32.

contradicting the witness's testimony"). The primary method of challenging or impeaching the credibility of witness testimony is often cross-examination regarding a relevant matter tending to cast doubt on the truth, accuracy, or reliability of the witness's testimony. *See* M. R. Evid. 401 and 611(b) (relevant evidence, scope of permissible cross-examination includes the matters within scope of the "direct examination and [those] affecting the credibility of the witness," and "[e]vidence developed on cross-examination may be considered . . . as proof of any fact in issue"); § 26-1-302(7) and (9), MCA. Cross-examination is thus "a substantial right" which should "not be unduly restricted." *Maier*, ¶ 42 (citing *McGonigle v. Prudential Ins. Co.*, 100 Mont. 203, 218, 46 P.2d 687, 694 (1935)).

¶29 As applied to the non-expert causation and damages testimony of the personal injury claimants in *Cheff*, *Ele*, and *Maurer*, *supra*, and subject to other applicable rules of evidence, cross-examination regarding a witness's prior inconsistent statements or other contradictory facts are among the various means of impeaching the credibility of a witness contemplated and authorized under M. R. Evid. 607(a). *State v. McGhee*, 2021 MT 193, ¶¶ 18-19, 405 Mont. 121, 492 P.3d 518 (citing Commission Comments to M. R. Evid. 607 (1976)). Aside from the manifest relevance of a witness's prior inconsistent statements for impeachment purposes,[25] we have recognized that:

[25] *See* M. R. Evid. 401, 613, and 801(d)(1)(A) (defining relevant evidence, specifying manner of cross-examination regarding prior statements, and defining prior inconsistent statements as non-hearsay where declarant "subject to cross-examination concerning" same).

> [*i*]*mpeachment by contradiction* is attacking the credibility of a witness by cross-examination or extrinsic evidence offered to prove that a fact which the witness asserted or relied upon in his or her testimony is not true. . . . [Such evidence] has two related but distinct purposes—first, as a basis for an inference that the witness either . . . was [dishonest or] mistaken with respect to the specific fact contradicted, and second, as a basis for an inference that the witness is thus a generally unreliable source of information and therefore similarly mistaken, dishonest, or unreliable as to the balance of his or her testimony. While impeachment by contradiction may relate either to a matter that is directly at issue or only ancillary or collateral thereto, admission is in either event subject to balancing under the relevance and limiting factors of M. R. Evid. 401-03. . . . [W]hen relevant . . . [for] impeachment purposes under M. R. Evid. 401-03 and 607(a), evidence of impeachment by contradiction is admissible via cross-examination or extrinsic evidence.

McGhee, ¶ 19 (internal punctuation and citations omitted, emphasis added).[26]

¶30 Moreover, as recognized in *Cheff*, *Clark*, and *Ele*, *supra*, regarding cross-examination of medical causation experts about other injuries and conditions as non-apportionment alternate cause evidence by impeachment, M. R. Evid. 705 governs cross-examination of experts regarding opinion testimony involving or dependent on specialized knowledge and expertise. *Reese v. Stanton*, 2015 MT 293, ¶ 20, 381 Mont.

[26] In contrast to evidence of impeachment by contradiction, evidence of general contradiction is evidence offered for the non-impeachment purpose of either directly contradicting previously admitted testimony or evidence, or indirectly challenging or undermining its truth or accuracy. *United States v. Williamson*, 424 F.2d 353, 355 (5th Cir. 1970) (distinguishing impeachment evidence and general contradictory evidence). *Accord United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1263 (7th Cir. 1975) ("[i]mpeachment is an attack upon the credibility of a witness" but "[a] witness'[s] testimony may be contradicted without being impeached"—citing *Williamson*). *McGhee*, ¶ 19 n.5. *See also, e.g.*, *In re C.K.*, 2017 MT 69, ¶¶ 17-21, 387 Mont. 127, 391 P.3d 735 (expert opinion testimony not meant "to serve as a conduit to admit otherwise inadmissible information as substantive evidence"); *Reese v. Stanton*, 2015 MT 293, ¶¶ 5-8, 13-14, and 22-25, 381 Mont. 241, 358 P.3d 208 (affirming allowance of defense Rule 705 cross-examination of plaintiff's vocational-rehab expert regarding contrary defense IME report considered by rehab expert but then reversing for new trial based on erroneous admission of the subject IME report as substantive evidence for jury consideration).

