DA 22-0123

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 174

BRETT CAMEN,

Plaintiff and Appellant,

v.

GLACIER EYE CLINIC, P.C., and KALISPELL REGIONAL MEDICAL CENTER, INC.,

Defendants and Appellees.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-2019-361(D)
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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Argued and Submitted: April 26, 2023

Decided: September 19, 2023

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Plaintiff and Appellant Brett Camen (Camen) appeals from the February 17, 2022 Judgment issued by the Eleventh Judicial District Court, Flathead County, which followed a jury verdict in favor of Defendants and Appellees Glacier Eye Center, P.C. (GEC), and Kalispell Regional Medical Center, Inc. (KRMC). Camen argues the District Court made a series of decisions during the January 31-February 9, 2022 trial which deprived him of a fair trial.

¶2 We address the following restated issues on appeal:

1. Whether the District Court abused its discretion by refusing to give the jury proportionate duty and loss of chance instructions.

2. Whether the District Court abused its discretion by allowing Dr. Wheeler to testify as an expert to matters beyond his disclosure.

3. Whether the District Court erred by failing to poll the jury in the manner required by statute.

¶3 We reverse and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In November of 2017, Camen was a 16-year-old with normal eyesight. On Thanksgiving, he began experiencing severe headaches, which he described as feeling like his head "was gonna explode." On December 15, Camen's vision suddenly changed. At school, during his last class of the day, Camen noticed he could no longer read normally as things became blurry. While driving home from school, he began seeing double. Still dealing with both the excruciating headaches and the vision deterioration, Camen went to

the Cabinet Peaks Medical Center emergency room on December 17. A CT scan conducted there was negative, as it found "[n]o evidence of acute intracranial process."

¶5 On December 18, Camen saw his optometrist, Dr. Steven Sorensen. Dr. Sorensen dilated Camen's eyes and detected both flame hemorrhages, which occur when blood vessels in the retinal nerve head rupture, and severe papilledema, the swelling of the optic nerve head caused by increased intracranial pressure. On December 19, Dr. Sorensen spoke with Dr. Marcus Wheeler, a pediatric neurologist at KRMC, and Matthew Bauer, PA-C, Camen's primary care provider, regarding Camen's case. PA Bauer also spoke with Dr. Wheeler that same day. Dr. Wheeler recommended PA Bauer have Camen undergo testing in the form of a brain MRI, lumbar puncture, and laboratory testing of cerebral spinal fluid (CSF). Dr. Wheeler's office also scheduled Camen for an appointment on January 3, 2018.

¶6 On December 20, 2017, Dr. Sorensen performed automated visual field tests on Camen, which showed nearly complete blackouts in the lower half of both eyes. Camen also underwent an MRI on December 20, which showed his brain was normal. On December 21, Camen underwent the lumbar puncture test. This test showed his CSF pressure was extremely high, overflowing the 55 cm tube. A "normal" CSF pressure is generally regarded as less than 25 cm. Dr. Wheeler received the results of Camen's testing on December 21 and spoke with PA Bauer that same day. Dr. Wheeler advised that both the MRI and pathology results appeared normal, but the lumbar puncture indicated high intracranial pressure. These results, in conjunction with Camen's negative CT scan,

indicated Camen was suffering from idiopathic intracranial hypertension (IIH). IIH may be either common, or, in rare cases, fulminant. Dr. Wheeler recommended PA Bauer begin treatment for common IIH by prescribing Camen a low dose of Diamox, a medication which reduces the production of CSF. PA Bauer prescribed Diamox that same day, and scheduled a follow-up appointment with Camen. Dr. Wheeler, meanwhile, left for vacation. PA Bauer's follow-up appointment occurred on December 27, at which Camen indicated his headaches had improved since starting the medication, but was unsure if his vision had improved. On December 28, Dr. Sorensen mailed a letter to Dr. Aaron Alme at GEC to advise of Camen's examination and test results, which showed Camen's visual acuities to be 20/40 and 20/60. GEC received Dr. Sorensen's letter on January 2, 2018. Camen's mother scheduled him for an appointment with Dr. August Stein, an ophthalmologist at GEC, on January 5, 2018.

¶7 On January 3, 2018, Camen had his first appointment with Dr. Wheeler. Dr. Wheeler noted Camen's headaches had improved while taking the Diamox, and that Camen's vision had "improved a bit," though Camen's visual acuity was now shown to be 20/50 in the right eye and 20/100 in the left eye. Dr. Wheeler recommended continuing Diamox at the same dosage and scheduled Camen to come "back in about 6 weeks' time," or sooner if problems developed. Dr. Wheeler also recommended an ophthalmology assessment once Camen had been taking Diamox for "about 3 months."

¶8 On January 5, Camen had his first appointment with Dr. Stein at GEC. Dr. Stein found hemorrhages in Camen's retinas and noted visual acuity to be 20/80 in the right eye

and 20/100 in the left eye. Optical coherence tomography (OCT) tests performed that day showed "massive edema." Dr. Stein raised Camen's Diamox dosage and noted he would "confer with Dr. Wheeler about [a] plan." Dr. Stein attempted to reach Dr. Wheeler on January 5, but was unable to and left a message. Dr. Stein did not hear back from Dr. Wheeler until the two spoke on January 9. Camen again visited the Cabinet Peaks emergency room on January 7 and saw Dr. Sorensen on January 8. Dr. Stein saw Camen again on January 9, and again saw significant hemorrhages around Camen's retinas. Dr. Stein again raised the Diamox dose and also ordered a repeat lumbar puncture, requesting the pathologist seek for cells to rule out cancer. Dr. Stein spoke with Dr. Wheeler on January 9. Dr. Wheeler told Dr. Stein that the MRI showed no venous clot and earlier testing did not appear to show malignant cells, but agreed repeating the lumbar procedure was appropriate. The lumbar puncture procedure was done on January 10. Once again, Camen's CSF pressure overflowed the 55 cm tube. Dr. Stein received the cytology results on January 11, which ruled out cancer.

¶9 Dr. Stein saw Camen again on January 12. Camen's visual acuity at this appointment showed 20/80 in the right eye and 20/400 in the left eye. Dr. Stein called Dr. Kelly Schmidt, a pediatric neurosurgeon, and spoke to her about Camen's case. Dr. Stein referred Camen to Dr. Schmidt for placement of a shunt to relieve the pressure in Camen's brain due to fulminant IIH and again increased the Diamox dose. Camen was admitted to the hospital on January 14, and Dr. Schmidt performed the brain shunt surgery

on January 15. Camen's vision slightly improved after the surgery for a brief time, but he is now permanently blind.

