IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 24-0517

SHERRI FROST,

Plaintiff/Appellee/Cross-Appellant,

v.

KEVIN R. FROST and FROST RANCHING CORPORATION,

Defendants/Appellants/Cross-Appellees.

APPELLEE/CROSS-APPELLANT SHERRI FROST'S RESPONSE TO APPELLANT KEVIN FROST'S OPENING BRIEF AND OPENING BRIEF AGAINST CROSS-APPELLEE FROST RANCHING CORPORATION

On Appeal from the Montana Twenty-First Judicial District Court, Ravalli County, Honorable Jason Marks Presiding.

Nicole L. Siefert
Matt Rossmiller
SIEFERT & WAGNER PLLC
1135 Strand Avenue, Suite A
Missoula, MT 59801
Phone: (406) 226-2552
nicole@swl.legal
matt@swl.legal
Attorneys for Sherri Frost

Murry Warhank
Erin M. Lyndes
JACKSON, MURDO & GRANT, P.C.
203 North Ewing
Helena, MT 59601
Phone: (406) 442-1300
mwarhank@jmgattorneys.com
elyndes@jmgattorneys.com
Attorneys for Kevin R. Frost

Curt Drake
Patricia Klanke
Drake Law Firm, P.C.
111 N. Last Chance Gulch, Suite 3J
Helena, MT 59601
Phone: (406) 495-8080
curt@drakemt.com
patricia@drakemt.com
Attorneys for Frost Ranching Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Montana Statutes and Rules

STATEMENT OF THE ISSUES

1. The jury's $20,000 verdict is unsupported by substantial credible evidence and the District Court's order granting Sherri's motion for a new trial should be affirmed.

2. The District Court incorrectly held the Frost Ranching Corporation could not ratify Kevin's conduct absent a "successful benefit," and therefore its order granting the Ranch's Rule 50 motion for judgment as a matter of law must be reversed.

STATEMENT OF THE CASE

A Statement of the Case is not included pursuant to M. R. App. P. 12(2).

STATEMENT OF FACTS

I. The Kidnapping.

A. The most terrifying day of Sherri Frost's life.

Ravalli County was gripped by a textbook Montana winter the early morning of February 9, 2016; it was frigid, snowy, icy, and dark. (Trial Tr., 287:18-25; 834:25-835:5.) Sherri got ready for work as a dental hygienist, a career she held for over twenty years. (*Id*., 780:6-23.) Sherri was entrenched in a contentious divorce that had been ongoing since June 2015. *In re Marriage of Frost*, Cause No. DR-15-165, Twenty-First Jud. Dist., Ravalli County ("divorce case"). Sherri would sometimes stay at her boyfriend Brian Moore's home, and February 9, 2016, was

one of those mornings. (Trial Tr., 286:14-287:3.)

Sherri got in her Hyundai Elantra at approximately 6:40 a.m. and started down Brian's driveway. (*Id*., 287:15-17; 834:15-20.) A garbage can blocked her path. (*Id*., 835:8-13); (Trial Ex. 11.) She got out to move the can, but in doing so walked herself into a violent ambush. (*Id*., 835:21-836:9.) Sherri was suddenly punched and pushed back into her car while her assailant grabbed and yanked her right arm up over the back of her head. (*Id*., 836:1-18; 837:17-838:12.) The assailant yelled, "shut the fuck up," at which point Sherri recognized the voice of Kevin Frost. (*Id.*, 836:1-9; 837:2-10.) Sherri fought back and screamed as Kevin continued to shove her into the Elantra. She was unable to free herself, but was able to kick the horn as Kevin pushed her into the passenger seat. (*Id*., 836:10-18.)

Sherri opened the door and tried to escape after Kevin peeled out but was only able to see the pavement rushing by before Kevin pulled her back. (Trial Tr. 837:19-838:4.) Kevin drove to the top of Mill Creek, parking behind a black GMC Yukon Sherri had never seen before. (*Id*., 838:21-839:3); (Trial Ex. 12.) Kevin bought the Yukon two weeks before the kidnapping on January 28, 2016. (*Id*., 1045:25-1046:2.) Kevin did not register the Yukon, never told anyone in his family he purchased the Yukon, and kept the Yukon parked in downtown Hamilton far from his own property. (*Id*., 1046:3-22.)

Kevin screamed at Sherri to get out of her car and dragged her when she

refused. (*Id*., 839:3-840:13.) Sherri fell and hit her head twice as Kevin continued assaulting her. (*Id*., 840:14-25.) Kevin pulled out and activated a stun gun, forcing Sherri into the Yukon. (*Id*., 841:7-842:6); (Trial Ex. 12, SF 05967.) Kevin then sped down Mill Creek Trailhead. (*Id*., 842:7-843:1.)

Sherri was convinced she was going to die. (*Id*.) She tried to exit the Yukon and get anyone's attention, but her attempts were stifled by Kevin. (*Id*., 843:3-844:17.) Kevin shut Sherri's phone off as it began to ring repeatedly. (*Id*., 1049:15-24.) Sherri pulled out strands of her hair and left them under her seat and on the floor of the Yukon to leave her DNA. (*Id*., 851:13-22); (Trial. Ex. 12, SF 05938, 05940-42, 05949.)

Kevin took her to a barn owned by neighbor and longtime associate of the Frost family, Dean Allen. (*Id*., 847:3-848:2.) Allen leased land from the Frost Ranch and paid Kevin to look after his property and manage cattle whenever he was out of state. (*Id*., 1086:15-1088:18.) Kevin knew Allen's property was empty by virtue of this work. (*Id*.)

Kevin shut the barn and ordered Sherri to exit the Yukon. (*Id*., 848:6-16.) He ordered Sherri to sit on a stool and retrieved a cooler from the Yukon. (*Id.*, 849:1-15); (Trial Ex. 12., SF 05955-62.) The cooler contained vodka, Sprite, Crown Royal, and Solo Cups. *Id*. Kevin poured Sherri a full cup of Crown Royal and forced her to drink, disregarding her protests. (*Id*., 849:13-850:8.)

Sherri spat on the ground to continue the trail of DNA evidence she started in the Yukon. (*Id*., 851:1-12.) The two talked about various things, one topic being that Kevin thought Sherri was trying to take his family ranch in the divorce. (*Id*., 851:23-852:14.) Sherri became intoxicated as Kevin continued to force her to drink. Eventually, she told him she needed ibuprofen because her head hurt, and he drove Sherri to Allen's house. (*Id*., 853:7-854:7.)

Sherri remembers sitting on the couch and Kevin bringing two old-looking bottles from the bathroom. (*Id*., 855:1-16.) Kevin poured some pills and told Sherri to take them. (*Id*.) Sherri's memory blacks out after taking those pills, and she has only hazy recollections of asking for water but being unable to drink. (*Id*., 855:15-857:11.) The next thing Sherri remembers is waking up in the hospital. (*Id*., 858:10-15.) Body cameras worn by law enforcement show an exhausted and broken woman ensnared in a pit of terror. (Trial Ex. 7.) Sherri's BAC was measured at 0.140. (Trial Ex. 9.) The kidnapping lasted six hours, but the stress, fear, and anxiety Kevin caused that day changed Sherri's life forever. (Trial Tr., 245:14-18.)

