IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO. DA-24-0215

JACQUELYN M. HUGHES,
Plaintiff and Appellant,
vs.

ERIC L. ANDERSON and MID-CENTURY INSURANCE COMPANY,
Defendants and Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the Thirteenth Judicial District
Yellowstone County, Montana Cause No. DV 56-2020-635
The Honorable Mary Jane Knisely

Appearances

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STATEMENT OF ISSUES

1. Did the district court err when it determined that Hughes' fibromyalgia claim accrued prior to September 10, 2019 and was, therefore, barred by the statute of limitations?
2. Did the district court err when it required Hughes to produce evidence of a known *misrepresentation* instead of a known *representation* to satisfy the elements of equitable estoppel and when it disregarded evidence of the parties' discussions about waiting for an accident-related diagnosis before pursing a claim?

STATEMENT OF THE CASE

Hughes and Anderson were involved in a single vehicle interstate roll over on April 23, 2014 when Anderson swerved to miss a deer in the road. The primary symptoms suffered by Hughes in the years following the accident were chronic full body hives, unexplained swelling, strep-like body aches and exhaustion. She sought medical treatment constantly for these symptoms and was given diagnosis reflecting illnesses such as vasculitis, sleep apnea, strep throat, iron deficiency and idiopathic hypersomnia. The treatment for these illnesses was not effective and Hughes reported to Mayo Clinic in September of 2019 for a full work up of her condition. On September 10, 2019, she learned that her condition was due to a malfunctioning central nervous system condition known as fibromyalgia. Hughes and Anderson were told at that time that physical trauma was a known cause of fibromyalgia. The undisputed facts in the district court record show that despite diligent efforts, no definitive diagnosis had been made prior to September 10, 2019, let alone an accident-related diagnosis. Hughes filed her claim less than six months later on April 23, 2020. Under Montana law, the discovery rule tolls the statute of limitations until the plaintiff knew or had reason to know of all elements

of the cause of action, including causation. The district court erred when it concluded that Hughes knew that her condition was accident related before April 23, 2017 and dismissed it as barred by the three-year statute of limitations.

The evidence before the district court showed that Hughes and Anderson discussed the potential that Hughes' condition was accident related, but both acknowledged the problematic nature of not having a diagnosis and therefore jointly decided that Hughes should wait to file the claim. Such facts establish that Appellee is equitably estopped from asserting a statute of limitations defense and the district court erred when it disregarded this information and required Hughes to present evidence that Anderson knowingly made a false representation, imposing upon Hughes a duty to establish an element that is not required by the legal authority of this Court.

The district court's decision must be reversed and remanded for trial.

STATEMENT OF FACTS

On April 23, 2014, the parties were traveling to a family member's funeral when Anderson braked and swerved in his efforts to avoid collision with the deer, causing the vehicle to roll. *Statement of Undisputed Facts*, Dkt. 47, (Jan. 9, 2023), Appx. Pg. 65 (hereinafter "*Pl. SUP")*. This case involves a clear liability accident, as this Court has held that swerving to miss a deer is negligence per se. *Craig vs. Schell*, 1999 MT 40, ¶¶ 32-34.[1]

Hughes claimed two separate injuries in this case, one of which is fibromyalgia. *Pl. SUP*, Appx. Pg. 83. Hughes' fibromyalgia symptoms, in the five and a half years after the accident, included full body hives, unusual swelling, unexplained painful sensations, severe water retention, exhaustion and cognitive

[1] Appellee disagrees with the clear liability nature of this accident and, in fact, argues that the "based on the undisputed facts and circumstances of this case, Anderson did not act negligently as a matter of law thus requiring dismissal of this action." *Def. E. Anderson's Br. In. Opp. Pl. M.S.J. Re: Liability,* Dkt.30, Pg. 3 *(*Oct 31, 2022). The district court did not decide this issue.

impairments. Hughes sought treatment consistently for these conditions from April 23, 2014 to September 10, 2019. *Pl. SUP*, Appx. Pgs. 82-85.

Hughes broke out in full body hives within approximately three weeks of the accident. The hives were diagnosed as "vasculitis." Hughes asked her doctor if the hives could have been caused by the accident and he informed her that such a trauma can trigger acute hives, which are hives lasting less than six weeks. Hughes' hives were chronic. Hughes requested her medical records, which did not even include reference to the accident. She and Anderson agreed not to make a claim until they had medical confirmation that hives were related to the accident, which did not come until September 10, 2019. *Pl. SUP*., Appx. Pg. 82.

When the severity of hives finally abated in late spring/early summer of 2015, the unusual swelling associated with them continued, as did the painful sensations. Together, Anderson and Hughes researched ways that they may be able to treat the condition nutritionally or homeopathically and tried various vitamins and dietary changes. The efforts were not successful and the symptoms continued. *Pl. SUP*, Appx. Pg. 83.

By early 2016, Hughes was taking Provigil, a prescription amphetamine, to treat the exhaustion. Her weight would fluctuate as much as thirteen pounds from day to day with swelling, much of which was in her lower abdomen. Together, Hughes and Anderson went to the doctor they were most familiar with, but still did not get answers. They jointly decided to wait until a medical provider connected the conditions to the accident. *Pl. SUP*, Appx. Pg. 82.

In early 2016, Hughes asked her psychiatrist if the exhaustion and mental impairments could be some sort of head injury. Dr. Walters indicated during that appointment that Hughes' condition seemed to be a problem of physical health more than a head injury and referred Hughes for a sleep study. Based on the outcome of that sleep study, Hughes began using a CPAP machine, but treatment

of sleep apnea did not relieve any of the conditions. *Pl. SUP*, Appx. Pg. 83.

Hughes went to her providers as a result of the exhaustion and body aches during the summer of 2016, where she was advised that the cause was likely recurring strep throat. As a result, she consulted with an ear, nose and throat doctor, who indicated a tonsillectomy was warranted. Hughes underwent a tonsillectomy on October 10, 2016. The tonsillectomy did not alleviate any of the symptoms. *Pl. SUP*, Appx. Pg. 83.

