

No. DA 25-0487

IN THE SUPREME COURT OF THE STATE OF MONTANA

ZACHARY MURRAY,

Plaintiff-Appellant,

v.

TAYLOR STEINMETZ,

Defendant-Appellee.

On Appeal from the Montana Eighteenth Judicial District Court
Gallatin County, Hon. Peter Ohman
Cause No. DV-16-2021-1212A

DEFENDANT-APPELLEE'S ANSWER BRIEF

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STATEMENT OF ISSUES

In June 2021, Zachary Murray was riding a Harley Davidson motorcycle in Bozeman when he struck Taylor Steinmetz's minivan that was exiting a Goodwill donation center. Murray sustained personal injuries. The parties disputed fault. After years of litigation, a Gallatin County jury allocated negligence with 65% to Murray and 35% to Steinmetz, resulting in a defense verdict. Murray now appeals, raising numerous issues.

1. Whether denying Murray's motion for partial summary judgment on liability warrants reversal when considering if: (a) Murray preserved the issue; (b) there were disputed issues of material fact when taking Steinmetz's offered evidence as true; and (c) any error was harmless given Murray was found 65% negligent.

2. Whether the District Court abused its broad discretion by allowing Crash Investigator Williams with the Bozeman Police Department to testify about the cause of this collision following his investigation at the scene.

3. Whether the District Court manifestly abused its discretion by disallowing Murray's father to play videos of other vehicles and different drivers in the flow of traffic near Goodwill's donation center taken weeks later.

4. Whether Murray is entitled to a new trial, when exercising necessarily very limited review of the jury's verdict.

STATEMENT OF THE CASE

This case arises from a disputed liability, motorcycle versus motor vehicle accident. This collision happened on Simmental Way in Bozeman, which is a two-lane road with a double-yellow no-passing zone. Murray was traveling in the northbound lane when he rode around four vehicles that were stopped in traffic—and occupying the northbound lane—while waiting to enter the Goodwill location (enter with a right-hand turn). Murray collided with the front driver's side corner of Steinmetz's minivan as she was attempting to pull out with a left-hand turn into the southbound lane.

Murray sued Steinmetz and Easterseals-Goodwill Northern Rocky Mountains (Goodwill). Doc. 9.00 (First Amended Compl.) Murray alleged Steinmetz was negligent and invoked traffic statutes. *Id.* At trial, Murray would later argue Steinmetz failed to yield the right-of-way. *E.g.*, Tr. 02.20.25, 203–06. As to Goodwill, Murray alleged it created a hazardous condition on Simmental Way because its donation center caused vehicles to back up. Doc. 9.00. Both defendants denied liability in their answers and asserted Murray's comparative conduct barred recovery. Docs. 10–11. Steinmetz would counter at trial that Murray was speeding and improperly went around four vehicles stopped in traffic, which created a limited sightline and did not provide Steinmetz with any time to respond. *E.g.*, Tr. 02.20.25, 228–38.

Upon the pleadings closing, the parties progressed with written discovery, numerous depositions, disclosing experts, and, eventually, motions practice. *See* Register of Actions. This included contested evidentiary motions and motions for summary judgment. For its part, Goodwill sought summary judgment while arguing it did not owe Murray a duty. *See* Docs. 43.00–44.00 The District Court granted Goodwill’s motion. Doc. 91.00.

Murray also sought summary judgment against Steinmetz. Murray’s fact-dependent motion argued Steinmetz violated § 61-8-343, MCA, by not yielding the right-of-way. Doc. 70.00. Steinmetz responded that material facts were contested. Doc. 80.00. Steinmetz pointed out that the Bozeman Police Department’s crash investigator opined Murray caused the accident and cited opinions from Steinmetz’s disclosed accident reconstruction expert, Mark Erickson, P.E. *Id.* at 2, 6–7; *see also* Ex. 3 to *id.* (Erickson’s Foundational Declaration and expert report). Erickson determined that Murray was speeding and operating his motorcycle unsafely, in a detailed and lengthy report that was disclosed and part of the summary judgment record. *See* Ex. 3 to *id.*, at Ex. A. Steinmetz asked the District Court to apply this Court’s precedent on alleged failure to yield cases such as *Contreras v. Fitzgerald*, which instruct the issue is for the jury because “[a] driver ... cannot ignore obvious dangers by blindly relying on her right-of-way, but

instead must maintain a proper lookout and use reasonable care,” under 2002 MT 208, ¶ 20 311 Mont. 257, 264, 54 P.3d 983. *See id.* at 3–7.

Before trial, the District Court addressed pending motions. The District Court granted Goodwill’s motion, declining to “expand the duty of property, business owners, and others to ensure traffic accidents do not occur on public roadways removed from their businesses[.]” Doc. 91.00.¹ But, determining there were “multiple genuine issues of material fact,” the District Court denied Murray’s motion for partial summary judgment seeking a finding, as a matter of law, that Steinmetz was negligent *per se*. Doc. 120.00. The Court contemporaneously addressed various evidentiary motions. Doc. 123.00.

Trial commenced on February 18, 2025. Before selecting the jury, the District Court resolved outstanding evidentiary issues. Among those issues were videos taken by “Murray’s father [Byron] a few *weeks* after the crash[.]” 02.18.25 Tr., 10–12. Steinmetz’s trial brief sought excluding the videos on various grounds. Doc. 156.00, at 16–17. As relayed to the Court shortly before trial, Byron Murray did not witness the accident, and the videos involved different vehicles and different drivers. 02.18.25 Tr., 10–12. Murray did not lay foundation establishing

¹ After trial, Murray dismissed Goodwill with prejudice. The claims against Goodwill are not before this Court.

the videos reflected circumstances like those in this accident. *Id.* The Court excluded the videos. *Id.*

A Gallatin County jury was then tasked with deciding the case. Murray’s trial brief forecasted he would seek judgment as a matter of law under M. R. Civ. P. 50 on Murray’s theory that Steinmetz violated § 61-8-343, MCA. Doc. 155.00, at 2. No such motion was made. The jury heard from the parties, listened to eyewitness testimony, and decided between competing experts.

The jury found Murray 65% negligent. Doc. 171.00. This led to a defense verdict by virtue of § 27-1-702, MCA. Judgment was entered for Steinmetz. Doc. 177.00. Unsatisfied with that result, Murray asked the District Court for a new trial, invoking M. R. Civ. P. 59 and § 25-11-102, MCA. Doc. 179.00. Steinmetz responded. Doc. 183.00. The District Court carefully considered each argument Murray made and denied the motion. Doc. 185.00. Murray now appeals.

