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STATE OF MONTANA
Case Number: DA 22-0018

IN THE SUPREME COURT OF THE STATE OF MONTANA

S. W., a minor, by and through her Guardian JEFFREY FERGUSON, Plaintiff and Appellee, vs. STATE OF MONTANA, by and through the Montana Department of Public Health and Human Services, Defendant and Appellant.	No. DA 22-0018

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court
Cascade County District Court Cause No. DDV 13-813(b)
The Honorable Elizabeth A. Best, Presiding

June 2, 2022

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2. Whether the District Court applied the incorrect standard for determining the causation element of S.W.'s negligence claim.

3. Whether the District Court incorrectly concluded the State was negligent *per se*.

4. Whether the District Court abused its discretion when it (1) excluded the State's liability expert; (2) imposed a sanction related to alleged evidence spoliation; and (3) permitted S.W. to introduce evidence and argument about her medical expenses and related services.

STATEMENT OF THE CASE

Minor S.W., through Appellant Jeffrey Ferguson, guardian, filed an initial Complaint (Doc. 1) and Amended Complaint and Demand for Jury Trial. (Doc. 21). The Amended Complaint (Doc. 21) asserts two causes of action. "Cause of Action No. 1" asserts the State of Montana ("State") failed "to exercise reasonable care and meet reasonable standards of care, resulting in the breach of its duties to protect [S.W.] from abuse." Doc. 21, ¶ 53. Cause of Action No. 1 is a claim of negligence asserted under Montana law.

"Count No. 2" of S.W.'s Amended Complaint seeks a declaration that the

damages limitations in §2-9-108(1), M.C.A. do not apply to S.W.'s action against the State, or, in the alternative, to declare the damage limitations unconstitutional. Doc. 21, ¶¶ 60-63, 64.

In a series of Orders addressing the parties' motions, the District Court ruled against the State on all issues related to: (1) the State's duties; (2) the State's alleged breach of its duties; and (3) the State's alleged role as the sole cause of S.W.'s injuries. The District Court left for the jury only the amount of S.W.'s damages.

The District Court ruled the State's "sole duty [was the] protection of abused and neglected children." Doc. 89 at 2. The Court concluded this "primary" duty mandated S.W.'s removal from her father's home "if she was at risk of harm," "despite not knowing which adult committed the abuse." Doc. 89 at 4, 6. The State breached this duty and was "grossly negligent" as a matter of law according to the District Court when it failed to remove S.W. from her father's home after being made aware of examining physicians' conclusions S.W. likely suffered abuse in the form of abdominal bruising. Doc. 89 at 6.

Mandating a damage award for S.W., the District Court determined the State was the only cause of S.W.'s injuries. Doc. 86.

The District Court also ruled the State was negligent *per se* (Doc. 59 at 7-11), ruling the State breached its duties under §41-3-202, M.C.A., engrafting into this statute "additional duties" arising from Department of Public Health and Human

Services' ("DPHHS"), Policy Manual and Investigative Safety Assessment ("ISA"). Doc. 59 at 13-17.

The District Court's Orders, in chronological order, and a summary of rulings subject to appeal contained in each Order:

1. Order Granting Partial Summary Judgment (Doc. 59):

a. The State was negligent *per se* as a matter of law for failing to fulfill its duties under §41-3-202(1)(a), M.C.A. – a statute addressing actions to be taken on receipt of a report of abuse (Doc. 59 at 7-11);

b. Genuine issues of material fact preclude summary judgment based on duties arising from Child and Family Services Division's ("CFSD") Policy Manual and ISA. (Doc. 59 at 13-14);

c. Genuine issues of material fact preclude summary judgment on issues of "common law" negligence. (Doc. 59 at 17-18.);

d. As a sanction for the State's inability to locate photos taken of S.W.'s injuries, the District Court indicated it would allow "the Plaintiff to inform the jury that the Department destroyed the evidence shortly after the catastrophic injuries were inflicted on S.W." Correspondingly, the District Court ruled it would "not [permit the State] to argue that the photographs were inconsequential, tangential, or cumulative, or to make any representation or argument in defense of the spoliation." (Doc. 59 at 21);

e. The State is not, as a matter of law, immune from liability under §41-3-203(1), M.C.A. for its handling of the matters giving rise to S.W.'s claims. (Doc. 59 at 21-26);

f. The District Court need not resolve the constitutionality of §2-9-108(1), M.C.A. because the $750,000 cap on governmental tort liability contained in §2-9-108(1), M.C.A., did not apply to the State's conduct out of which S.W.'s claims arose. (Doc. 59 at 26-29). The District Court concluded the cap on governmental tort liability does not, on its terms, apply to torts involving government-specific duties.

2. Order Granting Plaintiff's Motion For Partial Summary Judgment and *In Limine* Re: Causation Defenses (Doc. 86):

The State's causation defenses do not apply and the State's conduct is the sole cause of S.W.'s injuries and damages because Hocter's criminal assault of S.W. was foreseeable as a matter of law.

3. Order Denying Defendant's Motion For Summary Judgment Re: Immunity (Doc. 89):

Even if the State were entitled to immunity under §41-3-203, M.C.A., which it is not (as determined in Doc. 59), the State is nonetheless not entitled to immunity under §41-3-203, M.C.A. because its conduct was "grossly negligent" as a matter of law--it failed to satisfy its duty to protect S.W. by removing her from

Arnott's custody and home.

The District Court entered additional Orders that are a subject of this appeal. These rulings, in chronological order, are:

1. Order Granting Plaintiff's Motion To Strike Expert (Doc. 55):

All opinions proffered by the State's liability expert, Dr. Judy Krysik, MSW, are ordered excluded because they are either not the proper subject of expert testimony or invade the province of the jury.

2. Order Denying Defendant's Motion *In Limine* Re: Plaintiff's Medical Expenses and Related Services (Doc. 92):

Plaintiff may present evidence of S.W.'s past and future medical expenses.

At the conclusion of the jury trial held solely on the issue of damages, the jury awarded $16,652,538 in damages to S.W. Doc. 125. The District Court entered Judgment. Doc. 127. The State timely appealed. Doc. 132.

STATEMENT OF THE FACTS

S.W. was born August 24, 2008, to mother Kendra Bernardi ("Bernardi") and father Jacob Arnott ("Arnott"). **State Appendix 001-002** at ¶¶1 & 3. Within weeks of her birth, S.W. and her parents became the subject of DPHHS, CFSD reports and responses.

Child Protection Specialist Cari Davids' ("Davids") involvement with S.W.

began when S.W. was six weeks old. On October 7, 2008, CFSD received a report from Arnott alleging Bernardi neglected S.W. **State Appendix 13-25**. Davids investigated the October 7, 2008 report, including associated reports from October 8 and 20, 2008, determining they were not substantiated. **State Appendix 20-24**.