Once recovered from the tonsillectomy, Hughes again went to her sleep doctor, Dr. Ockay. Hughes discussed the extensive nature of the exhaustion with Dr. Ockay and asked if it could be somehow related to the auto accident. She was advised that it was idiopathic hypersomnia.[2] The only possible cause other than idiopathic hypersomnia that Dr. Ockay would consider was that maybe Hughes was extremely sensitive to iron deficiency and prescribed intravenous iron infusions which Hughes underwent in 2017. The parties again revisited the possibility of submitting a claim and, together, agreed to wait for a diagnosis before pursuing a claim. *Pl. SUP*, Appx. Pg. 83-84.

In 2018, Hughes' psychiatrist wondered if the decrease in activity since the accident was causing the exhaustion and pain and referred Hughes to swim therapy. Hughes was then referred to traditional physical therapy in the fall of 2018. Every attempted increase in activity caused a flare up of the symptoms, which went unexplained by Hughes' medical providers. Hughes was referred to Mayo Clinic in 2019 when Hughes' psychiatrist of three years determined that the condition was physical in nature. *Pl. SUP*, Appx. Pg. 84.

In Hughes' September, 2019 appointment with Dr. Todd Miller, a

[2] After Plaintiff began implementing her treatment protocol, the exhaustion began to abate and her current sleep doctor has expressed that "idiopathic hypersomnia" was likely not an accurate diagnosis.

cardiologist at Mayo Clinic, Dr. Miller explained that sometimes a terrible illness or other traumatic event would throw off the body's neurotransmitters and the body will not properly regulate its nervous system. On September 10, 2019, Hughes and Anderson met with Lasonya Natividad, a nurse practitioner at Mayo Clinic, who explained various causes of fibromyalgia and showed the parties a chart that noted "physical trauma" as a known cause. The parties asked if their auto accident could be that kind of "physical trauma". Natividad indicated that it was. This was the first time Hughes and Anderson had a diagnosis that explained the variety of symptoms and the first time a medical provider confirmed their suspicions that Hughes' condition was a result of the April 23, 2014 accident. Throughout that week, as the parties were learning about rehabilitation from fibromyalgia, they discussed that a claim to their insurance carrier may provide some economic relief while Hughes implemented the intense treatment recommendations for her condition. *Pl. SUP*, Appx. Pg. 84-85.

In the deposition of Lasonya Natividad, Hughes' diagnosing provider at Mayo Clinic, Natividad testified about the condition of fibromyalgia:

> Central sensitization is a manifestation of the central nervous system being overactive. Essentially, what happens is that the nervous system, because of a lot of insults to the nervous system, everything is – has some type of effect on the central nervous system, which is made up of the brain and spinal cord.
>
> So everything that happens to a person has some type of effect on the nervous system. And over the course of time, for some people, it becomes imbalanced. And there is an overproduction of chemicals that are produced that make you feel things, and an underproductionof the things – the chemicals that stop you from feeling things.
>
> Glutamate, the neurotransmitter that gives us sensation, where epinephrine and serotonin block some of the action of the signals that get to the brain.

> And what occurs as a result of this imbalances is a person will develop hyeralgesia which is an over-amplification of signas that get to the brain. And allodyna, which is a misinterpretation of signals getting to the brain.
>
> And once the signals get to the brain, because its so overhwlemed, the signals don't go where they are supposed to, causing additional symptoms depending on where those signals travel to in the brain. And they're manifested very differently in every patient.

Pl. SUP, Appx Pg. 131. Dr. Saadiq also explained the physical nature of fibromyalgia:

> Fibromyalgia is a neuropathic condition (not a psychiatric or psychological condition) that can affect multi organ systems and have various symptomology debilitating to the patient.

Pl. SUP, Appx. Pg. 85. While Hughes was aware of her symptoms, there is no evidence anywhere in the record, including from Anderson, that Hughes had a diagnosis or knew of the causal connection between the accident and hives, strep-throat-like body aches, severe water retention, and chronic exhaustion.

Despite Anderson's personal belief that the accident contributed to Hughes' development of fibromyalgia, Appellee's litigation position has consistently been that there is still no causation evidence to support a claim for fibromyalgia. Appellee purportedly began investigating Hughes when the claim was received by Hughes and Anderson's auto insurance carrier on February 3, 2021. *Aff. J. Hughes in Supp. MSJ*, Dkt. 22. (Sept. 27, 2022), Appx. Pg. 135. By February 23, 2021, Appellee had conducted a medical records canvas, contacting medical providers in the Billings area to ensure Hughes had disclosed all of her providers. *Id*. On August 26, 2021, Appellee sent Hughes a letter which stated "I have been unable to find any medical documentation linking the hives outbreak with the accident"

and "I could not find any statement indicating that a diagnosis of fibromyalgia has been made and that condition was due to the motor vehicle accident."

> Jacqui, I believe we need more medical information concerning exactly what injuries were caused as a result of the accident as contrasted to those that are unrelated or at a minimum, cannot be connected by way of medical testimony (i.e. hives).

Pl. Rep. Br. In Supp. MSJ Third Aff. Def., Dkt. 32 (Oct. 31, 2022), Appx. Pgs. 198-200. This letter was concluded with a statement "As we move forward, we will still be looking at medical causation issues…" *Id.* At that time, Appellee was denying a diagnosis had been made *at all*, let alone an accident related one.

As an affirmative defense, Appellee pled "Damages claimed by Hughes were not caused by the conduct of Defendant." *Def. E. Anderson's Ans.*, Dkt. 9 (Jan. 10, 2022). On October 18, 2022, in a brief filed approximately eighteen months after Appellee began investigating the case, Appellee again claimed causation for Hughes' injuries was in dispute. *Defendant Eric Anderson's Response in Opposition to Plaintiff's Motion for Summary Judgment Regarding Third Affirmative Defense* (*Failure to Mitigate),* Dkt. 18, Pg. 5 (Oct. 18, 2022). After eighteen months of investigation, In the *Affidavit of Calvin J. Stacey*, advised the district court "This case involves a dispute in regard to the liability claims of Plaintiff against Defendant ***as well as what appear to be significant medical causation issues*** to be more fully explored during the course of discovery and possible utilization of expert witnesses**.** Aff. C. Stacey, (Oct. 18, 2022), Appx. Pg. 251 (*emphasis added*). The denial of any evidence of causation continued into Hughes' deposition, wherein Hughes was questioned over whether she had produced causation evidence pre-litigation:

> **…All right. So let me ask you, we -- started out in your deposition a little on this subject is -- what medical record that has been produced in**

discovery states that your diagnosis of fibromyalgia was as a result of the car accident.

