

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0454

JUBILEE NESTA SARA DA',

Appellant,

v.

CITY OF BOZEMAN,

Appellee.

APPELLEE CITY OF BOZEMAN'S BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County,
the Honorable Rienne H. McElyea, Presiding

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STATEMENT OF THE ISSUES

Respectfully, Appellant's, Jubilee Nesta Sara Da' ("Nesta"), Statement of the issues was difficult to understand. Nesta presented three issues; However, Appellee, City of Bozeman ("City") believes that Nesta's brief only presents two issues: 1) Whether the City could be liable for an inoperable streetlight under a premises liability theory where the streetlight was not owned, operated, or maintained by the City but rather owned by settled party, and former Defendant, Northwestern Corporation ("NWE"); and 2) Whether the public duty doctrine should be abolished or is unconstitutional.

Therefore, the City states the issues on Appeal as follows:

1. Whether the District Court correctly determined that the City could not be liable for an inoperable streetlight where the City did not own, operate, or maintain the streetlight—rather, NWE owned, operated and maintained the streetlight—and where there was no contract or tariff requiring the City to notify NWE of any outage.
2. Whether Appellant preserved abolishment or constitutionality of the public duty doctrine and, even if properly preserved, whether this Court should leave this issue to the Legislature.

STATEMENT OF THE CASE

A. Nature of the case

This case arises from a pedestrian and vehicle accident that occurred on October 14, 2019, at dark in Bozeman, Montana. (Doc. 182, pg. 2) (*see also*, Doc. 64). At about 8:30 p.m., Nesta was walking across West College, from North to

South, toward MSU housing, at the intersection with 15th Ave. (Doc. 182, pg. 3, 5). At the same time, Tasha Nelson (“Nelson”), formerly a Defendant in this matter, was traveling eastbound on West College in her 2000 Nissan Maxima. (Id.) The passenger side of Nelson’s vehicle struck Nesta. As discussed below, there was a question as to whether Nesta was in a crosswalk, whether marked or unmarked, when she was struck.

On the night of the accident, there were two crosswalk signs, one on the intersection’s southeast corner, for westbound traffic, and one on the intersection’s northeast corner for eastbound traffic, i.e., the direction Nelson was traveling.

Nesta sued three parties. First, Nesta sued Nelson for negligence, asserting that Nesta was in a crosswalk and that Nelson had a duty to yield to Nesta but instead sped up. Nesta also sued NWE asserting the streetlight, which was owned, operated and maintained by NWE, was inoperable on October 14, 2019. Finally, Nesta sued the City. At trial the following claims were asserted against the City under a premises liability theory:¹

1. The City should have painted the asphalt with crosswalk markings on the west side of the intersection, where Nesta was allegedly crossing, and on the east side where the two crosswalk signs were located;
2. The City should have installed Crosswalk Ahead signs further west of the intersection; and

¹ These are not premises liability claims as discussed in the Argument Section.

3. The City should have installed a Rectangular Rapid Flashing Beacon (“RRFB”) on the east side of the intersection where the crosswalk signs were located (even though Nesta claimed she was crossing on the west side of the intersection).

(Doc. 213, pg. 3; *see also* Doc. 182, pgs. 6, 7 and 8 which contained Nesta’s Pretrial Order contentions).

The Jury returned a unanimous verdict that the City was not negligent. (Docs. 240 & 241). The Jury also determined that Nelson was 65% at fault and Nesta was 35% at fault and awarded gross damages, i.e., before application of the above apportionment, of \$1,600,000.00.

B. RELEVANT PROCEDURAL HISTORY

On July 9, 2024, the City filed a Motion for Summary Judgment and Brief. (Docs. 66 & 67). Said Motion asserted the City should be dismissed under the public duty doctrine. Specifically, the City asserted that Nesta’s claims were barred because the City’s duty related to the design of the crosswalk at the intersection of West College and 15th Ave. was a duty owed to all, and thus the public duty doctrine applied.

On July 23, 2024, Nesta filed her Brief in Opposition. (Doc. 70). Nesta asserted that the public duty doctrine was inapplicable because Nesta was asserting a premises liability claim against the City. As discussed in the Argument Section, a claim related to design is not a premises liability claim because the physical condition of the property was not the injury-causing event.

Nesta's Brief in Opposition did not assert that the public duty doctrine should be abolished.

The City filed a Reply Brief on August 9, 2024. (Doc. 77). The City argued that Nesta's claims were not premises liability claims, in part because her injury was not caused by any physical defect or hazardous condition in the City street or crosswalk. Rather, Nesta's injuries were caused by the moving vehicle Nelson was driving. At that time, NWE was still a party; therefore, the streetlight issue was focused on NWE, not the City.

The City identified a long list of premises liability cases, each of which involved an alleged injury caused by either some physical defect or hazardous condition on the property. (Doc. 77, pg. 7). For example, a person slipped on ice, tripped over barbed wire, or stepped in a gopher hole.

On September 4, the Court held a hearing on the City's Motion for Summary Judgment. (Appx. Tr. 9/6/24). During that hearing, Nesta argued for the first time that the doctrine should be abolished. However, the following exchange occurred between Judge McElyea and Nesta's Counsel:

[MS. MAGAN] . . . This case may be the case. The public duty doctrine should be abolished. But we don't need to prove that here.

[THE COURT] I was going to say is that what you're hanging your hat on, Ms. Magan?

[MS. MAGAN] No.

[THE COURT] All right.

[MS. MAGAN] And Your Honor need not consider that, . . .

(Id. pgs. 30:24 to 31:10). Therefore, the issue was not briefed below, and Nesta’s attorney admitted to the District Court that the abolishment issue need not be considered.

On December 5, 2024, Judge McElyea issued her *Order Denying Defendant City’s Summary Judgment*. (Doc. 168). Judge McElyea held that Nesta was alleging premises liability for negligent maintenance of City property. Said Order provides:

Plaintiff’s [Nesta] action challenges the City’s duty to maintain its property, independent from its general duty to design and maintain streets and crosswalks. Accordingly, the public duty doctrine does not shield the City from liability.

(Id. pg. 5) (underscoring added). Therefore, Judge McElyea held that Nesta was pursuing a premises liability claim and denied the City’s Motion.

On August 29, 2024, NWE filed a Motion for Summary Judgment and Brief. (Docs. 92 & 93). NWE’s Motion admitted that it owned and maintained the streetlight at the northwest corner of the subject intersection. (*See also*, Doc. 112, Ex. 7, Dep. of NWE representative Nicole Benge, pg. 38). However, the Motion presented a “narrow legal question—whether a regulated utility company owes a legal duty of care to pedestrians to maintain streetlights.” (Doc. 93, pgs. 1-2) (underscoring added).

