IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 24-0356

MARK MULLEE,

Appellant,

vs.

WINTER SPORTS, INC., dba
WHITEFISH MOUNTAIN RESORT,

Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana Eleventh Judicial District Court
Flathead County District Court Cause No. DV-22-0051
The Honorable Amy Eddy, Presiding

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STATEMENT OF THE ISSUES

1. Did the District Court err in: (a) granting summary judgment to Winter Sports, Inc. ("WSI") on Mark Mullee's ("Mullee") Complaint; and (b) denying Mullee's Motion for Summary Judgment on causation of Mullee's claimed injuries and damages?

2. Did the District Court abuse its discretion in: (a) precluding testimony from Mullee's retained medical expert; and (b) denying Mullee's motion *in limine* to exclude WSI's liability expert witness?

STATEMENT OF THE CASE

Mullee, a 56-year-old, lifelong expert/advanced level skier, lost control due to his own conduct when he caught a ski edge in snow and traveled off a beginner-level ski trail. Mullee asserted negligence claims against WSI.

WSI requested summary judgment contending it did not owe a duty to "catch" Mullee before he traveled off a beginner-level ski trail, after he lost control while skiing. **DKT. 26 – 28**. Mullee opposed WSI's motion. **DKT. 41 – 42**. WSI filed a reply. **DKT. 52**. After a hearing, the District Court filed its Order and Rationale granting WSI's motion. **DKT. 67**.

Mullee filed a motion for summary judgment on his claimed damages. **DKT. 39.** WSI opposed Mullee's motion. **DKT. 39.** Mullee filed a reply. **DKT. 49.** The District Court denied Mullee's motion for summary judgment. **DKT. 69.**

WSI sought orders *in limine* precluding Mullee's retained medical witness from testifying because her medical opinions failed to meet the standard for admissibility, also requiring exclusion of damage opinions dependent on the medical opinions. **DKT. 34.** Mullee opposed these motions. **DKT. 44.** WSI filed a reply. **DKT. 57**. After a hearing, the District Court filed its Order and Rationale granting WSI's motions *in limine* excluding the medical and dependent damage opinions. **DKT. 70.**

Mullee sought to exclude WSI's liability expert Dr. Irving Scher from testifying. WSI opposed Mullee's motion. **DKT. 45 – 46.** Mullee filed a reply. **DKT. 59.** The District Court denied Mullee's motion to exclude Dr. Irving Scher. **DKT. 73.**

The Court entered final judgment on May 28, 2024. **DKT. 81**.

STATEMENT OF THE FACTS

WSI has operated a ski area, known as Whitefish Mountain Resort ("WMR"), since 1947. **WSI Appendix 93.** WMR operates on approximately 3,000 acres of ski terrain. **WSI Appendix 94.** As with all Montana ski areas, every ski run on WMR is lined with countless trees, streambeds, rocks, cliffs, variations in ski surface, terrain and steepness, and other inherent dangers and hazards. **WSI Appendix 94.**

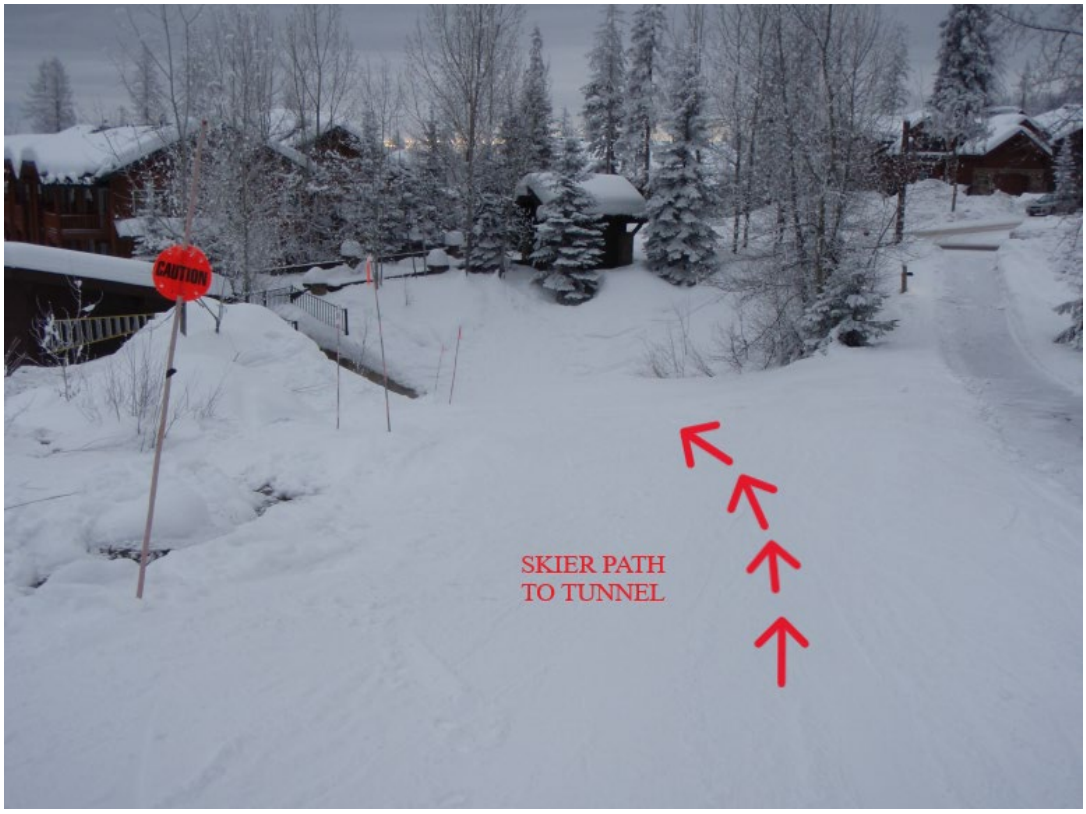
Mullee's ski accident occurred below the skier's tunnel on the beginner-level trail ("ski way") that departs a designated green (beginner-level) run under Chair 6,

and merges with another designated green run to access parking lots and Chair 6. **WSI Appendix 91.** The skier's tunnel was installed no later than 2002 to allow skiers to pass under a roadway. **WSI Appendix 94.** The accident occurred in a designated slow skiing zone at the base of WMR. **WSI Appendix 91.** The ski way includes a curve to skier's left into the skier's tunnel followed by a curve to skier's right below the tunnel. **WSI Appendix 91.** There is a streambed below the tunnel to skier's left of the ski way.

From the 2002/2003 winter season through the 2022/2023 winter season, there were more than 6.9 million skier visits. **WSI Appendix 94.** Mullee's ski accident on January 16, 2019, was the first and only ski accident of which WSI is aware in which a skier traveled off the ski way below the tunnel and into or near the streambed. **WSI Appendix 47; 69; 94.**

