CASE NO. DA 24-0668

IN THE SUPREME COURT OF THE STATE OF MONTANA

TRISTIN FAHRNOW,

Plaintiff/Appellant

v.

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

Defendants/Appellees.

APPELLEE E-5 OILFIELD SERVICE'S ANSWER BRIEF

On appeal from the Seventh Judicial District of the State of Montana
Richland County, Cause No. DV 21-100
The Honorable David Cybulski

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STATEMENT OF ISSUES

Appellee E-5 Oilfield Services, LLC, agrees with the following issues set forth by Appellant Tristin Fahrnow ("Fahrnow") in Fahrnow's Opening Brief:

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 [Fahrnow's] motion for summary judgment regarding E-5 and Eiker's liability.
3. Whether the District Court abused its discretion in refusing to sanction E-5 and Eiker for spoliation of evidence.

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

STATEMENT OF NON-ISSUES

Subsequent to the filing of the appeal E-5 waived recovery of costs and fees in the District Court. E-5 and Eiker have covenanted not to execute on the existing judgment for costs and fees. (CSApp. 127). Therefore, the following issues set forth in Fahrnow's Brief are now **non-issues** and will not be briefed by E-5:

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 . . . awarding E-5 its attorney fees for the cross-motion [for a protective order].

STATEMENT OF THE CASE

This lawsuit concerns two separate accidents which occurred minutes apart on November 8, 2018. The first accident involved vehicles driven by Fahrnow and Joseph Averett ("Averett") of XTO, Inc. The second involved Fahrnow and Greg Brown, who was driving E-5's truck in the course of his employment by E-5.

On November 2, 2021, Fahrnow filed this lawsuit against Brown, Averett, XTO and E-5. (Doc. 1).[1] After E-5 and XTO acknowledged that the employees were acting in the course and scope of their respective employments, Fahrnow dismissed Brown and Averett as defendants on August 18, 2022 in his first amended complaint. (Doc. 12). Sixteen months later, on December 20, 2023, Fahrnow filed a second amended complaint, adding Eiker, Inc. as a party defendant. (Doc. 40).

On March 4, 2024, Fahrnow moved to compel E-5 to supplement its answer to a single interrogatory regarding expert qualifications. (Doc. 58). E-5 countered with a motion for a protective order regarding the interrogatory. (Doc. 61). On September 9, 2024, the District Court granted E-5's cross-motion for a protective order and denied Fahrnow's motion to compel. (App. 18).

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[1]Throughout this brief, "Doc." refers to the district court electronic docket number; "App." refers to Fahrnow's appendix; and "CSApp." refers to the combined supplemental appendix filed by E-5 on behalf of both E-5 and Eiker.

On August 30, 2024, XTO moved for summary judgment. (Doc. 90). On September 18, 2024, XTO and Fahrnow notified the District Court that the claims against XTO had settled. (Doc. 125). Upon Fahrnow's receipt of payment from XTO, Fahrnow and XTO stipulated to dismissal of XTO on October 15, 2024. (Doc. 180).

On September 13, 2024, all the remaining parties moved for summary judgment – Plaintiff Fahrnow (Doc. 111, Doc. 114) and Defendants E-5 (Doc. 103) and Eiker (Doc. 118). Fahrnow's motion included a claim of spoliation of evidence as grounds for a liability sanction against E-5 and Eiker. (Doc. 114).

On October 15, 2024, the District Court orally denied Fahrnow's motions for summary judgment, including the spoliation claim, at the final pretrial conference. (App. 33-37). The District Court granted Eiker's motion for summary judgment on October 17, 2024 (App. 12-17) and granted E-5's motion for summary judgment on October 18, 2024 (App. 3-11).

On November 6, 2024, the District Court granted Eiker and E-5 their respective costs and awarded E-5 its attorneys fees incurred in the motion to compel. (App. 1-2). On March 21, 2025, Eiker and E-5 waived any right to recover costs and fees and covenanted not to execute upon the judgment. (CSApp. 126). The issue of costs and fees being moot, E-5 will not address Arguments IV and V.C. in Fahrnow's Opening Brief ("FOB").

STATEMENT OF THE FACTS

A. The Two Accidents

On the afternoon of November 8, 2018, two low-speed vehicular accidents occurred at the heavily traveled intersection of County Road 350 and Highway 23 near Sidney, Montana. (CSApp. 59, 248:23-249:4; CSApp. 48,136:1-5). County Road 350 is part of the truck route through Sidney, Montana, for commercial vehicle traffic; Highway 23 is the main route for commercial traffic from Sidney to Watford City, North Dakota. (CSApp. 49, 136:3-20).

The first accident involved Fahrnow and XTO. Fahrnow, who worked for Cowboy Crane Service, LLC, was driving back to the shop with his co-worker and passenger, Jordan Harrell. (CSApp. 46, 53:24-54:2; CSApp. 48, 129:6-8). Fahrnow remembers the conditions as being "really slick." (CSApp. 48, 129:17). Fahrnow stopped at the intersection, facing south on County Road 350. (CSApp. 49, 133:22-134:1). As Fahrnow waited to make a left-hand turn onto Highway 23, XTO Energy Inc.'s employee, Joseph Averett, was driving west on Highway 23 in a Ford F-250 truck. Averett attempted a right turn onto County Road 350. (CSApp. 50-51,139:25-141:7). While making the turn, Averett hit a patch of ice and the truck's rear driver's side impacted the rear driver's side of Fahrnow's Dodge. *Id.* Both trucks were driveable after this accident, and Fahrnow

admits there was essentially "no damage" to his Dodge after it was hit by Averett's Ford. (CSApp. 57, 231:17-20).

Both Fahrnow and Averett could have moved their undamaged vehicles off the road, but neither did so. (CSApp. 53, 151:2-11; CSApp. 63, 166-167). After the impact of the first accident Fahrnow put his Dodge in "park" in the southbound lane of County Road 350 at the intersection with Highway 23. (CSApp. 51, 142:2-25). Likewise, Averett parked his Ford in the northbound lane of County Road 350. (CSApp. 51,142:2-143:15). Averett, Fahrnow, and Harrell exited the vehicles to assess the damage. (CSApp. 51, 143:15-144:6). Averett returned to his vehicle and sat inside (CSApp. 22, 304:11-12), but Fahrnow remained in the southbound lane of County Road 350. (CSApp. 53, 149:16-24). Fahrnow admits that after the first accident, County Road 350 was "essentially blocked" by the vehicles and the people on the road. (CSApp. 54, 156:11-17).

The second accident involved Fahrnow and E-5. During the approximately four minutes Fahrnow was standing outside in the southbound lane of County Road 350, E-5 employee Greg Brown was driving E-5's hot oil truck westbound on Highway 23 returning to E-5's shop from the Watford City area. (CSApp. 19, 244:6-245:10). Although Highway 23's posted speed limit is 50 miles per hour, Brown was driving much slower – less than 30 miles per hour – and saw no warning signs of the first accident. (CSApp. 24, 411:21-25; CSApp. 54, 156:11-

17). He saw the vehicles in the road, but initially did not see the pedestrians. (CSApp. 20, 279:14-23). Fahnrow, back turned to traffic, did not see the oncoming truck. (CSApp. 53-54, 152:3-153:1).