B. The response by law enforcement and search for Sherri.

Although Sherri (and Kevin) did not know it, Brian watched Sherri pull out of the driveway that morning. (Trial Tr., 288:1-18.) He saw Sherri's taillights flash as she reached the end of the driveway, and her cries of "HELP ME, HELP ME" rang out. (*Id*., 288:1-289:20.) Brian took off in a sprint and found himself barefoot

because his slippers flew off. (*Id*., 289:22-290:1.) Brian heard the horn honk, the door slam, and the tires spin as the car peeled out onto the road when he was approximately 20 yards away. (*Id*., 290:10-16.) Brian testified it took Sherri 10 to 15 seconds to drive to the end of the driveway, and she immediately started screaming. (*Id*., 290:17-9.) Brian ran back to his house and called 911 as he got in his truck to look for Sherri. (*Id*., 291:10-22); (Trial Ex. 1.)

Ravalli County called for all available law enforcement officers to respond to Brian's 911 call. (Trial Tr., 216:1-9.) Included were 23 sheriff's deputies, two city officers, and a game warden. (*Id*., 216:10-23.) Officers found evidence of a struggle taking place at the end of Brian's driveway, including Sherri's scrape marks on top of the garbage can. (*Id*., 217:13-220:11); (Trial Ex. 11.) At the Mill Creek Trailhead, officers found scrapes and tracks in the ice and on Sherri's Elantra. (Trial Tr., 220:13-227:25); (Trial Ex. 4, 5, 6, 10, and 11.) Kevin was named as the main suspect. (Trial Tr., 228:1-19.) Law enforcement was concerned Sherri's abduction could turn into a homicide. (*Id*., 216:24-217:6; 235:12-23.) It was not until approximately 1:20 p.m. that Sherri was dropped off at the emergency room, bringing the search to an end. (*Id*., 235:24-236:9.)

Lead investigator Detective Matt Cashell interviewed Kevin after he turned

himself in. (Trial Tr., 211:9-13; 214:4-23; Trial Ex. 15.)[1] Kevin's version of events differs greatly from Sherri's[2], and law enforcement found Kevin unbelievable. (Trial. Ex. 15, 1:25:20-1:26:40.) A search of the Yukon found evidence of a violent premediated kidnapping, including the stun gun, knife, and clothes to camouflage Kevin. (*Id*., 251:1-24; Trial Ex. 12.) Kevin plead guilty to aggravated kidnapping and partner family member assault. (Trial Ex. 17.)

C. Sherri's new life post kidnapping.

Sherri's most significant physical injury occurred to her shoulder when Kevin yanked her arm up behind her head. (Trial Tr., 838:5-12; 1022:5-7.) Sherri's physical therapist, Sheri Stroppel, diagnosed multi-directional hypermobility in her shoulder joint. (*Id*., 348:22-349:17.) This resulted in significant pain which limited Sherri's ability to use her shoulder. (*Id*., 349:21-25.)

Sherri performed physical therapy two to three times per week, started taping her shoulder the March following the kidnapping, and underwent a rotator cuff repair in March 2018. (*Id*., 352:5-24; 368:5-12.) Sherri resumed physical therapy and tried to return to work following surgery. (*Id*., 368:15-369:5; 878:19-879:1.) Prior to the kidnapping, Sherri never missed work for her shoulder in her 13 years of

[1] Portions of Exhibit 15 were muted/edited out to remove matters excluded by the District Court's order on various motions *in limine*.
[2] Word limitations foreclose a full analysis of the contradictions in Kevin's version of the kidnapping.

employment with Dr. Molly Gannon. (*Id*., 1091:20-1092:2.) The pain eventually made Sherri unable to perform the job. (*Id.*, 1103:16-18.)

The most torturous injury from the kidnapping are the scars on Sherri's psyche. Dr. Jordan Scotti explained that Sherri meets the clinical criteria for Post Traumatic Stress Disorder. (*Id*., 420:22-24.) While Kevin's expert Dr. Craig McFarland disputed Sherri suffers from PTSD, he nevertheless admitted Sherri has good reason to be afraid and her mental health improved when the threat of Kevin was removed. (*Id*., 1166:8-1167:16.) Dr. McFarland opined it was reasonable for Sherri's fear and anxiety to increase after Kevin was released from prison. (1168:17-11:70:4.) In fact, Dr. McFarland admitted it was difficult to evaluate Sherri for PSTD because she still experiences current ongoing threats to her safety. (*Id*., 1172:3-7.)

Those that love and care about Sherri do not need an advanced medical degree to know she is a different person since the kidnapping. Brian testified Sherri is on edge and terrified of any loud or unexpected noise. (*Id*., 302:13-303:9.) Sherri continues to sleep in her clothes with a gun on her ankle, and she rarely gets a good night's sleep. (*Id*.) The kidnapping pushed Sherri to acquire her concealed carry permit, and she no longer leaves the house without a firearm. (*Id*., 303:16-25.) Sherri will not be alone and is in constant contact with Brian or another family member. (*Id*., 304:1-15.)

Angela Mason, Sherri's friend for over thirty years, witnessed the change to

Sherri's personality. (*Id*., 697:12-17.) Ms. Mason describes Sherri as a recluse, and when they do get together it is at one of their houses and away from the public. (*Id*., 706:20-707:24.) Where Sherri was once an uplifting and bubbly person, she is now reserved and avoids straying away from those she knows and trusts. (*Id*., 707:25-708:21.) Even when Sherri was able to attend a wedding for a mutual friend, she stayed to herself and refused to dance where she would have in the past. (708:24-709:10.)

Dr. Gannon, Sherri's former boss, saw the onset of Sherri's paranoia and panic attacks firsthand. (*Id*., 1094:16-1095:10.) Dr. Gannon made modifications to her office to help Sherri, such as putting buzzers on doors, locking previously unlocked doors, putting a buzzer lock on the door separating the patient waiting area and treatment space, and installing a code lock on her interoffice computer system. (*Id*., 1099:5-1099:2.) Dr. Gannon made a makeshift panic room for Sherri at the office and outfitted her staff with pepper spray and implemented an emergency procedure in the event Kevin appeared. (*Id*., 1099:13-1100:11.)

Dr. Scotti opined Sherri will not begin to heal until she is in a safe environment. (*Id*., 487:11-488:1.) Dr. McFarland also agrees Sherri needs to feel safe to gain benefit from therapy. (*Id*., 1168:13-16.) Due to the circumstances of the divorce and this litigation, Ms. Frost has been trapped in Ravalli County and has not been able to relocate. (891:11-892:1.) Sherri has lived in mental despair since the

kidnapping, and that horrific event has fundamentally changed how Sherri sees the world.

II. Frost Ranch.

A. Historical background.

The Frost Ranch was established by Kevin's grandfather in the 1920s. (Trial Tr., 599:2-6.) The Ranch is approximately 1,650 acres. (*Id*., 599:23-600:7.) In 1998, Kevin's parents George and Marilynn Frost established the Frost Ranching Corporation (FRC) and Frost Limited Partnership (FLP). (*Id*., 601:5-11.) The FRC handles the ranching operations and owns the ranching equipment. (*Id*., 660:22-661:4.) The FLP holds title to the Ranch's land. (*Id*.) The FRC holds a 1% general partnership interest in the FLP. (*Id*., 661:5-9.) The remaining interest is held as limited partnership interest, with Marilynn holding 19%, Kevin's brother, Randy, holding 40%, and Kevin holding the remaining 40%. (*Id*., 661:10-17.)

The purpose behind forming the Corporation and Partnership was to ensure Kevin and Randy would be taken care of and to keep the Ranch in the family. (*Id*., 601:5-21.) Kevin and Randy will receive the Ranch upon Marilyn's death. (*Id*., 601:23-602:5.) Randy testified the reason behind forming the Frost entities was to ensure the Ranch could not be swindled away from the family. (*Id*., 588:9-18.)