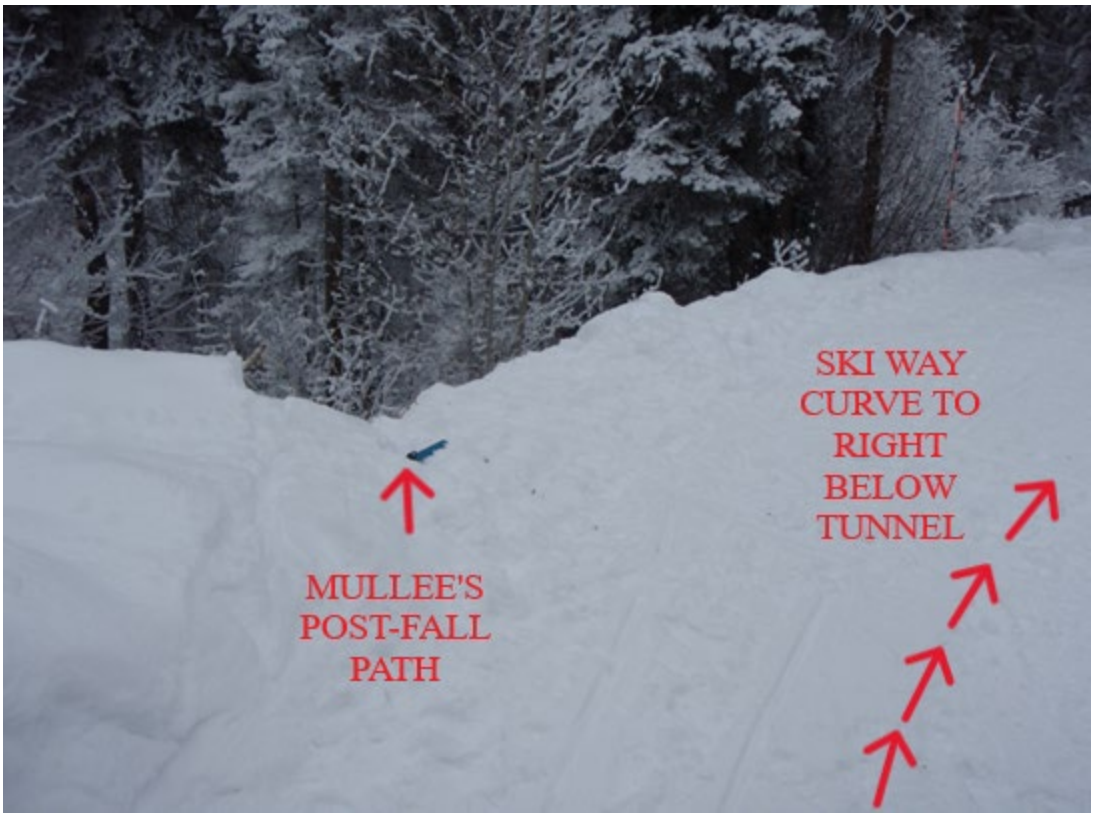
Prior to and at all times during the 2018/2019 winter season, WMR maintained a fence below the tunnel on skier's left. **WSI Appendix 32; 62 – 63; 83; 86 – 87.** The fabric fence was connected to three polycarbonate poles inserted into the snow. **WSI Appendix 33; 116.** The fence served as an additional visual aid to inform skiers to remain on the ski way as it proceeded to skier's right. **WSI Appendix 32; 62 – 63; 83; 86 – 87.** This fence, like all fences at WMR, was not designed or intended to arrest ("catch") out-of-control skiers. **WSI Appendix 51 – 52; 68.**

Photographs taken by WMR Ski Patrol following Mullee's ski accident depict the ski way taken by Mullee through the tunnel, the broken fence pole after his ski accident, and the fabric fence returned to its original position:

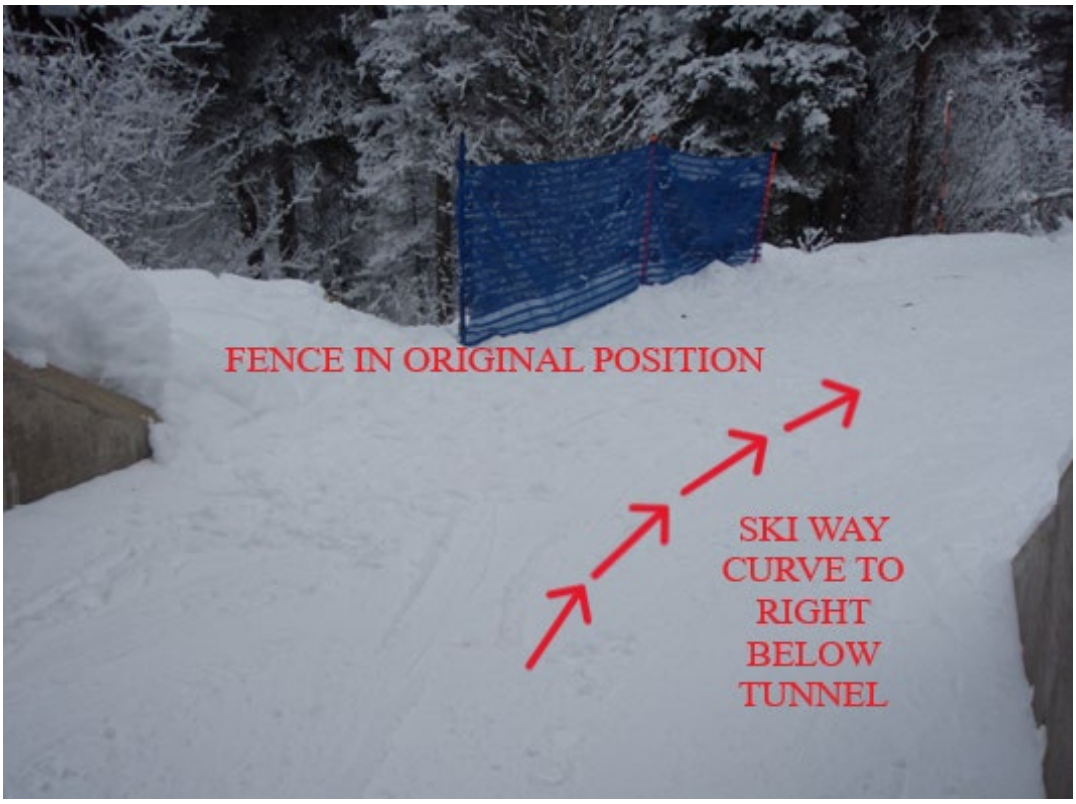



TUNNEL
ENTRANCE


SKIER PATH THROUGH TUNNEL


SKI WAY
CURVE TO
RIGHT
BELOW
TUNNEL
MULLEE'S
POST-FALL
PATH


BROKEN
POLYCARBONATE
FENCE POLE
FOLLOWING MULLEE'S
SKI ACCIDENT



WSI Appendix 109 – 116.

Mullee had decades-long experience as a skier at WMR who identified himself as an expert skier. **WSI Appendix 10.** Mullee raced down groomed trails faster than most people, skied all terrain at WMR, and jumped off cliffs. **WSI Appendix 46 – 47; 73; 75 – 76.** Mullee started skiing at WMR in the 1970s and had a season pass every season he lived in Flathead County, including the years 2010 to 2019. **WSI Appendix 6.** According to his season pass usage data, from the 2009/2010 season through January 16, 2019, Mullee skied at least 186 days at WMR. **WSI Appendix 99 – 104.**

Mullee was very familiar with the ski way, the skier's tunnel, and the curve to skier's right below the skier's tunnel. **WSI Appendix 14.** Mullee was as familiar with the ski way as he was any other trail on WMR and skied it at least once a day when he parked in the Pine or Spruce lots near the ski way. **WSI Appendix 14 – 15.**

Frequently, to access his vehicle, Mullee would take the ski way through the tunnel. **WSI Appendix 14.** Mullee parked in the Pine or Spruce Lots and skied the ski way through the tunnel at least 107 times from 2009 to 2019. **WSI Appendix 7 – 10; 16; 99 – 104.** Mullee skied the ski way at least six times in the 10 days preceding his January 16, 2019, ski accident – on January 7, 8, 9, 11, 14, and 15, 2019. **WSI Appendix 7 – 10; 16; 103 – 104.**

Prior to his ski accident, Mullee knew there was always a fence on the curve below the skier's tunnel that meant "don't ski into this area." **WSI Appendix 27.** Mullee knew that there was a "danger area" or "cliff" beyond the fence. **WSI Appendix 27.** Mullee was aware there was a streambed beyond the fence to skier's left below the tunnel. **WSI Appendix 27 – 28.** Mullee knew not to travel off the skiable terrain, through the fence, and into the streambed. **WSI Appendix 27 – 28.**

On the morning of January 16, 2019, Mullee claimed he realized he forgot his phone and water bottle and decided to ski back down to his truck in the Pine Lot to retrieve these items. **WSI Appendix 19.** Mullee exited the tunnel, pushed off with his right ski in a skate motion to gain speed and momentum "through the flat part,"

