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.

APPELLEE'S ANSWER BRIEF

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

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[1] The term "directed verdict" was used at the trial court level. If is reflected here a "judgment as a matter of law" (JML) in conformance with *Johnson v. Costco Wholesale*, 2007 MT 43, FN 1, 336 Mont. 105, 152 P.3d 727.

STATEMENT OF THE CASE

A road grader owned and operated by Defendant/Appellant the City and County of Butte-Silver Bow (BSB) back into Plaintiff/Appellee Jennifer Shahood's stationary vehicle and injured her. Jennifer sued BSB. The matter went to trial. The trial court entered judgment as a matter of law in Jennifer's favor on her claims of negligence, negligence per se, and medical causation. The case went to verdict and the jury assigned Jennifer 54% fault. Jennifer oved the trial court for a new trial on various grounds. The trial court granted Jennifer's motion and BSB appeals.

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Issue 1 Facts (new trial):

FACTS RE: INSUFFICIENCY OF EVIDENCE FOR COMPARATIVE NEGLIGENCE

At noon on a Tuesday at a busy intersection in Butte,[2] a 45,000 lbs. Butte-BSB road grader with a 14-foot-wide blade was facing northbound and in the southbound center and turning lanes. Operating a grader takes a lot of focus and attention. TR 536:1-2. Brian Moe had been operating the grader since 3 a.m. or for 9 hours. TR 501:21-23; 535:24.

Jennifer was driving southbound on Main Street, intending to drive straight through the intersection. BSB did not implement any traffic control, i.e., no flaggers,

[2] The intersection was at Main Street and Front Street. *See* Appx. 1 (Tr. Ex. 2 - satellite photograph of intersection).

signs, warning lights, or any other things of that nature (TR 437:17-23), i.e., nothing to tell a citizen driver like Jennifer how to navigate a wrong-way-facing grader spanning two lanes at the intersection she was approaching. She saw the grader and proceeded carefully and with caution. TR 437:4-8. Jennifer saw Bryan in the grader's cab. TR 436:1-16. She slowed down, moved to the far lane, and safely passed the grader. Bryan saw Jennifer and lost her in his line of vision as he turned his head until he could not see her anymore. He did not see her again until after the collision. TR 516:18-21. After Jennifer safely passed the grader, she stopped for a red light at the stop line in the center lane.

With the grader spanning the center and left turn lanes, Bryan started backing. He did not look in the grader's wide-angle rearview mirrors or backup camera,[3] in which Jennifer's car would have been visible. TR 543:23-544:2.[4]

At trial, Bryan testified that, to back safely, "[o]f course, [you] check your mirrors, and you know, make sure nothing is behind you." TR 513:18-20. He agreed you cannot drive a grader without looking where you are going, without backing safely, and without being aware of your surroundings. TR 535:16-23. He agreed these are basic rules of the road, as taught in civilian and commercial drivers manuals. TR 534-535. Brian agreed large vehicles are bigger, carry more

[3] Appx. 2 (Tr. Ex. 9, wide angle mirrors)
[4] Appx. 3 (Tr. Ex. 8, backup camera field-of-view)

force, and are more dangerous than other vehicles, and, consequently, their drivers have to be more careful. TR535:4-10.

Still not looking, Brian proceeded to back the grader into Jennifer's car. The grader's ripper attachment completely penetrated Jennifer's right rear taillight housing,[5] totaled her car (443:14-15), and injured her. Post-crash police photographs show Jennifer's vehicle was parked in the middle of the center lane and the grader had significantly encroached into the center. [6]

Bryan testified:

> Q. And would you agree that had you looked, you would have known that she was there?
>
> A. Had I seen – had I looked on that side of the grader, I would have seen her. Yes.

TR 542:19-22.

Due to the relative mass of the grader versus Jennifer's car, Brian didn't feel the collision. TR 523:12-13. Rather, he heard a sound like driving over a plastic bucket. TR 518:2-4. After the collision, in "the left rearview mirror, [Brian] could see that the ripper on the back [was in Jennifer's car]." TR 5187-11.

BSB's efforts to blame Jennifer are summarized in Brian's testimony:

> 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***

[5] Appx. 4-5 (Tr. Ex. Cite picture of ripper attachment; picture of Jennifer's care.
[6] Appx. 6 (Tr. Ex. 6-5; Jennifer's vehicle in center of center lane after collision).

> ***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.

TR 517:13-17. Blame is not evidence, however. There was no evidence of negligence – the breach of a standard of care – on Jennifer's part.

The trial court, having considered all the evidence at trial, the Court ruled as follows regarding common law:

> Moreover, without signs posted, working areas marked, or other indicators of the general work zone, the only alternative available to a driver in Shahood's situation would have been to change routes. The expectation that a driver preemptively and spontaneously develop their own detour routes exceeds the scope of foreseeability. A driver could not begin to guess which lanes are available, and in what radius, based on observing a stationary or slow moving work vehicle. Considering the evidence presented attesting to Shahood's behavior, there was not sufficient evidence for a jury to conclude that the ordinary negligence standard was met.

CR 165, p. 6 (01/21/25 Order Granting Motion for New Trial). Regarding negligence per se, the trial court ruled:

> Substantial evidence was not presented that Shahood failed to provide immediate use of the roadway to Moe, as Shahood could have foreseen it at the time. Again, it is not clear from the evidence how else she could have yielded, apart from detouring entirely to accommodate any potential direction that the grader might take. That is not the law as instructed at trial, and the evidence is not sufficient to allow a jury to conclude Shahood was negligent as a matter of law by her failure to yield to a working vehicle.

CR 165, p. 8.

FACTS RE: IRREGULARITIES IN THE PROCEEDINGS:

Facts re: Voir Dire: Many potential jurors were related to or knew key BSB witnesses. When asked who knew Brian Moe, Marty Hanley, or Tom Loggins, multiple hands went up (the record does not indicate how many). TR 59:4-8.

- Mr. Fleming was related to Tom Loggins (cousin) and Brian Moe, and he considered Marty Hanley a great friend. TR 36:24-37 (dismissed for cause).

- Tom Loggins was Ms. Gollinger's friend since high school and Marty Hanley's wife was her children's preschool teacher. TR 57:5-58:35.

- Ms. Hawe taught Tom Loggins and Tom Loggins' son, and Tom Loggins' dad taught her. 59:14-17. Also, Ms. Hawe had a very good friend who was very closely related to the Logginses, and she knew the Loggins family better through that close friend). TR 59:14-17.