When S.W. was approximately 3 months old, on November 19, 2008, Cascade County District Court ordered Arnott have primary custody of S.W. See **State Appendix 2** at ¶6, and **State Appendix 26-56**.

When and after Arnott was awarded primary custody of S.W., he lived with Alicia Hocter (Hocter). **State Appendix 59** at ¶18. During this time, Hocter was pregnant with a child apparently fathered by Arnott. **State Appendix 69.**

On December 27, 2008, Bernardi participated in a supervised visit with four-month-old S.W. **State Appendix 75-76.** This visit occurred in Arnott and Hocter's residence with Nicole Tangen supervising the visit. **State Appendix 77**.

The next day, Arnott and Hocter noticed blood in S.W.'s stool. **State Appendix 82**. They took S.W. to the emergency room at Great Falls Benefis hospital on December 28, 2008. *Id.* Arnott noticed bruising on S.W.'s abdomen either before or during the emergency room visit. *Id.*; see also **State Appendix 88-89**.

Based on his examination and findings during the December 28 emergency room visit, Dr. Robert Harper made an abuse report to CFSD**. State Appendix 90-**

100. Dr. Harper reported six bruises across S.W.'s belly consistent with someone pinching her within the preceding 24 to 48 hours. *Id.* Dr. Harper opined the "type of injury is unusual," concluding the injury was "Child abuse, superficial abrasion to the abdomen and bruising of the abdominal wall." *Id.*

The abdominal injury to S.W. allegedly occurred during Bernardi's supervised visit with S.W. on December 27, 2008. **State Appendix 82**. No one reported witnessing the infliction of the injury. *Id.* In at least two respects, the circumstances of S.W.'s abdominal injury were uncertain: (1) the precise date and time of the abdominal injury could not be determined; and (2) the person who caused the injury could not be determined.

Witness accounts of persons in contact with S.W. and persons observing contact with S.W. during the probable time frame of S.W.'s injury were inconsistent. Arnott told Dr. Harper that during Bernardi's supervised visit on December 27, 2008, he briefly left the room in which Bernardi was visiting S.W. and when he returned, S.W. was crying. **State Appendix 92**. The witness accounts are inconsistent regarding whether Arnott re-entered the room where Bernardi and S.W were. **State Appendix 101-102**.

Nicole Tangen, who supervised Bernardi's visit with S.W., left Bernardi alone with S.W. so she could use the restroom; after she departed the room, S.W. began crying. **State Appendix 101-102**. Hocter recalled that after Tangen left Bernardi

alone with S.W., S.W. began crying, which Hocter and Arnott heard. Hocter then entered the room containing Bernardi and S.W. to find Bernardi holding S.W. tightly against her chest. **State Appendix 82**. Hocter did not consider this circumstance to be out of the ordinary. *Id.*

Given the accounts of the circumstances and time frame in which S.W. was believed to have experienced the abdominal injury, Bernardi was the primary focus of the investigation as the potential perpetrator of the injury. **State Appendix 82-87**. Davids was assigned to investigate the December 28, 2008 report. **State Appendix 82-87**.

On December 29, 2008, the day after the report, Davids scheduled an appointment for pediatrician Jennifer Hall to examine S.W. that same day. **State Appendix 101-102**. Davids attended S.W.'s appointment with Dr. Hall as did Arnott and Hocter. **State Appendix 101-102** Dr. Hall concluded the bruising was "non-accidental trauma" and ordered a full body bone scan. **State Appendix 101-102**. The full body skeletal survey of S.W. was performed on December 30, 2008 and was negative for additional trauma. **State Appendix 77**.

Dr. Hall was unable to determine who or what caused S.W.'s abdominal bruising or when it occurred. **State Appendix 75-78**.

Also on December 29, 2008, Davids: (1) made a referral of the alleged abuse to the Great Falls Police Department; (2) met with and interviewed Nicole Tangen—

the person supervising Bernardi's December 27th visit with S.W.; (3) met with and interviewed Bernardi and her significant other; and (4) conducted an unannounced visit to Arnott's home and met with him and Hocter. *Id.* Additionally, on December 30, 2008, Davids had Arnott come to her office with S.W., where she emphasized to him his responsibility for S.W.'s safety. **State Appendix 78**.

Davids concluded from her investigation that, while the timing and precise cause of S.W.'s abdominal injury could not be determined, S.W. was reasonably safe from immediate threat of harm with her father. **State Appendix 75-78, 81-87.**

As a result of Davids' referral, the Great Falls Police Department investigated. **State Appendix 87**. A Great Falls officer met with Arnott and photographed S.W. A Great Falls police detective assisted with the investigation. **State Appendix 103-109**. The Great Falls police department concluded it did not have probable cause to charge anyone with a crime. **State Appendix 75-78, 87.**

On January 6, 2009, CFSD received an anonymous report concerning a possible strong odor of marijuana coming from Arnott's apartment on two separate occasions. The report stated there was a child crying inside the apartment. The reporter did not know the tenant or the number of residents in the apartment. **State Appendix 87 and 110.**

The January 6, 2009 report was not assigned to Davids. Another CPS specialist initiated an investigation on January 13, 2009. **State Appendix 91 and**

110. On January 15, 2009, Davids and CPS worker Autumn Wadell conducted a home visit with Arnott, Hocter, and S.W. **State Appendix 87**. Davids inspected the house, which was above minimal standards. *Id.* She also looked over S.W.; the bruising on S.W.'s stomach was gone, and S.W. looked happy and healthy. *Id.* The January 6 report was closed as unsubstantiated. *Id.*

On January 18, 2009, CFSD received a report from a labor and delivery nurse at Great Falls Benefis Hospital concerned that Arnott left S.W. in a child seat unattended in the hospital while he was attending Hocter's delivery of a baby. No conduct meeting the definition of child abuse or neglect was alleged. **State Appendix 115-16, ¶12**.

On February 18, 2009, Hocter assaulted S.W., causing S.W. severe and permanent injuries. The assault occurred in the apartment which Hocter was then sharing with Arnott, S.W., and her own newborn daughter. See *State of Montana vs. Alicia Hocter*, Cascade County, Cause No. DDC-09-90, Montana Eighth Judicial District Court.

Alicia Hocter was convicted in 2010 of aggravated assault and criminal endangerment arising from her intentional injury of S.W. on February 18, 2009.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a summary judgment motion de novo. *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, ¶8, 324 Mont.

366, 103 P.3d 535; *see also Lorang v. Fortis Ins. Co.*, 2008 MT 252, 345 Mont. 12, 192 P.3d 186.

A district court's discretionary rulings on the admissibility of evidence at trial are reviewed for abuse of discretion. *Lorang*, ¶52. "A district court abuses its discretion if the court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice." *Unidentified Police Officers 1 v. City of Billings*, 2019 MT 299, 398 Mont. 226, 454 P.3d 1205 (internal citation omitted).