B. Ranch operations and management.

Kevin and Randy worked on the Ranch most of their lives. (Trial Tr., 583:20-

23; 585:22-25.) Kevin started working on the Ranch more in 2011 after his father began struggling with Alzheimer's. (*Id*., 602:23-603:1.) Randy confirmed working the Ranch was a full-time job for Kevin. (*Id*., 584:20-585:1.) Marilynn holds all the shares for the FRC and was approximately 74-75 years old at the time of the kidnapping. (*Id*., 602:13-15; 652:1-4.) Kevin insists his mother has managed the Ranch ever since his father passed away, and he has never exercised any sort of managerial power. (*Id*., 1033:3-9.)

The evidence shows Kevin had an active role in running the Ranch long before kidnapping Sherri. Kevin held himself out as an employee of the Ranch since at least 1996. (*Id*., 1026:11-1027:3); (Trial Ex. 22.) In 2004, Kevin applied with the Property Assessment Division of the Montana Department of Revenue to get his and Sherri's personal parcel of land classified as agricultural for tax purposes. (Trial Tr., 791:19-792:17; 795:1-796:4); (Trial Ex. 33.) Kevin's letter accompanying the application detailed his partnership interests in the Ranch, and described how many cattle were raised by the Ranch. (Trial Tr., 796:9-797:10.) He further explained how the Ranch's cattle regularly grazed on his and Sherri's property and included the Ranch's Schedule F from its taxes. (*Id*.) Kevin did not seek Marilynn's approval prior to submitting the application. (*Id*., 800:13-19.)

Kevin could also buy and sell real estate on behalf of the Ranch. (Trial Tr., 812:3-6.) In 2007, Kevin facilitated a transaction in which the Ranch swapped 80

acres of dry land for 120 acres of irrigated land with a neighbor. (*Id*., 610:8-16; 611:5-12.) Kevin was authorized to communicate with the neighbor on the Ranch's behalf during the transaction. (*Id*., 613:16-615:23) (Trial Ex. 35, SF 13896). The transactions were all executed by Kevin. (*Id*.)

Kevin headed a project on the Ranch to reduce fire risk. (Trial Tr., 804:8-25.) That process involved applying for a grant through Bitter Root (sic) Resource Conservation & Development Area, Inc., all of which was done by Kevin. (*Id*.); (Trial Ex. 38.) In the application, Kevin identified FLP as the owner of the land to be cleared. (Trial Ex. 38, SF 13919.) Kevin indicated he would perform the thinning and would market the wood to help pay for his work. (*Id*., SF 13919-13920.) Additional workers required for the thinning project were hired by Kevin. (Trial Tr., 807:25-808:5.)

Kevin held himself out as responsible for running the Ranch to the community. (Trial Tr., 1028:7-12.) Multiple people wrote letters to the court on Kevin's behalf prior to his sentencing in his criminal case. (*Id*., 1028:20-25.) Dr. Luke Channer told the court Kevin not only held down a full-time job in insurance but also managed the ranch work for his mother as his father's health waned over the years. (*Id*., 1029:13-1030:16.) James Holmes, the best man at his wedding, represented Kevin had to manage the ranch after his father got sick. (*Id*., 1034:12-19.) Kevin Erickson, another of Kevin's childhood friends, stated Kevin runs a large

cattle ranch. (*Id*., 1034:20-1036:5.) Finally, Kevin denies having ever hired or fired anyone for the Ranch. (*Id*., 1041:4-8.) Yet, Perry Beaulieu, one of the Ranch's former workers, reported Kevin offered him a job on the Ranch doing associated duties under Kevin's direction. (*Id*., 1041:9-1042:1.)

C. Kevin and Sherri's divorce – the catalyst between the Ranch and the kidnapping.

Sherri filed for divorce June 17, 2015. (Trial Tr., 822:24-823:4; 328:21-329:1.) The most contentious issue was how the Ranch factored into the marital estate. (*Id*., 832:5-833:5.) Kevin submitted his financial disclosure in the divorce case on October 22, 2015. (Trial Ex. 46.) Kevin listed his interest in FLP as an asset but contended Sherri had no right to any portion of that interest. (*Id*.) By December 4, 2015, the Ranch's attorney, Gail Haviland, informed Kevin's divorce attorney, Gail Goheen, it was the Ranch's position Sherri was not entitled to any Ranch assets and none of the same should be included in the marital estate. (Trial Tr., 623:20-625:1); (Trial Tr. 30.)

Nobody in the Frost family wanted Sherri to receive a portion of the Ranch. Marilynn admitted the family was frustrated that Sherri wanted the Ranch included in the divorce case. (Trial Tr., 626:1-7.) Kevin and Sherri's daughter, Katelyn, admonished Sherri for "trying to get everything out of dad," and said the only present she wanted for Christmas was to "not try to take the ranch from dad." (Trial Ex. 63 and 64.) Randy admitted the family discussed their concerns about Sherri taking the

Ranch. (Trial Tr., 593:2-594:13.) Kevin admits he was worried Sherri would receive part of the Ranch. (Trial Tr., 1042:5-1044:5.) Kevin testified the Ranch is "very, very important" to his family. (*Id*., 1043:22-1044:5.)

In early 2016, Sherri hired Mars Scott as her divorce counsel. (*Id*., 528:11-529:3.) Mr. Scott explained the purpose of adding the Ranch was so the court could acquire jurisdiction over the entity to make an equitable division of the marital estate. (*Id*., 529:19-530:24.) Mr. Scott started preparing a motion to join the Ranch (specifically the FLP) in the divorce on February 4, 2016. (Trial Ex. 32.) The day before the kidnapping, Mr. Scott called Gail Goheen to ask whether Kevin objected to the motion. (*Id*.); (Trial Tr., 534:4-20.) Kevin kidnapped Sherri the next morning. (*Id*., 534:21-24.) As such, the filing of the motion to join was delayed until February 12, 2016. (Trial Ex. 20.)

D. Kevin and the Ranch post kidnapping.

Kevin was charged with, *inter alia*, aggravated kidnapping and partner family member assault. (Trial Tr., 1008:17-20.) Following a guilty plea, Kevin served three years in prison and is currently on parole. (*Id*., 1067:17-18.) The FRC paid $50,000 for his bail. (*Id*., 630:20-631:24.) The Ranch paid $25,000 for Kevin's criminal defense attorney. (*Id*., 631:25-632:56.) The Ranch provided Kevin with funds to aid his legal defense through 2017. (*Id*., 635:20-639:4); (Trial Ex. 23.) Notably, the decision to pay Kevin's legal fees with Ranch funds was discussed and agreed upon

by Marilynn and Randy. (Trial Tr., 589:16-590:5.)

Kevin insisted those funds be recharacterized as a personal loan from Marilynn upon learning they came from the Ranch. (Trial Tr., 632:14-17.) Kevin had the Ranch's accountant classify the funds as a distribution to Marilynn, which was then made a loan to Kevin. (*Id*., 632:18-633:6.) This "loan" was memorialized in a March 3, 2017, promissory note, over a year after the kidnapping. (Trial Ex. 25.)