After briefing, the Court held a hearing on December 17, 2024. (Appx. Tr. 12/17/25). Several relevant statements were made by the parties at that hearing as follows:

1. First, NWE’s counsel admitted what everyone knew—that NWE owns, operates, and operates the subject streetlight. (Appx. Tr. 12/17/25, pg. 7) (“The streetlight in the subject case here is owned and operated by Northwestern.”).
2. Second, NWE cited the Tariffs in the hearing and briefing. Those Tariffs were attached to NWE’s opening Brief as exhibits. (Doc. 93, Ex. C thereto). NWE also cited contracts with the City from 1966. (Doc. 93, Exs. E & F). In so doing, NWE argued under case law that “there’s no duty for a city, or a utility in that matter, to provide streetlights on an otherwise reasonably safe street.” (Appx. Tr. 12/17/24, pg. 14).
3. Third, City’s counsel clarified that the City only monitors City-owned streetlights and that the subject streetlight was not owned by the City, rather it was owned, operated, and maintained by NWE. (Appx. Tr. 12/17/24, pg. 25). City’s Counsel cited to the deposition of the City’s 30(b)(6) representative, Shawn Kohtz, at pages 175-176 and 169. (Page 169 of his deposition is attached to Doc. 93, Ex. G) (Pages 175-176 of his deposition are attached to Doc. 108, Ex. 1). Therein, Mr. Kohtz testified that the City does inspect City-owned streetlights to make sure they are operating, and no bulbs are burnt out; however, the City does not inspect streetlights owned by NWE or any other entity (Id.).
4. Fourth, Nesta’s counsel made several important statements and admissions. For context, in Nesta’s appellate brief, Nesta asserts that a contractual obligation existed between the City and NWE related to monitoring streetlights:

- a. First, she admitted that NWE owned, operated, and maintained the streetlight. (Appx. 12/17/24, pg. 37:9 to 37:16).²

² Nesta’s appellate brief, page 6, cites to deposition of Nicole Benge, the NWE 30(b)(6) designee. She asserts that on page 38 of that deposition Benge testified that the light was on City property. That is incorrect, Benge’s answered: “Yes, that light

- b. Second, she stated that there was **no contract** related to the subject streetlight between the City and NWE. (Appx. Tr. 12/17/24, pg. 36); (*see also*, Doc. 112, Ex. 7 thereto, deposition of Nicole Benge) (Q: Okay. So— and you can’t find the contract that applies to this particular streetlamp, correct? A: Correct); (*see also*, Doc. 93, Ex. G thereto, deposition of Shawn Kohtz — no contracts exist for this old streetlight between NWE and the City).
- c. Third, there was an assertion that PSC-approved Tariffs created a legal duty to the City to inform NWE of any power outages. However, she correctly argued that neither Tariff created such a duty.
 - i. As to the 2022 Tariff, (Doc. 93, Ex. C thereto, Bates numbers NWE 000019-20), that Tariff was effective after the October 14, 2019, incident and therefore could not apply. (Appx. Tr.12/17/24, pg. 36).
 - ii. Regarding the other Tariff, which is dated January 1, 2017, (Doc. 93, Ex. C thereto, Bates numbers NWE 000021-25), it only puts a duty of notification of a light being out for lights that are owned by the NWE *Customer*. Because everyone agreed that the City did not own the subject streetlight, this Tariff could not create such a duty for the subject streetlight. (Appx. Tr. 12/17/24, pg. 36-37).

Therefore, as discussed in the Argument Section, no contractual duty existed as admitted by Nesta.

On February 7, 2025, Judge McElyea granted NWE’s Motion stating:

Unlike its duty to maintain streets and crosswalks, the City’s duty to maintain the Streetlight is not covered by premises liability.

...

is owned and maintained by Northwestern Energy.” Nesta also claimed that the light was out for some time. There is no admissible evidence on this point as Nesta only cites an email from Nesta’s mother and the mother passed away before a deposition. (Doc. 112, Ex. 6 for the email.)

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.

(Doc. 193, pgs. 11 & 12) (underscoring added). Judge McElyea further reasoned that an inoperable streetlight “does not increase risk of harm” but rather leaves the natural state of nighttime. (Id. pgs. 5-8)

This ruling was discussed at the Final Pretrial Conference on February 19, 2025. (Appx. Tr. 2/19/25) (*see also*, Doc. 203, Minute Entry from Conference). At that hearing, the City brought up the issue that while the inoperable streetlight was admissible, the parties could not argue or introduce evidence that it *caused* the accident. (Appx. Tr. 2/19/25, pgs. 47-51).

The Court ordered the parties to submit additional briefing on this issue. (Docs. 211, 212 & 214).

On the first day of trial, March 12, 2025, the Court addressed the evidentiary issue related to the streetlight that NWE owned, operated, and maintained. (Appx. Tr. 3/12/25, pgs. 4:25-6:21). Judge McElyea stated that the light being out was an admissible fact but the parties could not argue the casual effect of the light being out. (Id.). Thereafter a Minute Entry was provided as follows:

Discussion was held on the Court’s ruling regarding Motions in Limine involving a nearby streetlight. The Court ADVISED that no testimony regarding the streetlight would be allowed. Though the area’s being dark might be mentioned as a relevant fact, it could not be entered as having caused the incident.

(Doc. 226) (underscoring added). Simply put, the fact that the streetlight was out was admissible, but testimony related to the effect of that, if any, was inadmissible.

Finally, the Court addressed this evidentiary ruling one more time during trial. On March 19, 2025, the issue came up related to demonstrative exhibits. (Appx. Tr. 3/19/25, pgs. 14 to 29). At this point in the trial, none of the parties had discussed the streetlight. (Id. pg. 29). Therefore, the Court made another evidentiary ruling holding that because Nesta and the City had already put on their cases-in-chief, demonstrative exhibits and evidence that the streetlight was out was not admissible.

STATEMENT OF THE FACTS

A. FACTS OF THE ACCIDENT

The parties all agree that Plaintiff crossed West College from the north to the south, but there is a dispute as to where Plaintiff was crossing. When the accident occurred, the east side of 15th Street had two signs identifying a crosswalk going north-south across West College. One sign was on the northeast corner facing westbound traffic, and one sign was on the southeast corner facing eastbound traffic. The west side of 15th Street was unmarked for north-south pedestrian traffic.

For reference, the photo below (*Dep. Ex. 5*) shows the sign on the southeast corner visible to east-facing traffic, i.e., the direction that Nelson was traveling:



(Doc. 77, pg. 3). Please note this picture shows construction on the south end of 15th and the MSU parking lot. That construction was completed before the accident.

