IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0036

JENNIFER SHAHOOD, an individual,

Plaintiff/Appellee,

v.

CITY AND COUNTY OF BUTTE-SILVER BOW,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Second Judicial District Court, Butte-Silver Bow County
Cause No. DV-19-400
The Honorable Kurt Krueger, Presiding

Cynthia L. Walker
Christopher L. Decker
BOONE KARLBERG P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula, MT 59807-9199
Phone: (406) 543-6646
cwalker@boonekarlberg.com
cdecker@boonekarlberg.com
Attorneys for Defendant/Appellant

Patrick T. Fox
James G. Hunt
HUNT & FOX, PLLP
32 S. Ewing St., Ste. 308
PO Box 1195
Helena, MT 59624
Telephone: (406) 442-8552
pat@huntfoxlaw.com
jim@huntfoxlaw.com
Attorneys for Plaintiff/Appellee

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INTRODUCTION

Defendant/Appellant City and County of Butte-Silver Bow ("BSB") road grader operator, Brian Moe, was plowing snow in Butte when Plaintiff/Appellee Jennifer Shahood ("Shahood") pulled in behind Moe's grader. An accident, at an undisputed speed of 1.5 miles per hour or less, occurred and Shahood sued BSB. Shahood claimed BSB was negligent and asserted negligence per se claims based on violations of Montana traffic regulation statutes. BSB denied negligence, claimed traffic control statutes do not apply to equipment engaged in work, and argued Shahood was negligent for failing to yield to the movement of working equipment.

The case was tried to a jury. After the close of evidence, on the fifth day of trial, the District Court granted judgment as a matter of law for Shahood on negligence, negligence per se, and causation. Shahood conceded that her comparative negligence must be decided by the jury. The District Court agreed. The jury found Shahood negligent, apportioning 54% of the negligence to her and 46% to BSB.

Shahood moved for a new trial, arguing there was insufficient evidence for the jury to find comparative negligence despite her prior concession. Shahood's second basis for her request for new trial was alleged irregularities in the proceeding, consisting of the "environment" in voir dire and BSB's closing

argument. None of those issues were preserved for appeal. Every juror Shahood challenged in voir dire was dismissed and she did not object to BSB's closing argument. Nonetheless, the District Court granted a new trial. This Court should reverse the District Court and allow the jury's verdict to stand.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting a new trial based on issues that were not preserved during trial?
2. Did the District Court err in granting judgment as a matter of law on BSB's negligence, negligence per se, and causation?
3. Did the District Court err in refusing to grant BSB's motion for partial summary judgment on Shahood's negligence per se claims which sought to preclude application of traffic regulation statutes to BSB equipment engaged in work?
4. Did the District Court abuse its discretion by categorically excluding admission of Shahood's medical records based on Rule 403 considerations?

STATEMENT OF THE CASE

After a five-day jury trial, the jury attributed 54% of the negligence to Shahood and 46% to BSB. Appx. 1-2 (Special Verdict, CR 142). Shahood claims BSB road grader operator, Brian Moe, was negligent while "removing snow" on Main Street in Butte, Montana. CR 8 (First Amended Compl.), ¶ 10. The accident

occurred as Brian Moe and his coworker, Marty Hanley, were lining up the blades of their road graders to clear a windrow of snow from the intersection of Front Street and Main Street. TR 507:17-509:23.

Moe watched Shahood pass his grader as he was backing up at approximately one mile per hour. TR 512:12-24; 514:5-10. Shahood was in the far-right lane, out of his way, but she pulled in behind the grader as it continued backing up to the top of the windrow of snow. TR 516:16-517:17, 517:24-520:14. Moe estimated that she left only 10-15 feet between her vehicle and the grader when she pulled in behind him. *Id.* Moe was scanning the sides of the grader and watching his blade as it was meeting up with Hanley's blade, so he did not see Shahood pull behind him. *Id.* While working, he explained, he "[j]ust can't look at everything at the same time." *Id.* The ripper attachment of the grader contacted the rear of Shahood's car, causing minor damage. *Id.*

Shahood alleged common law negligence and negligence per se. CR 8 at ¶¶ 30-74. BSB denied negligence and asserted Shahood failed to yield the right of way to the road grader, which was removing snow as part of BSB's highway maintenance activities. CR 10 (Answer to First Amended Compl.), p. 10 at Fourth Affirmative Defense. BSB moved for summary judgment on Shahood's negligence per se claims, arguing the road graders were not subject to Montana's traffic regulations under Mont. Code Ann. § 61-8-106(2), which exempts equipment engaged in work from

the regulations. CR 49, 50 (BSB's Motion for Summary Judgment and Brief in Supp. of Motion for Summary Judgment). The District Court denied BSB's motion, as well as Shahood's motion for summary judgment on liability, causation, and comparative negligence, finding "genuine issues of material fact exist as to the car accident itself." Appx. 10 (Order Denying Motions for Summary Judgment, CR 78, p. 8).

The trial occurred from May 28, 2024 through June 3, 2024. TR 3-5. Shahood argued none of her medical records should be admitted into evidence. Appx. 15-16 (Second Order on Motions in Limine, CR 120, pp. 4-5); Transcript of Proceedings on Appeal – Motions Hearing (May 17, 2024), TR 83:6-14. The District Court initially rejected this request: "Plaintiff cites no authority, and the Court can find none, which allows for categorical exclusion of medical records. Each record must be evaluated on a case-by-case basis…The Court therefore denies Plaintiff's motion and reserves determination on admissibility of medical records for trial on an exhibit-by-exhibit basis." Appx. 16, CR 120, p. 5. BSB redacted medical records to eliminate those concerns and offered Shahood the opportunity to propose any additional redactions she felt necessary. CR 108.1 (Def.'s Pre-Trial Brief re Admissibility of Medical Records), p. 3; Transcript of Proceedings – Pretrial Conference (May 1, 2024), TR 19:12-23, 27:17-19. At trial, the District Court initially precluded BSB from moving for the admission of medical records while the provider was testifying. *See* TR 314:5-11, 352:8-21. BSB nonetheless established

foundation for the medical records and moved for their admission. *See e.g.*, TR 352:8-21, 560:4-24, 571:21-572:21, 610:1-611:24 (Appx. 35-36), 634:8-18 (Appx. 40). Ultimately, the District Court categorically refused admission of Shahood's medical records. Appx. 36, 39-40, TR 611:13-24, 633:11-634:18.

After the close of evidence at trial, Shahood moved for a partial directed verdict on negligence, negligence as a matter of law, and causation (including medical causation). CR 132 (Pl.'s Point Brief in Supp. of Her Motion for Partial Directed Verdict). BSB opposed. CR 137 (Def.'s Point Brief in Opp. to Pl.'s Motion for Judgment as a Matter of Law). Although the District Court had previously ruled there were "genuine issues of material fact" related to the accident (Appx. 10, CR 78, p. 8), it granted Shahood's motion for judgment as a matter of law. Appx. 41-43, TR 644:19, 645:14-16, 645:24-646:1. Shahood did not seek judgment as a matter of law on comparative negligence. CR 132. She explained: "Jennifer does not seek a directed verdict on BSB's comparative defense and concedes its defense must remain on the verdict form if the Court grants her requested relief." *Id.* at pp. 1-2. Shahood noted: "So the Court is not taking that extent of the causation out, and it's still giving the opportunity for the jury to say Ms. Shahood caused injury to herself and that she's 60 percent negligent and she doesn't recover anything." Appx. 37-38, TR 614:24-615:3. The District Court agreed, explaining: "The Montana Supreme Court has repeatedly affirmed that the factfinder should consider a claim of

plaintiff's negligence, even if the defendant is found negligent per se. Appx. 43, TR 646:2-11.