SUMMARY OF ARGUMENT

The State is immune from liability for its conduct related to reports of abuse and neglect concerning S.W. The State, its Departments, and its employees fall within the definition of "anyone" entitled to the immunity §41-3-203, M.C.A., affords. The gross negligence exception to immunity does not apply because the State's conduct satisfied the standard for reasonable care, and in no event fell below the "slight care" standard for gross negligence. The District Court's Judgment should be reversed and judgment entered for the State.

If the Court does not enter judgment as a matter of law for the State because it determines genuine issues of material fact on gross negligence require jury resolution, the Judgment should be reversed and a retrial ordered on the gross negligence issue as a predicate for application of §41-3-202, M.C.A., immunity.

Should retrial be ordered on any negligence standard, the District Court's ruling on the causation element of negligence, which ruling relieved S.W. of her burden of proving causation, should be reversed. Consistent with this Court's long-standing authorities, unless this Court concludes evidence of Hocter's intentional criminal conduct supersedes the State's conduct as a matter of law, this evidence should be presented to the jury and argument allowed on the issue of the foreseeability of Hocter's criminal conduct.

The Court should also reverse the District Court's negligence *per se* ruling because it is erroneously based on duties incorrectly engrafted into the narrow requirements of §41-3-202(1)(a), M.C.A.. This statute requires DPHHS take three actions: (1) promptly assess the information contained in the report; (2) determine the level of response required; and (3) determine the timeframe within which action must be initiated. Section 41-3-202(1)(a), M.C.A., does not require any specific judgments be made or additional tasks be accomplished. The undisputed record establishes all statutorily required actions were taken.

The Court should also conclude the State cannot in any event be liable to S.W. for more than $750,000. The District Court's ruling that the statutory damages cap, §2-9-108, M.C.A., does not apply to torts involving a government-specific duty should be reversed. The District Court's interpretation renders the statute a nullity and is inconsistent with the plain language of the statute and Montana case law.

The Court should also reverse the District Court's rulings (1) excluding the State's liability expert; (2) imposing a sanction related to alleged evidence spoliation; and (3) permitting S.W. to introduce evidence and argument about her medical expenses and related care. These rulings were abuses of discretion. The State properly disclosed admissible expert testimony on the standard of care. The State did not spoliate evidence. And S.W.'s expenses for medical and home- and community-based care are not damages S.W. can recover against the State.

ARGUMENT

I. S.W.'s Complaint Should Be Dismissed Because The Immunity Protections of M.C.A. §41-3-203 Apply to The State, Its Departments, and Its Employees.

A. M.C.A. §41-3-203, requires entry of judgment as a matter of law for the state because there was no gross negligence.

On this record, no reasonable jury could find the State failed to use "even slight diligence or care." *Weber v. State*, 2015 MT 161, ¶14, 379 Mont. 388, 352 P.3d 8. The State was not grossly negligent and is immune from liability to S.W. The District Court should be reversed and judgment as a matter of law entered for the State.

Section 41-3-203, M.C.A., immunizes the State from S.W.'s claim unless: (1) the State was grossly negligent; (2) the State acted in bad faith or with malicious purpose; or (3) the State knowingly provided false information in its investigations involving S.W. In its Order Denying Defendant's Motion For

Summary Judgment Re: Immunity, Doc. 89, the District Court concluded: "The Department was grossly negligent... The State is not immune." *Id.* at 7. The District Court conducted no analysis and made no ruling on the other exceptions to §41-3-203, M.C.A., impliedly and correctly concluding there was no record support for these other exceptions to immunity from liability.

The District Court's analysis and conclusions are premised on its imposition of a duty that the State must "ensure safety first" (Doc. 89 at 5), which duty mandated removal of S.W. from her father's home. For the District Court, it was sufficient to mandate the State remove S.W. from her father's home "that [S.W.] was physically abused while in Arnott's and Hocter's care." *Id*. The State's failure to remove S.W. was, according to the District Court, gross negligence as a matter of law. Doc. 89 at 6 -7. Neither Montana law nor the facts support the District Court's Order. The undisputed facts confirm the State is immune from liability to S.W.

As the District Court's analysis implicitly confirms, the "gross negligence" exception is the only potentially applicable exception to the State's §41-3-203, M.C.A., immunity. In *Weber*, when analyzing and applying the "gross negligence" exception to §41-3-203, this Court stated:

> This Court has defined gross negligence as the "failure to use slight care." *Rusk v. Skillman*, (1973) 162 Mont. 436, 441, 514 P.2d 587, 589 (quoting *Batchoff v. Lraney*, (1946) 119, Mont. 157, 166, 172 P.2d 308, 313) (emphasis removed). *See also Black's Law Dictionary* (Bryan A. Gamer ed., 10th ed.2014)(defining "gross negligence" as "[a] lack of even slight diligence or care.").

Weber, 2015 MT 161, ¶14; *see also State v. Pastos*, (1994) 269 Mont. 43, 887 P.2d 199, 205 (gross negligence is a failure to use even "slight care").

The undisputed record confirms DPHHS's employees used reasonable care and, as a matter of law and fact, their conduct was not grossly negligent. After receiving each report, DPHHS timely analyzed the report, assessed the appropriate response, and took appropriate actions (if any). DPHHS investigated promptly, including multiple visits and interviews, in-home and in-office, with the involved individuals during which information concerning the reports was gathered and issues of S.W.'s safety were discussed. Davids also arranged and attended a physician visit to assess S.W.'s medical condition. In the case of the December 28, 2008 report, Davids referred the report to the Great Falls Police Department (GFPD). Neither DPHHS nor GFPD were able to determine who inflicted the reported bruising on S.W.

These facts permit only one reasonable conclusion: DPHHS demonstrated more than "slight care" in its handling of the reports concerning S.W, and judgment should be entered for the State.

B. <u>This Court has determined M.C.A. §41-3-203 includes the State, its departments, and its employees.</u>

The District Court ruled in two separate Orders the State was not entitled to immunity from S.W.'s claims. Doc. 59 and 89. In its initial immunity ruling

(Doc. 59 at 21-26), the District Court determined the State was not "anyone" entitled to immunity under the language of §41-3-203, M.C.A.. This was error.

§41-3-203(1), M.C.A., provides in full:

> Immunity from liability. (1) Anyone investigating or reporting any incident of child abuse or neglect under 41-3-201 or 41-3-202, participating in resulting judicial proceedings, or furnishing hospital or medical records as required by 41-3-202 is immune from any liability, civil or criminal, that might otherwise be incurred or imposed unless the person was grossly negligent or acted in bad faith or with malicious purpose or provided information knowing the information to be false.

The scope of the immunity granted under §41-3-203, M.C.A., includes both the actions and the parties identified in either §§41-3-201 or -202, to which it explicitly refers. The then-applicable version of §41-3-202, M.C.A., expressly included the State, through its departments and its employees, and their obligations regarding the investigation and reporting of child abuse and neglect. Through reference to §§41-3-201 and -202, the Legislature defined the scope of "anyone" entitled to immunity under §41-3-203.