A. If you understand how fibromyalgia causation is done, LaSonya's record indicates there's causation.

Q. Okay.

A. If you looked at the records and reviewed the three years of pre-accident records, you would have seen that there's no indication that there was anything like this developing or any similar problems. So even if you could find an expert that says we don't know what causes it, the fact is, it became symptomatic after the accident.

Q. (by Calvin J. Stacey) Let me ask you this. If no expert or medical care provider says that on a more likely than not basis that fibromyalgia diagnosis came as a result of the accident, would you agree with me that you failed in meeting your burden of proof?

A. If by the end of the expert deadline I don't have that in litigation, that would be a failure to meet the burden of proof. I was not a litigant and we were not opposing counsel at the time I submitted the settlement demand.

Q. This is a letter, August -- an email, August 18th of 2021.

A. Correct.

Q. Okay. So at that point, you did not have an expert to make that causal connection?

A. I had not hired an expert independently of what was already in the records.

Q. But you'll agree with me the records don't have that opinion in them?

A. The records yield that conclusion.

Q. When you say "yield," you're -- you're -- you almost sound like somebody should read all the records and read some literature whether I'm a doctor, a lawyer, a plumber, an electrician. In fact, I think what you're saying is a plumber could read all your records and make that

causal connection based upon reading those records. Aren't you saying that?

MR. MOYERS: Form.

THE WITNESS: I am not saying that. I'm saying that as somebody evaluating my claim and looking to see if there's causation, it would be something that you would have evaluated and you had sufficient evidence to support the conclusion that there is causation.

BY MR. STACEY:

Q. So is it your position that if a plaintiff -- you're representing a plaintiff -- all you need to do is write a letter to the defendant and say, Hey, I don't have an expert to make this connection, but you should just read everything and make that determination yourself. Is that your position?

A. If you had read the information that was available to you, that would have supported a causation opinion.

Pl. SUP, Appx. Pgs. 125-126.

While Appellee contests causation in the context of the court record, Anderson, himself, does not appear to contest Hughes' position that her health changed after the accident and that he agrees that the accident was a contributing factor:

Q. Do you believe that Jackie's had a change in her medical condition as a result of the April 2014 accident?

A. Yes.

Q. What have been your observations in that regard?

A. Since that time, or after that time, she started experiencing more pain, more difficulty in performing physical activities, just doing stuff or being up and out of bed in general.

Q. I saw in the medical records where Jackie was relating the muscle fatigue, some mental fogginess, joint pain, the hives as an outgrowth of the motor vehicle accident. You're aware she's made those claims?

A. Yes.

Q. And that has been consistent with your observations?

A. That they occurred since the motor vehicle accident?

Q. Right.

A. Yes.

Q. Do you have any opinion as to whether the motor vehicle accident caused or contributed to those symptoms?

A. I believe there is a contributing factor.

Pl. SUP, Appx. Pg. 92. Anderson went on to state that Hughes had not suffered any of these symptoms prior to the accident. *Pl. SUP*, Appx. Pg. 92.

Twenty-three months passed between when Appellee began investigating the case and when Appellee filed its Jan. 23, 2023 *Reply Br., In Supp. MSJ Statute of Limitations* (Dkt. 49.). Three full years passed between the time Appellee began investigating this case and when the district court issued its February 26, 2024 *Order Granting Summary Judgment.* [3] While Appellee argued that Hughes and her medical providers knew of her fibromyalgia, and knew that it was related to the accident prior to the running of the statute of limitations, Appellee was not able to provide a single medical record, testimony from any medical provider, testimony from Anderson, himself, or testimony of any other witness to support this position.

Once an accurate diagnosis was made and Hughes was provided with the necessary treatment and management protocol, she made significant strides towards regaining her health and working towards her pre-accident physical and

[3] Defendant Mid-Century received Hughes' claim on February 3, 2021 and referred it to Calvin J. Stacey for investigation on or about that time. *Affidavit of J. Hughes*, (Sept. 27, 2022), Appx. Pg. 135.

mental capabilities. *Aff. J. Hughes* (Sept. 27, 2022), Appx. Pg. 138.

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo "for conformance with applicable M.R.Civ.P. 56 standards and requirements." *Kostelecky vs. Peas in a Pod LLC*, 2022 MT 195, ¶ 17. As to the standard for determining whether summary judgment was proper:

> Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). A genuine issue of material fact exists only if the Rule 56 factual record manifests a non-speculative record fact that is materially inconsistent with proof of an essential element of an asserted claim or defense at issue. The party seeking summary judgment has the initial burden of showing a complete absence of any genuine issue of material fact on the Rule 56 record and that the movant is accordingly entitled to judgment as a matter of law. The burden then shifts to the opposing party to either show the existence of a genuine issue of material fact or that the moving party is nonetheless *not* entitled to judgment as a matter of law.

Id.

SUMMARY OF THE ARGUMENT

Montana law is clear that "except in rare cases where the cause of the alleged injury is plain and obvious to lay persons without the need for specialized knowledge or expertise, proof of the occurrence, nature, cause, and/or prognosis of an alleged bodily injury, disease process, or other medical condition general requires qualified medical expert testimony." *Kostelecky v. Peas in a Pod, LLC*, 2022 MT 195, ¶ 23. As articulately stated by a California court, "the first prerequisite for the running for the statute of limitations against a cause of action is the existence of such a cause." *Martinez-Ferrer v. Richardson- Merrrel, Inc.*, 164 Cal. Rpt. 591, 593 (Cal. 2nd Dist. Ct. of App. 1980). According to *Kostelecky,* absent qualified medical expert testimony establishing causation, there is no cause of action. It stands to follow, then, that when the causal connection between the

incident and the injury is not plain and obvious to a lay person, the statute of limitations is tolled until that plaintiff receives confirmation from a medical provider that the claimed injuries are a result of the incident. This Court has so held in both *Hando vs. PPG Industries, Inc.* (1989), 236 Mont. 493, 771 P.2d 956 and *Nelson vs. Nelson*, 2002 MT 151, 310 Mont. 329, 50 P.3d 139.

