

**IN THE SUPREME COURT OF
THE STATE OF MONTANA**

Supreme Court Cause No. DA 25-0711

MARK GRAHAM, as Personal Representative
of the ESTATE OF JANICE GRAHAM,

Plaintiff/Appellant,

v.

VICTORIA HOWELL,

Defendant/Appellee.

APPELLEE'S RESPONSE BRIEF

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Howard F. Recht Presiding

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STATEMENT OF THE ISSUES

1. Did the District Court correctly find that Victoria did not negligently entrust a vehicle to Mr. Howell because he was an owner?

2. Did the District Court correctly grant summary judgment on the plaintiffs' claim that she was negligent in sending Mr. Howell a text message because (a) Victoria did not have a special reason to know that Mr. Howell would view the message, and (b) there is no evidence that doing so caused the accident?

STATEMENT OF THE CASE

The Estate of Janice Graham (the “Estate”) and Mark Graham (collectively, “plaintiffs”) initially sued Michael Howell, Victoria’s husband, on June 1, 2023, in DV-23-181 in Ravalli County (“the First Lawsuit”). [First Lawsuit, Doc. 1, Comp. and Demand for Jury Trial.] Plaintiffs did not blame Victoria in that case, instead alleging, “Mr. Howell was under the influence of drugs, i.e. marijuana, at the time of the accident. He was driving too fast for the conditions and overcorrected when he lost control of his vehicle.” *Id.*, ¶ 6. They did not contend that Victoria failed to prevent Mr. Howell from driving or that her text messages caused the accident, nor did they name “Doe” defendants. *Id.* The First Lawsuit remains pending.

The Estate, through Mr. Graham as personal representative, sued Victoria in this separate case on November 4, 2024. [Doc. 1, Comp. and Demand for Jury

Trial.] Mr. Graham did not sue Victoria personally. *Id.* Victoria filed a motion to dismiss, contending that this suit violated the rule against claim splitting. [Doc. 2, Def.'s Mot. to Dismiss and Br. in Supp.] The Estate opposed the motion. [Doc. 3, Graham's Resp. to Mot. to Dismiss.] The District Court denied the motion. [Doc. 5, Order Re Mot. to Dismiss.]

Victoria requested summary judgment on both of the Estate's claims. First, she claimed that the Estate's negligent entrustment claim failed as a matter of law because Mr. Howell owned the vehicle he was driving at the time of the accident. [Doc. 10, Br. in Supp. of Def.'s Mot. for Summ. J.] Second, Victoria alleged that Victoria, who did not have a reason to believe that Mr. Howell would view the text while driving, did not have a duty to refrain from texting her husband. *Id.* Alternatively, if she did have a duty, there was no admissible evidence that the texts, as opposed to road conditions or Mr. Howell's driving, caused the accident. *Id.* The Estate opposed. [Doc. 12, Graham's Resp. to Mot. for Summ. J.]

The District Court granted the motion for summary judgment. [Doc. 16, Order re Mot. for Summ. J.] The Court entered judgment on October 10, 2025, and the Estate appealed. [Docs. 18, Not. of Filing, and 19, Not. of Appeal to the Mont. Supreme Ct.] The parties had mediated the matter shortly before summary judgment was granted, and this Court granted their joint motion to waive the appellate mediation requirement.

STATEMENT OF THE FACTS

On the morning of April 2, 2023, Mr. Howell prepared to drive to a water conference in Idaho from his home in Stevensville. [App. Br. 9] Victoria and Mr. Howell were together. *Id.* Before leaving, Mr. Howell performed chores around the house and small farm. *Id.* Victoria prepared breakfast and called to obtain a road report for Mr. Howell's trip. *Id.*

Mr. Howell did not appear intoxicated. Victoria did not see him use marijuana. [Doc. 14, Def.'s Reply in Supp. of Mot. for Summ. J., citing Dep. Victoria Howell, 22, September 27, 2024 (testifying that she did not see Mr. Howell use marijuana and that he did not smell like marijuana).] In addition, Victoria testified that she "feels quite strongly" that Mr. Howell did not appear under the influence when he left. [*Id.*, citing Criminal Trial Transcript at 234 ("Q. So your impression of your husband at the time he left the house on April 2nd of 2023, was that he was not under the influence of any drugs? A. That is my impression. I mean, I feel quite strongly about that.")].

