IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No.
DA 20-0023

MONTANA DIGITAL, LLC,

Plaintiff/Appellee,

-vs-

TRINITY LUTHERAN CHURCH,

Defendant/Appellant.

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-19-165A, Hon. Amy Eddy

APPELLEE'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding as fact that Trinity was unjustly enriched by Montana Digital's payment of long distance phone charges that originated from Trinity's phone system.

2. Whether the District Court erred in awarding damages that were stipulated by Trinity to be $47,977.29.

3. Whether the District Court erred in dismissing Trinity's affirmative defense of comparative negligence after it dismissed Montana Digital's claim of negligence.

STATEMENT OF THE CASE

In 2018, hackers accessed Trinity Lutheran's outdated phone system and charged $47,997 in long-distance calls. Montana Digital sued to collect on the charges and claimed breach of contract, unjust enrichment and negligence. In the pretrial order, Trinity stipulated that if it was found liable on any claim, the measure of damages that Montana Digital suffered was $47,997. After the pretrial conference but before trial, Montana Digital moved to dismiss its claim of negligence to narrow the issues for trial. Once dismissed, Montana Digital moved to dismiss Trinity Lutheran's "claim" of negligence which was really an affirmative defense, as ruled by the District Court. Following Plaintiff's case in chief, the District Court dismissed Montana Digital's claim for breach of contract because it failed to prove Trinity Lutheran consented to the terms and conditions which appeared on Montana Digital's website but not in the written contract. The District Court elected to use the sitting jury as an advisory jury on the remaining

claim of unjust enrichment. The jury found 12-0 that Trinity Lutheran had been unjustly enriched. The District Court then issued a ruling finding that Trinity Lutheran had been unjustly enriched and entered judgment in the amount of the stipulated damages plus costs and interest. Trinity appeals the District Court's ruling finding unjust enrichment and dismissing its negligence "claim."

STATEMENT OF FACTS

Montana Digital provides internet and phone services in the Flathead Valley. (*Pretrial Order*, Agreed Fact, ¶ 1) It is a small company with approximately 1,200 customers and only four employees. (TT 172) Montana Digital in an on-ramp to other providers of phone services, the first being Skylink Digital which provides services to Laurel, Montana. (TT 173-75) Skylink then hands off the call to Onvoy, which is a wholesale telecommunications switching operation. *Id.* (Onvoy was purchased by Inteliquent and the names were referred to same thing at trial. TT 223:11-18. For convenience, only Inteliquent will be used herein.)

Trinity Lutheran switched its internet and phone services to Montana Digital in 2016 for its four building campus in Kalispell. In the Terms and Conditions, Trinity was responsible for any unauthorized calls. (TT 193:6-194:22) Trinity used a NEC IPK phone system, which as manufactured in the late 1990s and its last software update was in 2004. (TT 232-33) By 2018, Trinity's phone system was four generations old. (TT 240:12) Trinity acquired the phones via a donation

in 2011. (TT 246) Trinity never updated its phone system during its seven years of ownership. (TT 247) Trinity used the phone services provided by Montana Digital without incident for nearly two years from mid-2016 to mid-2018.

The voicemail on the NEC phone system is essentially just a computer with its own software and database. (TT 234:7) Trinity had 16 voicemail boxes set up in the phone system. Three of the voicemail boxes were not protected with a passcode. (TT 249:6-8) Amy Glimm, Business Manager at Trinity, was responsible for managing the voicemail system but had never investigated whether all of the voicemail boxes were both assigned and passcode protected. (TT 247) Some of Trinity's voicemail boxes were protected with simple passcodes like 1-2-3-4 and 1-1-1-1. (TT 237:13-20) Trinity had several voicemail boxes set up that were unused. (TT 248) The next generation of the NEC IPK system, which was released in 2006, had a requirement that all voicemails were passcode protected to prevent against hacking. (TT 240-242)

In 2018, Trinity began receiving a number of "hang ups," calls that were placed to Trinity but hung up when answered. (TT 249) In addition, Trinity noticed that line 3 on the phone system was always busy. *Id.* Trinity did not call Montana Digital about these circumstances. (TT 252:21-253:17) Trinity employed a phone technician certified on the NEC system but did not alert him about these circumstances. *Id.*