Following the District Court's ruling granting judgment as a matter of law, Shahood proposed a revised Special Verdict that eliminated questions regarding BSB's negligence and causation, keeping the questions of Shahood's negligence, causation, and the apportionment of negligence on the Special Verdict. Appx. 44-45, TR 647:17-648:2. The jury determined Shahood was negligent, her negligence was a cause of the accident, and apportioned 54% of the overall negligence to her. Appx. 1-2, CR 142. This resulted in no recovery for Shahood. Mont. Code Ann. § 27-1-702.

BSB is the Appellant because the District Court granted Shahood's Motion for New Trial. Appx. 21-33 (Order Granting Motion for New Trial, CR 165). Despite previously conceding comparative negligence was a jury issue, post-verdict Shahood argues there was insufficient evidence to submit the issue to the jury. CR 132; CR 149 (Motion for New Trial); CR 150, pp. 14-16 (Brief in Supp. of Motion for New Trial). The District Court, reversing its prior determination, held there had been insufficient evidence for the jury to find comparative negligence. Appx. 21-33, CR 165.

A second basis for Shahood's Motion for New Trial was alleged "irregularities in the proceedings." CR 150, pp. 14-18. The "irregularities" claimed

by Shahood focused on members of the jury panel who "knew the various defense witnesses" and BSB's closing argument. *Id.* Shahood challenged eight jurors for cause, and each of those jurors was dismissed from the panel. TR 37:19-38:15, 63:7-65:7, 72:21-73:3, 79:12-82:8, 85:9-86:5. Shahood passed the jury for cause. TR 87:17-18. No relief was requested at trial concerning the jury panel. *See* TR 138:7-8.

Shahood did not object during BSB's closing argument. TR 702:4-718:9; Appx. 31, CR 165, p. 11. Her current contention that the closing argument created an "irregularity" was not raised during trial, and no relief was requested. *See* TR 723:16-23 (showing no request for relief at the time the jury was sent to deliberate). The District Court found Shahood's failure to object "excusable" based on *Cooper v. Hanson*, 2010 MT 113, ¶¶ 37-38, 356 Mont. 309, 234 P.3d 59, despite recognizing "the circumstances here vary somewhat from those in *Cooper*," and granted Shahood's alternate request for a new trial based on "irregularities" at trial. Appx. 31-32, CR 165, pp. 11-12.

BSB appeals the Order Granting New Trial as well as other rulings made by the District Court. The other issues on appeal are moot if the District Court's Order Granting New Trial is reversed.

STATEMENT OF FACTS

Brian Moe, BSB road grader operator, inspected his road grader to ensure everything was working properly. TR 502:12-25. The grader was equipped with lights, flashers, and signs. *Id.* at 503:11-504:25, 506:25-507:16. Prior to the accident, Moe was on Main Street in Butte, facing north, positioned so traffic could see him prior to the work area. *Id.* at 507:24-508:12, 511:16-512:2. Moe and Marty Hanley, who was operating another grader, had previously plowed the snow into a windrow and were in the process of connecting their blades to clear the snow from the intersection. *Id.* at 509:6-15.

Hanley was at the top of the windrow, with Moe backing up to meet him, when the accident happened. *Id.* at 509:16-23, 510:5-16. Moe was facing north, opposite of traffic, because "[t]here's no other way to get ahold of the snow and get it out of the intersection without having a machine on both sides to couple together to pull it up." *Id.* at 510:17-511:6. The graders were moving with the flow of traffic. *Id.* at 513:8-15. Prior to starting to back up, Moe checked his mirrors to make sure no vehicles were behind him and the traffic light at the intersection was green. *Id.* at 513:16-514:7.

As he was backing, Moe saw Shahood heading south on Main Street. *Id.* at 512:12-21. The backup alarm sounds the entire time the grader is in reverse. *Id.* at

512:22-24. His speed was approximately one mile per hour. *Id.* at 514:8-10. Moe explained why he was traveling slowly:

> Well, it's, it's an automatic default for first gear in reverse, and that's what gear I was in. You know, again, you're backing up, being guided by the pile of snow. You don't want to be in the pile of snow and scattering it everywhere; and you don't want to be away from the pile of snow, because you have to be able to reach it with your grader.

Id. at 514:11-18. He watched Shahood drive past the grader until he could no longer see her vehicle. *Id.* at 516:16-21. Moe testified he did not expect Shahood to pull in behind his grader because she was "well outside" of him, and he did not "believe she would end up there in that immediate area where [he] was working." *Id.* at 516:16-517:5. The accident happened as he was slowing down to stop to connect blades with the other grader. *Id.* at 517:24-518:6.

The accident happened "seconds" after Shahood drove past Moe's grader. *Id.* at 519:4-6. He estimated that she left only 10-15 feet of space between the vehicles. *Id.* at 519:7-18. Moe explained: "Well, like, the distance of where she was at from when she passed me to where I would have been touching with the other grader, it was a very short distance from where I lost her in my vision, where I could not see her anymore, to turn my head as I was slowing down to touch blades there at a very slow rate of speed." *Id.* at 519:12-18. He testified he must look at "several things" to complete his work, including scanning both sides of the vehicle, the camera,

mirrors, and his blade. *Id.* at 520:6-14. There are areas of restricted visibility. *Id.* at 522:5-15.

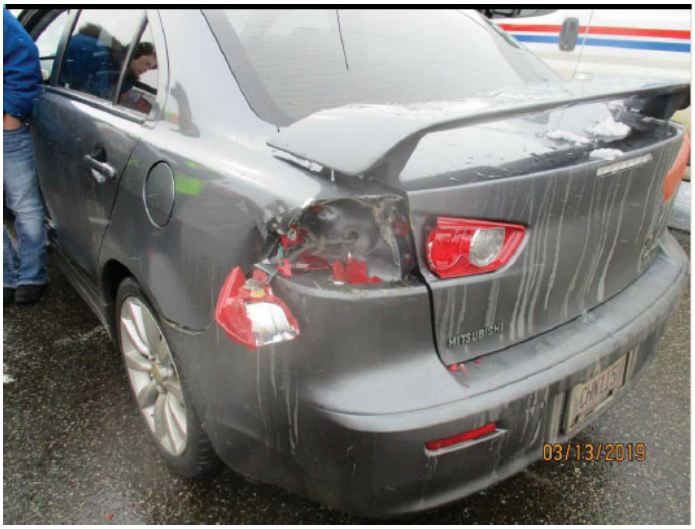
Shahood testified Moe's grader was occupying both the center lane and the turning lane as she approached it. TR 438:24-439:5. She did not hear backup sounds, speculating she may not have heard them because she was in her car. *Id.* at 439:13-22. Shahood testified she was not paying attention at all to the road grader. *Id.* at 439:23-25. As she approached, Shahood was in the straight lane, and she switched to the right lane as she passed the grader. *Id.* at 482:22-483:3. After passing the grader, she switched back into the lane to go straight through the intersection. *Id.* at 483:4-19. She was concerned about pulling into that lane because she did not know what the graders were doing at the time. *Id.* at 483:20-25. Shahood testified she left a space of two car lengths between the grader and her back bumper. *Id.* at 484:1-8. She did not see the graders moving at any time. *Id.* at 484:9-10.

