DA 22-0701

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 160

HUBERT TWO LEGGINS,

Plaintiff and Appellant,

v.

MARK GATRELL,

Defendant and Appellee.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Big Horn, Cause No. DV 20-44
Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John Meyer, Attorney at Law, Bozeman, Montana

For Appellee:

Martha Sheehy, Sheehy Law Firm, Billings, Montana

Randall G. Nelson, Nelson Law Firm, P.C., Billings, Montana

Submitted on Briefs: July 26, 2023

Decided: August 22, 2023

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Hubert Two Leggins (Two Leggins) appeals the Twenty-Second Judicial District Court Judgment following a Big Horn County jury's verdict that awarded him $1,000 in actual damages and $2,000 in punitive damages against Defendant Mark Gatrell. Two Leggins does not contest the compensatory damage award but challenges the District Court's exclusion of certain evidence from the punitive damage phase of the trial relating to Gatrell's potentially racial motivations. We reverse and remand for further proceedings on punitive damages.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Two Leggins sued Mark Gatrell, claiming assault and battery and the negligent and intentional infliction of emotional distress. Two Leggins is Native American and a neighbor of Gatrell, who is white. Two Leggins alleged that, while he was standing in line at a grocery store, Gatrell rammed a loaded shopping cart into him from behind, causing injuries that required him to be taken to the emergency room. Two Leggins also alleged that Gatrell had shot Two Leggins's dog and dragged it away with a four-wheeler in front of Two Leggins's family, leading to an altercation between the two men. The Complaint did not reference or allege racial motivations for these incidents.

¶3 Prior to trial, Gatrell filed a motion in limine to "preclud[e] any and all argument, comment, testimony, or evidence" pertaining to a prior restraining order Two Leggins had obtained against Gatrell from the Crow Tribal Court, documents related to criminal charges against Gatrell in Crow Tribal Court, Two Leggins's prepared victim statement in that

proceeding, a Big Horn County News article [the Article] that attributed comments to Gatrell, and to the issue of race generally. The restraining order referenced a Crow process server's statement that Gatrell said he was "a white man and tribal laws do not apply to him." The Article related to the dog-shooting incident and quoted Gatrell as stating, "[i]t's white against red[.]" It also reported Gatrell as saying that his dealings with the Two Leggins family led him to carry a weapon. Gatrell later affirmed the same in deposition testimony when he agreed that he "carr[ied] a rifle in [his] truck because of the Two Leggins family."

¶4 Two Leggins opposed Gatrell's motion, arguing that the evidence was relevant to his claims for negligent and intentional infliction of emotional distress and to his claim for punitive damages.

¶5 The District Court granted Gatrell's motion and excluded the Article for all purposes.[1] Noting that the Complaint had not referenced race, the court excluded evidence relating to "racial sentiments" as irrelevant and unfairly prejudicial under M. R. Evid. 401, 402, and 403. The District Court reasoned that the risk of unfair prejudice was "unacceptably high" because "Big Horn County is a racially diverse jurisdiction" and evidence of Gatrell's racial motivations would "likely [] arouse substantial emotion in a Big Horn County juror, risking them finding against Gatrell based on a desire to punish a bigot rather than because Two Leggins's claims have merit." Regarding documents from

[1] Two Leggins does not take issue with the court's ruling that the evidence would not come in during the trial's liability phase.

Gatrell's criminal proceedings, particularly his plea agreement, the District Court excluded them under M. R. Evid. 410 and 609.[2] The District Court excluded admission of Two Leggins's witness statement because it was an unsworn out-of-court statement that constituted inadmissible hearsay. The District Court excluded the Article because the relevant statements it attributed to Gatrell were hearsay, and Two Leggins had offered no argument that any hearsay exception applied. The District Court also deemed the Article to be excessively prejudicial to Gatrell under M. R. Evid. 403.

¶6 Two Leggins then filed a pleading that he denominated a motion in limine, asking the District Court to admit the Article into evidence. The supporting brief addressed the court's characterization of the Article as hearsay, pointing out that Gatrell admitted in his deposition that he told the Big Horn County Newspaper that he carries a rifle in his truck for the Two Leggins family. Two Leggins argued that Gatrell's deposition testimony and the newspaper article were relevant to his claim for intentional infliction of emotional distress. The District Court denied the motion, reasoning that Two Leggins "ignores the Court's other basis for excluding the newspaper article: the risk of prejudice outweighing any probative value of the newspaper article, pursuant to M. R. Evid. 403."

