

No. DA 24-0668

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IN THE  
**Supreme Court of the State of Montana**

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TRISTIN FAHRNOW,

*Plaintiff/Appellant,*

v.

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

*Defendants/Appellees,*

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ON APPEAL FROM THE MONTANA SEVENTH JUDICIAL DISTRICT COURT,  
RICHLAND COUNTY, DAVID CYBULSKI  
CASE NO. DV-21-100

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**EIKER INC.'S ANSWER BRIEF**

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## STATEMENT OF THE ISSUES

Notwithstanding Appellant Tristin Fahrnow's consistent conflation of the two, Appellee Eiker, Inc.'s role in this dispute is different than that of Appellee E-5 Oilfield Services, LLC. With respect to Eiker, the issues are:

1. Whether the district court abused its discretion by refusing Fahrnow's request for spoliation sanctions making Eiker jointly and severally liable for the alleged negligence of E-5's employee, Greg Brown, where (a) it is undisputed Eiker did not employ Brown or own the truck Brown was driving, and (b) any additional evidence about Brown's employment with E-5 would have been favorable to Eiker, not Fahrnow.

2. Whether the district court correctly granted summary judgment in favor of Eiker and against Fahrnow where (a) Fahrnow's claims are time barred for his failure to make allegations against a fictitious defendant, (b) there is no evidence Brown was employed by Eiker at the time of the accident, and (c) Fahrnow's alter ego theory would fail as a matter of law even if he had properly pled it.

## STATEMENT OF NON-ISSUE

In his opening brief, Fahrnow raised an issue regarding the district court's award of costs. *See* Open. Br., 1, 32–43. The parties have since stipulated that Eiker and E-5 waived their respective rights to recover the awarded costs, as well as any related arguments in this appeal. *See* CSApp. 127–28.<sup>1</sup> Accordingly, that issue is moot and is not further discussed in this brief.

## STATEMENT OF THE CASE

### A. Nature of the Case

This is a personal injury case stemming from two low-speed vehicle accidents at a slippery intersection in Richland County more than six years ago. The first collision occurred when an XTO Energy truck driven by XTO's employee, Joseph Averett, slid on a patch of ice and hit Tristin Fahrnow's truck while he was stopped waiting to turn left. The second collision occurred a few minutes later when Greg Brown, an E-5 employee driving an E-5-owned hot oil truck, hit the same patch of ice while Fahrnow was admittedly standing outside his vehicle in the lane of traffic.

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<sup>1</sup> "CSApp." refers to the combined supplemental appendix filed by Eiker and E-5. "App." refers to Fahrnow's appendix. "Doc." refers to the district court's docket numbers.

The underlying accidents are largely irrelevant to Fahrnow's claims against Eiker though. For those claims, this appeal centers on the distinction between the two small, family-owned businesses started by Paul and Marlene Eiker—Eiker, Inc. and E-5 Oilfield Services—as well as Brown's distinct periods of employment with each.<sup>2</sup>

As the district court's orders reflect, the issues are straightforward. Fahrnow's theory of liability against Eiker is premised solely on *respondeat superior*. But because Brown was an E-5 employee performing work for E-5 at the time of the accident, his case against Eiker falls apart quickly. Trying to avoid that reality, he attempts to create joint and several liability on Eiker's part via spoliation and alter ego arguments. First, he wants to hold Eiker liable for Brown's alleged negligence because E-5 could not locate *additional* evidence that Brown was an E-5 employee, rather than an Eiker employee. Second, he contends that Eiker is an alter ego of E-5, even though he never pled such a claim, has no supporting evidence, and refuses to acknowledge the second part of Montana's legal test for piercing the corporate veil.

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<sup>2</sup> To avoid confusion, Paul and Marlene Eiker are referred to by their first names. References to "Eiker" are to Eiker, Inc.

## **B. Course of Proceedings and Disposition Below**

With just six days to spare before the three-year statute of limitations expired in late 2021, Fahrnow filed his Complaint, naming Greg Brown, Joseph Averett, E-5, Ari Fleet LT, and Exxon Mobil as defendants. Doc. 1. After E-5 admitted in its Answer that E-5 was responsible for Brown's actions "under the doctrine of *respondeat superior*," see Docs. 1, 9, ¶¶ 43, 55, Fahrnow filed an Amended Complaint in August 2022, eliminating most of the original defendants. Doc. 12.

The Amended Complaint alleged claims against only E-5 and XTO Energy, while also naming "Does 1-10" as fictitious defendants. *Id.* Fahrnow's claims against E-5 included negligence and negligence per se, again premised on *respondeat superior* liability for Brown's actions. *Id.*, ¶¶ 16, 42–61. And again, E-5's responsive pleading admitted that Brown was acting in the course and scope of his employment with E-5 at the time of the accident and that *respondeat superior* applied. See Doc. 16, ¶¶ 16, 43, 55. Fahrnow never made any specific factual allegations against the Doe defendants. See generally Docs. 1, 12.

Nearly two years into the case, Fahrnow sought leave to file a Second Amended Complaint substituting Eiker for Doe No. 1. Doc. 31. In support, he represented that he had recently learned in discovery “that Eiker, Inc. also employed Brown at the time of the incident and the incident was within the scope of Brown’s employment.” *Id.* at 6. His briefing relied exclusively on that justification, pressing a theory of joint employment with no mention he intended to assert Eiker was the alter ego of E-5. *See* Docs. 31, 34.

