

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0454

JUBILEE NESTA SARA DA',
Plaintiff and Appellant,

v.

CITY OF BOZEMAN,
Defendants and Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the Eighteenth Judicial District Court,
Gallatin County, Montana
Cause No. DV-20-1267A
Honorable Rienne H. McElyea

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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE ISSUES | 1 |
| 1. The District Court erred by restricting the inapplicability of the public duty doctrine solely to premises liability claims, contrary to Montana statutes and common-law principles requiring the exercise of ordinary care..... | 1 |
| 2. The District Court erred by concluding that a nonfunctioning streetlight does not constitute premises liability under Montana law, thereby excluding causation evidence against the City..... | 1 |
| 3. Whether this Court should abolish the judicially created public duty doctrine, which conflicts with Montana’s Constitution, statutes, and precedent..... | 1 |
| STATEMENT OF THE CASE | 1 |
| Nature of the case. | 1 |
| Relevant procedural history..... | 2 |
| STATEMENT OF THE FACTS | 4 |
| STANDARD OF REVIEW | 9 |
| Issue 1 – Application of the public duty doctrine..... | 9 |
| Issue 2 – Characterization of a streetlight under premises liability, and exclusion of causation evidence. | 9 |
| Issue 3 – Continued validity of the public duty doctrine..... | 10 |
| SUMMARY OF ARGUMENT | 10 |
| ARGUMENT | 11 |
| 1. The District Court erred by restricting the inapplicability of the public duty doctrine solely to premises liability claims. | 12 |
| 2. The District Court erred by concluding that a nonfunctioning streetlight is not premises liability, thereby excluding critical causation evidence. . | 14 |

3. Whether this Court should abolish the judicially created public duty doctrine, which conflicts with Montana’s Constitution, statutes, and precedent..... 17

CONCLUSION AND PRAYER FOR RELIEF..... 19

CERTIFICATE OF COMPLIANCE..... 21

TABLE OF AUTHORITIES

CASES

| | |
|---|------------|
| <i>Bassett v. Lamantia</i> , 2018 MT 119, 391 Mont. 309, 417 P.3d 299 | 10, 13 |
| <i>Doris Nelson v. State</i> , 2008 MT 336, 346 Mont. 206, 195 P.3d 293 | 18 |
| <i>Fisher v. Swift Transp. Co.</i> , 2008 MT 105, 342 Mont. 335, 181 P.3d 601 | 13 |
| <i>Galt v. State Dept. of Fish, Wildlife</i> , 225 Mont. 142, 731 P.2d 912 (1987)..... | 17 |
| <i>Gatlin-Johnson ex rel. Gatlin v. City of Miles City</i> , 2012 MT 302, 367 Mont. 414, 291 P.3d 1129 | 12, 17 |
| <i>Gonzales v. City of Bozeman</i> , 2009 MT 277, 352 Mont. 145, 217 P.3d 487 | 17, 18 |
| <i>Jackson v. Dep’t of Family Servs.</i> , 1998 MT 46, 287 Mont. 473, 956 P.2d 35 | 9 |
| <i>Kent v. City of Columbia Falls</i> , 2015 MT 139, 379 Mont. 190, 350 P.3d 9. | 14, 15, 18 |
| <i>Lyman v. Solomon</i> , 258 P.3d 647 (Utah Ct. App. 2011)..... | 15 |
| <i>Massee v. Thompson</i> , 2004 MT 121, 321 Mont. 210, 90 P.3d 394 | 18 |

