

IN THE SUPREME COURT OF THE STATE OF MONTANA

<p>S. W., a minor, by and through her Guardian JEFFREY FERGUSON,</p> <p>Plaintiff and Appellee,</p> <p>vs.</p> <p>STATE OF MONTANA, by and through the Montana Department of Public Health and Human Services,</p> <p>Defendant and Appellant.</p>	<p>No. DA 25-0783</p>
--	-----------------------

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighth Judicial District Court
Cascade County District Court Cause No. DDV 13-813(b)
The Honorable Amy P. Eddy, Presiding

March 19, 2026

Appearances:

Maxon R. Davis
DAVIS, HATLEY, HAFFEMAN
& TIGHE, P.C.
P.O. Box 2103
Great Falls, MT 59903-2103
Telephone: (406) 761-5243
max.davis@dhhtlaw.com
Attorney for Appellant

Sarah Mazanec
STATE OF MONTANA
RISK MANAGEMENT AND TORT
DEFENSE
1625 11th Ave
Helena, MT 59604
Telephone: (406) 444-3562
sarah.mazanec@mt.gov
Attorney for Appellant

Eric Brooks
MOORE, COCKRELL,
GOICOECHEA & JOHNSON, P.C.
145 Commons Loop, Suite 200
PO Box 7370
Kalispell, MT 59904-0370
Telephone: (406) 751-6000
ebrooks@mcgalaw.com
Attorney for Appellant

Thomas J. Leonard
BOONE KARLBERG P.C.
201 West Main, Suite 300
PO Box 9199
Missoula, MT 59807-9199
Telephone: (406) 543-6646
tleonard@boonekarlberg.com
Attorney for Appellant

Benjamin R. Graybill
Raph Graybill
GRAYBILL LAW FIRM, P.C.
PO Box 3586
Great Falls, MT 59403-3586
brg@silverstatelaw.net
rgraybill@silverstatelaw.net
Attorney for Appellee

Lawrence A. Anderson
ATTORNEY AT LAW, P.C.
PO Box 2608
Great Falls, MT 59403-2608
laalaw@me.com
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS4

STANDARD OF REVIEW11

SUMMARY OF ARGUMENT12

ARGUMENT14

 I. Judgment Should Be Entered For The State Because
 S.W. Failed To Prove Causation-In-Fact.....14

 II. Judgment Should Be Entered For The State Because
 Hocter's Assault Was Unforeseeable, Beyond The Scope
 of Duty, And Was A Superseding Intervening Cause Of
 S.W.'s Injuries.....21

 III. The District Court's Erroneous Tailored Superseding
 Intervening Causation Instruction Requires Reversal.....24

 IV. The District Court's Erroneous Adverse Inference
 Instruction Requires Reversal.28

 V. The District Court Erred When It Denied The State's
 Challenges To Jurors For Cause.32

 VI. The District Court Incorrectly Concluded The Statutory
 Limit On State Tort Liability Does Not Apply To State-
 Specific Duties.34

 VII. The District Court Erred When It Incorrectly Awarded
 Judgment Interest.40

CONCLUSION.....41

CERTIFICATE OF COMPLIANCE.....42

TABLE OF AUTHORITIES

Cases

Associated Press v. Crofts, 2004 MT 120, 321 Mont. 193, 89 P.3d 97111

Blanton v. Dep’t of Pub. HHS, 2011 MT 110, 360 Mont. 396, 355
P.3d 123640

Brookshire Bros. Ltd. v. Alridge, 438 S.W.3d 9 20 (2014, Tex.).....28

Bryan v. Yellowstone County Elem. Sch. Dist. No. 2, 2002 MT 264,
312 Mont. 257, 60 P.3d 38126

Busta v. Columbus Hosp., 276 Mont. 342, 371, 916 P.2d 122 (1996).....27

City of Missoula v. Fox, 2019 MT 250, 397 Mont. 388, 450 P.3d 898.....34

Cottonwood Hills, Inc. v. State, Dept. of Labor & Industry, 238 Mont.
404, 777 P.2d 1301 (1989)38

Crail Creek Assocs. LLC v. Olson, 2008 MT 209, 344 Mont. 321, 187
P.3d 66712

Dick Irvin Inc. v. State, 2013 MT 272, 372 Mont. 58, 310 P.3d 52438

Drugge v. State, 254 Mont. 292, 837 P.2d 405 (1992).....37

Fisher v. Swift Transp. Co., 2008 MT 105, 342 Mont. 335, 181 P.3d
60121

Fowler Packing Co. v. Lanier, 844 F.3d 809, 815 (2016, 9th Cir.)26

Gudmundsen v. State ex rel. Mon. State Hosp. Warm Springs, 2009
MT 56, 349 Mont. 297, 203 P.3d 813 37, 38

Guertin v. Moody’s Mkt., 265 Mont 61, 68, 874 P.2d 710 (1994)26

<i>Harris v. Hanson</i> , 2009 MT 13, 249 Mont. 29, 201 P.3d 151	11
<i>In re I.B.</i> , 2011 MT 82, 360 Mont. 132, 255 P.3d 56	14
<i>In re J.D.</i> , 2025 MT 274, 425 Mont. 123, 580 P.3d 63	14
<i>Kaldahl v. State Highway Commission</i> , 158 Mont. 219, 490 P.2d 220 (1971).....	38
<i>Kenser v. Premium Nail Concepts, Inc.</i> , 2014 MT 280, 376 Mont. 482, 338 P.3d 37	11
<i>L.B. v. United States</i> , 2022 MT 166, 409 Mont. 505, 515 P.3d 818	36
<i>Labair v. Carey</i> , 2012 MT 312, 367 Mont. 453, 291 P.3d 1160	18
<i>Mang v. Eliasson</i> , 153 Mont. 431, 458 P.2d 777 (1969).....	22
<i>McConkey v. Flathead Elec. Coop.</i> , 2005 MT 334, 330 Mont. 48, 125 P.3d 1121	25
<i>Meech v. Hillhaven W.</i> , 238 Mont. 21, 776 P.2d 488 (1989)	39
<i>Meloy v. Speedy Auto Glass, Inc.</i> , 2008 MT 122, 342 Mont. 530, 182 P.3d 741	11
<i>Montana State University-Bozeman v. Montana First Judicial District Court</i> , 2018 MT 220, 392 Mont. 458, 426 P.3d 541	28
<i>Pfost v. State</i> , 219 Mont. 206, 713 P.2d 495 (1985).....	40
<i>Prindel v. Ravalli County</i> , 2006 MT 62, 331 Mont. 338, P 36, 133 P.3d 165	22
<i>Reff-Conlin’s, Inc. v. Fireman’s Fund Insurance Company</i> , 2002 MT 60, 309 Mont. 142, 45 P.3d 863	11, 12
<i>Reino v. Montana Mineral Land Dev. Co.</i> , 38 Mont. 291, 88 P. 853 (1909).....	27
<i>S.W. v. State</i> , 2024 MT 55, 415 Mont. 437, 578 P.3d 551	passim

<i>Shane v. Butte E. R.R.</i> , 37 Mont. 599, 97 P. 958 (1908)	12
<i>Small v. McRae</i> , 200 Mont. 497, 651 P.2d 983 (1982).....	38
<i>Spoja v. White</i> , 2014 MT 9, 373 Mont. 269, 317 P.3d 153	11
<i>State ex rel. Byorth v. District Court of Fourteenth Judicial Dist., in and for County of Golden Valley</i> , 175 Mont. 63, 572 P.2d 201 (1977).....	37, 38
<i>State v. Johnson</i> , 2019 MT 68, 395 Mont. 169, 437 P.3d 147	33
<i>State v. Thomas</i> , 2019 MT 155, 396 Mont. 284, 445 P.3d 777	34
<i>Stenstrom v. State, Child Support Enforcement Div.</i> , 280 Mont. 321, 930 P.2d 650 (1996)	38
<i>Unidentified Police Officers 1 v. City of Billings</i> , 2019 MT 299, 398 Mont. 226, 454 P.3d 1205	11
<i>Walden v. Yellowstone Elec. Co.</i> , 2021 MT 123, 404 Mont. 192, 487 P.3d 1	29
<i>Wilson v. Sellers</i> , 584 U.S. 122, 138 S. Ct. 1188 (2018).....	26
<i>Zubulake v. UBS Warburg LLC</i> , 220 F.R.D. 212, (2003, S.D.N.Y.)	28
Statutes	
Mont. Code Ann. § 2-9-101	35, 36, 37, 39
Mont. Code Ann. § 2-9-108.....	passim
Mont. Code Ann. § 2-9-202.....	36
Mont. Code Ann. § 2-9-211	36
Mont. Code Ann. § 2-9-220	36
Mont. Code Ann. § 2-9-301	35, 37
Mont. Code Ann. § 2-9-305	37