STATEMENT OF FACTS²

A. The Collision on Simmental Way by Goodwill’s Donation Center

On the morning of June 25, 2021, Steinmetz, a 22-year-old mother of two, had completed a job for her cleaning business before dropping off some goods at Goodwill’s donation center in Bozeman. Tr. 02.18.25, 123–24. Goodwill was then

² After a trial, the evidence is “[v]iewed in a light most favorable to the prevailing party,” Steinmetz. *Mason v. Ditzel*, 255 Mont. 364, 374, 842 P.2d 707, 714 (1992).

located on Simmental Way in Bozeman, *id.*, demonstrated by the following excerpt:



Pl.'s Tr. Ex. 75.³ Simmental Way is a two-lane road with a double yellow line indicating a no-passing zone. Tr. 02.18.25, 118:20–119:2. When arriving, Steinmetz pulled into Goodwill's location to the right while traveling northbound. Tr. 02.18.25, 125–28. After donating, Steinmetz planned on exiting the parking lot. *Id.* Steinmetz's children and 15-year-old sister were also in the minivan. *Id.* 126:12–20.

Steinmetz proceeded to carefully leave the parking lot, intending to make a lefthand turn into the southbound lane of Simmental Way. *Id.* 127–28. As she approached the entrance/exit, she noticed a truck traveling southbound, which she

³ The top of the photograph is facing north.

waited for. *Id.* 127:8–17. There were also four vehicles stopped in the northbound lane, waiting to pull into Goodwill. *Id.* Eyewitness Patricia Riis was one of the drivers stopped in traffic. Riis testified that she saw Steinmetz “inching out” of the Goodwill parking lot and “going very slow.” Tr. 02.19.26, 21:24–22:6.

Meanwhile, Murray was riding his Harley Davidson motorcycle on his way back to work at Gibson Guitars after picking up lunch from McDonald’s. Tr. 02.19.25, 194:24–195:17. Murray has no recollection of riding his motorcycle or the accident, given he sustained a traumatic brain injury, but knows he picked up lunch from looking at receipts. *Id.* 194–95.

Riis told the jury what she heard and saw. Riis heard Murray’s motorcycle before she saw it, and she could hear the motor getting louder. *Id.* 22–7–17. Riis also recalled music, but the increasing noise of the motorcycle’s engine indicated to Riis that Murray was accelerating. *Id.* 22:15–20. Riis then observed Murray passing her vehicle. *Id.* 22:21–25. Murray was ten feet away from (to the left of) Riis’s vehicle as he made the pass. *Id.* 22:21–25. Riis testified that Murray crossed over the double yellow line into the other (southbound) lane of traffic when passing. *Id.* 22:21–23:3. The speed limit on Simmental Way was 35 miles-per-hour. Tr. 02.19.25, 192:22–193:1.

At the same time, Steinmetz was creeping slowly out of the driveway into Simmental Way to make a left-hand turn, with the four vehicles still occupying the

lane of traffic standing still. Tr. 02.18.25, 128. At no point did Steinmetz place her foot on the accelerator but rode the brake pedal into the street. *Id.* 129:6–16.

Steinmetz was “barely moving” and traveling “[l]ike a mile or two” per hour. *Id.* 129:17–20. The impact ensued.

Though Murray crossed over the double yellow line into the southbound lane when making the pass, Tr. 02.19.25, 12:19–25, the point of contact was in the northbound lane. Steinmetz testified that, due to the traffic occupying the northbound lane of traffic, she never saw Murray or his motorcycle until Murray’s motorcycle impacted her minivan. Tr. 02.19.25, 130. Murray’s motorcycle impacted Steinmetz’s minivan some distance into Simmental Way, as post-incident photographs introduced at trial exhibits portrayed. *See, e.g.*, Def.’s Tr. Ex. G-2143

A post-impact photographic still from a dashcam video introduced at trial showed the location of vehicles stopped and occupying the lane of traffic in relation to the point of impact:



Pl.'s Ex. 44. Another exhibit provided a view from the parking lot, though one car had left from the four pictured above:



Def.'s Ex. G-2140 (As Riis explained, the vehicle behind the Suburban left by the time the photograph was taken. Tr. 02.19.25, 21.) Steinmetz testified that she believed she did not cause the collision, because she took every precaution and had assumed nobody would pass the stopped traffic given the double yellow line on Simmental Way. *Id.* 132.

After the collision, first responders arrived at the scene, and Murray was taken to the hospital by ambulance. Murray spent four days in the hospital and, fortunately, his stay was non-surgical. Tr. 25.02.25, 209. He returned to work two months after the accident. *Id.* 209:1–3. Liability for the accident was the central, key point of this litigation. It was uncontested that Murray was injured.

B. Crash Investigator Williams's Cause Opinion

Crash Investigator Williams arrived at the scene with an ambulance and other first responders. Investigator Williams works for Bozeman Police Department. Tr. 02.20.25, 119:23–120:1. He prepared a crash report after his investigation. *Id.* 122:16–20.

Investigator Williams has been in law enforcement for a considerable amount of time and testified:

I graduated from the Wisconsin Law Enforcement Training Academy, in Wisconsin, which is a post certified school; United States Air Force Security Police Academy; United States Army Military Police Academy; Montana Law Enforcement Recruit Academy; and Montana Highway Patrol Academy; and then I have a under grad degree in criminal justice.

Id. 144:18–145:1. He served “22 years and ten months as a military police officer” and has been deployed “many times.” *Id.* 145:2–22. He was previously a trooper for the Montana Highway Patrol, *id.* 145:23–146:2 and worked with the Bozeman Police Department for six years, *id.* 146:3–5.

Investigator Williams had investigated many motor vehicle accidents. He estimated “[b]etween 800 and 1,000” accidents yearly. *Id.* 146:6–9. And since he had been with the Bozeman Police Department, at the time of trial, he had investigated roughly “5,000 to 6,000 crashes.” *Id.* 146:10–14.

Investigator Williams analyzed this scene, *id.* 150–153, and his overall assessment certainly took longer than five minutes, *id.* 150:24–151:4. He noted the vehicles stopped in the driving lane. Trial Tr. 151. Investigator Williams also inspected the scene, took photographs, conducted witness interviews, and had Sergeant Munson later observe roadway markings. *Id.* 152:5–16. Given his experience and investigation, Williams was asked about “the cause of the crash”:

THE WITNESS: The cause of the crash?

BY MR. PAGNOTTA:Q. Yes.

A. In my opinion in the investigation, I determined that the motorcycle was passing the vehicles – going around the vehicles more in a careless manner, in which, in my opinion, was a direct cause of the crash.

Id. 153:19–154:1.

