FILED
01/21/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
~~Case Number:~~ DA 24-0668

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 24-0668

TRISTIN FAHRNOW,

Appellant,

v.

E-5 OILFIELD SERVICES, LLC and EIKER, INC.,

Appellees.

APPELLANT'S OPENING BRIEF

On Appeal From
The Montana Seventh Judicial District Court, Richland County
The Honorable David Cybulski, Presiding

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STATEMENT OF ISSUES

1. Whether the District Court erred in granting summary judgment in E-5 Oilfield Services, LLC's ("E-5") and Eiker, Inc.'s ("Eiker"). favor.

2. Whether the District Court erred in denying Tristin Fahrnow's ("Fahrnow") motion for summary judgment regarding E-5's and Eiker's liability.

3. Whether the District Court abused its discretion in refusing to sanction E-5 and Eiker for spoliation of evidence.

4. Whether the District Court abused its discretion in its order awarding E-5 $57,605.88 and Eiker $13,565.42 in costs.

5. Whether the District Court abused its discretion in denying Fahrnow's motion to compel, granting E-5's cross-motion for protective order, and awarding E-5 its attorney fees for the cross-motion.

STATEMENT OF THE CASE

On November 8, 2018, Fahrnow suffered severe and permanent injuries after being run over by a hot-oil truck driven by Greg Brown ("Brown"), who was working for E-5 and Eiker. On November 2, 2021, Fahrnow filed a lawsuit against E-5, and, on December 20, 2023, Fahrnow filed his second amended complaint to substitute Eiker for a Doe after the District Court entered an order allowing such.

On September 13, 2024, Fahrnow filed a motion for summary judgment on the issue of liability and spoliation of evidence by E-5 and Eiker. On September 13, 2024, E-5 and Eiker filed their respective motions for summary judgment. On March 4, 2024, Fahrnow filed a motion to compel E-5 to answer an interrogatory, to which E-5 opposed and filed a cross-motion for protective order.

On September 9, 2024, the District Court entered an order denying Fahrnow's motion to compel and granting the cross-motion for protective order. On October 15, 2024, the District Court orally denied Fahrnow's motion for summary judgment and spoliation motions at the final pretrial conference. On October 17, 2024, the District Court held a hearing on E-5's and Eiker's motions for summary judgment. On October 17, 2024, the District Court granted Eiker's motion for summary judgment. On October 18, 2024, the District Court granted E-5's motion for summary judgment. On November 6, 2024, the District Court awarded E-5 and Eiker their respective costs and awarded E-5 its attorney fees for the cross-motion

for protective order.

Fahrnow has appealed the judgments and the following orders: Order (November 6, 2024); Order on E-5 Oilfield Services, LLC's Motion for Summary Judgment; Order on Eiker's Motion for Summary Judgment; Order on Fahrnow's Motion for Summary Judgment on Liability and Spoliation of Evidence and Motion re: E-5's and Eiker's Spoliation of Evidence on Greg Brown's Scope of Employment; the Order on Plaintiff's Motion to Compel Defendant E-5 to Answer Interrogatory #11 and Defendant E-5 Oilfield's Cross-Motion for Protective Order.

This timely appeal ensues.

STATEMENT OF FACTS

I. Factual Background Regarding Liability

A. The Two Collisions.

This matter concerns severe and ongoing injuries Fahrnow suffered as a result of being run over by a hot-oil truck on November 8, 2018 around 3:30pm at the intersection of Highway 23 and County Road 350 near Sidney, Montana. (Fahrnow Motion for Summary Judgment on Liability and Spoliation of Evidence ("Fahrnow MSJ") at Exh. A and B).

Prior to the collisions, it was apparent that the roads were icy that day, including that intersection. (*Id.* at Exh. C at 129:12-19, Exh. D at 12:01-07, 38:12-39:01, Exh. E at 18:11-20, Exh. K at 45:03-04). It is generally understood by people in the area that the intersection is slicker than most areas from ice. (*Id.* at Exh. D at 40:04-10). Fahrnow was driving a work pickup truck with his co-worker, Jordan Harrell ("Harrell"). (*Id.* at Exh. C at 129:06-19, 141:09-20). Fahrnow was driving on CR350 southbound and approaching the intersection of Highway 23, and he maintained control of the truck. (*Id.* at Exh. D at 39:08-22). Fahrnow and Harrell stopped at the stop sign, waiting to turn onto Highway 23. (*Id.* at Exh. D at 12:08-12, Exh. F at 69:01-10).

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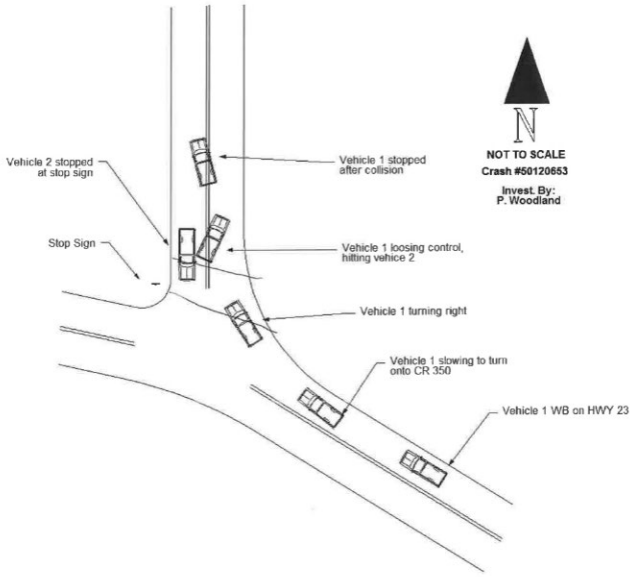
Joseph Averett ("Averett"), a then-employee of Defendant XTO, Inc.,[1] was driving too fast in icy conditions while turning from Highway 23 to CR350, lost control of his vehicle and crashed his vehicle into the truck Fahrnow had stopped at the stop sign. (*Id.* at Exh. C at 128:11-16, 138:03-09, 140:17-24, Exh. D at 13:11-16, 42:15-18, Exh. E at 23:05-25). Below is the diagram which generally shows how the crash occurred:



(*Id.* at Exh. A at p. 4). Averett confirmed the above-diagram is consistent with his memory of the crash. (*Id.* at Exh. F at 71:16-21). Averett also confirmed that he was following another truck, which also made the turn on CR350, and ***did not lose control***. (*Id.* at Exh F. at 76:12-25).

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[1] Fahrnow and XTO reached a settlement.

Fahrnow, Harrell and Averett all exited their vehicles to assess the damage. (*Id.* at Exh. C at 141:09-20, 142:22-24, Exh. D at 16:02-15, Exh. F at 94:01-07). Averett left the XTO vehicle either in the middle of CR350 or the northbound lane. (*Id.* at Exh. C 151:25-152:04, Exh. F at 71:22-72:04, 94:12-19). Regarding Fahrnow's truck there was no immediate area for Fahrnow to park the vehicle off the road. (*Id.* at Exh. C at 151:03-11). This is clear from photographs taken by E-5's expert, Martin Randolph, which show no shoulder and a drop off near the stop sign:

(Fahrnow Opposition to E-5 Motion for Summary Judgment at Exh. 1 at Exh. D).

Fahrnow and Harrell did not immediately move the truck because it was unclear the extent of damage and if the truck could move because it had a trailer hitched near the point of impact. (Fahrnow MSJ at Exh. C at 149:24-150:17). Fahrnow kept the truck in the southbound lane of CR350 at the stop sign, which was the appropriate lane for the truck. (*Id.* at Exh. C at 145:22-146:01, 151:19-24, Exh.

