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STATE OF MONTANA
Case Number: DA 22-0018

DA 22-0018

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 55

S.W., a minor, by and through her
Guardian Jeffrey Ferguson,

Plaintiff and Appellee,

v.

STATE OF MONTANA, by and through the Montana
Department of Public Health and Human Services,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDV-13-813(b)
Honorable Elizabeth A. Best, Presiding Judge

COUNSEL OF RECORD:

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Decided: March 19, 2024

Filed:

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 S.W. was a six-month-old infant in February of 2009 when her father's girlfriend inflicted serious injuries on her, causing lifelong impairment. Through her guardian, S.W. sued the Montana Department of Public Health and Human Services ("the Department") for its failure to remove her from her father's home prior to the injuries. The District Court determined as a matter of law that the State's child abuse investigation was negligent and caused S.W.'s injuries. After a two-day damages trial, a Cascade County jury awarded S.W. over $16 million.

¶2 We address the following issues:

> *Issue One: Whether the District Court erred by holding that the immunity provision of § 41-3-203(1), MCA, applied only to "persons" and not to the State.*
>
> *Issue Two: Whether the District Court erred by holding that the State was negligent as a matter of law.*
>
> *Issue Three: Whether the District Court erred by holding as a matter of law that the assault on S.W. was foreseeable.*
>
> *Issue Four: Whether the District Court abused its discretion when it (1) excluded the State's liability expert; (2) imposed a sanction related to evidence spoliation; and (3) permitted S.W. to introduce evidence and argument about her medical expenses and related services.*
>
> *Issue Five: Whether the District Court erred by concluding that the statutory cap on damages against the State did not apply to this case.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On February 18, 2009, Alicia Hocter severely injured her boyfriend's six-month old daughter, S.W. Hocter picked up the crying infant and slammed her head against the side

of her crib multiple times before throwing her back into the crib. S.W.'s injuries resulted in blindness and other permanent disabilities. Hocter was convicted of aggravated assault and criminal endangerment in 2010 and is currently serving a thirty-year sentence at the Montana Women's Prison.

¶4 Before Hocter's assault on S.W., the State received several reports concerning S.W.'s welfare. On December 28, 2008, a doctor reported that S.W. had been brought to the Great Falls Benefis Emergency Department by her father, Jacob Arnott, and Hocter. S.W. had multiple bruises on her belly. Arnott and Hocter could not explain how the bruising occurred but told the doctor that S.W. had been with her mother—Kendra Bernardi—for a supervised visit at the couple's home the day before. The doctor reported that S.W.'s bruises were 24 to 48 hours old and were consistent with being pinched. The doctor diagnosed the injury as "Child abuse, superficial abrasion to the abdomen and bruising [of the] abdominal wall." The doctor was unable to determine the cause of the bruising but described Arnott as "cooperative and protective."

¶5 The Department's intake system marked the doctor's report as "Priority 2," which required an investigation within fourteen days. The Department assigned employee Cari Davids to the case. Davids's supervisor informed her in a handwritten note that she needed to address the report "ASAP." Davids conducted an unannounced visit at Arnott and Hocter's home on December 29, 2009, the day after the report. Davids looked at S.W. and took pictures of her bruising. Davids described S.W. as "a happy alert baby." Davids described the couple's home as just at "minimal standards" and encouraged them to clean.

¶6 In response to Davids's questioning, Arnott and Hocter explained that they had brought S.W. to the hospital after they had noticed her bruises. But Arnott and Hocter told conflicting stories about when they first noticed S.W.'s bruises. The couple stated that at one point during Bernardi's visit at their home, the visit supervisor left Bernardi alone with S.W. Arnott and Hocter claimed to have heard S.W. crying at that time.

¶7 Davids arranged for S.W. to have a follow-up appointment with her pediatrician that day. Arnott brought S.W. to the appointment, which Davids also attended. The pediatrician diagnosed the bruising as "non-accidental trauma," but could not determine the cause or the estimated time when the bruising occurred. The pediatrician ordered a full-body bone scan for the following day. The pediatrician advised Davids that the scan revealed no additional trauma.

¶8 On December 30, 2009, Davids interviewed Bernardi, who stated that she did not recall seeing bruising on S.W.'s stomach during her visit. Davids also interviewed the visit supervisor, who largely confirmed Arnott and Hocter's version of events. That same day, Davids made a referral to the Great Falls Police Department, who sent a detective immediately to meet Hocter, Arnott, and S.W. at Davids's office. The detective interviewed Hocter and Arnott and took pictures of S.W.'s bruises. The detective told Davids that he did not have sufficient probable cause to charge anyone at that time.

¶9 On January 6, 2009, the State received an anonymous report about a strong odor of marijuana coming from Arnott and Hocter's apartment on two occasions and a child crying

inside. Another Department employee closed the report, as Davids was already investigating the case.

¶10 Davids conducted another home visit on January 15, 2009. Davids reported that Arnott and Hocter's home was "above minimal standards" and that S.W. "looked healthy and happy." S.W.'s bruising was gone by this time. Davids stressed to Arnott his responsibility to keep S.W. safe. Davids closed the case and summarized the facts and her actions in an Investigative Safety Assessment. Davids determined that S.W. had not received serious, inflicted, physical harm, was not at risk of imminent harm, was safe in Arnott and Hocter's home,[1] and that no more follow-up was required.

¶11 Three days later, on January 18, 2009, a labor and delivery nurse at Benefis Hospital reported to the State concerns that Arnott had left S.W. unattended in her car seat in Hocter's hospital room while Hocter was in labor and giving birth. The Department designated the report as a "Priority 0" because no conduct that met the definition of child abuse or neglect was alleged. The Department sent an employee to discuss the report with Arnott; the employee reported no concerns. S.W. remained in Arnott and Hocter's care until Hocter's assault on her one month later.

¶12 In 2013, S.W., through her guardian, brought a civil action against the State, alleging that the State, through the acts and omissions of its investigator Davids, breached its duty of reasonable care to protect S.W. from abuse. Following a years-long discovery process,

[1] Arnott had full custody of S.W.

the District Court issued a series of summary judgment orders and rulings on the parties' motions in limine. Relevant to this appeal, the District Court ruled:

> (1) The State could not claim immunity pursuant to § 41-3-203(1), MCA, because the statute granted limited immunity to individual caseworkers but not to the State itself. The District Court held that even if the immunity provision applied, the State acted with gross negligence as a matter of law and thus was not protected by the provision.
>
> (2) The State was negligent per se because it breached its duties under a Montana statute outlining actions the State must take on receipt of a child abuse report.
>
> (3) The State was sanctioned for its inability to locate Davids's photos of S.W.'s initial bruises. The sanction allowed S.W. to inform the jury that the State had destroyed the evidence shortly after Hocter's assault on S.W.
>
> (4) The statutory cap on government tort liability did not apply to this case; therefore, the District Court did not address S.W.'s constitutional challenge to the cap.
>
> (5) An expert witness for the Department was precluded from testifying at trial.
>
> (6) The State was precluded from arguing causation as a defense because the District Court concluded that Hocter's assault was foreseeable as a matter of law.

¶13 The District Court held a two-day jury trial on the sole remaining issue of damages. The court instructed the jury that the court had "found as a matter of law that the State of Montana was negligent and caused the injuries [S.W.] suffered on February 18, 2009." The jury awarded S.W. $16,652,538 for the loss of her future earning capacity, past personal care assistance, future life care costs, impairment of the capacity to pursue her established course of life, and mental and emotional suffering.

STANDARDS OF REVIEW

¶14 "The interpretation of a statute is a question of law that we review for correctness." *Weber v. State*, 2015 MT 161, ¶ 12, 379 Mont. 388, 352 P.3d 8 (citation omitted). We describe the standards of review for the remaining issues below.

DISCUSSION

¶15 *Issue One: Whether the District Court erred by holding that the immunity provision of § 41 3-203(1), MCA, applied only to "persons" and not to the State.*

¶16 In relevant part, § 41-3-203(1), MCA, states: "Anyone investigating or reporting any incident of child abuse or neglect under 41-3-201 or 41-3-202 . . . is immune from any liability, civil or criminal . . . unless *the person* was grossly negligent or acted in bad faith or with malicious purpose or provided information knowing the information to be false."[2] (Emphasis added.)

¶17 The State argues that the District Court erred when it held that the immunity provision of § 41-3-203(1), MCA, applied only to individual persons and not the State. The State contends that the word "person"—found both in the dictionary definition of "anyone" and in the immunity provision at issue ("Anyone . . . is immune . . . unless the person was grossly negligent . . . ." Section 41-3-203(1), MCA)—includes government entities along with natural persons. The State contends that the immunity provision must be read in conjunction with the two other statutes it cites, which describe child abuse reporting procedures and actions "the department" must take upon receiving such reports.

[2] The provision also excepts from immunity actions done in bad faith or with malicious purpose or where false information is knowingly provided. These exceptions were not argued by either party.

The State cites Montana's Tort Claims Act, stating that "[f]or the purposes of tort liability to S.W., in legal and practical effect, the State and its employees are one." Finally, the Department cites two decisions by this Court that applied immunity provisions to the State: *Weber* (applying to the State the same immunity provision at issue here), and *Gudmundsen v. State*, 2009 MT 56, 349 Mont. 297, 203 P.3d 813 (applying a different immunity provision, § 27-1-1103, MCA, to the Montana State Hospital).

¶18 As we did in rejecting this exact argument in *Newville v. Department of Family Servs.*, 267 Mont. 237, 269-70, 883 P.2d 793, 812 (1994), the resolution of this issue begins and ends with the application of the plain language of § 41-3-203(1), MCA. Our first task in statutory interpretation is reviewing the statute's plain language. Section 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). "Language that is clear and unambiguous requires no further interpretation." *Gannett Satellite Info. Network, Inc. v. State*, 2009 MT 5, ¶ 20, 348 Mont. 333, 201 P.3d 132 (citation omitted). On its face, § 41-3-203(1), MCA, does not reference political or institutional entities, and explicitly uses language that explicitly and exclusively refers to "persons." Section 41-3-203(1), MCA (stating that "anyone" is immune from liability unless the "person" was grossly negligent . . .).

¶19 This plain language application of this statute is entirely consistent with our holding in *Newville*. In *Newville*, this Court applied the plain language of § 41-3-203(1), MCA, and rejected the exact same argument the State makes in this case. *Newville*, 267 Mont. at

269-70, 883 P.2d at 812. Applying the unambiguous plain language of § 41-3-203(1), MCA, this Court unanimously held:

> The Department's second argument relating to immunity is that it is granted statutory immunity by § 41-3-203, MCA, *which provides immunity for persons* required to report and investigate child abuse under the provisions of §§ 41-3-201 and 41-3-202, MCA. *This immunity is not intended for the Department*; rather, it is intended to protect individuals such as teachers, doctors, and psychologists who are required to report suspected abuse. The stated public policy of Montana is to "provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection." Section 41-3-101(2), MCA. *We conclude that § 41-3-203, MCA, also does not immunize the Department from tort liability*.

Newville, 267 Mont. at 269-70, 883 P.2d at 812 (emphasis added).[3]

¶20 The State's reliance on *Gudmundsen* and *Weber* as somehow countermanding the binding precedent established in *Newville* is unavailing. In *Gudmundsen*, we held that § 27-1-1103, MCA—a different statute than the one at issue here—conferred immunity to the Montana State Hospital. *Gudmundsen*, ¶ 24. In *Weber*, we assumed, without deciding, that § 41-3-203(1), MCA, conferred immunity to the State because Weber did not appeal the trial court's ruling on that issue. *Weber*, ¶ 13. Cases that do not analyze relevant issues or statutes are not binding authority and do not persuade us that § 41-3-203(1), MCA,

[3] More recently, this Court reiterated our plain language interpretation of § 41-3-203, MCA, as applying only to persons but not to the State itself. In *Flathead Joint Bd. of Control*, we held that the challenged provision applied only to designated individuals but did not cover "[s]tate governmental entities." *Flathead Joint Bd. of Control v. State*, 2017 MT 277, ¶ 17, 389 Mont. 270, 405 P.3d 88. In giving examples of other statutes "that recognize[d] immunities from suit as to individual public employees, apart from immunities for the governmental entities themselves[,]" we cited "§ 41-[3]-203, MCA, immunizing from suit *persons* who report child abuse, in certain situations." *Flathead Joint Bd.*, ¶ 18 (emphasis added).

confers immunity to the State, particularly when faced with binding precedent that is directly on point to the issue before us.

¶21 Although the statute's plain language and this Court's binding precedent obviate any continuing analysis, it bears noting our long-standing rule that if "the Legislature disagrees with our interpretation of a statute, it is free in the exercise of its constitutional prerogative 'to override our interpretation and effect the proper legislative intent.'" *State v. Spagnolo*, 2022 MT 228, ¶ 8, 410 Mont. 457, 520 P.3d 330 (citing *State v. Wolf*, 2020 MT 24, ¶ 23, 398 Mont. 403, 457 P.3d 218). "We presume that the legislature is aware of the existing law, including our decisions interpreting individual statutes . . . . We presume that if the legislature disagreed with our interpretation . . . it would have amended the statute accordingly." *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 14, 362 Mont. 1, 261 P.3d 570 (citation omitted). In that regard, in the nearly three decades since our decision in *Newville*, the Legislature has made several amendments to § 41-3-203, MCA, including abrogating a separate holding in *Newville* concerning a different statute immaterial to this issue before us. *See* 1995 Mont. Laws ch. 330. Yet despite minor amendments over the years, including those directly responding to separate holdings in *Newville*, the Legislature has never exercised its authority to supersede *Newville* and expand the immunity provision of § 41-3-203, MCA, to include the State.

¶22 "Unless it appears that our interpretation is manifestly wrong, we will not overrule precedent regarding the construction of statutory language." *Spagnolo*, ¶ 8 (citation omitted). The State does not even argue that our construction of the statutory language in

Newville is manifestly wrong. The States devotes three sentences in its opening brief to our holding in *Newville*, the culmination of which is the contention that "post-*Newville* amendments to §§ 41-3-201, -202, and -203 make clear that immunity under § 41-3-203 applies to the State." In other words, the State argues that minor amendments to § 41-3-203(1), MCA, and amendments to two other statutes—none of which remotely indicated the Legislature's intention to expand the individual immunity provision of § 41-3-203(1), MCA, to the State—nevertheless resulted in an expansion of the immunity provision of § 41-3-203, MCA, from individuals to the State itself. Boiled down, the State asks us to hold that in the decades since our holding in *Newville*, during which time the Legislature has conspicuously avoided any amendment to § 41-3-203, MCA, which would have "specifically provided" a grant of immunity to the State, as mandated by Art. II, Sec. 18, the Legislature "accidentally provided" a grant of immunity to the State by making minor amendments wholly unrelated to the expansion of immunity and which do not even reference any intent to expand the immunity provision of § 41-3-203(1), MCA, to the State.[4]

[4] The legislative history of the amendments upon which the State relies further belies the State's argument that the amendments were intended in any way to expand the immunity provision of § 41-3-203(1), MCA, to the State. HB 66 was introduced by Rep. Vicki Cocchiarella at the request of the Department. The bill was introduced as "[a]n act creating a rebuttable presumption of good faith and no malicious purpose for *certain persons* involved in child abuse and neglect investigations and proceedings." (Emphasis added.) Before the House Judiciary Committee, Rep. Cocchiarella introduced HB 66 as a bill intended to "protect . . . *professionals*" by providing "some immunity in a lawsuit." (Emphasis added.) In her opening statement before the Senate Judiciary Committee, Rep. Cocchiarella clarified "that HB 66 protects law enforcement, social workers, and other professionals who investigate child abuse and neglect from liability for investigative work that they perform." Testifying before the House Judiciary Committee regarding the intent of the bill, Department Director Hank Hudson testified that "[Department] *employees* shouldn't be subject to litigation while performing the task [of investigation]." (Emphasis added.) In her

¶23 The plain language of § 41-3-203(1), MCA, unambiguously grants immunity to individual persons and not the State. In *Newville*, this Court applied the exact same language of § 41-3-203, MCA, currently before us and held that the statute applies only to individual persons and not the State. *Newville*, 267 Mont. at 269-70, 883 P.2d at 812. In the nearly three decades since our holding in *Newville*, the Legislature has never amended § 41-3-203, MCA, to extend its immunity provision to the State and it is not the province of this Court to do so now. We affirm the District Court's conclusion that the immunity provision of § 41-3-203(1), MCA, does not apply to the State.

¶24 *Issue Two: Whether the District Court erred by holding that the State was negligent as a matter of law*

¶25 Where ordinary negligence is the failure to use reasonable care, gross negligence is the "failure to use slight care." *Weber*, ¶ 14 (quoting *Rusk v. Skillman*, 162 Mont. 436, 441, 514 P.2d 587, 589 (1973)); *see also State v. Gould*, 216 Mont. 455, 475, 704 P.2d 20,

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testimony before the committee, Department Counsel Ann Gilkey further clarified that the intent of the bill was to limit the liability of individuals. In response to a Committee member's question as to the intent of the bill, Gilkey replied: "the intent is to protect any *reporter* suspecting child abuse or neglect . . . . *The reporter* should have immunity." (Emphasis added.) Gilkey concluded her written testimony by urging the Committee "to support HB 66 as a bill that will help protect all *people* who are required by law to report or investigate allegations of suspected child abuse or neglect." (Emphasis added.) After HB 66 passed the House, Gilkey appeared before the Senate Judiciary Committee and read from prepared testimony. Again, she made it abundantly clear that the proposed amendment to § 41-3-203, MCA, was designed *solely* for the protection of individuals involved in child abuse and neglect investigations. Gilkey testified that "HB 66 will provide a bit more protection to *these people* who are required by law or conscience to report suspected child abuse or neglect." (Emphasis added.) As she did before the House Judiciary Committee, Gilkey concluded her testimony before the Senate Judiciary Committee by urging the Committee "to support HB 66 as a bill that will help protect all *people* who are required by law to report or investigate allegations of suspected child abuse or neglect." (Emphasis added.) Nowhere in the legislative history is there any indication of an intent to expand the immunity provision of § 41-3-203(1), MCA, to the State itself.