Mont. Code Ann. § 2-9-314.....37

Mont. Code Ann. § 2-9-317..... 14, 40, 41

Mont. Code Ann. § 41-3-10114

Mont. Code Ann. § 41-3-301 9, 10, 14

Mont. Code Ann. § 41-3-422..... 10, 15

Other Authorities

Black's Law Dictionary, 10th Ed.26

Black's Law Dictionary, 7th Ed.26

STATEMENT OF ISSUES

1. The District Court incorrectly denied the State's motions for summary judgment and judgment as a matter of law that S.W. failed to prove causation-in-fact.
2. The District Court incorrectly denied the State's motions for judgment as a matter of law that because Alicia Hocter's assault of S.W. was unforeseeable, it was outside the scope of any duty owed by the State and was a superseding intervening cause of S.W.'s injuries.
3. The District Court's tailored superseding intervening causation instruction, Jury Instruction No. 24, was error requiring reversal.
4. The District Court's adverse inference instruction, Jury Instruction No. 19, was error requiring reversal.
5. The District Court erred when it denied the State's challenges to jurors for cause.
6. The District Court erred when it concluded the statutory damages cap, MCA § 2-9-108, does not apply to this case.
7. The District Court erred when it awarded judgment interest against the State.

STATEMENT OF THE CASE

On February 18, 2009, Alicia Hocter (“Hocter”), the then-girlfriend of S.W.’s father Jacob Arnott (“Arnott”), assaulted S.W. S.W. alleges the State breached its duty of care to her in investigating and responding to alleged reports of child abuse and neglect over seven weeks before, and claims that, had the State not breached its duty of care, Hocter would not have assaulted her on February 18, 2009. S.W. also claims the damages limitations of MCA § 2-9-108 are inapplicable or unconstitutional.

This case was previously tried, appealed, reversed, and remanded for retrial. *S.W. v. State*, 2024 MT 55, ¶ 57, 415 Mont. 437, 578 P.3d 551 (“*S.W. I*”).

Before retrial, the State moved for summary judgment because there is no evidence of causation-in-fact. **Docs. 169-170**. The State established that, even if a duty arose to remove S.W. from Arnott’s household in December 2008, which it did not, there is no evidence S.W., if removed in December 2008, would have remained out of Arnott’s care on February 18, 2009. DPHHS could only have unilaterally removed S.W. for a few days. Any longer removal would have required action by a local prosecutor and the district court, and there is no evidence of how that suit-within-the-suit would have resolved. The District Court denied the State’s motion.

The case was retried before a jury in July 2025. During trial, at the close of S.W.’s case-in-chief and the close of all the evidence, the State made and renewed

motions for judgment as a matter of law that: (1) S.W.'s claim failed for lack of causation-in-fact; (2) S.W.'s claim failed because Hocter's assault was unforeseeable and beyond the scope of any duty owed to S.W. by the State; and (3) S.W.'s claim failed because Hocter's assault was an unforeseeable superseding intervening cause of S.W.'s injuries. The District Court denied these motions. When instructing the jury, the District Court gave an incorrect tailored superseding intervening causation instruction and an incorrect adverse inference instruction regarding the State's inability to produce photographs of bruising of S.W., both over the State's objection.

The jury returned a verdict against the State. The jury voted 11-1 the State was negligent in failing to protect S.W. and 8-4 the State's negligence was a cause of injury to S.W. The jury awarded \$11,237,500. **Doc. 233-1.**

After trial, the District Court declined to address the applicability of the statutory damages cap, MCA § 2-9-108, finding the prior determination it did not apply remained in effect. **Id.; Doc. 237.**

The State timely renewed its motions for judgment as a matter of law. **Docs 238-239.** The State also timely filed a Rule 59(e) motion to alter or amend judgment, to conform the final judgment to the requirements of the statutory damages cap and to correct the District Court's award of post-judgment interest against the State. **Docs. 240-241.** The District Court deemed these motions denied. **Doc. 246.**

The State timely appealed. **Doc. 247.**

STATEMENT OF THE FACTS

S.W. was born to Kendra Bernardi and Arnott in August 2008. **Doc. 198, p.**

1. Soon after her birth, Bernardi and Arnott began to call Centralized Intake at Child Family Services Division, Department of Health and Human Services (“CFSD”) to report concerns about the other’s parenting. **Exs. 501-503¹**. CFSD Case Worker Cari Davids was assigned to investigate the various reports against Bernardi and Arnott. Davids investigated each allegation and determined S.W. was safe in both Arnott’s and Bernardi’s custody. **Exs. 506-507.**

On November 24, 2008, Arnott and Hocter brought S.W. to pediatrician Dr. Maynard stating they were concerned Bernardi had abused S.W. **Ex. 508.** Arnott reported Bernardi said she used to pinch children out of jealousy at the daycare where she worked because the children were going home to “parents who cared.” *Id.* Dr. Maynard found S.W. smiling, alert, attentive and gaining weight, with no bruising or signs of abuse. *Id.* Dr. Maynard sent S.W. home with Arnott and Hocter. *Id.*

Before December 28, 2008, Arnott obtained court-ordered full custody of S.W. **Transcript July 7-9, 351:4-9; 421:3-16.**

¹ For an index of all transcript pages where exhibits referenced in this Brief were admitted, please see **Transcript July 7-9, pp. 6-7.**

On December 28, 2008, Arnott and Hocter again brought S.W. in for medical care, reporting concerns that Bernardi bruised S.W. during a supervised visit. **Exs. 510-511.** The ER Physician, Dr. Harper, noted six small abdominal bruises. *Id.* Dr. Harper reported the bruising to Centralized Intake. *Id.* The case was not entered as a Priority One because S.W. was reported safe in the care of Arnott and Hocter and S.W. was discharged to their care. *Id.* In the experience of CFSD, if a medical provider suspects the party who has brought a child into the hospital may have been the one to abuse or neglect the child, the hospital calls law enforcement and does not let them leave. **July 7-9, 457:12-458:1.**

The next morning, the case was assigned to Davids. Davids took immediate action. She scheduled a pediatric exam for S.W. that day with a pediatrician who previously treated her. **Ex. 512; July 7-9, 459:8-460:7.** Davids and another social worker visited Arnott and Hocter's apartment unannounced. **Ex. 512.** Caregivers often do not welcome CFSD into the home, but Arnott and Hocter were open and cooperative. **July 7-9, 467:17-468:10.**

S.W. was happy, alert, and well cared for. **Ex. 512.** Arnott and Hocter denied causing the bruising and reported they believed it occurred during the three-hour visit S.W. had with Bernardi and her boyfriend the day before, noting the visit supervisor had left the room on a few occasions. *Id.* Davids asked to see S.W.'s room, and it was well-kempt with no safety hazards. *Id.* Davids photographed the

bruising. *Id.*

That same day, Davids interviewed Nicole Tangen, who supervised Bernardi's visit. *Id.* Tangen stated she did not witness anyone harm S.W., although she admitted she stepped out twice during the visit. *Id.* She relayed concerns about Bernardi's parenting, reporting Bernardi was unstable. *Id.* She relayed her belief that Arnott and Hocter were good parents and that S.W. was safe with them. *Id.*

Later that afternoon, Davids met Hocter and Arnott for the pediatric visit. **Ex. 514.** Arnott and Hocter were again cooperative. **July 7-9, 473:8-18.** The pediatrician documented S.W. was alert and smiling, and although she noted concerns about possible non-accidental bruising, she could not determine the cause or the timing. **Exs. 512, 514.** She recommended a skeletal survey to look for evidence of ongoing child abuse, which was scheduled for the next day. **Ex. 514.** The doctor again discharged S.W. to the custody of Arnott and Hocter. *Id.* On December 30, 2008, Arnott brought S.W. for the skeletal survey, which revealed no injuries. **Ex. 515.**