In the intersection, Brown encountered the same patch of ice that, unbeknownst to Brown, XTO's Averett hit a few minutes earlier. (CSApp. 86). At that time, Fahrnow was leaning into the driver side of his vehicle. (CSApp. 83). Brown swung wide, braked, and used corrective steering in an attempt to avoid vehicles blocking the roadway. (CSApp. 86). Brown was able to maneuver the hot oil truck into a position where it slid into the front driver's side wheel and fender of Fahrnow's Dodge at a slow speed, which Plaintiff's expert calculated to be as low as 12 miles per hour. (CSApp. 86; CSApp. 32, 120:7-9).

As he got closer, Brown saw Fahrnow and hit his horn to alert him to get out of the intersection and traffic lanes. (CSApp. 22-23, 301:4-22, 318:11-21). Fahrnow's co-worker, Jordan Harrell, heard the horn and got out of the truck's path without injury before the slow-moving hot oil truck reached them on the road. (CSApp. 89-90, 18:1-11; 32:16-18). Fahrnow finally heard the hot oil truck's horn and "had just enough time to get out from in between the door and the pickup" before he was pulled under the hot oil truck. (CSApp. 83). Fahrnow's injuries were described by the investigating Highway Patrol Trooper as "minor." (CSApp. 71, 77:12-20).

Fahrnow was familiar with the statutory duties imposed upon drivers after an accident (CSApp. 55, 163:11-23), as summarized by the Montana Driver Manual published by the Montana Department of Justice: .

- Drivers are responsible for making sure that their vehicle does not become a hazard after it has been parked. Whenever you park your car, be sure it is in a place that is (1) far enough from any travel lane to avoid interfering with traffic[.]

- If at all possible, get your vehicle off the road and away from traffic.

- Turn on your emergency flashers to show you are having trouble.

- Try to warn other road users that your vehicle is there. Place emergency flares behind the vehicle.

- If you do not have emergency flares or other warning devices, stand by the side of the road where you are safe and wave traffic around your vehicle. Use a white cloth if you have one.

- Never stand in the roadway. Do not even try to change a tire if it means you have to be in a traffic lane.

- Stop your vehicle at or near the accident site. If your vehicle can move, get it off the road so that it does not block traffic.

- Do not stand or walk in traffic lanes. You could be struck by another vehicle.

(CSApp. 92-97). Fahrnow admits he violated these standards after the first accident by leaving his car in the lane of travel; exiting his vehicle and remaining in the roadway; and failing to provide other drivers with emergency warnings. (CSApp. 55-56, 163:11-166:6).

B. Spoliation

Fahrnow alleges that E-5 destroyed computerized data – an engine control module, or "ECM" – and GPS data from the hot oil truck. The ECM data, if any ever existed, was automatically overwritten when the hot oil truck was moved on the day of the accident at the direction of the highway patrol. (CSApp. 75, ¶¶ 6-7). The truck itself was destroyed in an accidental fire two months after the accident. The GPS data was exclusively controlled by Verizon Connect, not E-5. (CSApp. 79). Verizon routinely preserves GPS data for only 90 days. (CSApp. 66, ¶ 8).

Prior to this lawsuit, E-5, a small family business, had no experience with or prior knowledge of litigation. (CSApp. 115, ¶ 2). Until service of this suit over three years after the two accidents, E-5 did not anticipate that this minor second accident would result in litigation and was unaware of any request or duty to preserve the truck or its computerized data. (CSApp. 115, ¶ 3).

Fahrnow alleges that E-5 or Eiker destroyed some of Greg Brown's employment records. E-5 defers to Eiker on this claim, and incorporates Eiker's argument by reference. E-5 has always acknowledged and admitted that at the time of the accidents on November 8, 2018, Greg Brown, as E-5's employee, was acting in the course and scope of his employment with E-5. (Doc. 9, ¶¶ 43, 55; Doc. 16, ¶16). Brown's employment with E-5 is not at issue.

C. Interrogatory No. 11

E-5 disclosed Dr. Ericksen as a medical expert and Fahrnow disclosed Dr. Donaldson as a medical expert. In the course of discovery, E-5 responded fully to all discovery requests. E-5 produced Dr. Ericksen's report from his independent medical exam of Fahrnow. E-5 responded to written discovery with production of Dr. Ericksen's expert report, which includes comprehensive information concerning his credentials and training. E-5 produced Dr. Ericksen's curriculum vitae ("CV"). Dr. Ericksen was deposed by Fahrnow's counsel without limitations. (Doc. 61).

Subsequent to these discovery activities, Fahrnow propounded Interrogatory No. 11, asking E-5 to compare and contrast Dr. Ericksen's qualifications with Dr. Donaldson's qualifications. E-5 answered the interrogatory and objected based on the scope of Rule 26(b), with which E-5 had fully complied. Interrogatory No. 11 is the only discovery request at issue in the District Court and on appeal.

STANDARDS OF REVIEW

E-5 agrees with Fahrnow's statement of the standards of review. Summary judgment rulings are reviewed *de novo*. *Speer v. State*, 2020 MT 45, ¶ 17, 399 Mont. 67, 458 P.3d 1016 (citations omitted). The District Court's rulings regarding discovery, spoliation, and sanctions are reviewed for an abuse of discretion. *Daley v. Burlington Northern Santa Fe Railway* Co., 2018 MT 197, ¶ 3, 392 Mont. 311, 425 P.3d 669; *Walden v. Yellowstone Co.*, 2021 MT 123, ¶ 10, 404 Mont. 192, 487 P.3d 1. A district court abuses its discretion if the court "acts arbitrarily without the employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *Daley,* ¶ 3.

SUMMARY OF ARGUMENT

Cross-Motions for Summary Judgment. The District Court correctly granted summary judgment to E-5 and denied summary judgment to Fahrnow. Negligence *per se* should be applied when "as between two drivers – one who has been free from fault and violated no law, and one who has violated a law upon which the other depended – fault should, as a matter of public policy, be attributed to that person who violated the law." *Craig v. Schell*, 1999 MT 40, ¶ 16, 293 Mont. 323, 975 P.2d 820. Fahrnow admits that he violated the numerous statutes which regulated his conduct after the first accident by parking his vehicle in the

traffic lane; failing to display hazard lights or flag; and walking in the traffic lanes. (CSApp. 55-56). Brown, on the other hand, was merely involved in a slow-speed accident, the mere happening of which is not sufficient to establish negligence. *Wilson v. Doe* (1987), 228 Mont. 42, 44, 740 P.2d 687, 688. Summary judgment is appropriate because "reasonable minds could reach but one conclusion as to the cause of the accident." *See Pappas v. Midwest Motor Express* (1994), 268 Mont. 347, 350, 886 P.2d 918, 920. Fahrnow's inexplicable decisions to block the road, exit his vehicle, and remain in the lane of traffic as a pedestrian without keeping a lookout for oncoming traffic caused the second accident.