The Estate produced no evidence that Mr. Howell used marijuana before he left home that morning. In fact, Mr. Howell denies that he was under the influence, and his criminal conviction is under appeal. Furthermore, the Estate has no evidence that would show that, at his alleged level of intoxication, Victoria would have had to notice that he was under the influence.

After leaving, Mr. Howell drove southbound on Highway 93 in a 2000 Toyota 4Runner (the “Toyota”). [Doc. 10, Br. in Supp. of Def.’s Mot. for Summ. J., citing Criminal Transcript at 21.] Mr. Howell jointly owned the Toyota with Victoria. [*Id.* at 2, citing Title, HOWELL0961.] While Mr. Howell was driving, Victoria sent him a text message.¹ [*Id.*, citing Criminal Transcript at 312.] Mr. Howell *pulled over* to read and answer the text message. The communication between the two occurred when Mr. Howell was stopped and prior to the accident. *Id.*

Mark and Janice Graham were traveling northbound on Highway 93 on April 2, 2023. *Id.* at 21. Mr. Howell lost control of the Toyota on glare ice and crossed the centerline. He collided with the Grahams. [Doc. 1, Comp. and Demand for Jury Trial, ¶ 5]. Law enforcement later determined that Mr. Howell had marijuana in his system at the time of the crash, though he denied using cannabis that morning. [Doc. 10, Br. in Supp. of Def.’s Mot. for Summ. J., Ex. 2 (Criminal Transcript) at , 335.]

Victoria testified that Mr. Howell was a “slow and thoughtful” driver. *Id.* at 228. During Mr. Howell’s criminal trial, Victoria was asked whether Mr. Howell

¹ For the most part at trial this is referred to as a text message, but at one point Mr. Howell says that it was an email. *See* Criminal Transcript at 312. For the purposes of this brief, text message is used because it appears the majority of the time.

texted while he drove. Her answer: “While driving, never.” *Id.* at 231-32. While driving, he did not use his phone “in any way.” *Id.* at 232.

STANDARD OF REVIEW

This Court reviews an order on summary judgment de novo and applies the same standard under M. R. Civ. P. 56(c) as the district court. *Mont. HHS v. Johnson*, 2025 MT 276, ¶ 6, 425 Mont. 151, 580 P.3d 74 (citing *Pennell v. Nationstar Mortg., LLC*, 2022 MT 235, ¶ 7, 410 Mont. 526, 520 P.3d 796; *Denturist Ass’n of Mont. v. State*, 2016 MT 119, ¶ 7, 383 Mont. 391, 372 P.3d 466). Legal conclusions are reviewed for correctness. *Id.*

When issues are not purely legal, “[s]ummary judgment is proper where there is no genuine dispute between the parties as to the material facts, and the movant is entitled to judgment as a matter of law.” *Id.*, citing Mont. R. Civ. P. 56. Nonmoving parties are entitled to reasonable inferences. However, “[a]n inference has probative value as evidentiary proof of a disputed fact only if it is based on duly proved record facts and circumstances and can be reasonably deduced as a logical consequence thereof.” *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, 410 Mont. 239, 268, 518 P.3d 840 (citing, *inter alia*, MCA, §§ 26-1-102(1), -501, and -502, MCA. Suggested inferences have no value “if any link in the deductive reasoning is based on mere suspicion, conjecture, or speculation.” *Id.* (citations omitted). “Suspicion, conjecture, or speculation is . . . not a sufficient basis on

which to raise a genuine issue of material fact under M. R. Civ. P. 56(c)(3).” *Id.*
(internal quotations and citations omitted).

SUMMARY OF THE ARGUMENT

The District Court correctly granted summary judgment to Victoria. First, plaintiffs’ negligent entrustment claim fails as a matter of law. Mr. Howell was driving an SUV he owned jointly with Victoria. As a co-owner of the vehicle, he had every right to control it. More importantly, Victoria did not have a superior right to control the vehicle. She had no right to prevent Mr. Howell from driving it. Under *Bahm v. Dormanen*, summary judgment was appropriate.

Second, the District Court correctly granted summary judgment on the claim that Victoria was negligent by texting Mr. Howell. Contrary to plaintiffs’ claim, the Court did not conclude that no texter could ever be held liable for texting a driver, no matter the facts. Instead, like the other courts that have considered the issue, it took a balanced, nuanced approach. It noted that Victoria had no reason to believe that Mr. Howell would view the text while driving. Mr. Howell may have had a duty not to view a message while driving, but absent reason to know he would do so, Victoria has no duty to protect him from his alleged breach. Any other rule would wreak havoc in negligence law.