33 (1979) (describing gross negligence as differing from ordinary negligence in degree, not in kind). In opposing the State's motion for partial summary judgment on the issue of gross negligence, S.W. argued that the District Court already determined the immunity provision did not apply to the State and so a ruling on gross negligence was unnecessary. While we have affirmed the District Court's ruling on that issue, a determination of gross negligence as a matter of law necessarily encompasses the lower standard of ordinary negligence; therefore, we must address whether the District Court erred by holding the State negligent as a matter of law.

¶26 In response to the State's motion for summary judgment, S.W. filed a document raising fourteen disputes with the State's factual statements. S.W. disputed the State's description of its report-assessment process and the completeness of Davids's safety assessment. S.W. contended that although Davids did not determine the identity of the perpetrator, she knew that S.W.'s bruising was the result of child abuse, that Davids failed to assess Hocter's protective capacity, and that Davids failed to follow up on Arnott and Hocter's inability to provide a convincing explanation for the bruises.

¶27 In its order on the State's motion, the District Court concluded that the undisputed facts demonstrated the State acted with gross negligence in investigating and responding to S.W.'s case. The court reasoned that the State was grossly negligent by failing to remove S.W. in light of two medical opinions diagnosing the bruising as abuse, knowledge that the bruising had occurred while S.W. was in Arnott and Hocter's home, and its statutory authority to remove a child in danger. The District Court stated that it was not consistent

with the State's "sole duty" to protect abused children to close an investigation when the investigator could not determine precisely who caused the injuries. Despite contrary evidence in the summary judgment record, the court stressed twice that Davids had never met with S.W.'s biological mother, Bernardi. The State argues on appeal that the summary judgment record permitted only the opposite conclusion—that the State was not grossly negligent.

¶28 Our de novo review of the Rule 56 record leads us to conclude that the District Court inappropriately weighed issues of material fact and failed to view the evidence in a light most favorable to the State when it granted summary judgment on negligence. Drawing all inferences in its favor, the State produced evidence sufficient to withstand summary judgment.[5] Davids conducted a prompt investigation of the initial report of bruising; her investigation included multiple visits, including interviews with Hocter, Arnott, Bernardi, and others, referrals to law enforcement and medical professionals, and a final report. The record also includes deposition testimony reflecting the adequacy of the State's actions. The January 6, 2009, anonymous report of a strong odor of marijuana and sounds of a crying child coming from Arnott and Hoctor's home on two occasions was closed by another Department employee because of Davids'ss ongoing investigation, which culminated with another home visit on January 15, 2009, after which Davids reported that S.W. "looked healthy and happy" and closed the case.

[5] Even though the State was the "moving party"—S.W. did not file a cross-motion—because the District Court entered summary judgment against the State, it is treated as the non-moving party in analyzing the propriety of the court's ruling.

¶29 By the same token, we disagree with the State's contention that the summary judgment record could support only a conclusion that it was not negligent. Two medical professionals had diagnosed S.W.'s bruising as the result of physical child abuse. Davids'ss report, for reasons unexplained, marked "NO" in response to the safety assessment question about whether a child had received serious, inflicted, physical harm. Davids also marked "NO" without explanation to a question about "unconvincing or insufficient explanation for the child's serious injury." Davids'ss supervisor did not sign her safety assessment. And while Davids's January 15, 2009, home visit led her to report that S.W. looked healthy and happy, this home visit occurred nine days after the anonymous report of a strong odor of marijuana and sounds of a crying child coming from Arnott and Hoctor's home on two occasions—a report that came in during an ongoing child abuse investigation. Viewing these facts in a light most favorable to S.W., the State likewise was not entitled to summary judgment on the issue of negligence.

¶30 "Ordinarily, questions of negligence are poorly suited to adjudication by summary judgment and are better left for jury determination at trial." *Prindel v. Ravalli Cty.*, 2006 MT 62, ¶ 20, 331 Mont. 338, 133 P.3d 165 (citation omitted); *see also Estate of Strever v. Cline*, 278 Mont. 165, 175, 924 P.2d 666, 672 (1996) ("Breach of a legal duty is a question of fact that is properly determined by the fact finder."). On these facts we cannot say that there was "a complete absence" of genuine issues of material fact that the State was or was not negligent. The Rule 56 record demonstrates disputed questions of fact regarding

whether the State failed to use reasonable care. This dispute is better left for jury determination at trial.

¶31 *Issue Three: Whether the District Court erred by holding as a matter of law that the assault on S.W. was foreseeable.*

¶32 We review summary judgment rulings de novo, applying Rule 56 of the Montana Rules of Civil Procedure. *Prindel*, ¶ 19 (citation omitted). Summary judgment is appropriate only where the record before the court reveals a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56. In a summary judgment proceeding, trial court judges must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Prindel*, ¶ 19 (citation omitted).

¶33 The District Court concluded, as a matter of law, that Hocter's assault was foreseeable and did not relieve the State of liability. The District Court therefore prohibited the State from asserting at trial several defenses describing Hocter's assault as a third-party act that broke the chain of causation between the State's actions and S.W.'s injuries. The court also reasoned that the State did not comply with the procedural requirements of § 27-1-703, MCA, a statute providing for the apportionment of tort liability among multiple defendants.

¶34 The State asserts on appeal that the District Court erred by holding that Hocter's assault on S.W. was foreseeable as a matter of law. The State asserts that "[t]he issue of foreseeability as part of causation . . . should have been determined for the State, or presented to the jury." The State argues that § 27-1-703, MCA, is inapplicable to the

circumstances of this case and the District Court erred in its application. S.W. responds that the court properly concluded that Hocter's assault was foreseeable and cites other jurisdictions holding that "when a state agency has notice of a child being abused, it is reasonably foreseeable that the abuse is likely to continue." S.W. does not address the District Court's application of § 27-1-703, MCA.

¶35 The State's assertion that it is entitled to judgment as a matter of law on the issue of causation is made for the first time on appeal. The State did not move for summary judgment on this issue before the District Court; nor did the State argue that it was entitled to judgment as a matter of law on this issue in response to S.W.'s motion for partial summary judgment on causation issues. In response to S.W.'s motion for partial summary judgment on this issue, the State argued that foreseeability of Hocter's assault on S.W. was a jury question. Addressing this issue to the District Court, the State quoted our holding in *Prindel*:

> In light of our foregoing analysis of the foreseeability of risk posed by Russell, we conclude that reasonable minds could differ as to whether Russell's intentional act of stabbing Prindel was so unforeseeable as to sever the chain of causation. Consequently, *this issue of causation should not be decided on summary judgment, but should be resolved by the trier of fact*.

Prindel, ¶ 46 (emphasis added). Referencing this quote from *Prindel*, the State argued to the District Court: "The same result should obtain here. *It is a jury question.*" (Emphasis added.) The State concluded this section of its argument, by asserting that "[c]ause is and remains a question for the jury as the trier of fact."

¶36 On appeal, the State asserts for the first time that, contrary to its argument to the District Court that the issue of foreseeability of Hocter's assault on S.W. is a question of fact for the jury to decide, it can be decided as a matter of law—in favor of the State. The State argues in the alternative that it is an issue for the jury's consideration. The State makes no effort to reconcile this discrepancy between its argument to the District Court and its assertion to this Court. And notably, although the State makes the *assertion* that it is entitled to judgment as a matter of law, the entire substance of the State's *argument* on appeal is devoted to its argument that the District Court erred by granting judgment as a matter of law on this issue in favor of S.W., and that it is an issue that should be presented to the jury.

¶37 The State acknowledges at the outset of its argument on appeal that "[t]he District Court . . . rejected [its] contention that foreseeability on the issue of causation *is a jury question* . . . ." (Emphasis added.) Referencing three cases[6] the State contends were central to the District Court's causation discussion, the State argues that these cases actually "require the State be allowed to present evidence of Hocter's conduct and argue the State's conduct did not cause S.W.'s injuries and damages." Noting this Court's decisions "uniformly hold[ing] the causation element of negligence, including the consideration of foreseeability of criminal conduct, is an issue for the jury unless reasonable minds can reach only one conclusion," the State concludes with the same quotation from *Prindel*, ¶

[6] *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777; *Cusenbary v. Mortensen*, 1999 MT 221, 296 Mont. 25, 987 P.2d 351; and *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 208 P.3d 836.

46, which it cited to the District Court when it argued that the issue of foreseeability as it pertains to causation in this case "is a jury question."[7]

¶38 In cases where there is an uninterrupted chain of events from a defendant's negligence to a plaintiff's injury, causation is satisfied by proof that the defendant's conduct was a "cause in fact or actual cause" of the injury. *Covey v. Brishka*, 2019 MT 164, ¶ 61, 396 Mont. 362, 445 P.3d 785 (citation omitted). A plaintiff must demonstrate only that her injuries would not have occurred without the defendant's act or omission. The State does not appear to dispute that its conduct was a cause-in-fact of S.W.'s injuries—had the State removed S.W. from Arnott and Hocter's home, S.W. would not have been injured by Hocter.

¶39 In cases involving an intervening cause, however, we also consider the foreseeability of the intervening cause. *Covey*, ¶ 60 (citation omitted). "An intervening cause case is one in which the facts indicate that a force came into motion after the time of the defendant's negligent act and combined with the negligent act to cause the injury to the plaintiff." *Cusenbary*, ¶ 26 (citation omitted). An unforeseeable third-party act—also known as a "superseding intervening cause"—may break the chain of causation and relieve

[7] In his dissent as to our resolution of this issue, Justice Sandefur contends: "The Court avoids the issue by erroneously asserting the State 'raised [this issue] for the first time on appeal,' 'did not move for summary judgment on this issue,' and did not 'argue that it was entitled to judgment as a matter of law on this issue.'" Sandefur Concurrence and Dissent, ¶ 103 n. 18. Although we have deemed it appropriate to point out that the State made no substantive argument either before the District Court or on appeal that it was entitled to judgment as a matter of law on this issue, since this matter is being remanded for further proceedings, there should be no mistake that we have resolved this issue on any basis other than its merits. Paragraphs 38-48 of this Opinion exclusively address our substantive rejection of both the State's and S.W.'s positions that this issue is susceptible to summary disposition as a matter of law.

a defendant of liability. A foreseeable third-party act does not break the chain of causation, and a defendant remains liable. *Covey*, ¶ 60 (citation omitted). Defendants need not foresee the specific injury in order for a third-party act to be foreseeable. *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 40, 342 Mont. 335, 181 P.3d 601 (citations omitted).

¶40 Cases involving intervening acts "normally" raise "questions of fact which are more properly left to the finder of fact for resolution." *Estate of Strever*, 278 Mont. at 178, 924 P.2d at 674. Only when there is "no room for a reasonable difference of opinion" as to whether the third-party act was reasonably foreseeable is summary judgment on the issue proper. *Estate of Strever*, 278 Mont. at 178, 924 P.2d at 673 (citation omitted).

¶41 We have decided in at least one case that a third-party's action was not foreseeable as a matter of law and thus relieved the defendant of liability for damages. In *Estate of Strever v. Cline*, we held that a group of teenagers' actions—stealing a gun from an unlocked truck and waving the gun around with a finger on the trigger while intoxicated—were clearly not foreseeable to the truck owner. Any negligence by the truck owner in keeping a gun in an unlocked truck was superseded by the unforeseeable criminal and grossly negligent acts of the teenagers. *Estate of Strever*, 278 Mont. at 179, 924 P.2d at 674.

¶42 We have decided in several other cases that a third party's action was foreseeable as a matter of law. In *Larchik v. Diocese of Great Falls-Billings*, we held that it was "clearly foreseeable" that intentional striking would occur during a high school P.E. lacrosse-style game. 2009 MT 175, ¶ 50, 350 Mont. 538, 208 P.3d 836. *See also*

Cusenbary, ¶ 30 (holding that the drunk driver's conduct of driving through the wall of the tavern was a foreseeable intervening cause); *Faulconbridge*, ¶ 92 (holding that it was foreseeable to the State, which was responsible for the construction and maintenance of a roadway, that a driver might drive negligently upon that roadway).

¶43 But often when reviewing summary judgment decisions regarding the foreseeability of a third-party act, we have held that the fact-intensive issue was not appropriately decided as a matter of law and should be sent to a jury. For example, in *Eklund v. Trost*, a youth ran away from a detention center; after getting into a high-speed police chase, the youth struck and injured a bystander. 2006 MT 333, ¶ 17, 335 Mont. 112, 151 P.3d 870. We held that reasonable minds could differ whether the youth's actions were foreseeable and thus whether the injured bystander could hold the detention center liable. *Eklund*, ¶ 46. Similarly, in *Prindel*, we held that reasonable minds could differ as to whether a stabbing committed by a person whom a jail declined to book was a foreseeable act. *Prindel*, ¶ 46. We similarly remanded for trial the question of foreseeability of a third party's act in *Fisher*, ¶ 48 (considering the foreseeability of a tow-truck operator negligently releasing a semitrailer and injuring a police officer after the semitruck had wrecked on icy roads); *Lopez v. Great Falls Pre-Release Services*, 1999 MT 199, ¶ 35, 295 Mont. 416, 986 P.2d 1081 (considering the foreseeability that an escapee from a pre-release center would violently attack someone); and *Starkenburg v. State*, 282 Mont. 1, 12, 934 P.2d 1018, 1024 (1997) (considering the foreseeability that a parolee would shoot three women after his release from prison).

¶44 To determine whether Hocter's assault—slamming S.W. against her crib—was a foreseeable third-party act if the State failed to exercise reasonable care in its earlier investigation, we examine the evidence available in the Rule 56 record. Contrary to the District Court's determination, we agree with the State's argument to the District Court that the evidence could support more than one conclusion. On one hand, a reasonable juror could find that Hocter's assault was unforeseeable, too remote in time or scope from the State's decision to leave S.W. in Arnott and Hocter's care. S.W.'s documented bruising occurred nearly two months before Hocter's assault. The State promptly investigated—conducting interviews and home inspections, arranging for and attending a follow-up pediatrician appointment, and making a police referral. The police investigation concluded with a lack of probable cause to file criminal charges. The later reports regarding S.W. did not rise to the level of child abuse. And the State's visits to the home revealed no further safety concerns.

¶45 On the other hand, a reasonable juror could find that Hocter's assault was just the sort of harm the State should have foreseen. S.W.'s December bruises were undisputedly non-accidental trauma. Even if the State does not have proof of how a child sustained injury, it has authority to remove a child on probable cause that a child is abused or neglected or is in danger of being abused or neglected, even in the absence of criminal charges. Sections 41-3-427, 41-3-102(3), MCA. In this case, the State had probable cause that S.W. had been physically harmed while in Arnott and Hocter's home. Although Arnott and Hocter suggested Bernardi may have been responsible for the abuse, Bernardi's only

access to S.W. was during a supervised visit in Arnott and Hocter's home. Arnott and Hocter could not provide a straight story about when they had noticed the bruises, and there were two subsequent reports on the same child from third parties while the abuse investigation was open and ongoing. This included two reports of a child crying inside the apartment that were designated as Priority 2, which required investigation within fourteen days. Yet these reports were closed two days later as "unsubstantiated" without any apparent additional investigation because of the already ongoing investigation. Despite S.W.'s bruising and her caregivers' inconsistent stories, Davids marked in the safety assessment that S.W. had not received serious, inflicted physical harm and that Hocter and Arnott had not failed to provide sufficient explanation for S.W.'s injuries. Given these disputes of material fact, we conclude that the question of the foreseeability of Hocter's assault cannot be determined as a matter of law and must be left to a jury for resolution.

¶46 In that regard, we address the proper jury instruction on remand. In *Estate of Strever*, we stated that "foreseeability is properly considered with respect to causation" in cases "where there has been an allegation that the chain of causation is severed by an independent intervening cause." *Estate of Strever*, 278 Mont. at 175, 924 P.2d at 672. We have also cautioned, however, that to avoid potential juror confusion, courts should not use terms such as "proximate cause," "legal cause," or "reasonable foreseeability" when instructing juries in such a case. *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 371-72, 916 P.2d 122, 140 (1996). We approved instead the following standard for a jury to determine causation: "In those cases where chain of causation is an issue (e.g., where there

is an allegation of an independent intervening cause) . . . [t]he defendant's conduct is a cause of the (injury/death/damage) if, in a natural and continuous sequence, it helped produce it and if the (injury/death/damage) would not have occurred without it." *Busta*, 276 Mont. at 371, 916 P.2d at 139. We reiterated our approval of this instruction in *Fisher*, ¶ 49. While recognizing that there may be circumstances where the tailoring of instructions is necessary, we take this opportunity to, once again, reiterate and approve this instruction for cases in which there is an allegation of an independent intervening cause severing the chain of causation.