On July 12, 2018, Montana Digital's bookkeeper noticed a large invoice from the wholesale switch company, Inteliquent. (TT 197-98) The bookkeeper immediately called the owner, Chris Galloway, who in-turn investigated the records and determined that a large number of international calls were originating from Trinity's phone system. *Id;* TT 202:5-8. Galloway called Glimm and asked if Trinity had any exchange students or staff that might be making calls to Africa, to which Glimm replied, "No, but we were wondering why our line 3 was always busy." *Id.*

Phone lines from a telephone pole are routed to a "66 Block" on a customer's property. (TT 196) From there, the customer routes the phone lines to its internal phone system. *Id.* Once Glimm stated that Trinity was not placing the calls, Galloway sent a technician to investigate the 66 Block and found no interference on the Montana Digital side of the block, which meant the calls were being placed from within Trinity's phone system. (TT 196:25-197:5) Within hours of noticing the large invoice, Montana Digital disabled the international calling. (TT 198)

Trinity's own certified technician investigated and found that Trinity's internal phone system had been hacked and made international calls to Africa. (*Pretrial Order*, Agreed Fact, ¶ 2; TT 235:24) The technician discovered that several mailboxes in the voicemail system had been accessed and programmed to

allow access to their phone lines from the outside. (TT 236:7-10) The hackers would call into Trinity's phone system and wait for the phone system to answer. If a person answered, the hackers would hang up. Once Trinity's voicemail system picked up, the hackers would use a sequence of codes to find the administrator's voicemail box. (TT 236-37) Once in the administrator's voicemail box, the hacker would check how each subscriber mailbox was programmed. *Id.* The technician found that several mailboxes did not have a passcode and one mailbox had a passcode of 1-2-3-4, which would be easy to guess. (TT 237:15-18) The hackers would then use another sequence of codes to transfer a call to a number, in this case number 9, which would then provide an outside line. (TT 237-38) If the voicemail boxes were passcode protected, this hacking could not occur. If Trinity would have reported the hang ups and line 3 always being busy, the hack could have been discovered sooner.

Montana Digital's affiliated company, Skylink Digital, LLC, tried to get the bills from Inteliquent reduced to no avail. (TT 200) Inteliquent charged Skylink Digital and Skylink Digital paid that invoice. (TT 201) Skylink then charged Montana Digital and Montana Digital paid that invoice. *Id.* Montana Digital then charged Trinity and Trinity refused to pay. *Id.*

Montana Digital sued Trinity to collect on the charges that originated from its phone system, claiming breach of contract, unjust enrichment, and negligence.

In the Pretrial Order, Trinity agreed that Montana Digital suffered $47,997.29 in damages. (*Pretrial Order,* Agreed Fact, ¶ 3) Later in the Pretrial Order under "Stipulations," the parties agreed that "if Trinity Lutheran is found liable on *any* claim made by Montana Digital, LLC, the measure of damages suffered by Montana Digital is $47,997.29, exclusive of interest and attorney fees." (*Pretrial Order,* Stipulations, page 9)

After Plaintiff's case-in-chief, Trinity moved for a directed verdict on Montana Digital's claims for breach of contract and unjust enrichment. (TT 280-88) The court granted a direct verdict against Montana Digital finding that Trinity had not assented to the terms and conditions that were on Montana Digital's website. *Id.* The court denied the directed verdict on unjust enrichment. *Id.*

On the morning of the second day, Montana Digital elected to have the court decide the issue of unjust enrichment. (TT 303) The Court kept the sitting jury as an advisory judge to make a determination on the issue. *Id.* The jury voted 12-0 in favor of unjust enrichment. (TT 336-38)

STANDARD OF REVIEW

Montana Digital agrees with Trinity's standard of review.

SUMMARY OF ARGUMENT

Trinity ignores its own conduct in using an outdated phone system, not

taking measures to ensure each voicemail box was passcode protected, and ignoring warning signs that someone was using its phone system. It was unjustly enriched by Montana Digital's payment of the calls that originated from Trinity's internal phone system. A jury found all of the elements of unjust enrichment by a vote of 12-0 and the District Court correctly concurred in the findings.

In a desperate attempt to wiggle out of the Judgment, Trinity makes a number of arguments which it raises for the first time on appeal. Trinity's two stipulations in the Pretrial Order to Montana Digital's damages preclude a number of Trinity's arguments.