Davids reported the bruising to the Great Falls Police Department for independent investigation. **Ex. 512.** Davids went to Bernardi and Wilson's house to interview them. *Id.* They denied responsibility for S.W.'s bruising but reported they observed S.W. with a black and blue eye and bruising on her nose during their supervised visit. *Id.* This accusation undermined Bernardi's credibility because

neither Davids, the other social worker, nor any medical providers who saw S.W. in the interim reported bruising on her eye or nose. **July 7-9, 481:16-482:9.**

That same day, Davids requested Arnott and Hocter report to the CFSD office to be interviewed. They again cooperated. Davids and her supervisor Gary Johnson interviewed them. *Id.*, **580:6-14.** Davids also arranged for Hocter and Arnott to be interviewed by a Great Falls Police Department detective. **Ex. 512.** The detective photographed S.W.'s bruising the day after Davids' photographs. **Exs. 525-526.** Detective Arthur Shalin, who was assigned to the Crimes Against Children unit, closed the criminal investigation into S.W.'s bruising after interviewing all the parties, discussing the case with the County Attorney, and sending the report for the County Attorney's review. **July 7-9, 714:1-5; 719:1-720:11.** Detective Shalin explained if he had concerns that any parent posed a danger to a child, including Hocter or Arnott, even if he did not have probable cause, he would have reported it to CFSD because the child's safety is his number one concern. *Id.*, **719:9-10; 720:22-721:21.**

On January 6, 2009, an anonymous reporter called CFSD to report marijuana odor outside the Hocter/Arnott apartment. **Ex. 517.** Anonymous reports must be corroborated within 48 hours. **July 7-9, 490:5-492:22.** Davids found no evidence Hocter or Arnott were using marijuana. *Id.*, **702:25-705:4.** The report was closed as unfounded. **Ex. 517.**

On January 15, 2009, Davids and another social worker conducted another unannounced visit to Hocter and Arnott's apartment. **Ex. 512; July 7-9, 701:10-702:12.** S.W. was happy and healthy. *Id.* Davids examined S.W. from head to toe and found no signs of physical abuse. *Id.* The family was doing well. *Id.*

Following this visit, Davids completed an Investigative Safety Assessment, which is a tool that assists case workers in assessing child safety. **Ex. 512.** Davids concluded she could not determine how S.W. received bruising, but that S.W. was safe with Hocter and Arnott based upon her entire investigation, which included two unannounced home visits with other social workers, multiple interviews of involved parties, an independent law enforcement investigation, and multiple visits with medical providers. *Id.* The fact that S.W. was alert and happy at the visits further corroborated Davids' determination that S.W. was safe with Arnott and Hocter. **July 7-9, 773:15-777:10.** Social workers are trained that infants who are abused are typically withdrawn and apathetic. **Ex. 524.** S.W. showed no such symptoms; she was active and healthy. **July 7-9, 773:15-777:10.** After Davids completed the assessment, she closed her investigation. **Ex. 512.**

On January 18, 2009, CFSD received a report from nurses at the hospital that Arnott left S.W. in her car seat in a hospital room unsupervised while Hocter was giving birth. **Ex. 518.** A CFSD worker followed up, and Arnott stated Hocter's father had been helping him care for S.W. at the hospital while Hocter was giving

birth. *Id.* He said the family was doing well with the two children. *Id.*

On February 3, 2009, Bernardi called the Great Falls Police Department to report S.W. had a black eye. **Ex. 525**. An officer immediately responded to Arnott's residence, where S.W. was asleep in her crib. *Id.* The officer carefully examined S.W. and found no bruising. *Id.*

On February 18, 2009, a nurse and mandatory reporter from Better Beginnings, Davida Hryszco, visited Hocter and Arnott's apartment twice.² **July 11, 119:13-15; 122:21-24; 124:4-10**. She came once to visit and once to drop off a baby swing. *Id.*, **126:2-127:15**. Hryszco recalled Hocter acting normally. *Id.*, **128:1-129:24**. Hryszco left the home around 12:30 p.m. A few hours later, Hocter severely beat S.W. **Doc. 198, p. 2**.

The lawsuit is based on the theory that Davids should have removed S.W from Arnott's custody following the December 2008 bruising report and that, if she had done so, S.W. would not have been present for Hocter to assault her on February 18, 2009. However, Davids was only legally authorized to remove S.W. from the home for no more than five days without action by the County Attorney. MCA § 41-3-301 (2007). To hold S.W. away from home beyond five days, the County Attorney would have to have filed for court intervention and a judge would have needed to

²Better Beginnings was a county-sponsored program providing support, including home-visits, to pregnant women and new mothers. **July 11, 118:23-120:23**. Hryszco had met with Hocter on multiple occasions prior to this visit, beginning in June 2008. *Id.*, **121:20-122:16**.

determine that S.W. was in imminent harm requiring emergency protective services. MCA §§ 41-3-301(5), 41-3-422(5) (2007).

Sarah Corbally, an Assistant Attorney General prosecuting child abuse and neglect cases in Cascade County at the time, conferred with CFSD after S.W.'s bruising had been discovered. **July 11, 96:2-105:9**. After reviewing photographs of the bruising and other information about the case, Corbally advised there was not enough information for a court to order removal of S.W. *Id.*, **105:1-9**. Corbally further testified, after cross-examination, that even with the benefit of hindsight and accepting information proffered by S.W.'s counsel as correct, there still was not a sufficient basis to justify removing S.W. before February 18, 2009. *Id.*, **110:21-112:8**.³

In sum, at every juncture, every mandatory reporter involved—including multiple social workers, law enforcement officers, medical providers, and a nurse conducting home visits on the very day Hocter assaulted S.W. in February—believed S.W. to be safe in Hocter and Arnott's care. Davids reached the same conclusion. There was no reasonable basis for CFSD to remove S.W. before February 18, 2009.

³ The State's expert witness, Judy Krysik, also interviewed former Montana judges about whether they would order removal of S.W. Karen Townsend and Nels Swandal both indicated they would not have removed her.

STANDARD OF REVIEW

This Court reviews rulings on summary judgment and judgment as a matter of law de novo. *Spoja v. White*, 2014 MT 9, ¶ 9, 373 Mont. 269, 317 P.3d 153 (internal citations omitted).

This Court generally reviews denial of a Rule 59 motion to alter or amend judgment for abuse of discretion. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶ 11, 342 Mont. 530, 182 P.3d 741 (internal citation omitted). When matters involved in a Rule 59 motion are purely legal, this Court reviews them de novo. *Id.* (citing *Associated Press v. Crofts*, 2004 MT 120, ¶¶ 12, 36-37, 321 Mont. 193, 89 P.3d 971).

This Court generally reviews jury instructions for abuse of discretion. *Kenser v. Premium Nail Concepts, Inc.*, 2014 MT 280, ¶ 22, 376 Mont. 482, 338 P.3d 37. However, to the extent a jury instruction is based upon a conclusion of law, this Court's review is de novo. *Unidentified Police Officers 1, 2 & 3 v. City of Billings*, 2019 MT 299, 398 Mont. 226, 454 P.3d 1205 (internal citation omitted).

This Court reviews denial of a challenge for cause for abuse of discretion. *Harris v. Hanson*, 2009 MT 13, ¶ 17, 249 Mont. 29, 201 P.3d 151 (citing *Reff-Conlin's, Inc. v. Fireman's Fund Insurance Company*, 2002 MT 60, 309 Mont. 142, 45 P.3d 863). A party does not need to use a peremptory strike to remove a juror whose for-cause challenge was denied to preserve the issue for appellate review.

Shane v. Butte E. R.R., 37 Mont. 599, 603, 97 P. 958(1908), 960. However, if this Court concludes the district court abused its discretion in denying a for-cause challenge, and the party whose challenge was denied used a peremptory strike to remove the juror at issue, prejudice is presumed and reversal is automatic. *Crail Creek Assocs. LLC v. Olson*, 2008 MT 209, 344 Mont. 321, 187 P.3d 667 (citing *Reff-Conlin's*, ¶¶ 28-31).

SUMMARY OF ARGUMENT

S.W.'s claims fail for lack of causation-in-fact. Even if DPHHS should have removed S.W. following the December 28, 2008, bruising report—it should not have—DPHHS's unilateral authority was limited by statute to five days. Longer removal required independent action by the prosecuting attorney and the district court. There is no evidence permitting the jury to conclude S.W., if she had been removed in December, would have remained out of Arnott's custody through February 18, 2009. The District Court's denial of the State's Rule 50 and 56 motions on this issue should be reversed and judgment entered for the State.