The district court granted Fahrnow’s motion to amend in a three-sentence order. *See* Doc. 39. Specifically, the court indicated that Fahrnow’s late request to amend “was prompted by the late disclosure of the driver’s multiple alter-ego employers by his employers.” *Id.* Still, Fahrnow did not change course. The Second Amended Complaint he filed on December 20, 2023 is devoid of any allegation that Eiker is E-5’s alter ego. *See* Doc. 40. Fahrnow simply added Eiker to the same negligence and negligence per se claims he had previously alleged against E-5, asserting that both Eiker and E-5 employed Brown at the time of the accident and that both were thus responsible for his actions. *Id.*, ¶¶ 43–63.

Among the various motions the parties filed, there are three that are primarily relevant to Fahrnow's claims against Eiker—two filed by Fahrnow and one by Eiker.<sup>3</sup> Fahrnow's first motion sought summary judgment on liability against both Eiker and E-5. *See* Doc. 102. With no effort to differentiate between Eiker and E-5—and no discussion at all of Brown's employment—Fahrnow's motion insisted Brown was negligent, that no reasonable jury could find Fahrnow comparatively negligent, and that Eiker and E-5 spoliated electronic data from E-5's hot oil truck. *Id.* His second motion also invoked spoliation, seeking a sanction of joint and several liability for Eiker's and E-5's purported failure to preserve Brown's physical employment file. *See* Doc. 114. Based on pure speculation, he hypothesized that if E-5 had been able to locate additional employment documents, they would have shown Brown was employed by both Eiker and E-5 at the time of the accident, rather than only by E-5. *Id.*

Eiker opposed both motions, *see* Docs. 138, 160, and sought summary judgment of its own, detailing that Eiker and E-5 are separate entities formed to perform different types of work, and that

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<sup>3</sup> Eiker also joined E-5's summary judgment motion. *See* Doc. 160.

Brown was working for E-5 at the time of the accident. *See* Doc. 118.

Eiker elaborated that although Brown was originally hired by Eiker to drive a water truck in 2017, his employment with Eiker ended several months before the accident and he began working exclusively for E-5 as a hot oil truck driver at that time. *Id.* Eiker also argued that Fahrnow's claims against Eiker were time barred and that the undisputed facts established that Fahrnow's negligence, not Brown's, caused the accident.<sup>4</sup> *Id.*

In response, Fahrnow argued for the first time that Eiker was the alter ego of E-5. *See* Doc. 163. With virtually no discussion of Montana law, Fahrnow provided only a serial, conclusory list of the alter-ego factors he believed to exist. *Id.* at 6–7. He also took a remarkable procedural position, asserting that because Eiker's summary judgment brief did not preemptively rebut an alter ego argument he had never previously raised, Eiker's opposition was waived. *Id.*

The district court ruled on Fahrnow's spoliation arguments first, rejecting them orally at the final pretrial conference. App. 30–37. With respect to data from the hot oil truck, the court reasoned there was no

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<sup>4</sup> On both points, Eiker joined E-5's briefing to avoid unnecessary repetition. *See* Docs. 33, 103, 118, 160.

evidence of intentional spoliation and E-5 was not negligent in failing to retain the data given both the minor nature of the accident and that the truck was destroyed in a fire two months after the accident—more than three years before E-5 was served with the lawsuit. *Id.* at 30–34. The court added that the truck plainly belonged to E-5, and not Eiker. *Id.* With respect to Brown’s employment records, the court found it inconsequential that E-5 could not locate a separate job application or additional employment records given the nature of small, family-run businesses, particularly where all the evidence established that Brown was working for E-5 anyway. *Id.* at 30–31, 35–36.

Several days later, following a hearing, the district court granted summary judgment in Eiker’s favor. App. 12–17. The court’s order: (1) held that Fahrnow presented no evidence Brown was working for both Eiker and E-5 at the time of the accident; (2) reiterated that Fahrnow’s spoliation arguments were meritless; (3) rejected Fahrnow’s alter ego argument, which he attempted to support through bank records with no foundation or discussion of their contents; and (4) concluded that Eiker was also entitled to summary judgment on statute of limitations grounds because Fahrnow never timely asserted allegations against a fictitious defendant for which Eiker could be

substituted. *Id.* The court entered a separate order granting summary judgment to E-5 the next day. App. 3–11. This appeal followed.

## STATEMENT OF THE FACTS

### A. Eiker’s and E-5’s Separate Businesses

Eiker, Inc. was originally founded by Paul Eiker’s father in the early 1970s. CSApp. 106, 10:24–11:3. It sold in 1991, but the Eikers retained the corporate name in the sale and, in 2000, Paul and his wife, Marlene, started a new trucking business with the same name. *Id.*, 10:24–12:10. Eiker initially served the agriculture industry but transitioned to the oil industry after about a year. *Id.* Today, Eiker’s work involves transporting things like water that are not heat related and which are stored at low pressure. CSApp. 107, 14:3-10.

Around 2015, Paul, Marlene, and their children started E-5 to perform a different kind of work in the oilfields—well maintenance involving hot oil and pressure work. CSApp. 106–07, 12:19–14:2. Not only is E-5’s scope of work completely different than Eiker’s, it is classified as higher risk by the insurance industry and the oil companies for whom E-5 provides services. CSApp. 107, 13:15–15:12. As Paul explained during his deposition, hot oil trucks have a propane heater with a coil system to heat different types of fluids and that work

is subject to a different set of guidelines than Eiker's. *Id.*, 13:10–14:25. Consequently, it made sense to form E-5 as a separate entity. *Id.*

Eiker and E-5 are distinct entities in more than just name. Eiker is a corporation, with Paul and Marlene serving as its directors. CSApp. 119–20. E-5, in contrast, is a limited liability company with five members—Paul, Marlene, and their three children. CSApp. 121–22. Eiker and E-5 file separate annual reports with the Montana Secretary of State, have separate articles of incorporation and articles of organization, maintain separate bank accounts, and have separate insurance policies. CSApp. 107, 16:10-12; CSApp. 119–20, 125–26.