¶47 We are unpersuaded by S.W.'s arguments that simply because the State investigates cases involving criminal acts of child abuse, such acts are foreseeable as a matter of law. We have instructed that defendants usually have less reason to anticipate criminal acts of a third party, but that in certain contexts criminal acts can be foreseeable. *Estate of Strever*, 278 Mont. at 183, 924 P.2d at 676. The State responds to many reports that do not involve criminal assaults against the child. Criminal acts of child abuse neither categorically absolve the State of liability for its wrongful acts nor categorically are foreseeable to the State. The test in each case is whether the criminal act at issue was reasonably foreseeable to the State, given what the State knew at the time of its decision. For summary judgment consideration, a trial court may not weigh conflicts in the evidence that could support more than one conclusion. M. R. Civ. P. 56.

¶48 We also note that the District Court's application of § 27-1-703, MCA, was inapposite in this case, a decision S.W. does not defend on appeal. That statute concerns

the apportionment of liability among multiple negligent actors. But as the State acknowledges in its brief on appeal, it is not seeking to admit evidence of multiple negligent actors as a means of apportioning responsibility for S.W.'s injuries. The facts of this case would not support such consideration in any event since Hocter's conduct was intentional. The issue in this case "is not how to apportion blame among several liable parties but whether, because of the intervening [acts] of another, the State's acts or omissions could be said to be the cause of [the plaintiff's] injuries." *See Pula v. State*, 2002 MT 9, ¶ 17, 308 Mont. 122, 40 P.3d 364. Section 27-1-703, MCA, has no application to intentional torts.

¶49 *Issue Four: Whether the District Court abused its discretion when it (1) excluded the State's liability expert; (2) imposed a sanction related to evidence spoliation; and (3) permitted S.W. to introduce evidence and argument about her medical expenses and related services.*

¶50 "We review evidentiary rulings for abuse of discretion." *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 11, 395 Mont. 432, 443 P.3d 369 (citation omitted). We also review for abuse of discretion a court's rulings on discovery sanctions. *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541 (hereinafter "*MSU*"). We review findings of fact related to discovery sanctions for clear error. *MSU*, ¶ 20. A trial court's "[f]indings are clearly erroneous if not supported by substantial evidence, [if] the court misapprehended the effect of the evidence, or [if] we are firmly convinced from our review of the record that the court was mistaken." *MSU*, ¶ 20. (citations omitted).

Liability Expert

¶51 Montana Rules of Civil Procedure require parties to disclose the opinions of the experts they plan to call at trial. M. R. Civ. P. 26(b)(4)(A)(i). The State disclosed the opinion of an expert witness, Dr. Judy Krysik, MSW. The District Court granted S.W.'s motion to exclude the opinion.

¶52 Only one part of Krysik's excluded opinion is discussed by the State on appeal—that she believed the State "acted with reasonable care in its involvement with [S.W.] from first contact following her birth until the time she was injured on February 18, 2009." The court reasoned that this opinion did not concern an issue beyond the common experience of the jury, was not the appropriate subject of expert testimony, and invaded the province of the jury. Although the court relayed our holding that expert opinions about the standard of care are proper, *see In re J.R.*, 2011 MT 62, ¶ 25, 360 Mont. 30, 252 P.3d 163, the court found "no disclosed opinions or facts addressing the standard of care applicable here." Because we are remanding, the State will have an opportunity to address this issue by supplementing any expert disclosures regarding the applicable standard of care. We need not reach this issue on appeal.

Sanction for Spoliation

¶53 "[S]poliation is the material alteration, destruction, or failure to preserve evidence for use by an adversary in pending or future litigation." *MSU*, ¶ 22 (citation omitted). Trial courts may sanction parties for spoliation by ordering payment of expenses, informing the jury of the spoliation, and imposing "other appropriate sanctions." M. R. Civ. P. 37(c)(1).

"Other appropriate sanctions" relevant to this case include designating certain facts as established, prohibiting a spoliating party from raising certain defenses, and rendering a default judgment against the spoliating party. M. R. Civ. P. 37(b)(2)(A).

¶54 In the discovery process, the State was unable to locate the photographs of S.W.'s bruising that Davids took at Arnott and Hocter's home the day after the emergency room doctor's report. S.W. requested that the District Court enter a default judgment due to spoliation. The court, finding no evidence of intentional or bad faith conduct by the State, declined to do so. But the court did find that the State should have reasonably foreseen litigation after Hocter's assault (which occurred just two months after S.W.'s bruising) and that its failure to preserve Davids'ss photos severely prejudiced S.W. The court issued the following sanction: S.W. could "inform the jury that the State destroyed the evidence shortly after the catastrophic injuries were inflicted on [S.W.]" and the State could not "argue that the photos were inconsequential, tangential, or cumulative, or to make any defense of spoliation."

¶55 The State argues that the District Court abused its discretion when it imposed such a harsh sanction for loss of the photos. The State asserts that it could not have foreseen litigation because S.W. did not file her claim until more than four years after the events at issue. Alternatively, the State argues that even if it had a duty to preserve the photos, the court's sanction was disproportionate to any prejudice S.W. experienced. S.W. disagrees—describing the court's sanction as well within the court's broad discretion. S.W. contends that the District Court correctly described Davids's photos as "smoking

gun" evidence because they would have provided unique insight into the foreseeability of escalation of violence.

¶56 When making a sanction decision, courts apply a "duty, breach, prejudice, and proportionality analysis." *MSU*, ¶ 40. S.W. is correct that district courts have broad discretion in this area. *See Richardson v. State*, 2006 MT 43, ¶ 21, 331 Mont. 231, 130 P.3d 634 ("[T]he district court . . . is in the best position to determine both whether the party in question has disregarded the opponent's rights, and which sanctions are most appropriate."). This discretion, however, "is not unfettered." *MSU*, ¶ 15. Trial courts abuse their sanctioning discretion "if [the] discretionary ruling is based on a mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice." *MSU*, ¶ 15 (citation omitted).

¶57 We begin with the District Court's conclusion that the State had a duty to preserve Davids'ss photos and breached that duty when it failed to preserve them. The court found that the State was on notice of suit—and thus had a duty to preserve evidence—at the time of Hocter's assault. Based on its conclusion that the State breached this duty, the court appears also to have found that the State either lost or destroyed the photos *after* Hocter's assault. Our review of the record, however, finds no support for such an implied finding. Indeed, the State's summary judgment briefing below suggests the possibility that the photos may have been lost when they were uploaded before Hocter's assault. Even if the

State was on notice at the time of Hocter's assault and not four years later when S.W. filed her claim, it is not evident from the record that the State spoliated the photos after that time.

¶58 Next, we address the District Court's conclusion that the inability to introduce the photos severely prejudiced S.W. Had the case gone to trial on the issue of liability, S.W. would have been able to introduce the photos of her bruising taken by the police department just one day after Davids's photos were taken. S.W. also had the emergency room doctor's report, Davids's testimony, and other eyewitness testimony. *Compare Spotted Horse v. BNSF Ry. Co.*, 2015 MT 148, ¶¶ 32-39, 379 Mont. 314, 350 P.3d 52 (reversing a defense verdict and remanding for a new trial with a sanction "commensurate" with the prejudice that resulted from the railroad's failure to preserve workplace video surveillance footage highly probative of the accident at issue). Although the District Court found that Davids'ss photos could have provided unique evidence of bruise progression, S.W. has not explained how any alleged progression of the bruising in this short interval of time would have had any material relevance as proof that the State failed to use reasonable care in failing to remove S.W. prior to Hocter's assault.

¶59 Within the context of the foregoing discussion, we consider the proportionality of the District Court's sanction. Notwithstanding its finding no evidence that the State acted intentionally or in bad faith, the court directed a finding that the State "destroyed the evidence" after Hocter's assault. Again, without finding intentional conduct, the court prohibited the State from defending its actions or making any argument about the photos. This sanction was disproportionately harsh in light of the record developed. In that regard,

we make no determination as to how the State's loss of the photos should be handled at trial on remand. Although we hold that the District Court abused its discretion in this instance because the sanction imposed was disproportionate to the conduct based on the record before it, the District Court retains its discretion on remand to fashion an appropriate sanction based on the record developed on remand. *Spotted Horse*, ¶ 15 ("[W]e generally defer to the district court because it is in the best position to determine both whether the party in question has disregarded the opponent's rights, and which sanctions are most appropriate.").

Medical Expenses and Related Services

¶60 Before the damages trial, the State moved to exclude certain evidence related to S.W.'s medical expenses. Relying on our decision in *Meek v. Mont. Eighth Jud. Dist. Court*, 2015 MT 130, ¶ 9, 379 Mont. 150, 349 P.3d 493, the State argued that because it was already paying some of S.W.'s expenses through its Medicaid program, evidence of those expenses was not admissible. S.W. responded that Montana's collateral-source statute, § 27-1-308(3), MCA, requires juries to determine awards without consideration of collateral sources such as Medicaid. The District Court denied the State's motion and allowed the evidence to be introduced.

¶61 The State did not brief this issue in its appeal. Instead, it incorporated by reference arguments made in its trial court briefs, citing the trial court's order to seal all private medical information relating to S.W. "[A]ppellate arguments must be contained within the appellate brief, not within some other document. The mere reference to arguments and

authorities presented in district court proceedings is no substitute for developing and presenting appellate arguments." *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463. An order to seal private medical information does not preclude appellate argument on a related issue.

¶62 In any event, our decision in *Meek*, though it focused on the plaintiff's past medical expenses, is controlling on the evidentiary question. Both parties are entitled to introduce evidence probative of the nature and extent of a plaintiff's injuries, and any collateral source payments are to be accounted for at the time of final judgment, if necessary. *Meek*, ¶ 17. We decline to disturb the District Court's ruling.[8]

¶63 *Issue Five: Whether the District Court erred by concluding that the statutory cap on damages against the State did not apply to this case.*

¶64 Section 2-9-108, MCA, limits governmental liability for damages in tort "in excess of $750,000 for each claim and $1.5 million for each occurrence." The District Court held that the cap did not apply to this case because the cap does not apply to torts involving a government-specific duty. Here, the court reasoned, the statutory duty rested only with the State, not private individuals who have no duty to investigate and respond to child abuse. Because we are vacating the jury's verdict, any discussion of the damages cap would be premature. We decline to issue an advisory opinion about the issue.

[8] *Meek*'s application has been narrowed by recent amendments to § 27-1-308, MCA. That statute was amended, effective April 30, 2021, to limit the evidence a jury may consider in determining the reasonable value of medical services or treatment. But the amendments expressly apply "to claims that accrue on or after [the effective date of this act]" and thus do not affect this case. Section 6, Ch. 327, L. 2021.

CONCLUSION

¶65 The District Court correctly held that the immunity provision of § 41-3-203(1), MCA, does not apply to the State. We conclude that the District Court erred by ruling, as a matter of law, that the State was negligent and that Hocter's assault on S.W. was foreseeable. Given the material factual disputes, these issues are best left to a jury. The District Court abused its discretion by imposing a disproportionate sanction on the State for spoliation of evidence. We affirm in part, reverse the judgment, vacate the jury's verdict, and remand for a new trial consistent with this Opinion.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON

Justice Beth Baker, concurring in part and dissenting in part.

¶66 I join the Court's Opinion on Issues Two, Three, and Four and its decision not to consider the statutory damages cap. I agree the case should be remanded for a new trial where a jury can consider all elements of S.W.'s negligence claim but would hold that the Department may be held liable only under the gross negligence standard that § 41-3-203(1), MCA, plainly establishes for the claim S.W. makes in this case. I therefore dissent from the Court's resolution of Issue One.

¶67 Because all claims for money damages arising from the negligence of a State employee are governed by the Montana Tort Claims Act, Title 2, ch. 9, MCA, I begin there. The Act provides in pertinent part:

> Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, section 18, of the Constitution of the State of Montana.

Section 2-9-102, MCA. The law reflects the State's common law doctrine of *respondeat superior*, which holds employers vicariously liable for the tortious acts of their employees when those employees are acting within the scope of their employment. *See Kornec v. Mike Horse Mining & Milling Co.*, 120 Mont. 1, 8, 180 P.2d 252, 256 (1947); *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 64, 342 Mont. 29, 179 P.3d 481 (describing *respondeat superior* as "a doctrine of the law of agency by which the consequences of one person's actions may be attributed to another person," citing *Restatement (Third) of Agency* § 2.01 Introductory Note (2006)). Thus, when, as here, a complaint is based on a State employee's alleged tortious acts or omissions, the State of Montana—not the employee—is the named defendant subject to any liability that may result. As long as the employee acted within the course and scope of employment, the State defends them in court and pays for any resulting damages. Section 2-9-305, MCA.

¶68 The Tort Claims Act provides parity between a government worker's liability and that of a private citizen—meaning that State entities and their employees are no more and no less subject to liability than is anyone else in the same circumstances. "Section

2-9-101(1), MCA, defines 'claim' in the context of governmental tort liability as arising from an act or omission 'under circumstances where the governmental entity, if a private person, would be liable to the claimant for the damages under the laws of the state.'" *Gatlin-Johnson v. City of Miles City*, 2012 MT 302, ¶ 19, 367 Mont. 414, 291 P.3d 1129. Under the Tort Claims Act, state liability attaches "only where a private person similarly would be liable." *Gudmundsen*, ¶ 24 (quoting *Drugge v. State*, 254 Mont. 292, 294-95, 837 P.2d 405, 406 (1992)). "Thus, where Montana law protects private citizens from liability, it also protects the State." *Gudmundsen*, ¶ 24.

¶69 In *Gudmundsen*, we considered State protection under an immunity provision for mental health professionals, § 27-1-1103, MCA. That provision states that no monetary liability and no cause of action may arise against any mental health professional for failing to warn of a patient's threatened violent behavior unless the professional had a duty to warn of such behavior. The plaintiff in *Gudmundsen* argued that the provision applied only to "mental health professionals" but not to the Montana State Hospital. *Gudmundsen*, ¶ 23. We cited the Tort Claims Act and concluded that "where Montana law protects private citizens from liability, it also protects the State. In this case, if a mental health professional would not be liable under the conditions indicated in the statutes, neither would the State be liable under those same conditions." *Gudmundsen*, ¶ 24.[1]

[1] We came to a like conclusion in *Weber,* where we examined the same provision at issue in this case, § 41-3-203(1), MCA. But as S.W. points out, Weber did not appeal the trial court's ruling that the immunity provision extended to the Department. *Weber*, ¶ 13. As such, we assumed the immunity provision applied to the Department and went on to analyze whether the Department investigator's actions were grossly negligent. Because the plaintiff failed to establish a genuine

¶70 Like in *Gudmundsen*, we should examine standards for the Department's liability in light of similar standards for private persons in the same context. Under § 41-3-202(1)(c), MCA, "[i]f the department determines that an investigation and a safety risk assessment are required, a child protection specialist shall promptly conduct a thorough investigation into the circumstances . . . ." Section 41-3-102(8), MCA, defines a child protection specialist as "an employee of the department who investigates allegations of child abuse, neglect, and endangerment and has been certified pursuant to 41-3-127." Section 41-3-203(1), MCA, insofar as it refers to "[a]nyone investigating" a report of abuse or neglect, thus pertains to Department employees the same as to any other person. The Tort Claims Act provides employees with full defense and indemnification for acts taken within the course and scope of employment. Section 2-9-305, MCA. The Act's indemnity provision "prevent[s] a plaintiff from recovering from both the governmental entity and the individuals acting on behalf of that entity for the same conduct," *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶ 88, 312 Mont. 52, 57 P.3d 836, and grants immunity to a government employee "from individual liability for the conduct if the [employing government entity] acknowledges that the conduct arose out of the course and scope of the employee's official duties," *Kenyon v. Stillwater County*, 254 Mont. 142, 146, 835 P.2d 742, 745 (1992) (*overruled on other grounds*, *Heiat v. Eastern Mont. College*, 275 Mont. 322, 331, 912 P.2d 787, 793 (1996)). Child protection specialists are thereby protected from exposure to individual liability from claims arising out of their investigations.

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issue of material fact to support her claim that the Department employees were grossly negligent, the Department was entitled as a matter of law to immunity under the provision. *Weber*, ¶ 26.

¶71 By limiting § 41-3-203(1), MCA, to determinations of individual liability, the Court displays a fundamental misunderstanding of the principles of governmental tort liability prescribed by the Tort Claims Act. Because the Tort Claims Act makes the State accountable for acts taken in the scope of an investigator's duties and prohibits suit against the investigator individually, § 41-3-203(1), MCA, imposes a standard of care for determining whether a claim arising from the investigator's conduct is compensable by the State.[2] The Tort Claims Act makes a "governmental entity" liable for a money damages claim arising from an employee's negligent or wrongful act or omission if a "private person" would be liable under similar circumstances. Section 2-9-101(1), MCA. Defining the scope of a governmental entity's liability, the Act uses the term "person" – the same term used in § 41-3-203(1), MCA. Section 2-9-101(1), MCA.

¶72 Our decision in *Kiely Construction, L.L.C.*, illustrates the point. In that case, we upheld a trial court's determination that the Red Lodge City Council acted arbitrarily, capriciously, and unlawfully when it denied Kiely's preliminary subdivision plat application, finding substantial credible evidence for the court's finding "that its 'conscience was shocked by the City Council's disregard for the laws of our state.'" *Kiely Constr., L.L.C.*, ¶ 70. Because the council members' actions served as the factual basis for Kiely's claims for damages, we applied § 2-9-305(5), MCA, to uphold the district court's dismissal of the individual council members as defendants, concluding that Kiely's recovery would be from the City. *Kiely Constr., L.L.C.*, ¶ 88. The same analysis applies

[2] S.W. understood this by naming only the State and the Department as defendants in the case. She did not sue Davids individually.

here, as in any claim against the government based on the conduct of its employees. In *Kiely*, the statute giving rise to the claim required proof of arbitrary, capricious, and unlawful action; the action in question was taken by the City Council through the individual council members, and the City was liable for damages arising from their unlawful conduct. Here, the sole negligence claim against the Department is predicated on the alleged tortious acts and omissions of its investigator Davids; there is no direct claim against the Department for negligent supervision, for example—to which § 41-3-203(1), MCA, would not apply.