[2] M. R. Evid. 410 bars the admission of plea agreements "against the person who made the plea or offer," and M. R. Evid. 609 bars the admission of a witness's conviction for the purpose of attacking that witness's credibility. Two Leggins does not contest this ruling on appeal.

¶7 The case proceeded to trial, and the jury awarded Two Leggins $1,000 in compensatory damages. It also found that Gatrell had acted maliciously or with conscious disregard for the high likelihood of injury and therefore was subject to punitive damages.

¶8 After the jury reached its verdict on Gatrell's liability, the court recessed to discuss with counsel what they envisioned for the punitive damages phase of trial. At the conclusion of that discussion, the court agreed with Gatrell that the "sole purpose" of a trial's punitive damages phase is to consider evidence of "the defendant's net worth" and arguments from the parties based on the trial evidence already presented.

¶9 Gatrell was the only witness during the punitive damages phase. Two Leggins submitted evidence of Gatrell's net worth through him, and both parties made closing arguments. The jury returned a verdict awarding Two Leggins $2,000 in punitive damages. The District Court did not, as required by § 27-1-221(7), MCA, "review [the] jury award of punitive damages, giving consideration to each of the matters listed" in the statute, nor did it enter written findings or rationale. Two Leggins did not request the District Court to increase the award or otherwise object but filed a timely notice of appeal from the resulting judgment.

STANDARDS OF REVIEW

¶10 "Trial courts enjoy broad discretion in determining whether evidence is relevant and admissible, and this Court reviews those evidentiary rulings for an abuse of discretion." State v. Quinlan, 2021 MT 15, ¶ 16, 403 Mont. 91, 479 P.3d 982. This authority extends to motions in limine as part of "the inherent power of the court to admit or exclude evidence

and to take such precautions as are necessary to afford a fair trial for all parties." *State v. Favel*, 2015 MT 336, ¶ 17, 381 Mont. 472, 362 P.3d 1126 (quoting *Wallin v. Kinyon Estate*, 164 Mont. 160, 164-65, 519 P.2d 1236, 1238 (1974), *overruled on other grounds by Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 21, 336 Mont. 105, 152 P.3d 727). A district court "abuses its discretion if it acts arbitrarily or unreasonably, and a substantial injustice results." *State v. Garding*, 2013 MT 355, ¶ 18, 373 Mont. 16, 315 P.3d 912 (quoting *State v. Bonamarte*, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457).

¶11 We review *de novo* a district court's application of a statute or evidentiary rule to a particular circumstance to determine whether the district court was correct as a matter of law. *State v. Osborn*, 2015 MT 48, ¶ 9, 378 Mont. 244, 343 P.3d 1188; *State v. Pelletier,* 2020 MT 249, ¶ 12, 401 Mont. 454, 473 P.3d 991. "[W]ith rare exception, we will not consider an issue or claim that was not properly preserved for appeal." *State v. Norman*, 2010 MT 253, ¶ 16, 358 Mont. 252, 244 P.3d 737 (citing *State v. West*, 2008 MT 338, ¶¶ 16, 19-20, 346 Mont. 244, 194 P.3d 683). To properly preserve an issue or claim for appeal, a party must timely raise the issue or claim in the first instance in the trial court. *Norman*, ¶ 16 (citing *West*, ¶ 16).

DISCUSSION

¶12 Two Leggins argues that the District Court erroneously granted Gatrell's motion in limine to exclude his race-based evidence because of its prejudicial nature. As noted, Two Leggins limits his claim to the exclusion of evidence from the punitive damages phase of trial. Gatrell responds that Two Leggins did not preserve his objection for appeal.

¶13 Gatrell's motion in limine argued that racial motivation had no relevance to the asserted claims for assault and battery, arguing that "[t]here is no justifiable legal reason for attempting to stir racial strife into this case" and that "nothing could be more prejudicial in Hardin[.]" In response, Two Leggins pointed out that his Amended Complaint also included standalone claims for intentional and negligent infliction of emotional distress, arguing that Gatrell's statements were probative of these claims. Two Leggins also referenced his claim for punitive damages, stating, "The jury can consider Gatrell's race-based hate speech and hateful actions when determining the appropriate amount of punitive damages." He emphasized the purpose of punitive damage awards and cited cases from this Court discussing a defendant's culpability for intentionally inflicting emotional distress when considering punitive damages. *See Sacco v. High Country Indep. Press*, 896 P.2d 411, 429, 271 Mont. 209, 239 (1995) (concluding that "when a cause of action for *intentional* infliction of emotional distress is pled, the plaintiff may request relief in the form of punitive damages, per § 27-1-220, MCA, to address the culpability of the defendant's conduct").