"caught the edge of [his] ski, and it spun [him] around and flipped [him] over." **WSI Appendix 20 – 21.** Mullee travelled off the ski run and ultimately came to rest on a rock in or near the streambed. **WSI Appendix 21.**

Mullee testified that he lost control when he caught his ski edge in the snow, flipped over and "couldn't regain control." **WSI Appendix 20.**

On January 16, 2019, before Mullee lost control and fell, WMR ski patroller Marchand Logan (f/k/a Dye) skied the ski way through the tunnel to check for grooming issues and maintain the fence below the tunnel "high and tight" as a visual aid. **WSI Appendix 60; 84; 88 – 90; 119.**

On the morning of Mullee's ski accident, Grace Byrd, an independent witness, skied the ski way twice with a child and was the first to discover Mullee's ski accident. **WSI Appendix 39 – 40.** Before the accident, she saw the fence upright at its standard location with no obstructions or hazards in the ski way. **WSI Appendix 39 – 41.** After Mullee's ski accident, Byrd discovered the fence was still partially standing with the left part of the fence sagging like someone had "hit the fence." **WSI Appendix 41 – 42.**

WSI's Winter Incident Report Form's "description of incident (skier's words)" reported that Mullee stated he was "going too fast through tunnel & lost control, went off bank into creek, hit hip on a rock." **WSI Appendix 80 – 81; 106.** Keagan Zoellner, who completed the Incident Report, testified that the squiggly line

to the left of "(PATIENTS' SIGNATURE)" was Mullee's signature confirming its accuracy. **WSI Appendix 81.** Mullee explained to Zoellner that "he was traveling very fast through the tunnel, … lost control and skied off the run." **WSI Appendix 80.**

Logan completed an "Additional Comments" document on January 16, 2019, stating that she heard Mullee state he had been traveling too fast through the tunnel and was distracted by looking for his phone in his jacket pocket, thus not paying attention to his route. **WSI Appendix 57; 59; 107.** Logan testified that she heard Mullee state that he was looking for his cell phone and going too fast. **WSI Appendix 57.**

Mullee reviewed, initialed, and signed his 2018/2019 Ski Season Terms and Conditions of Use prior to the 2018/2019 season, agreeing, among other things, that he had a duty to ski at all times in a manner that avoided injury to himself and to be aware of the inherent dangers and risks of skiing. **WSI Appendix 23 – 26; 121 – 122.**

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a summary judgment motion *de novo*. *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, ¶ 8, 324 Mont. 366, 103 P.3d 535. A district court's legal conclusions are reviewed for correctness.

Id. This Court ". . . will affirm a district court's correct conclusion even when that conclusion may have been reached for the wrong reason." *Id.*, 2004 MT 351 ¶ 15.

This Court reviews a district court's grant or denial of a motion *in limine* for an abuse of discretion. *Tin Cup Cty. Water v. Garden City Plumbing & Heating, Inc*., 2008 MT 434, ¶ 46, 347 Mont. 468, 479, 200 P.3d 60, 69. "[T]he authority to grant or deny a motion *in limine* rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties." *Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59. "District courts enjoy a wide latitude when determining the admissibility of expert testimony." *Reese v. Stanton*, 2015 MT 293, ¶ 21, 381 Mont. 241, 358 P. 3d 208. "A district court abuses its discretion only if it acts arbitrarily without employment of conscientious judgment of exceeds the bounds of reason resulting in substantial injustice." *Higgins for Benefit of E.A. v. Augustine*, 2022 MT 25, ¶ 7, 407 Mont. 308, 503 P.3d 1118.

SUMMARY OF ARGUMENT

Mullee intentionally ignores the existence and application of the Montana Skier Responsibility Act ("Act") to his ski accident. The Act modifies the standard negligence analysis because it expressly identifies the risks of skiing and allocates to the skier responsibility for these acknowledged risks and for avoiding injury. The language and legislative policy of the Act guide the Court's determination of the

existence and scope of any duty of reasonable care owed by WSI to Mullee, which must be viewed in the unique context of skiing. In this context, WSI had no duty to "catch" Mullee after he lost control.

WSI did not cause Mullee to lose control and fall. Nor could WSI have foreseen that Mullee's ski accident, nor any specific ski accident, would occur in the manner it occurred. Mullee, an expert skier, was intimately familiar with the design of the ski way and the obvious danger off-trail hazards posed to skiers across all 3,000 acres of WMR, including along this ski way. Mullee skied this beginner-level ski way over 100 times and at least six times in the 10 days preceding his ski accident. Notwithstanding his knowledge and experience, Mullee lost control due solely to his own conduct on a beginner-level trail when he caught a ski edge in snow. After losing control, Mullee traveled off the ski way and encountered inherent dangers and risks of skiing, dangers and risks of which he was aware and knew to avoid. Mullee is the first and only skier known to have traveled off the ski way at this location.

The Act and the specific circumstances of Mullee's ski accident require the same conclusion the District Court reached – that WSI's duty of reasonable care did not include a duty to "catch" Mullee after he lost control on a beginner-level trail. Additionally, Mullee's knowledge of the ski way and off-trail hazards render his accident and proposed duty distinct from all prior reported Montana ski cases.

Applying the Act, Mullee's specific accident was unforeseeable even though, as the Act specifically acknowledges, accidents of this general nature – that Mullee could suffer injury by traveling off-trail – were foreseeable to Mullee. To require WSI to "catch" Mullee would render meaningless the legal principles and purpose of the Act and would create a duty no ski area operator in Montana could reasonably meet. The District Court correctly granted WSI summary judgment.

This Court should affirm the District Court's Orders.

ARGUMENT

I. The District Court Correctly Granted Summary Judgment To WSI.

As a general proposition, ski area operators owe a duty of reasonable care to skiers. *Mead*, 264 Mont. at 474, 872 P.2d at 788. Under the specific circumstances of this case, applying the language and expressed legislative policy of the Act, and all case law interpreting the Act, Mullee's proposed duty does not exist. The District Court correctly held that, consistent with *Mead v. M.S.B*., and *Kopeikin v. Moonlight Basin Mgmt., LLC*, WSI had no duty to "catch" Mullee after he lost control. *Mead*, 264 Mont. 465, 872 P.2d 782 (1994); *Kopeikin*, 90 F.Supp.3d 1103 (D. Mont. 2015) aff'd sub nom. *Kopeikin v. Moonlight Basin Mgmt*., 691 Fed. App'x. 355, 355 (9th Cir. 2017).

The existence of a legal duty is a question of law. *Webb v. T.D.,* 287 Mont. 68, 72, 951 P.2d 1008, 1011 (1997). This Court has explained the framework within

which Montana courts determine duty as a matter of law: "...[A]ctionable negligence arises only from the breach of a legal duty; the existence of a legal duty is a question of law to be determined by the district court." *Estate of Strever v. Cline*, 278 Mont. 165, 171, 924 P.2d 666, 669 (1996) (internal quotations and citations omitted).

The District Court correctly rejected Mullee's assertion of issues of material fact regarding the existence, condition, or composition of the fabric fence below the tunnel. **DKT 67 at 2.** The circumstances of the fence do not inform whether the duty of reasonable care WSI owed to Mullee in this case included a duty to "catch" Mullee after he lost control due to his own actions.

Similarly, Mullee's retained experts cannot answer the legal question of whether WSI had a duty to "catch" Mullee. *Heltborg v. Modern Machinery*, 244 Mont. 24, 30-31, 795 P.2d 954, 958 (1990) (Experts may not express an opinion on a conclusion of law). Stan Gale's unsworn report is also inadmissible hearsay which cannot create an issue of material fact. *See* Mont.R.Evid. 801 – 805; *Reese*, ¶ 24; *Pannoni v. Bd. of Trs*., 2004 MT 130, ¶¶ 46, 59, 321 Mont. 311, 90 P.3d 438.