S.W.'s claims also fail because Hocter's assault was not reasonably foreseeable. A defendant's common-law duty of care only extends to those risks or hazards whose likelihood made the conduct unreasonably dangerous. A third-party act that is not reasonably foreseeable, occurring after a defendant's allegedly negligent act and combining with it to injure a plaintiff, breaks the chain of

causation. Because Hocter's assault was not reasonably foreseeable, S.W.'s claims fail for lack of duty and due to superseding intervening causation. The District Court's denial of the State's Rule 50 motions on these issues should be reversed and judgment entered for the State.

If this Court does not enter judgment for the State, the District Court's judgment should be reversed and this case remanded for retrial because the District Court incorrectly instructed the jury. The District Court issued an instruction requiring the State prove it had "no reason" to anticipate S.W. "would be abused," in any way, in February 2009, to demonstrate superseding intervening causation. This instruction incorrectly heightened the State's burden of proof and removed from the jury's determination whether the State's conduct "in a natural and continuous sequence" caused S.W.'s injuries. The jury returned its verdict 8-4 on causation. The District Court also issued an adverse inference instruction against the State based upon the State's inability to produce its photographs of the December 2008 bruising. The photographs were unavailable long before the State was on notice of this litigation, and S.W. failed to show they would have been favorable to her. These erroneous jury instructions prejudiced the State, requiring reversal and remand for a new trial.

The District Court also incorrectly denied the State's challenges to two jurors for cause, requiring reversal and remand for a new trial.

The State cannot in any event be liable to S.W. for more than \$750,000. The District Court’s ruling that the statutory damages cap, § 2-9-108, MCA, does not apply to torts involving a government-specific duty should be reversed. The District Court’s interpretation renders the statute a nullity and is inconsistent with the plain language of the statute and Montana case law. Additionally, the State cannot be liable for judgment interest except as permitted by MCA § 2-9-317.

ARGUMENT

I. Judgment Should Be Entered For The State Because S.W. Failed To Prove Causation-In-Fact.

S.W. presented no evidence any different intervention by DPHHS after the December 2008 bruising report would have prevented Hocter’s February 18, 2009, assault. “Any child protective social worker of the department... who has reason to believe any youth is in immediate or apparent danger of harm may immediately remove the youth and place the youth in a protective facility...” MCA § 41-3-301(1) (2007)⁴. However, DPHHS can only remove children from their homes for two days before it must submit an affidavit to the county attorney; the county attorney must then decide whether to petition the court to allow the child to remain

⁴ The constitutional right to parent must yield to child safety where DPHHS “has reasonable cause to suspect the child is at imminent risk of harm” because “state intervention [is] a grave and cautious undertaking.” *In re J.D.*, 2025 MT 274, ¶¶ 13, 15, 425 Mont. 123, 580 P.3d 63 (citing MCA § 41-3-101(1)(d) , emphasis in original). DPHHS must present evidence to establish by a preponderance of the evidence that a child has been abused, neglected, or abandoned for a district court to adjudicate a child as a youth in need of care. *Id.*, ¶ 13; *see also In re I.B.*, 2011 MT 82, ¶¶ 8-9, 20, 22-23, 360 Mont. 132, 255 P.3d 56.

outside the home and, if so, the county attorney must file the petition within five days of the removal. MCA § 41-3-301(5) (2007). If the county attorney files, the court must ultimately determine whether probable cause exists to remove the child from the home. MCA § 41-3-422(5) .

There is no evidence S.W. would have remained outside the Arnott/Hocter household if DPHHS had removed her from the home in December 2008. Such testimony fell outside the expertise of the witnesses who testified at trial, aside from Sarah Corbally, whose testimony is addressed below. S.W.’s expert Michael Corey admitted he did not understand DPHHS’s limited ability to remove children from parental custody *ex parte* before legal action is required. He testified he “imagined” DPHHS could present a petition to the county attorney, “or whoever the person is who goes before the Court,” to remove S.W., and he “imagined” DPHHS could have removed S.W. *ex parte* for “60, 90 days” before needing to present that petition. **July 7-9, 828:23-829:15.** When confronted with the fact that his “imagination” was wholly inaccurate under Montana law, Corey admitted he lacked the expertise to opine whether, if DPHHS had removed S.W. sooner, an attorney would have filed an abuse and neglect petition in district court and a judge would have granted it. *Id.*, **829:24-830:2.**

Other witnesses who testified in S.W.’s case-in-chief agreed DPHHS could only have removed S.W. for a few days before judicial intervention was required,

and none of S.W.'s witnesses opined regarding what, more likely than not, would have occurred if DPHHS had sooner removed S.W. *See, e.g., Id., 371:16-373:22.* There is no evidence that if DPHHS removed S.W. following the December 2008 bruising report, S.W. would have remained outside Arnott/Hocter's household through February 18, 2009. There is no evidence the State, by not removing S.W. after the December 2008 report, was a cause-in-fact of Hocter assaulting her on February 18, 2009.

S.W.'s alternative argument that a "safety plan" would have prevented the February 2009 assault was also based solely on speculation. No witness testified that Arnott/Hocter, who adamantly denied hurting S.W. in December 2008, would have entered into a voluntary protective services agreement. There is no evidence a "safety plan" would have prevented the February 2009 assault. The only evidence S.W. presented about a "safety plan" were vague references to the ability of DPHHS to enter into such agreements. There is no evidence about what a "safety plan" would have entailed or how it would have prevented S.W.'s assault in February 2009.

The State moved for summary judgment before trial, and judgment as a matter of law at the close of S.W.'s case, on S.W.'s inability to prove causation-in-fact. **Docs 169-170; July 11, 67:8-68:5.** The District Court, though it identified no facts from which a jury could draw a non-speculative conclusion regarding causation-in-

fact, denied the State's motions. **Doc. 195; July 11, 72:9-21.**

S.W., opposing the State's motion for judgment as a matter of law, did not dispute she had no evidence regarding what would have happened if the State removed her sooner. **July 11, 68:10-69:4.** She instead argued, "[t]he Plaintiff is not required to prove that she wouldn't have been in – that she wouldn't have been in Arnott and Hocter's care on the day that it [Hocter's assault of S.W. in February 2009] occurred when it was the defendant who refused to petition and take the actions necessary to remove her." *Id.*, **68:16-21.** S.W.'s position incorrectly states the law and attempts to shift her burden of proof onto the State, which the District Court erroneously permitted. If S.W. would have been in the Arnott/Hocter household on February 18, 2009, even if the State had earlier removed her in December 2008, then the State's earlier non-removal is not a cause-in-fact of S.W.'s injuries. To carry her burden to prove cause-in-fact, S.W. had to prove, more likely than not, that had the State removed her in December 2008, she would have remained out of the Arnott/Hocter household through at least February 18, 2009. Because causation by the State, if any, of S.W.'s injuries depended upon the outcome of an un-asserted underlying legal action—i.e., upon the outcome of the court petition to continue removal, if the County Attorney had filed that petition—S.W. had to prove the County Attorney would have filed the petition what the outcome of that underlying legal action would have been if it had been pursued. *See, e.g., Labair v.*

Carey, 2012 MT 312, ¶¶ 20-26, 367 Mont. 453, 291 P.3d 1160 (discussing the requirement, in legal malpractice cases arising out of litigation, that a plaintiff must prove the outcome of the “suit-within-the-suit” to carry her burden of proof on causation). S.W. presented no such evidence.

After the District Court incorrectly denied the State judgment as a matter of law, the State called Sarah Corbally. Corbally was a Deputy Cascade County Attorney from 2003-2007 and an Assistant Attorney General with the Montana Attorney General’s Child Protection Unit, based in Great Falls, from 2007-2010. *Id.*, **96:2-19**. Corbally was personally involved in handling about 1,000 child abuse and neglect legal cases. *Id.*, **98:9-14**. She had “a lot of daily interaction with Child and Family Service Division employees.” *Id.*, **99:15-100:1**. DPHHS reviewed its investigation of the December 2008 bruising with Corbally at the time and asked her whether there was enough information to remove S.W. from Arnott’s custody. *Id.*, **100:7-105:9**. After reviewing the information DPHHS provided, including photographs of the bruising, Corbally told DPHHS the evidence did not represent an imminent or apparent risk of immediate harm to S.W. and would not be sufficient to support court-ordered removal. *Id.*, **105:1-9**. After cross-examination by S.W.’s counsel, Corbally further testified:

Q. Let’s accept for the moment Mr. Graybill’s proffer of what those things say is true. Would that have altered what you told [DPHHS] if you were aware of it at the time?