¶14 The District Court granted Gatrell's motion in limine, in part because Two Leggins's objection was generalized. The District Court noted, "Two Leggins appears to object to the entirety of Gatrell's Motion but responds mostly to Gatrell's arguments regarding the issue of race as well as the newspaper story," and reasoned that Two Leggins did not "respond" or "offer[ed] no argument" to rebut Gatrell's requests to exclude specific evidence. The District Court faulted Two Leggins for "not explicitly respond[ing]" to

Gatrell's argument that the Article should be excluded as overly prejudicial. When Two Leggins filed his own motion in limine to explain why the statements contained in the Article were not inadmissible hearsay, the District Court refused to reconsider its ruling because Two Leggins had not addressed "the Court's other basis for excluding the newspaper article: the risk of prejudice outweighing any probative value of the newspaper article, pursuant to M. R. Evid. 403."

¶15 "[A] motion in limine may relieve a party of the obligation to contemporaneously object at trial providing that the motion is specific and articulates the grounds for the objection." *State v. Ankeny*, 2010 MT 224, ¶ 39, 358 Mont. 32, 243 P.3d 391. As long as the record shows that "the district court was directly faced with the question and ruled against the [movant], [the motion] thereby preserv[es] for appeal any evidentiary issue that [it] specifically addressed[.]" *Favel*, ¶ 19 (quoting *State v. Vukasin*, 2003 MT 230, ¶ 34, 317 Mont. 204, 75 P.3d 1284). If the requisite specificity is lacking in either the motion or the ruling, or if the movant "affirmatively acquiesc[ed]" to the trial court's ruling, a party must make a contemporaneous objection to preserve the claim. *See Horn v. Bull River Country Store Props*., 2012 MT 245, ¶ 34, 366 Mont. 491, 288 P.3d 218; *Favel*, ¶ 22.

¶16 Two Leggins sought to introduce statements evidencing Gatrell's racial motivation to prove Gatrell negligently and intentionally inflicted emotional distress and to prove punitive damages. On appeal, Two Leggins focuses on the exclusion of Gatrell's statements in the Article (that "it's white against red" and he carries a rifle in his truck for the Two Leggins family) and in the Tribal Court Restraining Order ("that he was a white

man and tribal laws do not apply to him"). Gatrell argues that Two Leggins forfeited his claim on appeal because he did not list these documents as exhibits in the Final Pretrial Order and that, during the court's discussion with counsel immediately before the jury reconvened to consider the amount of punitive damages, Two Leggins did not specifically seek to reference these two documents.

¶17 In the stipulated Final Pretrial Order, Two Leggins listed two documentary exhibits to be introduced, a police report and a medical intake form relating to the grocery store incident. As Two Leggins observes, the District Court already had granted Gatrell's motion in limine before the Final Pretrial Order was filed. The court had not yet acted on Two Leggins's related motion in limine but later denied it. During its discussion with counsel immediately following the liability phase of trial, the District Court advised the parties that it was "not going to admit any documents that haven't been listed [in the Final Pretrial Order]" or already moved for admission. Counsel for Two Leggins did not state specifically what other documents he wanted to introduce but asked if he could show a document without it having been admitted; the court said no. Gatrell then objected to any documents coming in besides net-worth evidence. Two Leggins protested, "those exhibits are relevant to the punishment. Those are relevant to the injury. Those are relevant to damages that should be awarded to him." The court agreed with Gatrell.

¶18 Through his response to Gatrell's motion in limine and his own subsequent motion asking the court to reconsider a portion of its ruling, Two Leggins presented the District Court directly with the question, and the court ruled definitively that Two Leggins's

proffered evidence would be excluded. Two Leggins did not acquiesce in the court's ruling; he raised the point again before the jury convened for the punitive damage phase and, given the court's prior rulings, was not obligated to make further contemporaneous objection. *See Ankeny,* ¶¶ 35-39. We conclude that Two Leggins preserved for appeal his contention that evidence to show Gatrell's racial motivation for the assault should have been admitted for the purpose of proving punitive damages.