The responding officer, Sergeant Tymofichuk, testified motorists have "a duty to give [working equipment] a wide berth and…give them room to work." TR 275:13-20. He confirmed motorists have a duty to yield the right-of-way to working equipment. *Id.* Sergeant Tymofichuk agreed this was necessary because equipment operators must pay attention to their work. *Id.* at 275:21-24. Shahood, he testified, had several options to avoid the working equipment and, had she taken one of those options, the accident would not have occurred. *Id.* at 276:9-277:1. Additionally, he

agreed Shahood bore responsibility for the accident if, as Moe testified, Shahood pulled behind him in his path of travel. *Id.* at 274:22-275:2.

Plaintiff's retained accident reconstructionist, Steve Harbinson, acknowledged the graders were engaged in work, at least to "some degree." *Id.* at 252:11-16. Harbinson estimated Moe's speed at the time of the accident to be 1.5 miles per hour. *Id.* at 234:19-25, 235:4-25. He agreed that flashing lights on equipment should alter the behavior of a driver to use caution. *Id.* at 252:7-24. Harbinson also recognized Shahood's obligation to pay attention to what other vehicles on the road were doing. *Id.* at 252:25-253:5.

There was minimal damage to Shahood's car, consisting of a broken taillight and slight damage to the car's body around the taillight. *Id.* at 269:17-20, 526:5-7. The damage was shown in admitted Trial Exhibit 6-6 (TR 224:4-9, 490:7-16):



Trial Exhibit 6-6, TR 490:7-16.

Harbinson testified the speeds in this accident were the lowest he had ever considered in more than 2,000 vehicle-vehicle accident reconstructions. *Id.* at 244:24-245:14. Harbinson admitted the delta-v, or change in speed, of Shahood's vehicle during the accident was approximately 1.5 miles per hour. *Id.* at 245:15-24. He was unaware of any study of accidents with a delta-v of less than 2.5 miles per hour that caused neck injuries. *Id.* at 247:20-248:6. Dr. Steven Martini, Shahood's hybrid medical expert, testified the Spine Journal is a peer-reviewed, authoritative source for medical literature, and that a Spine Journal article from September 2018 recognized "human volunteers can be safely exposed to rear impacts of less than 18 kilometers per hour without a meaningful risk of injury." *Id.* at 323:7-325:9.

Sergeant Tymofichuk testified there were no injuries in the accident. *Id.* at 269:17-20, 270:25-271:14. The responding EMT, Konnor O'Neill, testified Shahood mentioned "minor back pain," but did not complain of neck pain and "adamantly refused medical treatment." *Id.* at 562:20-563:12. Shahood's complaints to her chiropractor in the visit immediately preceding the accident were the same as her complaints in her first visit following the accident. *Id.* at 349:25-351:22. There was evidence of several preexisting conditions. *See id.* at 621:2-622:12. Dr. Martini agreed the "elephant in the room" was whether Shahood's symptoms were the result of an injury or the natural progression of her previous condition. *Id.* at 320:18-321:6.

STANDARD OF REVIEW

I. Order Granting New Trial.

A finding of insufficient evidence to support a jury verdict is reviewed de novo. *Giambra v. Kelsey*, 2007 MT 158, ¶ 27, 338 Mont. 19, 162 P.3d 134. "[W]here substantial evidence supports a verdict, the verdict generally cannot be overturned or vacated." *Id.*, ¶ 26 (citations omitted). A district court's "role in reviewing a jury's verdict is limited." *Buhr ex rel. Lloyd v. Flathead County*, 268 Mont. 223, 245, 886 P.2d 381, 394 (1994) (overruled on other grounds). Evidence is reviewed "in a light most favorable to the prevailing party." *Id.* Further, the Court "will not retry a case because the jury believed one party's evidence over another's; it is within the jury's province to adopt testimony on behalf of one party to the exclusion of testimony presented by the other party." *Id.* As the Montana Supreme Court has stated:

> The jury viewed the evidence, heard and viewed the witnesses, and entered its verdict. To permit the undoing of this verdict by affirming the trial court decision granting a new trial would…create a bench supremacy and sap the vitality of jury verdicts.

Maykuth v. Eaton, 212 Mont. 370, 372-73, 687 P.2d 726, 727 (1984) (citation omitted).

The District Court's ruling regarding "irregularities in the proceeding" is reviewed for an abuse of discretion. *Voegel v. Salsbery*, 2023 MT 137, ¶ 12, 413 Mont. 43, 532 P.3d 863.

II. Judgment as a Matter of Law on Negligence and Causation.

Orders granting judgment as a matter of law are reviewed de novo.[1] *Cleveland v. Ward*, 2016 MT 10, ¶ 11, 382 Mont. 118, 364 P.3d 1250. "Courts must 'exercise the greatest self-restraint in interfering with the constitutionally-mandated process of jury decision.'" *Id.* "Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury." *Martin v. BNSF Ry. Co.*, 2015 MT 167, ¶ 8, 379 Mont. 423, 352 P.3d 598. "All such evidence, and any legitimate inferences that might be drawn from the evidence, must be considered in the light most favorable to the party opposing the motion." *Id.*

III. Denial of BSB's Motion for Partial Summary Judgment on Negligence Per Se.

Summary judgment rulings are reviewed de novo. *Sieben Ranch Co. v. Adams*, 2021 MT 172, ¶ 8, 404 Mont. 510, 494 P.3d 307. Summary judgment should be granted "when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law." *Id.* A district court's conclusions of law are reviewed for correctness. *Id.*

[1] Shahood moved for a "Partial Directed Verdict." CR 132. "Th[e] Court no longer uses the term 'directed verdict,' but instead applies Rule 50's term, 'judgment as a matter of law.'" *S & P Brake Supply, Inc. v. STEMCO LP*, 2016 MT 324, ¶ 8, n. 1, 385 Mont. 488, 385 P.3d 567 (citing *Durden v. Hydro Flame Corp.*, 1998 MT 47, ¶ 3, n. 1, 288 Mont. 1, 955 P.2d 160).

IV. Order Excluding Shahood's Medical Records.

The District Court's categorical exclusion of Shahood's medical records is reviewed for abuse of discretion. *Breuer v. State*, 2023 MT 242, ¶ 17, 414 Mont. 256, 539 P.3d 1147. "An abuse of discretion occurs when a court exercises granted discretion based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Id.*

SUMMARY OF ARGUMENT

The District Court's Order Granting New Trial should be reversed. Its decision to supplant the jury's comparative negligence finding is directly contradicted by its prior ruling that comparative negligence "requires a determination by the jury."[2] Appx. 43, TR 646:2-11. The jury determined there was substantial evidence of comparative negligence. Appx. 1-2, CR 142. The "irregularities in the proceeding" were not irregularities, and Shahood cannot claim prejudice because she did not object or raise any of the issues at trial. In voir dire, Shahood was successful in each of her challenges for cause and she passed the jury for cause. TR 37:19-38:15, 63:7-65:7, 72:21-73:3, 79:12-82:8, 85:9-86:5, 87:17-18. Shahood did not object to BSB's closing argument, move *in limine* to preclude

[2] The District Court recognized: "The Montana Supreme Court has repeatedly affirmed that the factfinder should consider a claim of plaintiff's negligence, even if the defendant is found negligent per se." Appx. 43, TR 646:2-11.

any argument, or request any relief. BSB's arguments were "arguably" non-objectionable, as conceded by Shahood. CR 150, p. 18. The District Court abused its discretion in granting a new trial for "irregularities" that were not raised by Shahood during trial. Appx. 21-33, CR 165.