- Ms. Michelotti knew Tom Loggins because he and his family were very close family friends of her former in-laws. She knew Tom years ago but hadn't had any interaction with him for ten years.

- Ms. [Wendy] McGrath said, "I know all of them. I work for Butte-Silver Bow. TR 61:18-22. She had been a close personal friend of Tom Loggins for 30 years. Her husband and Tom were really close friends. TR 62:16-25.

When Jennifer moved for dismissal for cause for Ms. Gollinger and Ms. McGrath, BSB questioned both, starting with Ms. McGrath:

> And I think a lot of times -- You always want to be judged by a jury of your peers; right? That's one of the important components of our

> justice system. And you want to make sure that anyone who -- In a small community like Butte, there will be a lot of your peers on a jury when you have members of the community who are active and engaged. And, you know, that's something we've, we've spoken with Tom and Marty and Brian about.
>
> *And I think we have an expectation that* even if you do have, you know, a knowledge of them, some personal relationships, you know, *we would hope* that you can still become a fair juror in this case and put those aside and judge this based on the facts and the law.
>
> And I think, Ms. McGrath, it sounds like you think you could do that?

TR 63:23-64:12 (emphasis added). Despite the hope of the judge and the lawyers, Ms. McGrath reiterated she could not be impartial.

BSB then questioned Ms. Gollinger:

> Do you think you would be able to set that relationship aside, *knowing that's our expectation as well*, and judge this case based on the facts and the law?

TR 64:17. Despite the expectations of the judge and the lawyers, Ms. Gollinger also reiterated she could not be impartial. At that point, BSB did not object to her dismissal. The trial court also dismissed Ms. McGrath. TR 65:4-7.

- Mr. Johnson knew both Tom Loggins and Marty Hanley. The tie-in was because Wendy [McGrath] mentioned her husband, Danny, Mr. Johnson's wife was part of their Class of '84. Mr. Johnson clarified it was his brother, not him, who went to high school with them. He said he didn't have a personal relationship with them but knew who they were. TR 65:18-66:10.

- Ms. Lopuch did not personally know any of them, but her brother used to play basketball with the Hanleys. “I know them. I’ve lived here my whole life, so…” TR 66:18-21.

Facts re: Closing argument: BSB framed the case as Jennifer versus “Butte-born-and-bred” Brian and fact that he (truly) is a likeable and hardworking human being. This, however, is not a case against Brian Moe. Nonetheless, the defense personalized this case to elicit sympathy from the jury for a “working man” who “showers at the end of the day,” i.e., someone who could not afford to pay a judgment. To wit, BSB’s argued

> When you get back to the jury room, you're going to have to decide whether Ms. Shahood was negligent, whether that negligence was a cause of this accident, and, ultimately, *to apportion fault for the accident between **Mr. Moe** and Ms. Shahood*.
>
> Initially, I was going to start by talking about Ms. Shahood, but I'm going to start with Mr. Moe. *You all saw Mr. Moe come in here. He's a working man. He's a guy who showers at the end of the day, not at the start of the day. He's an equipment operator, and he takes pride in that.*

TR 702:17-703:22 (emphasis added).

Without any evidentiary basis, BSB told the jury Jennifer did not look, watch, see, etc., even though facts are undisputed Jennifer saw everything that could be seen with her eyes (i.e., not the future). To wit, BSB’s argued:

> The duty to see -- Instruction No. 21, motorists have a duty to see, to look where they are going and see that which is in plain sight. That applies to Ms. Shahood as well. It's true that Mr. Moe was driving

> very slowly at a speed safe to do the work tasks he was performing. But *whether it's difficult or not, Ms. Shahood has an obligation to slow down to a point where she can make a safe decision.* ***She has to figure out what is going on and make a safe decision***.

TR 708:8-15.

BSB argued:

> Brian Moe only has one set of eyes. He has to look away from his camera and mirrors to follow the windrow and connect to Mr. Hanley's blade. Exhibit 9 shows what the rearview camera looks like from the perspective of the operator. Brian Moe, again, testifies I look in my camera and my mirrors (illustrating), I see nobody behind me, so I look out my window and I'm following the blade along the windrow of snow. ***There's no way to do that job while he's looking in the rearview camera***.

TR 708:7-24 (emphasis added). BSB's argument regarding Brian's "one set of eyes" conflates his duty as a grader driver to see what is to be seen, suggesting Brian's negligent actions and inactions were acceptable even if they were dangerous to the public. BSB argued.

> But if you look at the location of Ms. Shahood's car, understanding that it wasn't pushed forward significantly, being past that white line leads to one of two conclusions: *Either she didn't have room to stop at the light because she noticed Brian Moe's position, so she cut in as far up as possible, leaving -- to try to leave more room between her and the grader. The second option is as she's passing, she sees the light change from green to yellow, and she makes a last-second decision that she has to stop at the light.*

> ***I don't know what was on her mind, whether she was distracted in some way***, but the facts of the accident clearly show that ***she wasn't using TR care***. Brian Moe estimated that she had to have pulled in very close behind him. Again, his estimate was 10 to 15 feet, which is one car length. ***She crowded the plow***.

TR 710:21-711:11 (emphasis added). There was no evidence Jennifer "didn't have room to stop at the light," that she cut in as far as possible, or that she made the last second decision. here is no evidence to support BSB's "one of two conclusions." The unsupported speculation that Jennifer was distracted is particularly prejudicial, especially given the high risk of enflaming the "distracted female driver" trope.

The fact is, Jennifer was the only person capable of testifying on the facts that occurred after Brian lost her in his field of vision. She testified she safely passed the grader and came to a stop at the stop bar for a red light. Moreover, BSB's unfounded insinuations she was distracted came shortly after BSB pitted her against Butte-born-and-bred Brian, heightening the unfair prejudice to Jennifer.

BSB continued to argue:

> I don't imagine most members of this community have an issue with slowing down for working equipment, and *they recognize that there is value in plowed streets,* even if it causes a bit of inconvenience. And operators like Brian and Marty can't safely do their jobs ***if motorists are allowed to disregard them***.

TR 706:24-707:4 (emphasis added). First, Jennifer did slow down – Brian acknowledged that. Second, BSB told the jury that its grader driver had a right to

violate Montana's rules of road, as defined by statutory and common law duties, because there was "value in plowed streets," i.e., when we violate the law to plow the streets there will be casualties, but… communally, you should be okay with our negligent conduct because there is a very low chance you will be one of the casualties. This is tantamount to the argument that a jury shouldn't enter a verdict because it will raise insurance rates.