**B. Brown's Initial Employment with Eiker and Subsequent Employment with E-5.**

Brown was hired by Eiker in late 2017 to drive a water truck. CSApp. 7–9, 137:6–139:3; CSApp. 100, 18:9-15. He started in a role he described as “low man on the totem,” driving a tractor-trailer with a tanker and pulling production fluid from tanks to take to a disposal. CSApp. 8–9, 138:23–139:3. By the spring of 2018 though, E-5 needed someone to drive a hot oil truck and Paul felt Brown would be a good fit because he was doing good work for Eiker. CSApp. 10–12, 178:17–180:15; CSApp. 111–12, 35:23–36:13.

Once Brown agreed to take the new role, he ceased working for Eiker and became an E-5 employee. CSApp. 12–15, 180:16–183:9; CSApp. 110, 30:10–31:11. Brown and Paul both agree that Brown completed a new E-5 employment application, just like the Eiker application that is in the record. CSApp. 12–16, 180:16–184:21; CSApp. 110, 29:16–30:9; *see also* Doc. 120, Ex. A. E-5 was unable to locate the application during this litigation, however. CSApp. 100, 19:17–20:4; CSApp. 110, 29:19–30:9. Marlene maintains both Eiker’s and E-5’s employment files in hard copy, moving boxes with the files of former employees to storage at the end of each year. CSApp. 100–01, 19:12–21:16. Brown left E-5 about a month after the accident, meaning that his file was moved to storage at the end of 2018. CSApp. 18, 220:1-7; CSApp. 111, 26:14-20. Although Marlene searched the storage facility in response to discovery requests served on E-5 in August 2023, she was able to locate only Brown’s initial Eiker job application, not the second application he completed as part of his transition to E-5. CSApp. 101, 21:1-9; *see also* Open. Br., 11.

### **C. Brown’s Role in the Accident**

Because the collisions themselves are tangential to Fahrnow’s theories of liability against Eiker, Eiker defers to the factual recitation

of the accident in E-5's brief. With respect to Eiker, several additional, undisputed facts are pertinent.

*First*, E-5—not Eiker—owned and was the federal motor carrier for the 2007 Western Star hot oil truck Brown was driving at the time of the accident. CSApp. 65, ¶ 5; CSApp. 70, 75:5-13. *Second*, the alcohol testing form Fahrnow cites was completed by an unknown third person whom Fahrnow never identified. CSApp. 117–18; *see also* App. 15. *Third*, Brown filled out and signed an E-5 timecard on the date of the accident. CSApp. 123. And, *fourth*, Brown does not appear on Eiker's list of employees working on the date of the accident. CSApp. 124.

## STANDARDS OF REVIEW

Orders granting or denying summary judgment are reviewed de novo, using the same Rule 56 criteria as the district court. *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, ¶ 11, 361 Mont. 241, 257 P.3d 383. Although the evidence must be viewed in the light most favorable to the nonmoving party and the court must draw all reasonable inferences in that party's favor, *unreasonable* inferences are insufficient to defeat summary judgment. *See Butler v. Domin*, 2000 MT 312, ¶¶ 20, 32, 302 Mont. 452, 15 P.3d 1189.

Orders imposing or denying discovery sanctions—including for spoliation—are reviewed for abuse of discretion. *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541. “An abuse of discretion occurs if a discretionary ruling is based on a mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice.” *Id.*

### SUMMARY OF THE ARGUMENT

**Spoliation.** The district court appropriately exercised its discretion in rejecting both of Fahrnow’s attempts to impose spoliation sanctions on Eiker. Regarding data from E-5’s hot oil truck, Montana law imposes a duty to preserve evidence only on those who control it. Montana also statutorily prescribes that the kind of vehicle recording data Fahrnow is seeking belongs exclusively to a vehicle’s owner. Because it is undisputed that Eiker did not own the hot oil truck, there is no legal or factual basis to hold Eiker responsible for failing to preserve it.

Regarding Brown’s E-5 employment file, Eiker never had a preservation duty either. E-5 admitted from the outset that Brown was its employee and that he was acting in the course and scope of his

employment at the time of the accident. Thus, no party had any reason to believe that Brown's employment would be a litigated issue.

Additionally, Eiker had no reason to suspect it would be brought into this lawsuit years after the fact simply because Brown was a former employee. But most importantly, the evidence Fahrnow contends was spoliated was simply *additional* evidence that Brown worked for E-5. That issue has never been controverted and more evidence of Brown's employment with E-5 would bolster Eiker's case, not Fahrnow's.

**Summary Judgment.** The district court also correctly granted summary judgment in favor of Eiker and against Fahrnow. To affirm, this Court need not look beyond the statute of limitations. Fahrnow never made *any* factual allegations against a fictitious defendant, let alone allegations about joint employment or alter ego companies. So, when he substituted Eiker for Doe No. 1 in December 2023, he was really just alleging negligence claims against a new party. And because the statute of limitations expired more than two years earlier, his claims against Eiker were time barred.

If the Court reaches the remaining summary judgment issues, Fahrnow's arguments rely nearly entirely on conclusory statements or speculation rather than supportable evidence. Applying the

appropriate standards, as the district court did, it is undisputed that Brown was not an Eiker employee at the time of the accident. Nor was he working on Eiker's behalf. Accordingly, Fahrnow's *respondeat superior* theory of liability fails as a matter of law.