The Ranch also continued to employ Kevin following his release from prison. (Trial Tr., 639:21-24.) The Ranch never considered firing Kevin for kidnapping Sherri. (*Id*., 640:2-6.) If anything, Kevin's incarceration encouraged the Ranch to implement formal business procedures, such as a payroll system. (*Id*., 640:7-641:5.) Kevin and Randy worked extensively on the Ranch, yet neither one of them, nor any other employees, were W-2 employees before the kidnapping. (*Id*.) Following his release from prison, the Ranch decided to make Kevin a W-2 employee and pay him formal wages for his work. (*Id*.) The Ranch has supported Kevin since the day of the kidnapping.

STANDARDS OF REVIEW

I. Order granting new trial.

A district court's ruling on a motion for a new trial where the basis of the motion is insufficiency of evidence is de novo. *Giambra v. Kelsey*, 2007 MT 158, ¶ 27, 338 Mont. 19, 162 P.3d 134. Like the district court, the Montana Supreme Court

determines whether there was substantial evidence to support the verdict. *Id*. (citing *Renville v. Taylor*, 2000 MT 217, ¶ 14, 301 Mont. 99, 7 P.3d 400). "There either is, or is not, sufficient evidence to support the verdict, and this determination is not a matter of discretion." *Id*., ¶ 26. The function of the Court is not to agree or disagree with a jury's verdict. *Renville*, ¶ 14. Rather, the Court's role is to determine whether there was substantial evidence to support the verdict. *Id*. (citation omitted). While a case will not be retried because a jury chose to believe one party over another, a jury may not disregard uncontradicted, credible, non-opinion evidence. *Id*.

II. Order granting a motion for judgment as a matter of law.

A grant or denial of a motion for judgment as a matter of law is reviewed de novo. *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 9, 395 Mont. 432, 443 P.3d 369. The legal principles governing whether a motion for judgment as a matter of law should be granted or denied by the trial court are well settled. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727. Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury. *Id*. All such evidence, and any legitimate inferences that might be drawn from the evidence, must be considered in the light most favorable to the party opposing the motion. *Id*. Judgment as a matter of law is not proper if reasonable persons could differ regarding

conclusions that could be drawn from the evidence. *Kearney v. KXLF Communications, Inc.*, 263 Mont. 407, 417, 869 P.2d 772, 777-78 (1994).

SUMMARY OF THE ARGUMENT

I. The District Court correctly granted Sherri's motion for a new trial.

Kevin's argument rests on the proposition the District Court should not guess the jury's intention behind its award. Ironically, he attempts to support his argument by guessing what the jury intended by its award and proposing it decided to deliberate Sherri's damages down to the cent in arriving at its $20,000 verdict. Kevin's main authority, *Murray v. Whitcraft*, is distinguishable from the case at hand. Where *Murray* involved a question of how the plaintiff sustained any substantial injuries, there is no question Sherri's kidnaping was a violent ambush that resulted in substantial trauma.

The District Court acknowledged the kidnapping was a violent crime outside the presence of the jury. Counsel for both Kevin and the Ranch expressed their reluctance to make Sherri testify about the kidnapping during their respective cross-examinations. Kevin's own expert acknowledged Sherri's fear of Kevin is reasonable given the kidnapping. Kevin admitted Sherri needs to move and "no doubt" had fear on the day of the kidnapping and suggested the jury award between $80,000 and $100,000 during closing argument. Yet, Kevin now argues the jury

could have found Sherri was only minimally impacted by the kidnapping despite the acknowledgement of Sherri's trauma by everyone else involved in the trial.

The District Court correctly concluded the jury's verdict failed to compensate Sherri for damages she undeniably suffered. This conclusion does not require "guessing what the jury thought." Rather, the jury heard Kevin say Sherri had $20,000 in medical expenses and awarded her the same. The jury's award does not compensate Sherri for her pain and suffering, as well as a host of other damages, and under Montana law she is entitled to a new trial. Accordingly, the District Court's order granting her motion for a new trial should be affirmed.

II. The District Court incorrectly granted the Ranch's motion for judgment as a matter of law on Sherri's ratification theory.

The District Court granted the Ranch's motion based on the conclusion it did not receive a "successful benefit" from the kidnapping. The Montana Supreme Court, however, has found that a principal can accept an agent's attempt to obtain a benefit by virtue of their wrongful acts. *See, Daniels v. Dean*, 253 Mont. 465, 833 P.2d 1078 (1992). *Daniels* concerned an agent's wrongful attempts to intimidate and harass a leaseholder into vacating their lease early. Both *Daniels* and this case concern agents engaging in criminal behavior to benefit their principals. In *Daniels*, the agent attempted to drive the leaseholder off so the principal could use the property. In this case, Kevin attempted to kill or intimidate Sherri to prevent the Ranch from being joined in the divorce case. The agents in both cases were

unsuccessful in achieving their goal, however that fact did not foreclose the possibility of ratification in *Daniels*. This case should be no different.

The District Court's order is not only inconsistent with Montana law but is also bad public policy. Under the District Court's order, a principal can never ratify their agent's wrongful acts if the agent was unsuccessful in the commission of the same. As shown in this case, this can lead to principals being free to provide support and safe harbor to their agents and frustrate the efforts of victims to seek full redress. The Ranch knew Sherri was seeking to add it to the divorce, and the Frost family testified they did not want Sherri to receive any portion of the Ranch.

Kevin learned Sherri was going to file a motion to join the Ranch in the divorce case the night before the kidnapping. Kevin brought multiple weapons with him during the kidnapping, and he went out of his way to hide his location and identity by conveniently "forgetting" his cell phone and using a vehicle that had never been on his property and was not registered to him. Given the evidence, a reasonable jury could conclude Kevin sought to kill or otherwise intimidate Sherri to prevent her from joining the Ranch in the divorce case.

A reasonable jury could conclude the Ranch ratified Kevin's conduct. The Ranch paid for Kevin's bail and counsel in his criminal case out of Ranch accounts. Because of these efforts, Kevin secured a plea agreement in which he served only three years in prison for aggravated kidnapping. Moreover, the Ranch has offered

Kevin formal employment as a W-2 employee. The Ranch did not have any W-2 employees prior to the kidnapping. The Ranch has taken significant effort to help support Kevin after he committed his crime, and at no point did it consider terminating or disassociating from Kevin. Interpreting the evidence and all reasonable inferences in Sherri's favor, a reasonable jury could conclude the Ranch ratified Kevin's conduct. As such, the District Court's order granting the Ranch's motion for judgment as a matter of law must be reversed.

ARGUMENT

I. The District Court did not err by concluding that the jury's award of $20,000 failed to compensate Sherri for her pain and suffering and ordering a new trial.

Following a jury trial, the court may grant a new trial on all or some of the issues for any reason for which a new trial has been granted in an action at law in Montana state court. M. R. Civ. P. 59(a). A district court may grant a motion for a new trial if there is insufficient evidence to justify the jury's verdict. *Delaware v. K-Decorators, Inc*., 1999 MT 13, ¶ 43, 293 Mont. 97, 973 P.2d 818 (superseded by statute on other grounds); Mont. Code Ann. § 25-11-102(6). Where the verdict returned by the jury is palpably and grossly inadequate or excessive, it should not be permitted to stand. *State by State Highway Comm'n v. Schmidt*, 143 Mont. 505, 511, 391 P.2d 692 (1964).

It is not the role of the Court to agree or disagree with a jury's verdict, but instead to determine whether there was substantial evidence to support the verdict. *Renville*, ¶ 14 (citation omitted). "If conflicting evidence exists, we do not retry a case because the jury chose to believe one party over another. However, a jury may not disregard uncontradicted, credible, non-opinion evidence." *Id*. The Montana Supreme Court has held that "[w]here a jury fails to award any damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside." *Reis v. Luckett*, 2015 MT 337, ¶ 10, 381 Mont. 490, 362 P.3d 632; *see also Renville*, ¶ 26.