A. No.

Q. Why not?

A. Because, in my experience and in my handling of cases, a bruise in and of itself is not sufficient, you know, for a – to file a child abuse and neglect case. A doctor can say that it's nonaccidental and they don't know how it happened, but there has to be the whole story. You have to find out, you know, more about the totality of the circumstances. And so, you couldn't just in a vacuum take – you know, we have lots of cases with very small bruises that wouldn't end up being child abuse and neglect cases in court. So that in and of itself, I guess, is in (*sic*) insufficient.

Q. All right. And what about the fact that at this time nobody knew who committed the abuse? Would [that] have played in to why your opinion wouldn't have changed, even assuming what Mr. Graybill has proffered were correct?

A. Correct.

Q. And why is that?

A. I mean, I think if you knew who it was it would obviously be – you know, there wouldn't be a question as to what happened. But we didn't know. But there was limit – you know, there were limiting – there were other facts. Like the fact that they had sought medical attention and cooperated with the Department and cooperated with law enforcement, things that – that went with the whole – all of the circumstances that would have made it appropriate.

Q. And so, was it your assessment, then, that this wasn't a sufficient basis, even assuming these things that Mr. Graybill has proffered were true, to file a petition and have a court uphold it?

A. Correct.

***Id.*, 110:21-112:8.**

Corbally's testimony is the only competent evidence, in the entire case, regarding what would have occurred if DPHHS removed S.W. sooner. Corbally testified that if DPHHS removed S.W. earlier, a petition to uphold that removal would *not* have subsequently been filed, and if filed would *not* have been upheld by a court. *Id.* If DPHHS removed S.W. after the December 2008 report, S.W. would

still have been in the Arnott/Hocter household on February 18, 2009. There is no evidence of a causal relationship between DPHHS not removing S.W. in December 2008 and Hocter assaulting S.W. on February 18, 2009.

The State renewed its motion for judgment as a matter of law on this issue at the close of evidence and timely renewed the motion after entry of final judgment. **Docs 238-239; Day 5, 283:1-8.** The District Court denied it without articulating any basis. *Id.*; **Doc. 246.**

The lack of evidence at trial confirms Justice Sandefur’s observations from *S.W. I* that “the [District] Court’s causation-in-fact conclusion is manifestly erroneous due to the daisy-chained sequence of procedural *what ifs* under Title 41, chapter 3, MCA, upon which S.W.’s theory of sequential causation-in-fact necessarily depends... Nor has S.W. made any non-speculative showing of any likelihood, even if the Department had requested discretionary filing of a protective proceeding, that the *county attorney* would have done so and that the *district court* would have in turn found sufficient cause and inclination to authorize *indefinite out-of-home protective custody* of S.W. under those circumstances of *sufficient duration* to have avoided the random Hocter assault almost two months later.” *S.W. I*, fn. 18 (Justice Sandefur, concurring in part and dissenting in part) (emphasis in original).

The majority of this Court did not address causation-in-fact in *S.W. I*. The

Court must address it now. Judgment should be entered for the State because S.W. failed to prove causation-in-fact.

II. Judgment Should Be Entered For The State Because Hocter's Assault Was Unforeseeable, Beyond The Scope of Duty, And Was A Superseding Intervening Cause Of S.W.'s Injuries.

In *S.W. I*, this Court reviewed and reversed the District Court's prior ruling that the State was negligent *per se* for purportedly violating MCA § 41-3-202. *S.W. I*, ¶¶ 12, 24-30; Doc. 59. Neither the District Court nor this Court reached common law negligence in *S.W. I*. *Id.* On retrial, S.W. proceeded solely on a common law negligence theory. *See, Doc. 198; see also* Doc. 226 (jury instructions address only common law negligence, not negligence *per se*).

As the close of S.W.'s case-in-chief, the State moved for judgment as a matter of law that Hocter's assault was not reasonably foreseeable and therefore was (1) beyond the scope of any common law duty of care owed by the State to S.W. and (2) a superseding intervening cause of S.W.'s injuries. **July 11, 69:7-71:2**. The State timely renewed these motions after entry of final judgment. **Docs. 238-239**. The District Court denied the State's motions. **Doc. 246; July 11, 72:9-21**. The District Court's denial was error and should be reversed, and judgment entered for the State.

A "defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 21, 342 Mont. 335, 181 P.3d 601 (citing *Mang v. Eliasson*, (1969)

153 Mont. 431, 437, 458 P.2d 777 (1969), 781). The duty exists only if the plaintiff is “within the ‘foreseeable zone of risk’ created by the defendant’s negligent act.” *Id.*, (citing *Prindel v. Ravalli County*, 2006 MT 62, ¶ 38, 331 Mont. 338, P 36, 133 P.3d 165).

There is no evidence DPHHS should have reasonably foreseen Hocter would violently assault S.W. after its December 2008 investigation. Hocter’s February 2009 assault was not within the foreseeable “zone of harm.” S.W. argued that because the State knew S.W. had been abused by someone, the State should foresee S.W. would be abused by Hocter. This argument misapprehends foreseeability in the context of duty. To have owed a relevant duty to S.W., the State not only had to reasonably foresee that S.W. was at risk of abuse, but it also had to reasonably foresee that S.W. was at risk of a brutal assault by Hocter. There is no evidence establishing the State could foresee that S.W. was a risk of a brutal assault by Hocter. The trial evidence bears out Justice Sandefur’s observations in *S.W. I* that Hocter’s February 2009 assault of S.W. was not reasonably foreseeable, in the context of duty, and was beyond the scope of any duty the State owed S.W. *S.W. I*, fn. 3 (Justice Sandefur, concurring in part and dissenting in part).

Addressing the State’s investigation of the December 2008 bruising, S.W.’s expert Corey identified no information the additional investigation he speculated about would have uncovered. **July 7-9, 831:7-841:24.**

Corey was asked to specifically identify what additional information DPHHS would have learned that would have led to a result other than what occurred. *Id.* Even with the benefit of all the available records and years of hindsight, he could identify no additional information DPHHS would have learned that would have, somehow, caused Hocter to not assault S.W. in February. *Id.* He was asked to identify any information that would have reasonably indicated Hocter was going to assault S.W. as she did in February. **July 10, 34:20-36:5.** He testified he believed some unspecified form of later abuse could have been predicted, but did not identify any evidence that Hocter would brutally assault S.W., or that any abuse of a type at least generally similar to Hocter's assault would occur. *Id.*

S.W. presented with superficial abdominal bruising at the Emergency Room in December 2008. DPHHS promptly responded, performed its own investigation, and referred the matter to law enforcement for investigation. Neither DPHHS nor law enforcement could conclude who caused the bruising. During the investigation, S.W. never had additional bruising or other injury and was doing well in Arnott/Hocter's care. No evidence established the State, from the available information, could foresee S.W. was a risk of a brutal assault by Hocter in February 2009. No evidence established any additional information the State could have reasonably obtained to enable it to foresee S.W. was at risk of the assault.

S.W. cannot establish the required element of foreseeability in the context of

duty. Additionally, the State established lack of foreseeability, meaning Hocter's assault was a superseding intervening cause of S.W.'s injuries. S.W.'s claims fail for lack of foreseeability, on both the element of duty and on the defense of superseding intervening causation. The District Court's rulings denying the State judgment as a matter of law on these bases should be reversed, and judgment entered for the State.

III. The District Court's Erroneous Tailored Superseding Intervening Causation Instruction Requires Reversal.

This Court previously addressed the proper causation jury instruction on remand, i.e., M.P.I. 2.09. *S.W. I*, ¶ 46. On remand, the District Court gave this instruction. **Doc 226, Ins. 23.** However, the District Court thereafter added the following instruction:

S.W. claims the State's conduct, in a natural and continuous sequence, was a cause of [S.W.'s] injuries because the State could have reasonably anticipated [S.W.] would be abused again.

