IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0018

S.W., A MINOR, BY AND THROUGH HER GUARDIAN,
JEFFREY FERGUSON,
Plaintiff-Appellee,

v.

STATE OF MONTANA, BY AND THROUGH THE MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES,
Defendant-Appellant.

On Appeal for the Eighth Judicial District Court,
Cascade County Cause No. DDV 13-813(b)
Honorable Elizabeth A. Best

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INTRODUCTION

This case turns on unique facts unlikely to occur again. In late 2008, an emergency-room doctor reported to the Department of Public Health and Human Services that newborn baby Sera Wilson had suffered "unusual" bruises "across the child's body" serious enough to injure her abdominal wall. The doctor's report concluded in no uncertain terms that Sera's injuries resulted from "[c]hild abuse." The following day, a pediatrician agreed that the bruising was the result of "non-accidental trauma"—yet another confirmation of serious abuse that led a Department supervisor to demand that the matter "be addressed ASAP."

But the Department, despite knowing that Sera had been injured at home, left her there, just as it failed to follow up on several other reports of abuse and neglect submitted by Sera's family, neighbors, and medical staff. The result was as foreseeable as it was tragic: Sera's head was struck repeatedly against her crib before she was thrown. At the hospital, doctors noticed that her eyeballs were filled with blood. On examination, they found that her optic-nerve fibers were swollen or severed. Sera has permanent brain damage, blindness, severe learning disabilities, and requires a feeding tube for her nutrition.

Those undisputed facts demonstrate a clear violation of the Department's statutory duties. Montana's legislature, recognizing the difficult task the Department faces, struck a balance. The statutory scheme it adopted requires that the

Department "shall promptly" make an initial assessment of reports of abuse, thus giving the agency discretion in each case to determine what response, if any, is appropriate. Section 41-3-202, MCA. Once the Department has decided that a response is necessary, however, the legislature provided that its response is "required" and "must be initiated" within the appropriate timeframe. *Id.* Consistent with the legislature's intent, the Department's civil liability under those provisions ensures enforcement of its most critical obligation: to protect children at serious risk.

The state nevertheless challenges the jury's assessment of damages in this case, advancing a laundry list of reasons why the Court should hold the Department unaccountable for violating its statutory duty. Its primary argument is that § 41-3-203, MCA, expressly immunizes the Department. But this Court has held the opposite: that the statute "does *not* immunize the Department from tort liability." *Newville v. State,* (1994) 267 Mont. 237, 269–270, 883 P.2d 793, 812 (emphasis added). The state also argues that the abuse Sera suffered was an intervening criminal act that destroyed the chain of causation. But, as this Court has recognized, a state agency cannot be excused from liability based on the occurrence of the precise harm that a statute charges it with preventing. *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 25, 296 Mont. 25, 987 P.2d 351. Here, the foreseeable consequence of continued abuse cannot—as a matter of law—excuse the Department for failing to prevent that abuse from occurring.

The state's other reasons for allowing it to escape liability—that the legislature did not impose *any* substantive duty on the Department to protect children, or that it imposed a statutory cap on the Department's liability—are equally irreconcilable with this Court's decisions, legislative intent, and the plain statutory language. Each of these arguments, if accepted by this Court, would condone the Department's neglectful response to serious cases of child abuse—even when, as here, doctors and police confirmed that abuse occurred and the Department *itself* found immediate action necessary. That unacceptable result cannot be reconciled with the legislature's overriding interest, expressed in the statute's plain language and legislative history, "to provide for the protection of children." Section 41-3-101(a), MCA.

The remaining issues that the state raises on appeal amount to a series of miscellaneous objections to the district court's evidentiary determinations. But none of these routine decisions comes close to an abuse of discretion requiring reversal, and none caused any prejudice to the state. This Court should affirm on all counts.

STATEMENT OF THE ISSUES

1. ***Immunity.*** Does § 41-3-203, MCA, immunize the Department from liability for negligence in carrying out its statutory duties?

2. ***Intervening cause.*** Does the repeated criminal abuse that the Department failed to prevent constitute an intervening cause that insulates the Department from liability by severing the causal chain?

3. ***Negligence per se.*** Did the Department commit negligence per se by failing to conduct the assessment and investigation required by statute?

4. ***Damages cap.*** Does § 2-9-108, MCA, impose a $750,000 statutory cap on the Department's liability?