C. Accident Reconstruction Opinions

The jury heard from competing accident reconstruction experts. In his case-in-chief, Murray called Steve Harbinson. Harbinson, who's testified a couple hundred times (90% for plaintiffs), is not an engineer, Tr. 90–91, but a former law enforcement officer from the Seattle area, *id.* 50–54. Harbinson had not been to the scene or taken measurements himself, *id.*, 93–96, but used photographs that the Bozeman Police Department took and input that information into a computer program, *id.* 97, along with using Google Earth. Harbinson opined that Murray was traveling 15–20 miles-per-hour before the collision and offered his views on a sight line analysis. *Id.* 77–78.⁴

Steinmetz called Erickson, an engineer with expertise in accident reconstruction. 02.20.25 Tr., 12–19. Erickson created a simulation depicting the sightline from Steinmetz's perspective, based on his review of the evidence and a site inspection. *See, id.* 20–57. Erickson calculated Murray traveling a minimum speed of 37–40 miles-per-hour and Steinmetz at a maximum speed of 5–6 miles-per-hour. *Id.* 37:15–24. Erickson determined the cause of the accident was a combination of Murray's speed and very limited sightlines, given that traffic was

⁴ The jury was, of course, free to entirely disregard these expert witness opinions, *see, e.g., Magart v. Schank*, 2000 MT 279, ¶ 10, 302 Mont. 151, 13 P.3d 390, including for reasons elicited during cross-examination, *see* 02.19.25 Tr., 89:7–111:11.

blocking Steinmetz's view. *Id.* 57:2–22. Further, from a perception-reaction analysis, the time Steinmetz had to react to Murray and stop the minivan was less than humanly possible. *Id.* 56:13–24.

During his rebuttal case, Murray called Andre Doria, who has a PhD in ocean physics and testified from Brazil via Zoom. *Id.* 189. Doria, as discussed below, is a self-proclaimed motorcycle expert hired for rebuttal purposes and did not himself reconstruct this accident. *Id.*

SUMMARY OF ARGUMENT

The District Court properly allowed the jury to decide this case and afforded Murray a fair trial.

I. Murray's argument that his motion seeking partial summary judgment on liability (duty and breach) should have been granted fails for three reasons. *First*, the issue is not preserved because the trial record displaced the summary judgment record. Murray did not preserve M. R. Civ. P. 50 review during and after trial. This Court should adopt United States Supreme Court precedent on this topic and find the issue waived. Second, even if reviewed, the District Court correctly applied this Court's precedent in finding jury questions based on disputed factual issues. Third, any error was harmless under M. R. Civ. P. 61. The jury found that Murray was 65% negligent. Murray's recovery would still have been barred, *see* § 27-1-702, MCA, under a question the jury would have still answered.

II. The District Court did not abuse its discretion by allowing Investigator Williams to testify about the collision's cause. A catalog of this Court's opinions hold that law enforcement personnel may offer such testimony. Investigator Williams was qualified and testimony relevant. It was up to the jury to decide the weight, if any, to give the testimony. Investigator Williams had the factual foundation for his testimony based on his investigation, akin to what this Court has found proper before.

III. The District Court did not manifestly abuse its discretion by not allowing Murray to introduce videos of other drivers in other vehicles on Simmental Way weeks after the accident. The circumstances were dissimilar and risked introducing non-parties' conduct while creating unnecessary and prejudicial mini-trials.

IV. The District Court appropriately denied Murray's motion for a new trial. This Court's review of jury verdicts is necessarily very limited. Murray's hodgepodge of legal arguments do not make this showing.

STANDARDS OF REVIEW

Murray's appeal raises a host of issues and implicates several standards.

I. Summary Judgment Standard. Summary judgment is proper only when the moving party demonstrates there is no genuine issue of material fact and an entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3). "Summary

judgment rulings are subject to de novo review for conformance with applicable M. R. Civ. P. 56 standards and requirements.” *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 13, 411 Mont. 269, 525 P.3d 1183. “The court must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable inferences in favor thereof.” *Kipfinger*, ¶ 14.

II. Evidentiary Issues. “District courts are vested with broad discretion in controlling the admission of evidence at trial.” *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. An abuse of discretion only “occurs if the court acts arbitrarily without employment of conscientious judgment, or if it exceeds the bounds of reason and substantial injustice results.” *Evans v. Scanson*, 2017 MT 157, ¶ 10, 388 Mont. 69, 396 P.3d 1284. The question is not “whether this Court would have made the same ruling[.]” *Seltzer*, ¶ 65.

III. Motion for New Trial. A losing party following a civil trial may seek relief under M. R. Civ. P. 59, utilizing the statutory grounds specified in § 25-11-102, MCA. But that party “may not use a Rule 59 motion to relitigate their claim and [courts] will not disturb a jury’s findings ‘unless they are inherently impossible to believe.’” *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 18, 369 Mont. 322, 298 P.3d 419. Montana courts use a “necessarily very limited” scope of review in dealing with motions for a new trial:

Our scope of review of jury verdicts is necessarily very limited. This Court will not reverse a jury verdict which is supported by substantial

credible evidence. This Court has defined substantial credible evidence as evidence which a reasonable mind might accept as adequate to support a conclusion. The evidence may be inherently weak and conflicting, yet it may still be considered substantial. It is well established that if the evidence is conflicting, it is within the province of the jury to determine the weight and credibility to be afforded the evidence. Finally, upon reviewing a jury verdict to determine if substantial credible evidence exists to support the verdict, this Court must view the evidence in the light most favorable to the prevailing party.

Sandman v. Farmers Ins. Exch., 1998 MT 286, ¶ 40, 291 Mont. 456, 969 P.2d 277 (quoting *Kneeland v. Luzenac Am., Inc.*, 1998 MT 136, ¶ 45, 289 Mont. 201, 961 P.2d 725).

ARGUMENT

I. The District Court Did Not Err in Denying Murray Partial Summary Judgment on Liability and Allowing the Jury to Decide the Case

Murray first argues the District Court should have judicially declared that Steinmetz violated § 61-8-343, MCA, and failed to yield the right-of-way. Murray's position fails for *three* independent reasons. *First*, Murray failed to preserve the issue for appellate review. *Second*, the District Court appropriately denied the motion due to factual disputes, allowing the jury process to function. *Third*, any error was harmless because Murray was found 65% negligent.

A. Murray failed to preserve the issue by not moving for judgment as a matter of law at trial on a highly factual issue.

This Court should adopt United States Supreme Court precedent holding a party waives the denial of a fact-bound motion for summary judgment after a jury trial, unless that party preserves M. R. Civ. P. 50 review.

The applicable Montana Rules of Civil Procedure track federal counterparts, so “[t]he federal rules have persuasive application to the interpretation of the state rules.” *U.S. Fid. & Guar. Co. v. Rodgers*, 267 Mont. 178, 182, 882 P.2d 1037, 1039 (1994); *see also Muri v. Frank*, 2001 MT 29, ¶ 12, 304 Mont. 171, 18 P.3d 1022 (similar); *Broadwater Dev., L.L.C. v. Nelson*, 2009 MT 317, ¶ 15, 352 Mont. 401, 219 P.3d 492 (applying summary judgment standards of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

As the Supreme Court held in 2011, “a motion for summary judgment does not preserve an issue for appellate review of a final judgment entered after trial because ‘once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion.’” *Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 251–52 (2d Cir. 2021) (quoting *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011)). This proposition was settled federally even before *Ortiz*. *E.g., Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1284 (11th Cir. 2001) (noting “[a]t least 10 circuits ha[d] held that the denial of summary judgment

is not reviewable on appeal after a full trial and final judgment on the merits” (collecting cases)).