241, 358 P.3d 208; *Clark*, ¶¶ 22-23. An expert who "testif[ies] in terms of opinion or inference" "may . . . be required to disclose" on cross-examination the "facts or data" underlying his or her opinion. M. R. Evid. 705. Cross-examination is the essential safeguard against unreliable or inaccurate expert opinion. *Reese*, ¶ 21 (citing *Clark*, ¶ 22). An adverse party may thus challenge—i.e., impeach—the truth, accuracy, credibility, or reliability of an expert opinion by cross-examination regarding the scope and depth of the expert's relevant knowledge, experience, or expertise, as well as the sufficiency or completeness of the underlying facts, data, or rationale upon which he or she based his or her opinion, including any pertinent facts not disclosed to or overlooked or disregarded by the expert. *See* M. R. Evid. 705, *Clark*, ¶¶ 12-13 and 22-26; *Ele*, ¶¶ 10-13 and 30-35; *Hart-Anderson v. Hauck*, 230 Mont. 63, 74, 748 P.2d 937, 943-44 (1988); *Wollaston v. Burlington N.*, 188 Mont. 192, 200-01, 612 P.2d 1277, 1281-82 (1980) (noting cross-examiner responsibility "to determine the underlying facts [upon] which the expert bases his opinion and expose [any] weaknesses" for factfinder consideration).[27]

¶31 If the subject information is of a type upon which experts in the field reasonably rely in rendering such opinions, an adverse party may cross-examine an expert regarding

[27] *But see Reese*, ¶ 22 (Rule 705 "[c]ross-examination must be limited to the underlying facts or data relied upon by the expert"—internal punctuation omitted); *Cheff*, ¶¶ 34, 37-38, and 42-43 (affirming exclusion of claimant medical records offered for admission as extrinsic alternate cause evidence for purpose of impeaching claimant and neurosurgeon causation testimony due to lack of foundation in re evidentiary competence but holding that "any possible error" in excluding related Rule 705 deposition cross-examination of treating neurosurgeon in re noted prior injury not an abuse of discretion in light of surgeon's excluded opinion it would not have changed his causation opinion); *but compare*, *supra*, *Cheff*, ¶ 37; *Clark*, ¶¶ 12-13 and 22-26; *Ele*, ¶¶ 10-13 and 30-35; M. R. Evid. 611(b)(2).

matters that are not otherwise "admissible in evidence." M. R. Evid. 703. *See also, e.g.*, *Reese*, ¶¶ 21-22 (Rule 705 cross-examination of an expert regarding otherwise inadmissible hearsay "does not implicate the rule against hearsay because the underlying facts and data are not offered to prove the truth of the matter asserted" but rather "for the limited and independent purpose of enabling the jury to scrutinize the expert's reasoning"—citation omitted). *See similarly In re C.K.*, 2017 MT 69, ¶¶ 17-29, 387 Mont. 127, 391 P.3d 735 (Rule 703 allows direct examination expert testimony regarding otherwise inadmissible hearsay information upon which expert relied as a basis for the subject opinion—citing M. R. Evid. 105 and alternative constructions of Rule 703 but noting that "Rule 403 is the critical safeguard" "strik[ing] the balance between proper admission of otherwise inadmissible hearsay under Rule 703 and the prejudicial admission of inadmissible hearsay as substantive proof contrary to Rule 802" and the attendant "danger that the factfinder will prejudicially view the [limited-purpose] Rule 703 information as substantive proof not subject to the usual safeguards of foundational competence and cross-examination"). However, even when a permissible subject of Rule 705 cross-examination, otherwise inadmissible hearsay used for cross-examination of an expert regarding non-apportionment alternate cause evidence under *Cheff*, *Clark*, *Ele*, and Rules 705, 703, and 611(2)(b) is not admissible as substantive evidence of the truth or accuracy of the matter asserted therein. *See Reese*, ¶¶ 5-8, 13-14, and 22-25 (affirming allowance of defense Rule 705 cross-examination of plaintiff's vocational-rehab expert regarding contrary defense IME report considered by rehab expert but then reversing for new trial based on erroneous

corresponding admission of the subject IME report as substantive evidence); *C.K.*, ¶¶ 16-29 (affirming admission of examining mental health professional testimony regarding hearsay report of subject's prior erratic behavior as a basis of her diagnostic opinion absent showing/basis "that any risk of prejudice posed by admission and consideration of the otherwise inadmissible hearsay . . . substantially outweighed its probative value under Rule 703").