¶19 Turning to the merits, we consider only the two statements attributed to Gatrell that Two Leggins argues on appeal, the one contained in the Article and the other in the Tribal Court's Restraining Order.[3]

¶20 M. R. Evid. 401 defines relevant evidence as that which "make[s] the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." Section 27-1-220, MCA, allows punitive damages to be awarded "for the sake of example and for the purpose of punishing the defendant." In pertinent part, § 27-1-221(7)(a), MCA, states:

> When the jury returns a verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as provided in subsection (7)(c). In the separate proceeding to

[3] With respect to both exhibits, Two Leggins focuses his arguments on Gatrell's alleged statements reflected in each. We limit our consideration to those statements.

> determine the amount of punitive damages to be awarded, the defendant's financial affairs, financial condition, and net worth must be considered.

¶21 Gatrell argued, and the District Court agreed, that the only evidence permitted during the punitive damages phase of trial is evidence of the defendant's net worth.

> To perform its office as a deterrent, punitive damages when awarded should be of such a significant amount as will serve the office of deterrence by punishing the defendant and as will warn others. Thus the wealth of a defendant is a fact in issue where punitive damages are involved.

Gibson v. Western Fire Ins. Co., 210 Mont. 267, 295, 682 P.2d 725, 740 (1984). Subsection (7)(a), providing that a defendant's net worth "must be considered," does not restrict the punitive damages phase of the trial to net worth alone. Nor does Gatrell direct our attention to any case law supporting his contention that a jury's deliberation of what amount will serve to punish the defendant, to deter him from similar future conduct, and to warn others must be informed *only* by evidence of the defendant's financial worth. Our cases are to the contrary. *See McEwen v. MCR, LLC*, 2012 MT 319, ¶ 80, 368 Mont. 38, 291 P.3d 1253; *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶¶ 102-103, 352 Mont. 325, 217 P.3d 514; *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 2007 MT 183, ¶ 85, 338 Mont. 259, 165 P.3d 1079.

¶22 The governing statute reflects numerous considerations that should inform a punitive damage award. Section 27-1-221(7)(c), MCA, provides: "The judge shall review a jury award of punitive damages, giving consideration to each of the matters listed in subsection (7)(b). If after review, the judge determines that the jury award of punitive damages should be increased or decreased, the judge may do so." The evidence in question

here bears directly on the court's required consideration of the punitive damage award under that section, including "the nature and reprehensibility of the defendant's wrongdoing"; "the extent of the defendant's wrongdoing"; and "the intent of the defendant in committing the wrong[.]" Section 27-1-227(7)(b)(i)-(iii), MCA. The District Court instructed the jury, in accordance with Montana Pattern Jury Instruction 25.66:

> In determining the amount of punitive damages, you should consider all of the attendant circumstances, including the nature, extent and enormity of the wrong, the intent of the party committing it, the amount allowed as actual damages, and, generally, all of the circumstances attending the particular act involved, including any circumstances which may operate to reduce without wholly defeating punitive damages.

This instruction broadly contemplates the jury's awareness of "all" circumstances attending the defendant's tortious conduct, his intent in committing the act, and the enormity of the wrong. A racial motivation for the defendant's intentional tortious conduct is relevant and admissible to inform these considerations, as it is a "fact . . . of consequence to the determination" of the punitive damage award, M. R. Evid. 401, and bears directly on the fact at issue in the punitive phase of trial—what amount is sufficient "for the sake of example and for the purpose of punishing the defendant." Section 27-1-220, MCA. Despite the court's exclusion of the evidence for the purposes of the underlying tort claims, "[a] court may admit evidence relevant to a punitive damages claim even if the evidence supports no other claim." *McEwen*, ¶ 80.

¶23 The District Court relied primarily on M. R. Evid. 403 in excluding the evidence, and Gatrell emphasizes the same point on appeal. Rule 403 explains that relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The court found the evidence unduly prejudicial, emphasizing the charged environment of racial tension in the Hardin area, and reasoning that such evidence could influence the jury to decide the case on an improper basis.

¶24 Important to our analysis here is the limited scope of Two Leggins's appeal. As noted, he does not seek reversal of the jury's compensatory damage award or of the District Court's exclusion of the evidence from the liability phase of trial. When considered for the exclusive purpose of determining an appropriate amount of punitive damages, the basis for the District Court's reasoning largely falls away. By the time the jury reconvened to consider the amount of punitive damages, it already had found that Gatrell acted with malice or with conscious disregard for the high likelihood of injury. The court's concern that the evidence could influence the jury to determine Gatrell's liability on the basis of passion or prejudice no longer pertained. In the punitive damages phase of trial, the jury was expressly tasked with deciding an amount sufficient to punish him for his malicious conduct. The District Court did not separately consider the relevance of Gatrell's alleged racial motivation for the sole purpose of determining punitive damages. We conclude that it erred in excluding the evidence during this phase of trial and restricted Two Leggins's proof to evidence of Gatrell's net worth.[4]

[4] As in previous cases, because Two Leggins challenges only the punitive damages verdict, we need not address whether or how the trial court should have allowed the jury to consider this evidence during the trial's liability phase. *Malcolm*, ¶ 103; *Sunburst*, ¶ 86; *McEwen*, ¶ 81.