And this legal tenet applies to the denial of a summary judgment motion that is *factual*, while the denial of a motion that is *purely legal* does preserve review. In *Dupree v. Younger*, the Supreme Court highlighted the interplay between numerous procedural rules. 598 U.S. 729 (2023). The Court held that “purely legal” motions preserve an issue for appellate review while the denial of a fact-dependent motion does not. *Dupree*, 598 U.S. 729. But when a motion is fact-dependent, “an appellate court’s review of factual challenges after a trial is rooted in the complete trial record, which means that a district court’s factual rulings based on the obsolete summary-judgment record are useless.” *Dupree*, 598 U.S. at 735–36.

So when a case “proceeds to trial, the party that seeks to preserve a factual challenge to a summary judgment order must make a post-trial motion under Federal Rule of Civil Procedure 50.” *Nazario v. Gutierrez*, 103 F.4th 213, 225 (4th Cir. 2024); *see also, e.g., Jensen v. EXC, Inc.*, 82 F.4th 835, 857 (9th Cir. 2023) (similar); *Courage to Change Ranches Holding Co. v. El Paso Cnty., Colorado*, 73 F.4th 1175, 1192 (10th Cir. 2023) (similar). “After trial, the summary judgment denial is ancient history and not subject to appeal.” *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 831 F.3d 815, 823–24 (7th Cir. 2016).

This Court should adopt *Ortiz* and *Dupree* when applying Montana Rules of Civil Procedure 50 and 56. Murray’s motion was heavily factual and not purely legal. In this setting, a litigant must move for judgment as a matter of law under M. R. Civ. P. 50 to preserve the denial of a factual motion for summary judgment—both during and after trial. *See In re M.A.L.*, 2006 MT 299, ¶ 57, 334 Mont. 436, 148 P.3d 606 (“a party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion”). Murray seemingly recognized this. His trial brief stated he would seek M. R. Civ. P. 50 relief. Doc. 155.00, at 2. No such motion was made. As for the denial of his fact-intensive partial summary judgment motion, the trial record displaced the record at the time Murray’s motion was denied. The issue was not preserved.

B. On the merits, the District Court correctly let the jury determine negligence.

The District Court denied Murray’s partial summary judgment motion because the record was replete with factual clashes. Murray “bore the heavy burden of demonstrating, in a manner sufficient to exclude any real doubt,” to show summary judgment entitlement. *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 32, 356 Mont. 417, 427, 234 P.3d 79. Thus, “[s]ummary judgment is an extreme remedy and should never be substituted for a trial” when material facts are disputed. *Clark v. Eagle Sys., Inc.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996).

The District Court, and this Court using *de novo* review, must review the summary judgment record in Steinmetz’s favor. *See Tonner v. Cirian*, 2012 MT 314, ¶ 9, 367 Mont. 487, 490, 291 P.3d 1182 (“In evaluating a motion for summary judgment, the evidence ‘must be viewed in the light most favorable to the non-moving party.’” (citation omitted)). That includes Steinmetz’s expert report. *See, e.g., Hopkins v. Superior Metal Workings Sys., L.L.C.*, 2009 MT 48, ¶ 13, 349 Mont. 292, 203 P.3d 803 (expert report raised fact issue precluding summary judgment). And “all reasonable inferences that might be drawn from the offered evidence should be drawn in favor” of Steinmetz, as the non-moving party. *Clark*, 279 Mont. at 283–84, 927 P.2d at 998.

Murray does not even pay lip service to this standard and ignores critical evidence that created fact issues. Investigator Williams opined that Murray had caused the crash in the summary judgment record. Doc. 80.00. While Murray posits Williams’ testimony should not be given much weight, “at the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses.” *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675.

Additionally, the District Court was obligated to consider Mark Erickson’s opinions as *true* given Steinmetz was the non-movant. *Tonner*, ¶ 9; *Hopkins*, 13.

Erickson’s opinions alone created fact issues. Erickson utilized the fields of accident reconstruction and biomechanics to opine that the “collision at issue in this case occurred as a direct result of Zachary Murray’s unsafe motorcycle operation.” Doc. 80.00, at Ex. A to Ex. 3 (Erickson’ expert report), p. 7. This included examples such as “operating at speeds in excess of the posted speed limit, [the] failure to ensure sufficient adequate visibility/sightlines, along with a general disregard of traffic conditions.” *Id.* “In contrast, Ms. Steinmetz was alert/attentive and operating in a reasonable safe manner – traveling at a speed of just 5 to 6 mph when struck by the Murray-operated Harley-Davidson.” *Id.*

The District Court was obligated to consider these contentions for summary judgment review as true: (1) that Murray was speeding above the limit; (2) that Murray disregarded traffic conditions; (3) that Murray failed to ensure visibility/sightlines; and (4) Steinmetz merely crept out of parking lot. These points in mind, this Court’s precedent shows summary judgment was properly denied. Murray essentially advocates that § 61-8-343, MCA, creates *absolute* or *strict* liability, even when it must be taken as true that he was speeding and operating his motorcycle unsafely. That is wrong.

Start with *Spinler v. Allen*, which found disputed issues of material fact under a duty to yield statute, § 61-8-341, MCA, that a defendant allegedly violated. 1999 MT 160, ¶¶ 13–26, 295 Mont. 139, 983 P.2d 348. The plaintiff likewise

appealed a defense verdict and argued the trial court should have instructed the jury that the defendant (the disfavored driver) failed to yield the right-of-way, establishing negligence. This Court disagreed, holding “the favored driver at an intersection cannot ignore obvious dangers by blindly relying on her right-of-way, but must maintain a proper lookout and use reasonable care.” *Spinler*, ¶ 22.

Because there were disputes as to where the vehicles were positioned, the Court found “genuine issues of material fact with regard to [the defendant’s] violation of the statutory duty to yield the right-of-way.” *Spinler*, ¶ 25.

Contreras is also instructive, which stemmed from a motor vehicle accident. *Contreras* interpreted two statutes that require a driver to yield a right-of-way when entering highways, §§ 61-8-341 and 61-8-343, MCA. *Contreras*, ¶ 20. The Court again confirmed a driver cannot blindly rely on a right-of-way but instead “must maintain a proper lookout and use reasonable care.” *Contreras*, ¶ 20. Fact issues prevailed there, because the Court “remain[ed] uncertain about what occurred immediately preceding the accident,” how long one vehicle was traveling down the highway, and when the other vehicle pulled out. *Contreras*, ¶ 22. Whether one driver “had to react and prevent the accident [wa]s [additionally] unclear.” *Contreras*, ¶ 22. These were jury questions.

Ten years after *Contreras*, this Court reversed a judgment as a matter of law taking the question out of the jury’s hands in *Tonner v. Cirian*, 2012 MT 314, ¶ 14,

367 Mont. 487, 291 P.3d 1182. Applying *Contreras*, the Court in *Tonner* held that judgment as a matter of law “is not appropriate in an intersection collision case when the parties dispute material facts with regard to the disfavored driver’s failure to yield the right-of-way.” *Tonner*, ¶ 14. *Tonner* reaffirmed that a driver must maintain a lookout, even with the right-of-way. *Tonner*, ¶¶ 13–18. With this evidence disputed, the Court went on to “hold that [the plaintiff] [wa]s not entitled to judgment as a matter of law.” *Tonner*, ¶ 19.