Even more telling is the fact that soon after the accident, City Police were dispatched to the scene. Officer Peterson's dashcam was active as he approached the scene driving eastbound, i.e., the same direction that Nelson was driving the night of the accident. Below is a still from the dashcam video in Officer Peterson's vehicle as he turned from 16th Street on to West College, heading eastbound. The sign is clearly visible even on the poor-quality dashcam:



(Doc. 77, pg. 4) (*see also*, Trial Exhibit 2003 which is the full video).

Nesta and her expert testified that Nesta was in the **unmarked** crosswalk on the west side of 15th. (Doc. 70, Plf. Opposition to City Motion for Summary Judgment, pgs. 5 & 6) (*see also*, Doc. 182, PTO, pgs. 6 & 7). If that is true, then she *chose* not to use the **marked** crosswalk on the east side of 15th and instead chose to cross on the **unmarked** west side. Note the above pictures are approaching from the west, and therefore the west side of the intersection is closest.³

³ At the time of this accident, the east side of the West College and 15th intersection had pedestrian crosswalk signs, so it was marked. The westside did not have any sign or pavement markings and was thus unmarked. Under Montana law, crosswalks can be either marked or unmarked. Mont. Code Ann. § 61-8-502.

The City maintained, as did its accident reconstruction expert, Mark Erickson, that Nesta was crossing in the middle of 15th, i.e., not in either crosswalk. (Doc. 44, pgs. 2 to 7). One basis for that conclusion is that Nelson testified that Nesta was not in any crosswalk and in fact was in the middle of 15th. (Doc. 45, Ex. A, Dep. of Nelson, pg. 132:17 to 133:25). Nelson also stated to City officers that evening that Nesta was in the middle of 15th Ave. (not in a crosswalk). (Doc. 45, Ex. D, Transcript of City Police dashcam with audio, Officer Braden Peterson, pgs. 7:7 to 8:8) (Doc. 49, NWE Expert Disclosure, Ex. A pg. 7).

B. IMMEDIATE POST-ACCIDENT FACTS

After the accident, Nelson and Nesta spoke. According to Nelson's sworn testimony, Nesta admitted to being too high to be walking across the street.

Q. . . . Why are you now saying that Nesta [Plaintiff] was consuming intoxicated beverages, or prescribed, or recreational drugs, or medications at the time of the collision?

A. **She told me she was under the influence. She told me she was too high to be walking across the street. She had a backpack on her person, and she tried to give it to me because it was full of paraphernalia, and she was afraid that she was going to get in trouble.**

...

Q. Okay. What do you recall exactly she said to you?

A. She said, "I don't want to be here. Let me go. I need to go. Let me get up. Please don't call the cops. I need to get away. I have paraphernalia in my backpack. I don't want to get in trouble." She says, "**I'm really high. I took too many edibles.**" These were her, quote unquote, words to me.

(Doc. 45, Ex. A, Dep. of Nelson, pg. 47-48 & 98:3-12).

City Police responded to the accident. When they responded, the Officers had their dashcams on with audio recording. Based on those audio recordings, and Nelson's deposition, Nelson stated to the Officers:

1. On October 14, 2019, Plaintiff stated that: "**I thought she [Nelson] saw me.**" (Doc. 45, Ex. C, Dep. of Nelson, pg. 107:1 to 107:25). Plaintiff admitted that it was her voice on the dashcam video making that statement. This exact same statement is also contained in the transcribed portion of Officer Stewart's dashcam. (Doc. 45, Ex. B at pg. 2:18 to 2:19).
2. On October 14, 2019, Plaintiff also stated that: "**I thought there was enough time to cross.**" (Doc. 45, Ex. C, Dep. of Nelson, pg. 113:2 to 114:7). Plaintiff admitted that it was her voice on the dashcam video making that statement. This exact same statement is also contained in the transcribed portion of Officer Stewart's dashcam. (Doc. 45, Ex. B at pg. 9:1 to 9:4).

C. BACKGROUND RELATED TO THE SUBJECT INTERSECTION

The intersection at West College and 15th Ave. has been in place for decades, back to the 1950s or earlier. In 2008 and 2013, the City retained third-party consultant Alta Planning and Design to study numerous parts of the City as part of the "Safe Route to School" ("SRTS") program. One of the schools addressed therein was Irving School and thus included the area of West College between 15th Ave. and 18th Ave.

For the subject intersection, Alta **only** recommended an east-to-west painting of the crosswalk. Alta did **not** recommend any painting or signage on the north-to-south crosswalks where Nesta was crossing. (Doc. 77, pgs. 5-6) (*see also*, Ex.9

thereto; *see also*, Trial Ex. C45). The City exceeded Alta's recommendation and installed crosswalk signs on the northeast and southeast corners of the intersection. (Doc. 77, pg. 6) (*see also*, Ex. 9 thereto; *see also*, Trial Ex. 2010) (*see also*, Doc. 50, Ex. A, pg. 10-11, City Expert Report of Scott Keller and citing to the Dep. of Shawn Kohtz, City 30(b)(6) representative pg. 149).⁴ Those signs, at least the eastbound sign, are shown in the above pictures.

In the five-year period from the installation of the signs, until the date of this accident, over 16,000,000 vehicles had traversed this intersection with **zero** reported pedestrian/vehicle accidents until Nesta's accident. (Doc. 59, City Rebuttal Expert Report, Ex. A, pg. 7) (*see also*, Doc. 183, pg. 34) (*see also*, Appx. Tr. 3/14/25 pg. 8:9 to 10:23 — testimony of Nesta's expert's testimony confirming no pedestrian/vehicle accidents in the preceding five years or even in the proceeding twenty years).

Nesta incorrectly claimed throughout trial, and in her appellate brief, pg. 5, that the City was advised to install a RRFB at this intersection. This was patently incorrect. In 2017, the City received the commissioned Master Transportation Plan ("MTP") which contained numerous recommendations throughout the City. One of those recommendations was to widen West College between 15th and 19th Ave. from two lanes to three lanes. (MTP, Trial Ex. 2014) (*see also*, relevant portion of the

⁴ The 2008 Alta SRTS is Trial Ex. 2009 and specific to the subject intersection, pg. 53.

MTP at Dep. Ex. 42A, attached to Doc. 77 as Ex. 4) (*see also*, Kohtz dep. pgs. 66-67; 71 & 74, attached to Doc. 77 as Ex. 5). After that widening, it would take longer to cross West College, so additional SPOT improvements would be needed, including a bike lane and additional crossing enhancements.

Even though this was clear in the MTP, it was conclusively established in two other ways. First, Kohtz, the City representative, testified in deposition and trial that the RRFB, and other SPOT improvements, would only be necessary after West College was widened. (Kohtz dep. pgs. 66-67; 71 & 74, attached to Doc. 77 as Ex. 5).