¶32 Here, primarily at issue below were references in Breuer's medical records, related Rule 705 cross-examination of his testifying medical providers, and the extrinsic deposition testimony of his pre-accident physical therapist and pre- and post-accident chiropractor regarding his pre-accident back injury and related pre- and post-accident back and leg pain which he reported to treatment providers as the cause of a wide scope of claimed pre- and post-accident disabilities. Pursuant to *Cheff*, *Clark*, *Ele*, and *Maurer*, *supra*, the State sought use of those alternate cause matters as subjects for cross-examination of Breuer and his testifying medical providers for the non-apportionment purpose of rebutting or negating by impeachment his claims and

supporting evidence of loss of established course of life,[28] causative physical pain,[29] and related mental anguish/distress.[30] In those regards, most of, if not all, the claimed

[28] Distinct from compensation for pain/suffering, damages for "loss of established course of life" compensate a permanently injured or disabled plaintiff for the loss of the ability to engage in or pursue chosen life activities that he or she had before the injury. *Hern v. Safeco Ins. Co. of Ill.*, 2005 MT 301, ¶ 39, 329 Mont. 347, 125 P.3d 597; *Henricksen*, ¶ 76; *Rasmussen v. Sibert*, 153 Mont. 286, 296-97, 456 P.2d 835, 841 (1969). Causes of loss of established course of life may include, *inter alia*, injury-related physical disability, pain, or mental distress or disability. *Henricksen*, ¶¶ 76-77; *Callihan v. Burlington N., Inc.*, 201 Mont. 350, 358-59, 654 P.2d 972, 977 (1982).

[29] Upon admission or proof that the defendant's tortious conduct caused the plaintiff to suffer personal injury, the plaintiff is entitled to damages in an amount sufficient to reasonably compensate him or her for past and future pain and suffering caused by the injury and resulting harm. *See Albinger v. Harris*, 2002 MT 118, ¶¶ 43-44, 310 Mont. 27, 48 P.3d 711; *Gehnert v. Cullinan*, 211 Mont. 435, 439, 685 P.2d 352, 354 (1984); *Allers v. Willis*, 197 Mont. 499, 643 P.2d 592 (1982); *Ankeny v. Grunstead*, 170 Mont. 128, 551 P.2d 1027 (1976); *Holenstein v. Andrews*, 166 Mont. 60, 530 P.2d 476 (1975). There is no set measure for determining the amount necessary to compensate a plaintiff for pain and suffering other than the reasonable discretion of the factfinder, exercised in the interests of justice under the particular circumstances in each case without manifest passion or prejudice. *Albinger*, ¶¶ 43-44; *Rasmussen*, 153 Mont. at 297, 456 P.2d at 841 (factfinder determination "conclusive unless" amount shockingly/grossly "out of proportion to" subject harm).

[30] Parasitic emotional distress damages are recoverable as an element of damages on proof that the subject tortious injury or other infringement of right in turn caused the claimant to suffer mental pain, anguish, or distress. *See* § 27-1-317, MCA (general measure of tort damages is amount which will compensate for *all* "detriment . . . caused" by tortious conduct at issue); *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649 (parasitic emotional distress damages recoverable as element of tort damages without requirement for proof of "serious or severe" distress); *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶¶ 184-94, 345 Mont. 12, 192 P.3d 186 (heightened standard of proof for independent intentional/negligent infliction of emotional distress claims n/a to parasitic emotional distress damages as element damages in tort); *French v. Ralph E. Moore, Inc.*, 203 Mont. 327, 333-35, 661 P.2d 844, 847-48 (1983) (parasitic emotional distress damages recoverable as element of tort damages without requirement for predicate physical injury); *Stensvad v. Towe*, 232 Mont. 378, 386-87, 759 P.2d 138, 143 (1988) ("damages for mental anguish or distress" recoverable in tort "absent physical injury" upon proof of "substantial invasion of a legally protected interest which caused a significant impact upon" claimant); *Nilson v. City of Kalispell*, 47 Mont. 416, 423, 132 P. 1133, 1135-36 (1913) ("no fixed standard" or measure for determining uncertain nature of "physical and mental pain and suffering"—amount of necessary compensation "rest[s] in the sound discretion" of factfinder).

post-accident disabilities and activities limitations attributed by Breuer to his accident-related shoulder injuries were similar to the types of disabilities and limitations he attributed to his pre-accident back and related leg pain upon seeking pre-accident medical treatment in 2010 through mid-2012, just over six months before the 2013 accident. For example, Breuer's chiropractor testified at deposition that, on intake in 2010, Breuer reported that his low back pain was "interfering with his activities of daily living, such as working and sleeping, and his daily routine," and that "he couldn't lift or bend" and "had that problem for five years." On intake for post-op physical therapy in August 2011 after a second back surgery in May 2011, Breuer reported, and his therapist noted, continuing back and leg pain with wide-ranging functional disability. In 2012, just over six months before the accident, Breuer sought chiropractic treatment for reported "neck" and "mid-back" pain. His pre-accident medical history and record clearly indicate a continuous line of ongoing pre-accident back-related pain and reported related impairment and limitations of even the most basic of daily activities (including sitting, walking, bending, and lifting, *inter alia*)—all stemming from his 2005 back injury. Those matters were thus highly relevant to the centrally disputed fact as to whether similar claimed post-accident disabilities, and related mental anguish/distress, were caused by his 2013 shoulder injury or, alternatively, his prior back injury and recurring related pre- and post-accident back and leg pain. As in *Cheff*, *Clark*, and *Ele*, *supra*, the nature and extent of Breuer's pre-accident back problems and associated physical disabilities were thus items of alternate causation evidence highly relevant for impeachment purposes under M. R.