In further argument, BSB improperly described the law's requirements:

> Ms. Shahood approaches, and she testified as she goes past, she moves over to the edge of the street. She initially stays out of his view. Brian Moe watches her pull to the far right and go out of view at a point where she wasn't in his way. He has a reasonable expectation that as he's backing up, flashing lights on his equipment, a beeper giving notification that he's backing up, *that someone is* ***not going to pull in behind him***. That's common sense, and *it's also the law*.

TR 704:9-17 (emphasis added). Nobody, including Brian or any other BSB employee, can reasonably expect it is safe to back up without looking. That's not the law. BSB argued:

> Brian Moe has a reasonable expectation that Ms. Shahood is going to act with reasonable care. *And in this instance, that* ***expectation is that she's not going to come into my work area***. A person exercising reasonable care ***doesn't put themselves anywhere near the path of a road grader*** -- two road graders moving snow.

TR 704:25-705:5 (emphasis added). Likewise, Bri does not have a reasonable expectation that he can back without look. BSB argued:

> So, Ms. Shahood had an obligation to ***yield the right-of-way*** to Brian Moe. What does "yield the right-of-way" mean? We're not talking about when she got to the light. She has to notice that Brian Moe is backing up towards the windrow and yield to his movement before she pulls back in and stops at that light. Even up here (indicating), she has an obligation to look in front of her, notice what's going on, there's working equipment, ***I need to stay out of their way.***

TR 705:20-706:3 (emphasis added).

> As far as responsibility for the accident is concerned, *it doesn't make any difference what lane Ms. Shahood was in*. She changed lanes after passing the grader and ***got in the way of his movement***. *Whether she got in the way in the left tum lane or got in the way in the straight through lane, it doesn't make a difference. You heard her experts testify that Brian Moe was occupying portions of both lanes. His movement was going back into the tum lane and the straight-through lane.* And her actual location would have made it even more difficult for Brian Moe to see her in the rearview mirrors.

TR 709:16-710:1. This argument is outside the bounds of reason. Restated, BSB is saying, "the grader was breaking the law and violating the rules of the road by spanning two lanes and it had the right and the intent to continue by backing without looking. And it was all Jennifer's fault because she had had the audacity to stop at a red light.

BSB continues:

> Who had the chance to -- best chance to prevent this accident from happening? And again, if Ms. Shahood makes the one decision that ***I'm not going to put myself in this work zone, I'm not going to come up to the windrow of snow and the graders***, this accident doesn't happen. I'm not going to try to tell you what percentage you should

allocate to each party, but her percentage should be much higher than Brian Moe's.

TR 712:11-18. Is BSB asserting it is Jennifer's duty was to stop in the middle of the road? That in itself is a violation of driving code/rules of the road.

Notably, BSB never defines a duty Jennifer breached. It's version of a duty of care, directly from the testimony above, consists of self-interested commands:

- Don't crowd the plow.
- Give us room.
- Get out of the way.
- Get out of the area.
- Yield the right of way.

Or, BSB blames Jennifer for failing (in its estimation) to follow its commands.

- Figure out what is going on and make a safe decision.
- She crowded the plow.
- She was distracted in some way.
- She wasn't using reasonable care.

Aside from the basic common law duty of reasonable care (directly above), none of these "expectations" constitute statutory or common law driving duties, i.e., rules of road. Indeed, BSB's expectations of "stay out of our way," "give us room," "get out of the way," and "get out of the area" are the exact type of communication

a citizen driver like Jennifer would have benefitted from had BSB bothered to use basic traffic control.

Instead of providing a driving duty Jennifer breached, BSB provides excuses that justify its illegal conduct:

- Our operators, having only one set of eyes, have too many things to look at in order to do their jobs so they can't look behind him while backing.

- [Citizen drivers] have to slow down and stay out of our way or we can't do our job.

- We expect people not to get close to us.

- If you [citizens of Butte] want your streets cleared, you're just going to have to deal with people getting hurt once in a while. It's your job to be safe, not ours.

- Drivers like Jennifer should expect us to act negligently and if somebody gets in the way, expect to get injured.

BSB's trial theme, "Don't Crowd the Plow" was particularly prejudicial. "Don't crowd the plow" is the Montana Department of Transportation's safety marketing campaign slogan. In the second sentence of its opening, BSB stated, "This case involves an accident that is a classic example of why we're not supposed to crowd the plow. TR 182:7-9. Brian testified to it. *Supra*. In closing BSB accused Jennifer of crowding the plow, *supra*, and in the second to last sentence of closing, stated, "Recall Brian Moe: Don't crowd the plow." TR 718:5.

As Brian conceded in cross-examination, TR 540:22-541:6, the slogan applies for snowplows, not graders. The campaign aims to reduce tailgating, passing in unsafe conditions, and turning into the path of a plow. Notably, all three of these violations are specifically defined driving duties in Montana code. *See* Mont Code Ann. §§ 61-8-323, 329. Yet, BSB never breaks down "don't crowd the plow" into its driving-duty parts for the jury. Why? Because none of these driving duties are even remotely related to the collision in this case. As the trial court stated, "However common the advice to avoid 'crowding the plow' in certain situations, this is not the common law negligence standard that courts must evenly apply. CR 165, p. 5.

The effect of BSB's "don't crowd the plow" theme was particularly harmful because MDT publishes pictures of mayhem and bloodshed on the highway to demonstrate the consequences when *civilian* drivers "crowd the plow."[7] Notably, the campaign squarely faults the civilian driver for violating the rules. This would not be lost on a Montana jury, in Butte or otherwise. In fact, the slogan came up in *voir dire*, unsolicited, when BSB asked Mr. Gransbery about how he felt about safety on the roads. He responded, "Well, they have the "don't crowd the plow" [campaign]. TR 118:12-15.

[7] Appx. 7-11 (MDT advertising photographs re: "Don't Crowd the Plow.")