Similarly, Fahrnow has no proof sufficient to send his alter ego claim to a jury. Pointing out that Eiker and E-5 share some owners, keep employment files in the same place, and share the same address is insufficient to create a genuine issue of material fact. Critically, Montana's test for piercing the corporate veil also requires significantly more than an alter ego showing. Fahrnow has never even acknowledged the subterfuge prong of the test, much less submitted factual support sufficient to defeat summary judgment.

## ARGUMENT

### **I. The District Court Appropriately Exercised Its Discretion by Refusing to Issue Spoliation Sanctions Against Eiker.**

Because he cannot prove his claims against Eiker on the merits, Fahrnow asked the district court to impose sanctions for purported spoliation. With no deference to the discretionary nature of the ruling, Fahrnow wants this Court not just to reverse, but to decide the litigation in his favor. He starts by seeking default judgment against both Eiker and E-5 because data from the hot oil truck is no longer

available. *See* Open. Br., 25–26. Then, he requests the imposition of joint and several liability against Eiker simply because E-5 was unable to locate Brown’s employment application, even though E-5 has conceded from the outset that Brown was an E-5 employee working for E-5 at the time of the accident. *See id.* at 27.

Both theories are meritless. “Extreme sanctions precluding or truncating litigation on the merits (i.e., claim dismissal, default judgment, striking of asserted defenses, or exclusion of evidence) are generally proper only when the predicate discovery abuse is so inexcusable and prejudicial that it outweighs the express preference in Mont. R. Civ. P. 1 for adjudication on the merits.” *Mont. State Univ.-Bozeman*, ¶ 21. Fahrnow cannot come close to meeting that standard. Indeed, he cannot even demonstrate any spoliation occurred.

**A. Eiker Did Not Own the Hot Oil Truck and Had No Duty to Preserve Its Data.**

Eiker agrees with E-5’s analysis regarding the alleged spoliation of electronic data from the hot oil truck. There is another reason for affirming the district court’s denial of sanctions against Eiker though. That is, it is undisputed Eiker did not own the hot oil truck.

“Sanctionable spoliation occurs only upon the breach of a duty to preserve the subject evidence” and such a duty does not exist absent a party’s control over the evidence. *Mont. State Univ.-Bozeman*, ¶¶ 22–23 (Rules of Civil procedure “give rise to a common-law duty to preserve evidence when a party *in control* knows or reasonably should know that existing items or information may be relevant to pending or reasonably foreseeable litigation”) (emphasis added). After all, it would make little sense to hold a party responsible for preserving evidence it does not control. *See, e.g., Lidey v. Moser’s Rides, SRL*, 2018 WL 6308012, at \*4 (M.D. Fla. Sept. 7, 2018); *Rodriguez v. Torres*, 2015 WL 1138256, at \*18 (D. Puerto Rico Mar. 13, 2015); *Smith v. Norcold, Inc.*, 2014 WL 5817258, at \*6 (E.D. Mich. Nov. 10, 2014).

Fahrnow repeatedly refers to “Eiker/E-5” in his opening brief as if they were a single entity but does not argue that Eiker had an independent duty to preserve data from E-5’s hot oil truck. Factually, he does not contest the undisputed evidence that E-5 was the sole owner of the truck. *See* CSApp. 65, ¶ 5. Nor does he point to other evidence suggesting Eiker exercised any level of control over the truck. Legally, he makes Eiker’s point for it, citing § 61-12-1002, MCA for the proposition that “the data on a motor vehicle event data recorder is

exclusively owned by the owner or owners of the motor vehicle.” *See* Open. Br., 26. In other words, Fahrnow is statutorily foreclosed from holding Eiker responsible for the data on another entity’s truck.

Frankly, the Court should find Fahrnow’s argument waived. His opening brief contains only sweeping, conclusory statements that Eiker had a duty to preserve the truck’s data and nevertheless negligently destroyed it, with no supporting factual or legal development. *See, e.g., Valley Bank of Ronan v. Hughes*, 2006 MT 285, ¶ 39, 334 Mont. 335, 147 P.3d 185 (citing Mont. R. App. P. 23(a)(4)); Open. Br., 25–27.

Waiver aside, however, the Court should affirm the district court’s discretionary refusal to sanction Eiker for failing to preserve the truck’s data where Fahrnow has not made even the slightest showing that Eiker owned or controlled the truck.

**B. Eiker Did Not Spoliate Brown’s E-5 Employment File.**

Fahrnow’s spoliation argument regarding Brown’s E-5 employment file fails for the same procedural reason as his truck data theory. Namely, his brief contains only conclusory statements with no supporting argument about *why* severe sanctions should be imposed. *See* Open. Br., 27–28. But if the Court reviews the merits, the history of this dispute plainly illustrates that Eiker had no reason to anticipate

litigation in late 2018 and even less reason to believe Brown's employment might be at issue.

**1. Eiker had no duty to retain Brown's E-5 employment file.**

Consideration of the duty element of the spoliation test involves two related inquiries—when any potential duty to preserve evidence arose and the scope of the duty.<sup>5</sup> *Mont. State Univ.-Bozeman*, ¶ 23.