Second, after the MTP was completed, the City hired another third-party consultant, Linda DuPriest, to help prioritize all the MTP projects. (Trial Exs. 2016 & 2022). Ms. DuPriest recognized and memorialized that the RRFB and other enhancements on West College were part of the larger project to widen West College. (Trial Ex. 2016, pg.5).

Moreover, the City and Linda DuPriest created a “**Stand-Alone SPOT and Pedestrian Projects From TMP**” listing, i.e., projects that were **not** part of a larger project. That listing did **not** include the RRFB, i.e., Spot-10, from the TMP, because that is only **after** West College is widened. Plaintiff is completely incorrect on her assertion. (Trial Ex. 2016, pg. 14 and Trial Ex. 2022, pg. 65).

Nesta did not show her own expert, Norris, these documents, per his testimony. (Appx. Tr. 3/14/25, pgs. 42:24 to 43:9).

STANDARD OF REVIEW

A District Court has “broad discretion to determine whether evidence is admissible; we will not overturn a district court’s evidentiary ruling absent abuse of discretion.” *Bueling v. Swift*, 1998 MT 112 ¶ 24, 288 Mont. 472, 958 P.2d 694; *State v. King*, 2014 MT 49 ¶ 12, 374 Mont. 109, 321 P.3d 800.

“In order to establish that the court abused its discretion, the appellant [Nesta] must demonstrate that ‘the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason.’” *Seltzer v. Morton*, 2007 MT 62 ¶ 65, 336 Mont. 225, 154 P.3d 561. “[I]f an appellant demonstrates that a district court has abused its broad discretion in rendering an evidentiary ruling” then it must be determined whether the “demonstrated abuse of discretion constitutes a reversible error.” *Id.* No reversible error occurs “unless a substantial right of the appellant [Nesta] is effected, nor does reversible error occur unless the evidence in question was of such character as to have affected the outcome of the trial.” *Id.*

Judge McElyea’s Order was an evidentiary ruling per her own Order; therefore, the standard of review is abuse of discretion. Nesta asserts that the standard of review is de novo as this involved the granting of a Summary Judgment. However, the City did not prevail on its Summary Judgment Motion. Further, the

NWE Motion, while granted, was not directed at the City (although admittedly that Order did address the streetlight issue as related to the City).

SUMMARY OF THE ARGUMENT

The District Court correctly held that the City could not be held liable for an inoperable streetlight that it did not own, operate, or maintain. First, because NWE owned, operated, and maintained the streetlight, not the City, a premises liability case cannot exist against the City as to the streetlight. Further, even if a duty existed, that is a duty to all, and therefore, the District Court correctly held that the public duty doctrine applied.

Second, there was no contract or Tariff in evidence that created any duty to the City to monitor the streetlight. Indeed, it would be unreasonable to conclude that Montana cities and towns are obligated to patrol the streetlights that NWE owned, maintained, and operated. This is especially true given that NWE, as the owner, operator and maintainer of streetlights, has no such duty.

Even if the City owned the streetlight, or otherwise had a duty to monitor the streetlight, an inoperable streetlight is not premises liability. A premises liability case must rest on the physical defect or hazardous condition of the property such as ice, a hole, or a puddle. Here, Nesta does not allege a physical condition of City-owned property caused her injury. Further, even if the City had a duty regarding the

streetlight that NWE owned, operated, and maintained, it would be a duty to all, meaning, as the District Court held, the public duty doctrine would apply.

Finally, although Judge McElyea did **not** err, even if she did, it was harmless error thereby precluding reversal.

Regarding Nesta's claim to abolish the public duty doctrine, she did not preserve that issue in the District Court. Specifically, no briefing on that issue exists and, although Nesta briefly raised the issue at oral argument, she also specifically stated that it need not be considered. Even if Nesta preserved the issue for appeal, the doctrine should be maintained for sound public policy reasons discussed below. Any changes to the public duty doctrine should be left to the Legislature to address. Finally, should this Court remand the case, the entire case should be re-tried, including damages.

ARGUMENT

Where a municipality owes a duty to the public, that duty is not owed to any individual. *Prosser v. Kennedy Enter., Inc.*, 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178 (citing *Driscoll*, ¶ 21). This concept is known as the public duty doctrine, which “derives from the practical conclusion that a municipality would be mired hopelessly in civil lawsuits if it were held responsible for every infraction of the law.” *Prosser*, ¶ 18 (quoting *Nelson*, ¶ 21). The public duty doctrine prevents individual members of the public from using tort liability to unduly constrain a

municipality's discretion⁵ to use its limited resources to promote the general welfare. *Id.* (citing *Nelson*, ¶ 21). Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct **unless** it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public. *Kneiper v. County of Missoula*, 2002 ML 3689, *8 (Mont. Dist. Ct. May 9, 2002) (Fourth Jud. Dist., Hon. John W. Larson presiding) (internal citations omitted). In other words, "a duty owed to all is a duty owed to none." *Nelson*, ¶ 21 (quoting *Beal v. City of Seattle*, 134 Wash. 2d 769, 954 P.2d 237, 244 (Wash. 1998)).

The public duty doctrine does not always apply. The first exception is if a "special relationship" exists between a plaintiff and the municipality. Nesta never asserted such a relationship existed. (Doc. 70) (Appx. 9/6/24, pg. 39, Nesta's counsel admitted that Nesta was not asserting she had a "special relationship"). The second exception, which is the only issue presented in this appeal, is the premises liability exception. Under this exception a municipality can be held liable for premises liability claims. *Gatlin-Johnson v. City of Miles City*, 2012 MT 302, 367 Mont. 414, 291 P.3d 1129 (holding that the public duty doctrine did not apply when the City failed to maintain the depth of the fall protection at a public park violating the City's

⁵ Nesta's counsel and expert, Norris, admitted there's discretion per the MUTCD. (Appx. 9/6/24, pg. 36); (Appx. 3/14/25, pg. 7 and 121).

own policy to maintain the fall protection depth during the summer). The Court in *Gatlin-Johnson* cited cases where the municipality or State owned the property, and it was the physical condition of the property that caused the injury, i.e., barbed wire on the City ground, balusters in university library were too wide, heaved sidewalk, or slip and fall on School property. For example, in *Richardson v. Corvallis Public School District*, 286 Mont. 309, 321, 950 P.2d 748, 755 (1997), this Court applied the rules of landowner premises liability (duty to use ordinary care in maintaining premises in a reasonably safe condition and to warn of any hidden dangers) in a case where the plaintiff fell on an icy walkway on school property. *Id.* ¶ 18.