A. The District Court Correctly Ruled That WSI Had No Common Law Duty To Maintain Fencing Designed To "Catch" Mullee After He Lost Control While Skiing.

1. Mullee Failed To Analyze The Existence Of A Common Law Duty At The District Court Level.

Mullee, for the first time on appeal, addressed whether WSI had a duty to "catch" him after he fell. The District Court correctly observed: "In fact, Mullee

completely failed to even respond to WSI's analysis regarding the existence of a common law duty to fence the area of the accident, and avoided such questions at oral argument." **DKT. 67, p. 5.**

Generally, this Court will not address an issue, argument or change in legal theory raised by a party for the first time on appeal. *H&H Dev., LLC v. Ramlow*, 2012 MT 51, ¶ 15, 364 Mont. 283, 272 P.3d 657; *Unified Industries, Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100. This Court, in *Unified*, observed that the basis for the rule is that it is "fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Unified*, ¶ 15.

Mullee's failure in the District Court dooms his appeal.

2. The Duty of Reasonable Care Owed By A Ski Area Operator To A Skier Must Be Viewed In The Context Of Skiing, The Montana Skier Responsibility Act, and Cases Interpreting The Montana Skier Responsibility Act.

The District Court's Order correctly concluded that the duty of reasonable care does not include a duty to "catch" Mullee after he fell because of his own conduct. The District Court's analysis of the duty issue was correctly conducted in the unique context of skiing. *Kopeikin*, 90 F. Supp. 3d at 1107; *see*, e.g., *Schuff v. Jackson*, 2002 MT 215, ¶¶ 36 – 37, 311 Mont. 312, 55 P.3d 387 (jury instructions should include complete statement of duty which could, in the right circumstances, include circumstance-specific duties); *Dale v. Three Rivers Telephone*

Cooperatives, Inc., 2004 MT 74, 320 Mont. 401, 87 P.3d 489 (same); *Camen v. Glacier Eye Clinic, P.C.*, 2023 MT 174, 413 Mont. 277, 539 P.3d 1062.

Support for the District Court's analysis is found in Judge Christensen's discussion in *Kopeikin*, granting summary judgment in favor of Moonlight Basin:

> Skiing is a sport in which thrill-seeking skiers embrace its inherent dangers and risks. It is a sport that occurs on 'a mighty mountain, with fluctuation in weather and snow conditions that constantly change.' '[A] ski area operator cannot be expected to expend all of its resources making every hazard or potential hazard safe, assuming such an end is even possible,' or desirable. 'Ski areas encompass vast and unwieldy terrain and mother nature is always at play.' **The act of skiing in such terrain presents an obvious array of dangers to a skier, many of which the ski area operator has no duty to protect against under Montana law**. Fundamentally, a skier bears much of the responsibility for avoiding injury to himself, which is a principal that is consistent with Montana law.

Kopeikin, 90 F. Supp. 3d at 1107 (emphasis added) (citing *Wright v. Mt. Mansfield Lift, Inc*., 96 F.Supp. 786, 791 (D. Vt. 1951) and *Kopeikin v. Moonlight Basin Management, LLC*, 981 F.Supp.2d 936, 945 (D. Mont. 2013)).

The scope of the ski area operator's duty of reasonable care must be consistent with the language and purpose of the Act. *See* § 1-1-108, MCA. Statutory interpretation must account for the statute's text, language, structure and object. *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. When interpreting statutes within an act, the individual statutes must be interpreted in a manner that is coordinated with the other statutes and attempt to give effect to all other statutes within the act. *State v. Pirello*, 2012 MT 155, ¶ 14, 365 Mont. 399,

282 P.3d 662. An interpretation of a statute which gives it effect is preferred to one which renders it void. § 1-3-232, MCA.

The Act imposes specific obligations on ski area operators to mark certain items or post maps, trail boards and notices to help inform skiers on the mountain – i.e. to educate skiers to make good decisions consistent with their own duties. § 23-2-733(1), MCA.

Correspondingly, the Act requires skiers to: (1) be aware of the inherent dangers and risks of skiing; (2) stay under control so as not to injure themselves or others; and (3) abide by the skier responsibility code and postings/warnings of the ski area operator. § 23-2-736, MCA.

When read as a whole, operation of the Act requires ski area operators to educate and inform skiers that skiing is inherently dangerous and holds skiers responsible for their own actions. It is the skier's duty to avoid injury from inherent dangers and risks of skiing. §§ 23-2-702, 736, MCA.

All reported cases that have analyzed the Act have considered a ski area operator's potential duty in the context of the Act[1]:

1. *Mead v. M.S.B.*, 264 Mont. 465, 872 P.2d 782 (1994)

[1] *Brewer v. Skilift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988) did not analyze the scope of a ski area operator's duty of care to a skier and considered a prior version of the Act that this Court held unconstitutional.

In *Mead*, the plaintiff suffered injury resulting from a collision with a protruding rock outcropping at the edge of the Outrun Trail as the trail rounded a curve, striking his knee, causing him to fall. *Mead*, 264 Mont. at 468. Plaintiff contended that the defendant ski area operator's negligent acts, including not marking the rock outcropping, caused his fall and injuries. *Id*. This Court held that there was no evidence that plaintiff was aware of the condition that caused his injury or that he had skied it recently enough that he should have been aware of the condition. *Mead*, 264 Mont. at 478.

This Court reversed summary judgment on two grounds: (1) a ski area operator's duties were not limited to those specifically listed in the statute but included any duties "consistent with the duty of reasonable care" of a ski area operator; and (2) there were questions of fact whether plaintiff's injury resulted from inherent risks of skiing[2]. *Mead*, 264 Mont. at 474, 478.

2. *Kopeikin v. Moonlight Basin Mgmt., LLC*, 90 F. Supp. 3d 1103, 1107 (D. Mont. Feb. 9, 2015)

In *Kopeikin*, the plaintiff skied over a variation in terrain and collided with a subsurface rock that caused him to collide with other rocks. *Kopeikin*, 90 F. Supp. 3d at 1107. The plaintiff testified that he fell because his "skis hit rocks." *Kopeikin*, 90 F. Supp. 3d at 1105. The Court held that plaintiff's injuries resulted from the

[2] Section 23-2-702(2)(f), MCA, was amended after *Mead*, to remove the word "ski" to modify "terrain" in the phrase "variations in steepness or terrain."

inherent dangers and risks of skiing and plaintiff failed to negotiate the terrain safely and without injury despite his expertise. *Kopeikin*, 90 F. Supp. 3d at 1107.

The Court held that the ski area operator had no duty to warn of the specific rocks that caused plaintiff's ski accident of which the plaintiff was not aware, and, acted consistent with its duty of reasonable care as a ski area operator to warn generally of unmarked hazards. *Id*. at 1108. The Court found that plaintiff was generally aware of the hazards inherent in a low snow year, and that with over 700,000 skier visits, there had never been another reported accident at the location of plaintiff's accident caused by a collision with rocks. *Id*. Considering the skier's knowledge and the location's lack of incidents, the Court noted that plaintiff's proposed duty to warn of specific rocks was undermined by the specific accident's unforeseeability, even though accidents of this general nature were foreseeable to skiers in low snow conditions, and would "require an impossibility." *Id*.

3. *Waschle v. Winter Sports, Inc*., 144 F.Supp.3d 1174, 1181 (D. Mont. 2015)

In *Waschle*, the decedent was found unresponsive, headfirst in unconsolidated snow around a tree, i.e., a tree well. *Waschle*, 144 F.Supp.3d at 1177. Due to the fact the skier passed away as a result of his ski accident, the Court identified questions of fact regarding what Waschle knew, what caused his accident, and whether Waschle would have heeded tree well warnings so as to prevent his accident. *Waschle*, 144 F.Supp.3d at 1181-82.

The Court in *Waschle* held that at the time of Waschle's accident, tree wells were not an inherent risk of skiing under § 23-2-702, MCA, due to the statute's amendment following Waschle's accident. *Waschle*, 144 F.Supp.3d at 1180. Therefore, the Act did not apply to Waschle's accident.