“The determination of when litigation became ‘reasonably foreseeable’ is an objective, fact-specific standard ‘that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.’ *Id.* (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

Although future litigation need not be imminent, “the mere abstract possibility or fear of future litigation does not alone give rise to a duty to preserve.” *Id.* And even when adverse litigation becomes reasonably foreseeable, “the duty to preserve applies only to then-existing items or

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<sup>5</sup> Marlene testified that Eiker and E-5 personnel files were kept in the same filing cabinet, with each having its own section. *See* CSApp. 100, 20:15-19. Thus, even though Fahrnow failed to address the control element of the duty analysis, Eiker assumes *arguendo* for purposes of this brief that it had control over Brown's entire file, including the E-5 section.

information reasonably likely to be relevant to, or likely to lead to the discovery of evidence relevant to, claims or defenses at issue in the contemplated litigation.” *Id.*, ¶ 24.

Here, Eiker had no reason to anticipate litigation when Marlene boxed up Brown’s employment file and sent it to storage at the end of 2018. Eiker was not aware of any threatened or filed litigation until June 2022 when E-5 was first served with this lawsuit. CSApp. 115, ¶¶ 2–3. And even as the litigation progressed, Eiker had no reason to believe it would later be added as a party merely because Brown was a former employee. If anything, Paul’s and Marlene’s knowledge that Fahrnow had filed two operative pleadings alleging Brown was acting in the course and scope of his employment with E-5—with no mention of Eiker—underscored Eiker’s lack of involvement.

Moreover, E-5 has admitted all along that Brown was an E-5 employee working for E-5 at the time of the accident. Doc. 9, ¶¶ 43, 55; Doc. 16, ¶¶ 16, 43, 55. Thus, there was never a reason for *any* party to believe that Brown’s E-5 employment file would play a role in this case. Only after Fahrnow obtained Brown’s initial employment application with Eiker did he conjure the theory Brown may have been jointly employed. But that was almost two years into the lawsuit, and nearly

five years after Brown left E-5's employment. Simply put, Fahrnow has never offered a single, supportable reason for holding that either Eiker or E-5 had a duty to predict in late 2018 that Fahrnow would assert an unsupported joint employment theory at some unknown point in the future just because Brown had previously worked for Eiker.

**2. Eiker did not breach a duty to retain Brown's E-5 employment file and Fahrnow cannot establish prejudice.**

If a party intentionally, willfully, or in bad faith destroys evidence, a rebuttable presumption arises that the evidence was materially unfavorable to that party, resulting in severe prejudice to the other party. *Mont. State Univ.-Bozeman*, ¶ 26. On the other hand, negligent spoliation does not give rise to a presumption of material prejudice. *Id.* “Absent a showing of purpose or intent to conceal unfavorable evidence, negligent spoliation is sufficient to warrant a merits-based sanction only upon a showing, by direct or circumstantial evidence, of a reasonable probability that the lost evidence would have materially supported an essential element of a claim or defense at issue.” *Id.* Importantly, “[m]ere speculation, conjecture, or possibility that negligently spoliated evidence was materially favorable to the opposing party is insufficient to warrant a severe sanction on the merits.” *Id.*

(citing *Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1174 (D.C. Cir. 1991)).

Applying those standards here is uncomplicated. Even assuming *arguendo* that Eiker somehow had a duty to preserve the missing portion of Brown's E-5 employment file, Fahrnow has never argued that Eiker lost it intentionally, willfully, or in bad faith. It is undisputed that E-5—acting through Marlene—simply could not locate the file when it was asked in discovery to search for it nearly five years after Brown left the company. *See* CSApp. 101, 21:1-9. For a small business that frequently has employees simply quit showing up for work, *see* CSApp. 110, 31:12-19, misplacing part of a physical employment file when moving it to a storage facility can hardly be characterized as negligent. Spoliation sanctions are intended to remedy discovery *abuses*, not clerical mistakes occurring years before a party unfamiliar with litigation is sued.

If there was some negligent act here, however, the lack of prejudice is still dispositive. Tellingly, Fahrnow avoids any real discussion of the specific evidence he contends was spoliated. Instead, he offers utter speculation that because Brown worked for Eiker at one time, it is possible not only that he still worked for Eiker at the time of

the accident, but that he was serving in some unidentified dual role for both Eiker and E-5 when the collision occurred.

The truth is much simpler, and it is undisputed. Every witness with personal knowledge of Brown's employment testified that he ceased working for Eiker in the spring of 2018 and began working for E-5 instead. *See* CSApp. 12–16, 180:3–184:21; CSApp. 100, 18:21–19:3; CSApp. 110, 29:19–31:11. On the day of the accident, Brown and was driving a hot oil truck owned by E-5, filled out an E-5 timecard, and testified he had been working for E-5 as a hot oiler for about six months at the time of the accident. *See* CSApp. 17–18, 219:12–220:7; CSApp. 65, ¶ 5; CSApp. 123. He was not even on the roster of Eiker employees at the time. *See* CSApp. 124.

In terms of documents, it is undisputed that Eiker does not confirm employees' resignations in writing, *see* CSApp. 110, 31:12–32:10, and Montana law does not require any such records. *See* § 39-2-501, MCA; *see also* Mont. Code Ann., tit. 39, ch. 2, pt. 2. Likewise, Brown did not have a written employment agreement with either Eiker or E-5, and there was no legal requirement for one. *See* CSApp. 110–11, 32:17–33:2; *see also, e.g., Watters v. City of Billings*, 2019 MT 255, ¶ 45, 397 Mont. 428, 451 P.3d 60 (employment relationships exist under

Montana law without written contracts). Accordingly, the only employment documents missing are Brown's employment application with E-5 and some driving-related documents for Department of Transportation purposes. *See* CSApp. 102, 29:17–30:6.