The State claims that its conduct, in a natural and continuous sequence, was not a cause of [S.W.'s] injuries because it had no reason to anticipate [S.W.] would be abused in February of 2009. The State has the burden of proving this claim by a preponderance of the evidence. If you find that the State has met its burden of proving this claim, then the State is not liable for any of the harm suffered by [S.W.] because its conduct was not the cause of her injuries. If you find the State has not met its burden of proving this claim, then the State may be held liable.

Doc. 226, Ins. 24. The State objected to this instruction. **July 14, 8:4-22.** This instruction incorrectly removed from jury determination what constituted a "natural

and continuous sequence,” if any, between the State’s actions and S.W.’s injuries and incorrectly heightened the State’s burden of proof on its defense of superseding intervening causation.

When there is a jury question on superseding intervening causation, the jury must determine what constitutes a “natural and continuous sequence,” and “courts should not use terms such as ‘proximate cause,’ ‘legal cause,’ or ‘reasonable foreseeability’ when instructing juries.” *S.W. I*, ¶ 46 (internal citation omitted). Instruction 24 incorrectly removed this determination from the jury, instead directing the jury to find the State’s conduct was a cause of S.W.’s injuries in a “natural and continuous sequence” unless the State proved it had “no reason to anticipate [S.W.] would be abused,” in any way without limitation, “in February 2009.”

Instruction 24 also incorrectly articulated the State’s burden of proof. The State did not need to prove it had “no reason” to anticipate S.W. would “be abused.” The State needed to prove Hocter’s February 18, 2009, assault of S.W. was not reasonably foreseeable before it occurred.

“No reason to anticipate” is not synonymous with “not reasonably foreseeable.” “Reason,” in this context, means “grounds,” “basis,” “cause,” or similar. *See, e.g., McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 26, 330 Mont. 48, 125 P.3d 1121 (using “reason” as synonymous with “cause”); *Guertin v.*

Moody's Mkt., 265 Mont 61, 874 P.2d 710 (1994), 714 (citing MCA § 39-2-903) (using “reason” as synonymous with “grounds”); *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 (2016, 9th Cir.) (using “reason” as synonymous with “basis”); *Black's Law Dictionary* (defining reason, inter alia, as a premise, ground, or cause) (10th Ed.). By contrast, this Court has held “reasonable” means “[f]air, proper, or moderate under the circumstances.” *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 264, ¶ 43, 312 Mont. 257, 60 P.3d 381 (quoting *Black's Law Dictionary*. 1272 (7th Ed. 1999)). The difference between a “reason” and “reasonableness” is highlighted by the fact that courts, in various contexts, routinely assess whether a reason was reasonable. *See, e.g., Wilson v. Sellers*, 584 U.S. 122, 125, 138 S. Ct. 1188, 1192 (2018) (“... a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.”).

To prove superseding intervening causation, the State did not need to show there was “no reason,” i.e., no basis, grounds, or cause, to foresee Hocter’s February 2009 assault. This Court already found there were some reasons, on the summary judgment record, a reasonable juror could conclude made Hocter’s assault reasonably foreseeable, and some reasons a reasonable juror could conclude made it not reasonably foreseeable. *S.W. I*, ¶¶ 44-45. “No reason” is not the standard for superseding intervening causation. The standard for superseding intervening

causation is whether the State should have reasonably foreseen that Hocter would assault S.W. in February 2009. Instruction 24 improperly heightened the State's burden of proof from "should have reasonably foreseen" to "no reason to anticipate," and injected confusing legal terminology to a lay jury. *See, Busta v. Columbus Hosp.*, 276 Mont. 342, 370-71, 916 P.2d 122 (1996), 139.

Instruction 24 also improperly instructed the jury regarding what the State needed to have reasonably foreseen, or not, for purposes of superseding intervening causation. The Instruction directed what the State needed to foresee, or not, was whether S.W. "would be abused again" or "would be abused in February." This is incorrect. The law required S.W. prove "the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation." *Reino v. Montana Mineral Land Dev. Co.*, 38 Mont. 291, 296, 88 P. 853 (1909), 854 (internal citation omitted). Instruction 24 directed the jury to conclude that if the State had any reason to anticipate any additional abuse of S.W., then all further abuse regardless of type, degree, source, or otherwise, was reasonably foreseeable and sufficient to defeat superseding intervening cause. This is not Montana law.

Instruction 24 was error and should not have been presented to the jury. This Instruction was prejudicial and requires reversal and remand for a new trial.

IV. The District Court's Erroneous Adverse Inference Instruction Requires Reversal.

The District Court instructed the jury:

The State took photographs of [S.W.'s] bruises on December 29, 2008. It had a duty to preserve these photographs. You may consider that the missing photographs would have been unfavorable to the State.

Doc. 226, Ins. 19. The District Court characterized this as “the somewhat spoliation instruction” and gave it over the State’s objection. **July 14, 5:20-7:5.**

The District Court erred when it concluded the State spoliated evidence and sanctioned the State with the above instruction. A party only has a duty to preserve evidence when “a party in control [of the evidence] knows or reasonably should know that [the evidence] may be relevant to pending or reasonably foreseeable litigation... Though the prospect of future litigation need not be ‘imminent,’ the mere abstract possibility or fear of future litigation does not alone give rise to a duty to preserve.” *Montana State University-Bozeman v. Montana First Judicial District Court*, 2018 MT 220, ¶ 23, 392 Mont. 458, 426 P.3d 541 (citing, *inter alia*, *Brookshire Bros. Ltd. v. Alridge*, 438 S.W.3d 9 20 (2014, Tex.), and *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216-17 (2003, S.D.N.Y.)); *see also Brookshire Bros.* at 22-23 (“...a spoliation instruction is still inherently a sanction... it is among the harshest sanctions a trial court can use to remedy an act of spoliation... Because a spoliation instruction has the propensity to tilt a trial in favor of a nonspoliating party, it can... be tantamount to a death-penalty sanction.”); *Zubulake*, 220 F.R.D.

at 220 (a spoliation instruction is “an extreme sanction” that “should not be given lightly”).

The District Court applied the wrong standard when it determined, incorrectly, the State had a duty to preserve the photographs before they became unavailable. The District Court failed to assess when the State should have reasonably foreseen litigation, and instead determined the State had a duty to preserve the photographs under the terms of its policy manual. **July 14, 6:11-7:5**. The District Court also failed to make any determination as to when or how the photographs became unavailable, despite this Court’s specific prior admonition. *Id.*; *S.W. I*, ¶ 57.

S.W. incorrectly argued the duty to preserve evidence attached after Hocter’s February 18, 2009, assault. **Doc 156, pp. 4-5**. (contending “[t]he facts known to the State on February 18, 2009 all but assured litigation would ensue.”). S.W.’s argument is based on S.W.’s already rejected contention that, before any adjudication by a jury, the State breached a duty to S.W. as a matter of law, and therefore fails. *Id.*; *see also S.W. I*, ¶¶ 24-48.

The sole case S.W. cited to support her argument, *Walden v. Yellowstone Elec. Co.*, demonstrates this litigation was not reasonably foreseeable at the pertinent time. 2021 MT 123, 404 Mont. 192, 487 P.3d 1. The District Court determined YECO spoliated evidence by allowing its truck to be destroyed without notifying the

Waldens and without preserving its data unit. *Id.*, ¶ 52. This Court affirmed, determining YECO’s duty to preserve the vehicle attached before YECO transferred the keys and title to its insurer. *Id.*, ¶¶ 52-53. Central to this determination were that (1) reasonable minds, on the available evidence, could only conclude that YECO negligently caused the accident, (2) YECO received correspondence from the Waldens’ counsel before it transferred the keys and title, and (3) YECO filed, and therefore should have reasonably anticipated, its own counterclaim against the Waldens, and should have preserved the vehicle as evidence for that counterclaim in addition to the Waldens’ reasonably-foreseeable claim. *Id.* No such facts are present here.

This Court’s opinion in *S.W. I* is evidence litigation in this matter was not “reasonably foreseeable” before S.W.’s May 1, 2013, Notice of Claim: Two justices of this Court would, on the undisputed facts, have entered judgment as a matter of law *for the State*. *S.W. I*, ¶¶ 82-105 (Justices Sandefur and McKinnon, dissenting). The State understands this was a dissenting opinion and is not contending it is legally binding. It merely illustrates the weakness of S.W.’s argument that the underlying facts as of February 18, 2009, were sufficient to make this litigation reasonably foreseeable.