4. *Meyer v. Big Sky Resort*, No. CV 18-2-BU-BMM, 2019 U.S. Dist. LEXIS 203443, 2019 WL 6251800 (D. Mont. Nov. 22, 2019); *Meyer v. Big Sky Resort*, No. CV 18-2-BU-BMM, 2020 U.S. Dist. LEXIS 101794, 2020 WL 3086036 (D. Mont. June 10, 2020)

The Court in *Meyer* considered two separate motions for summary judgment. In *Meyer*, the plaintiff alleged that the ski area operator failed to mark the cat track on the trail where plaintiff crashed – contending that he suddenly and blindly encountered an unmarked cat track that "was not obvious at all." *Meyer* (2019), *7.

The issue in *Meyer* (2019) was whether "any undue risk posed by the cat track where Meyer crashed could have been abated through 'posting a warning sign.'" *Meyer* (2019), *9. The U.S. District Court explained that it "will review the reasonableness of Big Sky's actions in this matter in conjunction with the language in Montana's skier responsibility statute." *Meyer* (2019), *4. The Court concluded there was a question of material fact whether plaintiff would have heeded warnings and thereby prevented his injury[3]. *Meyer* (2019), *8-9

[3] Mullee cited to inapplicable out-of-state cases *Hoar v. Great E. Resort*, 256 Va. 374, 506 S.E.2d 777, 786 (Va. 1998) and *Graven v. Vail Assocs., Inc*., 909 P.2d 514, 520-21 (Colo.1995). In *Hoar*, the plaintiff was unable to testify as a result of his brain injury. The issue was whether the hidden and unknown drop-off required a

The Court, in its Order on Big Sky's second motion for summary judgment explained that plaintiff alleged he "skied over a steep slope and hit a blind and unmarked 'cat walk' where he was ejected from his skis." *Meyer* (2020), *3. The Court reasoned that the "principal importance" to plaintiff's claim was the "blind and unmarked" nature of the catwalk. *Meyer* (2020), *3 – 4. The Court explained:

> Had Meyer alleged that he came upon a catwalk, rather than a 'blind and unmarked' catwalk, his claim almost certainly would fall within the exception to ski operator liability found in § 23-2-736(4). Because he alleged that the catwalk was 'blind and unmarked,' Meyer has alleged, in essence, that he fell because Big Sky created a run where a skier could not ascertain the upcoming variation in steepness or terrain. Thus, the blind nature of the catwalk removes it from the scope of § 23-2-736(4).

Meyer (2020), *4. The Court concluded there was an issue of material fact for the jury due to the alleged blind and unmarked nature of the catwalk that caused plaintiff skier's accident, of which plaintiff was unaware.

3. Mullee's Ski Accident Is Unique From All Prior Ski Cases Considering The Duty of Reasonable Care.

All the previous cases interpreting the Act concerned whether a warning would have abated the risk posed by the hazard that caused the skier's accident and of which the skier was not aware. This case is different in two controlling respects:

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warning under Virginia law. In *Graven*, the issue was whether defendant's failure to post warnings signs contributed to the ski accident under Colorado law. These cases do not support Mullee's position, because an alleged failure to warn is not at issue in the instant case.

First, Mullee's own conduct of catching a ski edge in snow, not a condition on the mountain, caused his fall. Second, Mullee was specifically aware of the hazards that caused his injuries. Mullee makes no allegation of a failure to warn. Earlier cases do not provide authority supporting Mullee's claim that WSI has a duty to "catch" him after he lost control.

Mullee's effort to impose a duty on WSI is dispositively distinct from the circumstances in *Mead*, *Kopeikin*, *Waschle*, and *Meyer* because Mullee admits he was aware of the ski way's curve and inherent dangers and risks off-trail. He intended to remain on the ski way as it proceeded to skier's right, and only traveled off the ski way because he lost control as a result of his own actions. A blind and unmarked hazard did not cause Mullee's ski accident. The Court properly held that any potential danger or risk was open and obvious to Mullee. **DKT 67 at 7.**

Mullee's contention in his brief that he was not aware of the hazards off-trail is an effort to revise the record. Mullee's own testimony controls. He testified that he was as familiar with the ski way as he was with any other trail on WMR (**WSI Appendix 14 – 15**); had skied the ski way over 100 times (**WSI Appendix 7 – 10; 16; 99 – 104**); had skied the ski way at least six times in the 10 days preceding his ski accident (**WSI Appendix 7 – 10; 16; 103 – 104**); was aware a fence was always on the edge of the ski way below the tunnel that meant "don't ski into this area" (**WSI Appendix 27**); knew there was a "danger area" or "cliff" beyond the fence

(**WSI Appendix 27**); was aware there was a streambed beyond the fence to skier's left below the tunnel (**WSI Appendix 27 – 28**); knew not to ski off the skiable terrain at that location (**WSI Appendix 27 – 28**); intended to continue on the ski way as it proceeded to skier's right because he was skiing to his truck (**WSI Appendix 18 – 22**); and he lost control after he exited the tunnel when he started a skate motion and caught the edge of his ski in snow, was unable to "regain control," causing him to spin around and flip him off the edge of the ski way (**WSI Appendix 20 – 22**).

When viewed through the context of the Act and all Montana cases interpreting it, WSI did not have a duty to "catch" Mullee after he lost control so as to physically prevent him from encountering off-trail inherent dangers and risks of skiing that he knew and intended to avoid.

4. WSI Had No Duty To "Catch" Mullee After He Lost Control When Considering The Foreseeability Of Risk And Weighing Policy Considerations.

"The existence of a duty of care depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against the imposition of liability." *Estate of Strever*, 278 Mont. at 173, 924 P.2d at 670. "In analyzing whether a duty exists, (the court) consider(s) whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 17, 342 Mont. 335, 181 P.3d 601 (citing *Henricksen v. State*, 2004

MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38). "The policy considerations weighed to determine whether to impose a duty include:

> (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent to of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the involved.

Henricksen, 2004 MT 20, ¶ 21 (quoting *Estate of Strever*, 278 Mont. at 173).

The District Court correctly held that: "it was not foreseeable that Mullee, an experienced skier who had skied on this ski way more than 100 times without incident, as had every other skier at WMR, would catch a ski tip and be spun about with enough momentum to land in the streambed." **DKT. 67 at 6.** The District Court correctly held that there was no moral blame attached to WSI's conduct and, considering the lack of prior accidents at this location, it is unlikely other skiers will sustain an injury at this location; and the burden would be massive if WSI were forced to "maintain safety netting in areas like the ski way – which exist all over the 3,000 acres of terrain." **Doc. 67 at 6.**

a. Mullee's Ski Accident Was Not Foreseeable.

Mullee's theory that WSI had a duty to "catch" him after he lost control is undermined by this specific accident's unforeseeability, despite the fact that accidents of this general nature are foreseeable to skiers. *See Kopeikin*, 90 F. Supp. 3d at 1107.

The Act exists because ski accidents, but not individual ski accidents, are foreseeable. This is why the Act defines inherent dangers and risks of skiing and establishes the duties of skiers and ski area operators. § 23-2-731, MCA. Only individual skiers decide where and how they ski, including what part of the run they ski, how fast they ski, when and how to make their turns, etc. There are countless natural hazards on ski areas and along beginner runs that could cause injury to a skier if the skier collided with them, including trees, logs, rocks, streambeds, cliffs, bare spots, stumps, and variations in steepness and terrain. Without knowing how a skier may lose control or interact with off-trail hazards, it is impossible to foresee and physically protect against them. This is why WSI uses visual aids to help inform and direct skiers, such as the fabric fence at this location and many others.