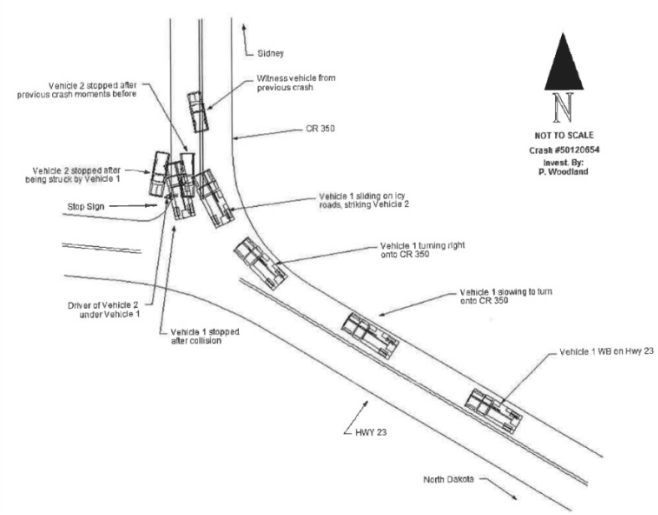
D at 22:12-15, Exh. E at 34:09-16 (Trooper Woodland noting that Fahrnow's truck was "legally stopped in traffic")). Harrell testified that leaving the truck there "seemed completely safe" at the time. (*Id.* at Exh. D at 27:18-20).

At that time, Brown was driving a hot-oil truck for both E-5 and Eiker too fast in icy conditions while turning from Highway 23 to CR350, lost control of his vehicle, and crashed his vehicle into Fahrnow dragging Fahrnow 20 feet. (*Id.* at Exh. C at 141:22-142:01, Exh. D at 23:08-15). Fahrnow testified:

> [A]fter we decided to move the truck off to the side of the road, I was walking back up to the cab, and as I was going to step into it is when that hot oil truck tried to make that corner, and he honked his horn and gave me enough time to turn to my right and get out of in between the door and the frame of the pickup, and he struck me. I ended up underneath of it, and … he pushed me and the work truck into the ditch.

(*Id.* at Exh. C 147:02-11).

Harrell did not see the E-5/Eiker truck coming and only heard the horn a split-second before the crash. (*Id.* at Exh. D at 16:12-15, 18:14-23).



(*Id.* at Exh. B). Brown testified the above-diagram is substantively consistent with his recollection of the second crash. (*Id.* at Exh. G at 291:03-296:08). Brown testified that he saw the trucks in the road after the first crash but he thought they were only stopped to chat, even though Fahrnow and Harrell were out of their vehicle

and Averett's truck was beyond Fahrnow's truck in the middle of the road. (*Id.* at Exh. G at 259:03-11). Brown claims he did not see that as a "[r]ed flag." (*Id.* at Exh. G at 265:19-22). "[V]isibility is not an issue" at this stretch of roadway which was clear for a "quarter mile". (*Id.* at Exh. D at 26:11-15, Exh. G at 268:14-21).

Fahrnow, Harrell, and Averett recalled that only 2-5 minutes had passed between the two collisions. (*Id.* at Exh. C at 145:08-11, Exh. D at 25:02-07, Exh. F at 96:25-97:06). Averett recalled about 10 vehicles had driven by in between the two collisions, including at least one roustabout truck that turned onto CR350 without losing control. (*Id.* at Exh. F at 145:06-22).

Trooper Perry Woodland testified all drivers who were making the turn onto CR350 at that time should have "greatly reduced" their speed and Brown was driving too fast for conditions. (*Id.* at Exh. E at 25:20-26:03, Exh. B). Fahrnow retained accident reconstructionist, Dr. Jay Przybyla, as a expert in this case, who opined Brown was traveling "at a speed of at least 20 – 29 mph" as he lost directional control, and the impact speed was "approximately 12 – 18 mph." (*Id.* at Exh. I at Exh. A at p. 3, 16). E-5 disclosed Randall Akers who testified Brown was travelling at speeds consistent with Przybyla's opinions. (*Id.* at Exh. J 80:02-81:06).

Brown testified that he was allegedly travelling "two miles an hour" or "[s]lower than a person walks" as he lost control and then struck Fahrnow. (*Id.* at Exh. G at 286:20-287:21, 341:21-342:10). Expert testimony established this is false.

(*Id.* at Exh. I at Exh. A at p. 19). Brown testified that when he hit his brakes, he realized that he had lost control of the truck. (*Id.* at Exh. G at 288:07-289:10, 326:18-22). This is contrary to Brown's written statement from the following day, which states he lost control when he turned and then later braked. (*Id.* at Exh. G at 345:12-349:02, Exh. H).

Paul Eiker ("Paul"), owner of E-5 and Eiker, checked "Yes" in the section that Brown was "Operating at improper speed" and paid the citations for Brown's driving without protest. (*Id.* at Exh. L, K at 63:08-64:22).

B. The Court's Order

Fahrnow and E-5 filed motions for summary judgment on the issue of liability. On October 15, 2024, the District Court orally denied Fahrnow's motion for summary judgment at the final pretrial conference. (Appendix at pp. 30-35 (11:17-16:17)). On October 16, 2024, E-5 submitted a proposed order to grant its motion for summary judgment. On October 18, 2024, the District Court entered an order granting E-5's motion for summary judgment, which was E-5's proposed order with legal citations omitted and a brief recap section. (Appendix at p. 3).

II. E-5's and Eiker's Spoliation of Evidence and Eiker's Employment of Brown

A. Data from the Hot-Oil Truck

Paul, upon learning of the collision, immediately "grabbed an accident report and took off from our shop and drove up there." (Fahrnow MSJ at Exh. K at 42:01-

04). Paul later reviewed the data from the hot oil truck, but E-5 nonetheless failed to preserve that data after Paul reviewed it. (*Id.* at Exh. K at 58:19-59:11). Paul recalls the data purportedly showed Brown to be driving at a "low speed", but could not clarify any more what a "low speed" was. (*Id.* at Exh. K at 60:17-25). A lay person without specific training, like Paul, could not reliably interpret the data. (*Id.* at Exh. J at 45:11-21, Exh. I, ¶ 5). All the documents and agreements for the vehicle tracking for E-5's trucks were through Eiker. (Fahrnow Motion re: Spoliation re: Greg Brown Employment ("Motion re: Spoliation") at Exh. G).

On November 12, 2018, E-5/Eiker submitted the claim to the insurer. (Fahrnow MSJ at Exh. K at 89:23-07, Exh. M). On June 5, 2019, Fahrnow's counsel contacted E-5, through its insurer, to provide notice of representation. (*Id.* at Exh. P).

E-5 and Eiker no longer have any data from the hot-oil truck from that day and allowed it to be destroyed. (*Id.* at Exh. Q, Exh. K at 58:09-14, Exh. R). Co-Defendant XTO preserved data from its truck that day. (*Id.* at Exh. N, Exh. O).

B. Brown's Personnel File & Eiker's Employment of Brown

On August 7, 2023, Fahrnow served his second set of discovery on E-5, which sought employment documents for Brown. (Fahrnow Motion to Amend at Exh. D). E-5 produced employment documents between Brown and Eiker ***only***, which include an employment agreement between Brown and Eiker and acknowledgments

and policies Brown signed using Eiker forms. (Motion re: Spoliation at Exh. A, Exh. H at 29:17-30:11). E-5 also produced an Accident Investigation Report regarding the crashes that injured Fahrnow using Eiker forms. (Fahrnow Motion to Amend at Exh. E). On the day of the incident, Brown submitted to US DOT alcohol testing, and on the form signed by Brown, "Eiker Inc." is named as Brown's employer at the time, and Brown certified that "the identifying information provided on the form is true and correct." (Motion re: Spoliation at Exh. B).