The remaining issues BSB appeals are rendered moot if this Court reverses the District Court's Order Granting New Trial. If the District Court is affirmed, however, rulings prior to the verdict must be reversed to ensure BSB a fair trial on all issues. First, issues of fact require BSB's negligence and causation to be determined by the jury, not the District Court. Second, Mont. Code Ann. § 61-8-106(2) requires that Shahood's negligence per se claims be dismissed, as those claims seek to enforce traffic regulations statues against equipment engaged in work. Finally, the categorical exclusion of Shahood's medical records must be reversed to allow for a record-by-record admissibility determination.

BSB prevailed at trial despite these rulings. The jury's verdict should stand.

ARGUMENT

I. The District Court Erred in Granting a New Trial.

A. Shahood Waived her New Trial Arguments.

At trial, Shahood and the District Court agreed there was sufficient evidence for comparative negligence to be decided by the jury. CR 132, pp. 1-2; Appx. 37-38, 43, TR 614:24-615:3, 646:2-7. The jury also heard the evidence, found

Shahood negligent, and apportioned 54% of the negligence to Shahood. Appx. 1-2, CR 142. The evidence did not change. Yet, post-trial, the District Court determined the same evidence that had been sufficient to send the issue to the jury was not sufficient to justify the jury's verdict. Appx. 21-33, CR 165. The District Court erred in this decision.

After the close of evidence, Shahood wrote: "Jennifer does not seek a directed verdict on BSB's comparative defense and concedes its defense must remain on the verdict form if the Court grants her requested relief." CR 132, pp. 1-2. This language is important—Shahood *conceded* comparative negligence must remain on the verdict. The concession is an acknowledgment that there was sufficient evidence of comparative negligence. *Id.* The specific result was contemplated by Shahood. She foreshadowed a scenario in which the jury might "say Ms. Shahood caused injury to herself and that she's 60 percent negligent and she doesn't recover anything." Appx. 37-38, TR 614:24-615:3.

The District Court reached the same conclusion:

> Shahood's comparative negligence remains for the jury. Plaintiff's assessment of Giambra v. Kelsey is correct. The Montana Supreme Court has repeatedly affirmed that the factfinder should consider a claim of plaintiff's negligence, even if the defendant is found negligent per se.
>
> My analogy of this judgment as a matter of law requires a determination by the jury of the Plaintiff's negligence if that issue has not been decided as a matter of law, and it has not.

Appx. 43, TR 646:2-11 (emphasis added). Shahood then proposed a Special Verdict form that required the jury to determine her negligence. Appx. 44-45, TR 647:17-648:2. The jury was instructed on BSB's primary theory of liability that Shahood failed to yield the right of way to equipment engaged in highway maintenance activities. CR 140, Instruction 20A.

These concessions and rulings, in addition to proving there was sufficient evidence to support the verdict, show an unequivocal waiver of any right Shahood may have had to contest the sufficiency of the evidence. The District Court ignored Shahood's concession and mischaracterized its own ruling as "reserve[ing] the question of Shahood's contributory negligence for trial." Appx. 24-28, CR 165, pp. 4-8. In fact, the District Court's words make clear it determined comparative negligence "requires a determination by the jury[.]" Appx. 43, TR 646:2-11.

A motion under Rule 59 "cannot be used to raise arguments which could, and should, have been made before the judgment was issued." *In re M.A.L.,* 2006 MT 299, ¶ 57, 334 Mont. 436, 148 P.3d 606. Here, Shahood did not argue there was insufficient evidence for comparative negligence to be considered by the jury—she conceded there was sufficient evidence. A litigant cannot be allowed to submit an issue to a jury and then receive a mulligan if it disagrees with the jury's determination. This approach would waste time and resources of the juries, litigants, and the courts.

The "irregularities" claimed by Shahood were also waived. She did not lose any challenge to the jury pool or request relief based on the "general environment established in voir dire. CR 150, p. 17. "The purpose of voir dire is to determine whether any member of the venire is disqualified by law, has 'an unqualified opinion or belief as to the merits of the action,' or harbors a state of mind 'evincing enmity against or bias in favor of either party' that could give rise to a challenge for cause." *Wenger v. State Farm Mut. Auto Ins. Co.*, 2021 MT 37, ¶ 15, 403 Mont. 210, 483 P.3d 480. This purpose was achieved by Shahood. She had eight successful challenges for cause and subsequently passed the jury for cause. TR 37:19-38:15; 63:7-65:7; 72:21-73:3; 79:12-82:8; 85:9-86:5, 87:17-18. If the "environment" in voir dire had been prejudicial, she should have requested additional relief.

Shahood concedes she did not object to BSB's closing argument. "A party who fails to contemporaneously object to purportedly impermissible comments during closing argument forfeits the right to appeal that error. To preserve an issue for appeal, a party must object when the grounds for the objection become apparent." *Evans v. Scanson*, 2017 MT 157, ¶ 23, 388 Mont. 69, 396 P.3d 1284. A timely objection allows a district court to address perceived improper arguments through a curative instruction or otherwise. *Id.* at ¶ 25. Reversal for improper argument is only appropriate where "(1) improper argument occurred, and (2) the

improper argument prejudiced a party such that it materially impaired the party's ability to receive a fair trial." *Covey v. Brishka*, 2019 MT 164, ¶ 53, 396 Mont. 362, 445 P.3d 785 (citations omitted).

The District Court recognized there was no objection to BSB's closing argument. Appx. 31, CR 165, p. 11. It cited *Evans v. Scanson* for the proposition that "[o]bjections must generally be raised 'when the grounds for the objection becomes apparent.'" Appx. 31, CR 165, p. 11 (quoting *Evans*, ¶ 23). *Evans* does not, however, include the caveat that objections must "generally" be raised. *Evans*, ¶ 23. In fact, the case unequivocally holds that a party who fails to object "forfeits the right to appeal that error." *Id.* Here, not only did Shahood fail to object, she conceded "it cannot be said that any one singular argument by BSB would itself be objectionable." CR 150, p. 18.

Similarly, the District Court cited *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326, and *United Tool Rental, Inc. v. Riverside Contracting, Inc.*, 2011 MT 213, ¶ 26, 361 Mont. 493, 260 P.3d 156, explaining it has a "a duty to prevent a 'miscarriage of justice' by granting a new trial where improper conduct of counsel is 'so pervasive' that it prevents the opposing litigant from having a fair trial." Appx. 29, CR 165, p. 9. Review of these cases illustrates the District Court's abuse of discretion.