5. ***Evidentiary rulings.*** Did the district court abuse its discretion in its rulings (a) excluding the state's expert testimony on the standard of care for failing to articulate any standard, (b) imposing a mild remedy for the state's spoliation of key photographic evidence, or (c) admitting evidence of Sera's medical expenses?

STATEMENT OF THE CASE

A. Statutory background

In 1965, Montana joined the growing list of states that enacted child-protection laws. In establishing a statutory scheme to address the problem of child abuse and neglect, Montana's legislature made clear that "it is the policy of this state to provide for the protection of children who," absent appropriate action, may be "threatened by the conduct of those responsible for their care and protection." Section 10-901,

MCA (1965). The legislature pursued this policy in two ways. First, it mandated that medical professionals, teachers, and social workers file a report whenever they have "reason to believe that such child has had serious injury or injuries inflicted upon him or her as a result of abuse or neglect"—what is known today as a mandatory-reporter law. Section 10-902, MCA (1965). Second, the legislature required a county attorney to respond to such reports by "immediately" starting an "investigation … into the circumstances surrounding the injury of the child." Section 10-903, MCA (1965).

Over the following decades, the legislature increased the strength of these twin pillars of Montana's child-protection scheme. The legislature expanded the list of mandatory reporters to encompass eleven categories of professionals, ranging from medical professionals to "religious healers" to foster care workers. Section 41-3-201(2), MCA. It also lowered the threshold for triggering a mandatory inquiry by the state from a report showing "serious injury" or "willful[] neglect" to one showing just "abuse" or "neglect." Section 41-3-202(1), MCA. The legislature created a trained force of "child protection specialist[s]" employed by the Department to investigate these reports. Section 41-3-102(8), MCA.

In 2001, the Department asked the legislature to amend the statutory scheme to relieve it from the burden of investigating all the numerous meritless reports it receives of abuse and neglect. In response, the legislature amended the statute to give

the agency the right to forgo an investigation of reports that do not actually amount to abuse or neglect. The new provision gave the Department discretion to do so by giving it authority to "assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated." Section 41-3-202(1)(a), MCA (2001).

When proposed, this revision caused concern that it could also allow the Department to forgo investigations into reports that rose to the level of abuse. Executive Action on SB 116 Before the Mont. H. Comm. on Human Servs., 57th Leg (2001), Mont. Leg. Hist. of SB 116 (2001). But the bill's backers rejected that interpretation, explaining that the Department would continue to remain subject to significant damages liability. The proposed changes, they explained, did not provide that the Department "do[es] not have to do anything about *meritorious* calls and *valid* complaints." *Id.* at 111 (emphasis added). Rather, they meant only that the Department can "weed out the things that really have no benefit" to children by skipping investigations when it is already "clear from the facts that there isn't an abusive situation." *Id.* at 93, 96. This meant, for example, that if a parent in a custody dispute repeatedly lodged meritless reports, the Department, taking account of its cumulative knowledge, would "not have to go out and investigate each and every time once they've concluded that there is no risk to the child." *Id.* at 93. But the "bill wouldn't increase or decrease liability" because, as "the entity responsible for

investigating these reports," the Department, in private damages suits, would still "ha[ve] liability" for failure to carry out its statutory responsibility. *Id.* at 93, 97.

The bill addressed the concerns of critics in two additional ways. To ensure that serious complaints would not go unreviewed, the legislature required the Department to "promptly" assess any report of abuse or neglect. *Id.* at 96. And it also retained the second pillar of Montana's child-protection scheme: mandatory investigation of reports. Although the Department now had discretion to "determine[]" whether a report showed abuse or neglect—as long as it did so "promptly"—the law still required that the agency "*shall* promptly conduct a thorough investigation" in such cases. Section 41-3-202(1)(c), MCA (emphasis added).

B. Factual background

1. Two doctors alert the Department of Public Health and Human Services that Sera has been physically abused.

In December 2008, Child Protection Specialist Cari Davids found a note on her desk: "Cari - This needs to be addressed ASAP." App. 91. The supervisor's directive was attached to an emergency-room doctor's report of his examination of a newborn baby, noting "small bruises across the child's body" that he described as "unusual" and causing "bruising of the abdominal wall." App 98–99. The doctor concluded that four-month-old Sera Wilson, the subject of the report, was the victim of "[c]hild abuse." App. 100. The next day, a pediatrician at the Great Falls Clinic concurred, diagnosing the bruises as "non-accidental trauma." App. 101. Although

the Department's intake system initially marked Sera's case as "priority 2," requiring an investigation within fourteen days, the supervisor's directive overrode that determination—requiring an immediate investigation. App. 90.