¶10 On April 23, 2019, Camen filed his Complaint and Demand for Jury Trial, alleging GEC and KRMC were responsible for their employees, Dr. Stein and Dr. Wheeler, respectively, departing from the standard of care by failing to recognize Camen's need for urgent neurological evaluation due to fulminant IIH.[1] Camen's Complaint alleged the delay in referring him for urgent neurological evaluation "reduced his chance for more successful treatment," because the high CSF pressure continued to damage his optic nerves in the meantime.

¶11 The matter was tried before a jury from January 31-February 8, 2022. At trial, Camen presented the expert testimony of Dr. Andrew Lee, a neuro-ophthalmologist; Dr. Todd Lefkowitz, an ophthalmologist; and Dr. Steven Glass, a pediatric neurologist. Camen's expert witnesses testified that blindness was the main risk posed by fulminant IIH and Dr. Wheeler and Dr. Stein violated the standard of care by not referring Camen for treatment earlier, which lost Camen the chance of preserving his eyesight. Dr. Wheeler and Dr. Stein both testified regarding the standard of care required and to their care and treatment of Camen.

[1] Camen's Complaint initially also named the Kalispell Regional Health System as a defendant, but Camen voluntarily dismissed KRHS before trial.

¶12 During the settling of jury instructions, the District Court refused to give two of Camen's proposed instructions relevant to this appeal. Camen's Proposed Instruction No. 9, the proportionate duty instruction, stated:

> The care required of a defendant in a negligence claim is always reasonable care. This standard never varies but the care which it is reasonable to require of the defendant varies with the danger involved in his acts, and is proportionate to it. The greater the danger, the greater the care which must be exercised.

KRMC and GEC objected to this instruction, asserting it was not appropriate for a medical malpractice case. Camen responded that "in medicine, absolutely, the greater the risk . . . that's what this whole case has been about[.]" The District Court refused to give this instruction, reasoning it may be appropriate for common law negligence cases, but was not appropriate in a medical malpractice case where the "standard of care is established appropriately by expert testimony." Proposed Instruction No. 11, the loss of chance instruction, stated:

> A doctor's negligence is a cause of damage to the plaintiff if it increases risk of harm to the plaintiff or reduces the plaintiff's chance for obtaining a better result.

KRMC and GEC objected to this instruction, asserting the loss of chance instruction of the type approved by this Court in *Aasheim v. Humberger*, 215 Mont. 127, 131-34, 695 P.2d 824, 827-28 (1985), had been superseded by § 27-1-739, MCA, and Camen failed to make a claim under the statute. Camen responded that his loss of chance claim was no surprise to KRMC and GEC as it had been addressed in the Complaint and the pretrial brief, the experts testified about the "chance and the percentages," and Camen's loss of chance to

avoid blindness was "the crux of this case." The District Court refused this instruction, concluding that *Aasheim* was superseded by § 27-1-739, MCA, and Camen's claim failed to conform to the statute.

¶13 Later, the District Court announced its planned method of polling the jury: to ask each juror if it was the jury's verdict and if at least eight of the jurors agreed on each issue. Camen objected to the District Court's method, because the court was not asking each juror if it was the juror's verdict. The District Court responded that it "appreciate[d] the objection," but that the "poll will be conducted, if at all, according to the [c]ourt's formulation."

¶14 The jury, after deliberating over the course of two days, reached a verdict on February 9. The jury found that neither GEC (Dr. Stein) nor KRMC (Dr. Wheeler) were negligent. Camen asked for a poll of the jury. Keeping with its earlier plan, the District Court asked the jury two questions: (1) "First, is this the jury's verdict?" and (2) "Second, on each question did at least eight of the jurors agree on the answer?" All twelve jurors answered "yes" to both questions. After the District Court asked if Camen accepted the poll, Camen responded that "subject to our earlier objection, we accept the poll that the [c]ourt just conducted." In a sidebar, Camen "object[ed] to the failure to inquire of each individual juror how they voted on each question." The District Court overruled the objection, reasoning that there had been a hearing on the court's poll formulation before the poll occurred, that it considered Camen's previous objection during that hearing to have been either withdrawn or waived, and that the poll was sufficient.

¶15 Camen appeals. Additional facts will be discussed as necessary below.

STANDARD OF REVIEW

¶16 We review jury instructions for an abuse of discretion. *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 10, 395 Mont. 432, 443 P.3d 369. An abuse of discretion occurs when a court acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904 (citing *Tarlton v. Kaufman*, 2008 MT 462, ¶ 19, 348 Mont. 178, 199 P.3d 263). While a district court has broad discretion in formulating jury instructions, the court's discretion is limited by the principle that jury instructions must fully and fairly instruct the jury on the law applicable to the case. *Peterson*, ¶ 22. When considering the jury instructions given by the district court, we review them in their entirety, in connection with the evidence introduced at trial, to determine if the instructions fully and fairly instruct the jury on the law applicable to the case. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 43, 351 Mont. 464, 215 P.3d 649 (citing *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 74, 337 Mont. 411, 162 P.3d 106).

¶17 We review a district court's rulings on the admissibility of expert testimony for an abuse of discretion. *Sharbono v. Cole*, 2015 MT 257, ¶ 10, 381 Mont. 13, 355 P.3d 782 (citing *Norris v. Fritz*, 2012 MT 27, ¶ 17, 364 Mont. 63, 270 P.3d 79).

¶18 The interpretation and construction of a statute is a matter of law, which we review de novo. *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 12, 390 Mont. 352, 413 P.3d 813.

DISCUSSION

¶19 *1. Whether the District Court abused its discretion by refusing to give the jury proportionate duty and loss of chance instructions.*

¶20 Camen asserts he was entitled under the law and the facts of this case to both his proposed proportionate duty and loss of chance instructions. Camen's theory of the case posited that due to the great risk of blindness from fulminant IIH, the doctors treating him "owed a greater duty in determining how to treat IIH," and that as a result of the doctors' failure to refer him for surgery sooner, he "lost the chance of preserving his eyesight." Camen argues that the District Court's failure to give these instructions essentially decimated his case, because their omission led the jury to not be instructed on two essential elements of Camen's theory of the case: duty and causation. Camen further asserts the instructions, as given, "precluded the jurors from considering Camen's theory of the case, and only allowed consideration of defense theories of the case." GEC, meanwhile, asserts no prejudicial error occurred because the District Court correctly instructed the jury on the issue of duty and the jury did not reach the causation question. GEC contends the proposed instructions "misstate the law and do not apply to the facts of this case." KRMC asserts the District Court's rejection of Camen's proposed proportionate duty and loss of chance instructions was proper as they were "factually unsupported and would confuse the jury," and, even if they should have been given by the court, the failure to do so was harmless.