Evid. 401-02, 607(a), 611(b)(1)-(2), and 705 on cross-examination of Breuer's testifying medical experts.[31] As in *Cheff* and *Ele*, *supra*, those matters were also highly relevant under M. R. Evid. 401-02, 607(a), and 611(b)(1)-(2) on cross-examination of Breuer for the purpose of impeaching his non-expert testimony regarding the occurrence, cause, and nature of his claimed post-accident functional disabilities, causative pain, and related mental anguish or distress.[32] Consequently, we hold that the District Court erroneously concluded that the above-noted evidence, in the form of the medical records or testimony of Breuer's treating medical providers, was *not* relevant for impeachment purposes on cross-examination of Breuer and his testifying medical causation experts as alternative cause evidence rebutting or negating the causation testimonies of he and his medical providers regarding claimed post-accident disability, causative pain, and related mental anguish or distress.

¶33 In contrast to the requisite defense burden of proof when seeking jury apportionment of causation of injury, harm, or disability under *Truman*, a defendant who asserts that some other injury or disability was or is the sole cause of the plaintiff's claimed injury, harm, or

[31] *See similarly* § 26-1-302(7) and (9), MCA (presumption that a witness speaks the truth "may be controverted and overcome by any matter that has a tendency to disprove the truthfulness of [the] witness's testimony," including "inconsistent statements of the witness" or "other evidence contradicting the witness's testimony").

[32] *See Moralli v. Lake Cty.*, 255 Mont. 23, 29-30, 839 P.2d 1287, 1291 (1992) (to extent not requiring or dependent on specialized knowledge or expertise a claimant may competently testify under M. R. Evid. 701 regarding circumstances and nature of a personal injury as perceived and experienced, as well as any prior or present pain, condition, or disability perceived and experienced as a result thereof).

disability, and thus attempts to rebut or negate the plaintiff's proof of causation with otherwise relevant and competent alternate cause evidence on cross-examination, has no foundation burden of proving that the injury or harm at issue is distinctly divisible or apportionable among multiple causes, or that the other injury or condition was more probably than not the cause or sole cause of the injury or harm at issue. *Cheff*, ¶ 36 ("only where a defendant seeks to apportion an injury, as opposed to rebut causation [on cross-examination], does he or she have to prove to a reasonable medical probability that the injury is divisible"—citing *Clark*); *Clark*, ¶¶ 24-27 (affirming denial of plaintiff's motion for judgment on causation as a matter of law where defendant merely cross-examined plaintiff's expert regarding prior injury and resulting preexisting condition and "presented no . . . evidence from lay or expert witnesses" challenging or rebutting plaintiff's "causation evidence"). Breuer attempts to distinguish *Clark* on its facts, and then cites *McCormack*, *Henricksen*, and *Truman*, for the contrary proposition that the State's proffered alternate cause evidence was not admissible, even for impeachment purposes, in the absence of qualified expert testimony that Breuer's claimed post-accident disability, and causative pain, were divisible for purposes of apportionment of causation. Recognizing that the State was *not* seeking apportionment of causation of Breuer's post-accident disability, the District Court cited *McCormack* for the distinct proposition that the State's proffered alternate cause evidence was not admissible, even as non-apportionment alternate cause evidence under *Clark*, without expert medical causation testimony establishing a more-probable-than-not "causal link between" Breuer's claimed

accident-related disabilities and his pre-accident back/leg pain and reported pre-accident disabilities.

¶34 However, as recognized by Breuer (citing *Clark*, ¶ 23), *Clark* "clarified the different evidentiary standards depending on whether causation is denied entirely or [only] in part." We have thus unambiguously rejected assertions, similar to the District Court's conclusion here, that otherwise relevant and competent alternate cause evidence, offered for impeachment purposes on cross-examination in a non-apportionment case to negate or rebut the causation testimony of a plaintiff and/or his or her medical experts, is admissible only upon qualified expert testimony that the prior or subsequent injury or condition was more probably than not the cause or sole cause of the plaintiff's claimed injury, condition, or disability. *E.g.*, *Cheff*, ¶ 36; *Clark*, ¶¶ 23-27. The record here (including the State's opening statement, closing argument, and pertinent jury instructions) clearly manifests that, as in *Clark* and *Cheff*, the State was *not* seeking jury apportionment of causation of injury or disability between Breuer's accident-related shoulder injury and his prior back injury, related pre-accident back/leg pain, and reported pre-accident disabilities. This case is further factually analogous to *Clark* and *Cheff* insofar that Breuer's claimed post-accident disabilities, and causative pain, are of types which the factfinder could reasonably conclude contradict and undermine the causation opinion testimonies of Breuer and his medical providers because they are types which the factfinder could reasonably conclude, without need for specialized medical knowledge or expertise, result from his prior back injury related back and leg pain rather than his accident-caused shoulder injury.