E-5 has no documents in its possession regarding Brown's employment, compared to Eiker. (*Id.* at Exh. C). Paul testified that Brown completed an employment application when he purportedly transferred employment from Eiker to E-5. (*Id.* at Exh. I at 29:16-24). The documents of Brown's employment at E-5 are "missing" and E-5 and Eiker have no documentation of Brown leaving work at either company. (*Id.* at Exh. I at 29:16-24, 31:12-21, Exh. H at 19:17-21:09). Both Eiker and E-5 have the same duties under federal regulations for hiring employees and maintaining a "driver qualification file". (*Id.* at Exh. I at 33:09-34:10); 49 CFR 391.23, 40.25. Brown's employment file at E-5 would have been physically in a "filing cabinet". (*Id.* at Exh. I at 34:15:18, Exh. H 19:12-20:19). If an employee was transferred from Eiker to E-5, the employment file would be split into two but maintained in the same place and filing cabinet. (*Id.* at Exh. I at 35:03-11).

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C. The Court's Order

On September 13, 2024, Fahrnow his Motion for Spoliation re: Brown's Employment file and a Motion for Summary Judgment on Liability and Spoliation regarding the Black Box data. On September 13, 2024, Eiker filed a motion for summary judgment. On October 15, 2024, the District Court orally denied Fahrnow's motions regarding spoliation at the final pretrial conference. (Appendix at pp. 30-36 (11:17-17:02)). On October 16, 2024, Eiker submitted a proposed order. On October 17, 2024, the District Court entered an order granting Eiker's motion for summary judgment, which was E-5's proposed order with legal citations omitted. (Appendix at p. 12).

III. Order on Costs

On October 22, 2024, E-5 and Eiker filed bills of costs. E-5 sought $57,605.88 in costs without any supporting documentation, and Eiker sought $13,565.43 in costs with attached invoices. On October 25, 2024, Fahrnow filed timely motions to tax and objections to the bills of costs. The vast majority of the costs are not recoverable under Montana law.

After the briefing on the bill of costs was complete, Fahrnow learned that E-5 had not, in fact, incurred Dr. Vadim Tsvankin's $2,000 deposition fee (which was already objected-to for other reasons) despite E-5's counsel's sworn statement the fee was incurred. (Motion to Recover Tsvankin's Fees at Exh. A, Exh. B). On

November 4, 2024, Fahrnow filed a motion to recover Dr. Tsvankin's fees and seeking E-5 and Eiker to pay $3,716.00 to Dr. Tsvankin for the time they spent questioning Dr. Tsvankin at his deposition in accordance with the parties' practice with other experts. (*Id.*) This includes the unpaid $2,000 E-5 swore it incurred, but did not. (*Id.*)

On November 6, 2024, the District Court awarded E-5 and Eiker all their requested costs totaling $71,171.31, including, eg, the $2,000 fee for Dr. Tsvankin E-5 never paid. (Appendix at p. 1).

IV. Motion to Compel and Cross-Motion for Protective Order

A. Dr. Donaldson, Dr. Ericksen, and Fahrnow's Interrogatory No. 11.

Fahrnow retained orthopedic surgeon, Dr. Michelle Donaldson, as an expert. Consistent with Fahrnow's treating physicians, Dr. Donaldson opined that Fahrnow required a spinal cord stimulator and the incident caused Fahrnow to suffer (I) a permanent injury to his right lateral femoral cutaneous nerve and acute bilateral S1 radiculopathies; (II) a left knee medial meniscus injury; and (III) a right thigh seroma. (Motion to Compel at Exh. C at pp. 3-4). Dr. Donaldson also opined that Fahrnow will require a spinal fusion and subsequent treatment for adjacent segment disease which is 50% apportionable to the incident. (*Id.*)

Dr. Donaldson has worked as Chief of Orthopedics at Northern Montana Health Care since January 2013, previously worked as Chief of Orthopedics and

Chief of Surgery at Livingston Health Care from 2003 to the end of the 2012, and has been an orthopedic surgeon since 2001. (*Id.* at Exh. D).

E-5 retained orthopedic surgeon Dr. Ericksen who issued an IME report opining that Fahrnow suffered a right lateral femoral cutaneous nerve injury. Dr. Ericksen disputed whether the incident caused Fahrnow other injuries.

During the deposition of Dr. Donaldson, it became apparent that E-5 was questioning Dr. Donaldson's qualifications to provide her opinions in the report. (*Id.* at Exh. F. at 16:21-17:10, 148:04-149:09). Fahrnow then served E-5 with the following Interrogatory to which E-5 provided a deficient and evasive answer:

> **INTERROGATORY NO. 11:** Please identify any pertinent experience, credentials, employment history, training, expertise and/or education which you contend Dr. Donald Erickson has which you contend Dr. Michelle Donaldson does not have.
> **ANSWER:** E-5 objects to this interrogatory to the extent seeks information which is beyond the scope of permissible discovery under Rule 26, M.R.Civ.P. .... Dr. Donaldson likely has the necessary experience … to provide Botox injections, lip fillers, facials … but she is not competent or qualified to offer any of the unsupported and speculative opinions contained in her reports the Advocates Injury Attorneys paid for in this lawsuit.

(*Id.* at Exh. A). During the meet and confer process, E-5 confirmed that its position (amazingly) was Dr. Donaldson could only give opinions on aesthetic medicine. (*Id.* at Exh. B at pp. 19, 27). Inconsistent with E-5's position, ***Dr. Ericksen testified that Dr. Donaldson is qualified to give the opinions in her report***. (*Id.* at Exh. G at 32:11-33:14).

On March 4, 2024, Fahrnow filed a motion to compel E-5 to answer Interrogatory No. 11. On March 11, 2024, E-5 filed a motion *in limine* to exclude Dr. Donaldson which contained numerous misstatements, and on which the District Court never ruled. (Fahrnow's Response to Motion *in Limine* re: Dr. Donaldson). Since the briefing on the motions, E-5 continued to harass Dr. Donaldson and attempted to conduct discovery on matters in her life unrelated to her expert work such as a 30(b)(6) deposition of Northern Montana Health Care with 9 topics about Dr. Donaldson's "comings and goings" and a deposition of Dr. Donaldson's colleague in her side aesthetic medicine business. (Fahrnow Motion *in Limine* #11-19 at Exh. D-G).

B. District Court's Order

On September 9, 2024, the Court entered an order denying Fahrnow's motion to compel and granting E-5's cross-motion for protective order holding that expert discovery was limited to Mont. R. Civ. P. 26(b)(4). (Appendix at p. 18). The order did not contain any award of attorney fees and expenses.

On September 11, 2024, E-5 filed a Notice of Filing Affidavit of Fees and Expenses which requested attorney fees and expenses, without any supporting documentation. That same day shortly thereafter, Fahrnow filed a Motion for Clarification seeking an order clarifying that the Court did not award E-5's its fees and expenses. Local Rule 15(B) provides that any object to an affidavit for fees shall

be filed "[w]ithin fourteen (14) days thereafter allowing three (3) additional days for mailing". On September 30, 2024, Fahrnow filed his timely objection to the affidavit for fees and expenses.[2]

At the October 15, 2024 Final Pretrial Conference, the Court noted "as far as the motion for clarification, I don't think you get the attorney's fees for the protective order part of it". (Appendix at p. 30 (11:10-14)).

As noted above, E-5 included these fees and costs in its bill of costs. On November 6, 2024, the Court awarded E-5 its fees incorrectly reasoning Fahrnow waived his objection. (Appendix at p. 1).

[2] 17 days after September 11, 2024 was September 28, a Saturday, thus the objection was due on September 30, a Monday. *See* Mont. R. Civ. P. 6(a)(1)(C).

STANDARDS OF REVIEW

1. Summary judgment rulings are subject to de novo review. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶13, 411 Mont. 269, 525 P.3d 1183.

2. In reviewing a district court's award of costs, the standard of review is whether the district court abused its discretion. *Mularoni v. Bing*, 2001 MT 215, ¶22, 306 Mont. 405, 34 P.3d 497.