The public duty doctrine has been applied in many contexts. (*See e.g.* Doc. 67, pgs. 6 to 8. One case on point is the District Court opinion in *Berkram v. City of Cut Bank et al.* (Doc. 67, pg. 8, and Ex. B thereto). There, Judge McKinnon ruled that the public duty doctrine applied to the City’s “establishment of a street maintenance district and maintaining stop signs” as it was for the benefit of the public. Therefore, that District Court granted summary judgment to the City of Cut Bank holding that the public duty doctrine applied and the exceptions thereto did not apply to street design—the exact same allegations as in this case.

The design of public streets and crosswalks is a duty owed to all and therefore, the public duty doctrine applies. Recall that Nesta’s theory against the City was that it should have painted the street, added a Crosswalk Ahead sign, and/or installed a

RRFB. These were not maintenance issues but rather design issues. This is distinguishable from the situation in *Gatlin-Johnson* where fall protection was not maintained. This is also distinguishable from the *Kent* situation where the City failed to comply with its own ordinances. Here, the City was not the owner or maintainer of the premises. Therefore, the duty of land possessors to use ordinary care in maintaining premises in a reasonably safe condition and to warn of any hidden dangers does not apply. Rather, the City's duty to design public streets and crosswalks is a duty owed to the public, which under the public duty doctrine cannot give rise to a duty to an individual.

Failure to apply the public duty doctrine to this instance would result in municipalities being "mired hopelessly in civil lawsuits . . ." *Prosser*, ¶ 18. Under Nesta's theory, municipalities could be sued for street and intersection design in virtually every motor vehicle accident case, which would interfere with the municipalities' discretionary public safety functions.

A. THE DISTRICT COURT CORRECTLY HELD THAT THE INOPERABLE STREETLIGHT, WHICH WAS OWNED, OPERATED, AND MAINTAINED BY NWE, WAS NOT ACTIONABLE UNDER A PREMISES LIABILITY THEORY AGAINST THE CITY.

1. *Premises liability cannot attach to the City as the City did not own, operate, or maintain the streetlight.*

Even if a premises liability claim may attach, where the condition of the premises did not cause the injury, as discussed below in Section A.3., Nesta did not

assert an actionable premises liability claim, as the City did not own, operate, or maintain the streetlight.

It is undisputed that the City did not own, operate, or maintain the subject streetlight. NWE admitted that it owned, operated, and maintained the subject streetlight. (Appx. Tr. 12/17/25, pg. 7). Nesta admitted to the same, (*id.*, pg. 37:9 to 37:16), and included that as a contention in the Pretrial Order. (Doc. 182, pg. 5, ¶ 14) (“That streetlight was owned, operated, and maintained by NorthWestern Energy”).

Because the City did not own, operate, or maintain the streetlight, “the inoperable Streetlight is not actionable under a theory of premises liability.” (Doc. 193, pgs. 11 & 12, Judge McElyea Order on NWE Motion). Specifically, the City is not the “possessor” of the streetlight, and therefore, premises liability cannot attach. Therefore, Judge McElyea correctly held that premises liability could not attach.⁶

The City still maintains that the public duty doctrine should have applied to all claims asserted by Nesta against the City. Nesta’s claims all related to design of the intersection which is a duty to the public. Admittedly, the City did not find a Montana Supreme Court decision applying the public duty doctrine to the design of streets or intersections. However, the City did cite numerous other jurisdictions

⁶ See *supra above*, FN2.

which held that no liability could attach in similar situations due to the public duty doctrine. (Doc. 56, pgs. 11 to 12).

For example, in *Goodwin v. City of Topeka*, the district court concluded that the public duty doctrine applies to a negligence claim against a city based on an alleged street defect. *See* 2021 Kan. Dist. LEXIS 940, *11 (Kan. 3d Jud. Dist. Ct. June 17, 2017). In its rationale, the district court determined that “[a]ny duty to keep city streets in a reasonably safe condition is owed to the public at large, not specifically to [the plaintiff].” *Id.* at *11-12. Other courts have similarly held that the public duty doctrine applies to governmental functions such as designing and implementing traffic control plans or exercising ownership, control, and supervision of streets. *See King v. Town of Selmer*, 2024 Tenn. App. LEXIS 9, *13-19 (Tenn. App. 2024) (public duty doctrine applied to town’s development and implementation of a traffic control plan for a festival that was open to the public); *see also Conine v. County of Snohomish*, 2007 Wash. App. LEXIS 1102, ¶ 24 (Wash. App. 2007) (“The ‘ownership, control, and supervision’ of streets is a governmental function for which public entities are immune.”).

2. *Nesta’s attorney admitted that there was no contract imposing any duty on the City to monitor the streetlight. All parties agree that the City was not obligated to monitor the streetlight.*

Nesta’s attorney attempts to circumvent the lack of ownership by asserting incorrectly that the City somehow had a contractual obligation to monitor all the

streetlights that NWE owned, operated, and maintained. (Appellant’s Brief, pg. 7 & 14-5).

The problem with this assertion is that the City disagrees—its representative asserted that no contract existed; NWE disagrees—its representative admitted that no contract existed. Furthermore, Nesta disagrees—Nesta’s counsel argued in the below proceedings that no contract existed, creating such a duty.

First, at the hearing on NWE’s Motion for Summary Judgment, City’s counsel clarified that the City only monitors City-owned streetlights and that the City did not own the subject streetlight; rather NWE owned, operated, and maintained the subject streetlight. (Appx. Tr. 12/17/24, pg. 25). City’s Counsel cited to the deposition of the City’s 30(b)(6) representative, Shawn Kohtz, at pages 175-176 and 169. (Page 169 of his deposition is attached to Doc. 93, Ex. G) (Pages 175-176 of his deposition are attached to Doc. 108, Ex. 1). Therein, Mr. Kohtz testified that the City does inspect *City-owned* streetlights to make sure they are operating, and that no bulbs are burnt out; however, the City does not inspect streetlights owned by NWE or any other entity (Id.).

Second, Nicole Benge, the NWE 30(b)(6) representative, admitted that NWE was unable to locate *any* contract related to the subject streetlight. (Doc. 112, Ex. 7, pg. 85:21 to 85:24 thereto, deposition of Nicole Benge) (Q: Okay. So — and you can’t find the contract that applies to this particular streetlamp, correct? A: Correct)

(*see also*, Id. pg. 84:21 to 84:22) (A: “Northwestern Energy cannot find a contract specific to this streetlight.”). Ms. Bengé also admitted that the Tariffs that Nesta cited are **not** with the City. (Id. pg. 84:2 to 84:10) (Q: “Okay. Does the public know you have this tariff with the City of Bozeman regarding this street lamp [sic] at 15th and College?” A: “The tariff isn’t with the City of Bozeman. This tariff is our general tariffs that, you know, were regulated by the public service commission, so it’s a tariff of all our facilities. It’s not specific to the City of Bozeman, and it’s a part of our greater tariffs.”) (*see also*, Id., pg. 115:10 to 115:13) (Q: “Okay. But you [NWE] don’t have a contract that says that [that customers will inform them of bulbs being burnt out]?” A: “Not for this specific light, but we have contracts with the City for many other lights.”).