| | |
|--|--------|
| <i>Miller v. Fallon Cnty.</i> , 222 Mont. 214, 721 P.2d 342 (1986)..... | 19 |
| <i>Phipps v. Old Republic Nat’l Title Ins. Co.</i> , 2021 MT 152, 489 P.3d 507 | 9 |
| <i>Plattner v. City of Riverside</i> , 82 Cal. Rptr. 2d 211 (Cal. Ct. App. 1999)..... | 15, 16 |
| <i>Prosser v. Kennedy Enters., Inc.</i> , 2008 MT 87, 342 Mont. 209, 179 P.3d 1178 | 17, 18 |
| <i>Richardson v. Corvallis Pub. Sch. Dist. No. 1</i> , 286 Mont. 309, 950 P.2d 748 (1997)..... | 14, 16 |
| <i>State v. Ring</i> , 2014 MT 49, 374 Mont. 109, 321 P.3d 800 | 10 |
| <i>Steichen v. Talcott Props., LLC</i> , 2013 MT 2, 368 Mont. 169, 292 P.3d 458 | 16 |
| <i>Tarrazi v. 2025 Richmond Ave. Assocs., Inc.</i> , 688 N.Y.S.2d 220 (N.Y. Sup. Ct. 1999)..... | 15 |
| <i>Transamerica Ins. Co. v. Royle</i> , 202 Mont. 173, 656 P.2d 820 (1983)..... | 19 |

STATUTES

| | |
|----------------------------|--------|
| Section 2-9-101, MCA..... | 13, 17 |
| Section 2-9-102, MCA..... | 13, 17 |
| Section 27-1-701, MCA..... | 12, 18 |

Section 28-1-201, MCA..... 12, 18

OTHER AUTHORITIES

Mont. Const. art. II, § 18..... 13, 17

STATEMENT OF THE ISSUES

- 1. The District Court erred by restricting the inapplicability of the public duty doctrine solely to premises liability claims, contrary to Montana statutes and common-law principles requiring the exercise of ordinary care.**
- 2. The District Court erred by concluding that a nonfunctioning streetlight does not constitute premises liability under Montana law, thereby excluding causation evidence against the City.**
- 3. Whether this Court should abolish the judicially created public duty doctrine, which conflicts with Montana’s Constitution, statutes, and precedent.**

These issues were preserved through briefing and oral argument on the summary judgment motions (*see* Docs. 70, 111, 112, and Tr. 9/6/24) and raised in supplemental briefing and Plaintiff’s offer of proof prior to trial. (Docs. 214, 215).

STATEMENT OF THE CASE

Nature of the case.

This appeal arises from a nighttime auto–pedestrian collision at a crosswalk adjacent to Montana State University in Bozeman. Appellant Jubilee Nesta Sara Da’ (“Nesta”), the pedestrian, sustained serious injuries and sued three parties: (1) the driver, Tasha Nelson; (2) the City of

Bozeman, as owner and maintainer of the intersection; and (3) NorthWestern Energy, owner of the streetlight located at the crosswalk. The complaint alleged that the crosswalk was hazardous because it lacked pavement markings and signage and was unlit due to a burned-out streetlight.

NorthWestern Energy had installed the streetlight on City property under a contract with the City requiring the utility to replace bulbs once notified of an outage. The City's police department was responsible under the contract for reporting outages to the utility. At the time of the collision, the streetlight had not been functioning "for some time," but the City never reported it, and NorthWestern Energy had no notice. Nelson later filed for bankruptcy, and Nesta settled with NorthWestern Energy after judgment. The only appellee remaining is the City of Bozeman.

Relevant procedural history.

The City moved for summary judgment, arguing that, under the public duty doctrine, it owed no individual duty to Nesta to maintain its streets and crosswalks in a safe condition. The District Court denied the motion, holding that because Nesta's claim sounded in premises liability, the public duty doctrine did not bar it. (Appx., Doc. 168 at 5).

NorthWestern Energy subsequently moved for summary judgment, contending it owed no duty regarding the streetlight. The District Court granted the motion, noting that the City had not raised maintenance of the streetlight in its earlier motion for summary judgment, and concluding that an inoperable streetlight was not actionable under a premises liability theory and, therefore, the public duty doctrine shielded the City from liability concerning the streetlight. (Appx., Doc. 193 at 11–12). NorthWestern Energy was later dismissed from the case. (Doc. 204).

At the February 19, 2025 final pretrial conference, the District Court stated that its order on NorthWestern Energy was the law of the case. (Tr. 2/19/25, 51:5-7). Because the parties remained uncertain about how the ruling applied to the City, the Court ordered supplemental briefing. Nesta filed her brief together with a written offer of proof. (Doc. 214).