¶21 "A trial court's refusal to give an offered instruction only constitutes reversible error when 'such refusal affects the substantial rights of the party proposing the instruction,

thereby prejudicing him.'" *Warrington*, ¶ 10 (quoting *Busta v. Columbus Hosp.*, 276 Mont. 342, 360, 916 P.2d 122, 132 (1996)). "In determining how to instruct the jury, the district court should take into consideration both the parties' theories and the evidence presented at trial." *Jacobsen*, ¶ 46 (citing *Cechovic v. Hardin & Assocs., Inc.*, 273 Mont. 104, 116, 902 P.2d 520, 527 (1995)). A party has a right to jury instructions adaptable to his or her theory of the case when the theory is supported by credible evidence and it is reversible error to refuse to instruct on an important part of a party's theory of the case. *Rix v. Gen. Motors Corp.*, 222 Mont. 318, 323, 723 P.2d 195, 198 (1986) (citations omitted).

¶22 On appeal from the jury verdict returned against Camen and in favor of KRMC and GEC in this case, we must determine whether Camen was entitled to his proposed instructions under the evidence presented at trial and whether the failure to give the proportionate duty and loss of chance instructions prejudiced him. If Camen was prejudiced by the District Court's failure to properly instruct the jury under the law and facts of the case, the proper remedy is to reverse the jury's verdict and remand for a new trial. *Peterson*, ¶ 43. We address each refused instruction in turn.

Proportionate Duty

¶23 Camen asserts the District Court's refusal to give his proposed proportionate duty instruction constitutes reversible error because the instruction was supported by both the law and the facts of this case. Camen contends the District Court not giving the proportionate duty instruction resulted in the jury not being properly instructed on

foreseeability and proportionality as they relate to duty. GEC asserts the proportionate duty instruction "has no place in a medical malpractice case because weighing the risks of various actions is inherent in a physician's exercise of medical judgment" and would "usurp the function of medical experts and place the role of defining duty with the court and jury." KRMC argues the proportionate duty instruction "is a bad fit for medical malpractice cases because it invites the jury, rather than experts, to establish the standard of care, and ignores that a doctor must navigate numerous competing risks, not just one." GEC and KRMC also assert that, even if the District Court failed by not giving the proportionate duty instruction, any error was harmless because Camen was not prejudiced.

¶24 The essential dispute the parties have here boils down to whether proportionate duty instructions can ever be applicable to medical malpractice cases, which may involve numerous competing risks, or simply to those general negligence cases involving a single, obvious danger that heightens the risk of an act. Under the specific facts of this case, we conclude instructing the jury on proportionate duty was both warranted and required.

¶25 "[D]uty 'is measured by the scope of the risk which negligent conduct foreseeably entails.'" *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 671 (1996) (quoting *Busta*, 276 Mont. at 363, 916 P.2d at 134)). "The existence of a duty turns primarily on foreseeability." *Eklund v. Trost*, 2006 MT 333, ¶ 40, 335 Mont. 112, 151 P.3d 870 (internal quotation marks and citation omitted). In *Estate of Strever*, we adopted § 298 of the Restatement (Second) of Torts (1965), pertaining to "the higher degree of care

required of individuals in the face of a known danger." *Schuff v. Jackson*, 2002 MT 215, ¶ 35, 311 Mont. 312, 55 P.3d 387.

¶26 The trial in this case was replete with references to the weighing of risks and benefits when treating Camen, raising fact issues of foreseeability. Camen contended blindness was a foreseeable consequence of delaying treatment for fulminant IIH, while the treating doctors contended fulminant IIH was incredibly rare and their treatment properly weighed the risks involved. Camen's experts testified that vision loss and blindness was the main risk and most feared complication of fulminant IIH and delaying treatment heightened the risk Camen would go blind. Dr. Lee noted that brain shunt surgery carried its own risks, but that the main risk of fulminant IIH was "vision loss" and "going blind." Dr. Glass noted the main complication of sustained pressure was damage to the optic nerve and loss of vision. Dr. Lee testified both Dr. Stein and Dr. Wheeler breached the standard of care by not referring Camen for surgery to relieve the pressure on Camen's optic nerves sooner, which "blinded the patient." Dr. Lefkowitz testified Dr. Stein violated the standard of care by not referring Camen for surgery sooner, while Dr. Glass testified Dr. Wheeler did not comply with the standard of care by failing to refer Camen for neurosurgery sooner. Dr. Stein and Dr. Wheeler, meanwhile, testified they did meet the standard of care in their treatment because fulminant IIH is incredibly rare and brain shunt surgery carries its own risks and is permanent, therefore they appropriately weighed the risks and benefits of the delay necessary to rule out other causes of Camen's increased intracranial pressure, such

as cancer. The weighing of risks and benefits, and the foreseeability of Camen's blindness, was central to Camen's case and both GEC and KRMC's defenses.

¶27 We disagree with GEC and KRMC that proportionate duty instructions can have no place in medical malpractice cases, as in all negligence cases the "existence of a duty turns primarily on foreseeability." *Eklund*, ¶ 40. It is not only applicable to those cases where a common activity involves an unusual risk, such as operating a boat near rocks, *Schuff*, ¶¶ 6-9, 39, or plowing underground telephone lines near dry grass, *Dale v. Three Rivers Tel. Coops., Inc.*, 2004 MT 74, ¶ 8, 320 Mont. 401, 87 P.3d 489. There is quite simply no blanket carve-out for medical malpractice negligence, and a proportionate duty instruction like the one proposed here, or the similar one we approved in *Schuff*, may or may not be applicable depending on the facts and theories of the case presented at trial. "In the taxonomy of civil actions, a medical malpractice action is a species of negligence action. Unsurprisingly, the general principles governing negligence actions apply." *Armacost v. Davis*, 200 A.3d 859, 879 (Md. 2019).