Section I will first address *Hando* and *Nelson* and their applicability to this case, including how courts across the nation have similar holdings which are in line with Montana's policy favoring recovery for persons injured by the negligence of another. Second, it will address Montana law on medical causation and how Appellee's positions over the last three and a half years underscore why a plaintiff is allowed to wait for an accident-related diagnosis before proceeding with a lawsuit. Finally, it will address the prevailing public policies of this Court and why those policies dictate application of *Hando* and *Nelson*.

Section II will focus on the district court's misreading of the requirements of equitable estoppel, which improperly required Hughes to establish a knowing *misrepresentation* rather than a knowing *representation*. The district court errantly required Hughes to establish that Anderson made a representation he knew to be false, which was never Hughes' position and which is not required by any legal authority addressing equitable estoppel.

ARGUMENT

I. The district court erred when found that the discovery rule did not toll the statute of limitations despite the undisputed facts showing that Hughes did not have an accident-related diagnosis for her symptoms prior to September 10, 2019.

A. *Nelson* and *Hando* dictate that the discovery rule tolled the statute of limitations until a medical provider gave Hughes an accident-related diagnosis, which did not occur until September 10, 2019. Hughes claim is timely filed.

Hando and *Nelson* are directly on point and dictate application of the discovery rule to toll the statute of limitations on Hughes' fibromyalgia claims. The district court's decision to the contrary is errant. Both *Hando* and *Nelson* involved a known traumatic incident which caused some immediate injury, followed by a litany of unexplained symptoms which were eventually determined to be accident related. In both cases, this Court determined that when a plaintiff's failure to learn the cause of her injuries is not due to a lack of diligence, she cannot be charged with knowledge that the symptoms are accident related until there is an accident-related diagnosis.

In *Hando vs. PPG Industries, Inc.* the plaintiff was exposed to paint in 1981, which she and others believed caused adverse physical reactions. She was exposed to the paint again in 1982, at which time she lost consciousness. The undisputed facts show that she was aware of the incident and some injury in April of 1992. She signed a workers compensation claim form in May of 1982 stating that she was poisoned by exposure to paint vapors. *Hando,* 236 Mont. at 495. In the years between 1982 and 1984, Hando suffered nauseousness, dizziness, fatigue, depression and recurrent infections. Unlike an injury such as an amputation, the cause of these symptoms is not plain and obvious to a lay person. Nonetheless, at all times, Hando herself thought that these symptoms were related to the April 1982 paint fume exposure. Between 1982 and 1984, Hando's physicians did not acknowledge a causal connection between the incident and the injuries. *Hando,* 236 Mont. at 495-496.

In 1984, Hando learned that her ailments were due to sensitivity to petrochemicals "and that her exposure to the PPG paint while employed by SSCC most likely triggered the sensitivity." Hando then filed her complaint on October 25, 1985. Defendant PPG filed a motion for summary judgment based on the statute of limitations, which the district court denied, holding "that the statute of

limitations had been tolled until April of 1984 when a physician diagnosed the causal connection between Hando's ailments and her exposure." *Hando,* 236 Mont. at 496-497. The defendants appealed the denial of summary judgment and this Court affirmed:

> This Court has, however, tolled the statute of limitations until a plaintiff discovers the injury, or until he should have discovered the injury with the use of due diligence, if the injury is self-concealing. A statute of limitations has even been tolled until the legal cause of an injury is determined, although the injury itself is apparent, if equity so demands. In *Hornung*, the Federal District Court Judge in Billings tolled the statute of limitations until the plaintiff discovered that the drug MER/29 may have caused his cataracts.
>
> The facts in the present case indicate that although Hando was very much aware of those continuing physical, emotional and mental ailments she suffered after her exposure to the paint, she did not know the cause of those injuries until May of 1984. Prior to that time, she and SCCC suspected that her ongoing ailments stemmed from her exposure to the paint manufactured by PPG. She even filed a workers' compensation claim in May of 1982 based upon this belief. However, the veracity of her belief was not known until May of 1984. Medical tests done in Chicago at that time provided Hando with a medical diagnosis that her continuing problems were due to a "sensitivity to petrochemicals," a sensitivity most likely triggered by her exposure to the PPG paint while working for SCCC in 1981-82.
>
> Hando's failure to learn the cause of her ongoing injuries was not due to a lack of diligence on her part. Between 1982 and 1984, Hando saw numerous physicians, including physicians at the renowned Mayo Clinic in Minnesota, to determine the cause of her ongoing problems. No physician who examined Hando during this period attributed her continuing ailments to her exposure to the PPG paint.

Hando, 236 Mont. at 501-502. The Court concluded "we likewise hold that the three-year statute of limitations did not begin to run until a medical opinion was rendered in April-May of 1984 linking her injuries to her exposure."

A similar issue came before this Court in 2002, and the Court applied its ruling in *Hando* to injuries that the defendants argued were "obviously tortious." *Nelson vs. Nelson*, 2002 MT 151, 310 Mont. 329, 50 P.3d 139. In July of 1989, an employee of Robert Nelson's accidentally injected Elizabeth Nelson's hand with bovine ecthyma vaccine. Elizabeth became dizzy and lapsed into unconsciousness within minutes of the injection. *Nelson*, ¶ 3. In the next several years, she suffered rheumatoid arthritis, sleep apnea, Pickwithian syndrome, recurrent blistering on her feet and in her mouth, diabetes, hypothyroidism, headaches and severe upper respiratory problems, but her doctors were unsure of the cause of these symptoms. "Finally, on March 6, 1996, one of Elizabeth's providers noted that the July, 1989 exposure 'resulted in a systematic autoimmune reactivity associated with skin and mucus membrane disorders.'" *Nelson*, ¶¶ 4-6. Nelson filed her complaint two years later. *Nelson*, ¶ 7.

The defendant argued the claim was barred by the statute of limitations and that *Hando* had no applicability because it involved a chemical exposure rather than immediately obvious tortuous conduct. In rejecting this argument, this Court noted "Hando was very much aware of her medical problems" and she "suspected that her ongoing ailments stemmed from her exposure to paint" but that she did not know of the cause of those injuries until May of 1984 "when the 'veracity of her belief' was finally known." *Nelson*, ¶ 17. The Court noted:

> …although Hando diligently sought to establish the cause of her ailments, none of the physicians who examined her prior to 1984 attributed her problems to her exposure to paint, and thus held the statute of limitations on Hando's claim was tolled until a medical opinion confirmed the causal connection between her symptoms and her injury ("three-year statute of limitations did not begin to run until a medical opinion was rendered in April-May of 1984 linking her injuries to her exposure to the PPG paint").