There is no evidentiary support for there being a "heightened danger" at this location, as opposed to any other of the countless inherent risks and hazards across a ski mountain such as WMR, as Mullee contends. This is evidenced by the fact that, despite 6.7 million skier visits from 2002 through the 2022/2023 season, there has never been ski accident where a skier traveled off the ski way at this location. This is particularly so for Mullee, who is an expert/advanced skier. Mullee skied this exact trail without incident more than 100 times, including six times in the 10 days preceding the accident. There was no danger on the beginner-level trail that caused

Mullee's fall. Mullee admits he alone caught an edge and lost control. Had Mullee remained on the ski way as he intended, he would not have suffered injury.

There is not a greater danger on this green-rated, beginner-level trail in a slow skiing zone that necessitated a greater duty owed by WSI pursuant to *Camen*. Moreover, the legislature resolved the "proportionate duty" analysis in this case when it enacted the Act. The legislature made clear that inherent dangers of the sport, which are ubiquitous in a winter mountain environment, do not require a proportional higher duty to Mullee in this case. *See* § 1-1-108, MCA.

To hold that a skier, such as Mullee, losing control and breaching his duties under the Act, was a foreseeable accident so as to impose a duty to "catch" skiers across a wild dynamic mountain would gut the legal principles and purpose of the Act. §§ 23-2-731, 736(4), MCA. Further, such a duty would "require an impossibility." *Kopeikin*, 90 F.Supp.3d at 1107.

b. Public Policy Considerations Confirm WSI Owed No Duty To "Catch" Mullee.

The Act provides its own policy statement in § 23-2-731, MCA, recognizing the inherent dangers and risks of skiing are among the attractions of the sport and to discourage claims based on damages resulting from inherent dangers and risks of skiing. "'[A] ski area operator cannot be expected to expend all of its resources making every hazard or potential hazard safe, assuming such an end is even possible,' or desirable." *Kopeikin*, 90 F. Supp. 3d at 1107.

Due to the impossibility to predict and prevent every accident, or "catch" every skier that loses control, there is: (1) no moral blame attached to WSI's conduct of not catching Mullee after he lost control and breached his duties as a skier; and (2) the desire to prevent future harm to skiers is not served because WSI could not prevent the harm to Mullee. This is precisely why the Act sets forth specific duties of skiers – emphatically requiring skiers to always maintain control and ski within their abilities – and makes clear that skiers shall accept all legal responsibility for injuries resulting from inherent dangers and risks of skiing. § 23-2-736, MCA; **DKT. 67.**

There is no moral blame attached to WSI's conduct because WSI did not cause Mullee to lose control and travel off the ski way. WSI informed Mullee of the inherent dangers and risks of skiing in his season pass agreement and signage on WMR. WSI informed Mullee to remain on the ski way and not to travel left after the skier's tunnel. WSI is permitted to rely on skiers complying with their duties under the Act, particularly in a slow-skiing zone on a beginner-level trail, and in a location that never had an incident like Mullee's.

As identified by the District Court, it is unlikely other skiers will sustain an injury by traveling off the ski way at this location. The lack of prior accidents confirms this. Fences designed to arrest individuals also cause greater harm when contacted by skiers due to their need to be rigid and supported by permanent

structures, i.e. wood, metal and cement. The out-of-state cases Mullee cited, in which skiers were injured by colliding with fences, highlight and support the hazard posed by fences. See *Shaheen v. Boston Mills Ski Resort*, 85 Ohio App. 3d 285, 619 N.E.2d 1037 (Ohio Ct. App. 1992), *Brown v. Steven Pass, Inc*., 97 Wn. App. 519, 984 P.2d 448 (Wash. Ct. App. 1999); *see also* § 23-2-702(2)(e), MCA (identifying collisions with fences as an inherent danger and risk of skiing).

Requiring WSI to employ netting designed to "catch" out-of-control skiers would impose an impossible duty. If WSI had a duty to maintain netting at this benign location, WSI would be forced to maintain safety netting around all inherent dangers and risks near beginner and intermediate level ski runs over 3,000 acres. Even if it were possible to safely barricade all inherent dangers and risks on a ski mountain (it is not), the skiing public would be deprived of the main attractions of the sport of skiing – the ability to make their own choices and enjoy the inherent dangers and risks of skiing. § 23-2-731, MCA.

The Act is intended to discourage, and under the specific circumstances, defeat Mullee's claim.

5. Mullee's Out-of-State Legal Authority Does Not Support His Position.

Mullee cites out-of-state cases for the premise that other jurisdictions have found a duty of reasonable care "regarding fencing on ski trails." These cases provide no useful guidance. The Act and Montana legal authority guide the Court's

analysis, not non-Montana cases applying different states' skier responsibility statutes or common law. Moreover, none of these cases from outside jurisdictions support Mullee's argument that WSI owed a duty to have fencing designed to "catch" him after he lost control.

In *Shaheen*, the plaintiff was injured when she collided with a fence. The Court held that there was a question of whether plaintiff's failure to stay in control or a breach of the ski area's duty to warn of allegedly unsafe fencing was the cause of the accident. *Shaheen*, 85 Ohio App. 3d at 288; 619 N.E.2d at 1039. Here, Mullee does not allege that WSI failed to warn him.

In *Brown,* the plaintiff skier suffered serious injuries when he collided with a metal fence post embedded in concrete that supported a snow fence. *Brown*, 97 Wn. App. At 520, 527, 984 P.2d at 449, 453. *Brown* held that if a ski area operator introduces a dangerous latent condition, such as fence posts and concrete obscured by snow that enhances the risk of skiers, then it may be negligent. In contrast, Mullee lost control due to his own conduct, traveling off-trail and contacting inherent dangers and risks that were open and obvious, and that he knew to avoid.

In *Milus v. Sun Valley Co*., the issue was not whether a duty existed, but whether the ski area operator breached a statutory duty regarding whether the yellow padding around snowmaking equipment constituted a warning implement as

required under Idaho law. No. 49693-2022, 2023 Ida. LEXIS 162, at *12 (Dec. 19, 2023).

B. The Court Correctly Found That A Plain Reading Of The Montana Skier Responsibility Act Bars Mullee's Complaint.

Decades ago, the Montana Legislature found that "skiing is a major recreational sport and a major industry" in the state of Montana and that "among the attractions of the sport are the inherent dangers and risks of skiing." § 23-2-731, MCA. The Act's stated purpose is to "maintain the economic viability of the ski industry by discouraging claims based on damages resulting from the inherent dangers and risks of skiing." § 23-2-731, MCA.

The legal principles informing resolution of this appeal are plainly stated in § 23-2-736(4), MCA: "[a] skier shall accept all legal responsibility for injury or damage of any kind to the extent that the injury or damage results from inherent dangers and risks of skiing."

"Inherent dangers and risks of skiing" are defined generally as "those dangers or conditions that are part of the sport of skiing," including, in pertinent part:

> (b) snow conditions as they exist or as they may change, including ice, hardpack, powder, packed powder, wind pack, corn snow, crust, slush, cut-up snow, and machine-made snow of any depth or accumulation, including but not limited to any depth or accumulation around or near trees or snowmaking equipment;
>
> …

(d) collisions with natural surface or subsurface conditions, such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, trees, and other natural objects;

…

(f) variations in steepness or terrain, whether natural or the result of slope design, snowmaking, or snow grooming operations, including but not limited to roads, freestyle terrain, ski jumps, catwalks, and other terrain modifications;

…

(i) the failure of a skier to ski within that skier's ability;

§ 23-2-702(2), MCA.

Montana law also imposes duties on skiers relative to the inherent danger and risk of skiing within their abilities:

(1) A skier has the duty to ski at all times in a manner that avoids injury to the skier and others and to be aware of the inherent dangers and risks of skiing.

(2) A skier:

(a) shall know the range of the skier's ability and safely ski within the limits of that ability and the skier's equipment so as to negotiate any section of terrain or ski slope and trail safely and without injury or damage. A skier shall know that the skier's ability may vary because of ski slope and trail changes caused by weather, grooming changes, or skier use.