Finally, even if plaintiffs could show that Victoria owed them a duty, the District Court correctly found that no material issue of fact would entitle plaintiffs

to a trial. Simply put, there is no evidence that Mr. Howell reviewed the message while driving or that any such viewing caused him to lose control of the vehicle. Courts will not speculate on causation questions in the absence of non-conclusory evidence.

ARGUMENT

I. The District Court correctly dismissed the negligent entrustment claim because Victoria could not “entrust” the vehicle to Mr. Howell, a co-owner.

The sine qua non of a claim for negligent entrustment is permitting someone to take control of a potentially dangerous chattel, like an automobile. Ms. Howell did not permit Mr. Howell to take the Toyota. He jointly owned it; it is undisputed he had every right to use it, with or without Victoria’s permission or consent. Because Victoria lacked the legal authority to prevent Mr. Howell from using the Toyota, she cannot be liable for negligent entrustment. To hold otherwise would require affirmative acts to protect against another’s negligence, which violates black-letter Montana law.

A. *Bahm v. Dormanen* requires summary judgment because Victoria did not have a superior right to control the vehicle.

To prevail on a negligent entrustment claim, plaintiffs must show the defendant had a superior right to use of the vehicle. “[T]he theory of negligent entrustment provides that the owner or one in control of the vehicle and

responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment.” *Bahm v. Dormanen*, 168 Mont. 408, 411, 543 P.2d 379, 381 (1975) (emphasis removed). “[T]he basis of negligent entrustment is founded on control which is greater than physical power to prevent. A superior, if not exclusive, legal right to the object is a precondition to the imposition of the legal duty.” *Id.* 168 Mont. at 412; 543 P.2d at 382 (emphasis added).

Bahm controls. There, Nordahl and Dormanen were drinking and decided to go hunting. *See generally id.* They borrowed a vehicle from their friend, Tripp. *Id.* Nordahl was driving the vehicle alone and collided with Bahm. *Id.* Law enforcement found that Nordahl was intoxicated, and he settled the claim against him out of court. *Id.* Bahm, however, also sued Dormanen—the other man who decided to go hunting and borrow the vehicle—for negligently entrusting the vehicle to Nordahl. *Id.*

The District Court dismissed the negligent entrustment claim against Dormanen, and the Supreme Court affirmed. *Id.* Both Courts concluded that Tripp loaned the vehicle to both Dormanen and Nordahl. Neither had a “superior if not exclusive legal right” to use of the vehicle. *Id.* Therefore, as a matter of law, Dormanen could not be liable for the accident that Nordahl caused. *Id.*

The same reasoning applies here. Victoria and Mr. Howell owned the Toyota jointly. *See Ex. 1.* Montana law provides that, as here, when two names are listed

on a motor vehicle title, joint ownership of the vehicle with right of survivorship is presumed. Mont. Code Ann. § 61-3-202; *see also State v. Fife*, 2002 ML 522; 2002 Mont. Dist. LEXIS 3083 (interpreting the statute). “[E]ach owner has a right to exercise the incidents of ownership, which in the case of a motor vehicle, would include the use to the same.” Mont. A.G. Opinion No. 134 (Nov. 22, 1950). The Howells jointly owned the Toyota, so Mr. Howell had the full right to use the vehicle as he saw fit. As in *Bahm*, Victoria did not have a “superior if not exclusive right” to use the vehicle, so she could not “entrust” it to Mr. Howell. as a matter of law.