The State did not receive notice of S.W.’s claim until May 1, 2013. **July 11, 63:1-7; see also Doc 21, ¶ 52; Doc 24, ¶ 52; Doc 157, Ex. D, ¶ 28.** The State

applied a litigation hold to DPHHS' file for this matter the same day. **Doc 157, Ex. D, ¶ 28.** That entire file, as it then existed, was scanned and produced with limited redactions in discovery in this case. *Id.* ¶¶ 14-15. Davids' photographs were not found within the file as it existed on May 1, 2013. *Id.* ¶¶ 2-3. Whatever occurred to the photographs, they became unavailable at some point prior to May 1, 2013. The photos were unavailable before the State was put on notice of this claim, and the State did not spoliage evidence.

Further, even if there had been spoliation, the sanction the District Court imposed was disproportionate. The State did not act intentionally or in bad faith. The prejudice, if any, from the photos' unavailability is minor because the emergency room doctor's report was still available, as were photographs taken just one day later by the police are still available and were entered as evidence. *See, S.W. I, ¶ 58; Exs. 527-529.* S.W. offered no evidence from any medical expert regarding the course of healing for bruises; what difference, if any, there would be between the unavailable photographs and the available photographs; and what relevance, if any, any such difference would have on any matter at issue. There is no basis to conclude the State intentionally "destroyed" the photographs or that the photographs would have materially altered the overall available evidence. The District Court's adverse inference instruction was "tantamount to a death penalty sanction," was disproportionate, and was an abuse of discretion even if there had been spoliation,

which there was not.

V. The District Court Erred When It Denied The State's Challenges To Jurors For Cause.

The District Court abused its discretion to the State's prejudice when it denied the State's challenges for cause to Ileia Adams and Nancy Woerdehoff.

Adams testified that, without hearing any evidence, she would lean toward favoring S.W. **July 7-9, 135:19-138:22.** The State, in follow-up, asked, "it[] doesn't sound like [the State] can get a fair trial with you if we had 12 Ileia Adams as juror, would you agree with that, or not?" *Id.* Adams agreed and re-confirmed she did not think the State could get a fair trial with her as a juror. *Id.* The State challenged Adams for cause. *Id.* S.W. attempted to rehabilitate Adams through a series of suggestive questions. *Id.* The Court denied the State's challenge for cause. *Id.*, **238:1-3.** The State used a peremptory challenge on Adams. **Doc. 218; July 7-9, 238:4-23.**

Woerdehoff testified she had prior knowledge from the news about this case. **July 7-9, 67:15-24; 74:18-75:5.** She said she would "try [her] best" to set aside what she had heard (*Id.*), but that it was "going to be a problem for" her to set aside her personal experiences and consider the case only on the evidence presented. *Id.*, **75:3-92:24.** S.W. made no further inquiry of Woerdehoff. *Id.* On examination by the State, Woerdehoff testified her stepdaughter's children were removed from her by CFSD in 2016, allegedly without follow-up or contact by CFSD, resulting in

those children temporarily residing with Woerdehoff. *Id.*, 202:2-203:17. She admitted this experience left her with negative feelings towards CFSD. *Id.* She then testified, repeatedly, that she did not know if she could be fair and not biased against the State, even if the judge instructed her she had to be. *Id.* The State challenged Woerdehoff for cause. *Id.* S.W. attempted to rehabilitate Woerdehoff with a series of questions that were suggestive and leading. *Id.*, 203:19-205:25. Even in response to these leading questions, Woerdehoff expressed uncertainty about her ability to follow the Court's instructions, set aside her personal experiences, and be a fair juror. *Id.* The Court denied the State's challenge for cause. *Id.*

Adams' and Woerdehoff's testimony manifested, at a minimum, serious questions about their ability to be fair and impartial. *State v. Johnson*, 2019 MT 68, ¶ 11-12, 395 Mont. 169, 437 P.3d 147 (for cause challenges should be granted when a serious question exists about a juror's ability to be fair and impartial; any doubt or ambiguity about a juror's ability to be fair and impartial must be resolved in favor of disqualification) (internal citations omitted). The State respectfully urges this Court review their testimony in its entirety. S.W.'s leading questions did not cure their disqualification. *Id.* ("...if a prospective juror's earlier unprompted responses to open[-]ended questions manifest a serious question about... her ability to be fair and impartial, it is improper for counsel... to attempt to rehabilitate the juror through use of leading or loaded questions, such as whether the juror will follow the law,

jury instructions, or an order of the court”) (internal citation omitted).

The District Court abused its discretion denying the State’s for-cause challenges. As to Adams, prejudice is presumed and reversal is automatic because the State peremptorily challenged her. As to Woerdehoff, prejudice is clear and the error is not harmless: The jury split 8-4 on causation, and Woerdehoff voted in favor of S.W. **July 14, 117:19-118:2**. This matter should be reversed and remanded for a new trial.

VI. The District Court Incorrectly Concluded The Statutory Limit On State Tort Liability Does Not Apply To State-Specific Duties.

The District Court adopted S.W.’s argument that Montana’s “[l]imitation on governmental liability for damages in tort,” MCA § 2-9-108, does not apply when the government is performing a government function. This construction has no support—not in the statute itself, not in case law, and certainly not in the sound public policy underlying the Montana Tort Claims Act. Indeed, the interpretation would nullify the damages cap and a host of other statutes.

In applying a statute, the Court’s purpose is to “ascertain the legislative intent and give effect to the legislative will.” *State v. Thomas*, 2019 MT 155, ¶ 8, 396 Mont. 284, 445 P.3d 777. “Statutory construction is a ‘holistic endeavor’ and must account for the statute’s text, language, structure, and object.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. Statutes must be read and interpreted as a whole, “without isolating specific terms from the context in which

they are used by the Legislature,” and the exercise “should not lead to absurd results if a reasonable interpretation can avoid it.” *Id.* (internal quotation omitted).

Applying these rules, § 2-9-108 applies to the jury verdict rendered in this case. The statute unambiguously provides the State is not liable in a tort action for damages suffered as the result of an act or omission of a State officer, agent or employee in excess of \$750,00 for each “claim.” *Id.* S.W.’s lawsuit comprises a “claim” because it is a tort action against the State for damages for personal injury allegedly suffered because of an act or omission of a State employee. MCA § 2-9-101(1). Understanding this, S.W. notified the State of a claim under MCA § 2-9-301(1) before filing suit.

The interpretation now advocated by S.W., and erroneously adopted by the District Court before the first trial, is premised upon a phrase within the statutory definition of “claim” found in § 2-9-101(1). That definition states, in pertinent part, that a “claim” is “any claim against a governmental entity, for money damages only, that any person is legally entitled to recover . . . *under circumstances where the governmental entity, if a private person, would be liable* to the claimant for the damages. . . .” *Id.* (emphasis added). S.W.’s argument goes that, where the government entity is performing a government duty or function, there is no “claim” because a private person would not be liable for negligently performing a government duty or function. This interpretation eviscerates MCA § 2-9-108 and

makes it meaningless. After all, to impose vicarious liability on the State for an employee's tortious conduct, that employee must necessarily have been acting in the course and scope of his or her employment. *L.B. v. United States*, 2022 MT 166, ¶ 30, 409 Mont. 505, 515 P.3d 818.

MCA §§ 2-9-101 *et seq.* evidence the Legislature's clear intent to limit damages against the State for negligence of governmental employees performing government functions. Section 2-9-101 states "[e]very 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* except as specifically provided by the legislature under Article II, section 18, of The Constitution of the State of Montana." (Emphasis added.) The "governmental liability for damages in tort" addressed in § 2-9-108 necessarily means liability for acts within the scope of *governmental* employment or duties. *See id.*

Moreover, the statutory definition of "claim" upon which S.W.'s argument hinges applies to the entire Tort Claims Act, not just § 2-9-108. MCA § 2-9-101. If the Court were to adopt S.W.'s interpretation, numerous statutes would effectively be nullified, as they would no longer apply to tort claims involving government functions. These would include: (1) governmental self-insurance reserve funds (MCA §§ 2-9-202(3) and -211(3)); (2) loss mitigation program (MCA § 2-9-220(2));

(3) pre-filing claim presentation (MCA § 2-9-301); (4) compromise and settlement (MCA §§ 2-9-303 and -304); (5) governmental employee immunity (MCA § 2-9-305); (6) and attorney-fees (MCA § 2-9-314).