¶73 Where Davids is not a named defendant, S.W. brings a single claim for damages against the Department alleging Davids's negligence, and the Department is accountable under the Tort Claims Act for her acts or omissions, it is impossible to segregate the two for determining the State's liability. "Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it." *Hillcrest Natural Area Found. v. Mont. Dep't of Envtl. Quality*, 2022 MT 240, ¶ 47, 411 Mont. 30, 521 P.3d 766 (quoting *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898). The reasonable interpretation of § 41-3-203(1), MCA, is that the Department's liability for Davids's conduct is to be determined by the standard the statute imposes for that conduct.

¶74 The Court places much weight on our 1994 decision in *Newville* in concluding that the statute's limited liability does not extend to the State. In that case, we affirmed that a predecessor agency—the Department of Family Services—could be tried for negligence for its failure to protect a child who had been injured by her foster father. *Newville*, 267

Mont. at 269-70, 883 P.2d at 812. We rejected the application of the immunity provision to the Department, stating simply that "[t]his immunity is not intended for the Department; rather, it is intended to protect individuals such as teachers, doctors, and psychologists *who are required to report* suspected abuse." *Newville*, 267 Mont. at 269-70, 883 P.2d at 812 (emphasis added). We did not cite the Tort Claims Act or discuss the application of § 41-3-203(1), MCA, to Department employees who *investigate* suspected abuse.

¶75 The plaintiffs filed their suit in *Newville* after a child sustained severe injuries from a beating inflicted by her foster father in November 1988. 267 Mont. at 245, 883 P.2d at 798. The case went to trial in December 1991; the jury returned a plaintiffs' verdict, apportioning thirty percent of liability to the State. Responding to this and two other lawsuits within a one-year period, the Department brought to the Legislature—in the very next session—its concerns about liability exposure for child abuse and neglect investigations. The Legislature amended § 41-3-203, MCA, in 1993 to strengthen liability protection in such cases. The amendments made explicit references to two sections of law and added a rebuttable presumption:

> Anyone investigating or reporting any incident of child abuse or neglect **under 41-3-201 or 41-3-202**, participating in resulting judicial proceedings, or furnishing hospital or medical records as required by 41-3-202 is immune from any liability, civil or criminal, that might otherwise be incurred or imposed unless the person acted in bad faith or with malicious purpose. **There is a rebuttable presumption that the person acted in good faith and with no malicious purpose.**

Section 41-3-203, MCA (1993) (amendments shown in emphases); 1993 Mont. Laws ch. 181, § 1.[3] Records from the House Judiciary Committee hearing on the bill reflect that the amendment was proposed to address the impact of these recent lawsuits. *Hearing on HB 66 Before the Mont. H. Jud. Comm*., 53rd Leg. (Jan. 7, 1993), Mont. Leg. Hist. of HB 66 ("House Judiciary Minutes"). Department Director Hank Hudson testified that "DFS employees shouldn't be subject to litigation while performing the task [of investigation]. If they operate outside the law, they should be held accountable for that." House Judiciary Minutes at 2. Ann Gilkey, Legal Counsel for the Department, submitted written testimony noting the "24 claims and three lawsuits filed against the *Department*" within the previous year and explaining that a "[portion] of these involve allegations of wrongful conduct by an investigator during an investigation of suspected child abuse." House Judiciary Minutes at Ex. 1 (emphasis added). Gilkey wrote that this "constant threat of litigation" made "an already stressful job nearly intolerable for some dedicated professionals." House Judiciary Minutes at Ex. 1. The Department's testimony encouraged the Legislature to pass the amendment to clarify that Department investigators were protected by § 41-3-203, MCA.

[3] The Legislature expressly made this amendment applicable only to reports made or records furnished *after* March 25, 1993. 1993 Mont. Laws ch. 181, § 2. The underlying facts in *Newville* took place in 1988 and the case went to trial in 1991. Our *Newville* opinion erroneously quoted the 1993 version of § 41-3-203, MCA, when we stated that it provided "immunity for persons required to report and investigate child abuse under the provisions of §§ 41-3-201 and 202, MCA." 267 Mont. at 269, 883 P.2d at 812. The Legislature did not add reference to those two additional sections until after the *Newville* verdict; indeed, as I explain here, the Legislature added the reference in direct response to Newville's and similar claims and the Department's stated concerns about increased liability. We did not discuss the 1993 amendment in *Newville* or purport to rely on it in deciding the case. *Newville* was on appeal to this Court when the 1993 Legislature made the change, and the amendment plainly did not apply to the case.

Gilkey concluded, "This bill in no way removes an aggrieved party's right to file a claim alleging that the reporter or investigator acted improperly, but simply puts the burden of proof for an allegation of bad faith or malicious intent on the claimant." House Judiciary Minutes at Ex. 1. House Judiciary Committee member Rep. Howard Toole "asked Ms. Gilkey if HB 66 was presented to create absolute immunity. He also commented that he believes it adds little protection to what's already in the law. Ms. Gilkey agreed, but stated HB 66 does not create absolute immunity." House Judiciary Minutes at 2. Representative Randy Vogel followed up, asking Gilkey "how many claims and lawsuits have been made against DFS." She replied, "three lawsuits and 24 potential claims and believes this number is too high for a state agency." House Judiciary Minutes at 2. The Legislature adopted the amendment the Department requested.[4]

¶76 The two sections referenced in the 1993 amendment—§§ 41-3-201 and -202, MCA—describe who mandated reporters are, reporting procedures, and the Department's response requirements. Mandated reporters "shall report . . . to the department." Section 41-3-201(1), MCA. The "department" assesses reports, determines the response level required, conducts safety and risk assessments, provides emergency protective services to children, and maintains a record system documenting investigations and response determinations. Section 41-3-202, MCA. Later amendments to those two sections further clarified the role of the Department. 1999 Mont. Laws ch. 566, § 4; 2005 Mont. Laws ch. 382, § 3; 2007 Mont. Laws ch. 166, § 3. To perform these tasks, the Department acts

[4] The following session, the Legislature removed the "rebuttable presumption" sentence and added gross negligence to the bad faith and malicious purpose standards. 1995 Mont. Laws ch. 458, § 9.

through its employees—the individuals who respond to, investigate, and decide action on reports of child abuse—and is accountable for employee actions taken within the course and scope of their employment. *See* §§ 2-9-101(1), -102, MCA.

¶77 The Legislature did not need to act in response to this Court's *Newville* decision (Opinion, ¶ 20); it already had. The 1993 changes to § 41-3-203, MCA, were in direct response to Newville's lawsuit and other claims like it. The Department brought the bill because of suits against the *agency*. The passage of its requested amendments—made applicable to subsequent claims—thus abrogated the effect of our decision in Newville's appeal. The amendments were made within the existing framework of governmental liability established by the Tort Claims Act.

> The Montana Legislature is presumed to act with deliberation and with full knowledge of all existing laws on a subject and, as a result, it is further presumed that the Legislature "does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable."

Ross v. City of Great Falls, 1998 MT 276, ¶ 17, 291 Mont. 377, 967 P.2d 1103 (quoting *London Guar. & Accident Co. v. Industrial Accident Bd.*, 82 Mont. 304, 310, 266 P. 1103, 1105 (1928)). There is nothing irreconcilable between the immunity statute and the over-arching application of the Tort Claims Act. Under the Tort Claims Act, the Department pays for the tortious conduct of its investigators. By operation of law, the standard of liability that applies to the employee applies to the Department.[5]

[5] The Court's contrary reasoning is—though the Court puzzlingly does not discuss it—directly at odds with our decision in *Gudmundsen*.

¶78 I also am unpersuaded by the District Court's expressed concern that the policies outlined in the Child Abuse and Neglect Chapter counsel a different result. *See* Declaration of Policy, § 41-3-101, MCA. S.W. and the District Court fail to account for the multiple, and sometimes competing, policies involved in the State's response to a report of child abuse. The first policy in the Child Abuse and Neglect Chapter is to protect children whose welfare may be threatened by the conduct of those responsible for their care; the policy immediately following directs the State to "preserve the unity and welfare of the family whenever possible." Section 41-3-101(1)(a)-(b), MCA. The immunity provision is consistent with the Legislature's desire to allow Department employees to consider each of the various statutory policies when responding to a report of child abuse. *See McCain v. Batson*, 233 Mont. 288, 297, 760 P.2d 725, 730-31 (1988) (describing how Good Samaritan legislation resolved the competing interests of malpractice victim rights and the encouragement of physicians to render emergency medical care by imposing liability for gross negligence but not for ordinary negligence). Section 41-3-203(1), MCA, evinces no clear departure from public policy by affording some latitude of discretion in these fraught situations.

¶79 Finally—though I need not elaborate here—because the statute does not bar suit against the State, I would reject the District Court's reasoning that it may not be applied to the Department without running afoul of Article II, § 18 of the Montana Constitution.

¶80 In sum, I would hold that § 41-3-203(1), MCA, imposes a gross-negligence standard for determining liability of Department employees who investigate child abuse and neglect.

Under the Tort Claims Act, the standard applies to the Department the same as to Department employees. S.W. accordingly should be required to demonstrate gross negligence, not ordinary negligence, to hold the Department liable for her injuries.

¶81 In all other respects, I join the Court's well-reasoned Opinion.

/S/ BETH BAKER

Justice Jim Rice joins in the concurring and dissenting Opinion of Justice Beth Baker.

/S/ JIM RICE

Justice Dirk Sandefur, concurring in part and dissenting in part.

¶82 I generally concur with the Court's holdings that:

(1) § 27-1-703, MCA (procedural requirements for apportionment of liability between defendant and non-party tortfeasor), does not apply to preclude the Department from asserting a non-affirmative fact defense that the intervening assaultive conduct of third-party Alicia Hocter, rather than any antecedent negligence attributable to the Department, was the cause-in-fact of S.W.'s injuries and claimed damages;[1]

(2) the District Court abused its discretion under the circumstances of this case in sanctioning the Department for spoliation of certain investigative photos

[1] I concur, however, based solely on our prior recognition that the current version of § 27-1-703, MCA, as revised to conform to *Plumb v. Mont. Fourth Jud. Dist. Ct.*, 279 Mont. 363, 379, 927 P.2d 1011, 1021 (1996) (statutory apportionment of liability between defendant and asserted non-party tortfeasor without notice and opportunity to defend violative of plaintiff's constitutional right to substantive due process), "did not disturb the validity of the [independent] intervening cause exception to" common law tort "causation" in fact). *Pula v. State*, 2002 MT 9, ¶¶ 15-17, 308 Mont. 122, 40 P.3d 364. The Court's assertion in Opinion, ¶ 48 (§ 27-1-703 "has no application" when the non-party was a co- or contributing tortfeasor based on an "intentional tort[]"), is a wholly unrelated issue of significant complexity beyond the scope of the pertinent issue here.

of S.W.'s earlier abdominal bruising taken several weeks before the Hocter assault;

(3) while the broad language of § 41-3-203(1), MCA, provides limited immunity to investigative Department employees from personal liability arising from otherwise tortious conduct in the performance of their investigative duties under §§ 41-3-201 and -202, MCA, the District Court correctly concluded that it provides no similar immunity to the Department as the state government entity principal of those employees;

(4) the standard of duty owed by the Department under the duty element of S.W.'s claim is thus the general common law negligence standard—reasonable care under the circumstances—not a higher standard of gross negligence or failure to exercise even "slight care" under the circumstances;

(5) the District Court erroneously applied the "substantial factor" standard of causation-in-fact under the circumstances of this case and thus erroneously granted S.W. summary judgment on the causation element of her claim;

(6) the District Court did *not* abuse its discretion in precluding the Department from presenting evidence and argument that it was already paying for certain of S.W.'s claimed medical expense damages under the Department-administered federal Medicaid program; and

(7) the issue of whether § 2-9-108, MCA (cap on tort damages awards against government entities), applies in this case is unripe for review in the wake of the above-listed holdings.

Subject to my dissent assertion that the Department is entitled to judgment as a matter of law on causation regardless of any outstanding question of causation-in-fact, I further concur in the Court's recognition, *albeit* equivocal, that the correct causation-in-fact jury instruction in this case was and is the independent intervening cause instruction specified in *Busta v. Columbus Hosp. Corp.*, 276 Mont. 343, 371, 916 P.2d 122, 139 (1996) (quoting Montana Pattern Instruction (MPI) 2.08 (Nov. 1, 1989)). I write separately, however, to emphasize that the *Busta*-specified independent intervening cause instruction is the one

and only correct causation-in-fact instruction in cases involving an asserted independent intervening cause.

¶83 I nonetheless dissent from the Court's remand of this case for new trial. I do so because the Department is entitled to judgment as a matter of law, whether under M. R. Civ. P. 56 or 50, on the causation element of S.W.'s claim under the public policy based too-attenuated analysis recognized in *Busta*, 276 Mont. at 361 and 371-72, 916 P.2d at 133 and 139-40, in accordance with *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103-04 (N.Y. 1928) (Andrews, J., dissenting)). I would therefore instead reverse and remand for entry of a corresponding judgment as a matter of law in favor of the Department.

1. *Scope and Effect of Limited Immunity Granted by § 41-3-203(1), MCA, as Applicable to Standard of Care Under Duty Element of S.W.'s Claim*.

¶84 In support of the Court's holding and analysis on this issue, I write separately to further elaborate on the legal context in which the Legislature enacted § 41-3-203(1), MCA. As amended by referendum in 1974, our 1972 Montana Constitution effectively abolished the former common law doctrine of general sovereign immunity under Montana law. Mont. Const. art. II, § 18.[2] The Legislature thus more specifically provided that all Montana state and local government entities are generally subject to direct liability for their respective tortious acts or omissions in their entity capacities, as well as vicarious liability as entity principals for the tortious acts or omissions of their respective "employees acting

[2] *Compare Kaldahl v. State Hwy. Comm'n*, 158 Mont. 219, 220-22, 490 P.2d 220, 220-21 (1971) (noting prevailing pre-1972 common law sovereign immunity of state governmental entities except as consented-to or otherwise provided by law in Title 83, chapter 7, RCM (1947) (1959) (pre-1973 Montana tort claims act)).

within the scope of their [governmental] employment or duties." Section 2-9-102, MCA (1973 as amended). However, even though government entities are now vicariously liable for tortious acts or omissions committed by their employees in the course and scope of governmental employment or duties, those employees are not *personally* liable for such tortious acts or omissions, *see* § 2-9-305(1)-(4), MCA (1973 as amended), thus leaving their employing government entities solely liable under what is essentially a statutory reflection, if not crystallization, of the common law doctrine of respondeat superior as applicable to state and local government entities. *See* § 2-9-305(1)-(4), MCA (1973 as amended); *compare Brenden v. City of Billings*, 2020 MT 72, ¶ 13, 399 Mont. 352, 470 P.3d 168 (common law doctrine of respondeat superior generally applicable to private and governmental employers alike).

¶85 Against that backdrop, carried forward under our new 1972 Constitution was a prior statutory grant of limited immunity to various professionals, including "social worker[s]," required by law to report suspected child abuse or neglect under what is now Title 41, chapter 3, MCA. *See* §§ 41-3-201(1), -202, and -203, MCA (1965 Mont. Laws ch. 178, §§ 2, 3, and 4 as amended) (providing "immun[ity] from any liability" to which they "might otherwise" be subject absent proof that they "acted in bad faith or with malicious purpose"). Subsequent amendments expanded and clarified the list of mandatory reporters, concurrently extended the prior grant of limited immunity to "[a]nyone investigating" child abuse or neglect including "social workers," and eliminated the prior statutory presumption of "good faith" intent for anyone "participating in the making" of a mandatory report of

child abuse or neglect. Sections 41-3-201, -202, and -203, MCA (1979 Mont. Laws ch. 543, §§ 6, 8, and 9). While it did not specifically refer to *Department* social workers or investigators, we held that the limited immunity provided by the broad language of pre-1993 § 41-3-203, MCA, encompassed Department social workers and investigators in the performance of their duties under §§ 41-3-201 and -202, MCA. *Newville v. State Dep't of Family Servs.*, 267 Mont. 237, 269-70, 883 P.2d 793, 812 (1994). We further held, however, that pre-1993 § 41-3-203 did *not* similarly provide limited immunity to the Department as the government entity employer of those employees. *Newville*, 267 Mont. at 269-70, 883 P.2d at 812.