United Tool Rental included three sentences of analysis, refusing to grant a new trial for remarks in closing argument because "[a] party's failure to object to alleged improper comments made by counsel precludes an appellant from raising that issue on appeal." *Id.* at ¶ 26. By contrast, the *Lopez* Court wrote: "Although the District Court, in understandable frustration, repeatedly admonished plaintiffs' counsel not to bolster with inadmissible evidence, not to attempt to introduce inadmissible hearsay, and not to ignore the court's rulings on certain issues, plaintiffs' counsel blithely proceeded to do what he knew he should not." *Lopez*, ¶ 33. Here, there was no ruling, admonishment, or objection that would have given BSB notice that Shahood or the Court would consider an argument improper. Without any objection, it is an abuse of discretion to grant a new trial.

The District Court's comparison of this case to *Cooper v. Hanson*, 2010 MT 113, 356 Mont. 309, 34 P.3d 59, is inapposite because issues were preserved for appeal in *Cooper*. Appx. 31-32, CR 165, pp. 11-12. Cooper relied on a combination of denials of challenges for cause in jury selection, and closing argument in violation of a motion in limine and contrary to counsel's assurances to the court that it would not engage in improper argument. *Cooper*, ¶¶ 29, 32, 37. None of that occurred here— Shahood allowed the jury to reach a verdict without objection and was then granted a new trial based on issues that were not raised at trial.

Shahood's failure to object, under existing Montana law, should be the end of the issue. If the District Court is affirmed, litigants will be encouraged not to object, await the outcome of trial, and ask for a new trial if the verdict is not in their favor. No trial result would be final. It was an abuse of discretion for the District Court to grant a new trial under these circumstances.

B. There was Sufficient Evidence to Support the Verdict.

As the District Court recognized, "The Montana Supreme Court has repeatedly affirmed that the factfinder should consider a claim of plaintiff's negligence, even if the defendant is found negligent per se." Appx. 43, TR 646:2-7; *Faulconbridge v. State*, 2006 MT 198, ¶ 99, 333 Mont. 186, 142 P.3d 777 ("Comparative negligence is a question of fact for the jury[.]"); *Contreras v. Fitzgerald*, 2002 MT 208, ¶ 25, 311 Mont. 257, 54 P.3d 983 (citations omitted) ("Issues of comparative negligence are particularly difficult to resolve as a matter of law."). The District Court specifically mentioned *Giambra*, where the Court affirmed Montana's comparative negligence scheme "requires the fact-finder to consider the negligence of the claimant, injured person, defendants, and third-party defendants, even if a party proceeds under a claim of negligence per se or if the fact finder determines that one or more persons was negligent per se." *Giambra*, ¶ 51.

The evidence supports the jury's comparative negligence finding. Moe and Hanley were engaged in highway maintenance activities—plowing snow—at the time of the accident. TR 509:6-15. In Montana, "[t]he operator of a vehicle shall yield the right-of-way to an authorized vehicle that is engaged in highway maintenance activities when the authorized vehicle is displaying flashing lights that meet the requirements of the department of transportation." Mont. Code Ann. § 61-8-317. Testimony from Hanley established the graders met the "authorized vehicle" and "flashing lights" requirements of the statute. TR 587:8-12, 592:21-593:15. Shahood did not object to a jury instruction on this statute, and the instruction was given by the Court. TR 661:12-24; CR 140, Instruction No. 20A.

Moe testified he was in the process of backing up to connect blades with Hanley's grader when Shahood switched lanes and placed her vehicle in his path of travel. TR 509:6-15, 512:12-21, 514:8-10, 516:16-517:5. He explained why he did not expect her to end up behind his grader:

> She was well outside of me. You know, again, the blade is sticking out, so she was well outside on my left side as she came around, and I was almost to where we were setting down to touch as she came around my left side. So I didn't believe that she would end up there in that immediate area of where I was working.
>
> …
>
> So, you know, the expectation is that you don't crowd the plow. You kind of give us room to do what we're trying to do to get out of the way and get out of the area that we're in and continue to remove the snow or move the snow to where we're trying to go.

Id. at 516:22-517:17. The grader was in reverse, with the backup alarm sounding. *Id.* at 512:22-24. Nonetheless, Shahood left minimal space between her vehicle and the grader. *Id.* at 519:7-18. The accident occurred within "seconds" after she passed him, and she was outside of his work area when she passed. *Id.* at 519:4-6.

Shahood's own testimony established that she switched lanes to the right lane to pass the grader and then switched back to the straight lane after passing, even though she recognized the grader was at least partially in the straight lane. *Id.* at 438:24-439:5, 482:22-483:3, 483:4-19. She admitted having concerns about pulling into that lane because she did not know what the graders were doing. *Id.* at 483:20-25. The minimal amount of space she left between the grader and her car was confirmed by her testimony that the distance was two car lengths. *Id.* at 484:1-8. Based on this evidence and testimony, the jury could have concluded Shahood did not yield, and was not paying attention based on her testimony that she did not see the grader move or hear the backup alarm prior to the accident. *Id.* at 439:13-22, 484:9-10.

Shahood's expert, Steve Harbinson, and the investigating officer, Sergeant Tymofichuk, provided opinion testimony supporting BSB's comparative negligence defense. Harbinson agreed that a motorist should exercise increased caution when approaching equipment with flashing lights, and that Shahood had an obligation to pay attention to what other vehicles were doing. *Id.* at 252:7-24,

252:25-253:5. Tymofichuk testified motorists, like Shahood, have "a duty to give [working equipment] a wide berth and…give them room to work." *Id.* at 275:13-20. He specifically agreed that Shahood bore responsibility for the accident if it occurred in the way Moe testified. *Id.* at 274:22-275:2.

The jury weighed this testimony and unanimously concluded Shahood was more negligent than BSB. Appx. 1-2, CR 142; TR 727:2-730:11. This conclusion is well-supported by the evidence. The jury was instructed on Shahood's duties, including the duty to yield to working equipment, and determined she was negligent based on the evidence at trial. Appx. 1-2, CR 142; CR 140, Instruction No. 20A; *see Covey*, ¶ 51 (noting the failure to object to jury instructions and the verdict form constituted a waiver of the opportunity to later object). The District Court erred in substituting its judgment for the jury's on a topic that is "a question of fact for the jury." *Faulconbridge*, ¶ 99.

Shahood argued there was insufficient evidence to support the verdict primarily by arguing Moe was negligent. CR 150, pp. 3-4. That misses the point. *Giambra* establishes that Shahood's negligence must be considered even if BSB was negligent. *Giambra*, ¶ 51. Further, she argued she was "legally stopped," another argument that misses the point of BSB's defense—if she had yielded to working equipment, she would not have been in a position for the accident to have occurred. Moe looked where he was going. TR 513:16-514:7. Nobody was there,

and he reasonably expected that Shahood would stay out of his work area. *Id.* at 516:22-517:17. She did not, and the jury had a sufficient evidentiary basis to conclude her decision to put herself in the path of Moe's movement was negligent.