Spoliation. The District Court did not abuse its discretion in denying liability sanctions based on Fahrnow's tardy and specious claim that E-5 destroyed evidence. Sanctions for spoliation are available if E-5 anticipated litigation and yet acted with culpability to destroy evidence, and if Fahrnow suffered prejudice as a result. *Mont. State Univ. - Bozeman v. Montana First Jud. Dis. Ct.*, 2018 MT 220, ¶ 22, 392 Mont. 458, 426 P.3d 541. Sworn testimony establishes that E-5 had neither the experience to anticipate litigation generally, nor the notice to anticipate Fahrnow's complaint. E-5 thus had no duty to preserve computerized truck data or employment records, and by the time Fahrnow requested the information five years after the accidents, the information no longer existed through no fault of E-5.

Interrogatory No. 11. The District Court did not abuse its discretion in refusing to compel a response to a single interrogatory regarding expert qualifications. Rule 26(b), Montana Rules of Civil Procedure, governs expert disclosures, and E-5 fully complied with the Rule, producing all documents and opinions required by Rule 26. Fahrnow fails to support his allegations with factually relevant authority, which is fatal to his appeal of the discovery order. *Hawkins v. Harney*, 2003 MT 58, ¶ 34, 314 Mont. 384, 66 P.3d 305.

Award of Costs and Fees. E-5 has waived the right to recover costs and fees. (CSApp. 127). Fahrnow's appeal from the award of costs and fees is now moot, and E-5 therefore does not address it on appeal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO E-5 AND CORRECTLY DENIED FAHRNOW'S MOTION FOR SUMMARY JUDGMENT.

E-5 and Fahrnow each asserted that the other acted negligently, and each moved for summary judgment on their respective negligence claims. "Negligence is the failure to use the degree of care that an ordinary person would have used under the same circumstance." *Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, ¶ 41, 326 Mont. 93, 107 P.3d 471. "To maintain an action in negligence, a plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a

legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted." *Peterson v. Eichhorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 189 P.3d 615. Summary judgment dismissing a claim of negligence is appropriate if the party advancing the claim fails to establish even one of the four elements. *Dubiel v. Mont. Dept. of Transp.* 2012 MT 35, ¶ 12, 364 Mont. 175, 272 P.3d 66.

Because each party bears the burden of establishing the elements of his or its own negligence claim, the District Court analyzed the each negligence claim separately to ascertain whether each proponent met the burden of establishing the elements. The District Court correctly granted summary judgment to E-5 because Fahrnow's sworn admissions establish that Fahrnow breached his statutory duties, causing his own injuries. The District Court correctly rejected Fahrnow's motion for summary judgment because the undisputed facts and admissions established that Brown (and thus, E-5) breached no duties, and even if Brown had breached, reasonable minds could reach but one conclusion– Fahrnow's violation of his statutory duties caused the second accident and Fahrnow's injuries. *Pappas*, 268 Mont. at 350, 886 P.2d at 920.

A. E-5 Established the Elements of Negligence Against Fahrnow.

1. Fahrnow breached his statutory duties as a matter of law.

Fahrnow's violations of Montana's traffic statutes constitute negligence *per se*. "Negligence *per se* is simply negligence established as a matter of law, which usually arises from a statutory violation." *City of Whitefish v. Jentile*, 2012 MT 185, ¶ 30, 366 Mont. 94, 285 P.3d 515. "The threshold element required to establish negligence *per se* is that the defendant violated a particular statute." *Hislop v. Cady*, (1993) 261 Mont. 243, 248, 862 P.2d 388, 391. Establishing negligence *per se* settles the questions of duty and breach. *Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 2008 MT 378, ¶ 67, 347 Mont. 1, 196 P.3d 126.

Fahrnow's sworn admissions of his violation of statutes require the finding that Fahrnow was negligent as a matter of law. Following the first accident with Averett, Fahrnow did not move his truck from the traffic lanes of County Road 350 as required by Montana's traffic code. (CSApp. 51, 142:2-143:15). After leaving his truck in "park" in the road, blocking the traveling lanes, Fahrnow did not place any warning signs to alert other motorists to the hazard he created in the intersection and traffic lanes. (CSApp. 55, 163:11-166:6). Fahrnow then stood outside his vehicle in the roadway and intersection for several minutes before

walking to his parked vehicle, all the while with his back turned to Highway 23 and approaching traffic. (CSApp. 53-54 152:23-153:1; CSApp. 82-83). In doing so, Fahrnow placed himself directly in harm's way and the "line of fire" of approaching traffic. (CSApp. 71, 78:8-79:3).

Based on these sworn admissions, the District Court properly determined as a matter of law that Fahrnow violated numerous statutorily imposed duties:

> Montana statutory law prohibits motorists from parking vehicles in the traffic lanes and intersections. [§ 61-8-354(1)]. Whenever a vehicle is parked on the traveled portion of the roadway, Montana statutory law requires the driver to display two red flags upon the roadway in the lane of traffic occupied by the disabled vehicle or at a distance of approximately 100 feet in advance of the vehicle. . . . [§ 61-9-412]. Montana statutory law further prohibits pedestrians from walking in the traffic lanes. [§ 61-8-503, -506].

(App. 6-7). The District Court also correctly determined that Fahrnow breached the common law duty to use reasonable care. (App. 7).

Fahrnow was negligent based on the violation of these particular statutes. Critically, Fahrnow admitted to each violation under oath:

> Q. Could you read the -- the first bullet there, what that says.
>
> A. "Stop your vehicle at or near the accident site. If your vehicle can move, get it off the road so that it does not block traffic."
>
> Q. Okay. And that's a good and safe and reasonable thing for people to do that have been involved in an accident. Do you agree with that?
>
> A. I agree.

Q. Okay. And before Mr. Brown entered that intersection, you hadn't done that? You hadn't moved that vehicle out of the roadway. Is that fair?

A. Yep.

Q. And Mr. Averett hadn't done that either. Is that fair?

A. Yep.

Q. Okay. And then could you read the second bullet down.

A. "Do not stand or walk in traffic lanes. You could be struck by another vehicle."

Q. Okay. And you agree that that's exactly what happened in -- in this situation? You were standing in the traffic lane and – after you were involved in an accident and got struck by another vehicle?

A. Yep.

Q. Okay. And do you understand that that's not a safe thing to do?

A. I mean, I guess, yeah.

****

Q. Okay. And then could you read the last bullet on that page.

A. "Make sure that other traffic will not be involved in the crash. Use flares or other warning devices to alert traffic of the accident."

Q. Okay. And that wasn't something that – that you did at the scene of the accident after Mr. Averett hit your truck. Is that fair?