On the morning of trial, March 12, 2025, the court ruled again outside the jury's presence that the inoperable streetlight was not actionable under premises liability and that the public duty doctrine applied, shielding the City from liability. (Appx., Tr. 3/12/25, 5:1-6 and 19-25) (quoting Appx., Doc. 193 at 12). The court also barred expert testimony about the streetlight's causal effect. (Appx., Tr. 3/12/25, 6:1-5).

The case proceeded to trial March 12 to 20, 2025. The jury found the City not negligent, assigned comparative fault of 35% to Nesta and 65% to Nelson, and awarded \$1.6 million in damages. (Doc. 240). Judgment was entered accordingly (Doc. 259), and Nesta timely appealed. (Doc. 262). Nelson thereafter declared bankruptcy, and NorthWestern Energy settled with Nesta during the appeal. This appeal proceeds only against the City of Bozeman.

STATEMENT OF THE FACTS

The following facts are drawn from the Statements of Uncontroverted Facts in Plaintiff's Responses to the Motions for Summary Judgment filed by the City of Bozeman and NorthWestern Energy (Doc. 70 at 3-10, and Doc. 111 at 3-11, and Doc. 112, Exhibits thereto). Citations to deposition excerpts, expert reports, and exhibits are included where relevant to illustrate the record support for these uncontested facts. Unless noted, all exhibits referenced in this statement of facts are to those exhibits attached to Plaintiff's Response to NorthWestern Energy's Motion for Summary Judgment (Doc. 112):

On October 14, 2019, at approximately 8:30 p.m., Nesta was struck by a vehicle while crossing West College Street at South 15th Avenue in

Bozeman. At the time, she lived in nearby graduate housing at Montana State University (MSU) with her mother and two sisters. She had been walking south across the western crosswalk when Defendant Tasha Nelson, driving eastbound on College Street, hit her (Compl.; Ex. 3, Nelson Depo. 26:18-19).

The intersection, located at one of the MSU entrances, was owned and maintained by the City of Bozeman (Doc. 5, City's Ans. at ¶ 5), and was not regulated by traffic control devices. Neither the eastern nor western crosswalks was marked with paint or striping (Ex. 1, Norris Report at 14). No pedestrian crossing sign was posted at the western crosswalk where Nesta crossed; the only crossing sign visible to eastbound drivers appeared at the eastern crosswalk, facing west, and Nelson did not encounter it until after the collision (Ex. 1, Norris Rpt. at 13; Ex. 3, Nelson Depo. 6:15-19). For years before the crash, the City had been advised to install a rectangular rapid flashing beacon at the intersection, but none was present. (*See* Doc. 214, Exs. 41–42). Nor was there an advance “Pedestrian Ahead” warning for drivers approaching from the west, such as Nelson (Ex. 1, Norris Rpt. at 13, 16; Ex. 3, Nelson Depo. 13:2-12, 14:1-25).

The speed limit was 25 miles per hour. At the time of impact, Nesta had already traversed the westbound lane and was partway through the

eastbound lane of College Street (Ex. 1, Norris Rpt. at 3). Nelson testified that she had been temporarily blinded by oncoming headlights and first saw Nesta mid-lane and braked, striking her almost simultaneously. (Ex. 3, Nelson Depo. 61:25-62:4, 89:18-21, 91:23-92:1).

Lighting conditions made the intersection especially dangerous. The only streetlight positioned to illuminate the crosswalk was not functioning and had been out “for some time” before the crash (Ex. 6, FOIA documents, email from Nesta’s mother). The light, owned by NorthWestern Energy but located on City property, was supposed to be serviced upon notice of outages. (Ex. 7, Bengé Depo. 38:2-6).

Both Nelson and her husband described the scene as unusually dark, with no awareness of a light at all. (Ex. 3, Nelson Depo. 70:18-20, 137:2-4;



Ex. 4, Todd Nelson Depo. 4:22-23, 5:4-13, 7:5-13). Dashcam footage showed the burned-out light. (Ex. 2, Depo. Ex. 64B).