¶35 In retrospect, our pre-*Clark* analysis in *McCormack* was not as precise in distinguishing the defense burden of proof required in divisible injury/causation apportionment cases like *Truman* from the lack of a similar burden in non-apportionment alternate cause by impeachment cases like *Clark* and *Cheff*. However, despite its ¶¶ 26 and 30 references to "alternate causation evidence" (citing *Henricksen*, ¶ 70), *McCormack* was a divisible injury/causation apportionment case like *Truman*, rather than an alternate cause by impeachment case as in *Cheff*, *Clark*, *Ele*, and here. *See McCormack*, ¶ 25 (defendant "argues that the jury would have *apportioned* the damages for the injuries stemming from this accident after learning of [plaintiff's] previous injuries"—emphasis added). Moreover, while *McCormack*'s cited underpinning (*Henricksen*) similarly discussed a defense burden to establish a "more probable than not" "causal connection" as a foundation requirement for admission of "alternate causation" evidence, *Henricksen*, ¶¶ 63 and 70 (citing *Newville v. Mont. Dep't of Family Svcs.*, 267 Mont. 237, 260, 883 P.2d 793, 807 (1994)), *Henricksen* was also a divisible injury/causation apportionment case like *Truman*, rather than an alternate cause by impeachment case as in *Cheff*, *Clark*, *Ele*, and here. *See Henricksen*, ¶¶ 67 and 70 (defendant "did not offer an expert opinion that it was more probable than not that prior stressors *may have contributed to* or were relevant to [plaintiff's] present claims" and was therefore "not entitled to present alternate causation evidence regarding the other stressors"—emphasis added). *See similarly Newville*, 267 Mont. at 260, 883 P.2d at 806-07 (cited *Henricksen* underpinning holding that court erroneously allowed defense cross-examination of plaintiff's medical experts regarding alternate cause (inherited

genetic conditions) as one of "a variety of [other] factors" that "could [have] *contribute*[*d*] *to*" the subject "condition" at issue—emphasis added).[33] As divisible injury/apportionment cases like *Truman*, rather than alternate causation evidence by impeachment cases like *Cheff*, *Clark*, *Ele*, and here, *McCormack* and *Henricksen* are thus distinguishable and do not support Breuer's assertion here. We hold that the District Court also erroneously concluded that, even to the extent otherwise relevant, the State's proffered alternative causation evidence by impeachment was in any event not admissible absent a qualified foundation showing that Breuer's pre-accident back injury, and related pre-accident back/leg pain and associated pre-accident disabilities, were more probably than not the cause of his claimed post-accident disabilities and causative pain.

2. Rule 403 Risk of Confusion of the Issues and/or Unfair Prejudice.

¶36 Apart from their manifest relevance as non-apportionment alternate cause evidence by impeachment on cross-examination of the causation testimony of Breuer and his treating medical providers under M. R. Evid. 401-02, 607(a), 611(b)(2), and 705, the ultimate admissibility of the particularly disputed items of evidence regarding Breuer's pre-accident disabilities, and causative back/leg pain, as alternate cause evidence by impeachment was still subject to other generally applicable rules of evidence pertinent to the proffered purpose and intended manner of introduction of those items. In that regard, the State's

[33] *Newville* further analogized the alternate cause evidence at issue to the causation evidence at issue in *Kimes v. Herrin*, 217 Mont. 330, 332-33, 705 P.2d 108, 110 (1985). *Newville*, 267 Mont. at 260, 883 P.2d at 806-07.

particular assertions of error on appeal narrowly focus on its contemplated use of the following specific items of alternate cause evidence for purposes of impeachment by contradiction:

(1) cross-examination of Breuer regarding disability statements made in his pre-accident RRB disability benefits claim, and the resulting RRB determination that he was "permanently disabled";

(2) cross-examination of Breuer regarding statements attributed to him in his pre- and post-accident medical records regarding reported physical disabilities and impairments associated with reported pre-accident back and leg pain;

(3) designated deposition cross-examination of Breuer's primary care physician (Dr. Lindley) as to whether he was aware of the physically demanding nature of Breuer's prior railroad and ranch work;[34]

(4) designated deposition testimony of Breuer's chiropractor (Boughton) regarding his claimed pre-accident back/leg pain and associated disabilities, and how his low back injury and related problems pre-dated the 2013 accident and continued into 2014 despite the fact that his immediate post-accident treatments in March-May 2013 more narrowly "focused on [his] acute [shoulder] injuries" at that time;

(5) the designated deposition testimony of Breuer's pre-accident physical therapist (Josh Henderson, PT) regarding his pre-accident back-related pain and disability claims;[35] and

[34] While the broad scope of the 2019 exclusionary ruling seemingly would have applied to preclude other Rule 705 defense cross-examination of Dr. Lindley at his subsequent 2020 deposition regarding Breuer's pre-accident back/leg pain and claimed disabilities, it is unclear from the record and briefing on appeal whether or to what extent, if any, the State otherwise intended such other cross-examination.