The trial court considered these discrete occurrences in the aggregate and, in summary, ruled as follows:

> While the circumstances here vary somewhat from those in *Cooper* - challenges for cause are not at issue and there were no motions *in limine* dealing with BSB's closing statements – the underlying principle applies with equal force. BSB's argument at closing was improper in multiple ways and created cumulative prejudice. The jury was encouraged to evaluate the case as if Moe and Hanley were harmed as workers, rather than consider Shahood's independent duty of care. And BSB relayed a version of the law to the jury which was inaccurate: the "duty" to not "crowd the plow." This version of the law again focused on the effect to BSB, rather than Shahood's obligation under the circumstances. Shahood's right to a fair trial could not be maintained given the prejudicial comments, and thus she is entitled to a new trial.

CR 165:12.

Issue 2 Facts (JML): After Jennifer rested her case, she moved for a directed verdict on the issues of BSB's negligence, negligence *per se*, and causation and filed a point brief in support. TR 493:17; *see, also,* CR 132 (05/30/24 Plaintiff's Point Brief in Support of Her Motion for Partial Directed Verdict). At that time, the trial court denied the motion. TR 497:9-11. After BSB rested its case, Jennifer renewed her motion. TR 637:17-23. The trial court granted the motion, holding, in summary:

> At this time, we've had four days of jury trial, with each of the parties being fully heard on all of the issues. The Court doesn't take this matter lightly, and in my 24 years on the bench, I've never made a similar ruling at this point in a jury trial, but at this time, I do hereby grant the Plaintiff's motion for partial directed verdict.

TR 644-12-18.

Regarding negligence and negligence *per se*, the trial court held:

> I grant the motion for directed verdict on negligence. BSB had made admissions that the driver of the grader didn't see the Plaintiff, Shahood, and could have seen her if he had made reasonable efforts to look. The BSB driver had a legal duty to see what was in plain sight. BSB failed to take reasonable precautions to account for the possibility of a driver in the place where Shahood was in relation to negligence per se, the BSB driver failed multiple traffic safety statutes. The driver did not move outside of a single lane without first ensuring it could be done safely. There is no dispute that BSB made no efforts to mark a work zone or to convey where the drivers could safely be. Therefore, BSB failed to operate its vehicles in a careful and prudent manner.
>
> BSB backed into a place where cars could reasonably expect to be waiting without exercising reasonable safety. BSB argued that traffic statutes do not apply as standards of care in roadwork, but there is no dispute as to the driver's actions. No reasonable jury could find BSB did exercise careful and prudent driving and safety precautions as required by statutory standards.

TR 644:19-645:16 (the evidence supporting this holding are set forth in the Issue 1 Facts above). Regarding causation, the trial court held:

> In relation to causation, while there's alternative theories of causation that may have been developed on cross, BSB failed to offer any evidence of a true alternative. At most, BSB's evidence on cross-examination argues for reduced damages and not lack of causation.
>
> Shahood's medical providers all agreed that the accident was a cause, or at least a cause in part, of her injuries. BSB offered no provider testimony to the contrary. Therefore, no reasonable jury could find that BSB's negligence was not the cause of Shahood's injuries.

TR 645:17-646:1.

The evidence at trial supports this holding. While BSB offered evidence questioning the *extent* of Jennifer's injuries, how badly she was injured in the crash is not the issue in the context of the Court's judgment as a matter of law. Rather, the issue is whether the crash caused *any* injury, even if minor.

Three years before trial, BSB proposed and Jennifer consented to a Rule 35 medical examination by orthopedic surgeon Anthony Russo, MD. BSB disclosed Dr. Russo as an expert, CR 40 (08/27/21 BSB's Expert Witness Disclosure), including his opinion "Ms. Shahood suffered a cervical strain [in the crash]."[8] CR 132, p. 7. Three months before trial, BSB supplemented its disclosure, stating Dr. Russo had reviewed additional documents and his opinions had not changed. CR 97 (03/14/24 BSB's Supplemental Expert Witness Disclosure). BSB listed Dr. Russo as a witness in the Final Pretrial Order. CR 103, p. 12 (05/01/24 Final Pretrial Order). In its opening statement, BSB told the jury Dr. Russo would testify. TR 189:21. BSB elicited testimony from Steven Martini, MD, who managed Jennifer's crash-related care, that he (Dr. Martini) knew and had a high regard for Dr. Russo. TR 321.7-11. During the afternoon break on Wednesday, BSB stated it would call Dr. Russo on Friday, the last day of evidence. TR 359:15. On Friday morning, BSB advised the trial court it would not call Dr. Russo. Thus, BSB

[8] Dr. Russo's actual report was not filed on the record due to medical privacy reasons. It was excerpted, however, in CR 132.

sponsored the notion Jennifer had been hurt, albeit minimally, up until the last day of evidence at trial.

Moreover, the evidence is conclusive on this point. Jennifer testified she was injured in the crash. TR 442:21-443:23. Theodore Preiss, PA, Jennifer's primary care provider for 15 years, testified she was injured in the crash. TR 618:14-17. Michael Welker, DC, testified she was injured in the crash. TR 338:18-356:12. Dr. Martini testified she was injured in the crash. TR 279:9-338:2. Connor O'Neal, EMT, testified Jennifer complained of back pain directly after the crash. TR 562:20-22. Ashley Westphal, NP, testified Jennifer complained of acute muscle pain at the ER after the crash. TR 573:9-11.

Issue 3 Facts (negligence *per se*): BSB filed a motion for partial summary judgment, arguing under Mont. Code Ann. § 61-8-106(2) that the driving duties imposed by Montana statutes did not apply to the grader because it was "actually engaged in work upon the surface of the highway." CR 50 (01/04/22 BSB's Brief in Support of it Motion for Partial Summary Judgment). The trial court denied BSB's motion. CR 78 (10/04/22 Order Denying Motions for Summary Judgment). The trial court:

> [took] issue with the Defendant's interpretation of Section 106(2), in that any individual "engaged in work upon the surface of a highway" can drive and conduct themselves as dangerously as they see fit without violating statutes designed to keep people safe.

CR 78, p. 8. The ultimate basis for the trial courts denial, however, was that genuine issue of material fact existed as to whether the grader was engaged in work on the surface of the highway. *Id*.

Before trial, the trial court addressed several evidentiary issues in its Second Order on Motions in Limine, Dk. 120 (05/23/24), including BSB's claim it was immune to claims of negligence *per se*. The trial court considered the issue depth, and, in summary, held:

> The purposes behind the [Uniform Vehicle Code] appear to be broad uniformity and obedience to traffic laws as routinely as possible. Nowhere does the UVC, or Montana's Title 61, Chapter 8, abrogate civil negligence remedies. A holistic reading of the code suggests that Section 61-8-106 is best read to provide flexibility and relief from criminal liability for road workers, without absolving them of common-sense liability for their own negligence. As the Court noted in its summary judgment ruling, "Section 61-8-106(2) is, therefore, reasonably construed to require due care to enjoy the immunities contained therein." The Court finds as a matter of law that traffic codes may be used to establish negligence against BSB.