Therefore, as between the City and NWE, it is agreed that no contract exists that created such a duty.

More importantly, Nesta’s counsel admitted that no such contractual duty existed. As discussed above, under Statement of the Case, Section B, Nesta’s counsel made several important statements and admissions at oral argument. For context, in briefing herein, Nesta asserts that a contractual obligation existed between the City and NWE related to monitoring streetlights:

- a. First, she admitted that NWE owned, operated, and maintained the streetlight. (Appx. 12/17/24, pg. 37:9 to 37:16).

- b. Second, she stated that there was **no contract** related to the subject streetlight between the City and NWE. (Appx. Tr. 12/17/24, pg. 36); (*see also*, Doc. 112, Ex. 7 thereto, deposition of Nicole Benge) (Q: Okay. So — and you can't find the contract that applies to this particular streetlamp, correct? A: Correct); (*see also*, Doc. 93, Ex. G thereto, deposition of Shawn Kohtz — no contracts exist for this old streetlight between NWE and the City).
- c. Third, there was an assertion that Tariffs created a legal duty to the City to inform NWE of any outage. However, she correctly argued that neither Tariff created such a duty.
 - i. As to the 2022 Tariff, (Doc. 93, Ex. C thereto, Bates numbers NWE 000019-20), that Tariff was created after the October 14, 2019, incident and therefore could not apply. (Appx. Tr.12/17/24, pg. 36).
 - ii. Regarding the other Tariff, which is dated January 1, 2017, (Doc. 93, Ex. C thereto, Bates numbers NWE 000021-25), it only put a duty of notification of a light being out for lights owned by NWE customers. Because everyone agreed that the City did not own the subject streetlight, that Tariff could not create such a duty. (Appx. Tr. 12/17/24, pg. 36-37).

Therefore, no contractual duty existed which again means that Nesta's purported premises liability fails.

- 3. *Nesta's theory of premises liability, i.e., that the City is liable for an inoperable streetlight that the City did not own, operate, or maintain, greatly expands premises liability because the streetlight was not the injury-causing product.*

Nesta's claim was not a premises liability case against the City, as to the streetlight, because the City did not own, operate, maintain, or control said streetlight. Even ignoring this point, Nesta's claim was not a premises liability claim because a premises liability claim is premised on the fact that the physical condition

of the property causes the injury, such as a pothole or patch of ice that is slipped on or a raised section of the sidewalk.

The City, and indeed, Nesta, could not cite the District Court to any premises liability claim wherein the actual property did not cause the injury. However, numerous cases from other jurisdictions have held that a premises liability claim must be based on the physical condition of the property that causes the injury. *Hernandez v. Dolgencorp of Tex., Inc.*, 2024 U.S. Dist. LEXIS 205473 (W.D. Tex. 2024); *Martuscello v. Jensen*, 134 A.D.3d *4 at *6; *Springer v. City and County of Denver*, 13 P.3d 794, 799 (CO Supreme Court); *Wilson v. Stephens*, 757 S.W.2d 297, 299 (W.D. MO 1988) (There was no allegation or proof that there was a dangerous condition in the physical condition of the school ground which contributed to cause the accident).

Further, *Laufenberg v. Golab*, 438 N.E.2d 1238 (Ill. App. Ct. 1982), is especially instructive. **There, the court held that no premises liability case exists where the plaintiff was struck by a car on a street—the car was an independent cause—and the injury was not attributed to the physical condition of the roadway.** The court stated:

The dispositive point of differentiation between each and all of these authorities and the case at bar is the fact that in all of these cases there was a physical defect of some kind either in the premises as such, or in the area very close to the premises. Absolutely to the contrary, in the case at bar, the injuries allegedly suffered by plaintiff have no

connection of any kind with the physical condition of the roadway but resulted entirely from the intervention of an independent factor beyond the control of the defendant.

Id. at 1241 (*underscoring added*); *see also*, *Flygare v. Ogden City*, 405 P.3d 970, 977 ¶ 29 (Utah App. 2017) (truck struck several pedestrians in a marked crosswalk where the streetlight was inoperable. Court held that no duty owed to the pedestrians as a matter of law stating: “the end result is the natural darkness of night that the Defendants had no duty eliminate.” *Citing* Rest. Torts, section 323(a)).

Here, no physical condition of the roadway or crosswalk existed that caused the alleged injury; rather, it was an entirely independent cause, i.e., the vehicle that Nelson was driving. The District Court did not err when it held that Nesta was not presenting a premises liability claim, and therefore, the public duty doctrine applied.

4. *Even assuming for argument’s sake that the District Court erred in holding that the City could not be liable for an inoperable streetlight that it did not own, operate, or maintain, said error is at most harmless error.*

“In order to establish that the court abused its discretion, the appellant [Nesta] must demonstrate that ‘the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason’.” *Seltzer v. Morton*, 2007 MT 62 ¶ 65, 336 Mont. 225, 154 P.3d 561. “[I]f an appellant demonstrates that a district court has abused its broad discretion in rendering an evidentiary ruling” then it must be determined whether the “demonstrated abuse of discretion constitutes a reversible error.” *Id.* No reversible error occurs “unless a substantial right of the appellant

[Nesta] is affected, nor does reversible error occur unless the evidence in question was of such character as to have affected the outcome of the trial.” *Id.*

The District Court correctly excluded the evidence related to causal effect, if any, of the inoperable streetlight. However, even if said ruling was erroneous, it is, at most, harmless error.

First, this is demonstrated by the Jury’s verdict. The Jury determined that the two individuals involved in the accident were the causes. Stated another way, Nelson was found to be inattentive, even though her headlights were operable she did not see Plaintiff, and Nesta incorrectly decided that she had enough to cross, although she clearly should have seen an approaching car’s headlights in the dark.

Conversely, the Jury unanimously held that the City’s street and intersection design did not cause the accident.

Second, Plaintiff chose not to introduce evidence of the streetlight being out that night despite the District Court’s ruling allowing evidence that the streetlight was out. Because Nesta chose not to introduce that fact at all, she cannot now claim error.

Third, and most importantly, the inoperable streetlight merely means that the natural state of darkness exists. That is a known and obvious situation.

Finally, Nesta’s argument omits that there were operable streetlights on the south side of West College. This is shown in Officer Peterson’s dashcam, Trial

Exhibit 2003. This is also depicted in the picture contained in the Fact Section. In that picture the south side is on the righthand side of the picture.

For these reasons, even if error, said error was harmless.