3. In reviewing a district court's order to grant or deny a motion to compel or protective order, the standard of review is whether the district court abused its discretion. *Lynes v. Helm*, 2007 MT 226, ¶29, 339 Mont. 120, 168 P.3d 651.

4. Imposition of spoliation or discovery sanctions is reviewed for abuse of discretion. *Walden v. Yellowstone Co.*, 2021 MT 123, ¶10, 404 Mont. 192, 487 P.3d 1.

SUMMARY OF ARGUMENT

First, the District Court erred in denying Fahrnow's Motion for Summary Judgment and granting E-5's Motion for Summary Judgment. Montana law is clear that Brown was negligent in losing control of his vehicle and running Fahrnow over in the lane of oncoming traffic as Fahrnow as reentering his vehicle. *See Craig*, *infra*.

Second, the District Court abused its discretion in failing to sanction E-5 and Eiker for the destruction of the truck data and Brown's employment documents.

Third, the District Court erred in granting Eiker's motion for summary judgment and finding, as a matter of law, Eiker was not liable under *respondeat superior* or an alter-ego of E-5.

Fourth, the District Court abused its discretion in awarding E-5 and Eiker an extraordinary $71,171.31 in costs; the vast majority of which are not recoverable under clear precedent.

Lastly, the District Court abused its discretion in denying Fahrnow's motion to compel, granting E-5's cross-motion for protective order, and awarding E-5's its attorney fees.

ARGUMENT

I. The District Court Erred in Granting E-5's Motion for Summary Judgment and Denying Fahrnow's Motion for Summary Judgment.

A. Legal Standard

Summary judgment is appropriate when the moving party demonstrates an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Albert v. City of Billings*, 2012 MT 159, ¶15, 365 Mont. 454, 282 P.3d 704 (citation omitted). Reasonable inferences are to be drawn in favor of the non-moving party. *Fisher v. Swift Transp. Co. Inc.*, 2008 MT 105, ¶ 12, 342 Mont. 335, 181 P.3d 601. "Negligence involves questions of fact, and where a factual controversy exists, summary judgment is never to be used as a substitute for trial." *Mead v. M.S.B., Inc.*, 264 Mont. 465, 470, 872 P.2d 782 (1994). "Only where reasonable minds cannot differ may the court, as a matter of law, decide the cause of an accident." *Id.* "When considering a summary judgment motion, a court may not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶16, 355 Mont. 243, 227 P.3d 601.

B. Applicable Statutes and Regulations

49 CFR §392.14 provides:

> Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice…adversely affect visibility or traction. Speed shall be reduced when

> such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued…

See also ARM 18.8.1502 (adopting 49 CFR parts 390 through 399). In addition, MCA §61-8-303(3) requires motorists to drive

> [I]n a careful and prudent manner and at a reduced rate of speed no greater than [was] reasonable and prudent under the conditions existing at the point of operation, taking into account the amount and character of traffic, visibility, weather, and roadway conditions.

MCA §61-8-302 imposes a duty on motorists to drive "in a careful and prudent manner that [did] not unduly or unreasonably endanger the life, limb, property, or other rights of a person entitled to the use of the highway." MCA §61-8-321 requires drivers to operate their vehicle "upon the right half of the roadway".

C. Summary Judgment Should Be Entered in Fahrnow's Favor on Liability

E-5 and Eiker are liable as a matter of law due to their employee's, Brown, inability to maintain control of the hot-oil truck and running Fahrnow (who was in plain view and in a lane of traffic Brown was not allowed to enter) over with the truck. *See Craig v. Schell*, 1999 MT 40, ¶¶32-34, 293 Mont. 323, 975 P.2d 820; *Walden,* ¶¶14-18.

> A driver should not be able to avoid the application of the negligence per se doctrine because he or she instinctively or, what we have labeled until now as "involuntarily," reacts to certain obstacles which should be anticipated, ***such as black ice***, animals running on the highway, or a chuckhole in the road. These hazards, in most instances, can be avoided when drivers proceed in a careful and prudent manner. However, if one drives too fast for the conditions, or fails to keep a proper lookout, such

> hazards may result in serious accidents…
> …
> Drivers constantly face such hazards and must be prepared to deal with them safely and not jeopardize other motorists or pedestrians…
> …
> We therefore conclude that the circumstances under which a driver may violate a motor vehicle statute and not be considered negligent as a matter of law are quite rare.

Craig, ¶¶32-34 (emphasis added) (finding District Court erred in denying plaintiff's motion for summary judgment). In *Walden,* this Court affirmed summary judgment where the defendant drove a vehicle into a herd of cattle on a roadway and despite defendant's claims that the cows were not in plain sight due to the hillcrest going into the sun. *Walden*, ¶¶12-18. The *Walden* Court held:

> Reasonable minds looking at the evidence could conclude only that Newell either: (a) failed to see a herd in plain sight or (b) failed to drive at a reduced rate of speed to accommodate limited visibility and safely deal with the potential for animals to be on the highway.

Id., ¶18.

Here, E-5/Eiker, through Brown's actions, are undisputedly liable for the crash. *See* 49 CFR §392.14; MCA §61-8-303(3); MCA §61-8-302; *Walden*; *Craig*. As a commercial driver, Brown had a duty to apply "[e]xtreme caution" (higher standard than the drivers in *Walden* and *Craig*). Fahrnow and the prior accident clearly were in "plain view" and the roads were clearly icy and slick. Moreover, Brown's testimony is undisputedly incredible, self-serving and contrary to expert opinions from both Fahrnow's and E-5's experts that he was driving at a speed well

in excess of what he testified. *See Dollar Plus Stores, Inc. v. R-Montana Assocs., L.P.*, 2009 MT 164, ¶29, 350 Mont. 476, 209 P.3d 216 (self-serving statements are insufficient to defeat summary judgment). Brown also drove his vehicle into the southbound lane, which he was not allowed to enter, and he struck Fahrnow and Fahrnow's vehicle ***which were in the appropriate lane of traffic before the stop sign***. *See* MCA §61-8-321.

For the reasons stated in Section II, *infra*, Eiker should also be held liable, in addition to E-5, as a matter of law for Brown's negligence.

D. No Reasonable Jury Could Find Fahrnow to Be Comparatively Negligent.

The District Court clearly erred in finding Fahrnow "extremely negligent" when, in fact, here no reasonable jury could find Fahrnow to even be slightly negligent. Fahrnow exited the vehicle after the first collision just like Harrell and Averett. At the time it was unclear to Fahrnow the extent of the damage to the vehicle and it was reasonable for him to check the damage before moving the vehicle; particularly because his truck had a trailer hitched which was near the point of impact. This is consistent with the Montana Driver Manual which instructs drivers to "Stop your vehicle at or near the accident site." (Fahrnow Resp. to E-5 Motion for Summary Judgment at Exh. 1 at Exh. B. at 78-79). In addition, the truck was always in the correct lane of traffic, legally stopped at the stop sign per Trooper Woodland, and at no time were Fahrnow or the truck in a lane or area where the E-

5/Eiker truck was allowed to drive. Fahrnow had no other reasonable place to place the vehicle before assessing the damage of the first crash as ahead was a dead end and the US Highway, and to the right was a drop off into a ditch. (*Id.* at Exh. D). Lastly, Fahrnow was only out of the vehicle for a couple of minutes and was in the process of returning to his truck when the E-5/Eiker truck ran him over.

In addition, the statutes E-5 relied upon to argue that Fahrnow as negligent are not applicable for countless reasons and/or were not the cause of his injuries as Fahrnow acted reasonably, practically, and would have been struck even if his truck and himself were off the road instead of stopped at the stop sign. *See e.g. Roe v. Kornder-Owen*, 282 Mont. 287, 293, 937 P.2d 39 (1997) ("After a review of the record, we conclude that [plaintiff] offered no evidence that [defendant's statutory violation]… actually contributed as a cause of the parties' collision."); *Dillard v. Doe*, 251 Mont. 379, 384, 824 P.2d 1016 (1992); *Griffel v. Faust*, 205 Mont. 372, 668 P.2d 247 (1983).