****

A. Or, yeah, that's fair.

****

Q. And Mr. Averett didn't do that?

A. No.

Q. And that's a good and safe and reasonable thing to do is -- is to use flares and warning devices and alert other traffic so that the first accident doesn't cause a second one. Do you agree with that?

A. Yep.

(CSApp. 55-56, Fahrnow 163:11-166:6).

Fahrnow concedes that he failed to remove his vehicle from the roadway (violating § 61-8-354(1)); failed to warn other drivers of the accident (violating § 61-9-412); and stood and walked in the traffic lanes after the first accident (violating § 61-8-503, -506). (CRApp. 55-56). Based on Fahrnow's sworn admissions, the District Court properly found that Fahrnow was negligent as a matter of law.

2. Fahrnow's breaches caused the second accident.

Just as Fahrnow's sworn admissions establish duty and breach, Fahrnow's admissions establish that Fahrnow's negligence, and not Brown's, caused the second collision.

"A party's act is the cause-in-fact of an event if 'the event would not have occurred but for that conduct.'" *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 36, 342 Mont. 335, 181 P.3d 601 (citations omitted). Fahrnow's vehicle

sustained only minor damage in the first accident and was not disabled. (CSApp. 57, Fahrnow 231:17-20). Fahrnow admits he could have moved the vehicle to clear the traffic lanes, and further admits that if he had moved his vehicle, he never would have been injured. (CSApp. 58, 234:1-8). Moreover, Fahrnow testified under oath that had he simply looked, he would have seen E-5's large, red hot oil truck coming directly towards him from at least one-half mile away. (CSApp. 50, 52; 137:6-24; 147:23-148:2). His co-worker, Harrell, who was also standing in the traffic lane "right next to" Fahrnow, saw the hot oil truck and moved out of danger. (CSApp. 89, Harrell 18:1-11; 32:16-18). Fahrnow's actions were the cause-in-fact of the accident.

In *Roe v. Kornder-Owen* (1997), 282 Mont. 287, 937 P.2d 39, this Court analyzed causation when, as here, one party was negligent *per se.* In that case, plaintiff failed to comply with the duty to yield the intersection pursuant to § 61-8-341, Mont. Code Ann. This Court held that defendant had a right to rely on plaintiff's compliance. "Therefore, we hold as a matter of law that [plaintiff] was negligent for failing to comply with [the statute] and that the predicate for imposition of a duty on the defendant to yield did not occur. To summarize, it was [plaintiff's] negligence, and not [defendant's] that caused the parties' collision." *Roe*, 282 Mont. at 292, 937 P.2d at 42-43. Like in *Roe,* in this case § 61-8-503(1)

required Fahrnow, a pedestrian not in a crosswalk, "to yield the right-of-way to all vehicles upon the roadway," and Brown had a right to rely on Fahrnow's compliance.

Similarly, in *Anderson v. Werner Enterprises, Inc.* 1998 MT 333, 292 Mont. 284, 972 P.2d 806, this Court considered a three-vehicle icy-road collision in which plaintiff lost control of his vehicle after two other vehicles spun into the road in front of him before lodging in a snow bank. The trial court granted directed verdict to plaintiff Anderson on the issue of his comparative negligence when the defendant testified that "there was nothing else [Anderson] could do" to avoid the accident. This Court affirmed, opining that Anderson's loss of control of the vehicle did not cause the accident and that "reasonable persons could draw no other conclusion but that the facts did not support a causal connection between Anderson's actions and his injuries." *Id.* at ¶ 38.

The same result is required here. Fahrnow failed to comply with his legal duties to pull his vehicle off the road, warn other drivers, and personally stay out of the roadway. His unforeseeable statutory violations constitute negligence *per se*. Considering the evidence, reasonable persons could draw no other conclusion but that the facts establish a causal connection between Fahrnow's statutory violations and his injuries. Just as in *Roe*, Fahrnow's negligence caused the second collision

as a matter of law. E-5 having met its burden of establishing that Fahrnow's breaches of duties caused his injuries, the District Court correctly granted summary judgment in favor of E-5 on its claim that Fahrnow was negligent.

B. Fahrnow Did Not Establish the Elements of Negligence Against E-5.

1. Brown (and thus E-5) breached no duties.

Fahrnow bears the burden of establishing the elements of his claim of negligence against E-5, including duty and breach. *Peterson*, 2000 MT 250, ¶ 23. In contrast to E-5's claim that Fahrnow violated specific statutory duties, Fahrnow's claim of negligence against E-5 does not give rise to negligence *per se*. Fahrnow alleges that Brown breached general duties based on factually unsupported claims that Brown was traveling too fast and failed to avoid the blocked intersection, which was in "plain view." (FOB 22-23). Although Fahrnow cites to § 61-8-303(3), Mont. Code Ann., and 49 CFR § 392.14, these general and vague allegations do not meet the threshold requirement for negligence *per se*: violation of a particular statute. *Edie v. Gray,* 2005 MT 224, ¶ 16, 328 Mont. 354, 121 P.3d 516.

For decades, this Court has held that "the mere happening of an accident is insufficient evidence of negligence." *Wilson,* 228 Mont. at 44, 740 P.2d at 688. Yet Fahrnow's speculative assertion of inappropriate speed amounts to nothing

more than an implication that because an accident occurred, Brown was driving too fast – a theory rejected in *Roe.* Unsupported claims of inappropriate speed are precisely the type of speculative and conclusory allegations that are insufficient to defeat summary judgment. *Roe*, 282 Mont. at 290-91, 937 P.2d at 41-42.

There is no admissible evidence that Brown was driving "too fast." Even Fahrnow's retained expert opined that the hot oil truck was traveling under 30 miles per hour as it approached the intersection – where the posted speed limit is 50 miles per hour – and had slowed to 12 to 18 miles per hour by the time of the second collision.[2] (CSApp. 34, 131:17-132:7).

As recently determined as a matter of law by Montana's federal district court, an expert's generic conclusion that slower, safer driving prevents accidents is insufficient when the party "fails to present any evidence that shows a change in [the driver's] speed or operation of the truck would have altered the outcome. . . ." *Creel v. Loy*, 524 F.Supp.3d 1090, 1100 (D. Mont. 2021). In this case, the District

[2]In his Statement of Facts, Fahrnow references accident investigation forms "checked off" by Paul Eiker and a citation. (FOB 11). Such investigative forms and the citation are inadmissible and "do not raise a genuine issue of material fact," as established in E-5's motion *in limine* below. (Doc, 106 and 196). To the extent Fahrnow relies on these documents on appeal – they are not referenced in his Argument – that reliance is misplaced. *Gourneau ex rel. Gourneau v. Hamill*, 2013 MT 300, ¶ 21, 372 Mont. 182, 311 P.3d 760 ("it is well settled that a district court may consider only admissible evidence" in deciding summary judgment motions).