¶28 While Justice Baker's Special Concurrence correctly notes South Carolina has rejected the giving of a proportionate duty instruction in a medical malpractice case, *Sulton v. Healthsouth Corp.*, S.E.2d 641, 644 (S.C. 2012), it would not be accurate to claim allowing a trial court to give a proportionate duty or foreseeability instruction in a medical malpractice claim would make Montana an outlier on the subject. Both Maryland and Ohio, while recognizing a foreseeability instruction may be superfluous under the specific facts of a medical malpractice case, have permitted such instructions and reversed their

intermediate appellate courts who determined such instructions could not be given. *Armacost*, 200 A.3d at 878-80; *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 2015-Ohio-229, ¶ 29, 29 N.E.3d 921 ("Because foreseeability of harm is relevant to the determination of the scope of a physician's duty in a medical-malpractice action, giving a foreseeability instruction in such an action is not manifestly incorrect[.]"). Ultimately, even when determining the foreseeability instruction was "unnecessary" under the specific facts of a particular medical malpractice case, the Ohio Supreme Court noted "the issue of foreseeability is relevant to a physician's standard of care in treating a particular patient, and separate consideration of the foreseeability of harm is appropriate if there is a question for the jury regarding whether the physician knew or should have known that a chosen course of treatment involved a risk of harm." *Cromer*, ¶¶ 44-45. Whether a proportionate duty instruction may be given in a medical malpractice case is therefore a fact-specific question, and we agree with Maryland and Ohio that, while the instruction may be unnecessary or superfluous in some medical malpractice cases, there need be no hard and fast rule banning foreseeability instructions like South Carolina has imposed. The facts of this case demonstrate why, in some medical malpractice cases, proportionate duty instructions may be necessary. There is no dispute that both Dr. Wheeler and Dr. Stein were required, as part of the standard of care, to weigh risks and rule out other possible causes. Having to perform such a risk/benefit analysis did not give the doctors carte blanche to take unlimited time to come to a diagnosis and treatment plan, however, particularly when dealing with the known risk presented by delaying treatment for

fulminant IIH—permanent blindness.[2] The dispute here centers around the actions of the doctors after December 21, 2017, when Dr. Wheeler knew Camen was suffering from IIH. Dr. Wheeler recommended PA Bauer prescribe a low dose of Diamox and then went on vacation. When Dr. Stein first saw Camen in early January, he raised Camen's Diamox dose and left a message for Dr. Wheeler. Dr. Wheeler did not respond and Dr. Stein did not reach out again until the two finally spoke four days later—four days during which the elevated CSF pressure continued to destroy Camen's optic nerve. Camen's theory of the case was that his vision could have been preserved if the doctors acted with diligence, and Camen alleged the doctors did not. Under this theory and the facts presented at trial, the proportionate duty instruction was key to Camen's case and he was entitled to it. *Rix*, 222 Mont. at 323, 723 P.2d at 198. Instructing the jury on the law applicable to the case is the duty of a district court. *Peterson*, ¶ 22. While there may be times a proportionate duty instruction is superfluous in a medical malpractice case, under the facts here, it was required and error for the District Court to not give one.

[2] The Special Concurrence misapprehends the Opinion's discussion with regard to the risk of blindness and concludes the Opinion requires the trial court has an obligation to instruct that doctors owe a greater duty of care against the singular risk of blindness. *See* Special Concurrence, ¶ 52. The proportional duty instruction does not suggest that one particular risk or outcome—such as blindness—requires a higher duty of care when compared to competing risks. It does, however, reinforce that when a catastrophic outcome rather than a more moderate outcome—such as blindness versus a period of discomfort without permanent impairment—is a known risk, a higher degree of care is required. The proportionality instruction is supported by law and the facts of this particular medical malpractice case as presented and should have been given to the jury.

¶29 We also do not agree with GEC and KRMC that instructing a jury on proportionate duty regarding blindness in a medical malpractice case where the expert testimony specifically singled out blindness as the main risk involved with a delay in treating fulminant IIH somehow invades the bedrock legal principle that the standard of care in a medical malpractice case must come from qualified expert testimony. "The plaintiff in a medical malpractice action must establish the following elements: (1) the applicable standard of care, (2) the defendant departed from that standard of care, and (3) the departure proximately caused the plaintiff's injury." *Howard v. Replogle*, 2019 MT 244, ¶ 17, 397 Mont. 379, 450 P.3d 866 (citing *Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410). "Foreseeability is a constituent part of proximate cause, and proximate cause is an essential element of a malpractice action." *Komlodi v. Picciano*, 89 A.3d 1234, 1251 (N.J. 2014). Expert testimony is required to establish the elements of a medical malpractice claim. *Howard*, ¶ 17. The five expert witnesses, all board-certified doctors, gave extensive testimony regarding the standard of care for treating IIH and/or fulminant IIH. Following the evidentiary presentations regarding the standard of care, it became "a matter of law for the court to determine the proper standard of care applicable to the case and instruct the jury on that standard." *Aasheim*, 215 Mont. at 129, 695 P.2d at 826. "Foreseeability of harm is relevant to a physician's standard of care, and a correct, general statement of the law regarding the standard of care or the breach of that standard includes the element of foreseeability." *Cox v. MetroHealth Med. Ctr. Bd. of Trs.*, 2015-Ohio-2950, ¶ 53, 39 N.E.3d 843 (citation omitted). After being properly instructed,

the jury "retain[s] the ability to determine whether the professional exercised the proper degree of care, skill and diligence warranted under the circumstances." *Thayer v. Hicks*, 243 Mont. 138, 151, 793 P.2d 784, 792 (1990). The District Court properly instructing the jury on negligence law, which includes concepts of reasonableness and foreseeability, does not invade the province of these expert witnesses.

¶30 This case turned on whether Camen's blindness was a foreseeable consequence of delaying treatment for fulminant IIH. Under both the facts presented at trial and his theory of the case, Camen was entitled to a proportionate duty instruction. *Jacobsen*, ¶ 46. The District Court's failure to give such prejudiced him by inadequately instructing the jury on foreseeability as it related to his treatment for IIH. As such, the District Court's instructions failed to fully and fairly instruct the jury on the law applicable to the case. *Peterson*, ¶ 22. This error in properly instructing the jury regarding duty affected the jury's ability to make the ultimate determination of whether GEC and KRMC were negligent.

Loss of Chance

¶31 Camen further asserts a second instructional error by the District Court in this case—that the court wrongly refused his loss of chance of recovery instruction based on a mistaken belief that *Aasheim* had been superseded by statute. Camen contends an essential theory of his case was that prompt action could have saved his 20/40 vision, but the delay in referring him to neurosurgery by the treating doctors cost him a chance at that outcome. KRMC argues the proposed loss of chance instruction was "based on case law that had been superseded by § 27-1-739, MCA, and was not supported by the facts." GEC contends

Camen's proposed instruction "misstates Montana law regarding medical negligence claims" and "bears little resemblance to" § 27-1-739, MCA. GEC and KRMC also assert that, even if the District Court failed by not giving the instruction, any error was harmless.