These decisions echo century old precedent. In *Flynn v. Helena Cab & Bus Co.*, the Court held that a law “granting the right of way to vehicles ... does not require ... [another driver] yield the right of way under all circumstances and conditions.” 94 Mont. 204, 21 P.2d 1105, 1108 (1933). In another example, the Court affirmed the denial of a directed verdict where “conflicting testimony raised a factual issue for the jury to decide” in an alleged failure to yield case. *Thibaudeau v. Uglum*, 201 Mont. 260, 268, 653 P.2d 855, 859 (1982).

Montana law led the District Court one direction—this case was bound for the jury. Again, for summary judgment purposes, it was established that Murray was speeding and otherwise operating his vehicle unsafely. Erickson’s accident reconstruction opinions outline these factual assertions and had to be accepted as true. As was the fact that Steinmetz slowly and prudently crept out of the Goodwill

parking lot. Factual inferences in Steinmetz’s favor, the summary judgment record was replete with disputed issues. That is why the jury performed its job.

What Murray really argues for is a holding that § 61-8-343, MCA, creates absolute liability whenever two vehicles impact in one driver’s lane. That position is nonsensical and contrary to the Court’s precedent. Take, for example, this hypothetical. If Murray was traveling 120 miles-per-hour and the collision took place in his lane, Murray’s train of thought would still fault the other driver as a matter of law. That’s wrong. In the end, summary judgment was properly denied.

C. Any error—and there was none—was harmless.

Any error (though none exists) was harmless. The jury found Steinmetz had some fault and allocated 35% negligence to her. But the jury also found Murray was 65% negligent. The predicament for Murray is not whether Steinmetz has any negligence but that *his* negligence is *greater* and bars recovery. *See* § 27-1-702, MCA. Even if Murray’s motion was granted, the jury still would have needed to decide his comparative negligence, and it bars recovery.

Any error was therefore harmless. *See* M. R. Civ. P. 61 (unless justice requires, no error “is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order”). This Court “will not reverse for an alleged error when the outcome would have been the same had the error not been committed.” *Howlett v. Chiropractic Ctr., P.C.*, 2020 MT

74, ¶ 32, 399 Mont. 401, 460 P.3d 942; see *Wenger v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 37, ¶ 26, 403 Mont. 210, 483 P.3d 480 (same).

This point forecloses Murray’s argument. The jury ultimately found Steinmetz 35% negligent but then found Murray 65% negligent, barring his case under § 27-1-702, MCA. Even if the District Court would have ruled on Steinmetz’s liability before trial, the jury would still have to undertake this same, exact exercise.

As this Court has repeatedly held, “[e]ven when a defendant is negligent as a matter of law, ... the issue of contributory negligence on the part of the plaintiff ‘is normally an issue for the jury or fact finder to resolve.’” *Olson v. Shumaker Trucking & Excavating Contractors, Inc.*, 2008 MT 378, ¶ 67, 347 Mont. 1, 196 P.3d 1265 (quoting *Pierce v. ALSC Architects, P.S.*, 270 Mont. 97, 107, 890 P.2d 1254, 1260 (1995)). “Montana’s comparative negligence scheme set forth in §§ 27-1-702 and -703, MCA, requires the fact-finder to consider the negligence of the claimant, injured person, defendants, and third-party defendants” even if one party is negligent per se. *Giambra v. Kelsey*, 2007 MT 158, ¶ 51, 338 Mont. 19, 162 P.3d 134.

That is true in traffic accident cases. See *Okland v. Wolf*, 258 Mont. 35, 42, 850 P.2d 302, 307 (1993) (“[W]e hold that where there was evidence of negligence on the part of both parties, it was for the fact finder to determine the comparative

degree of negligence.”); *Reed v. Little*, 209 Mont. 199, 206, 680 P.2d 937, 940 (1984) (“contributory negligence on plaintiff’s part is available to a defendant who has violated a traffic statute”); *Tonner*, ¶ 18 (“[w]e consistently have followed and applied *Reed*’s analytical construct” (collecting cases)).

So any error was harmless. The jury found both parties negligent. Murray, however, was allocated 65% negligence. The jury would still have been tasked with determining Murray’s negligence if his partial summary judgment motion was granted. Either way, § 27-1-702, MCA, bars Murray’s recovery because he was more than 50% negligent.

II. The District Court Did Not Abuse Its Discretion in Allowing Investigator Williams to Testify Regarding the Cause of the Accident

Murray next argues the District Court abused its discretion by allowing Investigator Williams to testify regarding the cause of the accident. Murray’s complaints largely resemble a jury argument rather than demonstrate legal reasons why Williams could not testify. The reason why is evident. This Court’s liberal expert testimony standards plainly allowed Williams to testify regarding the cause of the collision when applying the body of precedent regarding law enforcement officer’s testimony on cause.

“[A] district court is vested with broad discretion in ruling on the admissibility of expert testimony and, without a showing of abuse of discretion, the district court’s ruling will not be disturbed on appeal.” *State v. Villanueva*, 2021

MT 277, ¶ 24, 406 Mont. 149, 497 P.3d 586. And “[d]istrict courts should ‘construe liberally the rules of evidence so as to admit all relevant expert testimony.’” *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 23, 380 Mont. 204, 354 P.3d 604. The liberal construction standard means:

Our standard recognizes that admissible expert evidence should come in, even if that evidence may be characterized as “shaky.” The expert’s testimony then is open for attack through “the traditional and appropriate” methods: “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.”

McClue, ¶ 23; accord *Harris v. Hanson*, 2009 MT 13, ¶ 36, 349 Mont. 29, 201 P.3d 151 (“If the court deems the expert qualified, the testimony based on the results of his examination of the facts is admissible--shaky as that evidence may be.”). Montana Rule Evidence 702 governs experts:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

M. R. Evid. 702. The testimony here was relevant regarding the accident. It was also, as shown below, reliable.

Rule 702 “requires testing an expert’s reliability against ‘(1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts.’” *McClue*, ¶ 16 (quoting *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489). The district court evaluates the first two factors, but the *third* factor is *solely* a question

for the *jury* and does not affect admissibility. *McClue*, ¶¶ 16, 22; *see Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 35, 367 Mont. 21, 289 P.3d 131 (“[t]he last question is for the finder of fact”).

Murray emphasizes the third element but neglects that it was for the jury. There can be no question that field of accident investigation is reliable, and it was relevant to this case. Investigator Williams was also qualified by his extensive expertise in law enforcement.

Time and time again, this Court has “reiterated that an officer with years of experience in investigating accidents can assist the jury in its determination by presenting his opinions regarding the *cause* of an accident. The jury is free to decide the weight to give the officer's testimony.” *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 29, 314 Mont. 303, 65 P.3d 570 (collecting cases).