Court noted that Fahrnow "had not identified any speed at which the hot oil truck could have been driving to avoid the low-speed accident" nor "any path [Brown] could have taken to avoid the vehicles and pedestrians in the roadway and intersection." (App. 9-10).

Fahrnow also fails to establish that Brown had a duty to avoid vehicles and pedestrians impermissibly blocking an intersection. (CSApp. 54, Fahrnow 156:11-17). Settled law demonstrates that Brown had no duty to foresee – and therefore no duty to avoid – Fahrnow's baffling decision to park his vehicle in the road, exit the vehicle, and occupy the roadway. "Although a driver has a duty to keep a proper lookout and take reasonable steps to avoid a collision, a driver does not have a duty to anticipate injury which comes about only as the result of the negligence of another." *Anderson,* 1998 MT 333, ¶ 37.

"Montana courts have not extended the duty to anticipate to include anticipation of the negligent acts of others." *Creel*, 524 F.Supp.3d at 1097. Rather, drivers owe a duty to anticipate *unexpected* hazards such as wildlife, chuckholes, and black ice. *Craig*, 1999 MT 40, ¶ 32. In *Craig*, the driver could reasonably foresee the presence of wildlife (deer) on a rural highway, and thus his veering into the other lane to avoid a deer constituted negligence *per se* as opposed to an involuntary action. *Id.*

Unlike the foreseeable deer on the rural highway in *Craig*, Brown had no reason to anticipate that a human would be standing in the roadway at one of the busiest intersections in Eastern Montana. Fahrnow would not have been in the intersection absent his own incomprehensible violation of the statutory prohibition of pedestrians walking in traffic lanes. §§ 61-8-503, -506, Mont. Code Ann. Fahrnow's negligence theory against Brown ignores that "it is not negligent for a motorist to fail to anticipate injury which can result only from a violation of law or duty by another." *Roe,* 282 Mont. at 292, 937 P.2d at 42.

Fahrnow also posits that Brown was negligent because he drove his vehicle into the opposite lane in violation of traffic laws when he "swung wide" to avoid hitting the vehicles blocking the intersection. (CSApp. 86). As held by this Court in *Craig*, "[c]ertainly, if the defendant's presence on the wrong side of the road is caused by the plaintiff's prior negligence, the exception [to negligence *per se*] should apply." *Craig*, 1999 MT 40, ¶ 34. That is precisely what happened to cause Brown to cross the center line, and he cannot be held liable.

No motorist, including Brown, is required to foresee and anticipate the negligence of others. *Creel*, 524 F.Supp.3d at 1100. Brown could not anticipate the numerous dangers presented by Fahrnow's unexplainable decision to leave his

vehicle and maintain his presence in the roadway for several minutes with his back turned to approaching traffic. *See Roe*, 282 Mont. at 292, 937 P.2d at 42.

2. Brown (and thus E-5) did not cause the second accident.

Because Fahrnow failed to establish the duty and breach elements of negligence, the Court need not reach the issue of causation with respect to Fahrnow's negligence claim against Brown. *See, e.g., Edie*, 2005 MT 224, ¶ 19. Nonetheless, Fahrnow failed to establish that Brown, not Fahrnow, caused the accident.

Even while conceding he would not have suffered injuries if he had moved his vehicle or kept a proper lookout, Fahrnow has completely failed to establish that Brown's actions caused the accident or could have avoided the accident. Fahrnow's expert Przybyla had "no idea" what an appropriate speed would be or how much braking distance was required in such icy conditions. (CSApp. 35; 136:7-24). Because Fahrnow presented no evidence of a speed at which Brown could have traveled, or a path he could have taken, to avoid the vehicles and pedestrian, the District Court properly determined "[u]ltimately, [Fahrnow] failed to present any evidence showing that a change in speed or operation of [E-5's] hot oil truck would have prevented the accident." (App. 9-10). *See Roe*, 282 Mont. at 290-91, 937 P.2d at 41-42.

C. Reasonable Minds Could Not Differ in Concluding that Fahrnow's Negligence Exceeded E-5's Negligence (if any).

Even if this Court were to find a possibility of negligence on the part of Brown, the District Court correctly granted summary judgment in favor of E-5. In negligence cases, "where reasonable minds could reach but one conclusion as to the cause of the accident, questions of fact may be determined as a matter of law." *Pappas*, 268 Mont. at 350, 886 P.2d at 920; *see also Brohman v. State* (1988), 230 Mont. 198, 201, 749 P.2d 67, 69 (recognizing summary judgment is appropriate in negligence case "when it is clear that a party has breached a duty and caused an accident."). Fahrnow's negligent conduct after the first accident is indisputably greater than any negligence on the part of the unsuspecting second driver who acted reasonably when confronted with an intersection blocked by two vehicles and several pedestrians.

Negligence *per se* should be applied when "as between two drivers – one who has been free from fault and violated no law, and one who has violated a law upon which the other depended – fault should, as a matter of public policy, be attributed to that person who violated the law." *Id.* at ¶ 33. In *Craig*, unlike this case, the driver should have anticipated deer on a rural highway, and public policy required that liability be attributable to him. *Id.* at ¶ 32. Conversely, Brown had no reason – or duty – to anticipate that another driver, one aware of Montana's

statutes regarding responsibilities after an accident, would choose to leave his auto in the traffic lane and walk in the road with his back to traffic. This is especially true because the Montana Legislature prescribes public policy through its enactment of statutes, *Hardy v. Progressive Spec. Ins. Co.*, 2003 MT 85, ¶ 32, 315 Mont. 107, 67 P.3d 892, and Montana statutes impose specific duties upon Fahrnow to clear the scene of the first accident, to warn of the hazard in the road, and to refrain from walking in a traffic lane. §§ 61-8-354; 61-9-412; 61-8-503.

In contrast to this case, summary judgment is inappropriate in cases involving two parties when **both** parties are **substantially liable**. When a pedestrian and a driver "both have acted with substantial negligence, the Court must deny summary judgment to allow the factfinder to determine the degree of each party's negligence." *Estate of Lefthand v. Tenke*, 646 F.Supp.3d 1287, 1293 (D. Mont. 2022) (denying summary judgment when both parties presented evidence of potential substantial negligence), citing *Dillard v. Doe* (1992), 251 Mont. 379, 824 P.2d 1016, 1018-20. In *Dillard,* this Court found that a pedestrian walking on the wrong side of the highway who failed to move away from the road after he saw a snowplow approaching was clearly negligent, yet the Court denied summary judgment for the snowplow driver because the driver's negligence was also presumed to be substantial: the driver failed to keep a proper lookout, failed to

maintain control of his vehicle, drove too close to the pedestrian, and drove too fast. *Id.* at 1018-19. Because the snowplow driver had not been deposed at the time of the summary judgment motion, the court assumed negligence on his part, and summary judgment was improper. *Id*. at 392, 824 P.2d at 1019.