In granting a new trial, the District Court took on the role of factfinder, resolving issues of fact in Shahood's favor. For example, the Court concluded: "Even if a reasonably prudent driver should have anticipated the reverse movement of the grader, two car lengths is sufficient space to provide working room while waiting to cross an intersection." Appx. 26, CR 165, p. 6. To reach this conclusion, the District Court necessarily discredited Moe's testimony. First, it assumes Shahood's estimate of "two car lengths" was accurate. *Id.* Moe testified she only left 10-15 feet, which is the equivalent of approximately one car length. TR 519:7-18. Second, even if the space was two car lengths, the District Court's conclusion that this is sufficient space was a disputed fact. Moe testified that Shahood's vehicle was "in that immediate area where [he] was working." *Id.* at 516:16-517:5. This is one example—the District Court's Order is replete with factual findings in Shahood's favor.

"The jury viewed the evidence, heard and viewed the witnesses, and entered its verdict." *Maykuth*, 212 Mont. at 372-73, 687 P.2d at 727. The District Court exceeded its "limited" role in reviewing the jury verdict. *Buhr ex rel. Lloyd*, 268

Mont. at 245, 886 P.2d at 394 (overruled on other grounds). It erred by overturning the jury's conclusions based on its own weighing of the evidence.

C. The District Court Abused its Discretion by Granting a New Trial Based on "Irregularities in the Proceeding."

The fundamental abuse of discretion by the District Court in granting a new trial based on "irregularities in the proceeding," was overlooking Shahood's failure to object or raise any of the alleged irregularities during trial. Neither BSB nor the District Court had an opportunity to address the issues at trial, so they cannot be raised post-trial. Even if Shahood had objected, however, there were no irregularities warranting a new trial.[3]

Shahood first complained about the "general environment" during voir dire. Appx. 28, CR 165, p. 8. It is not uncommon for jurors to know parties or witnesses. One of the purposes of voir dire is to identify and, if necessary, challenge jurors who might have a bias. *Wenger*, ¶ 15 (citing Mont. Code Ann. § 25-7-223(6)-(7)). Shahood successfully challenged jurors for cause. There was nothing irregular about the process, and certainly nothing prejudicial to Shahood.

The District Court focused on the arguments Shahood claimed were improper. None were improper. "Counsel, in arguing the case to the jury, may argue and comment upon the law of the case as given in the instructions of the

[3] It should be noted that the absence of an objection weighs in favor of finding the alleged irregularities were not substantial and did not cause significant prejudice.

court, as well as upon the evidence in the case." Mont. Code Ann. § 25-7-301(6); *Covey*, ¶ 54. "Once evidence is admitted, a trial cannot be reverse-engineered." *Covey*, ¶ 57. "Even if evidence admitted was only relevant to claims that ultimately were not submitted to the jury, if that evidence was properly admitted, counsel may comment on that evidence during closing." *Id.*

First, the Court found comments about Brian Moe being a "working man" who "showers at the end of the day" improper. Appx. 29, CR 165, p. 9. These comments directly responded to Plaintiffs' argument that Moe should be distrusted because his incident report stated Shahood's vehicle was in the turning lane rather than the straight lane. TR 671:21-673:7. Moe testified that, rather than going into the office and filling out a report, he had provided information and an "administrative person[]" in the BSB office filled it out. TR 529:6-530:15. Pointing out that Moe is a "working man," as opposed to someone who frequently completes paperwork like incident reports, was consistent with his testimony and directly rebutted Shahood's claim he was dishonest in his reporting of the accident. It is unclear how this statement could have prejudiced Shahood.

Next, BSB's suggestion that Shahood was distracted was directly supported by her testimony. The District Court inferred that the only evidence of her actions was her own testimony. Appx. 30, CR 165, p. 10. That is untrue. Moe's testimony was relevant to her actions, as were the photographs of the accident, which showed

her vehicle was well beyond the line where vehicles are to stop while waiting for the traffic light. *See* Trial Ex. 6-5 (TR 224:4-9). Even if Shahood's testimony was all that could be considered, her admissions that she did not see any flashing lights, movement of the grader, or hear backup alarms support the conclusion that she was distracted. TR 437:17-25, 439:13-22. She testified she was not paying any attention to the road grader. *Id.* at 439:23-25. BSB's argument was a proper comment on the evidence. Mont. Code Ann. § 25-7-301(6); Mont. Code Ann. § 26-1-501 ("An 'inference' is a deduction which the trier of fact may make from the evidence").

Third, the District Court determined BSB's closing argument "improperly conflated its liability with the local government's ability to do its job safely to the community's benefit." Appx. 30, CR 165, p. 10. Again, this was in response to Shahood's argument. She argued the jury was the "conscience of the community" and the jury had to determine "what values are important here in Butte," including "the expectations specifically of people out on the roadway here in Butte[.]" TR 669:12-22. Among the "expectations" Shahood argued were unreasonable was the expectation that motorists take a detour in order to yield to working equipment under Mont. Code Ann. § 61-8-317. TR 682:14-23. BSB's response, that the "inconvenience" of having to take a detour is reasonable considering the value of plowed streets and the inability of BSB to do its work safely if motorists do not yield, was a proper response. The obvious purpose of Mont. Code Ann. § 61-8-317

is to allow working equipment to perform their work safely, without interference from motorists.

The statement in closing argument aligned with admitted evidence. Sergeant Tymofichuk testified road graders "wouldn't be able to perform snow removal if they had to strictly follow all traffic laws." TR 275:4-12. It was a proper argument based on the evidence and Shahood's own arguments.

Finally, the District Court took issue with BSB's statements regarding expectations road grader operators have of other vehicles, including that they cannot "crowd the plow." Appx. 30-31, CR 165, pp. 10-11. Not only did Shahood not object to this argument, she did not object to the underlying evidence and questioned Moe about the "don't crowd the plow" expectation. TR 517:6-17, 540:18-24. "[C]ounsel may comment on properly admitted evidence during closing argument, and the jury may make inferences from such evidence."[4] *Covey*, ¶ 54. This was a comment on admitted evidence as well as the jury instruction requiring that motorists yield to working equipment.

Assuming, *arguendo*, Shahood's failure to object is overlooked and BSB is found to have made an improper argument, there is no evidence Shahood was prejudiced. The purported improper arguments dealt with the evidence and the law submitted to the jury. The jury was instructed that statements of counsel in closing

[4] This statement was included in the Jury Instructions. CR 140, Instruction No. 9.

arguments are not evidence, and that they should be disregarded if not supported by the evidence. CR 140, Instruction Nos. 2, 5. The Court "presumes the jury properly follows given jury instructions." *Wenger*, ¶ 16.

BSB's closing argument was based on the facts and law presented to the jury. It was not improper and, undisputedly, BSB did not have notice from either Shahood or the Court that such arguments might subsequently be deemed improper.

II. If the District Court's Order Granting New Trial is Affirmed, its Errors in the Underlying Trial should be Reversed.

A. The Court Erred in Granting a Directed Verdict on BSB's Negligence, Negligence Per Se, and Causation.

At the close of evidence, the District Court granted Shahood's motion for judgment as a matter of law on negligence, negligence per se, and causation. Appx. 41-43, TR 644:19-646:13. Each of these issues involved factual questions for the jury to decide.