¶25 We accordingly reverse the judgment and remand to the District Court to conduct a new trial limited to the amount of punitive damages for which Gatrell is liable to Two Leggins in accordance with this Opinion. In light of this remand, we need not address further Two Leggins's claim that the District Court erred by failing to enter an order in review of the punitive damage award under § 27-1-221(7)©, MCA.

CONCLUSION

¶26 This judgment is reversed and remanded for further proceedings in accordance with this Opinion.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON

Justice Jim Rice, dissenting.

¶27 I would not reach the merits of the issues discussed in the Court's Opinion because I believe the manner in which the case was tried neither presented them for ruling by the District Court nor properly preserved them for appeal.

¶28 As the Court notes, a "specific and articulate" motion in limine "relieve[s] a party of the obligation to contemporaneously object at trial." *State v. Ankeny*, 2010 MT 224, ¶ 39, 358 Mont. 32, 243 P.3d 391. In its order granting Gatrell's motion in limine to exclude evidence of Gatrell's racial biases, the District Court specifically excluded the Article over concerns that it was both hearsay *and* overly prejudicial under M. R. Evid.

403. Thereafter, Two Leggins responded with his own pleading denominated a motion in limine. This motion addressed only the Court's exclusion on the basis of hearsay, and urged admission of the Article as relevant to Two Leggins' emotional distress claim in the liability phase of the trial. Two Leggins' motion did not address the District Court's secondary exclusion of the Article on the ground of prejudice. The District Court did not address Two Leggins' hearsay argument, reasoning the motion lacked merit in any event because "Two Leggins' argument ignores the Court's other basis for excluding the newspaper article: the risk of prejudice outweighing any probative value of the newspaper article, pursuant to M. R. Evid. 403." Thus, Two Leggins' motion in limine was not a "specific and articulate" raising of all the grounds on which the District Court excluded this evidence. *Ankeny*, ¶ 39. At no other point during the trial or in post-trial proceedings did Two Leggins broach the topic of the Article's admission, at least that can be discerned from the record.

¶29 The only other point at which admission of evidence was discussed was the conference between the District Court and counsel about what evidence could be introduced in the punitive phase. The Court offers that Two Leggins "raised the point again before the jury convened for the punitive damage phase," Opinion, ¶ 18, but the record is anything but clear about what Two Leggins was raising, because a record was never made. During that conference, counsel for Two Leggins began discussing documents he wanted to introduce, but did not identify them, and the resulting confusion is apparent in the transcript. Gatrell's counsel finally stated, "[i]f we're talking about . . . the incident report

by the Big Horn County Sheriff and then his medical record, the defendant objects." Immediately thereafter, and without contradicting Gatrell's counsel's clarification of the documents at issue, Two Leggins' counsel stated, as quoted in ¶ 17 of the Opinion, "*those* exhibits are relevant to the punishment. *Those* are relevant to the jury. *Those* are relevant to damages that should be awarded to him." (Emphasis added.) To whatever documents "those" refers was never explained. The only meaning I can draw from the transcript is that Two Leggins was arguing for admission of the two documents that Gatrell's counsel had just identified—the incident report and a medical record. However, these are not the documents about which Two Leggins argues on appeal: the Article, the prior restraining order with the process server's statement, and Gatrell's criminal judgment. At a minimum, there was a failure to make a record that the documents about which Two Leggins now argues were then being discussed such that the District Court could rule upon them. Two Leggins' inadequate motion in limine addressing only the Article cannot serve to preserve a challenge to the District Court's exclusion of that and the other documents when the trial progressed to a specific discussion about the evidence to be admitted during the punitive phase, and Two Leggins identified none of them.

¶30 Consequently, I do not believe these issues were preserved for appeal, and I would affirm.

/S/ JIM RICE

Justice Dirk Sandefur joins in the dissenting Opinion of Justice Rice.

/S/ DIRK M. SANDEFUR