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

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TRISTIN FAHRNOW,

Appellant,

v.

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

Appellees.

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**APPELLANT'S REPLY BRIEF**

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

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Ian P. Gillespie  
**DRIGGS, BILLS & DAY, P.C.**  
910 Brooks Street, Suite 103  
Missoula, MT 59801  
(406) 206-9707  
[igillespie@advocates.com](mailto:igillespie@advocates.com)  
*Counsel for Appellant Tristin Fahrnow*

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Martha Sheehy  
**SHEEHY LAW FIRM**  
P.O. Box 584  
Billings, MT 59103  
(406) 252-2004  
[msheehy@sheehylawfirm.com](mailto:msheehy@sheehylawfirm.com)  
*Counsel for Appellee E-5 Oilfield Services, LLC*

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Ryan P. Browne  
Amanda G. Hunter  
**HALL & EVANS, LLC**  
Billings, MT 59101  
(406) 969-5227  
[browner@hallevans.com](mailto:browner@hallevans.com)  
[huntera@hallevans.com](mailto:huntera@hallevans.com)

Michael Manning  
**RITCHIE MANNING KAUTZ PLLP**  
175 N. 27<sup>th</sup> Street, Suite 1206  
Billings, MT 59101  
(406) 601-1400  
[mmanning@rmkfirm.com](mailto:mmanning@rmkfirm.com)

*Attorneys for Appellee Eiker, Inc.*

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## ARGUMENT

### **I. No Reasonable Jury Could Find Fahrnow Negligent, Brown Was Negligent as a Matter of Law, and Summary Judgment in E-5's Favor Must Be Reversed.**

E-5's argument that Fahrnow purportedly breached his statutory duties and negligently caused his own injuries is replete with misreadings of the law, misstatements of fact, and/or misleading arguments which are even inconsistent with E-5's own expert findings. Fahrnow was not "blocking" the intersection; instead his vehicle was stopped at a stop sign in a lane Brown was not allowed to enter. The simple fact is E-5/Eiker, through Brown's actions, are undisputedly liable for the crash as Fahrnow as in "plain view" and the roads were clearly icy and slick. Yet Brown lost control of his vehicle, failed to drive with "extreme caution" (or at the very least in a careful and prudent manner), and allowed his truck to careen into the lane of oncoming traffic and struck Fahrnow as Fahrnow as attempting to re-enter his own truck. *See* 49 CFR § 392.14; MCA §61-8-303(3); MCA § 61-8-302; *Walden v. Yellowstone Electric Co.*, 2021 MT 123, ¶¶ 12-18, 404 Mont. 192, 487 P.3d 1. As E-5 concedes, Brown had a legal duty to anticipate the ice. *See Craig v. Schell*, 1999 MT 40, ¶ 32, 293 Mont. 323, 975 P.2d 820. To allow the District Court's orders to stand would upend Montana motor-vehicle and pedestrian law.

Fahrnow's actions were undisputedly reasonable. Fahrnow, Harrell and Averett (3 people) all exited their vehicles to assess the damage of the first crash.

(Fahrnow MSJ at Exh. C at 141:09-20, 142:22-24, Exh. D at 16:02-15; Exh. F at 94:01-07). Averett confirmed he left the XTO truck in the middle of CR 350, which should have given Brown notice of the crash that was in his plain view, and Brown admits that he had a clear view of the crash well before arriving at the intersection and it was dangerous. (Fahrnow MSJ at Exh. F at 71:22-72:04, 94:12-19, Exh. G at 268:14-21, Exh D at 26:11-15 (“you’d have a clear vision all the way to the bridge ... a quarter mile”); Fahrnow Opp to Eiker MSJ at Exh. 2 at 277:04-12, 313:01-25). Regarding Fahrnow’s work truck there was no immediately available location for Fahrnow to park the vehicle off the road, which is apparent from photographs taken by E-5’s expert which show no shoulder and a drop off to the right off the southbound lane near the stop sign.



(Fahrnow MSJ at Exh. C at 151:03-11; Fahrnow Opp to Eiker MSJ at Exh. 1 at Exh. D).