On the other hand, when a pedestrian acts negligently and a driver's negligence is not substantial, summary judgment in favor of the driver is appropriate. *Lefthand,* 646 F.Supp.3d at 1293. In *Brohman,* 230 Mont. at 201, 749 P.2d at 920, this Court upheld summary judgment in a comparative negligence case when the state's negligence was minimal (failing to warn of a no-passing zone), but the driver's negligence was substantial (attempting to pass in a no-passing zone, at night, in a snowstorm, with obscured visibility).

When a pedestrian is negligent *per se*, the court asks whether the pedestrian was plainly visible to the motorist, such that the motorist had a duty to stop or avoid the pedestrian. *Lefthand*, 646 F.Supp.3d at 1293, *citing Payne v. Sorenson* (1979), 183 Mont. 323, 326, 599 P.2d 362, 364 (pedestrian who negligently walked in the dark on the wrong side of the roadway with his back to oncoming traffic was substantially negligent and not entitled to entry of judgment in his favor). In this case, the pedestrian – Fahrnow – admittedly violated numerous statutes after the first accident, and negligence *per se* applies.

Conversely, Brown was traveling at a greatly reduced speed from the posted speed limit of 50 miles per hour. Moreover, Brown timely saw what was plainly in front of him – an intersection blocked by two cars. Brown took appropriate evasive action, swinging wide, braking, and using corrective steering in an attempt to avoid the two vehicles that were blocking the intersection and roadway. (CSApp. 86). Brown was able to maneuver the hot oil truck into a position where it slid into the front driver's side wheel and fender of Fahrnow's Dodge at a slow speed (CSApp. 86), which Plaintiff's expert calculated to be as low as 12 miles per hour. (CSApp. 32, 120:7-9).

Brown did not initially see Fahrnow standing unexpectedly in the traffic lane. (CSApp. 20; 279:14-23). At the time the hot oil truck was approaching the scene of the first accident, Fahrnow had exited the driver's side of his vehicle and was located between the vehicles that were parked in the roadway; he would not have been visible to the hot oil truck driver. (CSApp. 82-83). Most importantly, Fahrnow's illegal presence in the roadway as a pedestrian was completely unexpected and totally unforeseeable to Brown. When Brown saw Fahrnow, he honked his horn and "prayed out loud for this kid to move." (CSApp. 22; 306:21-307:17). Fahrnow presents no evidence establishing that he was in "plain view" or that the collision was avoidable.

These unusual and unforeseeable circumstances justify the grant summary judgment in this case. Fahrnow's actions and inactions constitute negligence *per se*, while E-5 (Brown) was not substantially negligent. The District Court summarized the parties' negligence based on Montana law and the admissions on file: "The negligence of both sliding drivers [first Averett and then Brown] is about the same, very little, if any. Conversely, the driver of the impacted pickup [Fahrnow] was extremely negligent when he stood where he was without giving close attention to the traffic." (App. 10).

Reasonable minds could not parse these undisputed facts differently. Brown was merely in an accident on an icy road, which is insufficient to establish negligence. Fahrnow, on the other hand, violated numerous motor vehicle statutes regulating his conduct after the first accident. The second accident was unavoidable because of Fahrnow's violations of law, not because of any action or inaction on the part of Greg Brown.

D. Trial of the Remaining Issues is Unnecessary and Wasteful.

Summary judgment should "never be substituted for a trial if a material factual controversy exists." *Payne Realty & Housing Inc. v. First Sec. Bank of Livingston*, (1992) 256 Mont. 19, 24, 44 P.2d 90, 93. However, in appropriate cases, summary judgment serves the purpose of eliminating unnecessary trials. *Id.*

The estimated ten-day trial is wasteful here because even if remanded, the case will not be decided by the jury. Fahrnow's sworn admissions of statutory violations – parking in the road, failing to warn others, and egregiously standing in the icy traffic lane – require a finding that Farhnrow was negligent *per se*, resolving the issues of Fahrnow's duty and breach. *Olson*, 2008 MT 378, ¶ 67. As to Brown's conduct, with no evidence that Brown breached any duty when driving well below the speed limit, the issue of Brown's negligence will not go to the jury. *See Anderson*, 1998 MT 333, ¶ 31. In fact, a trial court which submits such a claim to the jury abuses its discretion. *See, e.g., Edie*, 2005 MT 224, ¶ 21.

This Court has determined that the concept of negligence *per* se is particularly "useful" in traffic accident claims. *Craig,* 1999 MT 40, ¶ 16. "Insurance adjusters understand it and rely on it when resolving claims. As a result, litigation is avoided in most instances. . . ." *Id.* Here, Fahrnow settled with the primary tortfeasor, XTO, whose driver, like Fahrnow, blocked the intersection, causing the second accident. (Doc. 180). A jury is not needed to resolve Fahrnow's remaining claims against E-5 and Eiker; the essential facts are not disputed and all parties sought summary judgment. Rather, this is a case where the undisputed facts will result in judgment as a matter of law on the remaining claims, if not now, then at the close of Plaintiff's case in chief.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING FAHRNOW'S CLAIM OF SPOLIATION.

Fahrnow seeks to establish E-5's non-existent liability through non-existent spoliation of mostly non-existent "evidence." Fahrnow claims that E-5 destroyed computerized ECM data and GPS data from the hot oil truck and that E-5 and/or Eiker destroyed – or failed to maintain – Brown's employment records. Spoliation arises "when a party seeks discovery of evidence that no longer exists due to the opposing party's destruction or material alteration of evidence in contemplation of adverse litigation." *Mont. State Univ.-Bozeman,* 2018 MT 220, ¶ 22. Before obtaining sanctions for spoliation of evidence, Fahrnow must demonstrate: 1) there was a duty to preserve the evidence; 2) the spoliator knew it was destroying relevant evidence and acted with a sufficient degree of culpability; and 3) resulting prejudice. *Id.*, ¶¶ 23-25; *Estate of Willson v. Addison*, 2011 MT 179, ¶¶ 27-28, 361 Mont. 269, 258 P.3d 410. Fahrnow has utterly failed to establish any of these elements with respect to both the hot oil truck data and E-5's employment records.

A. E-5 Did Not Spoliate Evidence of the Hot Oil Truck Data.

1. *E-5 owed no duty to preserve the truck data*.

A common-law duty to preserve evidence arises only "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.* at ¶ 23, *citing Estate of Willson*, 2011 MT 179, ¶ 27. "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., quoting Micron Tech., Inc. v. Rambus Inc*., 645 F.3d 1311, 1320 (Fed. Cir. 2011).