Nelson admitted that illumination would have made pedestrians easier to see and that additional lighting would have helped her detect someone crossing. (Ex. 3, Nelson Depo. 72:9-10, 16:7-9). She had driven through the intersection roughly 200 times, many at night, but never realized there was a streetlight. (Doc. 214, Ex. 2, Nelson Depo. 10:1-2, 15:8-14, 21-25, 118:5-6). Nesta testified similarly that the intersection was “very dark” throughout the summer months leading up to the crash. (Doc. 214, Ex. 3, Nesta Depo. 284:23-25).

The City and NorthWestern Energy had an established arrangement for lighting maintenance. Officials described NorthWestern as a “good partner,” and both parties agreed the utility replaced bulbs within a reasonable time once notified. (Ex. 10; Ex. 7, Bengé Depo. 84:21-22, 86:3-11). NorthWestern relied on reports from the public or City police, but the police never reported this outage, despite headquarters being a block away. (Ex. 7, Bengé Depo. 80:6-12, 81:21-22; Doc. 93 at 3). The utility had virtually no maintenance records, except for replacing the bulb after Nesta’s collision. (Ex. 9, NWE Disc. Resp. Ans. to Interrog. 10-11, NWE 000012).

Expert testimony in the case uniformly concluded that the absence of a working streetlight significantly contributed to the crash. The disclosures explained that the collision was a foreseeable result of NorthWestern

Energy's and the City's joint failure to maintain the streetlight, the City's failure to properly mark and sign the crosswalk, and Nelson's failure to yield (Ex. 1, Norris Rpt. at 11; Ex. 5, Miller Eng'g Rpt. at 3). Experts further concluded that:

- The lack of lighting at the intersection made the crosswalk unsafe and the intersection unsafe for pedestrians and drivers alike. (Ex. 1, Norris Rpt. at 12);
- The City, in concert with NorthWestern Energy, failed to maintain street lighting that was placed at this location to provide pedestrian visibility. (*Id.* at 16);
- More likely than not, a working streetlight would have helped reduce the glare of oncoming headlights. (*Id.*, and Ex. 5 at 12 (“With the additional street lighting, Tasha may also have detected Nesta sooner and may not have been subjected to the same level of glare by the oncoming traffic.”));
- More likely than not, a working streetlight would have helped Nelson see Nesta in the crosswalk. (*Id.*);
- If the light had been operable there would have been a reasonable probability the oncoming vehicle would have detected Nesta sooner, notwithstanding whatever effects Tasha's vehicle's headlights might have had on the oncoming vehicle's detection capabilities (noting a study that found that such oncoming headlights might reduce pedestrian detection distances by as much as 52%). (Ex. 5 at 8);
- The darkness of the unlit intersection, with the combination of the oncoming headlights, would have prevented any driver to have had the opportunity to (a) observe pedestrian Nesta entering the traffic lanes, and yield to a pedestrian, or (b) sound horn, brake, or come to a complete stop prior to encountering Nesta, or (c) avoid encountering Nesta by maneuvering the vehicle. (*Id.* at 12).

In sum, the intersection where Nesta was struck combined multiple hazards: no markings, no signage, no advance warning, no beacon, and a darkened crosswalk due to an inoperative streetlight that had not been working for “some time.” These conditions, on City premises and under its responsibility to maintain and report, foreseeably created an unreasonable risk to pedestrians, such as Nesta, and to drivers, such as Nelson.

STANDARD OF REVIEW

Issue 1 – Application of the public duty doctrine.

Whether the public duty doctrine applies is a question of law reviewed de novo for correctness. *See Phipps v. Old Republic Nat’l Title Ins. Co.*, 2021 MT 152, ¶ 10, 489 P.3d 507 (citing *Jackson v. Dep’t of Family Servs.*, 1998 MT 46, 287 Mont. 473, 956 P.2d 35).

Issue 2 – Characterization of a streetlight under premises liability, and exclusion of causation evidence.

Whether a condition constitutes premises liability is a question of law, reviewed de novo. *See id.* Evidentiary rulings resting on an interpretation or misapplication of law, such as whether the City’s duty to maintain a streetlight is covered by premises liability, or whether the public duty doctrine bars a negligence theory, are likewise reviewed de novo. *See State*

v. Ring, 2014 MT 49, ¶ 12, 374 Mont. 109, 321 P.3d 800 (holding that when a discretionary ruling turns on a conclusion of law, review is plenary, and this Court determines whether the law was interpreted correctly).