E-5 claims that the intersection was “essentially blocked” when Brown was

driving. Averett testified that he left his truck in the middle of the road which would allow a driver in the northbound lane (i.e. Brown) to pass. (Fahrnow MSJ at Exh. C at 151:25-152:04). Importantly, Fahrnow was in the southbound lane **which Brown was not allowed to enter**. See MCA § 61-8-321. Even E-5's accident reconstructionist, Martin Randolph, places vehicles in a location where Brown could pass and proceed in the northbound lane:



(Fahrnow Opp to Eiker MSJ Exh. 1 at Exh. A). While there is inconsistent testimony on the exact location of Averett's truck, given the width of County Road 350, Brown's path of travel would **not** have been blocked, **which E-5's expert admits**. Fahrnow MSJ at Exh. I at Exh. A. In short, it should have been **obvious** to Brown that there was a crash; yet he proceeded to turn, lose control, and run over Fahrnow.

Tellingly, in its brief, E-5 fails to cite or analyze the text of each statute Fahrnow purportedly violated. This is because Fahrnow plainly did not violate these statutes, understanding the facts here and construing the text of each, which Fahrnow

will do below as he did in the District Court:

**A. MCA § 61-8-506**

MCA § 61-8-506 plainly does not apply. First, Fahrnow was not a pedestrian “walking along” a highway, but a person who quickly assessed his vehicle for damages and was walking back to enter the truck at the time he was struck. Moreover, there is no shoulder on CR 350. (Fahrnow Opp to Eiker MSJ at Exh. 1 at Exh. D). In addition, Fahrnow was walking as far as practicable, but he nonetheless needed to reenter his vehicle and was doing so when he was struck. *See Gunnels v. Hoyt*, 194 Mont. 265, 272, 633 P.2d 1187, 1192 (1981) (“[w]hat is ‘practical’ in any situation clearly depends upon all of the surrounding facts and circumstances.”). Even if Fahrnow technically violated the statute (which he did not), this violation did not contribute to his injuries as Brown’s vehicle still would have struck Fahrnow and his truck even if they were further off the road. This is evident by the post-crash photographs which show that Brown’s truck dragged Fahrnow and pushed Fahrnow’s truck off the roadway:





*See Roe v. Kornder-Owen*, 282 Mont. 287, 293, 937 P.2d 39 (1997) (“After a review of the record, we conclude that [plaintiff] offered no evidence that [defendant’s statutory violation]... actually contributed as a cause of the parties’ collision.”). Even if Fahrnow violated the statute (which he did not), it does not make him liable as a matter of law. *See Dillard v. Doe*, 251 Mont. 379, 384, 824 P.2d 1016 (1992).

**B. MCA § 61-8-353**

MCA § 61-8-353 does not apply for multiple reasons:

- It was not practical for Fahrnow to move the vehicle to another part of the roadway as there was not shoulder and a drop off from the edge of the roadway. (Fahrnow Opp to Eiker MSJ at Exh. 1 at Exh. D). Two others (Harrell and Averett) acted the same as Fahrnow. Moreover, Fahrnow was initially not sure if he could move the vehicle, which was hitched to a trailer, after the first wreck. At a minimum, practicality is a question for the jury.

*See Florea v. Werner Enterprises, Inc.*, No. CV 08-52-M-DWM-JCL, 2009

WL 2421853, at \*5 (D. Mont. July 29, 2009) (“For purposes of applying Mont. Code Ann. § 61–8–353(1), “[w]hat is ‘practical’ in any situation clearly depends upon all of the surrounding facts and circumstances.”) *Gunnels*, 194 Mont. at 272.

- Fahrnow and his vehicle could be seen for at least 500 feet. (Fahrnow MSJ at Exh. G at 268:14-21, Exh D at 26:11-15).
- At the time Fahrnow was struck by Brown’s truck, there was a justifiable emergency as Fahrnow, Harrell, and Averett were assessing the first crash.