Other courts have reached the same conclusion in similar cases. In *Neale v. Wright*, 322 Md. 8, 20-21, 585 A.2d 196, 202 (1991), the Maryland Court of Appeals reasoned that when a motor vehicle is jointly owned, each owner uses that vehicle as a matter of right. *Id.* Moreover, “where a husband and wife own an automobile, neither ordinarily has the power to permit or prohibit the other from using the vehicle.” *Id.* Neither, therefore, can negligently entrust the jointly owned vehicle to the other as a matter of law. *Id.* *See also Sanchez v. Transportes Internacionales Tamaulipecos S.A. de C.V.*, No. 7:16-CV-354, 2017 U.S. Dist. LEXIS 215687, at *5-7 (S.D. Tex. Aug. 2, 2017) (determining that spouses cannot negligently entrust community property to the other); *Courter v. Logan*, No. 02-4126-SAC, 2002 U.S. Dist. LEXIS 25117, at *4 (D. Kan. Dec. 17, 2002) (“when

two adults are joint owners of the car and . . . [are] entitled to equal use and possession of the car, the essential control factor is missing. . . . If the alleged entruster does not have a superior or exclusive right of control over the car, then no negligent entrustment claim can occur.” (internal quotations and citations omitted).

This Court should therefore affirm. The District Court correctly recognized that Victoria did not have a superior legal interest in the Toyota. She could not, as a matter of law, “entrust” it to Mr. Howell, because he had every right to use it.

B. The Court cannot assume facts disproven by the summary judgment to reverse *Bahm* in a way that requires people to protect against the negligent acts of third parties.

The Estate’s argument is contrary to the facts and the law. First, in a transparent appeal to the Court’s sympathy for what is an obviously awful tragedy, the Estate repeats the claim that Victoria knew Mr. Howell was intoxicated when he left. The Estate cites only its complaint to support this claim. [App. Br. at 7.] A complaint is not admissible evidence and may not be cited to defeat summary judgment. *See Peters v. Hubbard*, 2020 MT 282, ¶ 26, 402 Mont. 71, 81, 475 P.3d 730, 738 (“The Hubbards instead cite to the allegations in their complaint. . . . This is not sufficient to meet their burden in responding to a motion for summary judgment.”).

All admissible evidence shows that Victoria did not think Mr. Howell was intoxicated on the morning of the accident. She believed he was sober when he

left. The Estate fails to provide any evidence from which an inference to the contrary could be drawn. On the morning of the accident, Victoria prepared breakfast. Mr. Howell attended to the normal chores he had around the couple's small farm. Victoria called to obtain a road report for Mr. Howell, and she said goodbye to him. Her undisputed testimony is that Mr. Howell was not intoxicated when he left. She did not know that he possessed marijuana:

8	Q.	So your impression of your husband at the
9		time he left the house on April 2nd of 2023, was that he
10		was not under the influence of any drugs?
11	A.	That is my impression. I mean, I feel quite
12		strongly about that.
13	Q.	Okay. And it just occurred to me, were you
14		aware that the Defendant was purchasing or acquiring
15		marijuana and marijuana products from, at least,
16		dispensaries?
17	A.	I didn't know that.

[Crim. Trans. 234 (testimony of Victoria Howell).]

At best, the Estate may claim that Mr. Howell had marijuana metabolites in his system when his blood was tested after the crash. It produces no evidence, however, that the level or type of substances detected after the accident showed that Mr. Howell must have used cannabis before he left home. Marijuana products were found in Mr. Howell's car, so if he was using cannabis, he may have used it

after he left home. *Id.* at 95-96 (discussing cannabis found in the Toyota after the accident).

And even if the Estate could show that Mr. Howell had used cannabis before he left, it has no evidence that his intoxication would have been apparent to Victoria. It has no expert toxicologist to opine on the point. Certainly, the level of intoxication that would be apparent based on a blood test taken hours after Mr. Howell left home is not within the ken of an ordinary juror. Expert testimony would be necessary. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 29, 380 Mont. 204, 213, 354 P.3d 604, 610 (“[E]xpert testimony is required when the issue presented is sufficiently beyond the common experience of the trier of fact and the testimony will assist the trier of fact in determining the issue or understanding the evidence.”).

The record is crystal clear: Victoria neither knew nor had reason to know if Mr. Howell was intoxicated when he left home. The Estate’s fundamental premise—that the Court should encourage people to prevent driving under the influence—is false. The Court should reject these claims as a matter of law.

Second, the Estate’s legal claim relies on a misstatement of the law. It contends it seeks “extension” of *Bahm*. Incorrect. It would require the Court to reverse that case and expand the claim of negligent entrustment to require irresponsible or even dangerous actions by a vehicle’s co-owner.