¶32 We begin with the statute at issue here, which allows for damages against a health care provider if a negligent act or omission during diagnosis or treatment reduces a patient's chance of recovering:

> (1) For purposes of a malpractice claim, as defined in 27-6-103, damages may be awarded against a health care provider, as defined in 27-6-103, if a negligent act or omission during diagnosis or treatment for a medical condition reduces a patient's chance of recovering and the negligent act or omission is a contributing cause of:
>
> (a) death;
>
> (b) survival for a shorter period of time;
>
> (c) no recovery;
>
> (d) a recovery that is of lesser extent or quality or that takes longer to occur; or
>
> (e) other injury.
>
> (2) The damages must be determined based on which of the events referred to in subsections (1)(a) through (1)(e) occurred and the resulting types of injury, damage, and loss.
>
> (3)
>
> (a) If the evidence establishes that the chance of recovering prior to the negligent act or omission was more likely than not, the damages awarded must be 100% of the damages determined under subsection (2).
>
> (b) If the evidence establishes that the chance of recovering prior to the negligent act or omission was not more likely than not, the damages awarded must be the difference between the chance of recovering prior to the

> negligent act or omission and the chance of recovering after the negligent act or omission multiplied by the total damages determined under subsection (2).

Section 27-1-739, MCA. We have previously determined that this statute "codified" the loss of chance theory we approved in *Aasheim*, and "is included in the issue of causation." *Steffensmier v. Huebner*, 2018 MT 173, ¶ 11, 392 Mont. 80, 422 P.3d 95. "A loss of chance theory allows the jury to determine that a provider's negligence denied a patient 'the opportunity to recover.'" *Steffensmier*, ¶ 11 (quoting *Aasheim*, 215 Mont. at 133, 695 P.2d at 828).

¶33 From the very outset of this case, beginning in Camen's Complaint and continuing through to trial, it has been abundantly clear that Camen's theory was Dr. Wheeler and Dr. Stein were negligent by delaying treatment for fulminant IIH and that negligence reduced his chance of retaining his eyesight. The Complaint alleged that the delay "reduced his chance for more successful treatment." The Pretrial Order contended the delay caused Camen "to lose the chance for a better outcome from his malignant IIH." At trial, Camen presented expert testimony on this matter. Dr. Lee testified that prompt surgery would have more likely than not preserved Camen's vision. Dr. Glass testified Camen's vision could have been saved if Dr. Wheeler complied with the standard of care. It is clear the evidence presented at trial supports a loss of chance instruction in this case.

¶34 The District Court refused the loss of chance instruction, determining *Aasheim* had been superseded by § 27-1-739, MCA, and because Camen's case had testimony regarding preserving the status quo or some vision, rather than a full recovery, it did not comply with

the statute. The District Court was incorrect. First, § 27-1-739, MCA, "codified" *Aasheim*'s loss of chance theory. *Steffensmier*, ¶ 11. Second, the District Court's determination there could only be a loss of chance instruction given under § 27-1-739, MCA, when there is a chance of a full recovery is not supported by the plain language of the statute, which allows for damages when a doctor's negligence reduces a patient's chance of recovering and is a contributing cause of "death," "survival for a shorter period of time," "*no recovery*," "*a recovery that is of lesser extent or quality or that takes longer to occur*," or "other injury." Section 27-1-739(1)(a-e), MCA (emphasis added).

¶35 The District Court's mistaken interpretation and application of § 27-1-739, MCA, led to its erroneous refusal to give a loss of chance instruction in this case. While we appreciate the District Court's concern that Camen's proposed instruction cited only to *Aasheim*, and did not reference § 27-1-739, MCA, as authority, the flat-out refusal of a loss of chance instruction was an abuse of discretion because a party "has a right to jury instructions adaptable to his or her theory of the case when the theory is supported by credible evidence," and the evidence at trial clearly supported Camen's loss of chance theory. *Rix*, 222 Mont. at 323, 723 P.2d at 198. Even when unsatisfied by a party's proposed instruction, the District Court must properly instruct the jury on the law applicable to the case. *Peterson*, ¶ 42 ("[T]he district court has an overriding duty to ensure the jury is properly instructed, even in cases where failure to properly instruct the jury is arguably the fault of the parties themselves."). The District Court abused its discretion by not giving a loss of chance instruction in this case.

¶36 Both GEC and KRMC urge this Court to find any error by the District Court not giving a loss of chance instruction in this case to be harmless. In *Steffensmier*, we determined a district court not giving a loss of chance instruction was harmless under the facts of that case because the jury found the treating doctor to not be negligent and did not reach the issue of causation. *Steffensmier*, ¶ 12. We are not persuaded by GEC and KRMC's argument that this case is analogous to *Steffensmier* such that the District Court's failure to give a loss of chance instruction was harmless.

¶37 Here, like *Steffensmier*, the jury determined Dr. Wheeler and Dr. Stein were not negligent. There are important differences between this case and *Steffensmier*, however. In our discussion of the wrongly-refused proportionate duty instruction, we have already determined the jury was not properly instructed on negligence in this case. In addition, the instructions given at trial wrapped causation concepts into its negligence instructions. For example, Instruction No. 20 stated:

> There must be expert testimony to establish negligence in a medical malpractice action.
>
> Specifically, Plaintiff must present qualified expert medical testimony establishing the following elements: 1) the standard of care applicable to each defendant physician; 2) a departure from the applicable standard of care by each defendant physician; and 3) that the departure from the standard of care caused injury to Plaintiff.

In *Steffensmier*, meanwhile, the jury was instructed to consider negligence, causation, and damages separately. *Steffensmier*, ¶ 6. *Steffensmier* is therefore distinguishable from this case, as the jury here was both improperly instructed on negligence due to the proportionate

duty instruction not being given and encouraged to consider causation in its negligence determination. We cannot find the denial of the loss of chance instruction harmless here.

¶38 Ultimately, Camen was entitled under the law and the facts of this case to both the proportionate duty and loss of chance instructions he requested. The District Court's failure to give these instructions resulted in the jury not being fully and fairly instructed in the applicable law, prejudicing Camen. As such, the verdict must be reversed and the matter remanded for a new trial. *Peterson*, ¶ 43.