Even if Fahrnow violated the statute (which he did not), any violation did not substantially contribute to the accident as Brown lost control of his vehicle and drove into the southbound lane, where Brown was obligated to remain in the northbound lane. *See Roe*, 282 Mont. at 293. Moreover, even if Fahrnow violated the statute (which he did not) a jury could find him 0% at fault, or certainly below 51% at fault. *See Griffel v. Faust*, 205 Mont. 372, 668 P.2d 247 (1983) (affirming jury verdict finding 0% negligence to party who pickup had engine issues, pulled the pickup and haygrinder to the side of the road, but did not have any “flares or warning devices”, and allegedly violated MCA § 61-8-353).

### **C. MCA § 61-8-354(i)(c)**

MCA § 61-8-354(i)(c) does not apply because:

- Fahrnow and his vehicle were not “within an intersection”<sup>1</sup>, but stopped before a stop sign in the appropriate lane of traffic.
- Fahrnow had stopped in compliance with the law and to verify if the first crash had disabled his vehicle given that the trailer was hitched.

Even if Fahrnow violated the statute (which he did not), any violation did not substantially contribute to the accident as Brown lost control of his vehicle and drove into the southbound lane, where Brown was obligated to remain in the northbound lane. *See Roe*, 282 Mont. at 293. Moreover, even if Fahrnow violated the statute (which he did not) a jury could find him 0% at fault, or certainly below 51% at fault. *See Griffel*, 205 Mont. at 372.

#### **D. MCA § 61-9-412(4)**

MCA § 61-9-412(4) does not apply because:

- The Montana CDL Manual, federal regulation, and case law have clarified that this should be accomplished within 10 minutes, and undisputedly less than 10 minutes occurred between the crashes. (Fahrnow Opp to Eiker MSJ at Exh. 1 at Exh. C); 49 CFR § 392.22(b)(1); *Florea v. Werner Enterprises, Inc.*, No. CV 08-52-M-DWM-JCL, 2009 WL 2421853, at \*7–8 (D. Mont. July 29, 2009).
- Fahrnow’s employer did not provide Fahrnow with any red flags, and, thus,

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<sup>1</sup>As defined in MCA § 61-8-102(k).

this, at most, speaks to Fahrnow's employer's purported negligence.

- Fahrnow was not driving the type of vehicles in § 412, but instead was driving a pick-up truck with a trailer attached.

Moreover, even if Fahrnow violated the statute (which he did not), any violation did not substantially contribute to the accident because Fahrnow and his work truck were in the plain sight of Brown and Brown should have also clearly seen Averett's vehicle stopped in the middle of County Road 350, and Brown lost control of his vehicle and struck Fahrnow in the southbound lane, which is not where Brown's vehicle was allowed to travel. *See Roe*, 282 Mont. at 293.

#### **E. The Cases Upon Which E-5 Relies Are Clearly Distinguishable.**

Tellingly, E-5 evades the applicability of *Craig* and *Walden* to this case. These cases are directly applicable and require summary judgment in Fahrnow's favor on the issue of liability and reversal of summary judgment in E-5's and Eiker's favor. Importantly, E-5 conceded that *Craig* holds that Brown had a legal duty to anticipate black ice. (E-5 Brief at p. 29).

Instead, E-5 relies upon cases which are clearly distinguishable here. E-5's reliance on *Anderson v. Werner Enterprises, Inc.* is misplaced, and *Anderson* supports summary judgment in Fahrnow's favor. 1998 MT 333, 292 Mont. 284, 972 P.2d 806. The plaintiff in *Anderson* was driving a truck in icy conditions, came across a vehicle which had already crashed, and maneuvered his truck to avoid a