As discussed above, this Court unambiguously held that one must have a “superior” legal right to be liable for negligent entrustment. *Bahm v. Dormanen*, 168 Mont. 408, 412-13, 543 P.2d 379, 382 (1975). In response, the Estate claims that “[u]nder Montana’s joint tenancy for vehicle ownership, one owner’s right to the exclusive use can impose a duty to prevent another co-owner from engaging in unreasonably dangerous conduct such as driving under the influence on interstate highways.” [App. Br. 14.]

The Estate provides no authority for that proposition. It does not analyze why co-owners do not inherently fail the *Bahm* test, as the District Court found. It provides no authorities from other states that a co-owner has an obligation to somehow physically restrain a potentially intoxicated person from using a vehicle they have the legal right to use. It fails to address any of the out-of-state authorities discussed above, which supports the District Court’s decision.

The Estate also resorts to citation of facts that are not of record to salvage its position. It claims that Victoria could have “refused to provide the keys” to the vehicle. There are no facts in the summary judgment record that would support the argument that Victoria possessed the only set of keys to the vehicle. Regardless, the Court must refuse to consider unsupported, false, and newly raised facts on appeal.

The Estate also contends that Victoria could have “disabled” the Toyota or driven it away herself to prevent Mr. Howell from using the vehicle. Requiring a

co-owner to remove the distributor cap from their spouse's vehicle is farcical. Moreover, interference with the use of a chattel by a co-owner is, in and of itself, illegal. *Norick v. Dove Constr.*, 204 Mont. 57, 62, 662 P.2d 1318, 1320 (1983) (recognizing tort for interference with chattel rights).

Moreover, it highlights the fundamental problem with the Estate's position. Its claim is not that Victoria "entrusted" Mr. Howell the ability to use a dangerous chattel when he was intoxicated. Rather, it argues that Victoria had an affirmative obligation to protect other drivers from Mr. Howell's alleged intoxicated driving. The case is not about entrustment; it is about protection.

The Montana Supreme Court has never found that a co-owner has a tort duty to police a co-owner's use in that way. In fact, it has held that "a person is not liable for the actions of another and is under no duty to protect another from harm in the absence of a special relationship of custody or control" over the injured person. *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 24, 295 Mont. 416, 986 P.2d 1081 (internal citations and emphasis removed), *citing Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 279 (1989); *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984).

The Estate's claims are without basis in fact or law. All evidence supports Victoria's claim that she did not believe Mr. Howell was intoxicated. Even if she

did, this Court has consistently held that one has no duty to protect from the torts of third parties.

The District Court was therefore correct. This Court has held that, to be liable for negligent entrustment, one must have a superior legal right to a vehicle. That is, one must have the right to prevent the tortfeasor from using it. Here, it is undisputed that Victoria and Mr. Howell had equal rights to the vehicle. Finally, it should recognize that, despite its rhetoric, the Estate fails to provide any admissible evidence that Victoria knew or should have known that Mr. Howell was intoxicated. In fact, the undisputed evidence shows that she did not think he was under the influence. Either way, the Estate's claim fails as a matter of law.

II. The District Court correctly found that there was no evidence that Victoria knew that Mr. Howell would be distracted by a text message, so summary judgment on that issue is appropriate.

The Estate erects a straw man. It suggests that the District Court found no duty to refrain from texting, even if the sender was aware that the recipient was driving, dangerously intoxicated, and certain to concentrate on the text to the exclusion of the road. That is not the case. Like other courts that have ruled on the issue, the District Court held only that Victoria did not have a duty to refrain from texting her husband because she (a) did not believe he texted while driving, (b) believed him to be a careful driver, and (c) did not believe that he was intoxicated. The District Court's approach best represents the need to protect those on

roadways while understanding that distracted driving, not texting, must be the primary focus of public safety efforts.

“The question of whether a legal duty is owed by one person to another, as well as the scope of any such duty, are questions of law.” *Poole v. Poole*, 2000 MT 117, ¶ 19, 299 Mont. 435, 1 P.3d 936 (citation omitted). *Bassett v. Lamantia*, 2018 MT 119, ¶ 25, 391 Mont. 309, 417 P.3d 299, describes how Montana Courts determine whether a duty exists:

The existence of a legal duty . . . turns primarily on foreseeability. Therefore, we ask whether the injured party was a foreseeable plaintiff—whether he was within the scope of risk created by the alleged negligence of the tortfeasor. While the question of duty is usually presented in terms of the actor’s obligation, the essential question is whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.

Id. (citations and internal quotations omitted).