In this matter, Kevin made a motion for judgment as a matter of law at the close of Sherri's case in chief arguing she had failed to establish causation between the kidnapping and rotator cuff tear and subsequent surgery. (Trial Tr., 1252:21-24.) The District Court granted Kevin's motion and excluded the cost of Sherri's surgery from her damages because her surgeon did not testify at trial. (*Id*., 1267:17-24.) Accordingly, Sherri argued the amount of past medical care resulting from the kidnapping was $25,392.15. (*Id*., 1307:21-1308:2.) Sherri then proceeded to make recommendations to the jury for her other categories of damages, including, *inter alia*, $1.4 million for past pain and suffering (*Id*., 1314:4-13), $1.2 million for loss of established course of life (*Id*., 1317:1-6), and $682,000.97 for past lost wages. (*Id*., 1310:8-10.)

Kevin disagreed with Sherri's suggestions, and stated the following during his closing argument:

> You may recall at Hamilton PT there was a ton of therapy that was given for physical therapy after her surgery to recuperate from that surgery, and that was something that was testified to. If you take that out that, the physical therapy that occurred after the surgery, and also discount half of the counseling sessions which were about her children, the number is not 25,000. The number is closer to 20,000. ***So, we would agree that there is around $20,000 in medical expenses in this case.***

(*Id*., 1342:24-1343:12) (emphasis added). Kevin concluded by suggesting:

> If we count the $20,000 in medical expenses and the amount that Mr. Frost said that she needed to move, that Ms. Frost needs to move, and then added some money for pain and suffering, some money for the fear that she no doubt had on that day, I think an appropriate range, Ladies and Gentlemen, for your verdict is between eighty and a hundred thousand dollars.

(*Id*., 1349:22-1350:4.)

The District Court correctly concluded the jury followed Kevin's suggestion and awarded Sherri only $20,000 for her past medical expenses. Although Kevin lambasts the District Court for speculating as to what the jury intended by its award, his argument is built upon his own speculation as to how the jury "could have" awarded Sherri specific amounts for past medical expenses and pain and suffering. Kevin's logic is unsupported under any reasonable interpretation of the evidence. The District Court correctly concluded the jury's verdict is contrary to the uncontradicted, credible, non-opinion evidence regarding Sherri's pain and suffering, and its order granting a new trial should be affirmed.

A. The District Court correctly concluded this case is analogous to *Renville v. Taylor* and that the jury failed to compensate Sherri for her undisputed pain and suffering.

1. *Renville* was not abrogated by the Court's decision in *Murray.*

Renville concerned an automobile collision in which the jury found in Renville's favor and awarded $17,553 in damages. *Renville*, ¶ 1. The defendant, Taylor, admitted she was at fault and negligently caused the collision, so the only issues submitted to the jury were causation and damages. *Id*, ¶ 12. Renville filed a motion for a new trial because the jury's general damage verdict compensated her only for past medical bills while ignoring uncontroverted evidence of other damages. *Id*., ¶ 16. Taylor, in response, contended that (1) Renville's complaints were caused by a psychological component unrelated to the incident, as established by the testimony of other doctors, and (2) Renville documented $17,357.44 worth of medical expenses and the jury awarded approximately $200 more than that amount, meaning she was awarded damages in addition to past medical expenses. *Id*., ¶ 17.

On appeal, the Montana Supreme Court held the jury's damage award was not supported by substantial credible evidence and had to be set aside because the jury ignored uncontradicted evidence concerning Renville's pain and suffering. *Id*., ¶ 28. The Court noted the testimony of Renville, her mother, and physicians supported an award for pain and suffering, and the testimony of her doctor confirmed that Renville suffered a painful injury from the collision. *Id*. The Court was also not persuaded by

Taylor's argument that the jury awarded Renville other types of damages because the award was $200 more than the amount Renville had listed on her trial exhibit for past medical expenses. *Id*., ¶ 27.

Renville testified she visited the emergency room and clinic the week before trial, and the costs of those visits were $130 per emergency visit and $69 per clinic visit. *Id*. Accordingly, the Court concluded that the additional $200 appeared to cover those medical expenses rather than any other element of damages on which the jury was instructed. *Id*. The Court set aside the jury's verdict and remanded for a new trial on damages. *Id*., ¶ 28.

In contrast, *Murray v. Whitcraft*, 2012 MT 298, 367 Mont. 364, 291 P.3d 587, involved three acquaintances traveling in Montana in October 2006. *Murray*, ¶ 2. Shortly after leaving Lewistown, the driver, Whitcraft, lost control of the vehicle and ran into the guardrail. *Id*. Upon returning to Lewistown, "Murray was diagnosed with probable neck and right shoulder strain or contusion." *Id*. Murray was receiving a $500 baseball scholarship to attend school but was unable to play for the remainder of the semester and withdrew from college. *Id,* ¶ 3. Murray continued to receive chiropractic treatment until June 2007 and was discharged from all active medical care by January 15, 2008. *Id*.

The pain in Murray's shoulder returned after a day of bow hunting in 2008, and his doctor prescribed additional testing and physical therapy. *Id*., ¶ 4. Murray

filed his complaint against Whitcraft a year later seeking damages for medical costs, pain and suffering, loss of enjoyment of life and activity, emotional distress, and other compensatory damages. *Id*., ¶ 5. Whitcraft admitted liability. At trial, Murray suggested $250,000 for his damages, $35,000 of which represented past medical expenses. *Id*. The jury awarded Murray a total of $27,000 in damages, and Murray filed a motion for a new trial. *Id*., ¶¶ 5-6.

On appeal, Murray argued the jury was required to award him the full amount of the uncontested damages. *Id*., ¶ 10. The Montana Supreme Court disagreed and noted Whitcraft presented evidence and cross-examined Murray's key witnesses to suggest the collision caused little, if any, impact to Murray's shoulder and he re-injured the shoulder later while bow hunting. *Id*., ¶ 13. In arguing that the accident caused no impact to Murray's shoulder, Whitcraft presented photographs showing the damage occurred primarily to the front driver's side of the vehicle, where he had been sitting. *Id*., ¶ 14. Yet, the force of the collision did not cause Whitcraft any injury or cause the air bags to deploy. *Id*. Moreover, Whitcraft's cross-examination showed that Murray gave inconsistent reports about how and whether he remembered being injured during the incident. *Id*.

Murray's emergency room x-rays showed no acute injury, and his orthopedic surgeon testified his shoulder MRI showed an "aging" or "wearing away" process. *Id*., ¶ 15. Whitcraft showed Murray was able to perform his daily activities without

increasing his pain, and that Murray had reported a steady decrease in pain during treatment. *Id*. Murray's surgeon testified it was possible Murray reinjured his shoulder while bow hunting. *Id*. Finally, Whitcraft demonstrated Murray's ability to participate in his normal recreational activities, including flag football, big game hunting, fishing, and bowling. *Id*., ¶ 17. Whitcraft suggested in his closing argument the jury award a lower figure than the sum of medical expenses Murray provided. *Id*., ¶ 18. Whitcraft suggested Murray's medical expenses were closer to $26,000 discounting everything relating to the bow hunting injury. *Id*.