[35] While it made various foundational competence arguments in a post final pretrial conference response to Breuer's post-conference "Medical Record Admissibility Memo," the State makes no specific assertion on appeal, much less showing, that the District Court erroneously excluded a proffered admission of any particular item of documentary evidence for independent admission as *extrinsic impeachment evidence* as in *Cheff*, ¶¶ 31, 33-35, and 38-39, or *substantive evidence* independently contradicting his causation evidence as in *Reese*, ¶¶ 5-9, 13-14, and 22-25. We thus do not address whether any of Breuer's referenced medical records satisfied applicable

(6) cross-examination of the trial causation testimony of Breuer's treating orthopedic surgeon (Dr. Larry Stayner, MD) regarding Breuer's pre-accident back/leg injury and pain, and claimed associated pre-accident disabilities, as referenced in his pre-accident medical records.

We thus last address whether the District Court erroneously excluded those otherwise relevant items of alternate causation evidence on the stated ground that "any probative value [was] overwhelmed by the danger of unfair prejudice."[36]

¶37 Otherwise relevant evidence is subject to exclusion in the discretion of the court if its "probative value is substantially outweighed," *inter alia*, "by the danger of unfair prejudice, confusion of the issues, or misleading the jury." M. R. Evid. 403; *City of Bozeman v. McCarthy*, 2019 MT 209, ¶ 24, 397 Mont. 134, 447 P.3d 1048 (noting broad discretion of trial courts "to weigh the relative probative value of evidence against the risk of unfair prejudice"—citation omitted). While all probative evidence is generally prejudicial to the opposing party, it is "*unfairly* prejudicial only if" of a type or nature that poses a significant risk of arousing jury hostility or sympathy for a party irrespective of its probative value for the permissible purpose offered. *See McCarthy*, ¶ 24. Even if the subject evidence poses a danger of unfair prejudice, it is subject to exclusion under Rule

foundational competence limitations and requirements of M. R. Evid. 702, 801-04, and 901-02 (hearsay rule and foundational authenticity).

[36] The evidentiary competence of those items for that purpose under M. R. Evid. 801-04 and 901-02 (hearsay rule and foundation authenticity requirement) is not at issue on appeal.

403 only if the risk of unfair prejudice *substantially* outweighs the probative value of the evidence.[37]

¶38 RRB disability benefits, though somewhat similar to federal Social Security disability/retirement benefits, are a special type of disability/retirement benefits available only to railroad workers under a comprehensive federal statutory and administrative scheme provided under the Railroad Retirement Act of 1974. *See* 45 U.S.C. § 231a(a)(1)(iv) and (2)-(3) (2007). While based on a claimant's documented medical and related functional disability status, an RRB permanent disability determination is a matter defined by federal law and made by a federal agency upon application of applicable federal law standards to a claimant's documented medical and related functional disability status and prognosis. *See* 45 U.S.C. § 231a(a)(1)(iv) and (2)-(3). As such, an RRB disability determination, and underlying claim materials, are ultimately neither primary medical records, nor clinical determinations of a treating physician or other treating medical provider. *See* 45 U.S.C. § 231a(a)(2)-(3). Aside from the manifest evidentiary competence implications of such secondary third-party administrative materials under M. R. Evid. 602, 703, 801-04, and 901-02 (personal knowledge of witness, inadmissible matter relied upon by experts in subject field, hearsay, and authenticity requirements and limitations) as

[37] When requested by the opposing party, a well-tailored M. R. Evid. 105 limiting instruction is often sufficient to eliminate, or at least fairly reduce, the risk of unfair prejudice where the subject evidence is highly relevant but nonetheless poses a significant risk of unfair prejudice. *Pelletier*, ¶ 27. "Not so, however, when the probative value of the evidence is minimal . . . and the relative danger of unfair prejudice is high." *Pelletier*, ¶ 27.