CR 120, p. 4. On appeal, the issue is whether the trial court correctly interpreted this statute.

Issue 4 (medical records): At the final pretrial conference, BSB proposed 34 medical record exhibits totaling 271 pages. Appx. 12-13 (CR 103, Att. 2, BSB Exhibit List). Jennifer raised concerns about the volume of records and the issue was discussed at length. Appx. 14-30 (05/01/24 TR of FPTC, pp. 14-29). The parties agreed to prepare a joint exhibit list (which was not filed on the record) and

to brief the issue of the admissibility of medical records. See CR 108 (05/16/24 Defendant's Pretrial Brief re Admissibility of Medical Records); CR 113. (05/16/24 Plaintiff's Opposed Brief re Admissibility of Medical Records).

In its medical brief and after the exhibit lists had been combined, BSB's listed its proposed medical exhibits Nos. 28-57 (30 exhibits) comprising 210 pages. Appx. 31-34 (CR 108, pp. 3-6. BSB redacted personal identifiers and what it deemed "unrelated medical information" and stated, "If Plaintiff believes additional redactions are necessary, it is incumbent on her to propose such redactions." CR 108, p. 3. In her medical brief, Jennifer maintained BSB's proposed medical record exhibits were inadmissible under traditional evidentiary considerations and that it was BSB's obligation to ensure the admissibility of its own exhibits. CR 113, p. 2.

In its Second Order on Motions *in Limine*, CR 120, pp. 4-5, and after reviewing medical privacy issues and traditional evidentiary considerations raised by medical records as exhibits, the trial reserved ruling on the medical records' admissibility and evaluate each record on a case-by-case basis. Dk. 120, p. 5.

Throughout trial, BSB cross-examined and examined medical providers with Jennifer's pre- and post-crash records and Jennifer did not object:

Description	TR start	TR end
BSB x-exam.'d Martini w/ Preiss, PA 06/15/11 note (Ex. 37)	326:3	327:12
BSB x-exam.'d Martini w/ Preiss, PA 01/05/11 note (Ex. 57)	327:13	328:9
BSB x-exam.'d Dr. Welker with his 02/03/19 note (Ex. 32)	350:2	351:4
BSB x-exam.'d Dr. Welker with his 03/15/19 note (Ex. 32)	351:5	351:22
BSB x-exam.'d Dr. Welker with his 08/19/17 note (Ex. 32)	353:1	354:15
BSB exam.'d EMT O'Neill on the 03/13/19 EMT note (Ex. 28)	560:4	563:21
BSB exam.'d PA Westphal on the 03/13/19 ER note (Ex. 29)	572:12	575:8
BSB x-exam.'d PA Preiss on his 06/15/11 note (Ex. 37)	620:23	622:12
BSB x-exam.'d PA Preiss on his 05/06/19 note (Ex. 43)	622:13	624:14
BSB x-exam.'d PA Preiss on his 07/17/19 note (Ex. 42)	624:15	625:19
BSB x-exam.'d PA Preiss on his 12/03/20 note (Ex. 44)	625:20	627:17
BSB x-exam.'d PA Leber on his 12/03/20 note (Ex. 45)*	App.	App.
* May 24, 2024 Perpetuation Deposition played at trial. Appx. 35-54		

There are two good examples in the record of "ask-a-question-move-to-admit" strategy BSB attempted to employ. The first came during Dr. Welker's testimony and the second came in PA Leber's perpetuation deposition. For both examples, the Appendix contains the examination relative to the records, immediately followed by the records themselves. These documents have been provided in this fashion so the Court can efficiently compare the evidence elicited by examination to the would-be evidence (if admitted) that is contained on a medical record. Such a comparison underscores the evidentiary pitfalls associated with said strategy.

Regarding Dr. Welker, BSB asked him seven questions about his 02/03/19 note and five questions about his 03/15/19 note. App. 55-58 (TR 649-652). The questions were simple and asked Dr. Welker to confirm subjective pain complaints

noted in his records. BSB then moved to admit both records, comprising five pages and approximately 1,500 words (per digital word count). App. 59-63 (Tr. Ex. 32 30-34; 02/03/19 and 03/15/19 Welker DC notes). As can be seen, the records contain a myriad of complicated, unexplained, technical, undecipherable information that was not the subject of examination.

Regarding PA Leber, BSB established that the record at issue was a true and accurate copy of the treatment record kept in the ordinary course of business. App. 64-65 (excerpt of Leber depo.). BSB then moved the medical record for admission. Appx. 66-77 (10/07/17 Leber Note). As can be seen, the record itself is 11-pages long and, again, contains a host of information that is complicated, technical, medical-specific, hearsay, etc.

After BSB moved to admit Trial Exhibit 34, Jennifer's counsel examined PA Leber, in *voir dire*, on the records. PA Leber confirmed the record was written for himself and other medical providers and that people without a medical background "may have a difficult time understanding it because of the language and the format." Appx. 42-43 (Leber Depo, 8:25-9:2) Second, she confirmed it was a form document that pulls information out of an electronic medical record unrelated to the encounter. Appx. 43 (Leber Depo. 9:9-19). PA Leber also confirmed that some information on the record had not been written by him but, rather, other medical

personnel. *Id*. (Leber Depo. 9:23-10:7). Jennifer objected on confusion, hearsay, and relevance.

Dr. Martini also testified to the danger of misinterpretation and misunderstanding when medical records are considered on a piece-meal basis, Appx. 78-79 (TR 331:11-332:18), or by lay people. Appx. 80-81 (TR 335:22-337:12).

Later in the trial, there was further discussion on medical records. TR 610-611. The trial court ultimately ruled:

> Throughout the course of the trial and even the last two witnesses today I think make it clear that if I was to admit these, that they would only add to confusion; that based on the testimony that we had today, each of these witnesses testified, and that there's so many conflicting entries into these medical records that I'm going to deny that, deny the admissions as proposed.