Ignoring §41-3-203's reference to §§41-3-201 and -202, the District Court concluded that since Title 41, Chapter 3 did not define "anyone," it would apply the word's "plain and ordinary meaning." Doc. 59 at 23. The District Court noted "Merriam Webster defines "anyone" as "any <u>person</u> at all." Doc. 59 at 23 (emphasis in original). The District Court did not analyze whether the State or DPHHS was a "person." Instead, the District Court concluded the word

"anyone" included only human beings, and not the State or DPHHS. Doc. 59 at 24.

Contrary to the District Court's conclusion, this Court has interpreted §41-3-203, M.C.A., to include the State as "anyone," holding that "[w]here Montana law protects private citizens from liability, it also protects the State. " *Weber v. State*, 2015 MT 161, ¶13 (citing *Gudmundsen v. State ex rel. Mon. State Hosp. Warm Springs*, 2009 MT 56, 349 Mont. 297, 203 P.3d 813).

The District Court side-stepped this Court's statement regarding the application of §41-3-203, M.C.A., immunity to the State in *Weber*, concluding the issue of whether §41-3-203, M.C.A., immunized the State "was not presented on appeal [in *Weber*]." Doc. 59 at 23. While, as this Court observed in *Weber*, Weber did not appeal the District Court's conclusion that the immunity afforded in §41-3-203, M.C.A., applied "to the same extent" to both the DPHHS investigator and the State (*Weber*, ¶ 13), this Court nonetheless applied §41-3-203, M.C.A., to immunize the State. This Court's application of §41-3-203, M.C.A., in *Weber* conforms with its ruling in *Gudmundsen*.

This Court's application of §41-3-203 to the State in *Weber* does not stand alone. In *R.M.S. v. DPHHS,* 2009 MT 224N, 214 P.3d 790, the District Court granted summary judgment for DPHHS, two social workers, Deer Lodge County and a sheriff's deputy, holding the governmental agencies and the individuals

immune for the investigation and temporary removal of the plaintiff's daughter from his home. Further, in *Green v. Montana Department of Public Health and Human Services*, 2014 WL 12591835, Judge Christensen stated he could see no reason why DPHHS, in conducting its investigatory tasks pursuant to §41-3-202, M.C.A., should fall outside the scope of "anyone" as the term is used in §41-3-203(1). *Id.* *1.

The District Court relied on *Newville v. State of Montana*, (1994) 267 Mont. 237, 883 P.2d 792 to exclude the State from the definition of "anyone" provided in §41-3-203. This reliance is misplaced. The post-*Newville* amendments to §§41-3-201, -202, and -203 make clear that immunity under §41-3-203 applies to the State.

The District Court's ruling that §41-3-203, M.C.A., immunity applies only to the social worker conducting the investigation and not DPHHS or the State is based on the same conclusion this Court rejected in *Weber* and *Gudmundsen*, and should be similarly rejected.

C. Rules of statutory construction confirm "anyone" includes the State, its departments, and its employees.

In addition to the case law above, statutory construction confirms the State and its departments are "persons" included within the correct interpretation of the word "anyone." A "person" "includes a corporation or other entity as well as a natural person." §1-1-201(1)(b), M.C.A.. "Governmental entity" means the state and political subdivisions. §2-9-101(3), M.C.A.. Since a "governmental entity" is an "other entity," by mandate of §§1-2-106 and §1-2-107, M.C.A., a governmental

entity is a "person" and, thus, is included in the word "anyone" contained in §41-3-203. Correctly interpreted, the State, including DPHHS, is immune under §41-3-203, M.C.A..

Helpful by contrast, in *Montana Independent Living Project, Inc. v. City of Helena*, 2021 Mont. 14, ¶¶ 9-12, 403 Mont. 81, 479 P.3d 961, this Court concluded that the word "individual" did not include non-human entities. "Anyone" is a much broader term than "individual." As the District Court itself recognized, "anyone" includes "persons," which, in turn, includes non-human entities such as the State and DPHHS.

The District Court's error is revealed by interpreting §41-3-203, M.C.A., in context. Related statutes must be interpreted together and harmonized so at to give effect to each. *Gregg v. Whitefish City Counsel*, 2004 MT 262, ¶38, 323 Mont. 109, 99 P.3d 151 (citing *Chain v. Mont. DMV*, 2001 Mont. 224, 306 Mont. 491, 36 P.3d 358). Thus, to understand the scope of the intended immunity under §41-3-203, M.C.A., it is necessary to interpret the scope of immunity in light of the tort claims statutes (see §2-9-101, M.C.A., et. seq.) which define the circumstances under which the State may be liable in tort.

For the purposes of tort liability to S.W., in legal and practical effect, the State and its employees are one. DPHHS employees involved in responding to reports of abuse against S.W. *are* the State. See §2-9-102, M.C.A. ("Every

governmental entity is subject to liability for its torts and those of its employees..."). Similarly, §§2-9-305 and §2-9-313, M.C.A. confirm the State is the sole proper defendant in this case.

DPHHS employees perform the functions outlined in §41-3-202, M.C.A.. Since the State can only act through its employees and agents, without the conduct of human beings, the State's liability could not arise. Correspondingly, since the State's liability arises directly from the conduct of its employees, immunity applicable to its employees covers the State. Because §41-3-203, M.C.A., as the District Court concluded, applies to protect the State's employees ("natural persons") from liability under appropriate circumstances, it likewise applies to protect the State. Harmonizing §§2-9-102 and §2-9-305, M.C.A., with §41-3-203, M.C.A. requires this conclusion.

This Court has stated that §2-9-101(1), M.C.A., another statute that must be harmonized with §41-3-203, provides the State can be liable to S.W. "only where a private person similarly situated would be liable." *Gudmundsen*, ¶24. Correct interpretation of §2-9-101(1), in conjunction with §41-3-203, confirms §41-3-203 protects the State because, "where Montana law protects private citizens from liability, it also protects the State." *Id.*

II. If Immunity Does Not Bar S.W.'s Claims, The Issue Of Whether The State's Conduct Caused S.W.'s Injuries And Damages—Whether Hocter's Criminal Conduct Was Foreseeable—Should Be Determined As A Matter Of Law For The State, Or Presented To The Jury.

The District Court relieved S.W. of her burden to prove the State's conduct caused her injuries and damages by taking the causation issue from the jury. Doc. 86. The District Court's erroneous causation ruling is predicated on four mistakes of law:

(1) the District Court's incorrect assertion the State was seeking to apportion liability to Hocter based on her admitted intentional criminal conduct when, instead, the State was seeking to defend against S.W.'s claim that it caused her claimed injuries and damages;

(2) the District Court's incorrect assertion that its determination in its Order finding negligence *per se* included, as a part of its duty analysis, a conclusive ruling that Hocter's criminal injury of S.W. was foreseeable (Doc. 59) and, thus, no superseding, intervening cause defense could be sustained (Doc. 86 at 9-14);

(3) the District Court's application of the incorrect standard ("substantial factor") for determining causation in cases involving an independent intervening cause (Doc. 86 at 10, 13); and

(4) the District Court's incorrect alternative determination of causation as a matter of law based on its conclusion the State failed to prove S.W.'s injuries were divisible and apportionable (Doc. 86 at 14-15).