Thus, no reasonable mind could conclude that Fahrnow was negligent, and summary judgment should have been entered that Fahrnow was not comparatively negligent as a matter of law.

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II. The District Court Abused Its Discretion by Refusing to Sanction E-5 and Eiker for Spoliation of the Truck Data and Brown's Employment File.

A. Legal Standard

"[E]vidence spoliation is the material alteration, destruction, or failure to preserve evidence for use by an adversary in pending or future litigation." *Montana State University-Bozeman v. Montana First Judicial District Court*, 2018 MT 220, ¶22, 392 Mont. 458, 426 P.3d 541. The Montana Rules of Civil Procedure "give rise to a common-law duty to preserve evidence when a party in control knows or reasonably should know that existing items or information may be relevant to pending or reasonably foreseeable litigation." *Id*. ¶23. "The determination of when litigation became 'reasonably foreseeable' is an objective, fact-specific standard 'that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.'" *Id.*

> A party seeking the extreme sanction of precluding or truncating litigation on the merits has the burden of showing that: (1) the lost item or evidence was subject to a duty to preserve; (2) the other party intentionally, knowingly, or ***negligently*** breached the duty; and (3) the loss was sufficiently prejudicial to outweigh the overarching policy of M. R. Civ. P. 1 for resolution of disputed claims on the merits.

Id., ¶25 (emphasis added).

B. Truck Data

Here, the appropriate sanction for E-5's and Eiker's destruction of all information regarding the EDR data, telematics data, and black box data from the

hot-oil truck is default judgment against E-5 and Eiker. *See Montana State Univ.-Bozeman*, ¶¶25, 26 ("Whether material prejudice is presumed or shown, the resulting sanction imposed must be proportional to the prejudice"); *Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶20, 379 Mont. 314, 350 P.3d 52 ("this Court has upheld or imposed default judgment as an appropriate sanction for discovery abuses."). This is because (I) E-5/Eiker had a duty to preserve the information; (II) E-5/Eiker negligently destroyed this information despite this duty; and (III) the loss is unfairly prejudicial to Fahrnow. *See id.*

E-5/Eiker clearly had a duty to preserve the information, was well aware of potential for litigation, and even viewed the data after the incident. *See* MCA §61-12-1002 ("the data on a motor vehicle event data recorder is exclusively owned by the owner or owners of the motor vehicle"); *Walden*, ¶53 (this Court affirming spoliation sanctions where defendant's truck data was deleted). Importantly, the destruction of this important evidence is unfairly prejudicial to Fahrnow as Paul intends to mislead the jury that the data was favorable to E-5/Eiker, which warrants default judgment (i.e. liability established against E-5/Eiker) or (at the very least) another merits-based sanction. This information E-5/Eiker destroyed is crucial as it would have provided further proof of Brown's improper driving at the time he ran Fahrnow over.

The requested sanction has merit as Fahrnow already had proffered evidence

that E-5/Eiker are liable for Fahrnow's injuries as discussed in Section I, *supra*, and experts for Fahrnow (Przybyla) and E-5 (Akers) agree that Brown was travelling at a much higher rate of speed. *See Montana State Univ.-Bozeman*, ¶26 (party moving for spoliation sanctions must show more than "[m]ere speculation, conjecture, or possibility" that the destroyed evidence was materially favorable). Thus, E-5 and Eiker should be found liable as a matter of law for the destruction of the truck data.

C. Brown's Employment File

E-5 and Eiker again spoliated evidence by failing to preserve Greg Brown's physical employment file for E-5 and any transfer of employment, in full or in part, from Eiker to E-5. As a result of this destruction of evidence, the Court should find both E-5 and Eiker jointly and severally liable in the above-captioned matter. *See* Mont. R. Civ. P. 37(c)(1); *see Montana State Univ.-Bozeman*, ¶¶25, 26; *Spotted Horse*, ¶20. This is because (I) E-5 and Eiker had a duty to preserve the non-electronic information; (II) E-5 and Eiker destroyed this information despite this duty; and (III) the loss is unfairly prejudicial to Fahrnow. *See id.*

E-5 and Eiker clearly had a duty to preserve the information, which was in Brown's paper file at the time of the collision. This information E-5 and Eiker destroyed is crucial to this suit as it would be the only documentation clearly showing the scope of Brown's employment at the time of the collision and whether he was jointly employed at the time.

The requested sanction has merit as Fahrnow already had proffered evidence that E-5 and Eiker is liable for Fahrnow's injuries because:

(I) E-5 and Eiker are liable as a matter of law for the reasons discussed in *supra*.

(II) E-5 and Eiker are alter ego companies which should be held jointly liable as discussed in Section III, *infra.*

(III) Evidence exists that Brown was also employed by Eiker at the time of the incident. *See* Section III, *infra*.

See Montana State Univ.-Bozeman, ¶26 (party moving for spoliation sanctions must show more than "[m]ere speculation, conjecture, or possibility" that the destroyed evidence was materially favorable).

The District Court abused its discretion in denying Fahrnow's motion and request that both Eiker and E-5 be held jointly and severally liable as employers of Brown at the time of the incident. *See* Mont. R. Civ. P. 37(c)(1). This meaningful sanction is proportionate to the significance of the destroyed evidence.

III. The District Court Erred in Granting Summary Judgment in Eiker's Favor.

A. Eiker Failed to Establish It Was Not Liable under *Respondeat Superior* as a Matter of Law.

"Distinct from direct liability for an employer's own tortious conduct, the common law doctrine of respondeat superior imposes vicarious liability on employers for the tortious conduct of employees committed while acting within the

scope of their employment." *L.B. v. United States*, 2022 MT 166, ¶9, 409 Mont. 505, 515 P.3d 818; *Brenden v. City of Billings*, 2020 MT 72, ¶13, 399 Mont. 352, 470 P.3d 168. "The doctrine is designed to hold an employer liable for wrongful conduct by its employees." *L.B.*, ¶9. "For purposes of respondeat superior, a tortious act occurred within the scope of employment if the act was either expressly or implicitly authorized by the employer or was incidental to an expressly or implicitly authorized act." *Brenden*, ¶14. "'Scope of employment' is a commonly cited principle, but its contours are not rigidly defined." *L.B.*, ¶14. "Identifying whether a tortious act falls outside an employee's scope of employment is necessarily fact-intensive." *Id.* "The finder of fact may infer that an employee performed an expressly or implicitly authorized act in furtherance of the interest of the employer." *Brenden*, ¶15.

Importantly, "[o]nce an employment relationship is shown, the presumption is that it continues. The employer has the burden of proving either that the employment was terminated or that the authority of the employee was limited." MPI2d 10.09 (Vicarious Liability – Employment (Termination) (citing See *Healy v. Ginoff*, 69 Mont. 116, 131-32, 220 P. 539 (1923), cited with approval in *Exchange State Bank v. Occidental Elevator Co.*, 95 Mont. 78, 89, 24 P.2d 126 (1933)).

Here, at the very least, a genuine dispute of fact and presumption exists that Brown was still employed by Eiker at the time of the incident. Eiker conceded that

it hired him before the incident (Eiker Motion for Summary Judgment at SOF 12), but has failed to meet its burden showing that the employment relationship was terminated apart from self-serving testimony conclusorily stating it was. *See id.*; *Dollar Plus Store*, ¶29 (self-serving statements cannot support summary judgment arguments). In fact:

- The **only** produced employment documents for Brown are an employment agreement between Brown and Eiker and acknowledgments and policies Brown signed using Eiker forms. (Motion re: Spoliation at Exh. A, Exh. H at 29:17-30:11).
- Moreover, the incident report was completed using Eiker forms. On the day of the incident, Brown submitted to US DOT alcohol testing, and on the form, signed and certified by Brown, "Eiker Inc." is named as Brown's employer at the time. (*Id.* at Exh. B).
- E-5 has no documents in its possession regarding Brown's employment. *See* Factual Background §II(B), *infra*.