Nelson, ¶ 17 (*internal citations omitted*). This Court rejected the defendant's argued distinction that *Hando* does not apply when the cause of the injury is "obviously tortious" as opposed to a chemical exposure:

> We conclude the District Court erred in distinguishing Elizabeth's situation from our holding in *Hando*. In both *Hando* and here, the **plaintiff lacked knowledge concerning the ultimate causal link** between the ailments suffered by her and the exposures each had experienced (i.e., paint or chemicals and the vaccine). Both *Hando* and Elizabeth suspected the cause of her injuries and diligently sought medical treatment and diagnosis, but neither was certain of the causal relationships until later confirmed by a physician. Notably, both plaintiffs suffered immediate effects from the exposure as evidenced by loss of consciousness, but both plaintiffs also suffered other continuing effects that neither could have predicted at the time of the exposure. Moreover, both plaintiffs asserted beliefs or suspicions that her medical problems stemmed from exposure to paint/chemicals prior to filing her respective cause of action: Hando signed a workers' compensation claim in May of 1982, stating her belief that her problems stemmed from exposure to paint; and Elizabeth filed a motion to modify a marital settlement wherein she recited suspicions concerning problems possibly caused by her exposure to pesticides. Therefore, we conclude this case is on all fours with *Hando*, and disagree with the District Court's conclusions to the contrary.

Nelson, ¶ 18, *emphasis added*. In support of its position, this Court noted, with approval, that Nelson "waited to bring her claim until she could prove the necessary nexus between the suspected *cause of her ailments* and her ongoing medical conditions." *Nelson*, ¶ 21 (*emphasis added)*. The decision was not based on the exposure (latent versus immediate). Nor was there a distinction between products liability and obviously tortuous conduct. Rather, it the *Nelson* decision was clearly based on knowledge of medical causation.

This Court also noted the defendant provided no independent fact, such as physicians' ongoing or medical evaluations, that imputed knowledge of the causal link to Elizabeth prior to May of 1996. As diligence in finding a connection was

not contested and there were no independent facts to support a conclusion that Elizabeth "knew or should have known" of the causal connection before May of 1996, there was no question of fact "as to the timing of Elizabeth's knowledge of the causal connections" that would require remand for further factual determination. *Nelson*, ¶ 25. Just like *Hando*, Nelson's claim was timely filed as a matter of law.

California began recognizing the distinction between suspected causation and medical causation, and the impact of that distinction on the statute of limitations, over forty years ago. It also began recognizing that there can be an immediately apparent injury and a later developing injury and that justice requires a solution that allows recovery for the later developed and often more serious of the injuries. *Martinez-Ferrer vs. Richardson-Merrell, Inc.*, 164 Cal. Rptr. 591 (1980). In *Martinez-Ferrer*, the plaintiff injected a drug (MER/29) in March of 1960. Six months later, on September 23, 1960, the plaintiff discovered he was unable to read and reported to an ophthalmologist. A few weeks later, the plaintiff developed a severe case of dermatitis, which his doctor concluded was "likely caused" by the drug. He was unable to work for six weeks and it took four to five months for the dermatitis to clear up. Despite these very clear injuries, the plaintiff's knowledge of them and a medical provider indicating that they were caused by the drug, he did not file a lawsuit. Over fifteen years later, the plaintiff developed cataracts that his doctor determined were caused by the drug ingested in 1960. There was no indication that the cataracts were an increase in severity from the first injury. Rather, they were distinct from the first injury but caused by the same mechanism of injury.

The defendant moved for summary judgment on the basis that the plaintiff had a known injury, known damages and known causation in 1960. The plaintiff argued that the injuries suffered in 1960 were not permanent and there was no

point in bringing a lawsuit. The defendant argued the statute of limitations, arguing as Appellee in this case does, that because the plaintiff suffered injuries from the drug in 1960, the statute of limitations was triggered for all claims at that time. *Martinez-Ferrer*, 164 Cal. Rptr. At 593-594. The *Martinez-Ferrer* court rejected the defendant's argument.

The *Martinez-Ferrer* court noted that it was clear that the drug did cause the 1960 problems and stated "the real question for the trial court therefor will be whether Raul can proceed against defendants on the theory that his cataracts were caused by MER/29, even though his action was filed years after he knew or should have known that he had suffered **some** bodily injuries from that product." *Id, emphasis added.* The defendant argued that the statute of limitations for *all injuries* accrued at the time of the first known injury. The court rejected this argument and ultimately split the case into two causes of action, one for the injuries known to be caused by the drug in 1960 and one for the injuries for which a diagnosis and causation were not known until over a decade later. In doing so, the court noted that the law was moving towards allowance of claims that could not be discovered within the statute of limitations and "away from a blind adherence to rigid concepts of what constitutes a cause of action." *Martinez-Ferrer*, 164 Cal. Rptr. at 597. Based on the obvious injustice of barring a cause of action before the plaintiff could support such cause of action, the court determined that the injuries known in 1960 were time barred but the later developing injuries were not barred by the statute of limitations.

Numerous other courts, including courts in Washington, Delaware, Illinois, Maryland, New Jersy, Oregon, Ohio, Pennsylvania, Tennessee, Texas and Massachusetts have issued decisions in line with the *Martinez-Ferrer* concept of justice, finding that a second injury, which was not diagnosed within the applicable statute of limitations, would not be barred simply because there was a known