(b) shall maintain control of speed and course so as to prevent injury to the skier or others.

(c) shall abide by the requirements of the skier responsibility code that is published by the national ski areas association ["NSAA Skier Responsibility Code"]…

§§ 23-2-736(1), (2)(a), (2)(b), and 2(c), MCA.

It is undisputed that Mullee's accident resulted only from the inherent dangers and risks of skiing and his breach of duties. *See* §§ 23-2-702(2)(b), (d), (f) and (i), MCA; §§ 23-2-736(1), (2)(a), (2)(b), and 2(c), MCA; *Kopeikin*, 90 F. Supp. 3d at 1107-08. Accordingly, the District Court correctly found that a plain reading § 23-2-736(4), MCA, would bar Mullee's claims and Mullee bears all legal responsibility for his injuries. **DKT. 67 at 4-5.**

Because WSI had no duty to "catch" Mullee after he fell, the District Court correctly ruled that the Act foreclosed Mullee's negligence claim because his injuries were sustained as the result of the inherent risks and dangers of skiing for which Mullee bears all legal responsibility. **DKT. 67 at 4 – 5.**

II. The Court Did Not Abuse Its Discretion In Precluding Dr. Cameron-Donaldson's Testimony Regarding Future Medical Treatment

Non-treating, retained expert Dr. Cameron-Donaldson's two-page report included only three opinions regarding potential future care: (1) Mullee is at "significant risk" for needing removal of hardware in the socket of his hip followed by a left hip replacement; (2) Mullee "may also require" a future revision left hip replacement; and (3) Mullee's right hip arthritis, which may have developed regardless of Mullee's injury to his left hip and pelvis, "will likely progress at an accelerated rate," and Mullee "may require" a right hip replacement 5-10 years

sooner that he would have without the accident. **DKT. 23, DBD001948 – 1949.**

Expert medical testimony that does not meet the "more likely than not" standard is inadmissible. *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 23, 410 Mont. 239, 518 P.3d 840 (expert medical testimony that an act "could, may, or might have possibly" caused or is the "suspected or assumed cause" of a condition is "neither competent nor relevant proof of causation."); *see also State v. Vernes*, 2006 MT 32, ¶¶ 15-19, 331 Mont. 129, 130 P.3d 169 (affirming exclusion of expert medical testimony that "a definite possibility existed"); *Butler v. Domin*, 2000 MT 312, ¶¶ 13-15, 302 Mont. 452, 15 P.3d 1189 (affirming exclusion of expert medical testimony that defendant's act "could have caused" the claimant's injury); and *Nelson v. Mont. Power Co*., 256 Mont. 409, 412, 847 P.2d 284, 286 (1993) (expert testimony of a "suspicion" regarding what "possibly" caused an injury was not sufficient).

Dr. Cameron-Donaldson's opinions that Mullee is at "significant risk" for or "may require" future treatment do not meet the "more likely than not standard" required by Montana law. *Kostelecky*, ¶ 23; *Vernes*, ¶¶ 15-19; *Butler* ¶¶ 13-15; and *Nelson*, 256 Mont. at 412; **DKT. 70.**

Dr. Cameron-Donaldson's boilerplate language at the end of her report – "[t]his is my opinion to a reasonable degree of medical certainty" – does not save her proffered opinions from exclusion. This statement amounts to: "to a reasonable

degree of medical certainty, maybe Mullee will need future surgeries." Dr. Cameron-Donaldson's insertion of this boilerplate language establishes she is aware of the legal standard for admissibility of medical causation testimony and intentionally did not use it.

On February 16, 2024, with his reply brief, Mullee submitted a defective "affidavit" for Dr. Cameron-Donaldson attempting to revise her opinions two months after the December 23, 2023, expert disclosure deadline[4]. **DKT. 44 at 7-9.** The District Court did not abuse its discretion when it denied Mullee's tardy effort to disclose new and revised expert testimony with a defective "affidavit."

"The underlying policies requiring expert disclosures are to eliminate surprise and to promote effective cross-examination of expert witnesses." *Whitefish Credit Union v. Prindiville*, 2015 MT 328, ¶ 29, 381 Mont. 443, 362 P.3d 53. For this reason, Judge Eddy, in the Rule 16 Scheduling Conference, warned parties to fully disclose their experts because the Court will read the expert disclosure and hold the parties to them. **DKT. 70 at 2**.

[4] Dr. Cameron-Donaldson's February 16, 2024, "affidavit" fails to meet the legal requirements for an affidavit because there is no notary stamp or indication on the "affidavit" that she swore to its validity before a person who had authority to administer an oath or affirmation. *McDermott v. Carie*, 2005 MT 293, ¶ 26, 329 Mont. 295, 124 P.3d 168. Her "affidavit" also failed to meet the requirements for an unsworn declaration because it was not subscribed by her as true under "penalty of perjury" as required by § 1-6-105, MCA. Accordingly, it is legally defective and inadmissible.

This Court has also routinely held that expert opinions disclosed after the scheduling order's expert disclosure deadline should be excluded. *See Whitefish Credit Union*, ¶ 29; *Billings Clinic v. Peat Marwick Main & Co*., 244 Mont. 324, 342–43, 797 P.2d 899, 911 (1990); and *Rocky Mountains Enterprises, Inc. v. Pierce Flooring*, 286 Mont. 282, 298-99, 951 P.2d 1326, 1336-37.

Based on Dr. Cameron-Donaldson's deficient opinions, WSI made informed decisions not to obtain rebuttal opinions or depose Dr. Cameron-Donaldson. The parties completed discovery and WSI filed its motion *in limine* without prior disclosure of new opinions. Dr. Cameron-Donaldson's "affidavit" surprised WSI and deprived WSI of opportunities to effectively rebut and cross-examine Dr. Cameron-Donaldson.

Mullee incorrectly relied on *Henricksen*, which analyzed the exclusion of an expert as sanctions for discovery abuse. *Henricksen*, ¶¶ 56-59. The District Court did not sanction Mullee. Rather, the District Court correctly held Mullee to his expert disclosure and precluded Dr. Cameron-Donaldson's opinions that did not meet the standard for admissibility. *Kostelecky*, ¶ 23. This was not an abuse of discretion. The District Court's Order should be affirmed[5].

[5] Because Dr. Cameron-Donaldson's opinions regarding future medical treatment were properly excluded, Reg Gibbs' and Ann Adair's opinions based on Dr. Cameron-Donaldson's opinions on future treatment were properly excluded.

III. The District Court Correctly Denied Mullee's Motion For Summary Judgment On The Issues Of Mullee's Injuries And Certain damages.

The District Court correctly denied Mullee's Motion for Summary Judgment seeking an Order that the ski accident caused all of Mullee's claimed injuries, including past and future medical expenses.

Mullee misconstrued *Kostelecky* and *Hinkle v. Shepherd Sch. Dist*., 2004 MT 175, ¶¶ 35-38, 322 Mont. 80, 93 P.3d 1239, when he concluded that expert medical testimony is required by the defense to challenge causation of injuries or necessity/reasonableness of medical treatment and costs. Mullee's assertion of a non-existent legal principle is transparently intended to invert the burden of proof in personal injury cases. In conformance with the burden of proof, these cases set forth the requirement that plaintiffs must have qualified medical expert testimony to prove their claims. *Id.* These cases contain no such requirement for defendants. The distinction between the evidentiary requirements for plaintiffs and defendants is necessary because plaintiffs have "the burden of presenting sufficient evidence to prove each of the breach, causation, and damages elements of a negligence claim by a preponderance of the evidence." *Kostelecky*, ¶¶ 20-21.

Mullee's appeal also fails because causation of past and future medical treatment in his motion for summary judgment was only supported by Dr. Cameron-Donaldson's unsworn expert report. A jury is not bound by an expert witness' opinion and is entitled to disregard expert opinion testimony if it finds the testimony

unpersuasive, even if it is not directly controverted. *Magart v. Schank*, 2000 MT 279, ¶ 10, 302 Mont. 151, 13 P.3d 390; Mont. Pattern Jury Instructions (MPI) 1.12.