B. NESTA DID NOT PROPERLY PRESERVE THE ISSUE OF THE ABOLISHMENT OF THE PUBLIC DUTY DOCTRINE. FURTHER, EVEN IF PROPERLY PRESERVED, THE PUBLIC DUTY DOCTRINE IS BASED ON IMPORTANT PUBLIC POLICY, AND THE ISSUE OF ABOLISHMENT IS ONE FOR LEGISLATURE.

1. Nesta did not properly preserve this issue in the underlying litigation.

This Court has consistently held that it will not address either an issue raised for the first time on appeal or a party's change in legal theory. *See, e.g., Unified Indus., Inc. v. Easley*, 1998 MT 145 ¶ 15, 289 Mont. 255, 961 P.2d 100. "[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *State v. Akers*, 2017 MT 311 ¶ 12, 389 Mont. 531, 408 P.3d 142. To preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court. *Gateway Hosp. Grp. Inc. v. Phila. Indem. Ins. Co.*, 2020 MT 125 ¶ 15, 400 Mont. 80, 464 P.3d 44 (citations omitted); *see In re M.G.*, 2009 MT 97 ¶ 10 n.1, 350 Mont. 76, 204 P.3d 1242 (declining to address "various constitutional issues" surrounding the ICWA which were raised for the first time on appeal).

Nesta did not raise the issue of abolishing the public duty doctrine in her Brief in Opposition to the City's Motion for Summary Judgment, therefore the issue was

never briefed. While Nesta’s counsel did mention abolishment of the public duty doctrine in oral argument, she expressly stated: “we don’t need to prove that here” and agreed with the Court that abolishment was not what she was “hanging her hat on.” (Appx. Tr. 9/6/24, pgs. 30:24 to 31:10). Thus, the issue was not briefed or argued and Nesta’s counsel specifically indicated abolishment was not at issue. Nesta cannot now ask this Court to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.

2. *The public duty doctrine does not conflict with the abolishment of sovereign immunity because it is based on the fundamental concept of tort law that a duty must be owed to an individual, as opposed to the general public, to be actionable.*

Nesta asserts the public duty doctrine cannot be squared with Montana’s abolishment of sovereign immunity and §§ 2-9-101 and -102, M.C.A. This argument conflates the concept of immunity with the question of duty. The public duty doctrine provides that a governmental entity cannot be held liable for an individual plaintiff’s injury resulting from a duty owed to the general public rather than to the individual plaintiff. *Massee v. Thompson*, 2004 MT 121 ¶ 41, 321 Mont. 210, 90 P.3d 394. The doctrine was first formally recognized in Montana in *Nelson v. Driscoll*, 1999 MT 193, 295 Mont. 363, 983 P.2d 972, wherein this Court found that a police officer’s general duty to protect and preserve the peace is generally owed to the public at large and not to individual members of the public unless a “special relationship” exists between the officer and an individual. Though frequently applied

in the law enforcement context this Court has applied it in other contexts where there is a duty to protect the general public. *E.g.*, *Nelson v. State*, 2008 MT 336, ¶¶ 32-52, 346 Mont. 206, 195 P.3d 293 (finding licensing statutes regulating the practice of medicine imposed duty to protect public in general); *Prosser v. Kennedy Enter., Inc.*, 2008 MT 87, ¶¶ 12-13, 342 Mont. 209, 179 P.3d 1178 (finding zoning authority imposed duty to protect public in general).

Sovereign immunity is a different concept. It arose from the theory that “the king can do no wrong” and therefore could not be sued. Sovereign immunity completely bars tort liability based only on the defendant’s status. *See William L. Prosser, Law of Torts*, § 131 (4th ed. 1971). The Bill of Rights Committee of the 1972 Constitutional Convention completely abolished the “archaic doctrine” of sovereign immunity with Article II, Section 18, which provides that state and local government entities “shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.” *See Montana Constitutional Convention, Bill of Rights Committee Proposals*, February 23, 1972, at 31-33; *see also State ex rel. Mont. Bd. of Med. Examiners v. Mont. Second Judicial Dist. Court*, 398 Mont. 446, 454 P.3d 629 (2019) (Sandefur, J., dissenting) (discussing history). Importantly, Article II, Section 18, does not impose greater liability on governmental entities than what

would exist under general tort law principles. Further, it only addresses immunity and has no bearing on whether governmental entities owe legal duties.

The 1973 Legislature then enacted § 2-9-102, M.C.A., which states, “Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.” Tort claims mean any claim for damages caused by a negligent or wrongful act or omission of a government employee “under circumstances where the governmental entity, if a private person, would be liable to the claimant for the damages under the laws of the state.” § 2-9-101(1), M.C.A. The Legislature clearly intended to subject government entities and officers to tort liability only as otherwise provided under general tort law principles. *See State ex rel. Mont. Bd. of Med. Examiners*, 398 Mont. 446 (Sandefur, J., dissenting).

There is no conflict between the abolition of sovereign immunity, the tort claims act, and the public duty doctrine. The public duty doctrine assesses whether a legal duty is owed—a question that arises in all negligence cases. *Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277 (1989). “There can be no negligence in the absence of a duty.” *Green v. Hagele*, 182 Mont. 155, 158, 595 P.2d 1159 (1979). The public duty doctrine is merely “a special application or variant of the traditional common law limitation on foreseeability-based duty of care narrowly applicable to government entities and actors under certain circumstances.” *Md. Cas. Co. v.*

Asbestos Claims Ct., 2020 MT 70 ¶ 28 n.22, 399 Mont. 279, 460 P.3d 882 (citations omitted). This Court distinguished between sovereign immunity and questions of legal duty in *Orr v. State*, noting that the sovereign immunity defense does not mean that there is an absence of duty; it just means any breach of duty is not actionable against the sovereign. 2004 MT 354 ¶ 55, 324 Mont. 391, 106 P.3d 100.

The public duty doctrine does not bestow immunity because it does not apply in every case; indeed, “[t]he duty to behave as a reasonably prudent person does not simply disappear when an officer dons his or her uniform.” *Renenger v. State*, 2018 MT 228 ¶ 25, 392 Mont. 495, 426 P.3d 559 (citation omitted). The public duty doctrine has been found not to apply in premises liability cases where, unlike here, a governmental entity owns and controls property because the governmental entity owes a duty of care under premises liability principles. *Gatlin-Johnson v. City of Miles City*, 2012 MT 302 ¶ 18, 367 Mont. 414, 291 P.3d 1129 (collecting cases). The duty at issue in premises liability cases is not the governmental duty owed to all persons, but rather the duty to use ordinary care in maintaining premises in a reasonably safe condition and to warn of any hidden dangers. *Id.*, ¶¶ 17-19; *Kent v. City of Columbia Falls*, 2015 MT 139 ¶ 52, 379 Mont. 190, 350 P.3d 9. This is also consistent with §§ 2-9-101 and -102, M.C.A. because the governmental entity is subjected to liability to the extent a private person would be. *See Gatlin-Johnson*, ¶ 19.