Furthermore, the phrase “under circumstances where the governmental entity, if a private person, would be liable,” merely confirms governmental entities are not liable for claims for which a private person would not be liable. As this Court observed:

Under § 2-9-101(1), MCA, state liability attaches under the Tort Claims Act “only where a private person similarly would be liable.” *Drugge v. State*, 254 Mont. 292, 294-95, 837 P.2d 405(1992), 406. Thus, *where Montana law protects private citizens from liability, it also protects the State*.

Gudmundsen v. State ex rel. Mont. State Hosp. Warm Springs, 2009 MT 56, ¶ 24, 349 Mont. 297, 203 P.3d 813 (emphasis added). Together, §§ 2-9-101(1) and 2-9-108 preserve for the State all liability protections available to private persons and, in addition, cap the State’s liability for tort damages. *See id.*

Adopting S.W.’s interpretation would contradict *Gudmundsen*, *Drugge*, and numerous other decisions from this Court. In *State ex rel. Byorth v. District Court of Fourteenth Judicial Dist., in and for County of Golden Valley*, 175 Mont. 63, 65-67, 572 P.2d 201 (1977), 202—a death case alleging the State breached its duty to construct and maintain safe highways—this Court expressly addressed the definition of “claim” under the Tort Claims Act, finding a “claim” had been alleged in that case

because the Act “attaches liability to the State in the same manner and to the same extent that liability attaches to a private person.” *Id.* “[T]he construction and maintenance of our highway system is a governmental function for the use and benefit of the public” related to which, before its abolition, the State possessed sovereign immunity. *Kaldahl v. State Highway Commission*, 158 Mont. 219, 294, 490 P.2d 220 (1971), 221. The alleged negligence in *Byorth* concerned a uniquely governmental duty and function, and this Court squarely held the State’s alleged conduct in causing the death was a “claim” under the Tort Claims Act. *Byorth*, 175 Mont. at 67, 572 P.2d at 202.

This Court has consistently found tort claims arising out of government-specific functions—functions private citizens do not perform—are “claims” to which the Tort Claims Act applies. *See, e.g. Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 45, 372 Mont. 58, 310 P.3d 524 (same); *Stenstrom v. State, Child Support Enforcement Div.*, 280 Mont. 321, 329-330, 930 P.2d 650 (1996), 655 (alleged NIED arising out of child support collection); *Cottonwood Hills, Inc. v. State, Dept. of Labor & Industry*, 238 Mont. 404, 407, 777 P.2d 1301 (1989), 1303 (alleged bad faith prosecution of employer for failure to pay proper rate of unemployment insurance contributions); *Gudmundsen*, ¶ 24 (alleged negligent release of a patient from State mental hospital); *Small v. McRae*, 200 Mont. 497, 517, 651 P.2d 983 (1982), 993 (alleged tortious conduct in dismissing State college chairman).

S.W.’s interpretation contradicts the plain language of MCA § 2-9-101(1) and the long line of Montana authority applying “claim” under the Tort Claims Act to hold the State liable, even when the State is performing what is only a governmental, not a private party, function. S.W.’s claim for common-law negligence, on which the jury returned a verdict, is a “claim” to which the \$750,000 damage cap of § 2-9-108 applies.⁵ The District Court’s conclusion to the contrary should be reversed.

Lastly, the District Court did not address the constitutionality of the damage cap, and S.W. did not cross-appeal the issue. To the extent S.W. may argue constitutional infirmity provides an alternative ground for affirmance, however, the argument must be rejected. The Montana Constitution expressly authorizes the Legislature to limit governmental liability, as it did in passing § 2-9-108 by a two-thirds vote of each chamber. Mont. Const. Art. II, § 18. This Court has recognized the Legislature’s ability to limit governmental liability in this manner. *Meech v. Hillhaven W.*, (1989) 238 Mont. 21, 26-52, 776 P.2d 488 (1989), 491-507 (upholding the constitutionality of Montana’s Wrongful Discharge From Employment Act and

⁵ The District Court’s order on the application of the caps was based exclusively on S.W.’s previously-asserted negligence per se claim. (**Doc. 59**) The District Court determined the cap did not apply because “the statutory duty is only on the State and the Department, not private individuals.” (*Id.* at 27 (emphasis added).) Even if the District Court’s interpretation were correct in the negligence per se context (it is not), its conclusory analysis does not apply to common law negligence, which was the only liability theory prosecuted on retrial.

holding there is no fundamental right to a particular remedy, recovery, or cause of action). The damages cap is a “classic example of economic regulation,” *see id.*, and, as evidenced by its legislative history, was enacted to further legitimate government interests in protecting the economic stability of public entities. In fact, until 1972, the State and its agents enjoyed total immunity from suit for tort actions unless there was applicable liability insurance. *Pfost v. State*, 219 Mont. 206, 212, 713 P.2d 495 (1985), 496. The damages cap both applies in this case and passes constitutional muster.

VII. The District Court Erred When It Incorrectly Awarded Judgment Interest.

The District Court entered judgment “in favor of the S.W. and against the Defendant in the amount of \$11,242,764.40, plus post-judgment interest at the statutory rate.” **Doc. 233-1**. The award of post-judgment interest was error under MCA § 2-9-317. *Blanton v. Dep’t of Pub. HHS*, 2011 MT 110, ¶¶ 41-44, 360 Mont. 396, 355 P.3d 1236 (under MCA §2-9-317, “no interest may be assessed against the State until two years after the date of entry of judgment.”)

The State moved to amend the judgment to conform to the requirements of § 2-9-317, MCA. **Docs. 240-241**. The District Court deemed the State’s Motion denied. **Doc. 246**.

The District Court’s award of post-judgment interest and the denial of the motion to amend was error and should be reversed.

CONCLUSION

The District Court’s denial of the State’s motions for summary judgment and judgment as a matter of law should be reversed and judgment entered for the State. If this Court does not enter judgment for the State, the final judgment should be reversed and remanded for retrial. If this Court otherwise affirms the District Court’s final judgment, this Court should amend the amount of damages awarded, consistent with MCA § 2-9-108, to \$750,000.00, and should conform any award of post-judgment interest to the limitations of MCA § 2-9-317.

DATED this 19th day of March, 2026.

DAVIS, HATLEY,
HAFFMAN & TIGHE, P.C.

MOORE, COCKRELL,
GOICOEHEA & JOHNSON, P.C.

/s/ Maxon Davis
Maxon R. Davis
max.davis@dhhtlaw.com
Attorneys for State of Montana

/s/ Eric Brooks
Eric M. Brooks
ebrooks@mcgalaw.com
Attorneys for State of Montana

STATE OF MONTANA
RISK MANAGEMENT AND TORT
DEFENSE

BOONE KARLBERG P.C.

/s/ Sarah Mazanec
Sarah Mazanec
sarah.mazanec@mt.gov
Attorneys for State of Montana

/s/ Thomas Leonard
Thomas Leonard
tleonard@boonekarlberg.com
Attorneys for State of Montana

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word for Windows, is 9,974, excluding the appendix, caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 19th day of March, 2026.

MOORE, COCKRELL,
GOICOECHEA & JOHNSON, P.C.

/s/ Eric Brooks
Eric M. Brooks
P.O. Box 7370
Kalispell, MT 59901
Telephone: (406) 751-6000
ebrooks@mcgalaw.com
Attorneys for State of Montana

CERTIFICATE OF SERVICE

I, Eric M. Brooks, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-19-2026:

Benjamin R. Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Jeffrey Ferguson, S. W.
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Jeffrey Ferguson, S. W.
Service Method: eService

Lawrence A. Anderson (Attorney)
Attorney at Law, P.C.
P.O. Box 2608
Great Falls MT 59403-2608
Representing: Jeffrey Ferguson, S. W.
Service Method: eService

Sarah Marie Mazanec (Govt Attorney)
1625 11TH AVE
HELENA MT 59601-4600
Representing: State of Montana, Department of Public Health and Human Services
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: State of Montana, Department of Public Health and Human Services
Service Method: eService

Electronically signed by Lindsay Mena on behalf of Eric M. Brooks
Dated: 03-19-2026