A plethora of this Court’s opinions hold that an officer may testify regarding *causation* of an accident and opinions regarding matters such as speed. *See Foreman v. Minnie*, 211 Mont. 441, 446, 689 P.2d 1210, 1212 (1984) (“highway patrolmen meet necessary qualifications to testify as expert witnesses for automobile accidents and permitted them to testify regarding the cause of the accident”); *Hart-Anderson v. Hauck*, 239 Mont. 444, 449, 781 P.2d 1116, 1119 (1989) (similar) (*Hart-Anderson II*); *Rude v. Neal*, 165 Mont. 520, 525, 530 P.2d 428, 432 (1974) (allowing a law enforcement officer to testify as an expert and

“express his opinion as to the speed of the vehicles and the cause of the accident”); *Pachek v. Norton Concrete Co.*, 160 Mont. 16, 21, 499 P.2d 766, 769 (1972) (law enforcement causation opinion proper); *Hislop v. Cady*, 261 Mont. 243, 249, 862 P.2d 388, 392 (1993) (“the jury is free to decide the weight to give the police officer's testimony as to the cause of the accident”).

Investigator Williams had the requisite training and experience here. He has been in law enforcement for a considerable time and explained his background. Tr. 02.20.25, 144–46. He served 22 years as a military police officer and has been deployed. *Id.* He previously worked for Montana Highway Patrol and worked for Bozeman Police Department for six years. *Id.* He has investigated 5,000 to 6,000 accidents. *Id.*

Murray’s criticisms cross into the third element. But courts must “leav[e] to the jury ‘whether the qualified expert reliably applied the reliable field to the facts.’” *McClue*, ¶ 22. To be sure, this Court has reversed where a district court has “ventured to the third factor, misinterpreting its role.” *McClue*, ¶ 22; *see Harris*, ¶ 36 (similar). Murray cloaks his challenge as one towards foundation.

The record shows that Investigator Williams had “sufficient factual information on which to base an opinion.” *Wheaton v. Bradford*, 2013 MT 121, ¶ 16, 370 Mont. 93, 300 P.3d 1162. Upon responding to the accident, he made various observations. He noted the vehicles were in transit, and he observed the

scene. *See id.* 150–153. As part of his investigation, Investigator Williams performed an inspection of the scene that took longer than five minutes. *Id.* 150:24–151:4. He noted vehicles were stopped in the driving lane. Trial Tr. 151. While there, Williams inspected the scene, took photographs, took witness interviews, and then he had Sergeant Munson go to the scene to observe roadway markings. *Id.* 152:5–16.

While Murray argues this was not enough, what Williams did for this accident is analogous to what other officers performed in cases where they testified as to causation. This may perhaps be why Murray ignores this Court’s cases on law enforcement testimony on causation.

Take *Hart-Anderson II*, where the officer “investigated the accident shortly after it occurred. He was not an eyewitness to the accident.” 239 Mont. at 448, 781 P.2d at 1118. At trial, the officer “testified that his investigation of this accident included interviews with the parties involved, and observations of the scene of the accident, the vehicles, and the road conditions.” *Hart-Anderson II*, 239 Mont. at 448, 781 P.2d at 1118. He opined the defendant was driving too fast and addressed the cause of the accident. Like Murray, the “[d]efendant objected to this testimony at trial, *urging lack of foundation.*” *Hart-Anderson II*, 239 Mont. at 448, 781 P.2d at 1118 (emphasis added). This Court disagreed:

We conclude that Officer Oberg's testimony could assist the trier of fact on the issue of causation. He had extensive experience in these

types of investigations and an adequate foundation was presented for his testimony. Defense counsel cross-examined the officer as to the basis of his opinion. The jury is free to decide the weight to be given this testimony.

Hart-Anderson II, 239 Mont. at 449, 781 P.2d at 1119.

Other cases agree. In *Pachek*, the officer “investigated the accident, arriving at the scene approximately one-half hour after it occurred. He interviewed the two drivers and the three highway employees who were witnesses.” 160 Mont. at 20, 499 P.2d at 768. This Court held the testimony was proper regarding “the cause of a particular accident.” *Pachek*, 160 Mont. at 21, 499 P.2d at 769. Likewise, in *Foreman*, the plaintiff objected to an officer’s testimony, arguing he “was not the investigating officer at the accident[.]” *Foreman*, 211 Mont. at 446, 689 P.2d at 1212. This Court affirmed admission, because the officer was at the accident site and “assisted in the accident investigation. That combined with his experience clearly qualifie[d] him as an expert.” *Foreman*, 211 Mont. at 446, 689 P.2d at 1212; *see also Goodnough v. State*, 199 Mont. 9, 18, 647 P.2d 364, 369 (1982) (officer’s experience, training, and presence at accident site sufficient).

Murray makes no effort acknowledging these cases. Regardless, Williams met the minimum requirements for the jury to hear his testimony. Williams was at the scene and observed the vehicles and parties. He spoke with witnesses and conducted interviews. He had another officer document marks. Williams has investigated thousands of accidents over his decades of experience. Williams had

foundation for his opinions. Murray was free to bring up whatever concerns he had during his examination, and his counsel certainly did so.

In the end, though, “the jury [wa]s free to decide the weight to give” Williams’s testimony. *Hislop*, 261 Mont. at 249, 862 P.2d at 392. The testimony surely met the liberal standard for admission, even if it was “shaky.” *McClue*, ¶ 23. The District Court did not abuse its broad discretion.

III. The District Court Did Not Manifestly Abuse Its Discretion Not Admitting Videos of Non-Parties Taken After the Accident at Issue

Murray’s father, Byron, apparently went to the scene *weeks*⁵ after this collision and filmed *other* motorists driving *other* vehicles in this area. The District Court correctly excluded the videos and did not manifestly abuse its discretion.

“The decision whether to admit videotape evidence lies in the discretion of the trial court and will not be reversed absent a *manifest* abuse of discretion.” *Henricksen v. State*, 2004 MT 20, ¶ 83, 319 Mont. 307, 84 P.3d 38 (emphasis added) (citing *Palmer by Diacon v. Farmers Ins. Exch.*, 233 Mont. 515, 523, 761 P.2d 401, 406 (1988)). That is a high threshold for reversal: “A manifest abuse of discretion is one that is obvious, evident or unmistakable.” *McDermott v. Carie, LLC*, 2005 MT 293, ¶ 11, 329 Mont. 295, 124 P.3d 168.

⁵ The videos identify being taken on July 19, which is presumably in 2021.

To admit a demonstrative video, it “must supplement a witness’s spoken description of the transpired event, clarify some case issue, and be more probative than prejudicial.” *Henricksen*, ¶ 83. For instance, this Court has affirmed a district court’s *refusal* to show films, where the “films involved experiments with *different* and smaller vehicles” with dissimilar crash consequences. *State v. Sharbono*, 175 Mont. 373, 391, 563 P.2d 61, 71 (1977). This Court has also affirmed exclusion of photographs where the “pictured trucks [we]re different trucks loaded differently” than those at issue. *Leary v. Kelly Pipe Co.*, 169 Mont. 511, 517, 549 P.2d 813, 817 (1976)⁶. Likewise, in *Henricksen*, this Court affirmed exclusion of a video showing a plaintiff-child (that fell 20 feet and suffered significant injuries) at birthday parties and happy events. The tape did not supplement testimony and did not accurately depict the child’s life. *Henricksen*, ¶¶ 82–85.