Thus, a genuine dispute of fact exists whether Brown was also employed by Eiker at the time of the crash, and the District Court erred in granting summary judgment in Eiker's favor.

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C. Eiker Is an Alter-Ego Company of E-5.

The District Court also erred in granting summary judgment in Eiker's favor because it had expressly allowed Fahrnow to pursue alter-ego theory after Fahrnow sought leave to file his second amended complaint. (December 20, 2023 Order at p. 1). Allowing Fahrnow to pursue the alter-ego theory was the law of the case, and Fahrnow properly substituted Eiker for a Doe. *See State v. Gilder*, 2001 MT 121, ¶9, 305 Mont. 362, 28 P.3d 488; *Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422, 708 P.2d 1014 (1985); *see also* M.C.A. § 25-5-103; *Molina v. Panco Const., Inc.*, 2004 MT 198, ¶9, 322 Mont. 268, 95 P.3d 687 (the fictitious defendant statute should be construed liberally). Moreover, Eiker did not raise this issue in its initial summary judgment brief, thus, it waived this argument. *See State v. West*, 2008 MT 338, ¶17, 346 Mont. 244, 194 P.3d 683.

A genuine dispute of fact exists that E-5 and Eiker are alter-ego companies which should be held jointly liable. *See Meridian Minerals Co. v. Nicor Minerals, Inc.*, 228 Mont. 274, 284, 742 P.2d 456 (1987). Many of the factors in favor of finding E-5 as an alter-ego of Eiker are present here such as: (I) Paul Eiker is the sole manager of both E-5 and sole shareholder of Eiker (*Id.* at Exh. K, Exh. L); (II) E-5 does not follow corporate formalities such as executing documentation to establish the member interest of the 5 Eiker family members (*Id.* at Exh. M); (III) Paul's personal funds are commingled and he uses his personal credit to assist Eiker

and E-5 as a guarantor on all financing for both companies (*Id.* at Exh. D-F); (IV) Eiker is also a guarantor on a promissory note to E-5 (*Id.* at Exh. F); (V) Eiker's and E-5's business records are located in the same place and share employees (*Id.* at Exh. I at 34:15-18, 35:03-11, Exh. H at 19:12-20:19); (VI) Eiker and E-5 both engage in trucking businesses performing work on the oilfields; (VII) Eiker and E-5 share the same address: 557 Road 26, Glendive, MT; and (VIII) Eiker, E-5 (i.e. 5 Eikers), and the Eiker family share similar names.

Thus, Eiker's motion should be denied because it is an alter-ego company of E-5.

IV. The Majority of the Costs Are Unallowable under Montana Law

Here, the District Court clearly abused its discretion by awarding E-5 and Eiker a combined $71,171.31 in costs; the majority of which are not recoverable under Montana Supreme Court precedent.

A. Legal Standard

> Not all litigation expenses that may properly be billed to a client may necessarily be recovered from the opposing party. Only those costs delineated in § 25–10–201, MCA, may be charged to the opposing party unless the item of expense is taken out of § 25–10–201, MCA, by a more specialized statute, by stipulation of the parties or by rule of court.

Thayer v. Hicks, 243 Mont. 138, 158, 793 P.2d 784 (1990). MCA §25-10-201(2) provides in pertinent part that: "A party to whom costs are awarded in an action is entitled to include in the party's bill of costs…(2) the expenses of taking

depositions". "While § 25–10–201(2), MCA, allows costs incurred in taking depositions, this subsection has been modified by case law." *Thayer*, 243 Mont. at 159. "Only the costs of depositions used at trial are recoverable." *Id.* Or costs of depositions that were "used by the court in a dispositive summary judgment motion." *Bing*, ¶53. "Deposition costs are not allowed when the purpose of the deposition is merely to assist the requesting party in compiling its case, and is taken only for the convenience of counsel." *Id.*; *Gilluly v. Miller*, 270 Mont. 272, 276, 891 P.2d 1147 (1995). If a party seeks to recover the costs of an audio visual or tape recording of a deposition, "the audio visual or tape recording must be used at trial before the expenses incurred in obtaining such a deposition may be charged to the opposing party." *Thayler*, 243 Mont. at 160.

B. E-5's Costs

The vast majority of costs E-5 has requested are ***not*** recoverable under clear Montana law, and the District Court ignored precedent and Fahrnow's properly asserted objections in awarding the costs. The sheer amount of $57,605.88 in requested costs is clearly an attempt to unfairly and improperly pile onto Fahrnow after the improper grant of summary judgment. The only allowable costs total $3,489.45.[3]

[3] No costs should be awarded to E-5 because summary judgment should not have been granted in its favor.

Fahrnow objected to the following costs:

No.	**Cost**	**Amount**	**Authority**
4.	Travel costs to attend Plaintiff's deposition	$339.23	Not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
5.	Cost of mediation	$1,703.33	Mediation fees are not recoverable costs under §201. *See Lazy JC Ranch, LLC v. Donnes*, 2014 MT 25N, ¶13 (Unpublished).
7.	Travel costs to attend Perry Woodland's deposition	$578.10	Not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
8.	Debra Sheppard Ph.D fee and deposition expenses	$2,800.00	This deposition was not used for summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
9.	Travel costs to attend Randy Jensen's deposition	$436.60	*Id.*
10.	Cost of Randy Jensen's deposition transcript	$887.22	This transcript was not used for summary judgment. *See Bing*, ¶53.
11.	Cost of videographer of Greg Brown's deposition	$191.33	The video was not used for summary judgment. *See Thayler*, 243 Mont. at 160.
12.	Travel costs to attend Greg Brown's deposition	$753.74	Not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
13.	Travel costs to attend depositions of Paul and Marlene Eiker	$524.62	This deposition was not used for summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover,

			E-5 fails to provide documentation of these "travel costs" for its counsel.
14.	Cost of Paul Eiker's deposition transcript	$619.90	This transcript was not used for summary judgment. *See Bing*, ¶53.
15.	Travel costs to attend deposition of Dr. Michelle Donaldson	$1,130.72	This deposition was not used for summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
16.	Cost of Dr. Michelle Donaldson's deposition transcript	$1,658.25	This transcript was not used for summary judgment. *See Bing*, ¶53. While E-5 attached Dr. Donaldson's transcript, it was for inadmissible testimony regarding traffic laws and Dr. Donaldson was a retained medical expert and not a fact witness.
17.	Cost of Jay Przybyla's deposition transcript	$1,891.75	This transcript was not used for summary judgment as the Court found the "Crash really doesn't need expert analysis" in issuing its summary judgment order. *See Bing*, ¶53.
18.	Cost of videographer for Plaintiff's deposition	$1,933.11	The video was not used for summary judgment. *See Thayler*, 243 Mont. at 160.
19.	Cost of videographer for Perry Woodland's deposition	$50.00	*Id.*
20.	Cost of Karla Cassidy's deposition transcript	$248.54	This transcript was not used for summary judgment. *See Bing*, ¶53.
21.	Cost of Donald Ericksen, MD's deposition transcript	$689.65	*Id.*
22.	Subpoena service costs for Shelly Killen, MD	$100.00	*Id.*