The Court held the jury was not obligated to award all of Murray's proposed damages. *Id*., ¶ 20. The Court based its holding on the fact that "Whitcraft raised substantial conflicts in the evidence regarding the cause of Murray's injuries that a reasonable mind might accept as adequate to support a conclusion that he was not entitled to all of the claimed damages." *Id*., ¶ 21 (internal quotation and citation omitted).

Here, Kevin argues *Renville* was implicitly abrogated by *Murray*. (Kevin's Br., p. 35.) Logically, if it were the Court's intent to abrogate *Renville*, then it would have said as much. It would make little sense for *Murray* to overrule *Renville* when the two concern distinct and distinguishable scenarios. On the one hand, *Murray* involved a question regarding the *existence* of the plaintiff's pain and suffering. *Murray*, ¶ 24 (". . . the jury could have found that Murray experienced little pain,

except when playing baseball, until the bow hunting incident.") In contrast, the Court in *Renville* concluded the evidence "clearly supported an award for pain and suffering" given that the jury had concluded the plaintiff had been injured by the accident. *Renville*, ¶ 25.

Given *Renville* and *Murray* are distinguishable from one another, it is difficult to ascertain how Kevin concludes *Murray* established an absolute rule and abrogated everything that came before it. Kevin proclaims *Murray* "specifically held that Court[s] should not guess about the jury's intentions in awarding a general verdict." (Kevin's Br., p. 35.) There is no language in *Murray* supporting that proposition. The *Murray* Court did not critique or comment upon the *Renville* Court's deduction that the jury awarded Renville nothing for her pain and suffering. Rather, the *Murray* Court concluded it could not ascertain that the jury awarded zero damages for pain and suffering because the jury could have reasonably been persuaded by Whitcraft's theory "something in the twenty thousand dollar to thirty thousand dollar range" would fully compensate Murray for the damages caused by the accident. *Murray*, ¶¶ 25-26.

Nothing in *Murray* indicates the Court intended to overrule *Renville*. If that were the Court's intention, then there would have been no reason for the Court to distinguish the facts of *Renville*. *Murray*, ¶ 23. It is more apt to say *Murray* holds the Court will not disrupt a jury verdict where there is a reasonable interpretation of

the evidence in support of the same. Accordingly, Kevin's interpretation of *Murray* is overbroad, and nothing suggests *Renville* is bad law.

2. *Renville* is more analogous to this case than *Murray*, and the District Court correctly concluded it controls.

As noted by the District Court, "Sherri clearly established she experienced pain, suffering, and emotional distress during the kidnapping." (Doc. 173, p. 12.) "Kevin never argued that he did not cause Sherri's pain or injury during the kidnapping, nor did he controvert the fact that she experienced pain and suffering to some degree." (*Id*., p. 13.) Unlike *Murray*, there was no evidence to suggest Sherri suffered zero or minimal injuries because of the kidnapping. Rather, like *Renville*, the issue was not whether Sherri had been injured, but rather the extent of her damages.

The Court's consideration of Kevin's closing argument is also appropriate. The *Murray* Court considered Whitcraft's closing argument in concluding the jury could have been persuaded that its verdict would fully compensate Murray for his injuries. *Murray*, ¶ 25. In *Murray*, the jury's $27,000 verdict fell squarely between the suggestion made by Whitcraft in his closing argument. *Id*. This case, by contrast, saw the jury award an amount that was five times below Kevin's suggestion. The Court logically concluded the jury awarded Sherri $20,000 based on Kevin's suggested past medical expenses. (Doc. 173, p. 14.) Kevin's argument to the contrary that the jury "could have" awarded Sherri less than $20,000 in past medical

expenses and other arbitrary amounts in other categories requires significantly more speculation as to what the jury intended.

It is undisputable Sherri suffered injury as the result of the kidnapping. Like the plaintiff in *Renville*, these injuries were observed by numerous people following the kidnapping, including Sherri's friends and family, Dr. Scotti, and her former employer. Kevin did not present a scintilla of evidence at trial to suggest these injuries were inflicted by some other cause post kidnapping, like the bow hunting incident in *Murray*. His sole argument is the District Court "guessed" as to what the jury intended by its verdict, but one does not need to guess to reach the reasonable and logical conclusion the jury awarded Sherri the $20,000 in past medical expenses suggested by Kevin. The present matter is more akin to *Renville* than *Murray*, and the District Court correctly concluded it is the controlling authority.

B. The jury's verdict is unsupported, and a new trial is warranted.

Kevin faults the District Court for guessing what the jury intended by its verdict only to submit his own speculation regarding how the verdict could have represented $3,178.16 in past medical expenses and $16,821.16 for pain and suffering. Neither of those amounts were mentioned during trial. Cases like *Renville* demonstrate the Court is not required to abandon all logic in reviewing a motion for a new trial. It is more reasonable to conclude the jury heard Kevin say Sherri had

$20,000 in medical expenses immediately before deliberations and then gave her exactly that amount.

The verdict failed to compensate Sherri for her damages in addition to her pain and suffering. While Kevin relies on Dr. McFarland's conclusion Sherri was not suffering from PTSD when he examined her in 2022, a diagnosis of PTSD is not required for pain and suffering or emotional distress. *See*, *Henricksen v. State*, 2004 MT 20, ¶ 79, 319 Mont. 307, 84 P.3d 38. Kevin speculates the jury "could have" decided to award Sherri a pittance in certain categories of damages based on issues of causation, but the evidence does not support that conclusion. While the Court is required to view the evidence in the light most favorable to the non-moving party, its interpretation of that evidence must be reasonable. Mont. Code Ann. § 1-3-233.

Kevin analogizes this case to *Murray* and argues the kidnapping was a minor ordeal that resulted in minimal injury to Sherri. (*See*, e.g., Kevin's Br., p. 28). All parties agreed the kidnapping was traumatic. During her testimony, Sherri became overwhelmed by emotion and expressed her frustration toward Kevin. (Trial Tr., 845:12.) Later, outside the presence of the jury, the District Court expressed the following:

> All right. The other matter I wanted to address is with you, Ms. Frost, I understand you're emotional and ***there is no question that you were the victim of a violent crime at the hands of your ex-husband.*** I cannot have you direct another outburst at him during this trial.

(*Id*., 860:3-9) (emphasis added). Similarly, Kevin's own counsel expressed reluctance at having to discuss the kidnapping again during Sherri's cross examination:

> Now, Ms. Frost, I apologize for having to bring you back to testimony from yesterday, but do you recall testifying yesterday about the kidnapping?

(*Id*., 931:20-23.) The same is true for the Ranch's counsel:

> Q. You testified yesterday about the kidnapping as well?
>
> A. Uh-huh.
>
> Q. And I certainly don't want to make you go through all that again. There is one brief portion that I want to discuss, and that has to do with what you and Kevin talked about during the period while you were in Dean Allen's barn.

(*Id*., 957:10-17.) Dr. McFarland concluded Sherri had been exposed to a traumatic event. (*Id*., 1151:3-7.) Dr. McFarland further testified Sherri's fear for her safety is reasonable under the circumstances. (*Id*., 1170:1-4.)

The kidnapping was violent, abrupt, and horrifying, resulting in Sherri's life being upended. There is no dispute she was mortified, beaten, and bruised on the morning of February 9, 2016. Sherri's sense of safety, security, and stability were all shattered. Sherri is entitled to compensation for all damages inflicted by the kidnapping, not just her medical expenses. The District Court correctly concluded the verdict failed to compensate Sherri for any of those injuries, and as such its Order granting a new trial should be affirmed.

II. The District Court erred in granting the Ranch's Rule 50 motion on Sherri's theory the Ranch ratified Kevin's conduct.