¶86 In 1993, while *Newville* was still pending on appeal, the Legislature, at the urging of the Department, revised § 41-3-203, MCA, to more clearly apply to "[a]nyone investigating or reporting any incident of child abuse or neglect *under 41-3-201 or 41-3-202*." Section 41-3-203, MCA (1993 Mont. Laws ch. 181, § 1). As aptly pointed out by the Court, *supra*, nothing in the plain language of the amended statute, or its underlying legislative history, evinced *any* legislative intent to override or circumvent our construction of § 41-3-203, MCA, in *Newville*, much less limit the Department's preexisting entity liability under § 2-9-102, MCA, and the corresponding common law doctrine of respondeat superior. Construed in harmony with recognition that, in enacting or revising statutes, the Legislature is presumed to be aware of the effect of its prior enactments, the net effect of §§ 2-9-102 and 41-3-201, MCA, is that investigative Department employees are completely immune from liability for tortious conduct committed in the course and scope

of their statutory duties under §§ 41-3-201 or -202, MCA, thus effectively limiting the beneficial effect of § 41-3-203, MCA, to the provision of its specified limited immunity to the balance of "[p]rofessionals and officials required to report" child abuse or neglect under § 41-3-201(2)(i), MCA, who are *not* government employees. There is no other way to logically reconcile the 1993 amendment of § 41-3-203(1), MCA, with § 2-9-305(1)-(4), MCA, unless § 41-3-203(1) is construed to override and limit the broader immunity to the Department and all other government employees provided by § 2-9-305(1)-(4), a construction neither supported by the language or legislative history of § 41-3-203(1), nor asserted by the Department or Justice Baker's dissent here.

¶87 While the historical question as to why the Department perceived the urgent need in 1993 to clarify the limited personal liability immunity provided by § 41-3-203, MCA, to ensure protection of Department employees who already had broader immunity under § 2-9-305(1)-(4), MCA, is interestingly befuddling, the unsupported interpretive inference drawn from that historical mystery by the Department and the other Dissent here can neither circumvent, nor substitute for, the plain and limited language of the 1993 amendment vis-à-vis the Department's preexisting entity liability under § 2-9-102, MCA. I thus concur in the Court's holdings that the limited immunity provided by § 41-3-203, MCA, does not apply to the Department as a state government entity, and therefore does not reduce the general common law standard of reasonable care under the circumstances,

to the extent that the Department even owed one under the particular circumstances of this case.[3]

2. *Tort Causation — Distinct Cause-In-Fact and Proximate/Legal Cause Components in Asserted Independent Intervening Cause Cases.*

¶88 Even if taken, *arguendo*, as correct as far as it goes, the Court's narrow conclusion and supporting analysis that a question of fact remains under the *Busta*-specified

[3] Based on our standard of care holding, and its failure to contest the more fundamental existence of a common law duty of care as a matter of law, the Department is now seemingly stuck under the law of the case with our necessarily implied concomitant holding that it owed S.W. a common law duty of reasonable care as a matter of law. *See Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 15-28, 342 Mont. 335, 181 P.3d 601 (absent a more specific statutory duty the threshold existence of a common law duty under the duty element of a negligence claim is a question of law for judicial determination based on reasonable foreseeability as a matter of law and pertinent public policy considerations (associated moral blame, extent of duty burden, public consequences of duty, and insurance availability and cost)). However, on de novo review of the related standard of duty at issue as a matter of law, it would be remiss to not point out that, based on consideration of foreseeability of harm as a matter of law as a prerequisite for the existence of a common law duty, there is no circumstantial basis upon which to conclude that the Department owed any statutory or common law duty of care to S.W. *after the independent police and Department investigations* of her superficial abdominal bruising dead-ended upon due diligence. S.W.'s non-accidental but superficial abdominal bruising of *unknown origin and circumstances* a month earlier was not a sufficient basis alone upon which to determine as a matter of law that the Department should have reasonably foreseen that she was in immediate risk of future harm of a type at least generally similar, regardless of precise manner or degree, to that later inflicted upon her by her father's girlfriend in a postpartum rage. *See Fisher*, ¶¶ 17, 21, and 26 (nature and scope of reasonably foreseeable risk under the circumstances "defines" the nature and scope of resulting common law duty of care; "defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous"; and duty of reasonable care exists only if claimant was "within the 'foreseeable zone of risk' *created by* the . . . negligent act" at issue—internal punctuation and citations omitted, emphasis added); *Reino v. Mont. Min. Land Dev. Co.*, 38 Mont. 291, 295-96, 99 P. 853, 854-55 (1909) ("specific injury" at issue need not "have been specifically anticipated as the *natural and probable consequence* of the wrongful act"—only that "facts and circumstances are such that the *consequences*" *that occurred* were "*within the field of reasonable anticipation*" that "might be the *natural and probable results* thereof"—punctuation altered, emphasis added). *See similarly Busta*, 276 Mont. at 360-61, 916 P.2d at 133 (quoting *Palsgraf*, 162 N.E. at 100).

evidentiary and jury instruction standard for independent intervening cause cases fails to even acknowledge, much less address, the critical distinction between:

(1) the *question of fact* in every case involving an asserted independent intervening *cause-in-fact* under the evidentiary and jury instruction standard recognized in *Busta*, 276 Mont. at 370-73, 916 P.2d at 138-40 (quoting MPI 2.08); and

(2) the separate and distinct threshold *question of law* for judicial determination regardless of causation-in-fact as to whether the contributing causative effect of the alleged antecedent tortious conduct of the defendant was simply too attenuated, in the chain of contributing causes-in-fact at issue, from the subject injury or harm to be a fair and just basis for holding the defendant liable for harm more directly or immediately caused-in-fact by the subsequent tortious conduct of a third party, *see Busta*, 276 Mont. at 360-61 and 371-72, 916 P.2d at 133 and 139-40 (discussing "issues of public policy . . . concern" recognized in *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting)).

Upon recognition of those critical distinctions, the distinct issue of public policy based proximate or legal causation as a matter of law is clearly implicated in this case on the pertinent facts beyond genuine material dispute, whether under M. R. Civ. P. 56 or 50.

(A) *Pre-Busta Two-Tiered Causation Requirements for Proof of Causation-in-Fact and Reasonable Foreseeability in Fact*.

¶89 Prior to 1996, our conception of common law tort causation had evolved from the relatively simple "but for" standard of causation-in-fact into a far more complex and confusing two-tiered requirement for proof of causation-in-fact, under two alternative causation-in-fact standards, and a separate requirement for proof of foreseeability-based proximate cause as a distinct question of fact. *See King v. State*, 259 Mont. 393, 397, 856 P.2d 954, 956 (1993); *United States Fid. & Guar. Co. v. Camp*, 253 Mont. 64, 68-69, 831 P.2d 586, 589 (1992); *Kiger v. State*, 245 Mont. 457, 459, 802 P.2d 1248, 1250 (1990);

Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 Mont. 155, 167-68, 789 P.2d 567, 574 (1990), *overruled in part by Busta*, 276 Mont. at 364-70, 916 P.2d at 135-39; *Young v. Flathead Co.*, 232 Mont. 274, 281, 757 P.2d 772, 777 (1988); *Heckaman v. N. Pac. Ry. Co.*, 93 Mont. 363, 385, 20 P.2d 258, 265 (1933); *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 532-33, 100 P. 971, 973-74 (1909) (construing § 6068 Rev. Codes (1907), now § 27-1-317, MCA, in accord with common law proximate cause standard stated in *Reino v. Mont. Min. Land Dev. Co.*, 38 Mont. 291, 295-96, 99 P. 853, 854-55 (1909) (citing 1 Thompson's Commentaries on the Law of Negligence and *Morey v. Lake Superior Term. & Trans. Ry. Co.*, 103 N.W. 271, 274 (Wis. 1905))), *overruled on other grounds by Dawson v. Hill & Hill Truck Lines*, 206 Mont. 325, 671 P.2d 589 (1983). In most cases within the two-tier causation framework, *causation-in-fact* required proof that the alleged tortious conduct was *the* or *an* actual *cause-in-fact* of the subject injury or harm and resulting damages under the traditional "but for" test (i.e., that the subject injury would not have occurred but for, or without, the alleged tortious conduct). *King*, 259 Mont. at 397, 856 P.2d at 956; *Camp*, 253 Mont. at 68-69, 831 P.2d at 589; *Kiger*, 245 Mont. at 459-60, 802 P.2d at 1250; *Kitchen Krafters*, 242 Mont. at 167, 789 P.2d at 574; *Young*, 232 Mont. at 281-82, 757 P.2d at 777; *Smith v. Bonner*, 63 Mont. 571, 577-78, 208 P. 603, 604 (1922); *Andree v. Anaconda Copper Mining Co.*, 47 Mont. 554, 567-68, 133 P. 1090, 1094-95 (1913); W. Prosser & W. Keeton, *Prosser and Keeton on the Law of Torts*, § 41 at 265-66 (5th ed. 1984) (hereafter *Prosser and Keeton*). *See also Young*, 232 Mont. at 282, 757 P.2d at 777 (noting that we often "clouded" the "distinction between cause in fact and

proximate[] or legal cause" by referring to a proximate cause formulation that included both a statement of the "but for" causation-in-fact test and the "natural and continuous sequence" formulation of the proximate cause requirement).[4] The "substantial factor" test, i.e., whether the alleged tortious conduct was a substantial factor in bringing about the subject injury or harm and resulting damages regardless of another alleged contributing or concurring cause, later developed as an alternative causation-in-fact test narrowly applicable in cases involving assertions that two or more causes combined to bring about the same injury or harm, and where application of the "but for" test would necessarily preclude recovery because either cause would be sufficient alone to satisfy the "but for" test. *Camp*, 253 Mont. at 69, 831 P.2d at 589; *Kitchen Krafters*, 242 Mont. at 167-68, 789 P.2d at 574 (citing *Prosser and Keeton*, § 41 at 264-68, and tracing origin of "substantial factor" test to *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 46-47, (Minn. 1920)); *Young*, 232 Mont. at 281-82, 757 P.2d at 777 (citation omitted); *Kyriss v. State*, 218 Mont. 162, 166-68, 707 P.2d 5, 8-9 (1985); *Rudeck v. Wright*, 218 Mont. 41, 53, 709 P.2d 621, 628 (1985); *Prosser and Keeton*, § 41 at 266-68.

¶90 Distinct from proof of causation-in-fact, our pre-*Busta* jurisprudence also distinctly required proof that the alleged tortious conduct at issue was the *proximate cause* (i.e., the

[4] *See, e.g.*, *Bensley v. Miles City*, 91 Mont. 561, 567-69, 9 P.2d 168, 171-72 (1932) (defining proximate cause in terms of combined references to the "natural and continuous sequence" standard of proximate cause and the "but for" test of causation-in-fact); *Therriault v. England*, 43 Mont. 376, 382-83, 116 P. 581, 582-83 (1911) (defining proximate cause in terms of combined references to the "natural and continuous sequence" standard of proximate cause and "but for" test of causation-in-fact).

legal cause) of the alleged injury or harm and resulting damages. *King*, 259 Mont. at 397, 856 P.2d at 956; *Camp*, 253 Mont. at 68-69, 831 P.2d at 589; *Kiger*, 245 Mont. at 459, 802 P.2d at 1250; *Kitchen Krafters*, 242 Mont. at 167-68, 789 P.2d at 574-75; *Young*, 232 Mont. at 281-82, 757 P.2d at 777; *Heckaman*, 93 Mont. at 385, 20 P.2d at 265; *Mize*, 38 Mont. at 532-33, 100 P. at 973-74 (construing § 6068, Rev. Codes (1907), now § 27-1-317, MCA); *Bensley*, 91 Mont. at 567-69, 9 P.2d at 171-72; *Therriault v. England*, 43 Mont. 376, 382-83, 116 P. 581, 582-83 (1911). *Accord* § 27-1-317, MCA (formerly § 6068 Rev. Codes (1907), as construed in *Mize*, *supra*).[5] Except when the pertinent record facts were not subject to genuine dispute for purposes of judgment as a matter of law under M. R. Civ. P. 56 or 50,[6] proximate or legal cause was primarily a question of fact for jury determination upon appropriate legal instruction to the effect that the subject harm or injury was of a type within the *range or scope of risk* of harm that the defendant could have reasonably anticipated or foreseen as *a consequence of* his or her conduct under the circumstances, regardless of the specific type or manner of injury or harm that actually occurred. *See King*, 259 Mont. at 397, 856 P.2d at 956 ("[p]roximate cause is established by applying a

[5] Originally enacted as Montana Civil Code § 4330 (1895), § 27-1-317, MCA, was an adoption of California Civil Code § 3333 which was in turn an adoption of David Dudley Field's proposed, but never enacted, New York Civil Code § 1860. Like the other Montana statutes based on the Field Civil Code, § 27-1-317 was merely a codification of the prevailing state of common law principles and thus must be construed in accordance with the common law principles from which it derives. *Big Sky Civil & Envtl., Inc. v. Dunlavy*, 2018 MT 236, ¶ 11, 393 Mont. 30, 429 P.3d 258; *Cont'l Oil Co. v. Mont. Concrete Co.*, 63 Mont. 223, 228, 207 P. 116, 117 (1922); *Mont. Elec. Co. v. N. Valley Mining Co.*, 51 Mont. 266, 271-72, 153 P. 1017, 1018 (1915).

[6] *See also* § 25-7-302, MCA (motion for directed verdict).

foreseeability test"—"there is no proximate cause" "[i]f the consequences of an act [were] not reasonably foreseeable); *Sizemore v. Mont. Power Co.*, 246 Mont. 37, 46, 803 P.2d 629, 635-36 (1990) (proximate cause "requires a trier of fact to determine whether the consequences of a defendant's actions were reasonably foreseeable . . . to a [person] of ordinary prudence" under the circumstances rather than "generally . . . freakish, bizarre or unpredictable"—citing *Prosser and Keeton*, § 43); *Kitchen Krafters*, 242 Mont. at 168, 789 P.2d at 575 ("[p]roximate cause is normally analyzed in terms of foreseeability" and "one is only liable for consequences which are considered to be reasonably foreseeable"—"this analysis . . . [requires a] look forward through the chain of causation . . . to determine whether the events which occurred were foreseeable"—citing *Prosser and Keeton*, § 43); *Young*, 232 Mont. at 282, 757 P.2d at 777 ("proximate cause is one which in a natural and continuous sequence, unbroken by any new, independent cause, produces injury"—but noting that our appending of the "'but for' definition" of causation-in-fact to the natural and continuous sequence formulation of proximate cause "clouded" the distinction between cause-in-fact and proximate/legal cause—citations omitted); *Burns v. Eminger*, 84 Mont. 397, 407-08, 276 P. 437, 441-42 (1929) (for proximate cause, factfinder must "look to [the] succession of events and ascertain whether [under the circumstances] they [were] *naturally and probably connected* . . . [in] a *continuous sequence* or are dissevered by new and independent agencies—emphasis added); *Mize*, 38 Mont. at 531-32, 100 P. at 973 (a proximate cause "is that which in a *natural and continuous sequence*, unbroken by any new, independent cause, produces the injury, and without which the injury would not

have occurred"—but "not necessary to show that [the defendant] ought to have anticipated the particular injury which did result," only that defendant "ought to have anticipated that *some* injury was likely to result as the reasonable and natural consequence of his negligence"—construing § 6068 Rev. Codes (1907), now § 27-1-317, MCA, emphasis added). As perhaps most comprehensively recognized in 1909:

> the negligence of a person cannot be the proximate cause of a harm . . . unless, under all the attending circumstances, ordinary prudence would have admonished the [alleged tortfeasor] that his act or omission *would probably result in injury to some one*. The general test . . . is therefore . . . whether it is such that a person of ordinary intelligence *should have foreseen* that an accident was liable to be produced thereby. . . . [T]he "specific" injury . . . [that occurred need not] have been specifically anticipated as the *natural and probable consequence* of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences . . . [that occurred were] *within the field of reasonable anticipation* . . . [that] might be the *natural and probable results* thereof, though they may not have been specifically contemplated or anticipated by the person so causing them.

Reino, 38 Mont. at 295-96, 99 P. at 854-55 (internal punctuation and citations omitted, emphasis added).[7] *See similarly Prosser and Keeton*, § 43 at 299 ("what is required to be

[7] *See similarly* § 1-1-204(4), MCA (defining negligence as "a want of the attention to the nature or probable consequences of the act or omission that a prudent person would ordinarily give in acting in the person's own concerns"); *Camp*, 253 Mont. at 69-70, 831 P.2d at 589-90 (citing *Kiger*, *Kitchen Krafters*, and *Young*, et al., *supra*); *Thayer v. Hicks*, 243 Mont. 138, 155, 793 P.2d 784, 795 (1990) (citing *Kitchen Krafters*, *Young*, *Heckaman*, and *Reino*, *supra*); *Nehring v. LaCounte*, 219 Mont. 462, 469-70, 712 P.2d 1329, 1334-35 (1986) (quoting and adopting *Reino* proximate cause formulation, *supra*); *Heckaman*, 93 Mont. at 385-86, 20 P.2d at 265 (quoting proximate cause formulations stated in *Mize* and *Reino*, *supra*); *Burns*, 84 Mont. at 407-08, 276 P. at 441-42; *Lundeen v. Livingston Elec. Light Co.*, 17 Mont. 32, 36-40, 41 P. 995, 996-97 (1895).

foreseeable is only the 'general character' or 'general type' of the event or harm"—not "its 'precise' nature, details, or . . . manner of occurrence").[8]

¶91 As a special application of the reasonable foreseeability standard of proximate or legal cause, the doctrine of independent intervening causation arose in cases involving a defense assertion that, regardless of any earlier or antecedent negligence attributable to the defendant as a cause-in-fact of the subject harm, the plaintiff could not satisfy the distinct proximate cause requirement because some other event or tortious act or omission of a third party later occurred which was then the more direct or immediate cause-in-fact of the subject harm. *See Camp*, 253 Mont. at 69-70, 831 P.2d at 589-90; *Sizemore*, 246 Mont. at 46-47, 803 P.2d at 635-36; *Kitchen Krafters*, 242 Mont. at 169-70, 789 P.2d at 576; *Prosser and Keeton*, §§ 43-45.[9] The dispositive question of proximate cause in fact in pre-*Busta* independent intervening cause cases was thus whether, upon exercise of reasonable care under the circumstances, it was or should have been reasonably foreseeable that such or some generally similar type of harm might later result *as a consequence of* the *circumstances created or caused in fact by* the defendant's *earlier tortious conduct*.