Of course, the existence of those documents would not be the least bit helpful to Fahrnow. If Marlene had located them, Fahrnow's E-5 job application and driving records would not show that Fahrnow was working jointly for Eiker; they would bolster all the existing evidence establishing that Brown began working exclusively for E-5 months before the accident. *See Mont. State Univ.-Bozeman*, ¶ 26 (“[S]poliation [is] germane only if sufficient to support a reasonable inference that the evidence would have been unfavorable to the spoliating party.” (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003))). Said differently, Fahrnow is trying to manufacture spoliation where it does not exist. Denying sanctions for Eiker's and E-5's inability to locate *additional* evidence that Brown was working solely for E-5 was well-within the district court's broad discretion.

## **II. The District Court Correctly Granted Summary Judgment in Favor of Eiker and Against Fahrnow.**

The district court's order serves as an excellent roadmap on the summary judgment issues. *See* App. 12–17. This Court should affirm in all respects. In fact, the Court need not reach every issue because the district court correctly held that Fahrnow's claims against Eiker are barred by the statute of limitations, which alone suffices to affirm. But if the Court does review the entirety of the summary judgment ruling, Fahrnow cannot prove his *respondeat superior* theory because he has no evidence Brown was working for Eiker at the time of the accident. He also lacks any support for his alter ego theory, which ignores a crucial prong of the applicable legal test.

### **A. Fahrnow's Claims Against Eiker Were Woefully Untimely.**

Montana's fictitious defendant statute permits a plaintiff to designate a defendant by any name in a pleading and then amend "when the defendant's true name is discovered." § 25-5-103, MCA. But that statute does not give plaintiffs free reign to create a virtually endless statute of limitations by including fictitious defendants in the caption with no corresponding factual allegations. *See Sooy v. Petrolane Steel Gas, Inc.*, 218 Mont. 418, 422, 708 P.2d 1014, 1017 (1985); *see also*

*Novalk, LLC v. Kinsale Ins. Co.*, 2022 WL 17574076, at \*2 (S.D. Cal. Dec. 9, 2022) (“[U]se of doe defendants does not dissipate the requirement that Plaintiff make sufficient factual allegations as to each defendant.”). There is a distinct difference for statute of limitations purposes between setting forth a cause of action against a fictitious defendant and later substituting a real party, and adding a new party against whom no allegations were initially made. The first scenario tolls the statute of limitations; the latter does not. *See Sooy*, 218 Mont. at 422, 708 P.2d at 1017.

For example, in *Keller v. Stembridge Gun Rentals*, a plaintiff initially sued Ellis Rental—a company the plaintiff believed had supplied a gun that exploded—and ABC Manufacturing—a fictitious defendant who allegedly manufactured the gun. 221 Mont. 352, 353, 719 P.2d 764, 764–65 (1986). When the plaintiff later attempted to substitute Stembridge Gun Rentals, the Court held that he was improperly attempting to add a completely new party after the statute of limitations had run. *Id.* at 355, 719 P.2d at 765–66. The Court reasoned that the plaintiff could not sue Stembridge by incorrectly naming Ellis Rental as a defendant and could not substitute Stembridge for ABC Manufacturing because there were no allegations

in the complaint that ABC Manufacturing was anything but the gun's manufacturer. *Id.*

The analysis here is even less nuanced. Neither Fahrnow's original Complaint nor his Amended Complaint alleged that a Doe defendant was Brown's joint employer or that a Doe defendant was the alter ego of E-5. *See* Docs. 1, 12. Indeed, he did not make any allegations at all against Doe defendants. *Id.* Thus, when Fahrnow added Eiker to the case via the Second Amended Complaint more than five years after the November 2018 accident, he was just adding a new party. He simply made the same allegations against the new party (Eiker) as he had against an existing party (E-5). It was the equivalent in *Keller* of adding Stembridge but also keeping Ellis Rental as a defendant. Nothing about that procedural maneuver would have changed the fact that the *Keller* plaintiff could not properly substitute Stembridge and the Court should not sanction such a result here.

Having never made any factual allegations against the fictitious defendants he included in the caption, Fahrnow had no basis to substitute Eiker for those defendants. So when he added Eiker as a defendant on December 20, 2023, *see* Doc. 40, his claims did not relate back to the filing of the original Complaint. As the district court held,

the statute of limitations ran on November 8, 2021, *see* App. 16, meaning that Fahrnow sued Eiker more than two years too late. *See Nelson v. Nelson*, 2002 MT 151, ¶ 14, 310 Mont. 329, 50 P.3d 139 (“The statute of limitations in Montana in an action for negligence is three years.” (citing § 27-2-204(1), MCA)).

The Court should flatly reject Fahrnow’s law of the case and waiver arguments, which both attempt to circumvent his own pleading errors. *See* Open. Br., 31. The law-of-the-case doctrine is a non-binding rule that precludes “an appellant from raising issues that were decided by *this Court* on a previous appeal,” similar to *res judicata*. *State v. Gilder*, 2001 MT 121, ¶ 9, 305 Mont. 362, 28 P.3d 488 (emphasis added). The district court’s preliminary decision to grant Fahrnow leave to file his Second Amended Complaint adding Eiker was not in any sense law of the case precluding the court from later granting summary judgment on statute of limitations grounds. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001) (law-of-the-case doctrine “simply does not impinge upon a district court’s power to reconsider its own interlocutory order”).

It should also go without saying that a moving party has no obligation to predict arguments its opponent might make in a response

brief and preemptively rebut them. Rather, it is entirely appropriate for a reply brief to substantively address arguments asserted in an opposition brief. *Crystal IS, Inc. v. Nitride Semiconductors Co., Ltd.*, 2023 WL 2726702, at \*3 n.5 (N.D.N.Y. Mar. 31, 2023) (collecting cases). Fahrnow’s waiver argument—suggesting that Eiker could not contest his untimely injection of alter ego theories into the case—completely misunderstands the rule.