3. Important public policy exists for the continued recognition of the public duty doctrine as this Court has recognized.

The public duty doctrine reflects “the concern that the judicial branch give appropriate deference to a coordinate branch of government when a decision allocates resources or involves other significant political, social, or economic determinations.” *Restatement (Third) of Torts: Liability for Phys. & Emot. Harm* § 37 cmt. *i*. If a duty were owed every time a governmental entity provides a protective function, the potential liability would be limitless. *Id.*

The public duty doctrine attempts to balance public policy favoring just compensation for injuries caused by the tortious conduct of others against competing public policy concerns (1) that the judicially-determined common law not unduly interfere with discretionary public safety functions constitutionally or legislatively charged to other coordinate branches of government and (2) that the public treasury not be responsible for harm not directly caused by government entities or actors.

State ex rel. Mont. Bd. of Med. Examiners, 398 Mont. 446 (Sandefur, J., dissenting).

The public duty doctrine is necessary to prevent municipalities from becoming “mired hopelessly in civil lawsuits.” *Prosser v. Kennedy Enter., Inc.*, 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178. In *Prosser*, this Court considered the applicability of the public duty doctrine to zoning decisions. *Id.*, ¶ 12. Decisions about a change in use of a commercial building were made under local municipal codes intended to benefit the general public. *Id.*, ¶ 23. This Court found this statutory authority to reject a land use change created a duty to the public at large. To hold the

government liable to specific plaintiffs would force the government “either to deny all but the most benign development plans or face innumerable lawsuits.” *Id.*, ¶ 27.

“Juries and courts are ill-equipped to judge ‘considered legislative-executive decisions’ as to how particular community resources should be or should have been allocated to protect individual members of the public.” *Morgan v. Dist. of Columbia*, 468 A.2d 1306, 1311-12 (D.C. Cir. 1983) (cited in *Kent*, ¶ 64 (Baker, J., dissenting)). The public duty doctrine exists to rein in negligence liability to prevent ceaseless litigation and to preserve the government’s discretion as to how to use limited resources to protect the public. *Id.* For example, when a local public entity lacks sufficient resources to meet every need of its community, government entities such as the police, fire, ambulance, and other emergency responders “must be able to prioritize and create responses without the benefit of hindsight.” *Sawicki v. Village of Ottawa Hills*, 37 Ohio St.3d 222, 525 N.E.2d 468, 477 (1988).

This Court recognized the underlying public policy concerns when the public duty doctrine was first discussed, quoting with approval *Ezell v. Cockrell*, 902 S.W.2d 394, 400-01 (Tenn. 1995). The *Ezell* Court acknowledged additional public policy considerations behind the doctrine:

[I]ndividuals, juries and courts are ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public. . . .

[S]evere depletion of [community resources] could well result if every oversight or omission of a police official resulted in civil liability. . . .

[Absent the public duty doctrine] police officials [would be placed] in the untenable position of insuring the personal safety of every member of the public, or facing a civil suit for damages. . . .

[P]olice officials often act and react in the milieu of criminal activity where every decision is fraught with uncertainty.

Id., 397-399.

The policy behind the public duty doctrine is evident by looking closely at the practical effect of what Nesta is requesting. If Nesta's argument stands, Montana municipalities would be subject to liability for failing to protect every pedestrian from injury caused by a third party when there is an alleged issue with the design of lighting at an intersection. The City has discretionary public safety functions, including designing public streets and crosswalks, and must be free to exercise those functions without fear of liability. Application of the public duty doctrine in this case protects municipalities such as the City from second-guessing how they should use their resources in designing Montana's streets and crosswalks. The broad duty of care to design public streets and crosswalks is a duty owed to all members of the public and cannot give rise to a specific duty owed to one individual.

4. *Whether the public duty doctrine should be abolished is an issue for the Legislature.*

Nesta suggests this Court should take this opportunity to abolish the public duty doctrine. This issue should be addressed by the Legislature. As Justice Sandefur explained in his dissent in *State ex rel. Montana Board of Medical Examiners*:

[W]e [the Court] have no business upsetting the well-settled public policy balance underlying the public duty doctrine to meet the particular exigencies of a single case. Long aware of this well-settled public policy balance, the Legislature is better suited to reconsider it in the wheelhouse of its constitutional prerogative than we are at the outer limit of ours.

398 Mont. 446 (Sandefur, J., dissenting). The Legislature's constitutional prerogative is to correct judicial interpretations by amending the law to align with its legislative intent and policy objectives. *See State v. Keech*, 2025 MT 169 ¶ 45, 423 Mont. 226, 573 P.3d 311 (Swanson, J., dissenting); *Md. Cas. Co. v. Asbestos Claims Ct.*, 2020 MT 70 ¶ 29 n.23, 399 Mont. 279, 460 P.3d 882. The Legislature is in the best position to assess the competing policy interests of just compensation for injuries and allowing governmental entities to perform their discretionary functions without exposing them to tort liability.

C. SHOULD THIS COURT REMAND THE CASE, THE ENTIRE CASE SHOULD BE RE-TRIED, INCLUDING DAMAGES.

This case should not be remanded as discussed. If this Court is inclined to remand, a new trial would be necessary on all issues, including liability, comparative fault, and damages. The City as the prevailing party is entitled to defend the judgment in its favor on any grounds, including damages. *See City of Missoula v.*

Robertson, 2000 MT 52 ¶ 20, 298 Mont. 419, 998 P.2d 144 (finding cross-appeal is not necessary for a prevailing party to defend its judgment on such grounds). Nesta has not provided any authority for the proposition that the damages award should remain if the case is remanded. The jury unanimously found the City was not liable. The City is allowed to defend the \$0 verdict on any grounds, liability or damages.


CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court *affirm* the District Court's rulings and the unanimous verdict in favor of the City. The City also respectfully requests that this Court deny the request to abolish the public duty doctrine.

The District Court correctly held that the City could not be liable for an inoperable streetlight that the City did not own or maintain. Finally, as to the claimed contractual duty for the City to monitor the NWE owned and maintained streetlights, even Nesta's own attorneys admitted that no contract existed which would so require.

DATED this 8th day of December, 2025

HALL & EVANS LLC

By: 

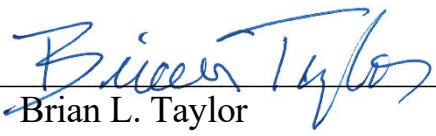
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this response brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,695 words, as determined by the undersigned's word processing program.

DATED this 8th day of December, 2025.

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