injury within the statute of limitations. The governing concept is simple. Where a cause of action cannot be sustained, the statute of limitations cannot be triggered. Where injuries are separate and distinct, rather than progressive, the discovery rule applies to toll the statute of limitations as to the second injury. *Green v. American Pharm. Co*. 935 P.2d 63 (Ct. App. Wash., 1997) ("Ms. Green argues that the discovery rule should apply separately to each injury because they are separate and distinct, rather than progressive. We agree."); *Sheppard v. A.C. & S. Co.*, 498 A.2d 1126, 1127-1130. (Sup. Ct. Del. 1985) (court refused to deny recovery for the "later and generally more serious and inherently unknowable claims"); *Va Sall v. Calotex, Corp.,* 515 N.E.2d 684 (App. Ct. Ill., 1987) (discovery rule applies regardless of whether injury is result of single traumatic event or several ostensibly innocuous circumstances); *Pierce v. Johns-Manville Sales Corp*. 464 A.2d 1020 (Md. Ct. App., 1983) (where plaintiff made a diligent effort to ascertain condition, knowledge of former injury would not work to bar recovery for later diagnosed injury); *Devlin v. Johns-Manville Corp,* 495 A.2d 495 (N.J. Sup. Ct. 1985) (allowing claim for injury diagnosed at later date to proceed is "appropriate response" by judiciary); *Girardi v. Boyles,* 2006 Ohio 947 (10th Dist. Ct. of App. Ohio, 2006) (holding that the general rule that any injury triggers statute of limitations is an injustice if applied in situations where diagnosis and causation of the second injury is not known until after statute of limitations ran); *Stephens v. Bohlman*, 838 P.2d 600 (Or. S. Ct. 1992), ("To say to one who has been wronged, 'You have a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law.") *Potts v. Colotex Corp.*, 796 S.W.2d 678 (S. Ct. Tenn., 1990) (public policy requires application of discovery rule when there are two separate injuries and causation of one is not known until after the statute of limitations has run); *Anderson v. W.R. Grace & Co.*, 628 F.Supp. 1219 (D. Mass. 1986) (judicial economy favors application of

discovery rule to later diagnosed claim because it prevents plaintiffs from pursuing minor claims which do not justify litigation, which, in the long run, would create more lawsuits). *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex. Sup. Ct., 1998) (a lay persons' suspicions of injury "do not justify filing of a lawsuit," especially when medical providers are giving diagnoses that are not accident related).

Establishment of a negligence claim requires proof of four elements; duty, breach, causation and damages. *Kostelecky, supra.* The entirety of the case law cited above focuses on the plaintiff's knowledge of medical causation (element three of a negligence claim) rather than plaintiff's knowledge of the incident (elements one and two of a negligence claim). Hives. Vasculitis. Sleep apnea. Strep throat. Iron deficiency. Idiopathic hypersomnia. It is clear that despite Hughes' and Anderson's suspicions, her medical providers thought she was suffering from various illnesses, not accident-related injuries. It is also clear from both *Nelson* and *Hando* that when the medical cause of the injury is not obvious to a lay person, the claim does not accrue until a medical provider reaches a diagnosis that supports the injured party's suspicions.

Like *Hando* and *Nelson,* Hughes knew she experienced a tortious event and suffered some immediate injury from the accident. Like Hughes, both Hando and Nelson knew of the incident which led to the injury on the date it occurred and had minor physical injuries on the date of the incident at issue. Hando lost consciousness, believed the paint fumes to which she was exposed were toxic and filled out a workers' compensation claim form, in which she reported an on-the-job injury. Nelson became instantly dizzy and lost consciousness. She moved to modify her divorce settlement based on her concern that the injury was accident related. Neither Hando or Nelson filed a lawsuit for the minor injuries sustained at the time of the incident. Nor did Hughes.

Like *Hando* and *Nelson*, Hughes lacked knowledge regarding the ultimate causal link between the ailments suffered by her and the accident she had experienced. Like *Hando* and *Nelson*, Hughes diligently sought medical treatment and a diagnosis unsuccessfully for several years after the accident. Like *Hando* and *Nelson*, Hughes suspected that her symptoms were accident related but her medical providers were giving her possible diagnoses and treating her as though she had conditions that were not accident related (vasculitis, strep throat, iron deficiency, idiopathic hypersomnia). *Hando* signed a workers' compensation form. Nelson moved to modify her divorce settlement based on her concern that the injury was accident related. While Hughes and Anderson both suspected that the dramatic change in physical health was accident related, just like *Hando* and *Nelson*, Hughes had a right to wait until a medical provider verified the accuracy of those suspicions.

Like *Hando* and *Nelson*, Hughes developed an immediately apparent injury and an injury that developed "***over the course of time***" which was fibromyalgia. *Pl. SUP,* Appx. Pg. 131 (*emphasis added)*.

Hughes' case also falls directly in line with the litany of other states' case law, which, like *Nelson* and *Hando*, focus not on the type of tortious conduct (negligence elements one and two), but on whether causation (negligence element three) for the second injury could have been proven within applicable statute of limitations. There is no argument that Hughes could have sustained a cause of action without a diagnosis. In fact, as will be seen in Section I(B), even with a diagnosis and after being informed that Hughes had located an expert to provide a causation opinion, Appellee claims there is no evidence of medical causation. Further, no argument had been made that fibromyalgia is a progression of the back injury Hughes sustained. Natividad was clear that this is a nervous system injury

which develops "over the course of time." This is an issue of two distinct injuries, rather than a question of scope and severity of one injury.

B. Appellee's positions over the past three years underscore the losing situation in which Hughes would be if she was required to pursue her claim before medical causation could be established.

Montana law does not allow a lay person's suspicions to satisfy the causation element of a negligence claim in litigation. Rather, "except in rare cases where the cause of the alleged injury is plain and obvious to lay persons without the need for specialized knowledge or expertise, proof of the occurrence, nature, cause, and/or prognosis of an alleged bodily injury, disease process, or other medical condition general requires qualified medical expert testimony." *Kostelecky v. Peas in a Pod, LLC*, 2022 MT 195, ¶ 23, 410 Mont. 239, 518 P.3d 840.