In its second issue, the District Court obviously did not error in awarding the amount of money that Trinity already had stipulated that Montana Digital had suffered. In fact, Trinity told the District Court to just impose the damage amount if Montana Digital prevailed.

In the third issue, Trinity had only pled an affirmative defense of comparative negligence and it was properly dismissed once Montana Digital's claim of negligence was dismissed. Montana law is well established that a claim for negligence cannot lie where a party has suffered no damages and Trinity admitted that it suffered no damages.

The District Court's findings are supported by either substantial evidence or pretrial stipulations which required no further evidence. This Court should AFFIRM the District Court.

ARGUMENT

A. TRINITY WAS UNJUSTLY ENRICHED BY MONTANA DIGITAL'S PAYMENT FOR LONG DISTANCE CHARGES THAT ORIGINATED FROM TRINITY'S OUTDATED PHONE SYSTEM.

The evidence at trial established that Montana Digital paid for the long distance phone calls that originated from Trinity's phone system. Both the advisory jury and the District Court found Trinity received a benefit by Montana Digital's payment. The District Court's finding is supported by substantial evidence and no mistake has been committed. *Wiegele v. W. Dry Creek Ranch, LLC*, 2019 MT 254, ¶ 14, 397 Mont. 414, 450 P.3d 879.

In its summary of the argument, Trinity states that the District Court erred by failing to grant its motion for a directed verdict. Denial of a Rule 50(a) motion is not reviewable on appeal unless a party renews the motion under Rule 50(b) after the verdict. *Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶ 25, 345 Mont. 125, 191 P.3d 374. Trinity did not renew its motion.

Trinity's primary argument is that a thief, not Trinity, received the benefit. *App. Br.* at 10. It made the same argument to the jury but it was rejected in the verdict and by the District Court. (TT 325:15-23, 328:17-22) Trinity's argument

is misplaced because the benefit received was Montana Digital's payment for the long distance calls that originated from Trinity's phone system, not who made the long distance calls. (TT 329:6-18; *Pretrial Order*, Conclusion of Law, ¶ 4)

Trinity next argues that there was no evidence to support the finding that Trinity knew that Montana Digital paid the bill to Inteliquent, which addresses the second element of unjust enrichment. *App. Br.* 11-12. Trinity raises this argument for the first time on appeal and it should be rejected. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839. Below, Trinity stipulated twice in the Pretrial Order that Montana Digital suffered $47,997 in damages, which implies that it was aware that Montana Digital paid for these calls on Trinity's behalf. (*Pretrial Order*, Agreed Fact, ¶ 3 and Stipulation, p.9) Evidence of actual payment was unnecessary because an agreed fact requires no further proof. *Dahl v. National Health & Life Ins. Co.*, 148 Mont. 330, 336, 420 P.2d 318 (1966) (holding a District Court's finding of an accident without sufficient evidence was not error because it was an agreed fact in the pretrial order and required no further proof). Additionally, Trinity never contended this below. Instead, it contended in the Pretrial Order that it was not unjustly enriched "because TLC did not gain anything from the stolen phone calls," not that it was unaware that Montana Digital paid for these services. *Pretrial Order*, Def.'s Contentions, ¶ 13. Finally, in making an argument on the second element of unjust

enrichment, Trinity argued in closing only that it did not "appreciate anything about long distance," and never argued that it did not appreciate or know that Montana Digital had paid Inteliquent. (TT 325-26) In short, Trinity never made this an issue for trial, waived this argument by not raising it below, and cannot raise it for the first time on appeal. *Danelson v. Robinson*, 2003 MT 271, ¶ 17, 317 Mont. 462, 77 P.3d 1010 (argument not raised below deemed waived on appeal).