[8] *See similarly Busta*, 276 Mont. at 360-61, 916 P.2d at 133 ("risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension . . . [but] [t]his does not mean . . . that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path"; it is "not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye"—quoting *Palsgraf*, 162 N.E. at 100).

[9] Distinct from a "concurring cause" which combines with the defendant's tortious conduct to cause the subject injurious result, "[a]n intervening cause is one which comes into active operation in producing the [subject injurious] result *after*" the occurrence of the defendant's alleged negligence. *Prosser and Keeton*, § 44 at 301-02.

Sizemore, 246 Mont. at 46-47, 803 P.2d at 635-36; *Thayer v. Hicks*, 243 Mont. 138, 155, 793 P.2d 784, 795 (1990); *Kitchen Krafters*, 242 Mont. at 168-70, 789 P.2d at 575-76; *Young*, 232 Mont. at 282-84, 757 P.2d at 777-78; *Nehring v. LaCounte*, 219 Mont. 462, 470, 712 P.2d 1329, 1334 (1986); *Halsey v. Uithof*, 166 Mont. 319, 328, 532 P.2d 686, 690-91 (1975); *Heckaman*, 93 Mont. at 385-86, 20 P.2d at 265; *Burns*, 84 Mont. at 408, 276 P. at 442; *Mize*, 38 Mont. at 531-32, 100 P. at 973; *Reino*, 38 Mont. at 293-96, 99 P. at 854-55; *Prosser and Keeton*, §§ 43-45. If so, then the defendant's earlier tortious conduct *was* a proximate cause of the subject injury or harm under the causation element of the claim *even if only* an *indirect* contributing cause-in-fact of the harm under the "but for" test. *See Sizemore*, 246 Mont. at 46-47, 803 P.2d at 635-36; *Thayer*, 243 Mont. at 155, 793 P.2d at 795; *Kitchen Krafters*, 242 Mont. at 168, 789 P.2d at 575; *Young*, 232 Mont. at 282-84, 757 P.2d at 777-78; *Heckaman*, 93 Mont. at 385-86, 20 P.2d at 265; *Burns*, 84 Mont. at 407-08, 276 P. at 441-42; *Mize*, 38 Mont. at 531-33, 100 P. at 973-74. In other words, the later intervening event or tortious third-party conduct that directly caused the subject harm was then merely a *foreseeable* intervening cause which, as a matter of law, did *not sever* the *chain of causation-in-fact* between the defendant's earlier tortious conduct and the injury or harm at issue. *Sizemore*, 246 Mont. at 46-47, 803 P.2d at 635-36; *Thayer*, 243 Mont. at 155, 793 P.2d at 795; *Young*, 232 Mont. at 282-84, 757 P.2d at 777-78; *Heckaman*, 93 Mont. at 385-86, 20 P.2d at 265; *Burns*, 84 Mont. at 407-08, 276 P. at 441-42; *Mize*, 38 Mont. at 531-33, 100 P. at 973-74. On the other hand, if the later intervening event or third-party conduct was *not* a reasonably foreseeable consequence of

the defendant's alleged tortious conduct, then the defendant's tortious conduct was a *not* a proximate cause of the subject harm more directly caused-in-fact by the subsequent intervening event or tortious third-party conduct, even though the defendant's conduct may have nonetheless been a contributing cause-in-fact under the "but for" cause-in-fact test. *See Camp*, 253 Mont. at 69-70, 831 P.2d at 589-90; *King*, 259 Mont. at 398, 856 P.2d at 956-57; *Kiger*, 245 Mont. at 461-62, 802 P.2d at 1251; *Kitchen Krafters*, 242 Mont. at 169-70, 789 P.2d at 576; *Goodnough v. State*, 199 Mont. 9, 16, 647 P.2d 364, 367-68 (1982); *Reino*, 38 Mont. at 293-96, 99 P. at 854-55. In such circumstance, the subsequent event or tortious third-party conduct that directly caused the subject injury or harm was an *independent intervening cause* which, by operation of law, *severed* the *chain of causation-in-fact* between the defendant's earlier tortious conduct and the injury or harm at issue. *See Camp*, 253 Mont. at 69-70, 831 P.2d at 589-90; *King*, 259 Mont. at 398, 856 P.2d at 956-57; *Kiger*, 245 Mont. at 461-62, 802 P.2d at 1251; *Kitchen Krafters*, 242 Mont. at 169-70, 789 P.2d at 576; *Goodnough*, 199 Mont. at 16, 647 P.2d at 367-68; *Reino*, 38 Mont. at 293-96, 99 P. at 854-55.

¶92 Though we consistently recognized that proximate cause-in-fact essentially required proof that the injury or harm at issue was of a type within the range, field, or scope of *reasonably foreseeable consequences* of the defendant's alleged tortious conduct, our pre-*Busta* cases and § 27-1-317, MCA, nonetheless put forth various alternative formulations of proximate cause in fact as a function of consequences which:

(1) were or should have been *reasonably foreseeable* to the defendant under the particular circumstances at issue, *King*, 259 Mont. at 397, 856 P.2d at 956;

Sizemore, 246 Mont. at 46-47, 803 P.2d at 635-36; *Kitchen Krafters*, 242 Mont. at 168, 789 P.2d at 575; *Heckaman*, 93 Mont. at 386, 20 P.2d at 265; *Burns*, 84 Mont. at 408, 276 P. at 442; *Reino*, 38 Mont. at 293-96, 99 P. at 854-55;

(2) were or should have been *reasonably anticipated by* the defendant under the particular circumstances at issue, § 27-1-317, MCA (as construed in *Mize*, *supra*); *Halsey*, 166 Mont. at 328, 532 P.2d at 690-91 (synonymously referring to harm or injury "of such . . . character" to have been *reasonably expected*); *Therriault*, 43 Mont. at 383-85, 116 P. at 583; *Mize*, 38 Mont. at 532, 100 P. at 973; *Reino*, 38 Mont. at 295-96, 99 P. at 854-55;

(3) occurred in a *natural and continuous sequence* or chain of events that followed from the defendant's alleged tortious conduct, *Kitchen Krafters*, 242 Mont. at 169-70, 789 P.2d at 575-76; *Young*, 232 Mont. at 282, 757 P.2d at 777; *Halsey*, 166 Mont. at 328, 532 P.2d at 690-91; *Bensley*, 91 Mont. at 567-69, 9 P.2d at 171-72; *Burns*, 84 Mont. at 408, 276 P. at 442; *Therriault*, 43 Mont. at 383-84, 116 P. at 583;

(4) were the *natural and probable result or consequence* of the defendant's alleged tortious conduct, *Kitchen Krafters*, 242 Mont. at 168, 789 P.2d at 575; *Young*, 232 Mont. at 282, 757 P.2d at 777; *Heckaman*, 93 Mont. at 385-86, 20 P.2d at 265; *Fletcher v. City of Helena*, 163 Mont. 337, 344-45, 517 P.2d 365, 369-70 (1973); *Spackman v. Ralph M. Parsons Co.*, 147 Mont. 500, 506, 414 P.2d 918, 921 (1966); *Sullivan v. Metro. Life Ins. Co.*, 96 Mont. 254, 272, 29 P.2d 1046, 1051 (1934), *overruled on other grounds by Life Ins. Co. of N. Am. v. Evans*, 195 Mont. 242, 637 P.2d 806 (1981); *Lyon v. Chicago, M. & St. P. Ry. Co.*, 45 Mont. 33, 41-42, 121 P. 886, 888 (1912); *Therriault*, 43 Mont. at 383-85, 116 P. at 583; *Reino*, 38 Mont. at 293-96, 99 P. at 854-55; or

(5) were *naturally and probably connected in a continuous sequence* following from the defendant's alleged tortious conduct, *Burns*, 84 Mont. at 408, 276 P. at 442.

Despite variable phrasing, however, our *natural and probable consequence* and *natural and continuous sequence* formulations of foreseeability-based proximate cause-in-fact merely referred to a consequence that could or should have been reasonably "anticipated at the time" in "light of ordinary experience." *See Prosser and Keeton*, § 43 at 282. As

such, our varying formulations of proximate cause-in-fact were in essence the "equivalent of" the "test of [reasonable] foreseeability" in fact under the circumstances. *See Prosser and Keeton*, § 43 at 282. Unfortunately, however, those varying formulations begged the question of how or in what manner trial courts should clearly and consistently instruct juries to avoid confusion in assessing whether the trial evidence was sufficient to distinctly prove both causation-in-fact and foreseeability-based proximate or legal cause in fact. *See, e.g.*, *Kitchen Krafters*, 242 Mont. at 169, 789 P.2d at 575; *Young*, 232 Mont. at 282, 757 P.2d at 777.

¶93 For example, *Kitchen Krafters* manifests the pinnacle of our inability to prescribe clear and consistent evidentiary and jury instruction standards for assessment of causation-in-fact and foreseeability-based proximate cause in fact under our two-tiered pre-*Busta* conception of tort causation. In the context of the various tort claims asserted against a bank (tortious bad faith, constructive fraud, negligent nondisclosure, and negligent misrepresentation), and the bank's responsive third-party claim, arising from a failed commercial lending transaction, we first held upon reversal and remand for new trial that the "substantial factor" test was the applicable causation-in-fact evidentiary and jury instruction standard under the circumstances at issue. *Kitchen Krafters*, 242 Mont. at 160 and 166-68, 789 P.2d at 570 and 574-75 (citing *Young*, 232 Mont. at 281-82, 757 P.2d at 777). Then, without reconciliation with our earlier prescription of a combined "but for" and "natural and *continuous* sequence" causation-in-fact and proximate cause in fact evidentiary and jury instruction standard in *Young*, 232 Mont. at 282, 757 P.2d at 777

(emphasis added), we endorsed a still confusing proximate cause in fact standard that redundantly required factfinder assessment of whether, under the circumstances, the defendant could or should have *reasonably* "*foreseen* that the [subject] injury would be the *natural and probable consequence*" of his or her alleged tortious conduct. *Kitchen Krafters*, 242 Mont. at 166-67 and 169, 789 P.2d at 574-75 (emphasis added).[10]

(B) *1996 Busta Clarification of Cause-in-Fact and Foreseeability-Based Proximate Cause in Asserted Independent Intervening Cause Cases*.

¶94 In 1996, faced with multiple inconsistent formulations of the evidentiary and jury instruction standard for foreseeability-based proximate cause in fact, inconsistent specification of the corresponding causation-in-fact standard, resulting confusion among courts and practitioners regarding those standards, and the even more fundamental question of whether our common law requirement for consideration of reasonable foreseeability of harm under both the duty *and* causation elements of negligence-based tort claims was unnecessarily redundant and confusing, we endeavored to clarify "the role of

[10] Though it involved a third-party claim asserted by the defendant bank, *Kitchen Krafters* did not involve a defense assertion that the intervening tortious conduct of a third party was the actual cause-in-fact of the alleged harm. *See Kitchen Krafters*, 242 Mont. at 158-60 and 169, 789 P.2d at 569-70 and 575. As pertinent, it merely involved a defense assertion that a subsequent economic downturn, rather than the defendant's alleged tortious conduct, was the "direct" cause-in-fact of the event (the departure of a key shareholder) that was in turn the triggering cause-in-fact that caused the subject harm ("the break up of the [plaintiff] corporation"). *Kitchen Krafters*, 242 Mont. at 169, 789 P.2d at 575-76. As a matter of proximate cause, we thus noted that a question of fact remained as to whether the shareholder departure and resulting "break up of the corporation" was "a reasonably foreseeable consequence of" the alleged antecedent tortious conduct of the defendant and, if not, the subsequent economic downturn would thus be "a superseding intervening event" that as a matter of fact severed "the chain of causation" in fact between the alleged tortious conduct of the bank and the plaintiff's claimed damages resulting "from the [shareholder] departure." *See Kitchen Krafters*, 242 Mont. at 169-70, 789 P.2d at 576.

foreseeability" of harm as matters of common law duty of care, causation of harm, and "the appropriate manner" of jury instruction on tort "causation." *Busta*, 276 Mont. at 360, 916 P.2d at 133.

¶95 *Busta* involved a hospital's appeal of an adverse jury verdict based on various negligence claims asserted by the estate of an undisclosed schizophrenic, who died from injuries sustained in a 2:00 a.m. fall from a third-floor hospital window while trying to lower himself to the ground. *Busta*, 276 Mont. at 346-52, 916 P.2d at 124-28. The case did not involve an asserted independent intervening cause, only the alleged negligence of the hospital and the alleged contributory negligence of the plaintiff under our then-prevailing jurisprudence requiring redundant consideration of foreseeability of harm under the duty and causation elements of a negligence claim, with causation as a two-tiered question of causation-in-fact and foreseeability-based proximate cause in fact. *See Busta*, 276 Mont. at 349, 916 P.2d at 126. Upon a jury verdict deeming the hospital 70% negligent, and the deceased plaintiff 30% contributorily negligent, the pertinent issue on appeal was whether the jury received proper instruction on the applicable evidentiary standards for proof of causation-in-fact and foreseeability-based proximate cause in fact. *Busta*, 276 Mont. at 357-59, 916 P.2d at 131-32.

¶96 Laboring under *Kitchen Krafters*, the plaintiff, like S.W. here, proposed a causation-in-fact instruction based on the multiple contributing cause "substantial factor" test. *Busta*, 276 Mont. at 358, 916 P.2d at 131. In accordance with *Kitchen Krafters*, the defendant proposed proximate cause instructions (1) requiring the plaintiff to prove that

the defendant's alleged negligence was "the proximate cause" of the plaintiff's death, and (2) further instructing that the defendant's alleged negligence was the proximate cause if, upon exercise of "ordinar[y] pruden[ce]," the defendant "could have reasonably foreseen" that the plaintiff's death was a "natural and probable consequence of" the defendant's alleged negligent conduct. *Busta*, 276 Mont. at 357, 916 P.2d at 131. The proposed defense instructions further explained that the hospital's alleged negligence was *not* the proximate cause of the plaintiff's death if the jury instead found that "the consequences of the hospital's action were not reasonably foreseeable or were generally freakish, bizarre, or unpredictable." *Busta*, 276 Mont. at 358, 916 P.2d at 131. Upon withdrawal of the plaintiff's proposed "substantial factor" cause-in-fact instruction, and rejection of the defense-proposed definition of proximate cause as non-conforming to our *Kitchen Krafters* specification, the trial court ultimately instructed only that each party "had the burden of proving that the other was negligent and that the other party's negligence was a proximate cause of" the plaintiff's death. *Busta*, 276 Mont. at 358, 916 P.2d at 131-32. The jury thus received no instruction on causation-in-fact, whether under the "but for" or "substantial factor" test, and no specification of the standard of required proof of proximate cause in fact. *Busta*, 276 Mont. at 357-58, 916 P.2d at 131-32. After summarizing the "tortuous history" of the common "law of foreseeability" and tort causation in our jurisprudence,[11] we:

> (1) generally *confined* consideration of *foreseeability of harm* to a threshold *question of law* for judicial determination under the *duty element* of a

[11] *Busta*, 276 Mont. at 360-70, 916 P.2d at 133-38.

negligence claim in cases where the threshold existence of a pertinent legal duty is at issue and there is no asserted independent intervening cause, *Busta*, 276 Mont. at 370-73, 916 P.2d at 138-40;[12]

(2) in cases not involving an asserted independent intervening cause, generally made *causation-in-fact* the sole question of fact under the causation element of a common law tort claim under one of two alternative evidentiary and jury instruction standards as applicable in each case, to wit:

(A) the generally-applicable *but-for* test (i.e., that the alleged tortious conduct at issue was "a cause" of the subject injury or harm "if it helped produce it" and the subject injury or harm "would not have occurred without it"); or, as applicable in a particular case,

(B) the *substantial factor* test (i.e., the alleged tortious conduct at issue was "a cause" of the subject injury or harm if it is was a substantial factor in bringing it about) in cases involving an assertion "that the acts of more than one person combined to produce" the subject injury or harm at issue (such as, e.g., when alleged contributory negligence is at issue or "there are multiple defendants") in accordance with *Kyriss* and *Rudeck*, *supra*, *Busta*, 276 Mont. at 371-72, 916 P.2d at 139-40;

(3) *eliminated* foreseeability-based *proximate cause* as a causation requirement or consideration in cases *not* involving an asserted independent intervening cause, *Busta*, 276 Mont. at 370-73, 916 P.2d at 138-40;

(4) *preserved* foreseeability-based *proximate cause in fact* in cases involving an asserted *independent intervening cause*, but under a specified causation-in-fact evidentiary and jury instruction standard unique to independent intervening cause cases and without reference to terms such as *proximate*

[12] We thus noted that the general definition of negligence stated in MPI 2.00 (Feb. 7, 1991)—"[n]egligence may consist of action or inaction" and thus a person "is negligent" if he or she "fails to act as an ordinarily prudent person would act under the circumstances"—is adequate "[t]o the extent that foreseeability raises" a question of fact for jury determination. *Busta*, 276 Mont. at 372 n.1, 916 P.2d at 140. *See also Busta*, 276 Mont. at 360-63, 916 P.2d at 133-35 (noting that Montana law regarding the role of foreseeability of harm under the duty element of a negligence claim essentially follows the majority view stated in *Palsgraf*, 162 N.E. at 100 (Cardozo, J.), as later tracked in our precedent in *Mang v. Eliasson*, 153 Mont. 431, 435-39, 458 P.2d 777, 780-82 (1969); *Ekwortzel v. Parker*, 156 Mont. 477, 483, 482 P.2d 559, 562-63 (1971); and progeny).

cause, *legal cause*, *reasonable foreseeability*, or the like, *Busta*, 276 Mont. at 370-73, 916 P.2d at 138-40 (quoting MPI 2.08); and

(5) recognized a narrowly-applicable *public policy based question of law* for judicial determination, when implicated in a particular independent intervening cause case, as to whether the contributing causative effect of the alleged antecedent tortious conduct of the defendant is simply too attenuated as a matter of law, in the chain of contributing causes-in-fact at issue, from the subject injury or harm to be a fair and just basis for holding the defendant liable for injury or harm more directly or immediately caused-in-fact by the subsequent tortious conduct of a third party, *Busta*, 276 Mont. at 360-61 and 371-72, 916 P.2d at 133 and 139-40 (noting "public policy . . . concern[s]" recognized in *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting)).