A. The issue of foreseeability as part of causation, determined as a matter of law for S.W., should have been determined for the State, or presented to the jury.

The District Court correctly recognized that "foreseeability is essential to the determination of the duty element of negligence. . . [and foreseeability] is also the focus when considering whether an intervening superseding cause defense will be permitted." Doc. 86 at 9-10. The District Court then rejected the State's contention that foreseeability on the issue of causation is a jury question because it determined "[f]oreseeability [as it relates to causation] is a question of law, for the Court." *Id.* at 13. The District Court relied on *Busta v. Columbus Hospital Corp.*, (1996), 276 Mont., 342, 370, 916 P.2d 122, for this proposition, citing as support its belief that "the Montana Supreme Court rejected [the State's argument that foreseeability on the issue of causation was a jury question] where it recognized that foreseeability is to be analyzed as part of the duty analysis as a 'better reasoned' approach." Doc. 86, p. 13.

The District Court conflated the issue of foreseeability as it relates to the duty element of negligence with foreseeability as it relates to the causation element of negligence. While a determination of foreseeability for the purposes of determining duty is part of a question of law for the Court, the causation element, in cases where there is an allegation of superseding, intervening conduct, involves a separate and distinct foreseeability issue. *See, e.g., Cusenbary v. Mortensen*, 1999 MT 221, ¶19,

296 Mont. 25, 987 P.2d 351(". . . in cases involving alleged intervening causes, foreseeability is properly considered with respect to causation.")

After incorrectly concluding Hocter's intentional criminal conduct could not be admitted or considered for any purpose, the District Court incorrectly decided causation as a matter of law against the State through reliance on its "[conclusion in its earlier summary judgment order] that Hocter's conduct was foreseeable . . . [and, thus,] the [State's] superseding, intervening cause defense is not permitted." Doc. 86 at 10. While analysis of foreseeability for the purpose of determining duty is endorsed under this Court's authorities, the District Court's earlier Order on Partial Summary Judgment (Doc. 59) contains no analysis or determination of foreseeability. Instead, the District Court found the State liable as a matter of law for negligence *per se* based on asserted violation of §41-3-202(1)(a), M.C.A.. Doc. 59 at 11, 14, and 29. In its Order on Partial Summary Judgment (Doc. 59), foreseeability as an element of duty was never analyzed or considered.

Under the District Court's erroneous causation analysis, there would never be a jury question of superseding, intervening cause. Instead, the court would, in every case, resolve foreseeability during its duty analysis as a matter of law, thereby determining the existence, or nonexistence, of causation. This formulation cannot be squared with this Court's authorities.

If the District Court's formulation were correct, this Court's decision in *Pula*

v. State, 2002 MT 9, 308 Mont. 122, 40 P.3d 364, would have been overturned in the intervening two decades. *Pula* has not been overturned. It allows the admission of non-party conduct as evidence and allows the jury to address foreseeability as part of resolving the causation element of negligence. See also *Bell v. Glock, Inc*., (2000) 92 F. Supp.2d 1067 (D. Mont.) ("The facts of the incident itself are admissible. Any reasonable inference that can be argued from those facts is permissible, so long as it goes to the negation of cause, not to its attribution to some third party.").

Central to the District Court's causation discussion are three cases that do not support its ruling, but instead require the State be allowed to present evidence of Hocter's conduct and argue the State's conduct did not cause S.W.'s injuries and damages: *Faulconbridge v State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777; *Cusenbary*; and *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 208 P.3d 836. None of these cases involved a third-party's intentional criminal conduct directed at the plaintiff or any determination a third-party's intentional criminal conduct was foreseeable as a matter of law.

This Court's decisions uniformly hold the causation element of negligence, including the consideration of foreseeability of criminal conduct, is an issue for the jury unless reasonable minds can reach only one conclusion thereon: *See Estate of Strever v. Cline*, (1996) 278 Mont. 165, 178, 924 P.2d 666, 673 ("...a cause of action involving superseding intervening acts, whether criminal or non-criminal, normally

involves questions of fact which are more properly left to the finder of fact for resolution."); *Starkenburg vs. State*, (1997) 282 Mont. 1, 10, 934 P.2d 1018, 1023 (same); *Lopez vs. Great Falls Pre-release Center*, (1999) 295 Mont. 416, 427, 986 P.2d 1081, 1088 (same) (overruling on other grounds recognized by *Emanuel v. Great Falls School Dist.*, 2009 MT 185, 351 Mont. 56, 209 P.3d 244); *LaTray v. City of Havre*, 2000 MT 119, ¶27, 299 Mont. 449, 999 P.2d 1010 (same) (overruling on other grounds recognized by *Emanuel*); *Prindel v. Ravalli County*, 2006 MT 62, 331 Mont. 338, 133 P.3d 165 (same). For example, *Prindel*, after resolving foreseeability as a matter of law in the context of duty in favor of the plaintiff, still concluded a fact issue remained for the jury regarding foreseeability in the context of intervening causation:

> In light of our foregoing analysis of the foreseeability of risk posed by Russell, we conclude that reasonable minds could differ as to whether Russell's intentional act of stabbing Prindel was so unforeseeable as to sever the chain of causation. Consequently, this issue of causation should not be decided on summary judgment, but should be resolved by the trier of fact.

Prindel at ¶ 46; see also *Samson v. State*, 2003 MT 133, ¶22, 316 Mont. 90, 69 P.3d 1154 ("in cases involving a dispute over the intervening criminal act of a third party, as here, foreseeability must be analyzed twice: first, with regard to the existence of a legal duty, and second, with regard to proximate causation.").

While the issue of causation should not be presented at any trial because the State is immune, if the alleged negligence is tried, evidence of Hocter's criminal

conduct should be admitted and a jury should decide whether S.W. can prove causation.

When the issue of causation involves the assertion of a superseding, intervening cause, this Court approved the following standard for determining causation: "In those cases where chain of causation is an issue (e.g., where there is an allegation of an independent intervening cause) . . . [t]he defendant's conduct is a cause of the (injury/death/damage) if, in a natural and continuous sequence, it helped produce it and if the (injury/death/damage) would not have occurred without it." *Busta*, 276 Mont. at 371, 916 P.2d at 139. This Court has clarified that, under *Busta*, causation is effectively a two-step analysis:

> When the defendant alleges that the chain of causation has been severed by an independent, intervening cause, we must undertake a two-tiered analysis: (1) we consider whether the defendant's negligent act was a cause-in-fact of the plaintiff's injury; and (2) we consider whether the defendant's act was a proximate cause of the plaintiff's injury. [Internal citation omitted]. The plaintiff must establish proximate cause by showing that it was the "defendant's breach which foreseeably and substantially caused his injury,"

Labair v. Carey, 2012 MT 312, ¶12, 367 Mont. 453, 291 P.3d 1160 (discussing *Busta* and *Cusenbary*; quoting *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 36-39, 342 Mont. 335, 181 P.3d 601).