Nevertheless, Montana Digital did, in fact, admit evidence that it paid Inteliquent:

> A: We opened up a trouble ticket with Envoy [Intelliquent] to have them justify or verify that the calls actually originated from us and that it wasn't just an erroneous charge…
> Q: And was part of that opening a trouble ticket trying to get them to reverse or not accept the charge?
> A: It was. We tried on Trinity Lutheran's behalf at that point and ourselves at Skylink, to not have to pay this bill.
> Q: And what was the result of your request to not have to pay the bill?
> A: **It was denied, they made us pay the bill.**
> Q: And to clarify for the record, when you say that Envoy "made us" pay the bill, who is the customer to Envoy?
> A: Skylink Digital was actually the customer.
> Q: Okay. **And Skylink Digital, which was the company you owned, paid that bill, correct**?
> A: **That's correct, yes**.
> Q: And then what does Skylink Digital do, then, with that bill?
> A: Skylink Digital bills Montana Digital. Skylink Digital is also a wholesale provider, so it provides wholesale services, not just telephone services, to Montana Digital, it then has to bill Montana Digital for its usage.
> Q: Okay. And it did that?
> A: It did.

Q: **And did Montana Digital pay**?
A: **They have**.
Q: And what does Montana Digital do with that bill?
A: Then they have to pass that bill to where it originated from, and that would be the customer.
Q: And that was Trinity Lutheran?
A: That's correct.
Q: And they have not paid, correct?
A: That's correct.

(TT 200:11-201:25; *see also* TT 225:6-11)

Subsequently, TLC never cross-examined Mr. Galloway on this point.

The second element requires proof of "an appreciation or knowledge of the benefit by defendant." *Associated Mgmt. Serv. v. Ruff*, 2018 MT 182, ¶ 65, 392 Mont. 139, 424 P.3d 571. Substantial evidence supports the District Court's finding that Trinity appreciated the benefit. First, as mentioned above, it stipulated that Montana Digital suffered these damages. Second, Trinity obviously was aware that $47,997 in charges had been incurred from its phone system because it testified that it did not pay for the long-distance charges billed to it. (TT 307:23) Finally, aside from the payment, Trinity's phone system used Montana Digital's phone services and therefore benefitted from those services, regardless of who placed the calls. That benefit is measured by the amount of tariffs charged for long distance calls. Thus, substantial evidence in the record supports the finding that Trinity either knew or appreciated the benefit received because its phone system incurred $47,997 in phone service charges and it did not pay for them.

Trinity makes a number of arguments for the first time on appeal that should be rejected. *Pilgeram*, ¶ 20. First, it argues that it owed nothing to and had no contract with Inteliquent, Trinity could not be aware of the alleged payment from Montana Digital to Inteliquent because no such payment was made, and that Skylink Digital paid the bill to Inteliquent. *App. Br.* at 11-12. The record establishes that since Trinity stipulated to damages, it was unnecessary to admit evidence of payment to Inteliquent. As the testimony quoted above shows, the record establishes that Montana Digital did, in fact, pay the bill.

Another argument Trinity makes for the first time on appeal is that a claim for unjust enrichment cannot lie where Montana Digital had other claims. *App. Br.* at 13. At no time prior to trial did Trinity ever argue that Montana Digital's unjust enrichment claim should be dismissed as a matter of law. Unjust enrichment is an equitable claim in the absence of a contract. *Estate of Pruyn v. Axmen Propane, Inc.*, 2009 MT 448, ¶ 63, 354 Mont. 208, 223 P.3d 845. Here, Montana Digital had a contract claim but the District Court dismissed that claim on a directed verdict. (TT 288)

Trinity also waived this argument based on its position below to the District Court. A discussion took place during the arguing of instructions about whether to offer an instruction on the contract claim. (TT 291-97) Montana Digital had understood the court had dismissed the contract claim because Montana Digital

had not established that Trinity has assented to the terms and conditions which addressed the customer's responsibility for fraudulent charges. The District Court mentioned that there may be a basis from some of the words of the admitted document for an argument to be made. (TT 292-94) Thereafter, the parties argued the instructions on unjust enrichment. At no time did Trinity object to the unjust enrichment claim on the basis of a contract claim. (TT 295) At one point, there was a discussion on the following proposed language: "When unjust enrichment exists the law operates to imply a contract in order to prevent the unjust enrichment; however if you find that an actual expressed contract was entered into by the parties covering the same subject matter you may not allow…" (TT 297:8-13) Trinity did not object at that time to the District Court's proposed language but agreed to it by stating, "I think you're fine." (TT 297) Immediately thereafter, when discussing the sole issue for the jury, Montana Digital said the only issue for the jury was whether Trinity was unjustly enriched, to which Trinity's counsel concurred: "That's the only issue." (TT 298) At no time during any of these discussions claims, instructions, or remaining issues did Trinity ever object to allowing unjust enrichment to go forward. Trinity never made the argument below that it makes on appeal, that is "The District Court should not have allowed Montana Digital to proceed with an unjust enrichment claim when Montana Digital refused to pursue their legal claims." *App. Br.* at 13. If it had made an objection,

specifically tailored instructions and verdict form could have allowed the jury to determine if the matter was covered under a contract and, if not, whether unjust enrichment was allowed.