“Traditionally . . . a person is not liable for the actions of another and is under no duty to protect another from harm in the absence of a special relationship of custody or control.” *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 24, 295 Mont. 416, 986 P.2d 1081 (internal citations and emphasis removed), *citing Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 279 (1989); *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984). *See also Emmanuel v. Great Falls School District*, 2009 MT 185, ¶ 12, 351 Mont. 56, 209 P.3d 244 (school district

did not owe a duty to Emmanuel to protect from an auto accident caused by a student).

A. The District Court appropriately took a nuanced approach to a complicated problem.

The Estate argues against a ruling the District Court did not make. The ruling was more nuanced than the all-or-nothing approach the Estate chose to attack. Specifically, the Court found:

Graham has not shown that Victoria was aware of Michael having a history of texting and driving. Graham has not alleged that Victoria urged or encouraged Michael to read or respond to her texts while driving, nor has he provided facts to support his contention that Michael's reading Victoria's texts (if he did) while driving lead to the unfortunate accident with the Grahams. The law places the duty not to text and drive on the driver, Michael in this instance, not Victoria. Because reading and responding to text messages while driving could be negligent, without the ability to control or determine what the recipient will do with the message, someone who sends a text message does not foreseeably place others at risk.

[Doc. 16, Order Re Mot. for Summ J. at 7.]

Several Courts have reached the same conclusion. In *Hall v. Naguit*, 2022 Cal. Super. LEXIS 24634, *8, opinion attached as Exhibit 3, Cosio sent her husband over ten angry, profanity-filled text messages, knowing he was driving at the time. *See generally Id.* Naguit was also under the influence of drugs and/or alcohol when he crashed into the plaintiffs' motorcycle. *Id.* Cosio argued that she

owed no legal duty to the plaintiffs to refrain from texting Naguit while he was driving. *Id.*

The court ultimately held that there is no general legal duty to refrain from texting someone who is known to be driving. *Id.* It found that foreseeability favored Cosio, as drivers can choose to read texts safely when stopped or by using hands-free technology. *Id.* The court also concluded that Cosio's texts were not closely connected to the accident. *Id.* Instead, Naguit's own decisions—to drive under the influence, to read and respond to messages while driving, and to ignore hands-free options—were the direct causes. *Id.*

Regarding moral blame, the court emphasized that the driver, not Cosio, breached the duty to drive as a reasonably prudent person. *Id.* Cosio did not compel him to respond to her texts. *Id.* Finally, the court noted that while California law restricts cell phone use by drivers, it imposes no such restrictions on individuals sending messages to drivers. *Id.* Requiring non-drivers to anticipate and avoid texting someone who might be driving would place an unreasonable burden on individuals and have broad societal consequences. *Id.* Taken together, the court found that recognizing a duty under these circumstances would inappropriately regulate common behavior only tenuously linked to the harm and would require complex public policy decisions best left to the legislature. *Id.* at 13.

Kubert v. Best, 432 N.J. Super. 495, 506, 75 A.3d 1214, 1221 (Super. Ct. App. Div. 2013) arose from a similar situation. Colonna texted Best, a man she was seeing socially, while he was at work and afterward. *See generally id.* Best decided to text Colonna back while he was driving. *Id.* Best crossed the center line and collided with the Kulberts. *Id.*

The trial judge concluded Colonna did not have a legal duty to avoid sending a text message to Best even if she knew he was driving. *Id.* at 507. The appeals court concluded that a person sending text messages only has a duty to refrain from sending texts if they know or have reason to know that the driver will view the text while driving. *Id.* Importantly, the Court concluded that a person should not be held liable for sending a wireless transmission simply because some recipient might use a cell phone unlawfully and become distracted while driving. *Id.* at 514-15.

As the District Court recognized, Victoria did not owe a duty under these standards. It is undisputed that Victoria believed that Mr. Howell was a “slow and thoughtful” driver. [Doc. 10, Br. in Supp. of Def.’s Mot. for Summ. J., Ex. 2 (Criminal Transcript) at 228.] Victoria was asked whether Mr. Howell texted while he drove. Her answer: “While driving, never.” *Id.* at 231-32. Mr. Howell did not use his phone in any way while driving. *Id.* at 232. The Court should find that Victoria did not owe a duty to the Grahams to protect against Mr. Howell’s texting or driving. Summary judgment was appropriate. This Court should affirm.