The District Court certainly had discretion to exclude videos of other vehicles driven by other drivers and in other circumstances. The ostensible purpose of these videos is to show what other vehicles did when traffic was stopped by Goodwill. But the videos did not involve these vehicles or these parties. There was no testimony that the *speeds* or sight lines were similar to *this* case. Instead, the videos solely focused on the conduct of non-parties. This is why Steinmetz sought

⁶ Overruled on other grounds, *King v. Special Res. Mgmt., Inc.*, 256 Mont. 367, 846 P.2d 1038 (1993).

to exclude them, Def.'s Trial Br., at 16–18 (Doc. 156), and the District Court agreed.

On appeal, Murray rests (Br. 34–36) entirely on *Palmer*, which allowed videos for narrow purposes and with caution. 233 Mont. at 523, 761 P.2d at 406. *Palmer* lends no hand to Murray, with his strategy to simply show the videos *carte blanche*.

The *Palmer* plaintiff-motorist presented two videos for narrow reasons. The plaintiff sought uninsured motorist coverage after he claimed to have swerved off a highway to avoid a tractor-trailer. The plaintiff had a passenger, who presented eyewitness testimony at trial. The first video, according to that eyewitness's testimony, included another tractor-trailer in the same location that the eyewitness testified occupied “the *exact* position” of the tractor-trailer on the day of the accident. *Palmer*, 233 Mont. at 522, 761 P.2d at 406. The video was admitted as “only a visual illustration of a part of [the eyewitness's] testimony.” *Palmer*, 233 Mont. at 523, 761 P.2d at 407. The second video was “made by the *defense* attorneys for their use in preparing their case” and filmed the same day a defense expert took measurements for trial assertions. *Palmer*, 233 Mont. at 522, 761 P.2d at 406. The video was used for impeachment purposes concerning the expert's

measurements, as the plaintiff “had the right to test the witness on that assertion and to impeach him if he could.” *Palmer*, 233 Mont. at 524, 761 P.2d at 407.⁷

This case is nothing like *Palmer*. As to the latter video in *Palmer*, Murray did not attempt to use a defense-created video to impeach a defense witness. Nor is the former option in play. Murray did not proffer any eyewitness that would testify that the videos demonstrated the *exact* position of *these* vehicles on the day of *this* accident. Byron Murray was not a witness to the accident. Zachary Murray had no memory of the accident, so he could obviously not provide that testimony. Nor did Murray establish at trial that Steinmetz or any other eyewitness would testify that the subsequent videos would show the *exact* location of the subject vehicles.

The Montana Rules of Evidence support this outcome. Evidence is only relevant if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” M. R. Evid. 401. Even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” Mont. R. Evid. 403.

⁷ This Court in *Palmer* also summarized the caution the district court provided the jury in that case and the limited nature of the videos. *See Palmer*, 233 Mont. at 524–25, 761 P.2d at 407–08.

What other drivers did or did not do at this location weeks after the accident is not in any way, shape, or form relevant to the questions the jury decided as to *these* parties. M. R. Evid. 401–402 were not met. Additionally, under M. R. Evid. 403, the videos would have confused and misled the jury by focusing on non-party’s conduct. None of the drivers in the videos were witnesses in this case. No jurors would have understood why any of the drivers took the actions they did. Steinmetz would also be placed in the untenable position of defending non-parties’ actions. *See Plumb v. Fourth Jud. Dist. Ct., Missoula Cnty.*, 279 Mont. 363, 927 P.2d 1011 (1996) (prior empty chair defense statute unconstitutional because it required parties to litigate and defend actions of non-parties).

The videos would have led to a series of mini-trials on what other parties did, requiring exclusion. *E.g.*, *State v. Pelletier*, 2020 MT 249, ¶ 24, 401 Mont. 454, 473 P.3d 991 (excluding evidence that would lead to “conducting a distracting mini-trial”); *McWhorter v. City of Birmingham*, 906 F.2d 674, 679 (11th Cir. 1990) (affirming the exclusion of evidence that “could have resulted in a series of mini-trials”); *Freeman v. Astrue*, 405 F. App’x 148, 151 (9th Cir. 2010) (affirming exclusion of evidence “to avoid a series of mini-trials”).

All told, Murray has not shown the District Court committed “a manifest abuse of discretion” when ruling on the videos. *Palmer*, 233 Mont. at 523, 761 P.2d at 406. The District Court considered the videos, the nature of this case, and

why Murray wanted to use the videos. No obvious, evident, or unmistakable error occurred.

IV. The District Court Correctly Denied Murray’s Motion for a New Trial

Murray concludes his appeal by arguing the District Court should have given him another bite at the apple. The District Court’s order denying this motion was thoughtful, and the elevated standard to undo a jury verdict is not met.

As described above, this Court uses a “very limited” review of jury verdicts under M. R. Civ. P. 59 and § 25-11-102, MCA. *Sandman*, ¶ 40. Moreover, this Court “will not disturb a jury’s findings ‘unless they are inherently impossible to believe.’” *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 18, 369 Mont. 322, 298 P.3d 419. Murray raises subsections (1) and (6) of § 25-11-102, MCA, which permits a new trial for specific “causes *materially* affecting the *substantial rights* of the party.” Murray raises three issues.

A. Erickson’s testimony did not necessitate a new trial, and, alternatively, Murray waived his objection.

When this Court reviews a jury verdict, “reversal is rarely warranted.” *Howard v. Replogle*, 2019 MT 244, ¶ 24, 397 Mont. 379, 450 P.3d 866. Murray seeks a new trial on what he calls new opinions from Erickson. This issue arises from testimony during Erickson’s direct examination addressing why Erickson did not use another method (the vault method, which considers how far a rider is thrown from a motorcycle to determine speed) in accident reconstruction. Tr.

38:11–42:22. Erickson did not formulate opinions using that method but explained why he did not use it. *Id.* At the conclusion of direct examination, the District Court indicated it would provide the jury a limiting instruction and asked Murray’s counsel to draft one. *Id.* at 61.

Murray’s counsel then, however, *specifically* cross-examined Erickson on the very topics that he objected to. Counsel asked about the vault method, inquired about Erickson not accounting for how far Murray was thrown from his motorcycle, and even asked Erickson about Murray’s expert’s vault analysis. *See id.* at 81:18–82:8, 83:3–86:24.⁸ The District Court found Murray waived the objection. *Id.* 128:18–129:3, 129:16–24. Murray’s position fails on the merits, or, as the District Court found, was waived.