TR 611:17-24

STANDARD OR REVIEW

Issue 1 (new trial): Generally, the decision whether to grant a new trial is committed to the discretion of the trial court and will not be disturbed absent a showing of manifest abuse of discretion. *Voegel v. Salsbery*, 2023 MT 137, ¶ 12, 413 Mont. 43, 532 P.3d 863. "The abuse of discretion question 'is not whether this Court would have reached the same decision, but, whether the trial court acted

arbitrarily without conscientious judgment or exceeded the pounds of reason." *Newman v. Lichfield*, 2012 MT 47, ¶ 22, 364 Mont. 243, 272 P.3d 625.

The abuse of discretion standard applies where the trial court *denied* a motion for new trial premised on irregularities in the proceeding under Mont. Code Ann. § 25-11-102(1). *Cooper v. Hanson*, 2010 MT 113, ¶ 28, 356 Mont. 309, 234 P.39 59. Therefore, it would hold that an abuse of discretion applies in a case where the trial court *granted* a motion for new trial.

However, when a new trial has been granted on insufficiency of the evidence to support the verdict (Mont. Code Ann. § 25-11-102(6)), it is reviewed *de novo* and "the assessment of the sufficiency of the evidence is a question of law." *Giambra v. Kelsey*, 2007 MT 158, ¶¶ 24-27, 338 Mont. 19, 162 P.3d 134.

Thus, a hybrid standard of review is required here. Review of the trial court's findings on the sufficiency of evidence is *de novo*. Review of the trial court's findings on irregularities is for an abuse of discretion. Given these considerations and others discussed below, Jennifer urges that the standard of "deferential review and an independent examination of whether the verdict was supported by substantial credible evidence" (*Giambra*, ¶ 24), as employed historically, is appropriate here.

Issue 2 (JML): The standard of review regarding the grant of judgment as a matter of law is a question of law and must be reviewed *de novo*. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶¶ 18, 336 Mont. 105, 152 P.3d 727.

Issue 3 (negligence per se): The standard of review applicable to the trial court's interpretation of Mont. Code Ann. § 61-8-106(2) is *de novo*. *Voegel v. Salsbery*, 2023 MT 137, ¶ 12.

Issue 2 (medical records): The trial court's exclusion of medical records as trial exhibits is reviewed for abuse of discretion. *Voegel v. Salsbery*, 2023 MT 137, ¶ 12.

SUMMARY OF ARGUMENT

The trial court's grant of new trial should be affirmed, and this case should be remanded for a trial on damages only. First, there is no evidence Jennifer Shahood breached any statutory or common law driving duties. Breach is a required *prima facie* element of negligence and, absent breach, a claim of comparative negligence fails. Second, the trial court's judgment as a matter of law holds because, from the evidence presented at trial, there is no issue of material fact that BSB was anything but common law and statutorily negligence. Third, BSB is not absolved from liability as to Jennifer's negligence *per se* claims because Mont. Code Ann. § 61-8-108(2) ("Sec. 108") cannot reasonably be construed to mean giant dangerous road equipment is absolved from civil remedies

prescribed by statutory driving duties. Finally, the trial court acted within its discretion – and beyond that, within the well-defined parameters of evidentiary – when it excluded BSB's proffered medical record exhibits on the bases of traditional evidentiary considerations.

ARGUMENT

I. The trial court did not err in granting a new trial.

A district court may grant a motion for a new trial if there is insufficient evidence to justify the jury's verdict. Giambra, 2007 MT 158, ¶ 26.

a. The evidence at trial was insufficient to support a finding of comparative negligence against Jennifer.

Whether there is evidence that Jennifer was comparatively negligent cannot be considered in a vacuum. BSB's negligence must be considered first. Montana law is unequivocal –a driver must look where they are driving and "a motorist is presumed to see that which he could see by looking. The driver will not be permitted to escape the penalty of his negligence by saying that he did not see that which was in plain view." *Walden v. Yellowstone Elec. Co.*, 2021 MT 123, ¶ 15, 404 Mont. 192, 487 P.3d 1. Moreover, it was irrefutable that BSB's grader spanned both the center and turning lane while backing.

Common law "ordinary" negligence is the duty to act reasonably under the circumstances, and for drivers, they must drive in a careful and prudent manner in the context of whether it was foreseeable their conduct could result in harm. *Fisher*

v. Swift Transp. Co., 2008 MT 105, ¶¶ 16, 40, 342 Mont. 335, 181 P.3d 601; Mont. Code Ann. § 61-8-302. As the trial court noted, "crowding the plow" is not a common law negligence standard. DK. 165. 5.

After Jennifer passed Brian, he didn't see her again until the crash. Thus, Jennifer is the only person with personal knowledge of what happened after she passed BSB's grader. What occurred during this time period? Jennifer safely passed the grader and stopped at a red light. There is simply no breach of her duty to act reasonably.

Likewise, Jennifer did not breach her duty after she initially saw the grader and continued toward it, slowed down, drove cautiously, and got in the far lane (Brian agrees this happen). Absent any manner of traffic control, it is simply unreasonable to expect Jennifer to do anything but what she did. The only alternative available to a driver in Shahood's situation would have been to change routes. The expectation that a driver must preemptively and spontaneously develop their own detour routes is an unreasonable expectation and exceeds the scope of foreseeability. Can you imagine a world where a driver was expected to turn around and go a different direction every time there was a piece of equipment (grader, garbage truck, tree-trimmer, street sweeper, etc.) sitting in the roadway? To assert Jennifer should have done this when she saw the grader is absurd.

Even if, *arguendo*, Jennifer's decision to stop where she did was not ideal, a prudent driver could not foresee that, without its operator *looking*, a grader would back up, cross partly into the adjacent lane, and cross that distance without stopping, resulting in a collision.

This Court has precedent affirming the summary adjudication of comparative negligence claims even without the benefit of trial. In *Walden*, while recognizing negligence claims are generally unsuitable for summary judgment, the Court affirmed the trial court's grant of summary judgment on the defendant's comparative negligence claims. *Id*., ¶ 12-14. While the *Walden* opinion indicates the Waldens' motion was supported by affidavits (*Walden*, ¶ 9), YECO's Opening Brief indicates, "[t[he Waldens, *before conducting any discovery*, filed a motion for summary judgment [and t]he District Court granted the motion and held, as a matter of law, that Newell was negligent and the *Waldens were not contributorily negligent*." *YECO Opening Brief* (11/30/20), p. 5, Cause DA 20-0462 (emphasis added).[9] In other words, the Walden Court affirmed judgment as a matter of law on a defendant's contributory negligence claim based upon a dispositive motion only supported with affidavits filed before discovery.