The District Court did not apply this standard and instead discarded the requirement to prove foreseeability, relying solely on the "substantial factor" test. Doc. 86 at 13. This was error. This Court should reverse the District Court and

conclude, on the undisputed facts, that Hocter's intentional criminal conduct was an unforeseeable superseding and intervening cause as a matter of law and enter judgment for the State. Or, at a minimum, this Court should remand the case for trial by jury including this issue.

B. Hocter's intentional criminal conduct could not be compared to the State's alleged negligence and the State is not seeking to apportion liability.

In an extended discussion of non-party at fault issues (Doc. 86 at 4-9, 14) the District Court explained its conclusion that non-party defenses did not apply to the circumstances of S.W.'s claims and that, in addition to being "expressly prohibited from doing so," the State "has not complied with the procedural requirements of §27-1-703, M.C.A.." Doc. 86 at 14. The District Court misapprehends the controlling legal principles.

The State did not join Hocter as a party or assert Hocter's criminal assault was conduct of a non-party at fault because Hocter's admitted intentional criminal conduct could not be compared to the State's alleged negligence. *See, e.g.*, *Martel v. Montana Power Company*, (1988) 231 Mont. 96, 100, 752 P.2d 140, 143 ("[A]ll forms of conduct amounting to negligence in any form including negligence, gross negligence . . .are to be compared with any conduct that falls short of conduct intended to cause injury or damage."). Because the State is foreclosed from utilizing §27-1-703, M.C.A., to include Hocter on the verdict form, the only means of

allowing the jury to determine causation is to allow evidence of Hocter's conduct and allow argument on causation.

In the circumstance where Hocter's intentional criminal conduct is present in the chain of causation, the State must be allowed to present evidence of that conduct and argue to the jury the impact of that evidence on whether the State caused S.W.'s claimed injuries and damages. This approach fits comfortably within this Court's recognition in *Pula* of the necessity of such causation proof and argument. Any other approach presents the jury with a fiction—a factual scenario where the criminal actor's conduct is artificially erased from the causation chain. Pretending Hocter's admitted intentional criminal conduct does not exist in the causation chain upends burdens of proof and denies the State any causation defense.

C. The record does not support the District Court's reliance on this Court's decisions addressing divisible injuries.

The District Court identified, as an additional basis to resolve causation against the State as a matter of law, the purported requirement of the State "to prove that S.W.'s injuries were divisible and apportionable to a reasonable degree of medical probability." Doc. 86 at 14-15. For this proposition, the District Court relied on *Truman v. Mont. Eleventh Jud. Dist. Ct.*, 2003 MT 91, 315 Mont. 165, 68 P.3d 654, and *Clark v. Bell*, 2009 MT 390, ¶14, 353 Mont. 331, 220 P.3d 650.

The District Court's reliance on *Truman* and related decisions is error. This Court explained in *Truman*: "The issue here is not the conduct of an unrepresented

person [meaning a non-party], but whether other events contributed to the plaintiff's condition. The plaintiff is not being asked to defend someone else's conduct, but to prove the cause of her own condition." *Id.* at ¶21. This Court expressly recognized that its authorities addressing issues of non-parties at fault did not apply to divisible injury circumstances—"Whether [defendant] is permitted to present evidence of the subsequent accidents to disprove causation of damages is not resolved by *Plumb [v Fourth Judicial Dist. Court*, (1996) 279 Mont. 363, 927 P.2d 1011]." *Id.*

The State is not seeking to admit evidence of multiple events causing injury to S.W. as a means of apportioning responsibility for S.W.'s alleged injuries. The undisputed record confirms all S.W.'s injuries arise from a single event—Hocter's intentional criminal assault. No "divisible injury" issue is presented. Instead, the State is seeking to offer evidence of Hocter's conduct and argue to the jury that Hocter's criminal assault is an intervening, superseding cause of S.W.'s injuries and damages.

The District Court's reliance on *Truman* is error.

III. The District Court's Misapplication of M.C.A. §41-3-202(1)(a) And Its Conclusion The State Violated This Statute Were Error, Requiring Reversal.

Considered in the context of its self-limited ruling, the District Court's grant of summary judgment on S.W.'s negligence *per se* claim is narrowly based on the State's alleged violation of the limited duties arising solely under §41-3-202(1)(a),

M.C.A.. Doc. 59 at 8-11, 13-18. The District Court set the parameters for its negligence *per se* ruling when it ruled that: (1) because "the law favors resolution of factual issues by juries," "the Court does not grant judgment as to the additional duties [which the Court concludes arise from DPHHS's ISA and Policy Manual]" (Doc. 59 at 13-14); and (2) "[b]ecause the Department raises potential material fact issues as to common law negligence... the Court declines to grant summary judgment on [common law] negligence...." Doc. 59 at 17-18.

Section 41-3-202(1)(a) requires, after the receipt of a report a child has been abused or neglected, that DPHHS take three actions: (1) promptly assess the information contained in the report; (2) determine the level of response required; and (3) determine the timeframe within which action must be initiated. Section 41-3-202(1)(a) does not require any specific judgments be made or additional tasks be accomplished. The undisputed record establishes for the three reports that were the focus of the District Court's ruling—reports dated December 28, 2008, January 6, 2009, and January 16, 2009—all statutorily required actions were taken.

On December 28, 2008, DPHHS received a report of suspected abuse or neglect of S.W. from Emergency Room Physician Dr. Harper. **State Appendix 75-78, 81-87, and 101-102**. DPHHS assessed the report and designated it a priority 2, which designation required action be initiated within 14 days. *Id.* These actions fully satisfied the State's obligations under §41-3-202(1)(a), M.C.A.. The District

Court had no factual or legal basis related to the December 28, 2008 report to find negligence *per se* based on §41-3-202(1)(a).

On January 6, 2009, an anonymous caller reported a baby crying and the possible strong odor of marijuana coming from an apartment in the building where Jacob Arnott lived, but the reporter did not know the tenants or residents of the apartment. **State Appendix 78**. The State assessed the report and designated it a priority level 2, which designation required action be initiated within 14 days. **State Appendix 110**. These actions fully satisfied the State's obligations under §41-3-202(1)(a). The District Court had no factual or legal basis related to the January 6, 2009 report to find negligence *per se* based on §41-3-202(1)(a).

On January 18, 2009, a nurse at Benefis Hospital reported S.W. had been left in a child seat unattended, but in the hospital, while Arnott was attending Hocter's delivery of their child. **State Appendix 69, 110, 115** and **117-123**. DPHHS assessed the report and designated it as child protection information because the allegations did not rise to the level of suspected child abuse or neglect under Title 41, Chapter 3. Because child protection information did not involve suspected child abuse or neglect, the report was assigned priority level 0 and did not require the initiation of further action. These actions fully satisfied the State's obligations under §41-3-202(1)(a). The District Court had no factual or legal basis related to the January 18, 2009 report to find negligence *per se* based on §41-3-202(1)(a).

Erroneously adding language to the statute and incorrectly applying that rewritten statute to the undisputed factual record, the District Court found as a matter of law that the State "failed to 'promptly assess [all of] the information' from December and January and failed to determine the level of response required in the context of all of the information it had and failed to make a timeline as required by §41-3-202, M.C.A. (2007)." Doc. 59 at 11 (bracketed language in original). The District Court also identified what it concluded were "breaches" of the State's "admissions" of its duties of care. *Id.* at 15-17. The District Court identified the source of the engrafted duties as the "Department's ISA and Policy Manual, [which defined the Department's] standard of care for assessing and determining the level of response required under §41-3-202, MCA." Doc. 59 at 9 and 14. The District Court identified and analyzed portions of the ISA and provisions of the Policy Manual which it concluded the State breached. *Id*. at 9-11, 13-17.

It was error for the District Court to impose negligence *per se* liability based on specific obligations derived from the State's administrative documents, which are not contained in §41-3-202(1)(a). The effect of the District Court's analysis is to expansively rewrite §41-3-202(1)(a), adding duties which the District Court derived from the ISA and Policy Manual. In addition to violating the first rule of statutory construction—"not to insert what has been omitted" (§1-2-101, M.C.A.)—this approach undermines the foundational premise for application of negligence *per se*:

That the statute on which negligence *per se* is based contains the specific requirements the allegedly negligent party violated. *Harwood v. Glacier Elec. Co-op, Inc.*, (1007) 285 Mont. 481, 489, 949 P.2d 651, 656 ("In order to impute liability to a defendant as a matter of negligence *per se*, this Court has repeatedly stated that the defendant must have violated a statute, as opposed to merely an administrative regulation, safety code, or professional standard. [Internal citations omitted]. The violation of a non-statutory standard may be used as evidence of negligence, but it is insufficient grounds on which to find the defendant negligent *per se*.")

The District Court's ruling is incorrect for another reason. Evident in the District Court's analysis of the State's alleged "breaches" (Doc. 59 at 15-17) are genuine issues of material fact which it resolved. The District Court disagreed with the judgment and analysis of DPHHS worker Davids, questioned Davids' credibility, and questioned the adequacy of the State's efforts in response to the reports of S.W.'s abuse and home circumstances. *Id.* The District Court incorrectly resolved these issues on a disputed record. Reasonable jurors could disagree concerning whether there are sufficient facts to carry S.W.'s burden of proof on the elements of negligence.

The District Court's grant of summary judgment on negligence *per se* should be reversed because it improperly resolved disputed factual issues. Further, S.W's negligence *per se* claim should be dismissed with prejudice because all required

actions were taken.

IV. The District Court Incorrectly Concluded The Statutory Limit On State Tort Liability Does Not Apply To State-Specific Duties.

The damages cap contained in §2-9-108, M.C.A., applies to claims based on the State's performance of governmental functions.[1] In construing §2-9-108, M.C.A., the District Court initially noted it limits governmental liability to not more than $750,000 for each "claim." Doc. 59, p. 26. The District Court then noted that a "claim," in this context, is "any claim against a governmental entity, for money damages only, that any person is legally entitled to recover.....*under circumstances where the governmental entity, if a private person, would be liable* to the claimant for the damages...." *Id.* (emphasis in original) (quoting §2-9-101, M.C.A.). The District Court erred when it construed the italicized language to mean the damages cap does not apply to claims involving government-specific duties.

The District Court's construction of §2-9-108, M.C.A., renders the statute a nullity. The statute is undisputedly intended to limit liability on claims against the government. It would be self-defeating to have a statute, intended to limit liability specifically for the government, that does not apply to government-specific claims. *See City of Missoula v. Fox*, 2019 MT 250, ¶18, 397 Mont. 388, 450 P.3d 898 ("We construe a statute by reading and interpreting the statute as a whole, 'without

[1] Appellee asserted, below, that §2-9-108, MCA, is unconstitutional. While Appellant asserts the statute is constitutional, the District Court expressly declined to make a determination regarding the constitutionality of the statute. Because the District Court did not make a determination on this issue, this brief does not address it.

isolating specific terms from the context in which they are used by the Legislature.' ... Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it.") (internal citations omitted).

Read in context, the phrase "under circumstances where the governmental entity, if a private person, would be liable," merely confirms governmental entities are not liable for claims for which a private person would not be liable. As this Court held in *Gudmundsen*:

> Under § 2-9-101(1), M.C.A., state liability attaches under the Tort Claims Act "only where a private person similarly would be liable." *Drugge v. State*, (1992) 254 Mont. 292, 294-95, 837 P.2d 405, 406. Thus, where Montana law protects private citizens from liability, it also protects the State.

Gudmundsen, ¶24. Together, §§2-9-101(1) and 2-9-108 preserve for the State all liability protections available to private persons and, in addition, cap the State's liability for tort damages at $750,000 per claim and $1.5 million per occurrence. The District Court's interpretation contravenes *Gudmundsen* and *Drugge*. *Id.*; *see also Stenstrom v. State, Child Support Enforcement Div.*, (1996) 280 Mont. 321, 329-330, 930 P.2d 650, 655 (As to the State, "claims" under the Tort Claims Act includes "[a]ll tort claims against the state..."); *Cottonwood Hills, Inc. v. State, Dept. of Labor & Industry*,(1989) 238 Mont. 404, 407, 777 P.2d 1301, 1303 (same).

Under the statute's plain language and longstanding Montana law, Appellee's allegations are a "claim" to which to which the $750,000 damage cap of §2-9-108

applies.[2]

V. The District Court Abused Its Discretion When It Excluded The State's Expert Testimony On The Standard Of Care.

The District Court abused its discretion by excluding the properly disclosed testimony of the State's expert, Dr. Judy Krysik, regarding the standard of care. Doc. 55. The State disclosed Dr. Krysik would opine "CFSD acted with reasonable care in its involvement with SW from first contact following her birth until the time she was injured on February 18, 2009," and the basis for this opinion. Doc. 44, Exhibit 1, pp. 1-6. The District Court held it would not permit Dr. Krysik to render this opinion because it (1) was not beyond the common experience of the jury and would not assist the jury in understanding the evidence, (2) was not the appropriate subject of expert testimony, and (3) invades the province of the jury. Doc. 55, p. 1. The District Court stated that, while "[o]pinions about the standard of care are properly within the scope of expert opinions... The Court has combed the Department's disclosure and can find no disclosed opinions or facts addressing the standard of care applicable here." *Id.*, p. 7.

The District Court erred when it concluded Dr. Krysik's disclosed opinion that the State exercised reasonable care was not an opinion regarding the standard of

[2] Federal courts have concluded similarly interpreting identical language in the Federal Tort Claims Act (FTCA). The FTCA, 28 U.S.C. §1346(b)(1), waives sovereign immunity, "under circumstances where the United States, if a private person, would be liable." The U.S. Supreme Court has repeatedly held this language permits liability for uniquely governmental functions, provided a private person would be liable under analogous circumstances. *See, e.g., US v. Olson*, (2005) 546 U.S. 43, 45-46, 126 S.Ct. 510, 512, 163 L. Ed.2d 306, 311; *Indian Towing Co. v. US*, (1955) 350 U.S. 61, 76 S.Ct. 122, 100 L. Ed. 48.

care. "Standard of care" is synonymous with "use [of] reasonable care and skill." *See, e.g., Labair,* 2012 MT 312, ¶20 (characterizing the breach element of a negligence claim as "failure to use reasonable care and skill"). What constitutes "reasonable care and skill," i.e. the standard of care, is a proper subject for expert opinion. *See, e.g., Babcock Place L.P. v. Berg, Lilly, Andiolo & Tollefsen, P.C.*, 2003 MT 111, ¶21, 315 Mont. 364, 69 P.3d 1145. The District Court correctly recognized that "[o]pinions about the standard of care are properly within the scope of expert opinions," but erred when it concluded Dr. Krysik's disclosed opinions did not address the standard of care.

VI. The State Did Not Spoliate Evidence And, Even If It Had, The District Court's Sanctions Were Disproportionate.

The District Court entered sanctions against the State for its inability to locate photographs, taken on December 29, 2008, of the bruising to S.W.'s abdomen. Doc. 59, pp. 18-21. The District Court concluded the State had a duty to preserve the photographs because "the Department knew that Hocter assaulted SW just seven weeks after the photos were taken, and... knew that, as a result, SW would suffer '[l]ifelong significant neurological problems and disability.' This is notice of a potential claim." *Id.*, p. 18. It concluded that "there is scant evidence of intentional or bad faith destruction of the photos," but imposed sanctions because "the loss of the photos was prejudicial to SW and her case." *Id.*, p. 21. The sanctions were "to allow the Plaintiff to inform the jury that the Department destroyed the evidence

shortly after the catastrophic injuries were inflicted on SW. The Department is not permitted to argue that the photographs were inconsequential, tangential, or cumulative, or to make any representation or argument in defense of the spoliation." *Id.*

The District Court erred when it concluded the State despoiled evidence. A party only has a duty to preserve evidence when "a party in control [of the evidence] knows or reasonably should know that [the evidence] may be relevant to pending or reasonably foreseeable litigation... Though the prospect of future litigation need not be 'imminent,' the mere abstract possibility or fear of future litigation does not alone give rise to a duty to preserve." *Montana State University-Bozeman v. Montana First Judicial District Court*, 2018 MT 220, ¶23, 392 Mont. 458, 426 P.3d 541 (internal citations omitted).

It is undisputed the State did not receive formal notice of S.W.'s claim until more than four years after the events at issue. Doc. 59, pp. 18-21. The District Court nonetheless concluded the State was on notice of the claim from the time it learned Hocter assaulted S.W. *Id.* This is a *non sequitur*. The District Court's conclusion that the State was on notice of a claim against it, from the time it knew of Hocter's actions, could only follow from, and be predicated on, the District Court's incorrect conclusion the State was negligent *per se*. For the same reasons the State was not negligent *per se* or grossly negligent, the State was also not on notice of this claim

until it received formal notice, under the Tort Claims Act, more than four years after the events at issue.[3] The photos were unavailable before the State was put on notice of this claim.

Further, even if there had been spoliation, the sanction the District Court imposed was disproportionate. The District Court concluded the State did not act intentionally or in bad faith. *Id.* The prejudice, if any, from the inability to locate the photos is minor because there are substantially contemporaneous third-party medical records documenting the photographed bruising, and photographs taken just one day later by the police are still available. Doc. 41, pp. 14-15. And the photos did not, and could not, speak to who caused the bruising or how the bruising occurred. There is no basis to conclude the State intentionally "destroyed" the photographs or that the photographs would have materially altered the overall available evidence. The District Court's sanction effectively provides S.W. an irrebuttable argument the photographs were consequential, directly relevant, non-cumulative, and the State intentionally destroyed them "shortly after the catastrophic injuries." Doc. 59, p. 21. This was disproportionate and an abuse of discretion even if there had been spoliation, which there was not.

[3] The fact the State is immune from liability, as addressed above, is further reason why the State was not on notice of a claim until it received formal notice under the Tort Claims Act.

VII. The District Court Incorrectly Permitted S.W. To Introduce Evidence And Argument About Her Medical Expenses And Related Services, Which Are Not Damages S.W. Can Recover Against The State.

The State, before the District Court, moved to exclude certain evidence and argument related to S.W.'s expenses for medical, home-based, and community-based care. Doc. 73-74, 91. The District Court denied the State's motion. Doc. 92. The State reasserts in this appeal, and expressly does not waive, the arguments it presented in Docs. 73-74 and 91. However, the District Court ordered these matters placed under seal. Doc. 79; see also Doc 92, p. 3. To honor the District Court's Order "that ALL private medical information relating to SW be SEALED," the State refers the Court to the arguments it presented in Docs. 74 and 91, and incorporates them herein by reference, instead of separately presenting those arguments in this brief.

The District Court's Order related to medical expenses (Doc. 92) should be reversed.

CONCLUSION

The State is immune from liability for S.W.'s claims. In addition, Hocter's intentional criminal conduct was the intervening and superseding cause of S.W.'s injuries. On each of these independently sufficient grounds, Appellant respectfully requests this Court reverse the District Court's Final Judgment entered November 17, 2021, and enter judgment for the State.

If this Court does not enter judgment for the State, this Court should reverse the District Court's final judgment and the decisions subsumed into that final judgment and remand the case for retrial. Should the case proceed to retrial, genuine issues of material fact on gross negligence (or negligence if immunity is found to not apply) and causation require a jury trial. The jury should be correctly instructed on the causation element of S.W.'s claim, and allowed to consider Hocter's intentional criminal conduct, along with the other admissible evidence, to determine the foreseeability to the State of S.W.'s injuries and damages. S.W.'s negligence *per se* claim should be dismissed with prejudice because the State took all required actions.

Should this matter be remanded for re-trial, the State's expert should be allowed to testify, no spoliation sanction should be applied, and S.W. should not be permitted to claim past and future medical expenses as damages against the State.

DATED this 2nd day of June, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows, is 9,711, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 2nd day of June, 2022.

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Dated: 06-02-2022