Appellee's positions throughout Hughes' claim capitalize on what was perceived to be an inability to produce proof of medical causation. These positions underscore why an injured claimant should be allowed to obtain an accident-related diagnosis prior to pursuing litigation. On August 26, 2021, Appellee denied Hughes' settlement demand on the basis that her medical conditions "cannot be connected by way of medical testimony." On January 10, 2022, as an affirmative defense, Appellee pled "Damages claimed by Plaintiff were not caused by the conduct of Appellee." *Def. E. Anderson's Ans, to Pl. 1st. Amend. Compl.*, Dkt. 9 (Jan. 10, 2022). After having eighteen months to investigate Hughes' claims, on October 18, 2022, Appellee again claimed in *Def. E. Anderson's Resp. Br. In Opp. MSJ (Failure to Mitigate)* that it disputed causation for the injuries. "This case involves a dispute in regard to the liability claims of Plaintiff against Defendant ***as well as what appears to be significant medical causation issues*** to be more fully explored during the course of discovery and possible utilization of

expert witnesses. In Hughes' deposition on November 18, 2022, Appellee confirmed its understanding that there was no diagnosis prior to June of 2019. The deposition continued with questions like:

> **Q. Okay. So at that point, you did not have an expert to make that causal connection?**
>
> A. I had not hired an expert independently of what was already in the records.
>
> **Q. But you'll agree with me the records don't have that opinion in them?**
>
> A. The records yield that conclusion.
>
> **Q. When you say "yield," you're -- you're -- you almost sound like somebody should read all the records and read some literature whether I'm a doctor, a lawyer, a plumber, an electrician. In fact, I think what you're saying is a plumber could read all your records and make that causal connection based upon reading those records. Aren't you saying that?**
>
> MR. MOYERS: Form.
>
> THE WITNESS: I am not saying that. I'm saying that as somebody evaluating my claim and looking to see if there's causation, it would be something that you would have evaluated and you had sufficient evidence to support the conclusion that there is causation.
>
> **BY MR. STACEY:**
>
> **Q. So is it your position that if a plaintiff -- you're representing a plaintiff -- all you need to do is write a letter to the defendant and say, Hey, I don't have an expert to make this connection, but you should just read everything and make that determination yourself. Is that your position?**
>
> A. If you had read the information that was available to you, that would have supported a causation opinion.

To date, while Anderson himself indicates he believes there is causation, Appellee continues to claim that there is no evidence of medical causation to support her claim that fibromyalgia, and the losses stemming therefrom, were caused by the April 23, 2014 accident. Currently, Appellee is armed with:

- Access to medical records from at least three years prior to the accident;
- Nine years of post-accident medical records;
- Anderson's own personal belief that the condition was caused by the accident; and
- Knowledge that Hughes consulted with an expert prior to serving her *Complaint*, who provided a preliminary causation opinion.[4]
- Three full years from the time Appellee received the claim to the February 26, 2024 *Order Granting Defendant's Motion for Summary Judgment* in which to investigate the facts of this case.

Armed with all of that information, ten years after the accident, the position continues to be that there is no medical evidence that Hughes' condition is caused by the April 23, 2014 accident.

These litigation positions underscore the lose-lose situation in which injured plaintiffs statewide will find themselves if the Court refuses to apply *Hando* and *Nelson* to cases in which causation is suspected but for which no diagnosis is made and for which no medical provider will confirm causation until well after the statute of limitations has run. Plaintiffs will be required to file their lawsuit within three years of the accident without a diagnosis and without any ability, whatsoever, to meet their burden of proof regarding causation. There is no question insurance carriers will take advantage of the lack of diagnosis and resultant inability to prove medical causation (as Appellee has done in this case) to ensure that they are not

[4] *Affidavit of J. Hughes* (Sept. 27, 2022), Appx. Pgs. 136-137.

required to compensate those persons injured by the negligence of another. Mr. Stacey's October 18, 2022 affidavit says it all. Even with a diagnosis and Appellant's knowledge that Hughes had found an expert to link the diagnosis with the accident, Appellee is claiming "significant medical causation issues." Significant medical causation issues. Appellee's litigation position that Hughes will not be able to prove medical causation underscores the necessity of allowing injured plaintiffs who diligently seek medical care to wait for an accident-related diagnosis before pursuing litigation. Had Hughes not waited for an accident-related diagnosis, Appellant would have gutted her case for lack of ability to prove medical causation.

C. Public policy considerations required this Court to apply the discovery rule to toll the statute of limitations.

As described by Lasonya Natividad, fibromyalgia develops "over the course of time." As an injury that develops "over the course of time," it is not an injury that is immediately apparent at the time of the accident. Further, the symptoms Hughes experienced are not like lacerations, broken bones, or amputations where causation is obvious to a lay person. In such cases, this Court will require expert medical testimony to establish causation. *Kostelecky, supra.*

If the Court requires expert testimony to establish causation for injuries such as those Hughes suffered, it cannot simultaneously saddle lay people with knowledge of causation before the medical community will acknowledge an accident-related injury. This double standard will allow the statute of limitations to run before a plaintiff can actually sustain a cause of action in accordance with this Court's evidentiary requirements. Such a requirement will work to preclude plaintiffs from recovering for legitimate, medically related injuries caused by the negligence of another. The result is contrary to this Court's longstanding policy

favoring recovery for injured persons. *Walker v. Engelke* (1987), 227 Mont. 470, 481, 741 P.3d 385. *See also Buckles vs. Cont.'l Resources, Inc.* 2020 MT 107 (noting public policy favors recovery and declining to apply North Dakota law for that reason, among others).

Requiring a plaintiff to pursue litigation before obtaining a diagnosis is also contrary to generally recognized concepts of judicial efficiency and a policy against inconsistent litigation results. As noted by Massachusetts, refusing to apply the discovery rule to a later developing and later diagnosed injury will require plaintiffs to pursue minor claims, which do not justify litigation, in hopes that by the time of expert disclosure deadlines, they will be able to establish causation for the more serious injuries. *Anderson v. W.R. Grace & Co.*, 628 F.Supp. 1219 (D. Mass. 1986). Plaintiffs will seek to stay litigation while continuing to seek an accurate medical diagnosis. Defendants, recognizing that the plaintiffs cannot sustain their burden of proof with respect to causation, will seek to force litigation forward. District courts statewide will be addressing these matters on a case-by-case basis. The inevitable result is an increase on the already over-burdened judiciary, as well as inconsistent results with some plaintiffs obtaining a stay of litigation while others are forced forward without the ability to prove their case.

It is quite clear that public policy favors recovery for persons injured by the negligence of another. Public policy favors fairness, requiring medical expert testimony for non-obvious injuries and allowing a plaintiff to obtain an accident-related-diagnosis before the statute of limitations forces her to pursue a claim. Public policy favors judicial efficiency and consistent results. Public policy favors application of *Hando* and *Nelson* when the symptoms go undiagnosed despite diligent efforts by the plaintiff to get treatment and obtain a diagnosis.

II. The district court erred when it applied the wrong legal requirements to Hughes' equitable estoppel claim and resolved questions of fact against Hughes.