See also Fisher v. Swift Transp. Co., 2008 MT 105, 342 Mont. 335, 181 P.3d 601 (summarizing *Busta*, 276 Mont. at 371-72, 916 P.2d at 139-40, and progeny in re reasonably foreseeable intervening causes in fact and independent intervening causes in fact (i.e., intervening causes-in-fact not reasonably foreseeable in fact)).

¶97 Accordingly, as pertinent, *Busta* preserved our longstanding recognition that the reasonable foreseeability of an asserted independent intervening cause is generally a question of fact for jury determination *upon appropriate instruction* under the totality of the circumstances at issue. *See Fisher*, ¶ 42; *Busta*, 276 Mont. at 370-71, 916 P.2d at 139-40. *See similarly, e.g.*, *Camp*, 253 Mont. at 70, 831 P.2d at 590; *Sizemore*, 246 Mont. at 46-47, 803 P.2d at 635-36; *Thayer*, 243 Mont. at 155, 793 P.2d at 795; *Kitchen Krafters*, 242 Mont. at 168-70, 789 P.2d at 574-76; *Burns*, 84 Mont. at 408, 276 P. at 442. *Busta* thus specified a clear and consistent evidentiary and jury instruction standard for proof of foreseeability-based proximate cause in fact in independent intervening cause cases, but *without* confusing reference to technical legal terms like *proximate cause*, *legal cause*,

reasonable foreseeability, or a consequence which the defendant could or should *have reasonably anticipated*. *Busta*, 276 Mont. at 371-72, 916 P.2d at 139-40 (quoting MPI 2.08).[13] We recognized that technical legal terms like *proximate cause*, *legal cause*, and *foreseeability* "can only serve to confuse jurors and distract them from deciding cases based on their merits," and are therefore "*not terms . . . properly submitted to a lay jury*." *Busta*, 276 Mont. at 371, 916 P.2d at 139 (emphasis added). We thus held that, while "hav[ing] some significance to lawyers and judges," courts should not use or include technical legal terms like *proximate cause*, *legal cause*, and *reasonable foreseeability* in jury instructions. *Busta*, 276 Mont. at 371-72, 916 P.2d at 140. Instead, we unequivocally instructed that, in cases involving an asserted "independent intervening cause," courts should instruct juries that:

> the defendant's conduct was a cause of the subject injury or harm if it "*helped produce*" it "*in a natural and continuous sequence*" and the subject injury or harm at issue "*would not have occurred without it*."

Busta, 276 Mont. at 371, 916 P.2d at 139 (quoting MPI 2.08—emphasis added). Similar to our prior *Young* formulation, our *Busta*-specified independent intervening causation-in-fact standard eliminated the need for a separate cause-in-fact instruction by combining the *but-for* causation-in-fact standard and a foreseeability-based proximate cause in fact

[13] *Compare Camp*, 253 Mont. at 70, 831 P.2d at 590; *Sizemore*, 246 Mont. at 46, 803 P.2d at 635; *Kitchen Krafters*, 242 Mont. at 168-70, 789 P.2d at 574-76; *Young*, 232 Mont. at 282, 757 P.2d at 777; *Goodnough*, 199 Mont. at 15, 647 P.2d at 367; *Heckaman*, 93 Mont. at 385, 20 P.2d at 265 (citing *Mize*, 38 Mont. at 531-33, 100 P. at 973-74); *Burns*, 84 Mont. at 407-08, 276 P. at 441-42; *Bensley*, 91 Mont. at 566-69, 9 P.2d at 171-72; *Therriault*, 43 Mont. at 383-84, 116 P. at 583; *Reino*, 38 Mont. at 293-96, 99 P. at 854-55; *Lundeen*, 17 Mont. at 36-40, 41 P. at 996-97.

standard into a single evidentiary and jury instruction standard. *See Busta*, 276 Mont. at 371, 916 P.2d at 139 (quoting MPI 2.08); *compare Young*, 232 Mont. at 282, 757 P.2d at 777. Thus, contrary to the Majority's equivocation here, Opinion, ¶ 46, there is thus *only one* causation-in-fact evidentiary and jury instruction standard in asserted independent intervening cause cases. *See Busta*, 276 Mont. at 371, 916 P.2d at 139 (quoting MPI 2.08); *accord Fisher*, ¶¶ 47-50 (citing *Busta*).

¶98 Our post-*Busta* cases continue to recognize that, while normally a question of fact for jury determination, courts may, when "reasonable minds may reach but one conclusion" on the pertinent summary judgment or trial evidentiary record under M. R. Civ. P. 56 and 50,[14] determine as a matter of law whether an asserted intervening cause-in-fact *was* or was *not* an independent intervening cause severing the chain of causation-in-fact between the subject injury or harm and the defendant's alleged antecedent tortious conduct. *See, e.g.*, *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶¶ 45-50, 350 Mont. 538, 208 P.3d 836; *Fisher*, ¶ 42; *Eklund v. Trost*, 2006 MT 333, ¶¶ 43-46, 335 Mont. 112, 151 P.3d 870; *Faulconbridge v. State*, 2006 MT 198, ¶¶ 86 and 89-92, 333 Mont. 186, 142 P.3d 777; *Prindel v. Ravalli Cty.*, 2006 MT 62, ¶¶ 44-46, 331 Mont. 338, 133 P.3d 165; *Lopez v. Great Falls Pre-Release Servs., Inc.*, 1999 MT 199, ¶¶ 32-42, 295 Mont. 416, 986 P.2d 1081, *partially overruled on other grounds by Samson v. State*, 2003 MT 133, ¶ 26, 316 Mont. 90, 69 P.3d 1154; *Starkenburg v. State*, 282 Mont. 1, 10-15, 934 P.2d 1018, 1023-26

[14] *See also* § 25-7-302, MCA (motion for directed verdict).

(1997); *Estate of Strever v. Cline*, 278 Mont. 165, 179, 924 P.2d 666, 674 (1996).[15] But, whether under Rule 56 or 50, the sole evidentiary standard for determining whether an asserted intervening cause-in-fact *was* or *was not* an independent intervening cause severing the chain of causation on the pertinent factual record not subject to genuine material dispute is the single *Busta*-specified "but for"/"natural and continuous sequence" cause-in-fact standard. *See Busta*, 276 Mont. at 371, 916 P.2d at 139 (quoting MPI 2.08). *Accord Fisher*, ¶¶ 47-50 (citing *Busta*).

(C) *Continued Confusing Post-Busta Analysis of Foreseeability-Based Causation-In-Fact in Independent Intervening Cause Cases*.

¶99 Despite *Busta*'s clear and unambiguous specification of a clear evidentiary and jury instruction standard for assessment of foreseeability-based causation-in-fact in asserted independent intervening cause cases without reference to terms like *foreseeability*, *proximate cause*, or *legal cause*, our post-*Busta* cases largely continue to ambiguously and confusingly discuss the sufficiency of the pertinent evidentiary record for Rule 56 or 50 judgment as a matter of law in terms of whether "reasonable minds" could differ as to whether the alleged subsequent intervening third-party tortious conduct, and resulting harm at issue, was a *reasonably foreseeable* consequence of the defendant's alleged antecedent tortious conduct. *See, e.g.*, Opinion, ¶¶ 39-45 and 47; *Larchick*, ¶¶ 49-50; *Eklund*, ¶¶ 45-46; *Faulconbridge*, ¶¶ 92-94; *Prindel*, ¶¶ 44-46; *Samson*, ¶¶ 24-26; *LaTray v. City of Havre*, 2000 MT 119, ¶¶ 27-33, 299 Mont. 449, 999 P.2d 1010, *partially overruled on*

[15] See similarly pre-*Busta Kiger*, 245 Mont. at 462, 802 P.2d at 1251; *Camp*, 253 Mont. at 70, 831 P.2d at 590; and *Sizemore*, 246 Mont. at 47-48, 803 P.2d at 636.

other grounds by Samson, ¶ 26; *Lopez*, ¶¶ 32-42; *Starkenburg*, 282 Mont. at 10-15, 934 P.2d at 1023-26; *Strever*, 278 Mont. at 179, 924 P.2d at 674. Only in *Fisher* have we properly recognized post-*Busta*, albeit ambiguously, that our *Busta*-specified independent intervening cause instruction defines the *evidentiary standard* governing the sufficiency of the pertinent evidentiary record for judgment as a matter of law as to whether the asserted intervening tortious conduct of a third party was an independent intervening cause-in-fact, thus by operation of law severing the chain of causation between the subject injury or harm and any antecedent negligence attributable to the defendant. *See Fisher*, ¶¶ 43-50 (first assessing sufficiency of an asserted independent intervening cause in terms of the reasonable foreseeability of the subject accident and resulting injury before holding that the question of whether defendant's "conduct, in a *natural and continuous sequence*, *helped produce* [it] constitutes a genuine issue of material fact, and thus is inappropriate for resolution on summary judgment"—emphasis added). While technically correct for the limited purpose of appellate review, *see Busta*, 276 Mont. at 371, 916 P.2d at 139 (noting that "legal concepts such as 'proximate cause' and 'foreseeability' are best left to arguments between attorneys for [judicial] consideration"), our continued imprecise analysis of the sufficiency of the pertinent evidentiary record for Rule 56 or 50 judgment as a matter of law without reference to *foreseeability* in fact, rather than and without reference to the *Busta*-specified "but for"/"natural and continuous sequence" evidentiary and jury instruction standard, serves no purpose other than to seed continued analytical imprecision and confusion, as so clearly manifest in the parties' briefing, the District

Court's summary judgment ruling, and the Court's analysis here. *See, e.g.*, Opinion, ¶¶ 39-45 and 47.

(D) *Busta/Palsgraf-Andrews Public Policy Based Analysis as to Whether Defendant's Antecedent Tortious Conduct was Too-Attenuated as a Matter of Law in the Chain of Sequential Causation-in-Fact*.

¶100 Separate and apart from the issue of *causation-in-fact* under our *Busta*-specified independent intervening cause-in-fact evidentiary and jury instruction standard (whether for factfinder determination or Rule 56 or 50 judgment as a matter of law), a court may grant Rule 56 or 50 judgment as a matter of law on causation to a defendant in an asserted independent intervening cause case based on judicial application of pertinent public policy considerations to the pertinent facts not subject to genuine material dispute. *See Busta*, 276 Mont. at 361 and 371-72, 916 P.2d at 133 and 139-40 (noting role of foreseeability as a proximate causation consideration as a matter of law based on "issues of public policy . . . concern" recognized in *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting)). The *Busta*/*Palsgraf*-Andrews public policy analysis derives from recognition that the *theoretical* range, scope, or sequence of possible "causes and effects" that could conceivably later occur or result, and therefore be reasonably foreseeable as matters of fact regardless of how remote, not directly connected, or attenuated from a defendant's alleged antecedent tortious conduct, could be infinite in number, variety, or progression. *See Busta*, 276 Mont. at 361, 916 P.2d at 133 (citing *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting)); *Kitchen Krafters*, 242 Mont. at 168, 789 P.2d at 574-75 (noting "policy consideration which led to the development of 'proximate' or 'legal' cause"); *Prosser and*

Keeton, § 44 at 302. Independent of any causation-in-fact question, an asserted independent intervening cause may thus occasionally present a public policy question of law as to:

> whether the defendant [should] be held liable for an injury to which the defendant [may] in fact [have] made a substantial contribution, [but which was] brought about by a later cause of independent origin for which the defendant [was] not responsible. . . . [T]he problem is not primarily one of causation at all, since it does not arise until cause in fact is established [or assumed]. It is rather one of the policy as to imposing legal responsibility.
>
> . . .
>
> The virtually unanimous agreement that the liability must be limited to cover only those intervening causes which lie within the scope of foreseeable risk [associated with the tortious conduct of the defendant], or have at least some reasonable connection with it, is based upon a recognition of the fact that independent causes which may intervene to change the situation created by the defendant are infinite, and that as a practical matter responsibility simply cannot be carried to such lengths.

Prosser and Keeton, § 44 at 301 and 312. "[F]oreseeability as an element of proximate cause reflect[s] the practical [public policy] judgment of whether the *effect of cause on result* was *too attenuated*." *Busta*, 276 Mont. at 361, 916 P.2d at 133 (citing *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting)—emphasis added).[16] "To the extent that foreseeability" implicates "issues of public policy" as to whether causation-in-fact is too

[16] The controversy at issue in *Palsgraf* involved the majority view that the risk to others "reasonably to be perceived . . . within the range of apprehension" "defines" the resulting common law duty of care, in contrast to the dissent view "that all persons have a duty of care to the world at large" and thus the role of foreseeability "as a limitation on [tortfeasor] liability" is a consideration of "proximate cause" rather than the duty element of a negligence claim. *Busta*, 276 Mont. at 360-63, 916 P.2d at 133-34 (discussing majority and dissenting views and noting adoption of majority view in *Mang v. Eliasson*, 153 Mont. 431, 437, 458 P.2d 777, 781 (1969)). *Accord Fisher*, ¶¶ 17 and 21-23 (citing *Mang* and *Palsgraf*, *supra*).

attenuated as a matter of law in an independent intervening cause case, "the subject is properly dealt with as an *issue of law*" for judicial determination. *Busta*, 276 Mont. at 372, 916 P.2d at 140 (emphasis added); *compare Busta*, 276 Mont. at 371-72, 916 P.2d at 139-40 (specifying "but for" and alternative "substantial factor" causation-in-fact standards in cases *not* involving an independent intervening cause and distinct combined "but for" and foreseeability-based "natural and continuous sequence" evidentiary and jury instruction standard in "cases where chain of causation" in fact is at issue, as in cases involving an alleged "independent intervening cause").

¶101 Accordingly, when implicated in an asserted independent intervening cause case, the dispositive question of law for judicial determination on the pertinent factual allegations taken as true or not subject to genuine material dispute is whether the causative "effect" or contribution of the defendant's alleged antecedent negligence was "too attenuated" as a matter of public policy from the subject injury or harm to serve as a fair basis upon which to impose liability on the antecedent tortfeasor for injury or harm more directly or immediately caused-in-fact by the subsequent intervening tortious conduct of a third party. *See Busta*, 276 Mont. at 361 and 371-72, 916 P.2d at 133 and 139-40 (citing *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting)). Relevant *judicial considerations* include: (1) whether the defendant's alleged antecedent tortious conduct created or substantially increased the risk that such an intervening event might occur; (2) the related likelihood in ordinary human experience that the defendant's conduct would result in the occurrence of such or a generally similar type of intervening cause and resulting harm;

(3) whether there was a natural and continuous sequence between the defendant's antecedent tortious conduct and the subsequent intervening tortious conduct of another; (4) the number of intervening contributing causes in the sequential chain of causation-in-fact between the defendant's antecedent conduct and the subsequent third-party conduct that was the direct or immediate cause-in-fact of the subject injury or harm; and (5) the extent to which the defendant's alleged antecedent tortious conduct was a substantial contributing factor in bringing about the injury or harm that later occurred. *See Fisher*, ¶¶ 41 and 48 ("we consider 'whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated'"—citing *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 25, 296 Mont. 25, 987 P.2d 351, and quoting *Strever*, 278 Mont. at 176, 924 P.2d at 672 (quoting *Prosser and Keeton* § 44 at 302)); *Cusenbary*, ¶ 25 (defendant generally liable "if one of the reasons that makes [the subject conduct] negligent is a greater risk of a particular harmful result occurring"); *Busta*, 276 Mont. at 361, 916 P.2d at 133 ("the court must ask itself whether there was a natural and continuous sequence between cause and effect[;] [w]as the one a substantial factor in producing the other[;] [w]as there a direct connection between them, without too many intervening causes[;] [i]s the effect of cause on result not too attenuated"; and "[i]s the cause likely, in the usual judgment of mankind, to produce the result"—quoting *Palsgraf*, 162 N.E. at 104 (Andrews, J., dissenting)); *Prosser and Keeton*, § 44 at 305 ("[e]ven though the intervening cause may be regarded as

foreseeable, the defendant is not liable unless the defendant's conduct has created or increased an unreasonable risk" that the intervening cause would occur and cause harm).[17]

¶102 Without saying so, we essentially applied the *Busta*/*Palsgraf*-Andrews public policy analysis in *Cusenbary*, ¶¶ 23-35. On the factual record not subject to genuine material dispute, we ultimately held *as a matter of law* that some form of "an injury-producing accident" caused by an impaired patron is a reasonably foreseeable consequence of the earlier tavern service of alcohol to such patron in a visibly intoxicated state. *Cusenbary*, ¶¶ 19-39. Our analysis was largely based on our pre-*Busta* public policy analysis in *Nehring*, 219 Mont. at 469-71, 712 P.2d at 1334-35 (holding that the "likelihood of an injury-producing accident" is a reasonably foreseeable result in modern society of serving alcohol to intoxicated persons in violation of statute—thus discarding our prior "Neanderthal approach to causation" holding that a third-party tortfeasor's voluntary consumption of alcohol and resulting intoxicated tortious conduct was, as a matter of law, an independent intervening cause breaking the chain of causation between the provision of alcohol to the intoxicated third party and a resulting motor vehicle accident injury caused thereby). The primary basis of our *Cusenbary* holding was recognition that a defendant is

[17] *See similarly Jackson v. Mont. Family Servs. Dept.*, 1998 MT 46, ¶ 57, 287 Mont. 473, 956 P.2d 35 (discussing reasonable foreseeability of harm in duty context); *Logan v. Yellowstone Cty.*, 263 Mont. 218, 222, 868 P.2d 565, 567 (1994) (remoteness of harm at issue from defendant's antecedent negligence); *O'Connor v. Nigg*, 254 Mont. 416, 420-21, 838 P.2d 422, 425 (1992) (analogously citing *Williams v. Smith*, 314 S.E.2d 279, 280 (N.C. 1984) (Montana citations omitted)); *Prosser and Keeton*, § 44 at 302 and 305 (the distinguishing factor between "intervening causes and concurring causes" is that an intervening cause occurs "at a later time" and "acts upon" a risk created or increased by the antecedent tortious conduct of the defendant).