"Judgment as a matter of law is properly granted only when there is a complete absence of <u>any evidence</u> which would justify submitting an issue to a jury. All such evidence, and any legitimate inferences that might be drawn from the evidence, must be considered in the light most favorable to the party opposing the motion." *Martin*, ¶ 8 (emphasis added). "Judgment as a matter of law is not proper if reasonable persons could differ regarding conclusions that could be

drawn from the evidence." *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727 (citing *Kearney v. KXLF Communications, Inc.*, 263 Mont. 407, 417, 869 P.2d 772, 777-78 (1994). Negligence actions "ordinarily involve questions of fact," which must be determined by the jury. *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 12, 342 Mont. 335, 181 P.3d 601. "[T]he credibility and weight given to the evidence is within the province of the jury[.]" *Papich v. Quality Life Concepts, Inc.*, 2004 MT 116, ¶ 29, 321 Mont. 156, 91 P.3d 553. Prior to granting judgment as a matter of law on negligence, negligence per se, and causation, the District Court recognized multiple issues of fact in its Order Denying Motions for Summary Judgment. Appx. 7-8, CR 78, pp. 5-6. Among those issues of fact were: "(1) whether the Plaintiff had pulled directly behind the grader; (2) whether the grader had reversed and occupied the lane in which the Plaintiff was driving;…(5) whether Mr. Moe's grader was in motion before the Plaintiff pulled behind it; (6) and whether the traffic light was green or red when Mr. Moe was backing the grader[.]" *Id.* On the issue of negligence per se, the Court noted: "[A] genuine issue of material fact exists as to whether Mr. Moe was engaged in 'work on the surface of the highway,' thus immunizing him from traffic regulations." *Id.* at p. 8.

Evidence on each of these issues of fact was presented to the jury. TR 438:24-439:5, 514:8-10, 519:4-6, 252:11-19, 275:4-12. A reasonable jury could

have concluded Moe exercised reasonable care. He was plowing in equipment that was marked, lighted, and beeping as it backed up. *Id.* at 503:11-504:25, 506:25-507:16, 512:22-24. Prior to backing, he looked behind him to ensure it was safe. *Id.* at 513:16-514:7. As he backed up, he saw Shahood pass him well outside of his path of travel, and he proceeded with his work. *Id.* at 512:12-21, 516:16-518:6. Inexplicably, Shahood pulled in behind him "seconds" before the accident. *Id.* at 519:4-6.

Shahood's expert conceded Moe was "engaged in work," at least to "some degree." *Id.* at 252:11-16. Sergeant Tymofichuk, similarly, testified normal traffic laws do not apply to road graders engaged in snow removal. *Id.* at 275:4-12. Despite this testimony, the District Court overlooked the "issue of material fact" it had previously identified, stating: "BSB argued the traffic statutes do not apply as standards of care in roadwork, but there is no dispute as to the driver's actions." Appx. 42, TR 645:3-16. The "driver's actions" have no bearing on whether Mont. Code Ann. § 67-8-106(2) exempts the driver from traffic regulations. The District Court's ruling essentially assumed the statutes applied by finding BSB violated them. *Id.*

At a minimum, the jury should have been instructed on Mont. Code Ann. § 67-8-106(2) to determine whether the graders were "engaged in work." Even if the jury determined Moe was not engaged in work, factual questions remained as to

whether he violated the statutes at issue. Shahood claimed Moe violated Mont. Code Ann. § 61-8-335 and -358, which preclude, in general terms, moving or backing without making sure the movement can be made with reasonable safety. Moe testified he ascertained whether he could safely back up, seeing nobody behind him, before backing. TR 513:16-514:7. The other statute relied upon by Shahood, Mont. Code Ann. § 61-8-328(1), requires that "a vehicle [] be operated as nearly as practicable entirely within a single lane and may not be moved from the lane until the operator has first ascertained that the movement can be made with safety." Moe testified he was primarily occupying the turning lane because it is the "closest lane to the crown of the road," which is where the windrow was located, and the width of the road grader can be greater than the traffic lane. TR 515:10-516:15, 531:8-12. With this testimony, the jury could have determined Moe did not violate any statute, assuming they applied to him.

Considering causation, the jury could have first concluded the facts of the accident were so minor that Shahood did not suffer any injury. It was undisputed the grader was traveling 1.5 miles per hour or slower. TR 234:19-25, 235:4-25, 514:8-10. The speed involved was the lowest Shahood's accident reconstruction expert had considered in more than 2,000 vehicle-to-vehicle accident reconstructions. TR 244:24-245:14. He admitted the delta-v was approximately 1.5 miles per hour, and he was not aware of any study finding accidents at less than 2.5

miles per hour can cause neck injuries. *Id.* at 247:20-248:6. Dr. Martini's testimony included discussion of a scholarly, peer-reviewed article explaining studies showing there is not a meaningful risk of injury to human volunteers in rear impacts of less than 18 kilometers per hour. *Id.* at 323:7-325:9. Shahood's vehicle had minor damage. Trial Ex. 6-6 (TR 224:4-9).

These facts were more than sufficient for the jury to conclude that the accident was not a cause of Shahood's alleged injuries. Evidence of a low-speed accident, causing minimal damage to vehicles is sufficient for a jury to decide "the accident was so minor that [the plaintiff] suffered no injury[.]" *Ele v. Ehnes*, 2003 MT 131, ¶ 33, 316 Mont. 69, 68 P.3d 835. Here, added facts supported BSB's causation defense, including her statements following the accident. Sergeant Tymofichuk testified nobody was injured in the accident based on his investigation. TR 269:17-20, 270:25-271:14. While Shahood claimed a neck injury at trial, she did not complain of neck pain to the EMT or at the emergency room. TR 562:20-563:12, 573:4-25.

Shahood had a preexisting history of neck pain, which was explored with several of her medical providers. She was visiting a chiropractor prior to the accident, and her pain complaints and ratings did not change between her last visit to the chiropractor prior to the accident and her first visit following the accident. *Id.* at 349:25-351:22. There was evidence of pre-existing conditions. Dr. Martini

agreed the "elephant in the room" was whether "what we're seeing with Ms. Shahood isn't the result of an injury but is the result of the natural progression of her previous condition[.]" *Id.* at 320:22-321:6.

This evidence, particularly with the low-impact nature of the accident, created a jury question. It was Shahood's burden to prove causation. *Breuer*, ¶ 19. BSB's examination of Shahood's medical providers and the first responders was a "permissible means of presenting alternate causation evidence[.]"[5] *Id.* at ¶ 22.

B. The District Court Erred in Denying BSB's Motion for Partial Summary Judgment on Shahood's Negligence Per Se Claims.

The accident in this case involved a BSB road grader that was plowing snow. Shahood claimed BSB was negligent per se for violating traffic regulation statutes: (1) Mont. Code Ann. § 61-8-302: Careless driving; (2) Mont. Code Ann. § 61-8-358: Limitations on backing; (3) Mont. Code Ann. § 61-8-335: Starting parked vehicle; and (4) Mont. Code Ann. § 61-8-328: Driving on Roadways Laned for Traffic. CR 8, ¶¶ 30-65. BSB moved for summary judgment on negligence per se, arguing these statutes do not apply to the grader under Mont. Code Ann. § 61-8-106(2). CR 49-50.