9 https://supremecourtdocket.mt.gov/PerceptiveJUDDocket/APP/connector/1/601/url/DA+20-0462+Appellant%27s+Opening+--+Brief.pdf [last accessed 06/24/25]

Unlike *Walden*, however, the trial court here supervised this case for four years, adjudicated multiple dispositive and *in limine* motions, heard hours of oral argument, and administered a five-day trial (951 pages of transcripts). In light of this, Jennifer urges a "simultaneous deferential review *and* an independent examination of whether the verdict was supported by substantial credible evidence." *Giambra*, ¶ 24; *see, supra*.

Even stronger precedent than *Walden* supports Jennifer's position that this case should be remanded for a trial on damages only. *See Edie v. Gray*, 2005 MT 24, 328 Mont. 354, 121 P.3d 516. In summary, Edie rented from Gray and fell and was injury because a light was out. Edie sued and Gray alleged, *inter alia*, comparative negligence. The case went to trial on a Montana Landlord Tenant Act (MLTA) negligence *per se* claim and the jury found for Gray. Edie appealed. The Court found the trial court erred in not granting Edie's motion for summary judgment. Edie also argued the trial court erred in submitting comparative negligence instructions to the jury. The Edie Court acknowledged the rule that the factfinder must apportion negligence, but, apparently *sua sponte* (it is unclear from the opinion), determined there was no evidence of negligence on *Edie's* part. *Id*., ¶¶ 17-18.

In contrast to *Edie*, here we have a case where the trial court, having administered the trial (with all the benefits of observing witnesses' credibility, etc.),

has determined BSB was negligent/negligent *per se*, Jennifer was hurt, and there was no evidence of comparative negligence.

With respect to BSB's argument that Jennifer waived new trial because she acknowledged apportionment must go to the jury, the argument fails. As Jennifer argued post-trial, an acknowledgment that apportionment must be submitted to the jury is not a concession that evidence of comparative negligence exists. Under *Edie*, if it has been judicially determined, whether by this Court or a trial court, that there's no evidence of comparative negligence, the issue need not go to the jury. So, in this case, if this Court affirms the trial court's grant of new trial, the issue of comparative negligence has been finally adjudicated in Jennifer's favor.

b. Irregularities in the proceedings require a new trial.

The trial court has a duty to "prevent a miscarriage of justice" by granting a new trial where improper conduct of counsel is "so pervasive" that is prevents the opposing litigant from having a fair trial. *United Tool Rental, Inc.* 2011 MT 213, ¶ 26, 361 Mont. 493, 260 P.3d 156; *Lopez v. Josephson*, 2001 MT 133, ¶ 35, 305 Mont. 446, 30 P.3d 326. Relatedly:

> Although we rarely find a manifest abuse of discretion in the denial of a motion for a new trial, there are certain instances in which the prejudicial matter at issue undermines the fairness to such a degree that a new trial is the only remedy. In *Kuhnke* [...], we addressed the question of improper argument to the jury and noted that "the only way to be sure which, if any, of the defendants should be exonerated or whether plaintiff should recover at all is to grant a new trial." ... We

> reversed [motions denying new trial] and held that "the guiding principle of our legal system is fairness. We must tenaciously adhere to the ideal that both sides of a lawsuit be guaranteed a fair trial. Sec. 27, Art. III, Montana Constitution [now Sec. 17, Art. II]." ... We also reasoned "that unexplained prejudicial references to important matters in litigation may have a 'natural tendency' to infect the proceedings with an unfairness that can be corrected only by starting anew the legal contest." ....

Cooper v. Hanson, 2010 MT 113, ¶¶ 37-38, 356 Mont. 309, 234 P.3d 59. ¶ 42 (citations omitted). In *Cooper*, the Court found the district court abused its discretion in denying a motion for new trial when multiple factors, in the aggregate, constituted an irregularity justifying an abuse of discretion and a new trial. *Cooper*, ¶ 37.

First, there is the general circumstance established in *voir dire* that many of the people on the panel knew the various defense witnesses. While some potential jurors were excused for cause, Jennifer did not object to those who spontaneously stated they could be impartial. Two of those – Richard Hawe and Telsa Lopuch – sat on the jury. To be clear, Jennifer is not claiming either Mr. Hawe or Ms. Lopuch were not impartial, but the incredibly close-knit nature of this particular Butte jury nurtured an environment wherein BSB's improper arguments could take root and taint the proceedings.

Second, during the evidentiary phase of trial, BSB did not introduce any evidence of the common law or statutory duties Jennifer purportedly violated.

Instead, BSB couched Jennifer's alleged comparative negligence in terms of: (1) blaming her for the crash without identifying a duty she breached, i.e., her negligent conduct; and (2) making excuses for why BSB employees have to break the law to do their jobs. This had the effect of conflating the law, i.e., what was read from the jury instructions, and fault insinuating imperatives like "stay out of the way" or "don't crowd the plow."

Third, BSB did these things in the context of framing the case as a conflict between Jennifer and Brian, and it played on Brian's blue-collar, likeable humanness to misdirect the jury's attention away from the facts and the law. These consistent and persistent arguments created a pervasive pattern that unfairly prejudiced Jennifer in the context of the trial.

Fourth, BSB improperly influenced the jury by suggesting Jennifer was distracted during the incident.

> I don't know what was on her mind, whether she was distracted in some way, but the facts of the accident clearly show that she wasn't using reasonable care .... she crowded the plow.

Supra. While Jennifer testified about what she did, she did not testify on her state of mind. In fact, she was not asked. Moreover, there were no facts to suggest she was distracted. BSB's suggestion in this regard further obfuscated the legitimate issues for the jury to Jennifer's unfair prejudice.

BSB's closing improperly conflated its negligent conduct with its ability, as the local government, to do its job safely for the community's benefit. At closing, BSB argued

> there is value in plowed streets, even if it causes a bit of inconvenience. And operators like Brian and Marty can't safely do their jobs if motorists are allowed to disregard them.

Supra. Again, BSB's statement in this regard misstates the law as instructed – nowhere in the law does it say a worker can jeopardize the safety of others if that is what is required to get the job done. The ability of BSB's workers to do their job safely was not an issue at trial. Raising this issue suggested to the jury it should consider Jennifer's negligence on the wrong standard, i.e., on a basis of how a driver must drive to be safe when BSB equipment operators are violating the law to do their jobs.