Sherri alleged the Ranch was vicariously liable under two theories. First, Kevin was an agent of the Ranch, and the kidnapping was incidental to an act authorized by the Ranch and motivated by Kevin's desire to serve the Ranch's interest. (Doc. 145, pp. 4-5). This theory was ultimately rejected by the jury. (Doc. 157, pp. 2-3.) Second, the Ranch subsequently ratified Kevin's conduct. (Doc. 145, p. 4.) The Ranch moved for judgment as a matter of law on both theories at the close of Sherri's case-in-chief pursuant to M. R. Civ. P. 50. (Trial Tr., 1233:13-1234:1.)

Regarding ratification, the Ranch argued there was no evidence it received a benefit by virtue of the kidnapping. (*Id*., 1237:6-1238:20.) The Ranch asserted it incurred a detriment due to the kidnapping because it paid Kevin's legal fees and was made a defendant in both this lawsuit and the divorce case. (*Id*.) They argued ratification is dependent upon circumstances giving rise to the inference the principal intended their actions to act as an approval and adoption of the agent's act, and thus ratification is not present if there are other explanations for what the principal did that would not give rise to that inference. (*Id*.) The Ranch proposed those circumstances were not present in this case because while Marilynn is the director of the Ranch, she was also Kevin's mother and had "multiple other motivations for assisting him with legal fees and bail." (*Id*.)

The District Court granted the Ranch's motion on Sherri's ratification theory. (*Id*., 1266:25-1267:4.) The District Court concluded Sherri needed to show a "successful benefit" for the Ranch to ratify Kevin's actions:

> Ms. Siefert: So if the – The question is if the ranch actually benefited from the kidnapping because they paid the bills and everything?
>
> The Court: So paying the bills would potentially, I mean – And this is how it survived summary judgment. I mean the ranch paying the bills could be evidence of ratification, that Marilynn said, Yes, I'm glad you did this; and, therefore, I'm going to cover these expenses.
>
> But I do think there's the issue of specifically for the ratification theory there needs to be some benefit to the ranch, **not might have benefited but a successful benefit**. Does that make sense?

(*Id*., 1244:17-1245:1.) (emphasis added). The District Court granted the Ranch's Rule 50 motion because it agreed "we do not have any benefit of the underlying act here." (*Id*., 1266:25-1267:4.)

The District Court's order granting the Ranch's motion was incorrect. The Montana Supreme Court has held a principal can ratify the wrongful acts of its agent even though those acts did not achieve their intended purpose. Further, the District Court's order shields principals from liability in the event their agent's wrongful acts (i.e., crimes) are unsuccessful, which is bad public policy. There was sufficient evidence in the record for a reasonable jury to conclude the Ranch ratified Kevin's actions, and as such the District Court's grant of the Ranch's Rule 50 motion should be reversed.

A. Montana law recognizes ratification of an agent's attempt to provide a benefit to its principal.

Regarding a principal's liability for wrongs committed by their agent, Montana law provides the following:

> A principal is not responsible for other wrongs committed by the principal's agent . . . unless the principal has authorized or ratified the acts, even though they are committed while the agent is engaged in the principal's service.

Mont. Code Ann. § 28-10-602(2). "Ratification is defined to be the confirmation of a previous act done either by the party himself or by another. And a confirmation necessarily supposes knowledge of the thing ratified. It follows that to constitute a ratification there must be an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances." *Audit Servs. v. Francis Tindall Constr.*, 183 Mont. 474, 478, 600 P.2d 811, 813 (1979).

Ratification requires three elements: (1) acceptance by the principal of the benefits of the agent's act; (2) with full knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangement. *Safeco Ins. Co. v. Lovely Agency*, 200 Mont. 447, 453, 652 P.2d 1160, 1163 (1982). "A requisite to the existence of ratification is good faith on the part of the person who asserts that the principal ratified the alleged agent's unauthorized act." *Id*. Ratification may be effected by express declaration or by implication, and it may be implied from any acts or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his

own. *Erler v. Creative Fin. & Invs.*, 2009 MT 36, ¶ 25, 349 Mont. 207, 203 P.3d 744 (citation omitted). While mere acquiescence on the part of the principal is not necessarily conclusive, it is to be considered as evidence of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery unless he intends to be bound by it, and such repudiation must be brought home to the party beneficially affected. *Id*.

The Montana Supreme Court held a principal can ratify an agent's attempts to convey a benefit to the principal even if those acts are unsuccessful. *See*, *Daniels v. Dean*, 253 Mont. 465, 833 P.2d 1078 (1992). In *Daniels*, a group of business associates named Dean, Lake, and Bolinger entered negotiations to purchase real property to be used as a used car business operated by Dean. *Id*., 253 Mont. at 467, 833 P.2d at 1080. Daniels ran a secondhand store on the property and had a lease with the prior owner that extended through September 1993. *Id*. Dean and associates entered negotiations to purchase the property in 1991, and their efforts to have Daniels vacate the premises prior to the expiration of his lease failed. *Id*. Nevertheless, Dean, Bolinger, and Lake purchased the property in January 1991, subject to Daniels's existing lease. *Id*. Dean was authorized to manage the property and the lease with Daniels and presented himself to Daniels as representing the owners of the property. *Id*., 253 Mont. at 468, 833 P.2d at 1080.

Dean proceeded to deliver a thirty-day eviction notice to Daniels on the same day the property was purchased. *Id*. When Daniels refused to vacate, Dean's son and another employee began parking vehicles immediately in front of Daniels's store to obstruct the entrance and take up customer parking. *Id*. They further threw gravel from their tires against Daniels's storefront window. *Id*. Dean also rejected Daniels's February rent check, and told Daniels he would never accept any rent payment. *Id*. On February 12, 1991, Lake entered Daniels's property and took measurements for where a garage door would be cut into the wall of Daniels's store. *Id*. Lake had knowledge of Dean's refusal of Daniels's rent and later testified he would not have entered the deal had he known Daniels would remain on the property. *Id*. Lake went further to say he was unwilling to tolerate Daniels having the right to remain on the property. *Id*.

There was a conflict in the parking lot of the property on February 15, 1991. *Id*., 253 Mont. at 468-69, 833 P.2d at 1080-81. Daniels testified Dean and others swore at him and threatened to kill him if he refused to vacate. *Id*. Dean's son and other employees gathered near the front of Daniels's store to threaten, frighten, and harass Daniels and his patrons. *Id*. Dean also removed the thermostat from Daniels's store and reported him to the fire department when he tried to use space heaters for heat. *Id*. Following a second parking lot confrontation, Dean filed a criminal complaint alleging Daniels was armed and threatening, resulting in a sheriff's deputy

frisking Daniels in front of his customers. *Id*. Daniels was never punished as the result of Dean's various complaints. *Id*. Following a bench trial the district court held that Dean, Bolinger, and Lake were "jointly and severally liable as principals of an agency relationship created by the Defendants, or as subsequently ratified with respect to the acts and conduct" described above. *Id*., 253 Mont. at 470, 833 P.2d at 1082.

On appeal, Lake argued there was no substantial evidence he had knowledge of, planned, or personally took any action towards Daniels. *Id*. While Lake did not dispute the existence of a principal and agent relationship between the named defendants, he argued the evidence failed to prove he ratified any of the wrongful conduct alleged in Daniels's complaint. *Id*. The Montana Supreme Court disagreed. After reciting the three elements of ratification from *Safeco, supra,* the Court noted:

> Harold Lake testified that it was important to him that Daniels vacate his lease, that he was unwilling to tolerate Daniels remaining on the property and that he would not have entered the deal had he thought Daniels would remain. Harold Lake clearly ***accepts the benefits of Dean's attempts*** to induce Daniels to vacate the lease satisfying the first element of ratification.