The plain language of Mont. Code Ann. § 61-8-106(2) makes it clear that traffic regulations are not applicable to working equipment operators, like Moe:

[5] The *Breuer* Court discussed *Clark v. Bell*, 2009 MT 390, 353 Mont. 331, 220 P.3d 650, where a defense verdict resulted under similar facts. *Breuer*, ¶¶ 23-24.

"Unless specifically made applicable, the provisions of this chapter except those contained in part 5 of chapter 8 shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work."

The Montana Supreme Court has not applied the statute. There is, however, case law from other states applying nearly identical statutes in analogous situations. *Caldwell v. Wash. State Dep't Transp.*, 96 P.3d 407, 410 (Wash. App. 2004). In *Caldwell*, the Washington Court of Appeals applied the statute, refusing to instruct the jury on traffic statutes allegedly violated by a litter truck. *Id.* at 408-10. The *Caldwell* Court approved instructions identifying the work vehicle as the "favored driver" and the other vehicle as a "disfavored driver." *Id.* at 410; *see also Howell v. State*, 169 A.D.3d 1208, 1209 (N.Y. App. Div. 2019) (holding a snow plow was "exempt from the rules of the road" while engaged in highway work).

The District Court's conclusion that Mont. Code Ann. § 61-8-106(2) did not preclude Shahood's negligence per se claims was an error of law. That error was compounded by the District Court's judgment as a matter of law in Shahood's favor on her negligence per se claims.

C. The District Court Erred in Categorically Excluding Admission of Shahood's Medical Records.

Prior to trial, Shahood argued her medical records could be discussed at trial, but the Court should not allow admission of any medical record as an exhibit.

Appx. 15-16, CR 120, pp. 4-5. She conceded she could find no authority supporting this practice, encouraging the District Court to "be the first person who ever makes the ruling that the [medical] records can't come in." Motions Hearing TR 83:6-14. Her counsel ultimately conceded rulings would probably have to be made "on a record-by-record basis." *Id.* at 84:13-18. In its pre-trial ruling, the District Court held: "Plaintiff cites no authority, and the Court can find none, which allows for categorical exclusion of medical records. Each record must be evaluated on a case-by-case basis…The Court therefore denies Plaintiff's motion and reserves determination on admissibility of medical records for trial on an exhibit-by-exhibit basis." Appx. 16, CR 120, p. 5.

The District Court's pretrial ruling on the admissibility of medical records was correct. Obviously, certain records or portions of records might be inadmissible. It is just as clear, conversely, that medical records of a personal injury plaintiff are relevant and such records cannot be categorically excluded. At trial, however, the District Court categorically refused admission of Shahood's medical records. Appx. 36, 39-40, TR 611:13-24, 633:11-634:18. Initially, the District Court precluded BSB from moving for the admission of medical records while the provider was testifying. *See* TR 314:5-11, 352:8-21. BSB nonetheless established foundation for the medical records and moved for their admission. *See*

e.g., TR 352:8-21, 560:4-24, 571:21-572:21, 610:1-611:24 (Appx. 35-36), 634:8-18.

Generally, "[a]ll relevant evidence is admissible." Mont. R. Evid. 402. "While all probative evidence is generally prejudicial to the opposing party, it is '*unfairly* prejudicial only if' of a type or nature that poses a significant risk of arousing jury hostility or sympathy for a party irrespective of its probative value for the permissible purpose offered." *Breuer*, ¶ 37. "Claiming damages for personal injury in a negligence case legitimately subjects a plaintiff to examination of relevant pre-existing conditions to 'the extent of the physical or mental injury at issue.'" *Wenger*, ¶ 28 (quoting *Henricksen v. State*, 2004 MT 20, ¶ 36, 319 Mont. 307, 84 P.3d 38).

Shahood's alleged injuries, both the cause and extent, were central issues at trial. Shahood "object[ed] to the introduction of <u>all</u> medical records under traditional evidentiary considerations (TECs), including irrelevance, confusion, unnecessary duplication, waste of time, unfair prejudice, hearsay, etc." CR 113, p. 2 (Pl.'s Opp. Brief Re: Admissibility of Medical Records). Clearly, treatment records in a personal injury case are relevant, and BSB provided solutions to the remaining concerns. It did not attempt to introduce any medical records without testimony from the medical provider. Pretrial Conference TR 20:12-20. With the provider there to clear up any potential confusion, Shahood's concern was

alleviated. She had the opportunity to cross-examine the provider to clear up any confusion. Even if some confusion remained, the balance of probative value versus potential prejudice was not considered.

BSB substantially limited the medical records it sought to introduce and redacted those records to eliminate information regarding unrelated medical conditions. It offered Shahood the opportunity to propose additional redactions she felt necessary. CR 108.1, p. 3; Pretrial Conference TR 19:12-23, 27:17-19. Shahood refused, creating a situation where BSB had to guess what information Shahood believed was prejudicial. This approach—claiming a record is prejudicial while refusing to identify the source of prejudice should be rejected.

The District Court abused its discretion by refusing to consider the admissibility of medical records while the sponsoring witness was testifying. TR 314:5-11, 352:8-21. This ruling eliminated Shahood's obligation to object to the records, as well as BSB's opportunity to cure potential foundation or admissibility concerns. The abuse of discretion was compounded when the District Court later refused to evaluate the admissibility of specific records, excluding all of them under Rule 403. Appx. 36, 39-40, TR 611:13-24, 633:11-634:18. The specific relevance, probative value, and potential prejudicial effect of the specific records was not considered. *Id.* The District Court should be reversed.

CONCLUSION

At trial, everyone agreed comparative negligence was a jury issue. The jury's unanimous verdict concerning Shahood's comparative negligence was supported by substantial evidence. Further, Shahood waived any objection she might have had to jury selection and closing argument. She did not preserve the issues. Even so, BSB's closing argument was proper. Accordingly, the District Court's Order Granting Motion for New Trial should be reversed and the jury's verdict should be reinstated.

DATED: April 25, 2025

BOONE KARLBERG P.C.

/s/ Christopher L. Decker
Cynthia L. Walker
Christopher L. Decker
Attorneys for Defendant/Appellant City and County of Butte-Silver Bow, Montana

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11, I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced, except for footnotes and for quoted an indented material; and the word count calculated by Microsoft Word is not more than 10,000 words pursuant to Montana Rule of Appellate Procedure 11(4)(a), being 9,478 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, and Exhibits.

DATED: April 25, 2025

BOONE KARLBERG P.C.

/s/ Christopher L. Decker
Cynthia L. Walker
Christopher L. Decker
Attorneys for Defendant/Appellant City and County of Butte-Silver Bow, Montana

CERTIFICATE OF SERVICE

I, Christopher Lee Decker, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-25-2025:

Cynthia L. Walker (Attorney)
Boone Karlberg P.C.
201 West Main, Suite 300
P. O. Box 9199
Missoula MT 59807-9199
Representing: City and County of Butte-Silver Bow
Service Method: eService

James G. Hunt (Attorney)
P.O. Box 1195
32 S. Ewing St., #308
Helena MT 59624
Representing: Jennifer Shahood
Service Method: eService

Patrick T. Fox (Attorney)
Hunt & Fox PLLP
111 N. Last Chance Gulch, Ste. 3A
Helena MT 59601
Representing: Jennifer Shahood
Service Method: eService

Electronically signed by Nila Glover on behalf of Christopher Lee Decker
Dated: 04-25-2025