A ruling imposing a general duty to refrain from electronically communicating with any party who could be driving is unworkable. Notifications, calls, emails, calendar reminders, and other digital notices are omnipresent. A recent study found people may receive, on average, up to 293 notifications on their phones each day. Tiffany G. Munzer, MD, Alison L Miller, Ph.D, Heidi M. Weeks, Ph.D, Niko Kaciroti, Ph.D, Jenny Radesky, MD, *Greater Mobile Device-Prompted Phone Pickups are Associated with Daily Parent Stress*, *Acta Paediatr.* 2024 August ; 113(8): 1868–1875. That is more than one notification every five minutes.

As a society, we rely on these notifications and means of communication for all manner of things, from business to personal health. We understand that these notifications pose risks to our physical and emotional health and largely require individuals to assess and mitigate those risks. In some cases, such as texting while driving, governments have determined that certain risks associated with electronic communications must be legally proscribed.

But these laws and norms prohibit acts by the recipient of electronic communications, not the sender. Laws prohibit texting while driving and sending electronic communications to someone who may be driving. That is because distracted driving is a risky behavior, not electronic communication per se. Certainly, in some instances, a communicator may have special reason to know that the act of communication carries special risks. But this is not the case.

Electronic communication is wide-reaching and diverse. Emails are sent to hundreds of thousands of recipients simultaneously. Senders do not usually understand the notification settings of the device to which they send a message. In the case of email, a sender does not necessarily know whether messages are delivered to a mobile device. Finally, electronic communication is generally used when the sender and recipient are not physically present. There is usually no way to know whether you are texting someone while they are driving or engaged in another potentially dangerous activity.

Unless the Court adopts the flexible approach of the district court, any electronic message could reach the recipient while they are driving or otherwise engaged in conduct that could pose a risk to others. That cannot, in and of itself, be the basis of a lawsuit. If a driver causes an accident and received an email around the same time, that is no more than a coincidence, until proven otherwise. The burden on Courts to gatekeep these issues could be extreme.

This Court should therefore affirm the District Court. Victoria had no reason to believe that Mr. Howell would be distracted by her message. She knew him as a cautious driver who did not review messages while operating a vehicle. She did not (and does not) believe that Mr. Howell was intoxicated. She is like any of us—she sent a communication, trusting that the recipient would handle it responsibly. In the

absence of this information, she has no greater duty to protect those on the road than someone who sends a “blast” email to thousands who may be driving.

B. Even if Victoria owed a duty, the Court appropriately granted summary judgment because the plaintiffs have nothing more than speculation to connect her message to the accident.

The Estate argues that the District Court failed to draw a reasonable inference in its favor, which entitled it to a trial on causation. “A party advancing a claim of negligence must prove: (1) the existence of a duty; (2) a breach of that duty; (3) causation; and (4) damages. Failure to prove any single element of a negligence claim is fatal to the entire claim.” *Norris v. Olsen*, 2024 MT 123, ¶ 21, 417 Mont. 14, 550 P.3d 323 (internal citations and quotations omitted). Here, the undisputed evidence demonstrates that Mr. Howell was not distracted by his phone; rather, he lost control on an extremely slippery road. The District Court correctly failed to consider the Estate’s proposed inference, which is hopelessly speculative and contrary to the established record. Summary judgment was appropriate.

Although a responding party is entitled to reasonable inferences on summary judgment, “[a]n inference has probative value as evidentiary proof of a disputed fact only if it is based on duly ‘proved’ record facts and circumstances and can be reasonably deduced as a logical consequence thereof.” *Kostelecky*, 2022 MT 195 (additional citations omitted). “In contrast, an inference or suggested inference has

no probative value as circumstantial proof of a disputed fact if any link in the deductive reasoning is based on mere suspicion, conjecture, or speculation.” *Id.* “Suspicion, conjecture, or speculation is thus not a sufficient basis on which to raise a genuine issue of material fact under M. R. Civ. P. 56(c)(3).” *Id.* (internal quotations and citation omitted).