crash or significant damage to his truck and “without jackknifing or losing control”. *Id.*, ¶ 8. The defendant was travelling behind plaintiff in a truck, lost control, jackknifed, and drove his truck into plaintiff’s truck. *Id.* The district court found that plaintiff could not have been comparatively negligent as a matter of law and this Court affirmed that ruling. *Id.*, ¶¶ 37-38. The Plaintiff had avoided the collision of the first crashed vehicle, did not lose control of the vehicle, and then was struck by defendant’s truck from behind. The Court reasoned that plaintiff, under those facts, “could not have avoided the collision”. *Id.*, ¶ 37. Here, Fahrnow acted reasonably (as discussed above) in assessing the first crash and Brown (unlike the plaintiff in *Anderson* and just like the at-fault defendant in *Anderson*) lost control of his truck, careened into oncoming traffic, and struck Fahrnow. Fahrnow, like the plaintiff in *Anderson*, cannot be comparatively negligent because he acted reasonably and did not cause Brown to lose control of his truck. *See id.*, ¶ 38.

*Dillard* is also distinguishable to this case. In *Dillard*, the plaintiff was walking on a state highway in dark, windy and snowy conditions. 251 Mont. at 380-81. He had his back to traffic and was ultimately hit by a snow plow the plaintiff had anticipated was coming because the highway had not been plowed. After hearing the snow plow, plaintiff “walked 25 yards further, stopped, hung his hard hat on the highway delineator post and bent slightly to light a cigarette with his back still to the traffic when he was hit either by the snowplow [blade] or by thrown

snow.” *Id.* at 381. This Court affirmed because plaintiff was negligent in keeping his back turned to the plow (even though he knew it was coming) and knowing that the conditions were dark and snowy. *Id.* at 383. However, the Court reversed on the “issue of comparative negligence” which could not be determined as a matter of law. *Id.* at 384. Thus, this case only further supports that the District Court finding Fahrnow negligent as a matter of law and granting summary judgment in E-5’s and Eiker’s favor was clear error. *See id.*

#### **F. E-5’s Brief Is Replete with Misleading Statements Concerning the Crash.**

Just as E-5 attempted to do in the District Court, here it makes several misstatements of fact or misleading statements regarding the crash, which Fahrnow will address below:

- Fahrnow does *not* admit he violated numerous statutes. The testimony cited by E-5 is a colloquy between E-5’s counsel and Fahrnow where E-5’s counsel handed Fahrnow the Montana Driver’s Manual (not the statutes), cherry-picked certain guidelines, and asked that *generally* if actions such as moving a vehicle out of a roadway or not standing in traffic lanes are good practices. (CSApp 55-56). Of course, E-5’s counsel in that colloquy ignored provisions in the manual that support Fahrnow’s case such as, e.g., a driver should put out warning devices within 10 minutes of the wreck; “[i]f you are involved in an accident you must stop”; “[i]t is a crime for you to leave a crash site where your vehicle is involved if there is an injury

or death before police have talked to you and gotten all the information they need about the crash.”; and “[s]top your vehicle at or near the accident site.” (Fahrnow Opp to E-5 MSJ at Exh. 1 at Exh. B at pp 78-79). Lastly, even if Fahrnow made such an admission and/or was qualified to make such legal finding (which he is not), his testimony cannot bind him; particularly where there is clear evidence (discussed above) that he did not violate traffic laws. *See* Mont. R. Evid. 607(b) (“No party is bound by the testimony of any witness.”); *see also* (Fahrnow MSJ at Exh. E at 34:09-16 (Trooper Woodland noting that Fahrnow’s truck was “legally stopped in traffic”)).

- E-5 mistakenly claims: “Fahrnow presents no evidence establishing that he was in ‘plain view’ or that the collision was avoidable.” Testimony cited in Fahrnow’s brief, including Brown’s testimony, is that “visibility is not an issue” at this stretch of roadway and the prior crash which was clear for a “quarter mile”. (Fahrnow MSJ at Exh. D at 26:11-15, Exh. G at 268:14-21). Despite these clear indicators of a crash, Brown claims he did not see that as a “[r]ed flag” and proceeding to make the turn. (Fahrnow MSJ at Exh. G at 265:19-22).

- Moreover, E-5’s argument regarding hazard lights is a red herring as Brown could only see the left side of Fahrnow’s vehicle and thus he would not have been able to see that Fahrnow’s vehicle had hazards on versus being stopped at the stop sign with a turn signal. (Fahrnow Opp to Eiker MSJ at 193:01-13). Brown

even conceded in his deposition that the hazard lights would not have been apparent to him because he could not see both headlights on Fahrnow's truck. (*Id.*).