Defendants are entitled to challenge whether plaintiffs have met their burden of proof through evidence and argument, including cross-examination of any admissible medical experts and treating providers at trial. *E.g., Clark v. Bell*, 2009 MT 390, ¶¶ 20–27, 353 Mont. 331, 220 P.3d 650; *Ele v. Ehnes*, 2003 MT 131, ¶¶ 10–13, 30 – 35, 316 Mont. 69, 68 P.3d 835. The efficacy of defendants' challenges to plaintiffs' medical and damage evidence are within the province of the jury to resolve. *Clark*, ¶ 27; *Ele*, ¶¶ 30–35.

Montana law requires that damages be reasonable and the jury determines the credibility and weight of testimony and reasonableness of damages under the circumstances. *Meek v. Mont. Eighth Judicial Dist. Court*, 2015 MT 130, ¶ 22, 379 Mont. 150, 349 P.3d 493 (citing § 27-1-302, MCA); *State v. Shields*, 2005 MT 249, ¶ 19, 328 Mont. 409, 122 P.3d 421; *Magart*, ¶¶ 15-16; *Clark*, ¶ 27.

Finally, Dr. Cameron-Donaldson's unsworn expert report is inadmissible hearsay and insufficient evidence to support Mullee's motion for summary judgment. *Alfson v. Allstate Prop. & Cas. Ins. Co*., 2013 MT 326, ¶¶ 11 – 14, 372 Mont. 363, 313 P.3d 107 (citing Mont.R.Civ.P. 56 and Mont.R.Evid. 901)); Mont.R.Evid. 801-805; *Reese*, ¶ 24; *Pannoni*, ¶¶ 46, 59; *Reckley v. Cmty. Nursing, Inc.*, No. CV 19-119-M-KLD, 2021 WL 3861270, at *1 (D. Mont. Aug. 30, 2021).

The District Court correctly denied Mullee's motion for summary judgment.

IV. The District Court Did Not Abuse Its Discretion In Denying Mullee's Motion to Exclude Dr. Scher.

Relative to Mullee's motion to exclude Dr. Irving Scher, the District Court generally denied Mullee's motion, "subject to development of testimony at trial." **Doc. 73, p. 2.** WSI specifically identified the subject matter in which Dr. Scher would testify, the "substance" of Dr. Scher's expected facts and opinions, and a "summary" of the grounds for his opinions[6]. **DKT. 24 at 13 – 21.** WSI's disclosure of Dr. Scher satisfied the requirements of Rule 26, Mont.R.Civ.P. Mullee's appeal fails because experts under Montana law are not required to disclose the underlying facts or data of their opinions.

Rule 26, Mont.R.Civ.P., requires a party to: (1) state the subject matter of the expert's testimony; (2) the "substance" of the expert's expected facts and opinions; and (3) a "summary" of the grounds for each opinion. *Sharbono v. Cole*, 2015 MT 257, ¶ 16, 381 Mont. 13, 355 P.3d 782. The Montana Rules of Civil Procedure do not require detailed expert disclosures or a separate report containing "the facts or

[6] WSI adequately responded to Appellant's discovery requests, which never requested data, measurements or calculations. WSI objected to portions of Plaintiff's Interrogatory and Request for Production that sought information protected from disclosure pursuant to Rule 26(b)(4)(B), Mont.R.Civ.P., and as to the phrase "statements," which WSI contended was vague and ambiguous. **DKT. 37 at 40-44.** The term "statements" cannot be read to include Dr. Scher's underlying data, measurements or calculations, as Mullee now asserts.

data considered by the witness in forming them," as required by Rule 26, Fed.R.Civ.P. *Sharbono*, ¶¶ 16, 37; *Advisory Committee Notes to Rule 26(b*).

Further, Rule 705, Mont.R.Evid., provides that an "expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." Under Rule 705, an expert's opinion testimony is admissible, "irrespective of what underlying facts or data may have buttressed his opinion." *Wollaston v. Burlington N.*, 188 Mont 192, 201-202, 612 P.2d 1277, 1282 (1980). "It is then a matter for a cross-examiner to determine the underlying facts based on which the expert bases his opinion and expose the weaknesses, if any, in those underlying facts for the consideration of the jury." *Id*.

Appellant's reliance on *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., does not inform this Court's decision. 2007 MT 183, 338 Mont. 259, 165 P.3d 1079. *Sunburst*, involving Texaco disclosing 67 experts without their qualifications and failing to specify the facts and opinions of which the experts would testify, is factually distinguishable from WSI's eight-page disclosure of Dr. Scher and provision of his CV, testimony list, and fee schedule. *Sunburst*, ¶ 20; **DKT. 24 at 13 – 21.**

"The underlying policies of Rule 26, Mont.R.Civ.P., are to eliminate surprise and to promote effective cross-examination of expert witnesses." *Hawkins v.*

Harney, 2003 MT 58, ¶ 21, 314 Mont. 384, 66 P.3d 305 (citing *Smith v. Butte-Silver Bow County*, 276 Mont. 329, 333, 916 P.2d 91, 93 (1996)). When analyzing the sufficiency of discovery responses or expert witness disclosures, the court is to look to this underlying policy. *Hawkins*, ¶ 24. A factor in determining prejudice is whether the party could have obtained the allegedly deficient information by deposing the expert. *Sharbono,* ¶ 12.

Mullee incompletely cited portions of Dr. Scher's disclosure and took them out of context. A complete review of Dr. Scher's disclosure, which the District Court conducted, establishes WSI sufficiently disclosed Dr. Scher's subject matter areas, the substance of facts and opinions, and a summary of the grounds. Dr. Scher's opinions are not a surprise to Mullee and his disclosure is more than sufficient to promote effective cross-examination of Dr. Scher.

The District Court did not abuse its discretion when it denied Mullee's Motion to exclude Dr. Scher.

Mullee ignored reasonable opportunities to depose Dr. Scher. The expert disclosure deadline was December 22, 2023. **DKT. at 21.** Discovery closed 25 days later, on January 17, 2024. ***Id.*** Trial was scheduled for the civil jury term commencing September 3, 2024. ***Id.*** WSI's counsel promptly informed Mullee's counsel that Dr. Scher would not be available for his deposition until at least February. **DKT. 37 at 33, 36**. Dr. Scher additionally had two multi-week trials in

February, as well as a multi-week pre-scheduled work trip to Europe in March, of which WSI's counsel promptly informed Mullee's counsel. **DKT. 37 at 32**. Dr. Scher could not commit to dates for his deposition during trials in which he did not know when he may be required to testify or be available to consult with attorneys, or when he was in Europe.

On January 25, 2024, WSI's counsel explained why Dr. Scher could not commit to any dates certain in February and offered several potential date ranges for Dr. Scher's deposition: February 29, March 1, and March 5 (subject to potential unavailability due to Dr. Scher's appearance in trial); and March 26 – 29 and April 2 – 3. **DKT. 37 at 32**. These available dates in March and April were five months before the civil jury term in this case. Mullee's counsel never responded to this email and refused to depose Dr. Scher. **DKT. 46.** Mullee's failure to respond to WSI's counsel's email of available dates to depose Dr. Scher in March and April is fatal to Mullee's appeal.

CONCLUSION

Appellee WSI respectfully requests that this Court affirm the District Court's Order RE: Defendant's Motion for Summary Judgment (**DKT. 67**), Order RE: Plaintiff's Motion for Summary Judgment on Damages (**DKT. 69**), Order RE: Defendant's Motion to Exclude Dr. Donaldson, Reg Gibbs and Ann Adair (**DKT. 70**), and Order RE: Plaintiff's Various Motions *in Limine* (**DKT. 73**).

DATED this 4th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Answer 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 9527, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 4th day of October, 2024.

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I, Christopher Cameron Di Lorenzo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-04-2024:

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