Id., 253 Mont. at 471-72, 833 P.2d 1082-83 (emphasis added). The Court found substantial evidence supported the second element of ratification because Lake was on notice that Daniels's lease did not expire until 1993 and he would not leave early, and Lake believed that Daniels would be induced to vacate his leasehold. *Id*. The final element was also supported by substantial evidence because Lake knew Dean

refused to accept Daniels's rent payments and sent Daniels an eviction notice despite the lease agreement. *Id*. Lake also testified to the importance that was attached to getting Daniels to vacate. *Id*. The Court held all three elements of ratification were satisfied and the district court did not err in finding Lake jointly and severally liable. *Id*.

In this case, the District Court's order granting the Ranch's Rule 50 motion based on the lack of a "successful benefit" is incompatible with the Court's reasoning in *Daniels*. Dean's various attempts to run Daniels off the property never resulted in a "successful benefit" to Lake because Daniels did not vacate prior to the expiration of his lease. Yet, the lack of a "successful benefit" did not preclude the Montana Supreme Court from finding Dean's actions were an attempt to convey a benefit and thus satisfied the first element of ratification.

The Ranch argued during its Rule 50 Motion it had incurred a detriment rather than a benefit from the kidnapping because it incurred legal fees and was named as a defendant in a lawsuit. (Trial Tr., 1237:14-17.) The same was also true for Lake in *Daniels*. Despite the fact Lake received no benefit from Dean's actions, he was nevertheless found to have ratified and accepted Dean's *attempts* to secure a benefit. There is no reason to apply a different standard in this case.

Under the District Court's order, an agent can engage in criminal conduct and attempt to provide a benefit to their principal, but the principal can never ratify that

conduct if the agent is ultimately unsuccessful in their goal. Put another way, if an agent fails to provide an affirmative benefit to their principal in the commission of criminal conduct, then the principal is free to provide aid and safe harbor to their agent without fear of having been found to ratify the criminal conduct. This logic is not only contrary to *Daniels*, but also problematic from the standpoint of public policy.

As shown by *Daniels*, there are situations where a principal can ratify the actions of an agent even if the principal does not receive a benefit. It therefore makes little sense to conclude it is impossible, as a matter of law, for principals to ratify an agent's wrongful conduct if the agent is unsuccessful. The damage from an agent's wrongful actions can be severe and long-lasting for a victim, even if an agent fails to achieve their goal. Providing a shield against liability for principals who know of or condone their agent's wrongful conduct achieves nothing but prolong the victim's suffering and hinders their ability to seek redress for the harm.

The Court stated in *Daniels* that whether a principal ratified the actions of an agent is a question of fact. *Daniels*, 253 Mont. at 471, 833 P.2d at 1082. The District Court's order in this case created a brightline rule, i.e., if the principal did not receive a "successful benefit" then ratification is impossible as a matter of law. This rule is contrary to Montana law, creates bad public policy, and disregarded the fact there was ample evidence for the jury to conclude the Ranch ratified Kevin's conduct.

Accordingly, the District Court's order granting the Ranch's Rule 50 Motion was incorrect and should be reversed.

B. A reasonable jury could conclude the Ranch ratified Kevin's conduct, and as such the Ranch's judgment as a matter of law must be reversed.

Considering the evidence and all legitimate inferences therefrom in Sherri's favor, as the Court must, a reasonable jury could conclude the Ranch accepted Kevin's attempt to convey a benefit by kidnapping and killing Sherri. The Ranch paid Kevin's bail and attorney fees (over $75,000) for the criminal case using funds from its own coffers after a discussion amongst Randy and Marilynn. Not only that, but the Ranch continued to employ Kevin and implemented formal business practices by making him the only W-2 employee in the Ranch's history. Conveniently, this also provided Kevin with the ability to show he is employed during the pendency of his parole. At no point did the Ranch consider firing or otherwise denouncing Kevin because of the kidnapping. On the contrary, the Ranch has been Kevin's biggest champion.

Kevin, Marilynn, and Randy testified the Ranch is important to the Frost family and none of them wanted Sherri to receive any portion of it in the divorce. As shown by the letter from Gail Haviland (Trial Ex. 30), the Ranch knew Sherri was looking to add it to the divorce case as early as December 2015. The Ranch knew of the circumstances surrounding the kidnapping when it paid for Kevin's legal

expenses and helped him secure a plea agreement which resulted in him serving only three years in prison for aggravated kidnapping.

Finally, a reasonable jury could conclude that Kevin kidnapped Sherri to prevent her from adding the Ranch to the divorce case. Kevin's attorney learned Sherri was seeking to add the Ranch in the divorce, and Kevin kidnapped Sherri the next day. Kevin used a car which had no association to him, and was armed with a stun gun and a knife. He turned Sherri's phone off, and did not allow her to inform anybody about what was happening until he abandoned her in the emergency room. Kevin's excuses throughout this case, like his claim that he brought the stun gun to use as a flashlight, exceed the bounds of a reasonable imagination. A reasonable jury could conclude Kevin sought to kill or intimidate Sherri to prevent her from adding the Ranch in the divorce.

Construing all evidence in the light most favorable to Sherri, a reasonable jury could conclude the Ranch ratified Kevin's conduct. Whether the payment of Kevin's legal fees was a legitimate "personal loan" or maternal support on Marilynn's part is immaterial for this appeal. Those are both questions of fact for the jury to decide. Judgment as a matter of law should not be granted unless there is a complete absence of evidence which would justify submitting the issue to the jury. That is not the case here. Accordingly, the District Court's order granting the Ranch's Rule 50 motion on Sherri's ratification theory must be reversed.

CONCLUSION

The Court should affirm the District Court's order granting Sherri's motion for new trial and reverse the District Court's order granting the Ranch's Rule 50 motion for judgment as a matter of law regarding Sherri's ratification theory.

DATED this 27th day of February 2025.

Respectfully Submitted:

SIEFERT & WAGNER, PLLC

By: */s/ Matt Rossmiller*
Nicole L. Siefert
Matt Rossmiller
Attorneys for Sherri Frost

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF is proportionately spaced in 14-point roman, non-script text and contains 9999 words excluding brief's cover, table of contents, table of authorities, certificate of compliance and certificate of service.

DATED this 27th day of February 2025.

SIEFERT & WAGNER, PLLC

By: */s/ Matt Rossmiller*
Nicole L. Siefert
Matt Rossmiller
Attorneys for Sherri Frost

CERTIFICATE OF SERVICE

I, Nicole Lynn Siefert, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 02-27-2025:

Curt Drake (Attorney)
111 N Last Chance Gulch Suite 3J
Helena MT 59601
Representing: Frost Ranching Corporation
Service Method: eService

Patricia Hope Klanke (Attorney)
111 N Last Chance Gulch Suite 3J
Helena MT 59601
Representing: Frost Ranching Corporation
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Kevin R. Frost
Service Method: eService

Erin Michelle Lyndes (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Kevin R. Frost
Service Method: eService

Matthew Rossmiller (Attorney)
1135 Strand Ave.
Ste. A
Missoula MT 59801
Representing: Sherri Frost
Service Method: eService

Electronically signed by Lily Tate on behalf of Nicole Lynn Siefert
Dated: 02-27-2025