In conclusion, substantial evidence exists in the record to support the District Court's finding that Trinity received a benefit by Montana Digital's payment of the $47,997 in phone service charges that originated from Trinity's phone system, and that it knew or at least was aware or appreciated that benefit. No mistake has been committed. Trinity's other arguments raised for the first time on appeal should be rejected. This Court should AFFIRM the District Court's findings and conclusions.

B. THE DISTRICT COURT DID NOT ERROR IN AWARDING DAMAGES THAT THE PARTIES STIPULATED WERE $47,977.29.

Trinity stipulated to damages in the Pretrial Order and several times during trial. In the Pretrial Order, Trinity stipulated as follows:

> "if Trinity Lutheran is found liable on *any* claim made by Montana Digital, LLC, the measure of damages suffered by Montana Digital is $47,997.29, exclusive of interest and attorney fees."

(*Pretrial Order*, Stipulations, page 9)

A stipulation to agreed facts means that no further proof is required. *Webb v. Wolfe,* 230 Mont. 322, 325, 749 P.2d 531, 532 (1988) ("[i]f the fact stipulated to is material, then the stipulation is binding on the court"); *CDN Inc. v. Kapes* (9th

Cir. 1999), 197 F.3d 1256, 1258 ("[b]ecause stipulations serve both judicial economy and the convenience of the parties, courts will enforce them absent indications of involuntary or uninformed consent.") If no further proof is required, it follows that the standard of review of "substantial evidence" is either inapplicable or the agreed fact itself meets the standard.

During trial, Trinity confirmed its stipulation on damages a number of times:

- At the pretrial conference, the issue of damages came up and the Court stated: "The Court agrees, damages are stipulated." (TT 14-15) Trinity did not object.
- Prior to opening statements, the Court clarified its position on mitigation of damages: "The failure to timely report calls is out because that went to the duty to mitigate, which we've stipulated to the amount of damages that Montana Digital suffered if Trinity Lutheran is found liable." (TT 135:17) Trinity did not object.
- During Trinity's cross-examination of Montana Digital's main witness, an evidentiary issue arose on mitigation of damages. The Court stated: "The Court has previously ruled that there was not going to be any evidence as to when Montana Digital advised Trinity Lutheran if it should have advised it earlier because that went to mitigation of damages and the parties have

already stipulated as to the amount of damages owed in this case." (TT 218-19) Trinity did not object.

- Montana Digital also made clear to the Court that it did not admit billing records into evidence because of the stipulation on damages. (TT 220) Trinity did not object.
- During the argument on instructions, Trinity stipulated that the only question for the jury was whether Trinity was unjustly enriched because damages had been stipulated:

> Frampton: Yeah, so I think the question to the jury is . . . was Trinity Lutheran unjustly enriched. Is that not the question? I mean it's only one element, but it's –
> Johnson: That's the only issue.
> Court: That's the question.
> Frampton: We stipulated to damages
> Court: Yes or no, damages are stipulated?
> Johnson: Yes.

(TT 298-99)

- Again, and **probably most importantly**, while arguing instructions, the question about damages was specifically addressed and Trinity said that the Court did not need to make any findings about damages because they were stipulated and it should just enter the stipulated number:

> Court: So how are we going to do damages? Do you want to impose them at the end because they're stipulated, or do you want the jury to award them?

Johnson: **I think you just impose them at the end if they win**, I think that's the best way.

(TT 298) (emphasis added)

Trinity argues that the District Court's Findings of Fact ¶¶ 15-16 and Conclusions of Law ¶¶ 3-7 are not supported by substantial evidence. *App. Br.* at 15-16. In other words, Trinity is taking another stab at arguing the first two elements of unjust enrichment (benefit and awareness of same) but this time it focuses on the damages awarded. Specifically, Trinity argues that "at no point did Montana Digital provide evidence as to its invoice from Inteliquent" and "the Inteliquent bill was never introduced." *App. Br.* at 1-16.