First, Erickson authored a lengthy report. Docs. 62.00–63.00. Erickson was entitled to defend his position by explaining why he did not conduct another method, such as the vault method. Brief—much less than here—expert disclosures have satisfied M. R. Civ. P. 26(b)(4). *See Hawkins v. Harney*, 2003 MT 58, ¶¶ 20–29, 314 Mont. 384, 66 P.3d 305 (party only provided “the name and address of a veterinarian in Oklahoma that she intended to use as an expert witness”); *Scott v. E.I. Dupont De Nemours & Co.*, 240 Mont. 282, 268, 783 P.2d 938, 941 (1989)

⁸ Murray also stressed this testimony—that Erickson did not perform a vault analysis—in closing. Tr. 156:25–157:2.

(two experts briefly disclosed with fields and topics). Murray knew Erickson's ultimate opinions were. The limited testimony at issue only described why Erickson did what he did, instead of another method.

Second, as the District Court concluded, Murray waived the objection. The District Court indicated it would give Murray's limiting instruction during a break after Erickson's direct examination. Murray, however, then cross-examined Erickson on the *very issues* he objected to and went so far as to even raise Murray's expert's use of the vault method. Murray's counsel explored why Erickson did use the vault methodology in reconstructing the accident and determining speeds, which was what counsel objected to earlier. The District Court found that Murray waived his objection by raising these issues with Erickson, and Murray's counsel seemingly assented.

The District Court did not commit error. For one thing, Murray waived the position. *See State v. Olsen*, 2004 MT 158, ¶ 10, 322 Mont. 1, 92 P.3d 1204 (collecting cases explaining a party may waive a position at trial) (citing cases). Or, at the very least, Murray acquiesced with allowing Erickson to discuss these areas. “A district court will not be put in error for a ruling or procedure in which the appellant acquiesced or participated...” *Sandman*, ¶ 23. Murray cross-examined the very areas he objected to after the District Court stated it would give a limiting

instruction, Murray thus acquiesced with Erickson providing the jury that testimony.

Either way, there is no error for the drastic remedy of a new trial.

B. Murray’s lane filtering argument fails.

Murray’s lane filtering position is difficult to follow and lacks legal authority. *See Daley v. Burlington N. Santa Fe Ry. Co.*, 2018 MT 197, ¶ 40 n.6, 392 Mont. 311, 425 P.3d 669 (this Court does not generate legal analysis for litigants). Nonetheless, what the District Court excluded was “Evidence of Montana’s Lane Filter Statute Enacted Post-Accident.” Doc. 123.00, at 8. That order targeted post-accident legislative changes, *see* § 61-8-392, MCA, permitting motorcycles the ability to lane filter. This was not violated. Questioning at trial explored areas Murray’s expert professed to have expertise.

Murray’s retained expert, Andre Doria, testified that he is “a certified motorcycle safety instructor” and has been “through training from basic riding all the way through ... advanced riding courses.” Trial Tr. Day 3, at 149:18–22. Doria proclaimed that his company is “constantly looking at ways to innovate and to understand the science of collisions and motorcyclists and motorcycle safety,” so that he “can retire ... because people aren’t getting hurt anymore and everybody’s safe.” *Id.* 151:10–19; 194:17–19.

Steinmetz did not address the “lane filtering” statute but cross-examined Doria on motorcycle safety standards since, again, he was the self-described expert. *See* M. R. Evid. 705 (expert cross-examination). This Court has “repeatedly stated that Rule 705 affords a party an essential right to cross-examine the plaintiff’s expert witness regarding the basis of that expert’s opinion,” *Clark v. Bell*, 2009 MT 390, ¶ 22, 353 Mont. 331, 220 P.3d 650, and “zealously guarded the right of cross-examination.” *Hart-Anderson v. Hauck*, 230 Mont. 63, 73, 748 P.2d 937, 943 (1988) (*Hart-Anderson I*) (expert cross-examination “may extend not only to facts stated by the witness in his direct examination, but to all other facts connected with them which tends to enlighten the jury upon the question in controversy”).

Indeed, cross-examination may “test the skill and reliability of the witness” with “questions which would be wholly irrelevant except for the purpose of ascertaining the value of the witness’s opinion or the degree of credibility to be attached to his testimony.” *Green v. Hagele*, 182 Mont. 155, 159, 595 P.2d 1159, 1161 (1979). With those standards governing, there was no semblance of error. Steinmetz was free to test motorcycle safety with the expert Murray hired.

C. The District Court did not abuse its discretion by giving the jury Instruction 12.

Murray’s several sentences urging Instruction 12 was improper are not appellate argument, *Daley*, ¶ 40 n.6, and do not warrant reversal. The District

Court had discretion with jury instructions. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904. This Court considers “the instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial.” *Tarlton v. Kaufman*, 2008 MT 462, ¶ 19, 348 Mont. 178, 183, 199 P.3d 263. The “party assigning error to a district court’s instruction must show prejudice in order to prevail.” *Tarlton*, ¶ 19.

Instruction No. 12 fittingly included two statutes, §§ 61-8-326 and 61-8-343, MCA, that were at issue. Murray objected to § 61-8-326, MCA, which addresses no-passing zones. But that section was relevant because an eyewitness, Patricia Riis, testified Murray crossed the double yellow line. Tr. 02.19.25, 22–23. Section 61-8-326, MCA, was appropriate on that basis alone.

Including both statutes was also permissible. The instruction collectively “state[d] the applicable law of the case.” *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 77, 337 Mont. 411, 162 P.3d 106; *see Ammondson v. Nw. Corp.*, 2009 MT 331, ¶ 53, 353 Mont. 28, 220 P.3d 1 (no error when “the jury instructions as a whole fairly and fully apprised the jury of the applicable law”). Instruction 12 certainly did that. There was no abuse of discretion.

D. Cumulative error does not apply.

Murray ends with the cumulative error doctrine. There is “no civil case in which th[e] Court has applied either structural error or cumulative error.” *Est. of*

Frazier v. Miller, 2021 MT 85, ¶ 38, 404 Mont. 1, 484 P.3d 912. Even so, the doctrine “concerns prejudice resulting from the cumulative effect of two or more individually harmless errors that, combined, have the same prejudicial effect as a single reversible error.” *Est. of Frazier*, ¶ 38. There were no harmful errors here. *See Baxter v. Archie Cochrane Motors, Inc.*, 271 Mont. 286, 289, 895 P.2d 631, 633 (1995) (rejecting the doctrine with six alleged errors); *Est. of Frazier*, ¶¶ 39–41 (doctrine not met even if considered). The high degree of prejudice needed is absent. *See McGarvey v. State*, 2014 MT 189, ¶ 36, 375 Mont. 495, 329 P.3d 576.

CONCLUSION

For the reasons above, the District Court should be affirmed. The District Court appropriately let the jury decide this case. The jury did its job, and Murray received a fair trial. The jury’s verdict should stand.

Dated: November 25, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the above brief is proportionately spaced, 14-point font, double-spaced, and the word count calculated by Microsoft Word is 9,772 words, excluding the sections under Rule 11(4)(d).

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CERTIFICATE OF SERVICE

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