Issue 3 – Continued validity of the public duty doctrine.

Because the public duty doctrine is a judicially created common-law rule, this Court has the inherent authority to modify or abolish it, particularly where it conflicts with Montana’s Constitution or public policy. *See, e.g., Bassett v. Lamantia*, 2018 MT 119, 391 Mont. 309, 417 P.3d 299 (significantly narrowing the doctrine to officers’ general duty to the public, and refusing to extend it to injuries caused by affirmative conduct).

SUMMARY OF ARGUMENT

The District Court committed two legal errors.

First, it improperly limited the inapplicability of the public duty doctrine to premises liability claims. Montana law imposes a universal duty of ordinary care on all persons and entities, including municipalities, and does not recognize immunity based solely on status.

Second, the court held that a nonfunctioning streetlight on City property was not part of the premises, thereby excluding key causation evidence. This contradicted its own prior order that the public duty doctrine

does not bar premises liability claims, and it conflicted with this Court's precedent rejecting "open and obvious" conditions as a defense.

Finally, this case presents the right occasion for this Court to abolish the public duty doctrine altogether. The doctrine is judge-made, inconsistently applied, and incompatible with Montana's Constitution and statutes, which expressly abolish sovereign immunity and impose a general duty of care. Eliminating it would restore clarity and fairness by holding governmental entities to the same duty as private actors. Montana law has always grounded duty in foreseeability, not immunity; the City should be held to the same standard of ordinary care as any private actor.

ARGUMENT

This appeal presents three issues. First, the District Court erred by restricting the inapplicability of the public duty doctrine solely to premises liability claims, effectively reviving governmental immunity that the Montana Constitution abolished. Second, the court further erred in holding that a nonfunctioning streetlight on City property was not part of the premises, thereby excluding critical causation evidence and contradicting Montana precedent rejecting the "open and obvious" bar to liability. Finally, because the public duty doctrine is judge-made, inconsistently applied, and

irreconcilable with Montana's Constitution and statutes, this Court should exercise its supervisory authority to abolish the doctrine altogether. The Montana Constitution abolished sovereign immunity; the public duty doctrine cannot resurrect it.

1. The District Court erred by restricting the inapplicability of the public duty doctrine solely to premises liability claims.

In denying the City's summary judgment motion, the District Court acknowledged that "if a private person would be liable to the plaintiff for the acts that were committed by the government, then the governmental entity would similarly be liable." (Appx., Doc. 168 at 4 (quoting *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*, 2012 MT 302, ¶¶ 39, 53, 367 Mont. 414, 291 P.3d 1129)). Yet in granting NorthWestern's motion, it drew an artificial boundary: because the court had ruled the streetlight was not actionable under premises liability, it held the public duty doctrine applied, shielding the City from all other negligence claims. (Appx., Doc. 193 at 12).

That restriction is contrary to Montana law. Statutes impose a universal duty of ordinary care on all persons and entities. Section 27-1-701, MCA, provides that "[e]very person is responsible ... for an injury occasioned to another by the person's want of ordinary care or skill." Section 28-1-201, MCA, similarly requires that "[e]very person is bound,

without contract, to abstain from injuring the person or property of another.”

Neither statute exempts municipalities.

The Montana Constitution also abolished sovereign immunity, providing that “[t]he state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature.” Mont. Const. art. II, § 18; *see also* §§ 2-9-101, -102, MCA. And this Court has long held that duty turns on foreseeability: a defendant owes a duty where it is reasonably foreseeable that their conduct may cause injury. *Bassett*, ¶ 16; *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 13, 342 Mont. 335, 181 P.3d 601.

By confining the public duty doctrine’s inapplicability to premises liability alone, the District Court effectively reintroduced governmental immunity that the Constitution abolished. This error prevented the jury from considering the City’s negligence concerning the streetlight and denied Appellant the right to have liability decided under Montana’s ordinary duty framework.

2. The District Court erred by concluding that a nonfunctioning streetlight is not premises liability, thereby excluding critical causation evidence.