This Court applied this principle in a similar context in *Kostelecky*. There, a child was being cared for by Peas in a Pod, a day care. *Id.* ¶ 5. The child was upset one day and the family took her to see a doctor. *Id.* The doctor did not find evidence of trauma. The child returned the next day and was also upset. *Id.* The child was then cared for at home for a period, before returning to her doctor more than a week later. *Id.* ¶ 8. The neurologist found concerning signs in the child’s skull and referred her to a pediatric neurologist in Salt Lake City. *Id.* That specialist found subdural hematomas which required draining to relieve pressure. *Id.* ¶ 9. He testified that the likely cause of the hematomas was trauma, although he could not say if it was accidental or intentional, or when it occurred. *Id.* ¶ 11.

Plaintiffs contended that the specialist had testified that trauma likely caused the hematomas. Additionally, they alleged that the timing of the baby becoming upset lead to an inference that something that happened at Peas in a Pod caused the accidental or intentional trauma. The District Court rejected this argument and

found that plaintiffs had failed to meet their burden of proof on causation, and the Supreme Court affirmed. *Id.* ¶ 16.

Plaintiffs argued to this Court that Peas in a Pod’s representatives lacked credibility when they testified that they did nothing and knew of nothing that could have caused the hematomas. *Id.* ¶ 38. This Court correctly recognized that credibility problems at most negate the causation testimony of the witness. They cannot suffice as independent evidence that the defendant caused an injury:

Viewed in the light most favorable to Kosteleckys, any conflicting or contradictory evidence undermining the credibility of the testimonial denials of Allen or Williams [the Peas in a Pod agents] regarding their lack of knowledge regarding the cause or source of any head trauma experienced by S.M.K. would still not provide a non-speculative basis upon which the finder of fact could reasonably conclude, on a more probable or likely than not basis, that any particular act or omission of either was the cause-in-fact of head trauma to S.M.K. In other words, mere disproof of the defendants’ testimonial denials that they did or know of nothing that could have caused head trauma to S.M.K. is not a non-speculative evidentiary basis upon which to reasonably deduce that they acted or failed to act in any particular manner that did.

Id. Thus, the fact that the injury may have happened while the baby was in Peas in a Pod’s care was insufficient as a matter of law to show that it did something that caused the injury. The Court found that this “glaring evidentiary gap” could not be spackled over by an appeal to allow an “inference.”

A similar “glaring evidentiary gap” exists here. Like in Kostelecky, the evidentiary record discloses no evidence that the act in question caused an injury. When Mr. Howell received the text, he pulled over. Mr. Howell testified that, upon

receiving the text notification, he did not check or respond to it while driving. [Criminal Trial Trans. at 312.] Instead, he waited until he reached a safe location to pull over. *Id.* He stated, “I proceeded until I got to the four-lane outside of town, past Murdoch’s, where there’s nothing much around, and pulled over.” *Id.* This indicates that he did not engage with the text while actively driving, which eliminates the possibility of distracted driving at that moment.

Like the Kosteckys, the Estate contends that the message may have been delivered at a different time, which would undercut Mr. Howell’s testimony. Its analysis, however, fails to create a genuine issue of fact. At most, the Estate argues that the messages were sent nearer to the time of the accident than the testimony claims.

Even if the Court completely disregarded the sworn testimony, the Estate would still have to provide non-speculative evidence that the message distracted Mr. Howell and that the distraction was a cause-in-fact of the accident. It provides no such evidence. The claim that the text may have caused the accident is pure speculation, and as this Court found in *Kostecky*, a possible temporal propinquity cannot create an inference to support the causation plank of negligence.²

² Under the circumstances, the determination of whether a driver was distracted enough to cause the loss of control, as opposed to the conditions, is also outside the ken of a normal jury. It would require expert testimony that the Estate has not provided. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 29, 380 Mont. 204, 354 P.3d 604.

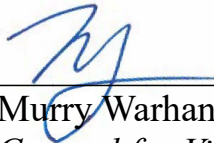
The Estate's claims therefore fail even if Victoria owed a duty under these facts. There is no evidence that Mr. Howell was viewing the message at the time he lost control on icy roads. In fact, all evidence is to the contrary. He pulled off the road to respond. Even if he was viewing the message, there is no evidence that his diverted attention is what caused him to lose control.

CONCLUSION

This Court should affirm the District Court's grant of summary judgment to Victoria.

DATED this 9th day of February 2026.

JACKSON, MURDO & GRANT, P.C.



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 6,221 words, excluding certificates of service and compliance.

By:  _____
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CERTIFICATE OF SERVICE

I, Murry Warhank, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-09-2026:

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