Since Trinity stipulated to damages that Montana Digital suffered, proof of the upstream charges were unnecessary. *Dahl, Webb, supra.* Furthermore, the District Court was not required to make any findings on proof of damages based on Trinity's position that it could just impose the stipulated amount:

Court: So how are we going to do damages? Do you want to impose them at the end because they're stipulated, or do you want the jury to award them?
Johnson: I think you just impose them at the end if they win, I think that's the best way.

(TT 298)

Of course, the evidence as quoted on pages 10 above clearly established the upstream charges and Montana Digital's efforts to get the charges from Inteliquent reduced. Even if the District Court's finding was wrong, it will be upheld if it

reached the correct result. *Md. Cas. Co. v. Asbestos Claims Court*, 2020 MT 70, ¶ 57, 399 Mont. 279, 460 P.3d 882 ("…we will affirm a district court decision that reaches the correct result even if for the wrong reason"). Imposing the stipulated amount is the correct result.

Trinity argues, again for the first time on appeal, that Montana Digital did not argue until trial the equitable theory that Trinity benefitted from its payment to Inteliquent on Trinity's behalf. *App. Br.* at 16. This is not true as Plaintiff's Contention, ¶ 8, stated:

> Trinity Lutheran's phone system used Montana Digital's phone network for the placement of calls. Trinity Lutheran knows calls were made and charges were incurred and *Montana Digital has paid its carrier for these charges*. Under the circumstances, it would be inequitable for Trinity Lutheran to retain these benefits without compensating Montana Digital for the value of the charges incurred.

(emphasis added)

On page 16 of Appellant's Brief, Trinity argues again that no evidence supports the Court's finding that Trinity was aware Montana Digital paid $47,977.29 to Inteliquent. This is the same argument it made on page 11 of its opening brief. Montana Digital has shown above how substantial evidence in the record supports the second element. But Trinity focuses on the specific fact that Amy Glimm did not know Montana Digital paid Inteliquent. *App. Br.* at 16. Again, it never made this argument below and raises it for the first time on appeal.

Pilgeram, ¶ 20. Trinity moved for a directed verdict on unjust enrichment but did not make this argument. (TT 281:24-283:21) Trinity could have argued during the argument of instructions but did not. (TT 290:23-301:12) It could have also argued it to the jury in closing but did not. (TT 324:15-329:1) In short, Trinity waived the argument and cannot raise it on appeal. *Danelson*, at ¶ 17 (argument not raised below deemed waived on appeal). Nonetheless, the second element only requires that Trinity know or be aware of the benefit received and Glimm testified that she was aware of the charges because she refused to pay them.

In conclusion, Trinity's pretrial stipulation and consent for the District Court to just impose the stipulated damages amount means that the damages were established by stipulation and that substantial evidence was not required. Trinity is making the same arguments it made in the first issue and they should be rejected. This Court should AFFIRM the District Court's award of damages.

C. TRINITY ONLY PLED AN AFFIRMATIVE DEFENSE OF COMPARATIVE NEGLIGENCE, AND IT WAS PROPERLY DISMISSED WHEN MONTANA DIGITAL'S NEGLIGENCE CLAIM WAS DISMISSED.

Trinity's claim is nothing more than a claim for offset. Shortly before trial, it admitted it was trying to preserve its claim for offset. (Docket No. 78) At trial, it wanted to argue that Montana Digital failed to mitigate its damages. (TT 14:12-19) Trinity also admitted that it didn't suffer damages but will suffer them if

damages are awarded against it. (TT 6:14; 18-20) Unfortunately for Trinity, offset is not a defense to unjust enrichment.

Procedurally, Trinity's "claim" was considered on the merits. Following the Pretrial Order, Plaintiff moved to dismiss its negligence claim to simplify the issues for trial, which for a two day jury trial would result in fewer jury instructions, fewer opportunities for error, and fewer decisions for the jury to decide such as negligence, causation, comparative negligence, and superseding-intervening defense. (*Pl.'s Motion to Dismiss* and *Reply Brief*, Docket Nos. 70 and 72) The Court granted Plaintiff's motion to dismiss. (Docket No. 76) Notably, Trinity does not challenge the District Court's dismissal of Montana Digital's negligence claim.