Montana courts usually impose a common law duty to preserve evidence only upon entities with institutional knowledge of and experience in litigation. *See Peschel v. City of Missoula*, 664 F.Supp.2d 1137 (D.Mont. 2009) (City of Missoula had duty to preserve police vehicle video recording of an arrest allegedly performed with "unreasonable force"); *Spotted Horse v. Burlington Northern Santa Fe R.R. Co.*, 2015 MT 148, ¶ 30, 379 Mont. 314, 350 P.3d 52 ("BNSF is a seasoned and sophisticated corporate litigant well aware of its obligations when responding to workplace violations and employee injuries and accidents"). This makes sense because institutions with litigation experience and in-house legal departments prepare for litigation in the ordinary course of their businesses, and should be obligated to preserve information gleaned in pre-litigation investigations. The same standard should not be imposed upon individuals or small businesses involved in minor traffic accidents. Undisputed sworn testimony establishes that

E-5 had never been sued – or even threatened with suit – prior to being served with the complaint in this suit in June of 2022. (CSApp. 115). Having never been engaged in litigation prior to this minor accident, E-5 had no reason to anticipate litigation from the time of the accidents to the time of service, nearly four years later. (CSApp. 115).

In addition to its lack of litigation experience, E-5 had no reason to foresee *this* litigation until served in June of 2022. At no time prior to serving E-5 with summons did Fahrnow ever contact E-5 to notify E-5 of his intent to file suit or request E-5 preserve the truck. (CSApp. 65; 115).

Fahrnow relies upon *Walden* for the implied proposition that any person involved in an accident must assume a lawsuit is in the offing and preserve the vehicle. In *Walden*, this Court held that a truck driver whose negligence in a catastrophic accident which caused the deaths of ten cows could reasonably foresee litigation and owed a duty to preserve truck data. Notably, in *Walden* the defendant was also culpable for discovery abuses in addition to the alleged spoliation of data **and** the driver and his insurer salvaged the vehicle *after* the insurer received notice of representation and a settlement demand.

The District Court in this case properly distinguished *Walden*, finding that "this thing looked like . . . a minor fender bender." (App. 32; 13:9-11). The

investigating Montana State Trooper also characterized Fahrnow's injuries as "minor." (CSApp. 70; 76:4-8). The trooper did not collect computerized vehicle data in his investigation because obtaining vehicle data is "not a typical process of a technically minor injury crash." (CSApp. 69; 47:12-14). The mere happening of this minor accident – unlike the crash in *Walden* – did not alert E-5 to the potential litigation and did not give rise to a duty to preserve the truck.

In his Statement of Facts, Fahrnow notes in passing that on November 12, 2018, E-5 notified its insurance company following the accidents, implying that insurer notification indicates the foreseeability of litigation. (FOB 11). The undisputed evidence shows otherwise. E-5 needed to repair the damage to the hot oil truck as soon as possible to allow the truck back into the service of the business. (CSApp. 66, ¶ 9). E-5 notified its insurance company not out of fear of litigation or to seek a defense, but to make sure the repairs would be covered. *Id.*

Fahrnow also implies that E-5 should have reasonably anticipated litigation as of June 5, 2019, when his counsel sent notice of representation to E-5's insurer. (FOB 11). That letter – sent not to E-5 but to an insurer – did not seek preservation of evidence and did not declare an intent to file suit. (CSApp. 40). The letter to the insurance company did not give E-5 reason to believe litigation would ensue. (CSApp. 80).

However, even if the June 5, 2019 letter had given rise to a duty to preserve, "the duty to preserve applies only to then-existing items or information. . . ." *Montana State University-Bozeman*, ¶ 24; *Willson,* ¶ 27. The truck data no longer existed on June 5, 2019; the truck was destroyed by an accidental fire two months after the November 8, 2018 accidents. (CSApp. 66, ¶ 6). The GPS data, which was held by a non-party vendor, was only preserved by the vendor for 90 days, and therefore also did not exist at the time Fahrnow's counsel notified the insurer of the representation. (CSApp. 66. ¶ 8).

E-5, a small family business with no litigation experience, had no reason to anticipate this litigation, and therefore owed no duty to preserve the truck data.

2. E-5 did not act with any degree of culpability.

For the loss of evidence to give rise to sanctions, the "spoliator" must act with a degree of culpability. E-5 bears no responsibility for the loss of the ECM data. At the time of the accidents, Paul Eiker of E-5 did not even know that the hot oil truck contained ECM capable of recording some data. (CSApp. 65-66, ¶ 5). Moreover, the ECM data – if any actually existed – was automatically overwritten when the hot-oil truck was moved in reverse immediately after the accident at the direction of the highway patrol. (CSApp. 74, ¶¶6-7). Finally, the truck itself and

all ECM data was accidentally destroyed by fire two months after the accidents. (CSApp. 66, ¶ 6).

As to the Fleetmatics GPS records, that data was in the exclusive control and possession of Verizon Connect, not E-5. The "terms and conditions" of the "Master Technology and Subscription Services Agreement" precluded E-5 from copying the data:

> The Customer [E-5 Oilfield] **shall not**, except to the extent expressly permitted under this Agreement, **attempt to copy**, modify, adapt, **duplicate**, create derivative works from, **republish**, **download**, display, **transmit**, reserve compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form or **distribute** any portion of the Services, Software or Equipment, and/or associated documentation, in any form or media or by any means, or permit or assist any third party to do so.

(CSApp. 79, *emphasis added*).

Although Paul Eiker was able to view this GPS location data shortly after the accidents, E-5 was prohibited from copying, republishing, downloading, transmitting, or distributing the data "in any form or media." *Id.* Moreover, in the ordinary course of its business, Verizon Connect only preserves the location data for ninety (90) days following the accidents before it is no longer available for viewing. (CSApp. 66, ¶ 8). E-5 is not culpable for the loss of GPS data it never possessed, was prohibited from copying or distributing, and which was not preserved by a third-party vendor (Verizon Connect) long before this litigation

ever became "reasonably foreseeable" to E-5 Oilfield. *Mont. State Univ.-Bozeman*, ¶ 23. Pointedly, Rule 37(e) expressly precludes sanctions for loss of electronically stored data: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system."

3. *Fahrnow was not prejudiced by the lack of ECM and GPS data.*

To obtain sanctions for spoliation, Fahrnow must show more than mere speculation or conjecture of prejudice. *Montana State University-Bozeman*, ¶ 23. Moreover, he must establish the proportionality of the sanction to the alleged culpable conduct. Fahrnow asserts that "the destruction of this important evidence is unfairly prejudicial to Fahrnow as Paul [Eiker] intends to mislead the jury that the data was favorable to E-5/Eiker, which warrants default judgment." (FOB 26). This is pure conjecture about Paul Eiker's testimony, but even if the allegation were accurate, the proportional remedy is either robust cross-examination or a motion *in limine* to preclude any testimony concerning the GPS data Paul reviewed on the day of the accident.

Fahrnow offers mere conjecture as to what the GPS and ECM data would show and only speculates that the data would establish Brown's speed. Ample

proof of speed is available to Fahrnow from other sources, such as witnesses and expert opinions. Moreover, the photos of the vehicles, as viewed by the District Court, reveal a slow speed collision – "a minor fender bender." (App. 32, 13:9-11). Even if E-5 breached a duty to preserve the GPS and ECM data – which it did not – Fahrnow is in no way prejudiced given the ample evidence available from typical sources.