	deposition		
23.	Travel costs to attend deposition of Shelly Killen, MD	$1,699.31	This deposition was not used for summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
24.	Cost of Shelly Killen, MD's deposition transcript	$2,043.25	This transcript was not used for summary judgment. *See Bing*, ¶53.
25.	Cost of David Lundin, MD's deposition transcript	$734.95	*Id.*
26.	Cost of Michael Jacobs, MD's deposition transcript	$417.15	*Id.*
27.	Cost of Martin Randolph's deposition transcript	$603.65	*Id.*
28.	Cost of Vadim Tsvankin, MD's deposition transcript	$1,488.34	*Id.*
30.	Donald Ericksen, MD fee/deposition expense	$966.67	This deposition was not used for summary judgment. *See Bing*, ¶53. Moreover, expert witness fees are not recoverable under §201. Fahrnow paid Dr. Ericksen his reasonable fee for the deposition.
31.	Cost of Misty Brown's deposition transcript	$1,079.80	This transcript was not used for summary judgment. *See Bing*, ¶53.
32.	Cost of Randall Akers' deposition transcript	$432.03	*Id.*
33.	Cost of Joseph Averett's deposition transcript	$1,095.60	*Id.*
34.	Cost of Stuart Goodman, MD's	$198.75	*Id.*

	deposition transcript		
35.	Cost of Sammie Sharp's deposition transcript	$465.65	*Id.*
37.	Cost of Dave Wieferich's deposition transcript	$534.65	This transcript was not used for summary judgment. *See Bing*, ¶53.
38.	Cost of McLaryn O'Neil's deposition transcript	$356.30	*Id.*
39.	Cost of Plaintiff's deposition transcript from February 27, 2024	$853.25	*Id.*
40.	Cost of Shawn Coleman, PA's deposition transcript	$915.25	*Id.*
41.	Cost of Debra Sheppard, Ph.D's deposition transcript	$804.65	*Id.*
42.	Cost of Debbie Wilson's deposition transcript	$878.05	This transcript was not used for summary judgment. *See Bing*, ¶53. Moreover, as the Court held collateral source testimony (including testimony of State Fund employee Debbie Wilson) is inadmissible. (Order on Plaintiff's Motions *in Limine* #1-10 at pp. 3-4).
43.	Cost of Teresa Millsap's deposition transcript	$1,288.24	This transcript was not used for summary judgment. *See Bing*, ¶53.
44.	Michelle Donaldson's fee/deposition expense	$2,250.00	Expert witness fees are not recoverable under §201. Moreover, this deposition was not used for summary judgment. *See Bing*, ¶53. While E-5 attached Dr. Donaldson's transcript, it was for inadmissible testimony regarding traffic laws and Dr. Donaldson was a retained medical

			expert and not a fact witness.
45.	Teresa Millsap fee/deposition expense	$2,250.00	Expert witness fees are not recoverable under §201. Moreover, this deposition was not used for summary judgment. *See Bing*, ¶53.
46.	Ann Adair fee/deposition expense	$1,500.00	*Id.*
47.	Jay Przybyla fee/deposition expense	$1,540.00	Expert witness fees are not recoverable under §201.
48.	Cost of Raymond Kordonowy's deposition transcript	$153.00	This transcript was not used for summary judgment. *See Bing*, ¶53.
49.	Cost of XTO Energy, Inc.'s deposition transcript	$168.00	*Id.*
50.	Cost of Marlene Eiker's deposition transcript	$128.70	*Id.*
51.	David Lundin, MD fee/deposition expense	$4,600.00	Expert witness fees are not recoverable under §201. Moreover, this deposition was not used for summary judgment. *See Bing*, ¶53.
52.	Subpoena fee for Randy Jensen	$65.00	This deposition was not used for summary judgment. *See Bing*, ¶53.
53.	Vadim Tsvankin fee/deposition expense	$2,000.00	Expert witness fees are not recoverable under §201. Moreover, this deposition was not used for summary judgment. *See Bing*, ¶53. Moreover, as noted in Fahrnow's motion to recover Dr. Tsvankin's fees, ***E-5 has not even incurred this cost***.
54.	Attorney fees for Plaintiff's motion to compel	$4,212.00	Attorney fees are not recoverable under §201. Moreover, E-5 should not recover those fees as discussed in Section V, *infra.*
55.	Travel costs to attend	$1,612.98	Counsel's travel costs are not

	deposition of Jay Przybyla		recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
56.	Travel costs to attend depositions of Dave Wieferich, Jordan Harrell, and McLaryn O'Neil	$181.26	These depositions were not used for summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover, E-5 fails to provide documentation of these "travel costs" for its counsel.
57.	Mileage to attend Final Pretrial Conference	$63.65	E-5's counsel attended the conference remotely thus these costs were not incurred. Counsel's travel costs are not recoverable under §201.

Thus, the District Court clearly abused its discretion in awarding E-5 these costs.

C. Eiker's Costs

The vast majority of costs sought by Eiker are ***not*** recoverable under clear Montana law. Importantly, Eiker appeared in this suit after many of the depositions were taken in this case, and Eiker was provided courtesy copies of the transcripts without charge from the other parties. ***After*** summary judgment was granted, Eiker contacted the court reporters to incur charges for the transcripts it already had and is now requesting the Court to have Fahrnow to pay for these costs it voluntarily incurred after the grant of summary judgment. This is clearly an attempt to unfairly and improperly pile onto Fahrnow after summary judgment. The only allowable costs total $136.00; 1% of what Eiker seeks. [4]

[4] No costs should be awarded to Eiker because summary judgment should not have been granted

Fahrnow objected to the following costs:

No.	**Cost**	**Amount**	**Authority**
2.	Deposition of Tristin Fahrnow on July 17, 2023	$745.90	This transcript was not used for Eiker's motion summary judgment. *See Bing*, ¶53. Moreover, this cost was voluntarily incurred by Eiker on October 21, 2024 ***after*** summary judgment was granted and thus is not a "necessary disbursement under §201.
3.	Deposition of Jordan Harrell	$299.40	*Id.*
4.	Deposition of Greg Brown	$1,215.30	This transcript was not used for Eiker's motion summary judgment. *See Bing*, ¶ 53. Moreover, this cost was voluntarily incurred by Eiker on October 21, 2024 ***after*** summary judgment was granted and thus is not a "necessary disbursement under MCA §201. Moreover, $150 of this amount was for the video of the deposition, which Eiker did not use in its motion for summary judgment.
5.	Deposition of Paul Eiker	$410.80	This cost was voluntarily incurred by Eiker on October 21, 2024 ***after*** summary judgment was granted and thus is not a "necessary disbursement under §201.
6.	Deposition of Marlene Eiker	$128.70	*Id.*
7.	Deposition of Trooper Perry Woodland	$333.80	*Id.*
8.	Deposition of Michelle Donaldson, MD	$756.75	*Id.*
9.	Deposition of Jay Przybyla	$981.80	*Id.*

in its favor.

10.	Deposition of Ray Kordonowy	$153.00	*Id.*
11.	Deposition of XTO Energy	$168.00	*Id.*
12.	Deposition of Tristin Fahrnow on February 27, 2024	$273.92	This transcript was not used for Eiker's motion summary judgment. *See Bing*, ¶53.
13.	Deposition of Shelley Killen, MD	$1,133.75	*Id.*
14.	Deposition of Stuart Goodman, MD	$198.77	*Id.*
15.	Deposition of Michael Jacobs, MD	$417.15	*Id.*
16.	Deposition of Vadim Tsvankin, MD	$789.30	*Id.*
17.	Airfare to attend Vadim Tsvankin's deposition	$568.95	This deposition was not used for Eiker's motion summary judgment. *See Bing*, ¶53. Counsel's travel costs are not recoverable under §201. Moreover, Eiker failed to provide documentation of these "travel costs".
18.	Deposition of David Lundin, MD	$659.95	This transcript was not used for Eiker's motion summary judgment. *See Bing*, ¶53.
19.	Deposition of Randy Jensen	$245.00	*Id.*
20.	Deposition of Karla Cassidy	$189.92	*Id.*
21.	Deposition of Martin Randolph	$603.65	*Id.*
22.	Airfare to attend Martin Randolph's deposition	$678.94	*Id.*
23.	Costs of Motions of Summary Judgment	$20.00	No objection to $10. But objection to the additional $10. Eiker cannot double recover for E-5's motion.
	REJECTED SEPTEMBER 18, 2024 OFFER OF		