Montana law recognizes that premises liability arises from conditions or hazards on land controlled by the defendant. *See Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 286 Mont. 309, 321, 950 P.2d 748, 755 (1997).

Property owners must exercise ordinary care to maintain their premises in a reasonably safe condition and to warn of hidden dangers. *Id.* The law does not excuse the City from duties that every private landowner must follow — to keep its premises safe and address foreseeable hazards.

The intersection where Appellant was struck was City property. The streetlight, though owned by NorthWestern Energy, was installed on City land under a contract obligating the City’s police department to report outages. (Doc. 93 at Ex. A; Ex. 7, Bengé Depo. 80:6–12, 83:5–8). Evidence showed the light had been out “for some time,” that police headquarters was a block away, so that the City had constructive notice of the outage. (Doc. 214 at 6; Ex. 6, FOIA email; Ex. 3, Nelson Depo. 70:18-20). A streetlight affixed to City land and serving pedestrian safety is no less a condition of the premises than a sidewalk or traffic signal. And like the City of Columbia Falls in *Kent*, which was found to have undertaken an active role “in

monitoring, determining, and approving the engineering aspects of the trail system,”¹ the City of Bozeman here undertook an active role when it assumed the contractual duty to notify the utility of an outage and assumed a duty to act reasonably.

In granting NorthWestern’s motion, however, the District Court held:

Here, the inoperable Streetlight is not actionable under a theory of premises liability. As such, the public duty doctrine applies, shielding the City from tort liability with respect to the Streetlight.

(Appx., Doc. 193 at 12).

That conclusion contradicted the court’s earlier ruling that the public duty doctrine does not bar premises liability claims (Appx., Doc. 168). It also relied on out-of-state precedent treating darkness as an “open and obvious” condition barring liability. (Appx., Doc. 193 at 11–12, citing *Plattner v. City of Riverside*, 82 Cal. Rptr. 2d 211 (Cal. Ct. App. 1999); *Lyman v. Solomon*, 258 P.3d 647 (Utah Ct. App. 2011); *Tarrazi v. 2025 Richmond Ave. Assocs., Inc.*, 688 N.Y.S.2d 220 (N.Y. Sup. Ct. 1999)). But this Court rejected that doctrine nearly three decades ago, holding that

¹ *Kent v. City of Columbia Falls*, 2015 MT 139, ¶ 49, 379 Mont. 190, 350 P.3d 9.

whether premises are reasonably safe is generally a factual question for the jury. *Richardson*, 286 Mont. at 321, 950 P.2d at 755–56 (overruling prior “open and obvious” cases); *Steichen v. Talcott Props., LLC*, 2013 MT 2, ¶ 17, 368 Mont. 169, 292 P.3d 458. That darkness was known may be evidence for the jury, but it should not be determinative of whether the City reasonably maintained the premises. *See Steichen*, ¶ 19.

Here, in contrast to *Plattner*, the totality of hazards made the intersection unreasonably dangerous: no markings, no signage, no warnings, and no light. (*See* Doc. 214, Offer of Proof at 2, list of hazards). Experts testified that a working streetlight would have reduced glare from oncoming headlights and allowed Nelson to see Nesta in time to avoid impact. (Ex. 1, Norris Rpt. at 12; Ex. 5, Miller Eng’g Rpt. at 12). Nelson herself admitted illumination would have made pedestrians easier to detect. (Ex. 3, Nelson Depo. 72:9–10, 16:7–9).

By categorizing the streetlight as outside premises liability, the District Court barred expert testimony and other causation evidence that was central to Appellant’s theory of negligence. This was not a discretionary evidentiary ruling but a legal error. It deprived the jury of a full understanding of the hazards and denied Appellant a fair trial.

3. Whether this Court should abolish the judicially created public duty doctrine, which conflicts with Montana’s Constitution, statutes, and precedent.

This Court should not resort to creating or finding legal theories when a result can be reached from express constitutional language.

– *Galt v. State Dept. of Fish, Wildlife*, 225 Mont. 142, 149, 731 P.2d 912, 916 (1987) (Turnage, C.J., concurring).

Unlike the first two issues, this is not a District Court error. It is a question of law for this Court’s supervisory power over judge-made doctrines.