## **II. E-5 and Eiker Spoliated Evidence by Allowing the Destruction of the Truck Data and Brown's Employment File.**

### **A. E-5 and Eiker Had a Duty to Preserve.**

None of the cases cited by E-5 or Eiker state that a spoliator *must* be a sophisticated institutional company in order to be sanctioned for spoliation of evidence. At most, this is just one factor courts consider in assessing whether the party breached its duty to preserve evidence. See *Spotted Horse v. Burlington Norther Santa Fee R.R. Co.*, 2015 MT 148, ¶ 30, 379 Mont. 314, 350 P.3d 52. By no means are any and all companies and individuals which are not large institutions absolved of the duty to preserve evidence. To find what E-5 and Eiker suggest would allow non-institutional defendants free reign to destroy or allow the destruction of crucial evidence without consequence.

E-5 incorrectly attempts to distinguish the facts in *Walden* to this case and incredibly argues that the crash in *Walden* (which involved a truck crashing into cattle and no humans) was "catastrophic" triggering the duty to preserve; while at the same time arguing that Brown running the hot-oil truck over Fahrnow, dragging him ~20 feet, and causing him to suffer permanent nerve damage was "minor". Simply, if a truck driver had a duty to preserve the data upon crashing into the cows, E-5 and Eiker certainly had a duty to preserve the data and Brown's employment

file upon Brown running over Fahrnow. Here, Brown was ticketed for driving at an improper speed, E-5/Eiker's owner Paul Eiker marked the cause of the incident as driving at an improper speed in the incident report, and Brown was immediately sent to be alcohol and drug tested after the incident. The District Court finding that this "looked like ... a minor fender bender" is clearly an erroneous conclusion of fact. Fahrnow was run over by a hot-oil truck and was rushed the hospital via EMS. Trooper Woodland (who has presumably seen many traffic accidents in his position) testified that he recalled the incident at his deposition years later because of the severity of the crash and the fact Fahrnow was under the truck. (September 20, 2024 Trooper Woodland Designation at 09:02-09).

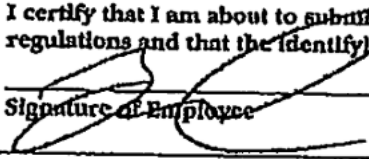
Thus, E-5 and Eiker breached their duty to preserve the evidence.

**B. Fahrnow Has Established Prejudice.**

E-5 and Eiker also ignore that Fahrnow has established material prejudice due to the destruction of (I) the trucking data; and (II) any employment records of Brown working at E-5. With regard to the trucking data, Fahrnow has shown through expert testimony (both proffered by the defense and Fahrnow) that Brown was travelling significantly faster than his incredible testimony that he was driving "2 miles an hour" when he struck Fahrnow. *Compare* (Fahrnow MSJ at Exh. G at 286:20-287:21, 341:21-342:10) *with* (Fahrnow MSJ at Exh. I at Exh. A at p. 3, 16. Exh. J 80:02-81:06). As noted in the initial brief, Paul reviewed the data and intends to

mislead the jury with his unqualified testimony (contrary to his own experts) that Brown was travelling at such an incredibly low speed. (*Id.* at Exh. K at 60:17-25).

With regard to the employment records, Eiker/E-5 destroyed all records of Brown’s employment at E-5 (even though such records are required to be maintained by law (Motion re: Spoliation at Exh. I at 33:09-34:10; 49 CFR 391.23, 40.25)), yet they also argue that Fahrnow must accept their cherry-picked, conclusory facts that Brown was only working or providing a benefit for E-5 that day. They ignore that the Alcohol Testing Form from the incident listed “Eiker Inc.” as Brown’s employer and Brown signed and certified that that information was “true and correct” that day:

<b>Step 2: TO BE COMPLETED BY EMPLOYEE</b>			
I certify that I am about to submit to alcohol testing required by US Department of Transportation regulations and that the identifying information provided on the form is true and correct.			
			