¶39 *2. Whether the District Court abused its discretion by allowing Dr. Wheeler to testify as an expert to matters beyond his disclosure.*

¶40 Camen asserts certain testimony given by Dr. Wheeler at trial went beyond the scope of his expert disclosure. As we have determined the matter must be remanded for a new trial based on the District Court's instructional error, we need not address Camen's contention regarding the scope of Dr. Wheeler's testimony at the first trial. The scope of Dr. Wheeler's testimony at retrial may be addressed through the District Court's thorough review of the expert disclosures prior to trial and motions and objections at that trial. We decline to issue an advisory opinion regarding the exact words to which Dr. Wheeler may testify. *See generally Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n*, 2022 MT 227, ¶ 13, 410 Mont. 450, 520 P.3d 301 (citing *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 13, 408 Mont. 187, 507 P.3d 169) (declining to issue an advisory opinion on a hypothetical set of facts which may or may not occur).

¶41 *3. Whether the District Court erred by failing to poll the jury in the manner required by statute.*

¶42 While our decision to reverse and remand for a new trial because the District Court failed to properly instruct the jury is dispositive, we also briefly address the District Court's jury poll conducted in this case as the issue may arise again after retrial. Due to our reversal of the jury's verdict here, we need not address whether the poll conducted following trial was prejudicial to Camen or harmless under the facts of this case, only whether it complied with the relevant statute. It did not.

¶43 In this case, the District Court asked the jury two questions: (1) "First, is this the jury's verdict?" and (2) "Second, on each question did at least eight of the jurors agree on the answer?" The relevant jury polling statute at issue here states:

> Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is the juror's verdict. If upon the inquiry or polling more than one-third of the jurors disagree to the verdict, the jury must be sent out again, but if disagreement is not expressed, the verdict is complete and the jury discharged from the case.

Section 25-7-501(2), MCA. We review the District Court's interpretation and application of this statute de novo. *Hines*, ¶ 12.

¶44 The District Court did not ask each juror if it was "the *juror's* verdict," as required by statute, but asked each juror whether it was "the *jury's* verdict[.]" In Montana, the polling of the jury "is a statutory right the purpose of which is to determine whether the required number of jurors concur in the verdict," which requires each juror to be "asked individually whether that is his [or her] verdict[.]" *Martello v. Darlow*, 151 Mont. 232, 236, 441 P.2d 175, 177 (1968) (citation omitted). As such, the District Court's jury poll

did not comply with the jury polling statute in this case because it did not ask each juror whether it was the juror's individual verdict, but whether it was the jury's collective verdict. Again, it is unnecessary to determine whether the deficient poll was prejudicial to Camen or harmless under the facts of this case because a new trial is required due to the District Court's failure to properly instruct the jury regarding proportionate duty and loss of chance. However, if a jury poll is requested and conducted following retrial, the District Court is instructed to ask each juror if it is the juror's verdict, not whether it was the jury's verdict, as required by statute. Section 25-7-501(2), MCA.

CONCLUSION

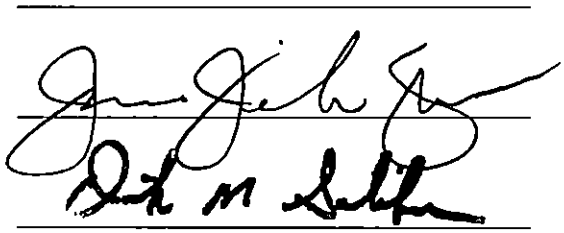
¶45 The District Court abused its discretion by refusing to give the jury instructions regarding proportionate duty and loss of chance under the facts of this case, requiring this matter to be remanded for a new trial. In addition, the District Court erred by failing to poll the jury in the manner required by statute.

¶46 Reversed and remanded for a new trial.

Justice

We concur:

Chief Justice



Justices

Justice Beth Baker, specially concurring.

¶47 I concur with the Court's disposition of this appeal on all issues but one. In my view, the District Court did not commit reversible error when it refused to instruct the jury on "proportionate duty." The court properly instructed the jury on the applicable standards of care, and its refusal to give the proposed instruction did not affect Camen's ability to present his theory to the jury. I would conclude that the instruction was not required and need not be given on retrial.

¶48 "Medical malpractice is a particular species of professional negligence applicable to health care providers." *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 17, 411 Mont. 269, 525 P.3d 1183. Like in other negligence cases, a plaintiff must prove an applicable legal duty, the defendant's breach of that duty, causation, and resulting damages. *Kipfinger*, ¶ 16. For a medical malpractice claim, proof of an applicable legal duty "generally requires qualified expert medical opinion testimony establishing the standard of medical care applicable to the field of medical practice in which the defendant is licensed and in regard to the type of medical care or procedure at issue." *Kipfinger*, ¶ 17 (citing § 26-2-601(1), MCA; other citations omitted). Both Dr. Stein and Dr. Wheeler are board-certified—Dr. Stein a board-certified ophthalmologist with specialty training in pediatric ophthalmology and Dr. Wheeler a board-certified pediatric neurologist. As such, the standard of care applicable to each "is the national standard of care applicable to all such specialists in the provision of the subject specialized care throughout the United States, without regard for lesser

geographic limitations." *Kipfinger*, ¶ 17. The standard "is generally the degree of skill and learning possessed and employed by other physicians in good standing practicing in the same specialty with the same national board certification." *Kipfinger*, ¶ 17. To establish that the doctors breached their respective duties of care, Camen was required to present proof, "in the form of qualified expert testimony," that each deviated from the applicable standard of medical care. *Kipfinger*, ¶ 18 (citations omitted).

¶49 Both Dr. Wheeler and Dr. Stein were required to meet the standard of care for diagnosing and treating IIH, which both neurologists and ophthalmologists diagnose and treat. The doctors presented evidence that the applicable standards of care required them to rule out other causes of Camen's intracranial hypertension—including blood clots, a brain tumor, infection, and leukemia—before they could conclude it was idiopathic and treat it accordingly.

¶50 The doctors testified to the importance of ruling out cancer or other potential causes of intracranial pressure so that the patient does not unnecessarily undergo shunt surgery and all its potential complications, including abdominal pain and bowel perforation; cerebrospinal fluid leak; general anesthesia risks; infections, including meningitis; injury to the brain; strokes; a chance of shunt failure ranging from forty-eight to eighty-six percent; permanent restriction of contact sports and activities; revision brain shunt surgery; and even death. Dr. Wheeler explained that meningitis is one of the worst complications of brain shunt surgery and can lead to permanent neurological damage; he described seeing patients who had contracted meningitis and suffered numerous strokes.