The public duty doctrine provides that a governmental entity cannot be held liable for an individual plaintiff’s injury resulting from a breach of a duty owed to the public at large. *See Gatlin–Johnson; Prosser v. Kennedy Enters., Inc.*, 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178. It has traditionally been applied to police and fire protection duties. *See Gonzales v. City of Bozeman*, 2009 MT 277, ¶ 20, 352 Mont. 145, 217 P.3d 487.

The doctrine, however, cannot be squared with Montana’s constitutional and statutory framework. Article II, § 18 of the 1972 Constitution abolished sovereign immunity except as specifically reinstated by a two-thirds legislative vote. The Legislature responded with §§ 2-9-101 and -102, MCA, which hold governmental entities liable in tort “if a private

person would be liable to the claimant under the laws of the state.”

Montana’s general duty statutes likewise impose ordinary care on “every person,” without exception. §§ 27-1-701, 28-1-201, MCA.

By carving out immunity not enacted by the Legislature, the public duty doctrine undermines both the Constitution and statutes. Several Justices have already questioned its validity. *See Kent*, ¶¶ 54–63 (Cotter, J., concurring); *Gonzales*, ¶¶ 54–87 (Nelson, J., dissenting); *Doris Nelson v. State*, 2008 MT 336, ¶¶ 64–78, 346 Mont. 206, 195 P.3d 293 (Nelson, J., concurring in part and dissenting in part); *Prosser v. Kennedy Enters., Inc.*, 2008 MT 87, ¶¶ 60-101, 342 Mont. 209, 179 P.3d 1178 (Nelson, J., dissenting); *Massee v. Thompson*, 2004 MT 121, ¶¶ 65-96, 321 Mont. 210, 90 P.3d 394 (Nelson, J., specially concurring in part and dissenting in part). Justice Cotter presciently wrote that “another day will come” for this Court to revisit the doctrine. *Kent*, ¶ 63 (Cotter, J., concurring).

This is that case. The doctrine was invoked to bar evidence of a plainly hazardous condition on City property and to shield the City from liability that any private actor would bear. Retaining the doctrine perpetuates confusion, inconsistent application, and unconstitutional immunity.

This Court has not hesitated to abolish outdated common-law doctrines that conflict with Montana law. *See Miller v. Fallon Cnty.*, 222

Mont. 214, 219, 721 P.2d 342, 345 (1986) (abolishing interspousal immunity); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 180, 656 P.2d 820, 824 (1983) (limiting parental immunity). The same principle applies here. Eliminating the public duty doctrine would restore coherence to Montana's duty analysis and align the law with both constitutional text and legislative command.

CONCLUSION AND PRAYER FOR RELIEF

The District Court erred in two respects: (1) by restricting the inapplicability of the public duty doctrine solely to premises liability, and (2) by excluding the nonfunctioning streetlight from premises liability, thereby barring essential causation evidence. These rulings conflicted with Montana's statutes, constitutional provisions, and this Court's foreseeability-based duty framework, and denied Appellant a fair trial.

This Court should reverse the judgment and remand for trial with the excluded evidence admissible. Because damages have already been assessed, remand should be limited to liability and allocation of responsibility between the City and other parties.

Finally, Appellant respectfully asks this Court to take this opportunity to abolish the judicially created public duty doctrine altogether. The doctrine

conflicts with Montana's Constitution and statutes, undermines foreseeability as the foundation of duty, and perpetuates an immunity the people of Montana expressly abolished. Its elimination would harmonize Montana law with its constitutional text, statutory mandates, and this Court's precedent. A darkened crosswalk at a university entrance is not an abstract doctrine but a foreseeable danger the City had a duty to prevent.

For these reasons, Appellant respectfully asks this Court to reverse, hold the burned-out streetlight actionable as premises liability, abolish the public duty doctrine, and remand for a trial limited to liability and comparative fault.

Respectfully submitted on September 30, 2025.

By: /s/ E. Casey Magan
E. Casey Magan

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, the undersigned certifies that this brief is prepared in Times New Roman 14-point font, double-spaced, and contains 3971 words, excluding tables and certificates.

By: /s/ E. Casey Magan
E. Casey Magan