applicable in a particular case, the particular RRB disability determination at issue here ultimately found only that Breuer was "totally and permanently disabled" from performing the "frequent more than medium lifting of at least 50 pounds, and walking on uneven terrain," *required of a railroad* "*track laborer*." (Emphasis added.) Even to the scant extent documented on the record here, Breuer's RRB claim statements were plainly directed and limited in focus and scope to his inability to perform the work required of a railroad track laborer. *See* 2007 Breuer RRB Disability Briefing Document (Dist. Ct. Doc. 20, Ex. C) and 45 U.S.C. § 231a(a)(2) (RRB duty to "determine whether [claimant's] condition is disabling for work in [claimant's] regular occupation in accordance with the standards generally established" by RRB). Thus, in contrast to the significant relevance of Breuer's primary pre- and post-accident medical records regarding his pre-accident back injury and related recurring pre-accident back and leg pain as alternate causes of his claimed post-accident related disabilities, his 2007 RRB claim statements, disability determination, and underlying RRB claim materials had only minimal probative value for impeachment purposes in this case. We thus agree with Breuer and the District Court that the only-minimal probative value of that evidence was substantially outweighed by the danger of unfair prejudice and confusion of the issues. *See Mickelson v. Mont. Rail Link, Inc.*, 2000 MT 111, ¶¶ 36-38 and 43-47, 299 Mont. 348, 999 P.2d 985 ("evidence of workers' compensation benefits or other collateral source benefits [generally] constitutes prejudicial and reversible error requiring a new trial"—holding that admission of evidence of claimant receipt of workers' compensation benefits to prove malingering and secondary

gain motive probative of failure to mitigate damages was reversible error); *Thomsen v. State ex rel. Dep't of Highways*, 253 Mont. 460, 463-64, 833 P.2d 1076, 1077-78 (1992) (noting "strong likelihood of prejudice resulting from introduction of collateral source evidence" and that potential substantial "prejudicial impact of [collateral source] evidence" on a damages claim "varies little from case to case" and thus "should be permitted only upon such persuasive showing that the evidence sought to be introduced is of substantial probative value"—holding that allowance of defense cross-examination of claimant regarding Veterans Administration "medical and rehabilitative services" was reversible error—citation omitted).[38] We hold that the District Court did not abuse its discretion in excluding admission of or reference to Breuer's RRB disability claim statements, disability determination, and related RRB claim materials.

¶39 In contrast, as noted *supra*, the following disputed alternate cause evidence was highly relevant for the purpose of negating or rebutting Breuer's causation evidence by impeachment on cross-examination of Breuer and his testifying medical providers on foundation showing of evidentiary competence pertinent to the subject cross-examinee:

(1) cross-examination of Breuer regarding statements attributed to him in his pre- and post-accident medical records regarding reported physical disabilities and impairments associated with his reported back and leg pain related to his pre-accident back injury;

[38] *Compare Evans v. Scanson*, 2017 MT 157, ¶¶ 13-15, 388 Mont. 69, 396 P.3d 1284 (affirming defense cross-examination of personal injury claimant regarding health insurance under "curative admissibility" doctrine to "rebut any false impression" created by claimant testimony that she was "financially unable to care for her child" where claimant had already referenced her health insurance coverage for her own purpose in her direct testimony).

(2) designated deposition cross-examination of Breuer's primary care physician (Dr. Lindley) as to whether he was aware of the physically demanding nature of Breuer's prior railroad and ranch work;

(3) designated deposition testimony of Breuer's pre- and post-accident chiropractor (Boughton) regarding his claimed pre-accident back/leg pain and associated disabilities, and how his low back injury and related problems pre-dated the 2013 accident and continued into 2014 despite the fact that his immediate post-accident treatments in March-May 2013 more narrowly "focused on [his] acute [shoulder] injuries" at that time;

(4) the designated deposition testimony of Breuer's pre-accident physical therapist (Henderson) regarding his pre-accident back-related pain and disability claims; and

(5) cross-examination of the trial causation testimony of Breuer's treating orthopedic surgeon (Dr. Stayner) regarding Breuer's pre-accident back/leg injury and pain, and claimed associated pre-accident disabilities, as referenced in his pre-accident medical records.

Contrary to Breuer's assertion, his documented reoccurring need for treatment for similar and related back/leg pain, and reported associated disabilities, both before the January 2013 accident in 2010-12, and thereafter as late as 2020-21, manifests that the passage of time did *not* substantially diminish the probative impeachment value of his prior back-injury-related back and leg pain as an alternate cause of his claimed post-accident disabilities. Nor has he shown any significant danger of confusion of the issues, or that the jury might seek to apportion causation of his claimed post-accident disabilities between his accident-related shoulder injury and his prior back injury and recurring back/leg pain. The record manifests that, except to the extent restricted by the court's exclusionary pretrial rulings, the State's consistent defense theory was that Breuer's accident-related shoulder injury was neither the cause, nor any contributing cause, of his claimed post-accident