In short, Fahrnow’s claims against Eiker are barred by the statute of limitations because he never made any allegations against the fictitious Doe defendant for whom he substituted Eiker. The Court should affirm on this basis alone and need not reach the rest of the summary judgment analysis.

**B. Brown Was Not an Eiker Employee or Acting on Eiker’s Behalf at the Time of the Accident.**

If the Court’s analysis proceeds, it should still affirm. Eiker agrees that *respondeat superior* imposes vicarious liability on employers for the tortious conduct of employees committed in the course and scope of their employment. *L.B. v. United States*, 2022 MT 166, ¶ 9, 409 Mont. 505, 515 P.3d 818. But the fundamental premise of the doctrine depends on an employment relationship, *Denke v. Shoemaker*,

2008 MT 418, ¶ 79, 347 Mont. 322, 198 P.3d 284, which Fahrnow cannot prove. And even if he could establish that Brown remained an Eiker employee on November 8, 2018, he has no evidence that Brown was working for Eiker—as opposed to E-5—at the time of the accident. *See, e.g., Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 39, 290 Mont. 126, 962 P.2d 1205 (*respondeat superior* liability does not attach when employee is not acting within the course and scope of his duties).

Fahrnow’s interpretation of the relevant evidence, *see* Open Br., 30, is wrong on multiple levels. The documents Fahrnow characterizes as an employment agreement with Eiker are just a job application and onboarding forms. *See* Doc. 120, Ex. A. Those documents are inconsequential, however. It is undisputed that Brown formerly worked for Eiker. Fahrnow conveniently ignores that critical evidence of Brown’s employment with E-5—a timecard from the day of the accident—exists uncontroverted in the record. *See* CSApp. 123.

His opening brief also attempts to artificially limit the evidence the district court could consider. Summary judgment motions need not be based on documents alone. *See, e.g., Mathie v. Mont. Power Co.*, 167 Mont. 183, 186, 536 P.2d 775, 777 (1975) (summary judgment

warranted based on pleadings, answers to interrogatories, and depositions). There is sworn testimony from three witnesses that Brown was working for E-5 at the time of the accident, and like Brown's timecard, it is all undisputed. *See* CSApp. 12–16, 180:3–184:21; CSApp. 100, 18:21–19:3; CSApp. 110, 29:19–31:11.

Fahrnow vastly overstates the evidence he deems favorable too. The document naming Eiker, Inc. as Brown's employer is a U.S. Department of Transportation Alcohol Testing Form expressly stating it was provided by Lifeloc Technologies, not Eiker. *See* CSApp. 117–18. The reference on that form to Eiker, Inc. was handwritten by an unidentified "Alcohol Technician," *see id.*, and Fahrnow never attempted to lay any foundation for its contents even though he now offers it for the truth of the matter asserted in the form. *See* App. 15; *see also, e.g., Evans v. Port Auth. of N.Y. and N.J.*, 192 F. Supp. 2d 247, 265 n.129 (S.D.N.Y. 2002) (collecting cases about the inadmissibility of statements from unidentified sources); *Cahoon v. Shelton*, 2009 WL 1758738, at \*5 (D.R.I. June 18, 2009).

Beyond admissibility problems, the district court's reasoning about that form is apt. The mere existence of an employer's name on a third-party alcohol testing form cannot create an employment

relationship. *See* App. 15. As the court held, if the unidentified author of the form had written that Brown’s employer was the New York Yankees, that statement would not have legally affiliated him with the professional baseball team. *Id.* The same would be true had the alcohol tester written NASA or the Supreme Court of Montana or Walmart on the “employer” line of the form. In each instance, Brown would have remained an E-5 employee.

The bottom line is that every piece of admissible evidence in the summary judgment record—from the pleadings to the deposition testimony to Brown’s timecard—established that it is undisputed Brown was an E-5 employee working for E-5 when the accident occurred. As such, the district court correctly granted summary judgment to Eiker. *Respondeat superior* does not extend to a former employer for whom the alleged tortfeasor was not working at the time of the acts in question.

**C. Fahrnow’s Alter Ego Theory Is Both Factually and Legally Deficient.**

In addition to never pleading an alter ego theory against a fictitious defendant, there are two independent reasons for affirming the district court’s rejection of Fahrnow’s argument. Not only did

Fahrnow fail to provide adequate factual support for treating Eiker and E-5 as the same company, he never even attempted to meet the second prong of Montana’s corporate veil-piercing test, which requires proof of ill intent.

**1. Fahrnow cannot factually establish that Eiker is an alter ego of E-5.**

There are no genuine issues of fact about whether Eiker is an alter ego of E-5. Nearly every Montana case addresses the issue in one of two contexts—piercing the corporate veil between a parent and subsidiary company or piercing the veil between a corporation and its shareholder. *See, e.g., Hando v. PPG Indus., Inc.*, 236 Mont. 493, 498, 771 P.2d 956, 960 (1989) (subsidiary context); *Peschel Fam. Trust v. Colonna*, 2003 MT 216, ¶ 24, 317 Mont. 127, 75 P.3d 793 (shareholder context). In both instances, Montana law employs a two-part test which first requires an alter ego showing and then requires a showing that “the corporate cloak [was] used to defeat public convenience, justify wrong, perpetrate fraud, or to defend crime.” *Hando*, 236 Mont. at 498, 771 P.2d at 960; *see also Peschel Family Trust*, ¶ 24.