Immediately thereafter, Trinity moved to amend the Pretrial Order to "preserve its right to offset" potential damages from Montana Digital's negligence. (Docket No. 78) In its written Response, Montana Digital argued that Trinity's negligence counterclaim was really an affirmative defense based on the following: (1) it failed to contend or list issues of fact on causation and damages it suffered in the Pretrial Order, (2) its proposed verdict asked whether Montana Digital's negligence caused its own damages, not whether it caused Trinity damages; and (3) its proposed verdict form only listed a question for comparative negligence (ie,

percentages) rather than a line for the jury to state a damage amount. *Id.*, D's Prop. Jury Instr., Docket No. 74.

The next day at the pretrial conference on the morning of trial, the District Court raised the issue presented by Trinity's motion to amend the Pretrial Order. Trinity admitted that it hadn't suffered any damages but argued it would suffer damages if Montana Digital prevailed. (TT 5:21-6:15) The issue was argued a second time at the end of the pretrial conference and, again, Trinity admitted that it had not suffered damages but would suffer damages in the future: "If they prevail on any of their tow claims, that's when we're damaged." (TT 18-20)

Prior to *voir dire*, the District Court ruled that Trinity's "claim" of negligence was an affirmative defense because it didn't alleged either causation or damages. (TT 22:10-15) The Court issued a written order as well. (Docket No. 82)

On appeal, Trinity makes no argument on how the District Court erred. Its heading simply states the error occurred in dismissing the negligence. *App. Br.* at 17. The tort of negligence has four elements: (1) existence of a duty; (2) breach of that duty; (3) causation; and (4) damages. *U.S. Fidelity and Guar. Co. v. Camp*, 253 Mont. 64, 68, 831 P.2d 586, 588-89 (1992). A plaintiff must establish all of these elements to succeed on an action in negligence. *Camp,* 831 P.2d at 589; *Peschke v. Carroll Coll.*, 280 Mont. 331, 335-36, 929 P.2d 874, 877

(1996). Without damages, there is no claim for negligence. *Shepherd v. Carbon Cty. Bd. of Comm'rs,* 2002 MT 98, ¶ 19, 309 Mont. 391, 46 P.3d 634. Trinity admitted that it had not suffered any damages and therefore no claim for negligence existed. *Id.*

In *New York v. Corwen*, 164 A.D.2d 212, 217 (App. Div. 1990), the court held: "The defendants-appellants also contend that the IAS court erroneously barred the city's claimed negligence as a defense to the intentional tort causes of action. While the Corwen defendants did not explicitly assert comparative negligence as a defense, they did assert negligence as a recoupment and setoff and the IAS court correctly regarded that as identical to asserting a comparative negligence defense." Under *Corwen*, the district court correctly regarded Trinity's negligence "claim" as an affirmative defense.

Trinity appears to be arguing that its negligence claim was "incomplete" at the time of trial but now with the judgment, it is now "appropriate for tort remedy." *App. Br.* at 18. This "argument" is a further concession that it never had a negligence claim to begin with. Trinity's argument also doesn't make any sense – in proving that it suffered $47,997 in damages, Montana Digital neither breached a duty nor caused Trinity to suffer damages.

Trinity argues that it "has been damaged in the amount of $47,977.29 resulting from an equitable judgment entered in Montana Digital's behalf." *App.*

Br. at 18. Accepting this argument as true, it would mean that the District Court, not Montana Digital, caused it to suffer damage by the conduct of entering its judgment. Obviously, this is not a valid claim either.

CONCLUSION

This Court should AFFIRM the District Court's Findings of Fact, Conclusions of Law, and Order.

DATED this 8th day of June, 2020.

FRAMPTON PURDY LAW FIRM

By: _____
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CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Appellees, hereby certify that Appellees' Response Brief complies with the Montana Rules of Appellate Procedure:

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DATED this 8th day of June, 2020.

FRAMPTON PURDY LAW FIRM

By: _____
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CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 8th day of June, 2020, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, as indicated below.

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CERTIFICATE OF SERVICE

I, Sean S. Frampton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-08-2020:

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Dated: 06-08-2020