Signature of Employee	Date	Month	Day Year
		11	18 118

(Motion re: Spoliation at Exh. B). Indeed this form was produced in discovery *because it was in Brown’s Eiker personnel file and we know Brown’s E-5 personnel file was destroyed.* (Motion re: Spoliation at Exh. C, Exh. I at 29:16-24, 31:12-21, Exh. H at 19:17-21:09).

**C. E-5 and Eiker “Controlled” the Data.**

Eiker mistakenly argues that it should not be sanctioned because it did not “own” the truck data. Eiker ignores that all documents and agreements for the E-5

vehicle tracking were entered into and through Eiker. (Motion re: Spoliation at Exh. G). Simply, both Eiker and E-5 had *control* over the evidence, and their principal, Paul Eiker, immediately reviewed the data after the crash and after he checked “operating at an improper speed” on an Eiker crash report. *See Mont. State Univ.-Bozeman*, ¶¶ 22-23; (Fahrnow MSJ at Exh. L, Exh. K at 58:19-59:11, 63:08-64:22).

Moreover, Fahrnow’s argument against Eiker for spoliating the data is not waived. He presented a specific factual section and argument on spoliation by Eiker in his opening brief which was subject to a word-count limit. Fahrnow also presented facts and legal argument on this issue in the District Court. (Fahrnow MSJ).

**D. E-5 and Eiker Make Numerous Misstatements of Fact and Law.**

Below, Fahrnow will briefly address additional misstatements of fact and law by Eiker and E-5:

- E-5 mistakenly claims: “At no time prior to serving E-5 with summons did Fahrnow ever contact E-5 to notify E-5 of his intent to file suit or request E-5 preserve the truck.” As noted in Fahrnow’s initial brief, on June 5, 2019, Fahrnow’s counsel contacted E-5, through its insurer, to provide notice of representation, which is 3 years before Paul Eiker claims he purportedly received notice in a sworn declaration. (Fahrnow MSJ at at Exh. P).

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- E-5 mistakenly states the second element to find spoliation is that the “the spoliator knew it was destroying relevant evidence and acted with a sufficient degree of culpability.” Knowledge is not required. The second element as established by this Court is “the other party intentionally, knowingly, or negligently breached the duty”. *Mont. State Univ.-Bozeman v. Montana First Judicial Court*, 2018 MT 220, ¶ 25, 392 Mont.458, 426 P.3d 541.

- E-5 makes a misleading argument to the Court that Trooper Woodland characterized Fahrnow’s injuries as “minor”. The deposition testimony cited by E-5 entails leading questions by E-5’s counsel about a “suspected minor injury”. Trooper Woodland is not a doctor, and as noted above, Fahrnow was later diagnosed by his treating physicians as having suffered permanent nerve damage. (*See e.g.* Fahrnow’s Opp. to E-5’s Motion to Quash Trial Subpoena at pp. 3-4, Fahrnow’s Motion to Compel at p. 4; Fahrnow’s MSJ re: Certain Injuries). Indeed even E-5’s medical experts *concede* Fahrnow suffered 4 of the injuries he contends he suffered from the incident, including a right lateral femoral cutaneous nerve injury and neuropathy, but dispute whether the crash also caused Fahrnow to suffer bilateral SI radiculopathy. (Fahrnow’s MSJ re: Certain Injuries).

- “Paul Eiker of E-5 did not even know that the hot oil truck contained ECM capable of recording some data.” The simple fact is that E-5 and Eiker contracted to record data from the truck, and Paul Eiker testified that he reviewed

the data after the incident. (Fahrnow MSJ at Exh. K at 58:19-59:11). That data is gone.