Estoppel is a doctrine used to promote justice, honesty, fair dealing and to prevent injustice. *Keneco v. Cantrel*, the Court found that four factors that are determinative of the application of estoppel:

> This Court believes that Kenik has established the six essential elements of estoppel including: (1) There must be conduct -- acts, language, or silence -- amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the, at the time when it was acted upon by him. (4) The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon.

Keneco v. Cantrel (1978), 174 Mont. 130, 136. Unlike fraud, there is no requirement showing nefarious intent.

In its February 26, 2024 ruling, the district court found that there was no evidence of "a statement of material fact [Anderson] knew to be untrue." *Order Granting Def. MSJ*, Pg. 11 (Feb. 26, 2024). This Court has never held that equitable estoppel requires a known *misrepresentation*. In fact, in *Degel v. Great Falls*, 250 Mont. 224, 236, cited by the district court, the Court found equitable estoppel when "there was conduct by the City which amounted to a representation of material fact." *Id.* A known representation is not the same as a known *misrepresentation*. The district court applied an improper legal standard to Hughes' equitable estoppel argument, which yielded a conclusion that is not based on the applicable law.

Element one of equitable estoppel, as cited by the district court, is that "there must be conduct, acts, language, or silence amounting to a representation or concealment of material facts." Element two, likewise does not require an awareness of the falsity of the representation. It simply requires that the facts are known to the party estopped. It doesn't matter whether Anderson knew that Appellee would argue Hughes had to file her claim before a medical provider could provide an accident-related diagnosis. Rather, element two is based on Anderson's knowledge that he and Hughes did not have a diagnosis and his agreement with Hughes that they should wait to obtain such a diagnosis prior to the filing of the claim. As to element three, the evidence in the record, establishes that Hughes had no idea that Anderson would later claim that Hughes was barred from bringing the claim because she waited for an accident-related medical diagnosis.

Once it errantly determined that equitable estoppel requires a known *misrepresentation*, the district court failed to consider any of the other facts presented by Hughes. The reliance argued by Hughes included numerous discussions between the parties that they should wait to file because no medical provider would confirm their suspicions that the conditions were related to the accident. The reliance included over five years where two people jointly sought answers in hopes that Hughes would be able to return to her pre-accident physical health and pre-accident lifestyle. When Hughes and Anderson discussed whether they should make a claim, they discussed that despite their belief that a physical change occurred after the accident, they should wait until they had a diagnosis and an indication of causation from a medical provider. While they both believed that Hughes' condition was caused by the accident, they also knew that none of Hughes' providers were connecting it. When the parties discussed the case in 2014 and recognized there was no medical causation, they jointly chose to wait for an accident-related diagnosis. The parties discussed the claim again in early 2016,

within the three-year statute of limitations, and together acknowledged there was no accident-related diagnosis and agreed to wait until a medical provider connected the conditions to a lawsuit. In 2017, the parties again discussed a potential claim, but Hughes still did not have a diagnosis and they agreed to wait until a provider confirmed their suspicions before pursuing a claim. While Appellee generally denied Hughes' sworn testimony on equitable estoppel, Appellee did not submit an affidavit from Anderson contesting the representations made by Hughes in her January 9, 2022 *Affidavit.* Appellee's denial is not based on admissible evidence.

The parties jointly chose to wait until Hughes had a diagnosis and an indication of medical causation from Hughes' providers prior to initiating a lawsuit, a choice this Court supported in *Hando* and *Nelson* and an indication of medical causation from Hughes' providers. Anderson was aware he was engaging in these discussions and participating in the decision to wait to file the claim. He participated actively in Hughes' efforts to obtain medical treatment and he agreed that they should not file until they had confirmation of their suspicions. His conduct was directly involved in Hughes' decision to wait. He knew that the parties were jointly making a decision based on Hughes' overall condition and the hope that if they waited, they would get a diagnosis, a causal connection would be made or that Hughes would at least get answers and regain her health.

Appellee now claims the case must be dismissed based on an assertion that a three-year statute of limitations bars Hughes' claim. Hughes had no way of knowing that after it was too late, Appellee would change its position, and argue that a three-year statute of limitations applies.

Appellee is estopped from asserting the statute of limitations defense. At the very least, a question of fact exists. In requiring Hughes to present evidence of a known false representation, the district court applied the wrong standard. Once it determined that there was no evidence of a false representation, it failed to

consider the representations Anderson had made and Hughes' reliance thereon. The district court's errant decision must be reversed.

CONCLUSION

The medical community, including facilities like Mayo Clinic, now recognize the legitimacy of the symptoms Hughes suffered, as well as why they manifest, and have developed an understanding that such conditions can be caused by a physically traumatic injury.

The evidence before the Court was that Hughes diligently sought medical treatment but was unable to obtain an accurate diagnosis, let alone an accident-related diagnosis, prior to September 10, 2019. This Court's holdings in *Nelson* and *Hando* are consistent with legal authority across the nation finding that knowledge of tortious conduct and suspicion of causation cannot trigger the statute of limitations until those suspicions are validated by a medical provider. As a matter of law, the statute of limitations on Hughes claim did not accrue until her fibromyalgia diagnosis on September 10, 2019.

Further, the undisputed facts in the district court record show that Anderson and Hughes jointly decided to wait for an accident-related diagnosis before pursuing a claim. The district court erred when it required Hughes to present evidence of a knowing misrepresentation rather than a knowing representation. The parties both recognized that the diagnoses Hughes received prior to September 10, 2019 would not support a cause of action and jointly decided to wait until they had a diagnosis before proceeding with a claim. Hughes' sworn statements on this issue are not disputed by Anderson. The district court applied the wrong legal standard to Hughes' claim and, in doing so, reached an errant conclusion.

Hughes' claim is timely filed and Appellee is estopped from asserting otherwise. This case must be reversed and remanded for trial.

Dated this 15 day of July 2024.

HUGHES LAW, P.L.L.C.

/s/ Jacquelyn M. Hughes
Appellant

APPELLANT'S CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with Rule 11 of the Montana Rules of Appellate Procedure. In accordance with Rule 11(a), the required portions are double spaced and printed in Times New Roman, proportionately spaced, fourteen-point typeface, with a total word count of 9,581 as calculated by this party's word processing system.

/s/ Jacquelyn M. Hughes

CERTIFICATE OF SERVICE

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