Given Camen's age and gender, along with other findings indicating a red flag for potential leukemia, they proceeded first with ruling that out and treating Camen with medication widely used as the first line of treatment for IIH—which initially showed encouraging results.

¶51 The District Court instructed the jury:

> There must be expert testimony to establish negligence in a medical malpractice action. Specifically, Plaintiff must present qualified expert medical testimony establishing the following elements: 1) the standard of care applicable to each defendant physician; 2) a departure from the applicable standard of care by each defendant physician; and 3) that the departure from the standard of care caused injury to Plaintiff.

It instructed further, using the Montana pattern jury instructions this Court has approved in medical malpractice cases, that:

> It is the duty of a board certified doctor to use that skill in learning ordinarily used in like cases by other doctors in good standing practicing in that same specialty and who hold the same national board certification.
>
> The violation of this duty is negligence.
>
> In determining whether the doctor was negligent in performing professional services the proper test is whether the doctor's performance met the accepted standards of skill and care at the time the services were provided.

See MPI 2d (Civil), §§ 3.01 and 3.07; *Aasheim*, 215 Mont. at 131, 695 P.2d at 827. The instruction thus advised the jury to determine the doctors' negligence, or lack thereof, by reference to "the accepted standards of skill and care" applicable to each doctor at the time they treated Camen.

¶52 Finding "no blanket carve-out for medical malpractice negligence," the Court states as a matter of given fact that "the expert testimony specifically singled out

blindness as the main risk" Camen's symptoms presented. Opinion, ¶¶ 27, 29. Without reference to the record, the Court concludes that Camen's condition presented two potential risks: "a catastrophic outcome . . . such as blindness" versus "a more moderate outcome—such as . . . a period of discomfort without permanent impairment[.]" Opinion, ¶ 28, n.2. From its unsupported surmise that blindness was the only real "catastrophic" risk, the Court concludes that the trial court had an obligation to advise the jury that the doctors owed a greater duty of care to presumably protect against that singular risk. Dr. Wheeler's description of the risks of brain shunt surgery, however, explained in detail the serious potential life-altering or even fatal outcomes inherent in its risks. He said first that of the "many, many patients" he had with shunts, he had seen only two who had never had any complications from their shunts. These range from shunt failure—which can occur simply as the patient's body grows or changes or if they "move in the wrong way," leading to an "immediate increase in pressure" and necessitating additional surgery—to bacterial meningitis, which can be fatal or cause permanent neurological deficits.

¶53 The Court's summary assessment overlooks the evidence demonstrating the varied dangers and risks of other potential causes and courses of treatment to which the doctors testified. More importantly, a "proportionate duty" instruction suggests to the jury that one particular potential risk or outcome requires a higher duty of care even when, as here, there is expert evidence regarding competing risks and dangers and multiple medical decisions the doctors needed to consider. This amounts to instructing the jury as a matter

of law that it must consider one risk to be more important than others, confusing the standard that a doctor's duty is "to use that skill and learning as ordinarily used in like cases by other doctors practicing in that same specialty and who hold the same national board certification." *Aasheim*, 215 Mont. at 130-31, 695 P.2d at 826-27. Virtually every medical decision in treating the human condition is fraught with grave risk. The instruction would leave it to the jury to determine independently the standards by which a doctor should weigh those risks and would inappropriately suggest that one danger—here, blindness—outweighs all the others the doctor considers.

¶54 Neither Camen nor the Court cites any other medical malpractice case in the country in which a court has required the instruction proposed here. The few decisions appearing to address the question directly have rejected its application to such a case. In *Pittman v. Stevens*, 613 S.E.2d 378 (S.C. 2005), the South Carolina Supreme Court concluded that the trial court properly declined a medical malpractice plaintiff's requested instruction substantially similar to the instruction Camen offered here. *Pittman*, 613 S.E.2d at 380. The court noted that, even in a general negligence case, "the amount of care in relation to the degree of danger is encompassed in the appropriate standard of care which is determined by the facts of each case." *Pittman*, 613 S.E.2d at 381 (citation omitted). It found the instruction "even more inappropriate in a medical malpractice case[,]" observing, "Every medical decision encompasses varying degrees of danger." *Pittman*, 613 S.E.2d at 381. The Court cited the lone case it had found from another jurisdiction discussing the issue, which also held that the trial court did not err in

refusing to charge the "greater danger" instruction in a medical negligence case. *Hinkle v. Cleveland Clinic Found.*, 823 N.E.2d 945, 960 (Ohio Ct. App. 2004) (noting that the court could "find no case law to support the proposed jury instructions in a medical malpractice case"). *Hinkle* approved the trial court's instructions, similar to Montana's pattern instructions, that a medical doctor's failure to follow an accepted standard of care constitutes negligence. 823 N.E.2d at 960. The South Carolina Supreme Court reaffirmed *Pittman* in *Sulton v. Healthsouth Corp.*, 734 S.E.2d 641 (S.C. 2012), where it reversed a trial court for giving the same instruction in a medical malpractice case. These cases are persuasive authority.

¶55 The Court finds two cases to support its decision here. Neither does. Both *Armacost* and *Cromer* considered instructions to a medical malpractice jury regarding "foreseeability" in the context of a physician's duty of care to his or her patient. For starters, these decisions are unhelpful in evaluating a Montana negligence case. "Foreseeability is generally 'confined to the duty element of negligence under Montana law.'" *Newman v. Lichfield*, 2012 MT 47, ¶ 23, 364 Mont. 243, 272 P.3d 625 (citation omitted). "As an element of duty, foreseeability must be determined by the court[.]" *Wages v. First Nat'l Ins. Co. of Am.*, 2003 MT 309, ¶ 24, 318 Mont. 232, 79 P.3d 1095; *Newman*, ¶ 23. *See also Babcock v. Casey's Mgmt., LLC*, 2021 MT 215, ¶ 14 n. 8, 405 Mont. 237, 494 P.3d 322 ("the primary role of foreseeability of harm is as the determinative factor under the duty-breach elements of a negligence claim (as a threshold question of law under the duty element and an unreferenced subsumed question of fact

under the breach element)") (citing *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 357-73, 916 P.2d 122, 131-41 (1996)). Unlike in Ohio and Maryland, foreseeability is not presented to a jury for determination of duty or breach in a Montana general-negligence case. Beyond that, the courts in neither *Armacost* nor *Cromer* held that a "proportionate duty" instruction such as the one Camen proposed was required in a medical malpractice case.