"generally liable" for injury or harm caused by the intervening tortious conduct of a third party if the defendant's antecedent negligence created or increased the "risk of a particular harmful result occurring, *and* [then] that harmful result occur[red]." *Cusenbary*, ¶ 25 (emphasis added). Citing *Busta*, 276 Mont. at 361, 916 P.2d at 133 (quoting and discussing *Palsgraf*, 162 N.E. at 104 (Andrews, J., dissenting)), we thus noted that the alleged antecedent negligence of the defendant tavern owner (serving alcohol to a visibly intoxicated patron) was "the very act which caused the [subsequent tortious] conduct" of the third-party patron "that resulted in the [subject] injury" to the plaintiff. *Cusenbary*, ¶¶ 30-33 (thus distinguishing the foreseeable intervening cause in *Cusenbary* from the subsequent intervening causes-in-fact found unforeseeable as a matter of law in *Strever*, *Camp*, and *King*, *supra*).

¶103 Here, whether on the pretrial Rule 56 factual record or the trial evidence under Rule 50, the following facts were and remain beyond genuine material dispute:

(1) when the Department became involved with S.W., she had only then-healing superficial abdominal bruising, apparently the result of some form of non-accidental pinching inflicted by an unknown person under circumstances unknown;

(2) regardless of the inconsistencies in the respective accounts of her father and Hocter regarding the discovery of S.W.'s abdominal bruising, due investigation by the Department and police revealed no non-speculative particularized factual basis upon which to suspect either that he or Hocter caused S.W.'s bruising or that either of them posed any future risk of harm to her in his continued custody;

(3) thus in contrast to the Court's assertion in Opinion, ¶ 45, *supra*, there is no non-speculative evidentiary basis upon which to reasonably conclude that the Department investigator *inaccurately* "marked in the safety assessment

either that S.W. had not received serious[] inflicted harm," or that her father "had not failed to provide sufficient explanation for [her] injuries";

(4) nor is there any non-speculative factual basis upon which to conclude, as asserted in the Court's Opinion, ¶ 45, *supra*, that the Department investigator *inaccurately* reported that a subsequent third-party report "of the child crying inside the apartment" was "unsubstantiated" *for child abuse or neglect*, much less that it was indicative or suggestive of either her father or Hocter as the suspected abuser;

(5) nor is there any non-speculative factual basis upon which to conclude, as asserted in the Court's Opinion, ¶ 45, *supra*, that S.W.'s superficial abdominal bruising of *unknown origin and circumstances* several weeks earlier, coupled with a subsequent crying-baby report, should have reasonably indicated or suggested to the Department that she was in immediate risk of future harm of a type at least generally similar, regardless of precise mechanism or degree, to that later inflicted upon her by her father's girlfriend in a postpartum rage;

(6) before Hocter criminally assaulted S.W. several weeks after the initial Department and police investigations had dead-ended despite due diligence, the Department had no particularized "reason to believe" that S.W. was "in immediate or apparent danger of harm" in the continued custody and care of her father as required by § 41-3-301(1) and (6), MCA, for an emergency Department protective removal and submittal of a child abuse probable cause "affidavit" referral to the county attorney;

(7) follow-up medical care, and an independent home inspection by Department personnel, revealed that S.W.'s abdominal bruising was fully healed shortly after discovery, nothing in her home environment indicated any subsequent risk of abuse or neglect of S.W. in the continued custody and care of her father and Hocter, and that S.W. was a happy and healthy young child;

(8) even to the extent, as asserted in the Court's Opinion, ¶ 45, *supra*, that S.W.'s abdominal bruising, her physician's report of non-accidental causation, and the inconsistent statements of her father and Hocter regarding the discovery of her bruising may arguably have constituted sufficient probable cause to support immediate prosecution of a formal protective proceeding under §§ 41-3-306, -422(1)(a), (5)(a), -427, -432(1), -433, and -437, MCA, the ultimate institution and successful prosecution of a child protective proceeding *to result in* an extended protective removal of the child from the home depended entirely upon: (A) an independent prosecution decision in

the sole discretion of the *county attorney*; (B) followed by a discretionary evidence-based district court finding of probable cause and then a subsequent preponderance of the evidence *judicial finding* of child abuse on hearing; and *only then* (3) a *court-ordered* grant of temporary protective custody of *sufficient duration* to have avoided the Hocter assault that unexpectedly occurred almost two months later. *See* §§ 41-3-306(4)-(6), -422(1)-(2), (5)(a), -427(1)(b)-(c), -432(1), (5)(a), (c), (8), -437(7)(a)(ii), (iii), (b)(iv), -438(1), (2)(a), and (3)(a), MCA. S.W. has made no non-speculative factual showing of any likelihood of the timely occurrence of *any* of those results; and

(9) even if the Department had referred the matter, the county attorney initiated a formal protective proceeding, the district court made the requisite probable cause and preponderance of the evidence findings of child abuse, and then granted the Department temporary protective custody of the child under §§ 41-3-422(1)-(2), -427(1), -432(1), and (5)(a), MCA, S.W. has made no evidentiary showing, whether on the Rule 56 summary judgment or Rule 50 trial record, that the Department would not have already reasonably and properly returned her to her father's care under Department supervision in accordance with §§ 41-306(4)-(6), and -423(1), (5)(a), (8), -432(5)(a), (c), (8), -437(7)(a)(ii), (iii), (b)(iv), and -438(3)(a), MCA, by the time that Hocter unexpectedly assaulted her in a postpartum rage almost two months later.

Under these record factual circumstances beyond genuine material dispute, there is simply no record basis for purposes of the *Busta*/*Palsgraf*-Andrews public policy analysis upon which to conclude that any alleged negligent failure by the Department in the performance of its statutory child protective duties regarding S.W. either created or substantially increased the risk that Hocter *might* violently assault her in her crib *two months later* in a post-partum rage *triggered by* the birth of a new baby *that had not yet occurred* at the time the Department closed its earlier S.W. investigation. Nor is there any basis under the circumstances here upon which to concluded that any alleged negligent failure by the Department in the performance of its statutory child protective duties regarding S.W. was in any way a substantial causative factor in bringing about the subsequent Hocter assault

several weeks later. Under the particular record circumstances here, regardless of whether the subsequent Hocter assault may arguably have been a reasonably foreseeable consequence, as a *theoretical possibility as a matter of fact*, of the alleged antecedent Department negligence under our *Busta*-specified independent intervening cause-in-fact standard, I would thus hold *as a matter of law* pursuant to our *Busta*/*Palsgraf*-Andrews public policy analysis that any antecedent negligence attributable to the Department was simply too attenuated *as a matter of law* in the chain of causation-in-fact from the independent Hocter assault that occurred two months later to serve as a fair and just basis for imposing liability on the Department for the independent criminal conduct and resulting injuries inflicted on S.W. by a third party.[18]

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[18] While I have chosen to focus on the distinct issue of proximate or legal causation as a *public policy based matter of law*, the Department was and remains alternatively entitled to Rule 56 or 50 judgment as a matter of law on foreseeability-based causation-in-fact. The Court avoids the issue by erroneously asserting that the State "raised [this issue] for the first time on appeal," "did not move for summary judgment on this issue," and did not "argue that it was entitled to judgment as a matter of law on this issue." Opinion, ¶ 35. Not true. By analogy to *Emanuel v. Great Falls Pub. Sch. Dist.*, 2009 MT 185, ¶¶ 13-16, 351 Mont. 56, 209 P.3d 244, the Department alternatively argued in opposition to S.W.'s summary judgment motion that *Emanuel* "strongly suggests that it *should be the State which is entitled to summary judgement*" on causation. *See* Defendant's Answer Brief to Plaintiff's Motion for Partial Summary Judgment on Causation, Dist. Ct. Doc. 78 (emphasis added). *See also* M. R. Civ. P. 56(b) and (c)(3). On the merits, the 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. Even if it is assumed *arguendo* that the Department owed a foreseeability-based common law duty under the circumstances here, its *unilateral authority* was narrowly *limited as a matter of law* to a five-day protective removal of S.W. for production and transmission of a *probable cause* affidavit for discretionary *county attorney* assessment and filing of a protective proceeding under §§ 41-3-422(1)-(2), -427(1), -432(1), and (5), MCA. *See* §§ 41-3-202(1)(a), (c), (3), (5)(a), -301(1), (6), and -302(1), MCA. Within that limited authority, it is undisputed that the Hocter assault did not occur until almost two months after the independent police and Department investigations of S.W.'s earlier superficial bruising had dead-ended on due diligence, and that the Department had no non-speculative evidence sufficient to establish probable cause, much less a preponderance of the evidence, that either S.W.'s father, or his as-yet

¶104 In anticipation of certain criticism that the Department did not assert or "raise" below any argument that the subject injury to S.W. was too attenuated as a matter of law under the public policy based *Busta*/*Palsgraf*-Andrews analysis recognized in *Busta*, the above-noted "tortuous history" of foreseeability-based proximate causation encompassing distinct matters of fact and law continues to plague our jurisprudence despite *Busta*, as manifest in the parties' arguments and the Court's resulting analysis here. The Court's narrow analytical focus reflects the undiscerning and conflated briefing in this case, which is in turn directly based on our continuing imprecise and undiscerning analysis of foreseeability-based tort causation even since *Busta*. While it correctly recognized that *Busta* preserved cause-in-fact and "proximate cause" in fact in independent intervening cause cases, Plaintiff's briefing below (Dist. Ct. Docs. 63 and 82) erroneously confused

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postpartum girlfriend, caused or allowed S.W.'s prior bruising or otherwise posed an imminent risk of future similar abuse, much less of the type or manner of occurrence or extent later inflicted by Hocter. *See Fisher*; *Reino*; *Busta* (quoting *Palsgraf*), *supra* note 4. 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. The circumstances here are thus strikingly similar in material regard to those in *King v. State*, 259 Mont. 393, 396-97, 856 P.2d 954, 955-56 (1993) (holding as a matter of law that the State owed no legal duty to protect a later-murdered person from a dangerous mental patient upon release from the state hospital upon expiration of his court-ordered commitment by initiating and successfully prosecuting a discretionary appeal of a district court denial of the State's petition for extension of the prior involuntary commitment), *overruled on other grounds by Estate of Strever v. Cline*, 278 Mont. 165, 178, 924 P.2d 666, 673 (1996). *See similarly Kiger*, 245 Mont. at 459-62, 802 P.2d at 1250-51 ("reasonable minds could reach but one conclusion" on pre-*Busta* proximate cause in fact due to "*too many* '*what ifs*' that are superseding events that break the chain of causation" in fact between the State's negligent early release on parole of a theretofore non-violent convict and his subsequent shooting of the plaintiff 18 days later in an attempted car theft—emphasis added).

and conflated the *Busta*-specified independent intervening cause-in-fact evidentiary and jury instruction standard, which encompasses both of those requirements, with the distinct "substantial factor" cause-in-fact standard applicable in certain multiple cause cases *not* involving an asserted independent intervening cause. *Compare Busta*, 276 Mont. at 371-73, 916 P.2d at 139-40 (distinctly specifying "but for" and "substantial factor" evidentiary and jury instruction causation-in-fact standards in cases *not* involving an asserted independent intervening cause, and then combining "but for" and foreseeability-based "natural and continuous sequence" in a single evidentiary and jury instruction standard of causation-in-fact in asserted independent intervening cause cases). Plaintiff's briefing below then further erroneously confused and conflated the *Busta*/*Palsgraf*-Andrews public policy considerations for judicial assessment of *proximate causation* as a matter of law with the distinct public policy considerations pertinent under the *duty* element of a common law negligence claim. *See Busta*, 276 Mont. at 361 and 372, 916 P.2d at 133 and 140; *compare Fisher*, ¶¶ 17 and 28. For its part, the Department derides the District Court on appeal for erroneously applying the "substantial factor" cause-in-fact test, without regard for the *Busta*-specified "but for"/"natural and continuous sequence" cause-in-fact test for independent intervening cause cases, but has made no showing that it made any such argument to the District Court. The parties' briefing, district court rationale, and the Court's causation analysis here clearly manifest the continued and confusing analytical disarray in our foreseeability-based tort causation jurisprudence in disregard of the clarification provided in *Busta*.

¶105 As to any assertion that we must limit our causation analysis to the particular legal arguments made by the parties or followed by the trial court below, this case is similar to *Busta* insofar that, for the purposes of review of the underlying judgment and *providing prospective clarification of law*, *Busta*'s holding and analysis clearly exceeded the more limited scope of the party arguments made before the trial court below. *See Busta*, 276 Mont. at 357-73, 916 P.2d at 131-41. *See similarly Craig v. Schell*, 1999 MT 40, ¶¶ 27-28, 293 Mont. 323, 975 P.2d 820 (noting prevailing "difficult[y]" shared by "district courts, attorneys, and insurance adjusters in . . . sort[ing] out the concepts of negligence per se and its exception" in the "motor vehicle accidents" context and thus overruling a conflicting case "that neither party . . . asked us to overrule" because "we cannot ignore" on Rule 56 de novo review the validity of the law relied on by the parties and the district court "and its fundamental application to the facts" at issue—"it serves no purpose to allow confusion to permeate an area of the law which" has such widespread effect). Regardless of our generally prudential common practice, "when an issue or claim is properly before" it, an appellate "court is not limited to the particular legal theories advanced by the parties, but rather retains the independent [constitutional] power to identify and apply the proper construction of governing law." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446, 113 S. Ct. at 2173, 2178 (1993) (quoting *Kamen v. Kemper Fin. Servs, Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718 (1991)).[19] An appellate court "may

[19] *See also* Mont. Const. art. VII, §§ 1-2 (judicial power); §§ 1-1-107 and -108, MCA (decisional common law).

[thus] consider an issue antecedent to and ultimately dispositive of the dispute before it, even [if] an issue the parties fail to identify and brief." *U.S. Nat'l Bank*, 508 U.S. at 447, 113 S. Ct. at 2178 (internal punctuation and citation omitted). We have long held similarly. *See, e.g.*, *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 37 n.8, 329 Mont. 129, 122 P.3d 1220 ("if the boundaries of our opinions were circumscribed by the inadequacies of the briefs submitted on appeal, then in many cases we would be issuing opinions that set bad precedent and confuse, rather than clarify, the law"); *Kudrna v. Comet Corp.*, 175 Mont. 29, 51, 572 P.2d 183, 195 (1977) ("[i]f the court were limited to the arguments and reasoning of counsel . . . to the exclusion of its own observations, many cases would lead us far from what we understand to be the true object of the court"—citation omitted). Here, though not directly raised here or below, the public policy based question of whether any prior negligence attributable to the Department was simply too attenuated as a matter of law under the circumstances of this case from the third-party assault of S.W. two months later was and is clearly antecedent to and ultimately dispositive of the claim and issues properly before this Court as manifest in the legal arguments and authorities relied upon by the parties and trial court. If this Court is no longer interested in clarification and correct application of the complex common law of foreseeability-based tort causation, then we should just say so and squarely overrule *Busta* so that we can continue unabated down the muddled analytical path we are now on. If not, we need to stop fostering and inviting practitioner confusion, trial court error, and similar analytical imprecision in our jurisprudence by simply following our own direction in *Busta*.

¶106 Under the unique circumstances here, any antecedent negligence attributable to the Department was simply too attenuated as a matter of law and public policy from the third-party Hocter assault of S.W. two months later. Whether under M. R. Civ. P. 56 or 50, the Department is thus entitled to judgment as a matter of law on causation under our public policy based *Busta*/*Palsgraf*-Andrews analysis, regardless of any question of fact under the correct *Busta*-specified "but for"/"natural and continuous sequence" evidentiary and jury instruction standard applicable in this independent intervening cause case. I therefore dissent from the Court's remand for new trial, and would instead simply reverse and remand for entry of a corresponding judgment as a matter of law on causation in favor of the Department.

/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon joins in the concurring and dissenting Opinion of Justice Sandefur.

/S/ LAURIE McKINNON