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

#### **A. Fahrnow Timely Amended His Complaint and Substituted Eiker.**

Fahrnow moved to amend the First Amended complaint to substitute Eiker for a fictitiously named defendant, and the District Court's initial order allowing such was correct. (Fahrnow's Motion to Amend; December 12, 2020 Order). Eiker mistakenly argues that Fahrnow was required to set out discrete factual allegations against each Doe in order for the substitution to be proper. MCA § 25-5-103 should not be so strictly construed, and nowhere in the statute does it require such detailed pleading. *See also* MCA § 1-2-101 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). This Court has expressly held that MCA § 25-5-103 should be construed "liberally" to favor substitution. *Molina v. Panco Const., Inc.*, 2004 MT 198, ¶ 9, 322 Mont. 268, 95 P.3d 687; *see also* MCA § 1-2-102. Thus, Fahrnow properly substituted Eiker for a Doe.

#### **B. Genuine Disputes of Fact Exist as to Whether Eiker Is Liable under the Doctrine of *Respondeat Superior* or as an Alter-Ego.**

Eiker simply ignores there are numerous genuine disputes of fact regarding

whether Eiker is liable under *respondeat superior* or as an alter-ego of E-5. Regarding scope of employment, Eiker simply stating Brown was not employed at the time does not conclusively establish this issue, and Fahrnow has cited to numerous employment documents, including the alcohol testing for signed and certified by Brown, which show that Eiker, in addition to E-5, could be found liable for the crash under *respondeat superior*. See *L.B. v. United States*, 2022 MT 166, ¶ 14, 409 Mont. 505, 515 P.3d 818 (holding scope of employment is “not rigidly defined”, “necessarily fact-intensive”). Eiker also ignores that it has a burden to show that its employment relationship with Brown was terminated. MPI2d 10.09 (Vicarious Liability – Employment (Termination) (citing *Healy v. Ginoff*, 69 Mont. 116, 131-32, 220 P. 539 (1923))).

Regarding alter-ego theory, Eiker never argued it was entitled to summary judgment on the alter ego claim in its initial motion and improperly raised it in its reply. Fahrnow has produced numerous facts which support his alter-ego theory previously allowed by the District Court. (Fahrnow Brief at pp. 31-32). Eiker also mistakenly argues that Fahrnow has not established the second prong of the alter-ego test. However, Eiker did not raise this issue substantively in the lower court and also did not meet its initial burden at summary judgment to establish no genuine dispute of fact on this prong, and thus, the argument is waived and cannot be considered on appeal. See *Tai Tam, LLC v. Missoula County*, 2022 MT 229, ¶ 21,

410 Mont. 465, 520 P.3d 312; *Lawrence v. Pasha*, 2023 MT 150, ¶ 8, 413 Mont. 149, 533 P.3d 1029.

Therefore, this Court should reverse the District Court's grant of summary judgment in Eiker's favor and, on remand, allow Fahrnow to pursue his claims against Eiker under both *respondeat superior* and as an alter-ego of E-5.

#### **IV. E-5 Should Be Compelled to Answer Interrogatory No. 11.**

Contrary to E-5's argument, Fahrnow has cited to legal authority and the facts of the case. First, Mont. R. Civ. P. 33(b) allows Fahrnow to conduct discovery on E-5's contention that Dr. Donaldson was unqualified to opine on this matter or a jury should doubt her qualifications. In contrast, the text of Mont. R. Civ. P. 26(b)(4) only apply to "facts known and opinions held by experts" and thus does apply here. Fahrnow is simply allowed to conduct discovery on a party's contention regarding the propriety of an expert's testimony and how that party may attack that expert at trial. *See Richardson v. State*, 2006 MT 43, ¶¶ 22, 24, 331 Mont. 231, 130 P.3d 634 ("Modern instruments of discovery, together with pre-trial procedures, "make a trial less a game of blindman's buff"). E-5 refused to answer Interrogatory No. 11 because it likely knows Dr. Donaldson and Dr. Ericksen are equally qualified, and it has decided to evade admitting to a fact that would doom its motion *in limine* regarding Dr. Donaldson and/or undercut its questioning of Dr. Donaldson at trial. Thus, the District Court abused its discretion in precluding Fahrnow from

conducting discovery on E-5's contention.