disabilities and causative pain that were similar to those he attributed, both pre- and post-accident, to back and leg pain related to his pre-accident back injury.[39] Moreover, neither party requested, nor did the District Court give, the divisible injury jury instruction mandated in *Truman*, ¶¶ 25-32 (*inter alia* citing *Azure v. City of Billings*, 182 Mont. 234, 249-53, 596 P.2d 460, 469-71 (1979), and *Callihan v. Burlington N. Inc.*, 201 Mont. 350, 357, 654 P.2d 972, 976 (1982)), in divisible injury/causation apportionment cases. Nor did the State suggest or imply on opening or closing that the jury could or should apportion causation of Breuer's claimed post-accident disabilities, and resulting loss of established course of life, between his accident-related shoulder injury and any other cause. Under these circumstances, we agree with the State that, for purposes of M. R. Evid. 403, the danger of confusion of the issues or unfair prejudice did *not* substantially outweigh the probative value of the above-enumerated alternate causation evidence offered by the State to negate or rebut the causation testimonies of Breuer and his testifying medical providers by impeachment on cross-examination as in *Cheff*, *Clark*, and *Ele*. We therefore hold that the District Court abused its discretion in excluding the above-enumerated items of alternate cause evidence by impeachment under Rule 403.

3. Materiality of Erroneous Exclusion.

[39] On closing argument, the State again acknowledged that Breuer was "entitled to" reasonable compensation for "pain and suffering" "experienced as a result of any accident related . . . injury," but not for disabilities and causative pain caused by other unrelated "ongoing problems" which continued well after his "accident related [shoulder] problems" were twice "fixed" by surgical means. The State thus suggested a sum in the range of $50,000 to $100,000 would be reasonable to compensate Breuer for his prior accident related pain/suffering and loss of established course of life, but none for his claimed future pain/suffering and loss of established course of life.

¶40 Contrary to Breuer's assertion, the exclusion of the above-noted alternative causation evidence by impeachment materially prejudiced the State's right to a fair trial insofar that it unfairly denied the State a full and fair opportunity to rebut or negate the plaintiff's causation evidence regarding the most significant element of Breuer's claimed damages. Absent consideration of the full permissible scope of the State's proffered alternate cause evidence, the jury award for past and future pain/suffering and loss of established course of life made up more than 75% ($390,000) of the total damages award ($510,345.05). Compounding that prejudice, it is unfair and "improper legal maneuvering" for a party who has successfully obtained an exclusionary evidentiary ruling to "then argue" to the jury that the opposing party would have presented it "if [such] evidence existed." *Hall v. Big Sky Lumber & Supply*, 261 Mont. 328, 337, 863 P.2d 389, 395 (1993). Breuer did precisely that here, to wit:

> And back pain . . . , I hate to even talk about it because it's dumb, but so what. So, he has back pain. Nobody [is] trying to hide from back pain. [Breuer] testified he had the flare up in 2020 so, what eight years after the accident. Who cares? He had a flare up. He went to physical therapy. He got better. Back's bugging him still. Maybe he's going to have to have it looked at down the road. Who cares? What [does] that have to do with his shoulder? Not a dang thing. Not a dang thing. They keep bringing it up and bringing it up. Why do they do that? They just want to change the subject.
>
> . . .
>
> *They didn't bring you any evidence*. All you've heard is *unsupported speculation and attorney arguments* . . . [A]ll we've heard are hints, innuendo and speculation about these things. . . . A [c]ourt of law is not a time for hinting, *either show your evidence or keep your mouth closed*. They brought you *no evidence of any of those things* let alone that they have anything to do with this case or [Breuer's] damages.

. . .

> [If such existed,] they could've brought in . . . some of [his] doctors if they thought there was anything to do with [his claimed accident-caused pain, disability, and resulting activities limitations]. That's how trials work. . . . [Y]ou heard from [Breuer's physician] who's been seeing [him] *for years before the crash*. *If there was anything to . . . any of this* wouldn't you think that [he] would be the guy to ask? [But] *they didn't . . . because none* of *these* [prior injuries and conditions] to the extent they're even a thing *have anything to do with this case.*

(Emphasis added.) Reversal and remand for a new trial is thus warranted pursuant to § 25-11-102(1), MCA (new trial warranted if "irregularity in the proceedings" prevented "a fair trial"). *See also Maier*, ¶ 43 (preclusion of permissible cross-examination of otherwise uncontroverted witness testimony regarding material issue reversible error).

CONCLUSION

¶41 We hold that the District Court erroneously excluded or precluded the disputed alternative causation evidence enumerated in the foregoing ¶ 39 for the purpose of negating or rebutting Breuer's causation evidence by impeachment on cross-examination of Breuer and his testifying medical providers. We hold further that such error was materially prejudicial to the State and thus warrants reversal and remand for a new trial in accordance with this opinion.

¶42 REVERSED and REMANDED for a new trial in accordance with this opinion.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE