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 REPLY 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

November 3, 2022

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I. Section 43-3-203, MCA, Immunizes The State From Liability.

S.W. argues § 43-3-203, MCA, does not immunize the State from liability and that this Court's decision in *Newville v. State*, (1994) 267 Mont. 237, 883 P.2d 793 controls. S.W. is incorrect.

A. *Newville* applied an earlier version of § 41-3-203, MCA, and does not control.

The version of § 41-3-203, MCA, applicable at the time of *Newville* did not explicitly reference the statutes covering investigation by the Department under § 41-3-202, MCA or reporting under § 41-3-201, MCA. That version does not apply here. The amended version applicable here confirms the immunity granted in § 41-3-203, MCA, applies to the State, including DPHHS, by explicit reference to the statute that authorizes investigation by the Department.

The versions of §§ 41-3-201, -202 and -203 applicable in *Newville* were last modified in 1987, 1987, and 1979, respectively. The versions of §§ 41-3-201, -202 and -203 applicable in this proceeding were last modified in 2007, 2005, and 1999, respectively.[1]

S.W. contends the versions of §§ 41-3-201, -202 and -203 that applied in *Newville* were "substantively identical to the current version." S.W.'s Brief at

[1] For the Court's convenience in review, the previously and presently applicable statutes are located at State's Appendix 173-80. The relevant versions of each statute are reproduced fully to enable comparison of the differences between the older and newer versions.

20. A review of the statutes refutes this contention.

The post-*Newville* amended and applicable statutes expressly include "the department" within the scope of immunity granted in § 41-3-203, MCA. The version of § 41-3-203 applicable in *Newville*, when defining who was entitled to immunity as "[a]nyone investigating any incident of child abuse or neglect," did not expressly refer to §§ 41-3-201 and -202, MCA, and the persons and entities listed in these sections. Absence of this reference apparently underlies the *Newville* Court's conclusion immunity did not extend to what was the Department of Family Services.

The *Newville* Court's interpretation of the then-applicable version of § 41-3-203, MCA, is revealed in its statement that "[t]his immunity is not intended for the Department; rather it is intended to protect individuals such as teachers, doctors, and psychologists." 267 Mont. at 269-270. The *Newville* Court's interpretation replaces the all-inclusive word "anyone" with the narrower word "individuals." *Id.*

The version of § 41-3-203, MCA, applicable to S.W.'s claims expressly refers to §§ 41-3-201 and -202, which in turn include "social workers" and "the department"—i.e., DPHHS (§ 41-3-102(9), MCA)—within the scope of immunity protection. This confirms § 41-3-203 expressly immunizes the State for S.W.'s claims.

B. ***Newville*** **did not address controlling statutory interpretation principles.**

Newville considered §§ 41-3-201, -202 and -203, MCA in a single paragraph.[2] 267 Mont. at 269-270. *Newville* did not attempt to interpret the word "anyone" or to harmonize §§ 41-3-201, -202 and -203, MCA, with the statutes governing the State's liability for torts. *See*, State's Brief at 18-20.

S.W. contends the State's interpretation of the word "anyone" found in § 41-3-203 MCA, is flawed because it relies on the definition of "person" (see, §1-1-201(1)(b), MCA), when the word "person" is not contained in § 41-3-203, MCA. S.W.'s Brief at 15, 21. This contention fails for two reasons. First, § 41-3-203 MCA, includes the word "person." Section 41-3-203 provides in relevant part: "Anyone . . . 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." § 41-3-203 MCA (emphasis added). The only two direct references in § 41-3-203 to those immunized under the statute are the words "anyone" and "person." That § 41-3-203 uses the words "anyone" and "person" interchangeably supports the District Court's statement that the "plain

[2] The *Newville* District Court's treatment of § 41-3-203, MCA, is even more conclusory, consisting of a single sentence: "This statute does not apply to the Department of Family Services, which is the direct employer of the persons alleged to have been careless here or to the State of Montana that is one of the defendants in this lawsuit." DV-90-228, Order On Motions For Summary Judgment, p. 4, November 6, 1991.

and ordinary meaning" of "anyone" includes "person." Doc. 59 at 23. The District Court erred when it did not examine the statutory definition of "person," which includes the State (§ 1-1-201(b), MCA), thus leading it to its incorrect conclusion regarding the scope of immunity. The District Court compounded this error when it failed to examine § 41-3-203's references to §§ 41-3-201 and -202, MCA, which—contra S.W.'s assertion that "[t]he state does not, and cannot, argue that § 41-3-203's language expressly immunizes the Department" (S.W.'s Brief, p. 16)—expressly include the State, DPHHS, and its employees within the scope of the immunity.

Second, it was the District Court, not the State, that interpreted the "plain and ordinary meaning" of "anyone" to mean "any person at all." Doc. 59 at 23. Addressing the District Court's analysis, the State demonstrated that it was a "person" entitled to immunity. State's Brief at 16, 18-19.

S.W.'s selective reference to legislative history fails to support her conclusions. S.W. incorrectly concludes the Department understood it was not immune based on 2001 legislative testimony that a proposed amendment to § 41-3-202(1) "wouldn't increase or decrease liability." S.W.'s Brief at 19. First, ambiguous legislative history cannot overcome the plain language of the applicable statutes. *See, e.g., Glendive Medical Center, Inc. v. Montana Dept. of Public Health and Human Services*, 2002 MT 131, ¶15, 310 Mont. 156, 49

P.3d 560 ("…absent ambiguity in the language of the statute or rule, this Court may not consider legislative history or any other means of statutory construction."). Second, with the post-*Newville* changes to §§ 41-3-201, -202, and -203, application of immunity to DPHHS and its employees was already clear by 2001. The recognition that the "department has liability" in the testimony refers to the fact that under § 41-3-203 DPHHS is immunized for negligence, but remains liable if it was "grossly negligent or acted in bad faith…" This fact also neutralizes S.W.'s hyperbolic statement that if DPHHS were not liable for negligence "nobody would be liable for failure to keep children safe." S.W.'s Brief at 20. The statutory immunization of DPHHS and its employees, except in circumstances involving gross negligence, reflects the legislative decision to limit liability when DPHHS and its employees undertake the difficult tasks of investigating and addressing claims of child abuse and neglect.

Finally, this Court long ago rejected S.W.'s contention that immunity can apply to individual employees of public entities, but not to their employers. *See*, *e.g.*, *Rahrer v. Board of Psychologists*, 2000 MT 9, ¶13, 298 Mont. 28, 993 P.2d 680. In *Rahrer*, this Court addressed: "Whether the District Court erred in concluding that the Board of Psychologists, Department of Commerce, and the State were immune from suit for causes of action arising out of a contested case

hearing?" *Id.* at ¶10 (emphasis added). This Court extended prosecutorial immunity to "not only the personal liability of prosecutors, but also the vicarious liability of the State and Department of Justice." *Id.* at ¶13 (citing *State ex rel. Dept. of Justice v. District Court*, (1976), 172 Mont. 88, 92, 560 P.2d 1328, 1330). This Court's extension of a State-employed individual's immunity to the agency and, ultimately, the State who employed her, endorsed the public policy justification that "the objectives sought by granting immunity to individual officers—free, independent and untrammeled action—would be seriously impaired or destroyed if we did not extend immunity to the state and its agencies." *Id*. This Court concluded the Board of Psychologists, the Department of Commerce, and the State were immune. *Id.* at ¶ 20.

The public policy and reasoning employed in *State ex rel. Department of Justice* and *Rahrer* to extend to the State and its agencies the immunity granted to agency employees applies here. For the purposes of tort liability to S.W., the State, DPHHS, and its employees are one. Any liability on the employees involved in S.W.'s circumstances flows directly to the State through principles of vicarious liability enshrined in the Tort Claims Act, specifically, § 2-9-305, MCA. If the liability of State-employed individuals flows to the State, so too should any immunity afforded to State-employed individuals. Accepting as correct the District Court's conclusion that the individual DPHHS employees

who were involved in S.W.'s case are immune, the State and DPHHS are also immune.

State employees acting in the course and scope of their employment have had immunity for decades, per § 2-9-305. If S.W.'s interpretation of § 41-3-203 were correct, § 41-3-203 would be meaningless as to state employees, considering § 2-9-305.

C. This Court's post-*Newville* decisions applying § 41-3-203 immunity to the State, its departments, and employees control.

S.W.'s effort to distinguish the holding of *Weber v. State*, 2015 MT 161, 379 Mont. 388, 352 P.3d 8, as "not the holding of this Court" is contrary to the resolution of *Weber*. *Weber* held "[t]he State is entitled as a matter of law to immunity from Weber's claims under § 41-3-203(1)." *Weber*, ¶26. This holding requires two predicates: (1) The immunity provided under § 41-3-203 applies to the State, and (2) the plaintiff in *Weber* failed to establish a genuine issue of material fact to support her claim that an exception to this immunity, e.g. gross negligence, applied. *Id.*

Because the *Weber* plaintiff only disputed the second of these predicates, S.W. argues "this Court never passed on the issue [of whether immunity under § 41-3-203 applies to the State], limiting its discussion to the question of whether individual State officials were grossly negligent." S.W.'s Brief, pp. 20-21. S.W.'s interpretation conflicts with this Court's direct holding in *Weber* that "the

State"—not just individual State officials—"is entitled as a matter of law to immunity… under § 41-3-203(1)." *Weber*, ¶ 26. S.W. also ignores the fact the Weber plaintiff asserted claims against the State, not against individual State officials. This Court's holding that the individual State officials in *Weber* were not grossly negligent only resolved the case in the State's favor because the State, not just the individual state officials, is entitled to immunity under § 41-3-203. *Id.*; see also, *Id.* at ¶22 (noting DPHHS investigates incidents of child abuse or neglect under § 41-3-202, consistent with its holding the State is immune under § 41-3-203 as "[a]nyone investigating… any incident of child abuse or neglect under… 41-3-202").

S.W.'s additional effort to distinguish *Weber* and *Green v. Mont. Department of Public Health and Human Services*, 2014 WL 12591835 (D.Mont. June 13, 2014) because those cases involved children "removed" from homes instead of children who remained in homes is also without basis. DPHHS and its employees are obligated to investigate and act based on their investigation. The outcome of the investigation can, in appropriate circumstances, lead to removal of a child, or not, but it is not any particular outcome that is immunized, it is the conduct of reporting, investigating, and participating in proceedings that is immunized.

S.W. asks this Court to adopt a results-oriented approach that immunizes

only, and thereby incentivizes, removing children from homes, while characterizing any result other than removal as "failing to protect children." This distinction does not exist in § 41-3-203; contradicts longstanding Montana law; and would violate the fundamental rights of both parents and children. This Court has repeatedly acknowledged parents' fundamental right to the care and custody of their children. *See*, *e.g.*, *Matter of R.J.F.*, 2019 MT 113, ¶24, 395 Mont. 454, 443 P.3d 387. Likewise, the Legislature has determined "[i]t is the policy of the state of Montana to… provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for the children's care and protection," and to "achieve these purposes in a family environment and preserve the unity and welfare of the family whenever possible," and to "ensure that there is no forced removal of a child from the family based solely on an allegation of abuse or neglect unless the department has reasonable cause to suspect that the child is at imminent risk of harm…" § 41-3-101(1)(a) through (1)(c), MCA.

S.W. ignores the competing fundamental rights and policy interests that bear on whether a child should be removed from a home. Section 41-3-203 favors neither removal of children nor their remaining in homes nor any other result. It instead provides immunity for simple negligence in investigating or reporting any incident of child abuse, etc., so that the State and individuals can

weigh these competing interests, without fear of liability.

The State is immune under § 41-3-203, MCA, and S.W.'s contrary arguments fail. The State did not act with gross negligence and the other exceptions to immunity do not apply. S.W. did not contest this in her Answer Brief. *See, e.g., Beery v. Grace Drilling*, (1993) 260 Mont. 157, 161-62, 859 P.2d 429, 432 (failure to raise or argue issue in brief is deemed waiver).

This Court should reverse the District Court and enter judgment for the State and DPHHS on S.W.'s Complaint.

II. The District Court's Causation Rulings Were Incorrect.

The State addressed the four bases the District Court articulated for its incorrect ruling that Hocter's criminal assault of S.W. was foreseeable as a matter of law. State's Brief 21. S.W. did not respond to the State's arguments regarding the first and fourth bases.[3] State's Brief, pp. 21, 23-29; S.W.'s Brief at 23-27. S.W. has, thus, conceded the District Court's causation ruling cannot be supported on these bases.

S.W. fails to even mention the District Court's incorrect assertion the State was seeking to apportion liability to Hocter or the State's related argument and supporting authorities that the State is entitled, separate from issues of intervening

[3] "(1) the District Court's incorrect assertion the State was seeking to apportion liability to Hocter…" 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…" State's Brief, p. 21.

cause, to offer evidence of Hocter's conduct on the question of the causal relationship between the State's conduct and S.W.'s claimed injuries and damages. State's Brief at 23-26. S.W. does not contest the State's entitlement under *Pula v. State,* 2002 MT 9, 308 Mont. 122, 40 P.3d 364, to offer non-party conduct as evidence so the jury can resolve the necessary causation element of the State's alleged negligence, separate from issues of intervening cause. See also *Bell v. Glock, Inc*., (2000) 92 F. Supp.2d 1067, 1070-71 (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."). S.W.'s concessions provide, at a minimum, an independent basis to reverse the District Court's rulings on causation. Thus, regardless of this Court's disposition of independent intervening cause arguments, the Court should reverse the District Court and the State should be allowed to present evidence of Hocter's conduct on the issue of whether the State caused S.W.'s claimed injuries and damages.

On appeal, S.W.'s causation argument is solely focused on independent intervening cause. S.W. misapplies the District Court record and fails to correctly apply the applicable legal standards. S.W. argues the District Court correctly analyzed foreseeability as an element of causation and correctly determined Hocter's conduct was foreseeable as a matter of law. S.W.'s Brief at 23-27.

The District Court erred when it only considered foreseeability as related to the duty element of negligence and concluded foreseeability as related to the causation element was "a question of law for the Court." Doc. 86 at 9-10, 13. The State cited this Court's authorities confirming that independent intervening cause is a jury question on this record.[4] State's Brief at 24-27. S.W. failed to address these authorities and provides no legal basis to support resolution of foreseeability against the State as a matter of law.

Additionally, both the District Court's and S.W.'s formulation of foreseeability based on the factual record ignore a key undisputed fact: Hocter was never suspected of abuse and was never the focus of allegations or investigation before her criminal assault of S.W., a month after any reports to DPHHS concerning S.W.[5] Instead of allowing a jury to hear the evidence and resolve foreseeability, the District Court and S.W. both argue for a formulation of foreseeability that imposes liability on the State for "chains of causation stretching into infinity" and essentially dictates a requirement that if a child suffers any abuse, even if the perpetrator cannot be identified and the circumstances cannot be determined, the child must be removed

[4] With no support and relying on her incorrect application of Montana law governing superseding intervening cause, S.W. makes the erroneous statement that "[t]he state's argument that Hocter's abuse of [S.W.] was not foreseeable is relevant only to… (proximate cause)." To be clear, the State's position is and continues to be that both tiers of the *Labair v. Carey*, 2012 MT 312, ¶12, 367 Mont. 453, 291 P.3d 1160, formulation of causation, or that are found in the Court's other authorities (State's Brief, pp. 24-27), should be presented to the jury.

[5] This fact alone also distinguishes each of the extra-jurisdictional cases S.W. cites in her Answer Brief at pp. 26-27, all of which involved at least a prior allegation, if not more, against the perpetrator of the abuse.

from the home. *Hamlin Constr. & Dev. Co. v. Montana DOT*, 2022 MT 190, ¶20, -- Mont. --, -- P.3d -- ("the foreseeability tier cuts off legal liability from the 'logical extreme' of traceable chains of causation stretching into infinity, particularly when unforeseen independent causes intervene to divert the causal chain in unpredictable ways or public policy consideration compel a truncation of liability"). This formulation is embodied in S.W.'s argument: "Here, as the district court recognized, it is plainly foreseeable that a child who has suffered past physical abuse and is left where she suffered the abuse is likely—in the absence of intervention—to continue suffering abuse in the future." S.W.'s Brief at 23. Applied to this record, this argument means the State must be liable for S.W.'s injuries because it did not remove her from her home. As applied here, it imposes strict liability on the State based on a requirement to remove children from homes found nowhere in Montana law or sound public policy.

The District Court should be reversed.

III. The District Court's Negligence *Per Se* Ruling Based On § 41-3-202(1), MCA, Should Be Reversed.

Application of immunity moots the District Court's negligence *per se* ruling. Should this Court reach the District Court's negligence *per se* ruling, whether it is reversed or affirmed, causation issues remain for jury determination. Further, because the District Court's ruling was based solely on the first sentence of § 41-3-

202(1), fact questions on all other issues regarding the State's alleged duty breaches remain for trial.

The State and DPHHS have shown the District Court's grant of summary judgment on the issue of negligence *per se* should be reversed. State's Brief, pp. 29-34. S.W. contends the District Court's grant of summary judgment based on the State's asserted negligence *per se* violation of the first sentence of §41-3-202(1)[6] should be affirmed. S.W.'s arguments both impermissibly expand the basis on which she claimed entitlement to summary judgment in the District Court and expansively rewrite the District Court's narrow Order granting her summary judgment request—"the Court does not grant judgment as to the additional duties [contained in DPHHS's ISA and Policy Manual]." Doc. 59 at 14; *see also Id.* at pp. 16-17 ("Because the Department raises potential material fact issues as to common law negligence, however, the Court declines to grant summary judgment on that claim…"). The District Court denied S.W. summary judgment on every basis except the narrow ground addressed below. *Id.* S.W. did not cross-appeal the District Court's denial on these other grounds.

S.W. moved for summary judgment based solely on the narrow confines of the first sentence of § 41-3-202(1), MCA. Plaintiff's Brief In Support of Motion for

[6] S.W. moved, and the District Court ruled, based on specific statutory language from § 41-3-202 "(1)(a)," MCA. There was no subsection "(1)(a)" in the then-applicable version of Section 41-3-202, only a subsection (1). *See,* § 41-3-202, MCA (2007). Section § 41-3-202 was revised to include a subsection (1)(a) in the 2019 MCA. This is a purely clerical distinction because the operative language is identical in both versions of the statute.

Partial Summary Judgment, Doc. 30 at 7-9. S.W.'s entire District Court argument in support of negligence *per se* consists of approximately 1.5 pages of text in which the only statutory provision relied upon and quoted to the District Court was the first sentence § 41-3-202 (1). S.W.'s argument to the District Court stated:

> In the present case, the statute at issue is §41-3-202, MCA (2007). That statute, in force at the time the events in question occurred, provided as follows:
>
> > 41-3-202. Action on reporting. (1) (a) (sic) Upon receipt of a report that a child is or has been abused or neglected, the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated.
>
> (emphasis added [to the statute by S.W.]) This Court should assess the doctrine [of negligence *per se*] with reference to this statute.

Doc. 30 at 8. Because, on this record, S.W.'s negligence *per se* argument is confined to the first sentence of §41-3-202(1), MCA, she is not at liberty to expand her argument on appeal. *See*, *e.g.*, *Pilgeram v. Greenpoint*, 2013 MT 354, ¶20, 373 Mont. 1, 313 P.3d 839 ("It is well established that we do not consider new arguments or legal theories for the first time on appeal…") (internal citations omitted).

The District Court's ruling on negligence *per se* was also confined to the first sentence of § 41-3-202(1), MCA. Doc. 59 at 8. In its Order, the District Court relied only on the first sentence of § 41-3-202(1), MCA, and quoted only the first sentence.

Id. When reciting the issues for which it concluded there were no factual disputes, the District Court stated:

> There is no genuine factual dispute as to the material facts that the Department 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, MCA (2007).

Doc. 59 at 11.

S.W. adopts the District Court's revision of § 41-3-202(1), MCA, to add the words "all of" to the requirement that the Department assess information contained in the report. Next, ignoring fact issues which even the District Court identified related to this added language, S.W. incorrectly concludes the Department "failed to make any reasonable assessment, or to determine the level of response required." S.W.'s Brief at 28. This argument suffers from the same infirmity that requires reversal of the District Court's negligence *per se* ruling. It seeks to impose negligence *per se* liability based on specific obligations derived not from the first sentence of § 41-3-202(1), but from the remainder of the language in § 41-3-202, MCA, and the State's administrative documents, contrary to the District Court's decision. S.W.'s Brief at 29.

The full text of § 41-3-202 reveals that the duties S.W. attempts to engraft within the first sentence are actually contained within the remaining language of the statute. State's Appendix 177-78. Similarly, no citation to legislative policy or

history can pack into the first sentence of § 41-3-202, MCA, all the requirements of the remainder of the statute.

The District Court's narrow negligence *per se* ruling based on S.W.'s likewise narrow request for judgment should be reversed.

IV. Section 2-9-108, MCA, Applies To Claims Involving Governmental Functions, Including S.W.'s.

S.W. argues, and the District Court incorrectly concluded, the statutory damages cap does not apply because "claim," as used in the Tort Claims Act, excludes claims arising out of a governmental function. This Court has rejected this interpretation since at least 1977, and continuously since. In *State ex rel. Byorth v. District Court of Fourteenth Judicial Dist., in and for County of Golden Valley*, (1977) 175 Mont. 63, 572 P.2d 201, this Court expressly addressed the definition of "claim" in the context of governmental liability for torts under the Tort Claims Act. 175 Mont. at 65-66. This Court held "the Tort Claims Act attaches liability to the State in the same manner and to the same extent that liability attaches to a private person. Section 82-4302(7) [the definition of "claim"]." *Id.* at 67.

This Court reiterated its holding in subsequent decisions. *See, e.g., Small v. McRae*, (1982) 200 Mont. 497, 517, 651 P.2d 983, 993 (restating and citing *State ex rel. Byorth*, *supra*: "There can be no legal entitlement to recovery for liability [against the government] when the action complained of does not fall within the definition of a tort"); *Dick Irvin Inc. v. State*, 2013 MT 272, 372 Mont. 58, 310 P.3d

524 (restating and citing *State ex rel. Byorth*, *supra*); *Gudmundsen v. State ex rel. Mon. State Hosp. Warm Springs*, 2009 MT 56, ¶24, 349 Mont. 297, 203 P.3d 813 ("Under § 2-9-101(1) [the definition of "claim"], M.C.A., state liability attaches under the Tort Claims Act 'only where a private person similarly would be liable.'") (citing *Drugge v. State*, (1992) 254 Mont. 292, 294-95, 837 P.2d 405, 406).

As stated in the State's opening brief, and in accord with longstanding Montana law interpreting this statute, the definition of "claim" under the Tort Claims Act confirms the State (and other governmental entities) are liable to the same extent liability would attach to a private person, no more and no less.

Analyzing the Tort Claims Act as a whole confirms S.W.'s interpretative error. As the District Court did, S.W. focuses narrowly on the impact of her constricted interpretation of "claim" on § 2-9-108, MCA, the tort damages cap, and incorrectly posits the Legislature intentionally excluded governmental-function claims from the cap[7]. But "claim," as defined in § 2-9-101(1), applies to the entire Tort Claims Act, not just § 2-9-108. § 2-9-101, MCA ("As used in parts 1 through 3 of this chapter, the following definitions apply: …"). If S.W.'s interpretation were correct—it is not—the following provisions of the Tort Claims Act would not apply to governmental-function claims: (1) governmental self-insurance reserve funds (§§

[7] The history of § 2-9-108 demonstrates the legislature understood it would cap damages on governmental function claims. *See, e.g.,* State's Appendix, 181-87; *see also* Montana State Senate, Judiciary Committee, Minutes of the Meeting, June 25, 1986, pp. 21-24 (testimony of Senator Towe).

2-9-202(3) and -211(3), MCA); (2) loss mitigation program (§ 2-9-220(2), MCA); (3) pre-filing claim presentation (§ 2-9-301, MCA); (3) compromise and settlement (§§ 2-9-303 and -304, MCA); (4) governmental employee immunity (§ 2-9-305, MCA); (5) and attorney-fees provisions (§ 2-9-314, MCA). S.W.'s interpretation, and the District Court's, would gut the Tort Claims Act and render it nonsensical.

S.W.'s attempt to evade *Gudmundsen*'s contrary, and correct, construction of "claim" also fails. S.W. attempts to distinguish *Gudmundsen* by asserting "the plaintiff's claim in *Gudmundsen* was not based on a governmental function but on a duty applicable to '*any* mental health professional' in the state." S.W.'s Brief, p. 33. S.W. asserts that, had *Gudmundsen* involved a government-specific duty, this Court would have found that was not a "claim" under § 2-9-101(1), MCA. *Id.* Not so. *State ex rel. Byorth* involved claims against the State for negligent construction and maintenance of a highway, which this Court held were "claims" as defined in the Tort Claims Act. 175 Mont. at 64-66. "[T]he construction and maintenance of our highway system is a governmental function for the use and benefit of the public" related to which, before its abolition, the State possessed sovereign immunity. *Kaldahl v. State Highway Commission*, (1971) 158 Mont. 219, 221, 490 P.2d 220, 221. Thus, this Court already, in *State ex rel. Byorth*, concluded governmental function claims are "claims" within the meaning of the Tort Claims Act.

Finally, S.W. incorrectly argues *Delaney & Co. v. City of Bozeman*, 2009 MT 441, 354 Mont. 181, 222 P.3d 618, compels a different result. S.W.'s Brief, pp. 31-32. *Delaney* is inapposite. *Delaney* addressed whether the plaintiff's claim was for "damages because of personal injury or property damage;" held it was not; and held it was therefore not a "claim" under § 2-9-108. *Delaney*, ¶¶ 20-25. S.W.'s claim is plainly a claim for personal injury. § 2-9-101(4), MCA. *Delaney* did not address the "if a private person" language at issue in this case, and does not support S.W.'s faulty attempt to read governmental function claims out of the Tort Claims Act.

This Court should reverse the District Court and hold the statutory damages cap applies to S.W.'s claims.

CONCLUSION

The State is immune from liability for S.W.'s claims. No issues remain regarding application of immunity. Judgment should be entered for the State.

In addition, Hocter's intentional criminal conduct was the intervening and superseding cause of S.W.'s injuries. On this additional ground, judgment should be entered for the State.

Should the case be remanded for retrial, fact issues concerning the State's alleged duty breaches and issues of causation would require a jury trial. The § 2-9-108 damages cap applies to S.W.'s claims.

DATED this 3rd day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Reply 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 4,942, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 3rd day of November, 2022.

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