B. E-5 Did Not Spoliate Employment Records.

E-5 has always admitted and established that Greg Brown was driving a vehicle owned by E-5 in the course and scope of his employment with E-5 at the time of the accidents. (Answers, Docs. 9, 16). E-5's position has not changed. Given that Brown's employment had never been at issue, E-5 had no reason to preserve a former employee's records based on this litigation – which E-5 did not anticipate until served in June 2022.

For all the reasons set forth above with respect to the truck data, E-5 had no common law duty to preserve Brown's employment records; did not anticipate the need for such records as evidence given E-5 has acknowledged employing Brown; and did not culpably destroy any records. Eiker addresses the spoliation of employment records in its brief. E-5 hereby joins in, and incorporates, Eiker's argument in full.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FAHRNOW'S MOTION TO COMPEL EXPERT DISCLOSURES OUTSIDE THE SCOPE OF RULE 26.

Fahrnow argues that the District Court abused its discretion in denying his motion to compel supplementation of an answer to a single interrogatory regarding expert qualifications. A district court abuses its discretion if the court "acts arbitrarily without the employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *Daley*, 2018 MT 197, ¶ 3, *citing State v. Sage*, 2010 MT 156, ¶ 21, 357 Mont. 99, 235 P.3d 1284. Fahrnow fails to establish any error, much less abuse of discretion.

Fahnrow submits a single interrogatory for appellate review:

> **INTERROGATORY NO. 11**: Please identify any pertinent experience, credentials, employment history, training, expertise and/or education which you contend Dr. Donald Ericksen [E-5's expert witness] has which you contend Dr. Michelle Donaldson [Fahrnow's expert witness] does not have.

(FOB 15). In response, E-5 objected that the interrogatory sought information beyond the scope of Rule 26 – with which E-5 had already fully complied. (Doc. 61).

Because Interrogatory No. 11 sought information solely regarding expert qualifications, the District Court properly consulted Rule 26(b)(4), which "governs expert disclosures." (App. 19). The District Court stated the obvious: Rule 26(b)

"allows a party, through interrogatories, to require disclosure of certain information regarding the expert and the expert's predicted testimony." (App. 19-20). The District Court then concluded that the "parties have exchanged discovery as to their disclosed expert witnesses as required under Rule 26, M.R.Civ.P. There is no need to answer interrogatory #11 as each party may compare the expert's credentials and make a determination of their adequate experience based on the disclosed discovery." (App. 19).

Indeed, by the time E-5 answered Interrogatory No. 11, E-5 had provided Fahrnow with Dr. Ericksen's report from his independent medical examination; E-5 had responded to written discovery with the production of Dr. Ericksen's comprehensive expert report which includes ample information regarding his experience, credentials, employment history, training, expertise and training; E-5 had produced Dr. Ericksen's CV; Fahrnow had produced Dr. Donaldson's CV and report; and both parties' experts had been deposed under oath without condition, limitation or restrictions. (Doc. 61 and exhibits).

The fulsome discovery already conducted regarding experts was key to the District Court's analysis of this fabricated discovery dispute. As held by the District Court, Rule 26 governs the disclosures required of experts. *See Hawkins*, 2003 MT 58, ¶ 21 ("Rule 26(b)(4)(A)(I) . . . addresses expert witnesses").

Fahrnow cites to no authority to refute the District Court's Rule 26 analysis regarding the scope of discovery of expert opinions and qualifications. Instead, Fahrnow ignores the specific application of Rule 26 and cites Rule 33's general scope-of-discovery language. In addition to inapplicable Rule 33, Fahrnow cites only two cases, both inapposite: *Richardson v. State*, 2006 MT 43, ¶ 22, 331 Mont. 231, 130 P.3d 634 and *Culbertson-Froid-Bainville Healthcare Corp. v. J.P. Stevens & Co., Inc.*, 2005 MT 254, ¶ 17, 329 Mont. 38, 122 P.3d 431. Neither of those cases involve the scope of expert discovery. In both cases, the district courts imposed sanctions under Rule 37(b) against a party who failed to respond not only to multiple discovery requests, but also failed to comply with an order compelling response. Rule 37(b), which addresses "failure to comply with a court order," does not apply to this situation, where no order issued and no order was violated.

Fahrnow cites to no authority to support his theory that a party who has obtained all the information regarding experts required by Rule 26 may then seek additional information requiring opposing counsel to conduct qualification comparisons. Fahrnow's failure to cite relevant legal authority is fatal to Fahrnow's appeal from the denial of its motion to compel.

This Court rejected a similar appeal from a discretionary discovery ruling in *Hawkins*, 2003 MT 58, ¶ 33. In that case, Hawkins filed a motion to compel

discovery in which she asserted that Harney failed to properly respond to her discovery requests. The district court determined that the additional information requested by Hawkins was either irrelevant or confidential, and denied Hawkins's motion. On appeal, Hawkins alleged error, but failed to support her allegations with factually relevant authority. *Id.* at ¶ 34. This Court deemed the failure fatal, noting that it "will not consider unsupported issues or arguments." *Id., quoting In re Custody of Krause*, 2001 MT 37, ¶ 32, 304 Mont. 202, 19 P.3d 811.

This Court is cognizant that the district court is in the best position to regulate discovery practices. *Culbertson-Froid-Bainville*, 2005 MT 254, ¶ 11. Moreover, the "district court's decision is presumed to be correct." *Hawkins,* 2003 MT 58, ¶ 35, *citing Matter of M.J.W.*, 1998 MT 142, ¶ 18, 289 Mont. 232, 961 P.2d 105. In exercising its broad discretion to regulate discovery, and presuming its decision to be correct, the District Court did not abuse its discretion in denying Fahrnow's motion to compel. Certainly, the District Court did not act arbitrarily in determining that E-5 had met its obligations of expert disclosure pursuant to Rule 26(b) when E-5 answered all written discovery; provided the IME report; responded to discovery with an indisputably proficient expert report; and allowed the expert to be deposed without conditions.

CONCLUSION

Appellee E-5 respectfully requests that this Court affirm the District Court's orders (1) granting summary judgment to E-5; (2) denying summary judgment to Fahrnow; (3) rejecting Fahrnow's requests for a liability sanction based on spoliation; and (4) rejecting Fahrnow's motion to compel discovery of expert qualifications outside the scope of Rule 26.

DATED this 21st day of April, 2025.

SHEEHY LAW FIRM

/s/ Martha Sheehy
Martha Sheehy

Attorney for Appellee E-5 Oilfield Services

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), Mont. R. App. P., I certify that the foregoing brief is printed with a proportionately-spaced Times New Roman text typeface of 14 point, is double-spaced, and the word count as calculated by Corel Wordperfect is 9,718, excluding caption, tables, and certificates.

/s/ Martha Sheehy
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CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-21-2025:

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