Second, even if Mont. R. Civ. P. 26(b)(4) limited expert discovery in this instance, the District Court abused its discretion in limiting Fahrnow's ability to conduct such discovery here because E-5 spurred and engaged in extraordinarily broad expert discovery in this case. For example, E-5 attempted to notice a 30(b)(6) deposition of Dr. Donaldson's hospital about her "comings and goings" and also attempted to depose Dr. Donaldson's colleague in a side business completely unrelated to her opinions in this suit. (Fahrnow Motion *in Limine* #11-19 at Exh. D-G). Moreover, E-5 served all 4 of Fahrnow's experts with subpoenas duces tecum seeking documents in addition to their disclosures<sup>2</sup> and Fahrnow with at least 6 discovery requests after the expert disclosures seeking (I) all email correspondence with the experts, (II) all invoicing, retention agreements, and time sheets from the experts, (III) draft reports, and (IV) a description "in detail any meetings or conversations". (Fahrnow Motion to Compel at pp. 10-11). Moreover, E-5 questioned Dr. Donaldson in her deposition about an unrelated case where she issued a report and prior malpractice claims. (*Id.* Exh. F at 152:23-157:13). Thus, the District Court abused its discretion to allow E-5 to engage in such extensive expert discovery; yet limit Fahrnow to the text of Rule 26(b)(4).

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<sup>2</sup> Dr. Donaldson noted in her deposition that E-5's subpoena "is the most extensive request for documents that I have even been asked to produce." (Fahrnow Motion to Compel at Exh. F at 150:06-12).

**V. E-5 and Eiker Have Waived Their Right to Recover the Award of Costs and Fees by the District Court.**

Fahrnow and the undersigned appreciate that appellate counsel for E-5 and Eiker have waived the baseless award of costs. (Stipulation re: Award of Costs). Fahrnow notes that this award, which was contrary to black-letter Montana law, was requested by defense counsel in the District court and required Fahrnow (a young oil-field worker who was permanently injured in this incident) to place \$76,000 in escrow to avoid E-5 and Eiker executing on his assets and wages with the baseless award of costs pending appeal.

Particularly in light of this backdrop, the Court should look askance at the District Court's orders, which were, in effect, proposed orders submitted by the same counsel for E-5 and Eiker and, as discussed in this briefing on appeal, should also be reversed. Eiker characterizes the district court's order on summary judgment as "an excellent roadmap". The simple fact is the District Court's orders, which adopted almost verbatim E-5's and Eiker's proposed orders, should be reversed as discussed here and in Fahrnow's initial brief.

Fahrnow is a young man with permanent injuries as a result of being run over by Brown in the hot oil truck. He deserves his day in court and a trial.

//

**CONCLUSION**

For the forgoing reasons, this Court remand this case providing the relief requested in Fahrnow's opening brief.

DATED this 19<sup>th</sup> day of May, 2025.

**DRIGGS BILLS & DAY, P.C.**

*Attorney for Appellant Tristin Fahrnow*

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

**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that, pursuant to M. R. App. P. 11, this brief is proportionately spaced, 14-point font, and contains 4,914 words, as counted by the undersigned’s word processing software, excluding any Caption, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and/or any Appendix.

DATED this 19<sup>th</sup> day of May, 2025.

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

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

## CERTIFICATE OF SERVICE

I, Ian Philip Gillespie, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-19-2025:

Ryan P. Browne (Attorney)  
175 North 27th Street  
Suite 1101  
Billings MT 59101  
Representing: Eiker, Inc.  
Service Method: eService

Amanda G. Hunter (Attorney)  
125 Bank Street  
Suite 403  
Missoula MT 59802  
Representing: Eiker, Inc.  
Service Method: eService

Martha Sheehy (Attorney)  
P.O. Box 584  
Billings MT 59103  
Representing: E-5 Oilfields Services, LLC  
Service Method: eService

Michael Manning (Attorney)  
175 N. 27th St., Suite 1206  
Billings MT 59101  
Representing: Eiker, Inc.  
Service Method: eService

Electronically Signed By: Ian Philip Gillespie  
Dated: 05-19-2025