	JUDGMENT[5]		
24.	B/W copying charges	$95.90	No documentation is provided of this invoice. In light of the lack of documentation, Fahrnow contends these are not "reasonable expenses of printing papers for a hearing when required by a rule of court". MCA §25-10-201(6); MRCP 68.
25.	Scanned image charges	$8.50	This is not an "expense[] of printing papers", but scanning documents electronically. MCA §25-10-201(6); MRCP 68.
26.	Color copy reproduction charges	$1,849.60	These are not "reasonable expenses of printing papers". The charges are for color copies presumably for trial exhibits, but the majority of trial exhibits are not color documents. It is also unclear whether these were made for a hearing or trial "required by a rule of court" or just for Eiker's counsel's internal file. MCA §25-10-201(6); MRCP 68.
27.	EconoPrint charges	$93.62	*Id.*
28.	FedEx	$103.86	This is not a "cost" and was not necessarily incurred. MCA §25-10-201; MRCP 68.
29.	Ultra Graphics	$263.00	These are not "reasonable expenses of printing papers". The charges are for color copies presumably for trial exhibits, but the majority of trial exhibits are not color documents. MCA § 25-10-201(6). It is also unclear whether these were made for a hearing or trial "required by a rule of court" or just for Eiker's counsel's internal file. MCA §25-10-201(6);

[5] The type of costs that are recoverable from an offer of judgment still must be within the scope of MCA 25-10-201. *Fisher v. State Farm Ins. Companies*, 281 Mont. 236, 239, 934 P.2d 163 (1997).

			MRCP 68.
31.	Judgment fee for E-5	$52.50	Eiker cannot recover E-5's judgment fee.

Thus, the District Court clearly abused its discretion in awarding Eiker these costs.

V. The District Court Abused Its Discretion in Refusing to Compel E-5 to Answer Interrogatory No. 11

A. Legal Standard

Mont. R. Civ. P. 37(a)(3)(A)(iii) permits a party to file a motion to compel where the other party "fails to answer an interrogatory submitted under Rule 33." "The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation." *Richardson v. State*, 2006 MT 43, ¶22, 331 Mont. 231, 130 P.3d 634. "Rule 33, M.R.Civ.P., authorizes the use of interrogatories for the purpose of pre-trial discovery from an adverse party. This rule is liberally construed to make *all relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." *Id*, ¶24 (emphasis in original). A party fails to answer an interrogatory if the answer is "evasive, woefully incomplete and tantamount to complete silence." *Culbertson-Froid-Bainville Health Care Corp. v. JP Stevens & Co. Inc.*, 2005 MT 254, ¶17, 329 Mont. 38, 122 P.3d 431.

B. Fahrnow Can Conduct Discovery on E-5's Contention and Expected Attempt to Attack His Expert at Trial

Here, E-5 should have been compelled to answer Interrogatory No. 11 by either (I) identifying the pertinent qualifications it contends Dr. Ericksen has which Dr. Donaldson purportedly does not have; or (II) affirmatively state that it is aware of no such qualifications. E-5's answer is tantamount to complete silence on the issue. This interrogatory is a proper use of discovery and seeks discoverable information because E-5 moved to exclude Dr. Donaldson, an orthopedic surgeon, from testifying due to her purported lack of qualification while also disclosing and intending to call Dr. Ericksen, an orthopedic surgeon, to testify at trial. *See* Mont. R. Civ. P. 33(b) ("An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact"). In addition, E-5 was expected to question Dr. Donaldson's experience to the jury at trial, to make the absurd argument she is only qualified to testify about aesthetic medicine, and to attack Dr. Donaldson's credibility and the reliability of her opinions. *See Richardson*, ¶ 22. Therefore, Fahrnow, through Interrogatory No. 11 and otherwise, may discover information regarding E-5's position that Dr. Donaldson is allegedly not qualified.

The District Court mistakenly held that Interrogatory No. 11 was outside the scope of discovery because it is not within the confines of the minimum requirements for an expert disclosure. Contrary to this holding, the parties, spurred

by E-5, conducted extensive discovery well outside the scope of Mont. R. Civ. P. 26(b)(4), and, as discussed in Factual Background §IV(A), E-5 even conducted harassing discovery on Dr. Donaldson.

Therefore, E-5should have been compelled to answer Interrogatory No. 11.

C. E-5's Attorney Fees

The District Court abused its discretion in awarding E-5 its attorney fees and violated Fahrnow's due process rights in making such an award without notice, hearing, or opportunity to review ***any*** documentation in support of said fees. This is because:

(I) Fahrnow's motion to compel should have been granted, as discussed above, or, at the very least, Fahrnow's motion was substantially justified. *See* Mont. R. Civ. P. 37(a)(5)(B).

(II) The District Court clearly erred in its conclusion that Fahrnow waived any objection to the fees. Fahrnow timely filed his objection within 17 days of E-5's affidavit of fees in accordance with Local Rule 15(B). Moreover, any untimeliness does not justify simply awarding a sanction as the District Court proposed postponing the issue until after trial/judgment. (Appendix at p. 30 (11:10-14)).

(III) E-5 refused to produce any billing records or other documentation to support its purported fees. This Court has strongly advised against this practice when

requesting fees. *See Tacke*, ¶¶32-38. E-5's affidavit lacked detail which made it impossible for Fahrnow to adequately respond to the purportedly incurred fees or apply the lodestar method. Moreover, E-5 failed to comply with Fahrnow's subpoena requesting such documentation. (Fahrnow's Objection to Affidavit of Fees at Exh. A).

(IV) The District Court failed to provide Fahrnow due process by not providing a hearing regarding the requested fees, not compelling E-5 to produce supporting documentation, and not making findings of the award of fees or its reasonableness; particularly in light of its prior comment before its order that "I don't think you get the attorney's fees for the protective order part of it" (Appendix at p. 30 (11:10-14)) days before awarding all of E-5's requested fees. *See* Mont. R. Civ. P. 37(a)(5)(B); Local Rule 15(B) ("The Court ***will*** docket the matter for hearing.") (emphasis added); *Byrum v. Andren*, 2007 MT 107, ¶¶32, 36, 337 Mont. 167, 159 P.3d 1062.

For the foregoing reasons, the District Court abused its discretion in awarding E-5 its attorney fees for its Cross-Motion for Protective Order.

CONCLUSION

For the forgoing reasons, this Court should vacate the judgment, reverse the District Court's Order granting E-5's and Eiker's respective motions for summary judgment, find that E-5 and Eiker are liable to Fahrnow as a matter of law, and

remand the case for trial on the issue of Fahrnow's damages.

Moreover, the Court should reverse the District Court's Order refusing to issue a merits-based sanction on E-5 and Eiker for spoliation of the truck data and Brown's employment documents.

In addition, the Court should vacate the District Court's award of costs to E-5 and Eiker.

Lastly, the Court should reverse the District Court's Order denying Fahrnow's Motion to Compel and reverse the award of E-5's attorney fees.

DATED this 21st day of January, 2025.

DRIGGS BILLS & DAY, P.C.
Attorney for Appellant Tristin Fahrnow

By: /s/ Ian P. Gillespie
Ian P. Gillespie

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to M. R. App. P. 11, this brief is proportionately spaced, 14-point font, and contains 9,954 words, as counted by the undersigned's word processing software, excluding any Caption, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and/or any Appendix.

DATED this 21st day of January, 2025.

DRIGGS BILLS & DAY, P.C.
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CERTIFICATE OF SERVICE

I, Ian Philip Gillespie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-21-2025:

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