Without acknowledging the second prong of that test, Fahrnow invokes *Meridian Minerals Co. v. Nicor Minerals, Inc.*, 228 Mont. 274,

284, 742 P.2d 456, 462 (1987), which sets out 14 factors courts may consider in determining whether a corporation is the alter ego of its shareholder. He then lists—in serial form with no discussion—eight of the factors he believes supports his argument. *See* Open. Br., 31–21. None of them approach sufficient evidence to establish a genuine issue of fact.

*First*, Fahrnow points out that Paul is the sole manager of E-5 and the sole shareholder of Eiker. Based on the documents he cites, that was correct when the companies were first formed. But the 2024 annual reports filed with the Montana Secretary of State reflect that Paul and Marlene are now both directors of Eiker, Inc., and that Paul, Marlene and their three children are members of E-5, which is a member-managed limited liability company. *See* CSApp. 119–22. Legally, any slight change in ownership over the years is immaterial though. “Under Montana law, control over a corporation by a single shareholder is not, by itself, enough to warrant piercing the corporate veil.” *Meridian Minerals*, 228 Mont. at 285, 742 P.2d at 462.

*Second*, Fahrnow argues that E-5 does not follow corporate formalities, such as executing documentation to establish the member interest of each of the Eiker family members. In support, he cites E-5’s

responses to his sixth discovery requests, in which E-5 specified each family member's respective ownership percentage. *See* Doc. 120, Ex. M. Nothing in that exhibit suggests that E-5 does not follow corporate formalities. As with most of his analysis, Fahrnow improperly relies on his own conjecture rather than admissible evidence. *See, e.g., Davis v. Dep't of Pub. Health and Human Servs.*, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320 (“Conclusory statements, speculative assertions, and mere denials are insufficient to defeat a motion for summary judgment.”).

*Third and fourth*, Fahrnow asserts that Paul's personal funds are commingled, and that he uses his personal credit to assist Eiker and E-5 as a guarantor. As the district court found, the banking records Fahrnow cites—with no foundation or discussion of their contents—“do nothing” to support his alter-ego theory. *See* App. 16. His co-mingling accusation is completely unsubstantiated and a small business owner providing a personal guaranty for business loans is not a supporting factor under any alter-ego test articulated in Montana case law. To the contrary, it is a common financial practice. *See, e.g., Hoven, Vervick & Amrine, P.C. v. Mont. Comm'r of Labor*, 237 Mont. 525, 533, 774 P.2d

995, 1000 (1989) (three partners in an accounting firm made personal guaranties to the Small Business Administration for company loans).

*Fifth, sixth, seventh, and eighth*, Fahrnow cherry picks minor alter-ego factors and inaccurately treats them as dispositive. While it is true that Eiker and E-5 keep employment records at the same location, the deposition testimony Fahrnow cites does not reflect that the companies share employees, as he contends. Instead, Paul testified that the entities are separate and that if an employee moves from one company to the other, he or she fills out a separate job application. *See* CSApp. 111, 34:5-10. And while Fahrnow wants to distill each company's business down to trucking in the oilfield, the *only* evidence in the record on that subject establishes that E-5's hot oil work is significantly different than Eiker's low pressure work. *See* CSApp. 107, 13:10–14:25. Finally, Fahrnow is correct that the companies share the same address, but similarity in their names is irrelevant; the alter-ego factor he is attempting to invoke asks whether “the parent and subsidiary have the *same* name.” *Meridian Minerals*, 228 Mont. at 285, 742 P.2d at 462 (emphasis added).

In the end, Fahrnow's alter ego showing is based only on a similarity of ownership and the fact that Eiker and E-5 share a

business address and keep employment records at the same location.

The district court rightly rejected that scant proof. *See* App. 16 (“There is no legal or factual basis for [Fahrnow] to pursue an alter-ego theory at trial.”). It does not come near establishing a genuine issue of fact about whether Eiker is E-5’s alter ego.

**2. Fahrnow has consistently ignored the second factor of the corporate veil-piercing test.**

This Court should also reject Fahrnow’s position for a reason the district court did not reach. *See Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241 (this Court may affirm on any basis supported by the record). Fahrnow has never attempted—either below or on appeal—to satisfy the second part of the corporate veil-piercing test despite years of litigation and ample opportunity to conduct discovery. Even if he could create a genuine issue of fact on the alter ego prong of the test, Eiker still would not stand in E-5’s shoes for liability purposes unless he could also demonstrate that the corporate entity was used as a subterfuge to effectuate wrongdoing of some kind. *See Peschel Family Trust*, ¶ 24. Having never attempted to make such a showing, his alter ego theory fails and is insufficient to defeat summary judgment for Eiker.

**D. Eiker Is Also Entitled to Summary Judgment for the Same Reasons as E-5.**

All other issues aside, the Court should affirm summary judgment for Eiker for the same reasons the district court correctly granted summary judgment to E-5. On those points, Eiker joins E-5's arguments in full, just as it did in the district court. They will apply to Eiker, however, only if the Court concludes that Eiker could bear *respondeat liability* for Brown's alleged negligence notwithstanding the deficiencies in Fahrnow's joint employment and alter ego arguments.

**CONCLUSION**

For the foregoing reasons, the Estate respectfully requests that the Court affirm the district court's entry of judgment in Eiker's favor.

Dated: April 21, 2025

Respectfully submitted,

/s/ Michael P. Manning

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## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,817 words, as determined by the undersigned's word processing program.

*/s/ Michael P. Manning* \_\_\_\_\_

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