¶56 The Ohio Supreme Court in *Cromer*, a medical negligence action that, like this case, involved an alleged delay in appropriate care, summarized its holding as follows:

> Foreseeability is generally relevant to a determination of whether a physician has exercised reasonable care in understanding or determining the existence of a risk of harm associated with a particular course of treatment. But when the parties do not dispute that a physician conducted a risk-benefit analysis prior to treating a patient and do not dispute that the physician understood that the chosen course of treatment carried some risk of harm, a jury instruction regarding the foreseeability of harm need not be given. However, the instruction would not be patently prejudicial, and the judgment is not subject to reversal absent a showing of material prejudice.

Cromer, 29 N.E.3d at 924-25. The question in *Cromer* was whether the defendant health care providers had acted quickly enough to intubate an infant brought to the emergency room in a state of shock who died within several hours of admission and shortly over an hour after insertion of a tracheal tube. In addition to instructions outlining the elements of medical negligence and applicable standard of care, the trial court instructed the jury from general negligence provisions of the Ohio Jury Instructions, including an instruction on foreseeability of harm. *Cromer*, 29 N.E.3d at 927. The intermediate court of appeals reversed the defense verdict, and the plaintiff appealed. The Ohio Supreme Court agreed

with the court of appeals "that foreseeability is irrelevant to a determination of a physician's duty." It explained,

> In the context of an established physician-patient relationship, there is no need to independently determine whether the patient falls within the class of people who could foreseeably be injured, because the existence of the physician's duty to that patient is already clear. . . . But the foreseeability of one's duty to a particular person does not necessarily determine the foreseeability of a risk of harm, and it therefore does not end the inquiry into the scope of an actor's duty to another person.

Cromer, 29 N.E.3d at 929. Explaining that foreseeability of harm is "relevant to the determination of the scope of a physician's duty in a medical-malpractice action," the court held that it "usually does not enter into the analysis of medical negligence, not because it is legally irrelevant, but because it is almost always factually undisputed that a risk of harm was foreseeable and that the medical professional was aware that the chosen course of treatment involved a risk of harm." *Cromer*, 29 N.E.3d at 930. "Instead, in the more common line of cases, the pertinent question is whether the medical professional acted unreasonably in the face of those risks." *Cromer*, 29 N.E.3d at 930. Under the facts in *Cromer*, that was the very question for the jury, "whether the physicians' chosen course of treatment was reasonable in light of the [recognized] risks." *Cromer*, 29 N.E.3d at 931. The court concluded that, because the medical professionals were aware that their course of treatment carried "some risk of harm . . ., the instruction regarding the foreseeability of harm was not necessary in light of the facts and arguments presented in this case." *Cromer*, 29 N.E.3d at 931. Reviewing the record as a whole in light of all the instructions given, the court concluded that the record did "not establish that the

unneeded jury instruction on foreseeability prejudiced the Cromers' substantial rights" and accordingly reversed the court of appeals' decision to overturn a defense jury verdict. *Cromer*, 29 N.E.3d at 934.

¶57 The focus of the appeal in *Armacost,* likewise, was whether general negligence instructions should be given along with the instructions more specifically applicable to medical malpractice instructions that—similar to Montana's—hold a health care provider to the degree of care and skill that a provider engaged in similar practice and acting in similar circumstances would use. As in *Cromer*, the trial court had given general negligence instructions in addition to those pertaining to professional liability for allegedly negligent medical care. The court determined that the defendant doctor had not shown prejudice from the combination of both general and medical-malpractice-specific instructions because, in light of the record as a whole, there was little possibility that the jury was misled as to the appropriate standard of care and any misunderstanding "would not have been to the detriment of [the defendant]." *Armacost*, 200 A.3d at 880. Among the given instructions was one that told the jury,

> A reasonable person changes conduct according to the circumstances and the danger that is known or would be appreciated by a reasonable person. Therefore, if the foreseeable danger increases, a reasonable person acts more carefully.

Armacost, 200 A.3d at 866. Discussing *Cromer*, the court concluded similarly that even if the instruction was "unnecessary or superfluous," the defendant had not shown prejudice. *Armacost*, 200 A.3d at 879.

¶58 Neither *Cromer* nor *Armacost* answers the question on appeal here. Both involved concepts of duty on which Montana juries are not instructed in negligence cases, and neither held that a proportionate duty instruction should have been given. If instructive at all, the decisions support the proposition that Camen's proposed instruction is not necessary. I would follow the same reasoning applied in *Hinkle*, *Pittman*, and *Sulton* instead of relying on the inapposite *Cromer* and *Armacost*.

¶59 Finally, we will not reverse a district court for refusing a party's proposed jury instruction unless the "omission affected the substantial rights of the complaining party." *Busta,* 276 Mont. at 373, 916 P.2d at 140-41. The trial court's refusal of the proportionate duty instruction did not undermine Camen's theory of the case or prevent him from arguing, through his experts, that Dr. Stein and Dr. Wheeler were obligated to proceed with more caution given the risk of vision loss. Camen presented testimony from three different experts about the significant risks of blindness from fulminant IIH and argued without limitation that the doctors failed to prioritize this risk or act quickly enough to prevent its occurrence. Camen argued in closing that the doctors "have to comply with the national standard of care[,]" which recognized that delay in treatment of fulminant IIH presents the greatest risk of the patient's permanent blindness. He told the jurors, accurately and in accordance with Montana law and the instructions the court gave, that they would decide whether the doctors met that standard of care and "[w]hat they should have done for a patient like Brett."

¶60 The doctors argued in closing that they met the standard of care by prescribing Diamox right away, which initially worked, while they examined and ruled out other potential causes. Dr. Stein reminded the jurors that Camen's expert Dr. Lee agreed they had to "rule out any other potential cause of the elevated intracranial pressure"—particularly leukemia or other blood cancer—"before [they] place[d] the permanent shunt in the patient." The doctors reminded the jury of the significant and permanent risks of brain shunt surgery. Dr. Wheeler argued that he "wanted to give Brett every chance of recovering his vision without a permanent and dangerous shunt put into his body[,]" emphasizing that "[t]his is classic, classic physician judgment" of weighing "risk" and "benefit."

¶61 Under the instructions given, the jury was able to properly weigh the expert conclusions with those the Defendants presented to determine whether the doctors breached the standard of care required of them and appropriately considered the risks. The District Court did not err in refusing Camen's proposed instruction on proportionate duty. On retrial, I would require only the loss-of-chance instruction as discussed in ¶¶ 31-38 of the Opinion.

Justice

Justice Jim Rice joins the Special Concurrence of Justice Beth Baker.

Justice