Finally, BSB improperly argued that duty of care applicable to Jennifer was defined by the expectations of BSB employees. Directives like "stay out of our way," suggests to the jury that Jennifer's negligence is presumptively related to her proximity to the grader.

While Jennifer acknowledges she did not object the items listed about, her decision not to object must be considered in the context of the irregularities and should not be held against her. *See e.g., Cooper*, ¶ 38. First, the cumulative and compounding nature of subtle improprieties throughout trial masked the ultimate

effect, like a frog slowly boiled in a pot. Moreover, and even *with* the benefit of hindsight and the transcript, it cannot be said that any one singular argument by BSB is, taken singularly, objectionable. Rather, the irregularities aggregated into various arguments and themes that, together, constitute grounds for a new trial.

Also, Jennifer was aware, and this Court has recognized, that objections can simply underscore the objectionable evidence or argument. This is particularly true with argument, as opposed to testimony. With testimony, if an objectionable question is asked, an objection (if sustained) prevents the objectionable evidence from being presented. With argument, an objection necessarily comes after the objectionable argument, highlighting it for the jury. Further, absent an egregious infraction, the only recourse is an instruction from the court to disregard, i.e., another highlight to make the objectionable argument more memorable to the jury.

II. The trial court did not err in granting judgment as a matter of law in Jennifer's favor on her negligence and negligence *per se* claims (including causation).

> Whether a directed verdict should be granted or denied is a question of law, which we review de novo. In reviewing a motion for a directed verdict, we determine "whether the non-moving party could prevail upon any view of the evidence including the legitimate inferences to be drawn therefrom." Courts must 'exercise the greatest self-restraint in interfering with the constitutionally mandated process of jury decision. Thus, unless there is a complete absence of any credible evidence in support of the verdict, a motion for a directed verdict is not properly granted."

Cleveland v. Ward, 2016 MT 10, ¶ 11, 382 Mont. 118, 364 P.3d 1250.

The question is, could BSB prevail on any view of this evidence, including legitimate inferences, to show that it was not negligence, not negligent *per se*, and that Jennifer was completely unharmed from the crash. In answering this question, we cannot improve on the district court's order from the bench:

- Regarding negligence: "The BSB driver had a legal duty to see what was in plain sight. BSB failed to take reasonable precautions to account for the possibility of a driver in the place where [Jennifer] was.

- Regarding negligence *per se*: No reasonable jury could find BSB did exercise careful and prudent driving and safety precautions as required by statutory standards.

- Regarding causation: [N]o reasonable jury could find that BSB's negligence was the cause of [Jennifer's] injuries.

TR 644:19-645:16; TR 645:17-646:1.

III. The trial court did not err in holding Mont. Code Ann. § 61-8-108(2) does not absolve road workers' civil liability for negligence *per se*.

Although BSB has couched this issue in the context of the denial of its motion for partial summary judgment, the real issue is whether the trial court correctly interpreted Sec. 106, to mean "as a matter of law that traffic codes may be used to establish negligence against BSB." CR 120, p. 3.

> 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. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. We

> interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature. Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it. Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." The duty of this Court is to "read and construe each statute as a whole" so that we may "give effect to the purpose of the statute."

City of Missoula v. Fox, 2019 MT 250, ¶18, 397 Mont. 388, 450 P.3d 898 (internal citations and quotations omitted).

The trial court provided a detailed analysis of Sec. 106's in its Second Order on Motions in Limine.[10]. Applying the rules of statutory construction above, it reasonably construed the statute to "provide flexibility and relief from criminal liability for road workers, without absolving them of common-sense liability for their own negligence." CR 120, p. 4.

North Dakota's 1968 version of 106(2) states:

> The provisions … shall not apply [to road workers] while actually engaged in work upon the surface of a highway and other procedures that are necessary and are carried on in a safe and prudent manner.

See Linington v. McLean Co. (N.Dak. 1968) 161 N.W.2d 487. In other words, to enjoy the immunity offered by the statute, the road workers must operate in a safe and prudent manner under the circumstances, i.e., when their work necessarily

[10] For additional briefing, *see* Appx. 83-92 (excerpts from Plaintiff's 01/02/22 Response in Opposition to Defendant's Motion for Partial Summary Judgment CR 53, pp. 8-15).

requires a statutory violation that can be performed safely. North Dakota has a common-sense equivalent of Sec. 106. If this Court adopts the trial court's interpretation, Montana will too.

IV. The trial court did not abuse its discretion when it applied traditional evidentiary consideration in denying admission of BSB's medical exhibits.

Jennifer's argument is simple. Just because information on a medical record is admissible through testimony doesn't mean that the record itself is admissible under traditional evidentiary considerations. Medical records contain a host of information. The vast majority of the information subject to misinterpretation by non-qualified medical providers. Moreover, much of the information on a medical record can only be considered when put in context, by a medical profession, with the rest of the information in a patient's chart. Dr. Martini specifically discussed the dangers of piecemeal introduction and interpretation absent such context and training. Appx. 78-82.

It is a defense strategy to ask a medical a question about a record and then move the admission of the entire record into evidence. Indeed, that happened in this case. *See* Appx. 55-77. This can result in publication of irrelevant, prejudicial, confusing, misleading, and hearsay evidence to the jury.

This happened in *Wenger v. State Farm*, 2021 MT 37, 403 Mont. 210, 483 P.3d 480. In *Wenger*, the trial court admitted over 60 pages of medical records over

Wenger's objection, which were founded on issues of privacy, irrelevance, confusion, etc. (traditional evidentiary considerations). On appeal, the Court held "a good portion of information in the admitted records was sensitive and private personal health information that had absolutely nothing to do with the accident" and should have been redacted or excluded. *Id*. at ¶ 28.

Wenger demands that each medical record be examined on its four-corners, on a page-by-page basis, to ensure that all the information on the record is relevant and otherwise admissible. That's exactly what the trial court did in this case. This was not a matter of a wholesale exclusion of medical *evidence*. BSB freely cross-examined Jennifer's providers without objection.

CONCLUSION

For the foregoing reasons the trial court's order for new trial should be affirmed and the matter remanded for trial on damages.

DATED: June 27, 2025

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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 9,619 words, excluding the caption, Table of Contents, Table of Authorities, Signature Block, Certificate of Compliance, and Exhibits.

DATED: June 27, 2025

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