Davids responded by visiting the apartment of Sera's father, Jacob Arnott—a 21-year-old pizza-delivery driver—and his girlfriend, Alicia Hocter—an unemployed student who watched Sera while Hocter was pregnant with Arnott's child. Davids found the apartment in rough shape, writing that it was "messy" and "just at minimal standards," App. 82—any worse, in other words, and Arnott and Hocter would be guilty of neglect. Section 41-3-102(21), MCA (defining "physical neglect" to include "failure to provide cleanliness"). Arnott and Hocter explained the disarray by claiming that they "had not been home much due to the holidays," but admitted that they had, in fact, been home for at least the previous two days. App. 76, 77, 82.

In recounting their version of events, Arnott and Hocter told a changing and inconsistent story. At first, they told Davids that they had discovered Sera's bruises at noon on December 28, but did not take her to the hospital until finding blood in her stool later that evening. App. 82. In contrast, they told the doctor at the Great Falls Clinic that they took Sera to the hospital as soon as they discovered the bruising. App. 101. And when questioned separately by police, they gave two entirely new stories: Hocter said that she first saw the bruises during a 10 a.m. diaper change,

while Arnott claimed that he wasn't even aware of them until the emergency-room doctor pointed them out at the hospital. App. 88, 105.

The only thing that Arnott and Hocter were consistent about was their accusation that Sera's mother, Kendra Bernardi, was responsible for Sera's injuries. They claimed—to Davids, doctors, and the police—that Bernardi must have abused Sera during a December 27 visit. App. 82, 88, 98. But that visit, they both acknowledged, had gone smoothly. Arnott's friend, who was in the room with Bernardi and Sera for all but a few minutes, did not witness any bruising or abuse. *Id.* at 82. Indeed, Bernardi was the only one who noticed anything amiss during the visit, telling Davids that she noticed Sera had a "black and blue eye and bruising on the bridge of her nose." App. 87. Davids, however, dismissed that report out of hand because the emergency room doctor hadn't mentioned it, without considering whether the bruising might already have faded by then. *Id.*

In her report on the incident, Davids admitted she was "unable to determine how [Sera] received the bruising to her stomach." App. 85, 87, 90. Still, Davids concluded that Arnott was capable of caring for Sera and that "no follow-up [was] required." App. 85. Not much else made sense in the report either. Davids answered "no" to the question whether the "child received serious, inflicted, physical harm," despite two doctors' clear findings of abuse. App. 81. She also answered "no" under a line item for "caretaker has not … protect[ed] the child from … harm from other

persons having familial access" without examining whether Sera was safe with Hocter—her primary caretaker at the time. App. 83.

2. The Department summarily dismisses additional reports of Sera's abuse and neglect.

Even before her emergency-room visit, Sera was no stranger to the Department. The previous October, Sera's parents had lodged dueling complaints of abuse or neglect. Bernardi reported that Arnott had run out of formula to feed Sera, refused to return her at agreed times, and stopped taking his medication for bipolar disorder and depression. App. 18, 75. Arnott in turn, claimed that Bernardi had once returned Sera dirty and "wheezing"—though he admitted that he never took her to the doctor and didn't even know her pediatrician's name. App. 21. Davids, however, only investigated the allegations against Bernardi, which she quickly dismissed. A staff member at Bernardi's new-mothers support group reported that she was "nurturing," "very appropriate," and left no "concerns or worries about [her] ability to parent." *Id.* But Davids never looked into the serious allegations concerning Arnott's negligent care. She questioned neither Arnott nor Hocter, taking Arnott's word that he had things under control and closing her report on Arnott as requiring no additional follow-up. *Id.*

The emergency-room doctor's report was also not the last report of abuse or neglect that the Department received about Sera. On January 6, 2009—just a week later—the Department received an anonymous report of marijuana smoke coming

from Arnott's and Hocter's home on two occasions and of a "child crying inside." App. 110. The Department intake noted that there was an "open report" on the family, but immediately closed the new report because Davids was "already investigating." *Id.*

Three days later, the Department received yet another report. While Hocter was in the hospital to deliver her baby, Arnott left Sera unattended and alone in a hospital hallway "numerous times throughout the night." App. 118. Hospital staff repeatedly "confronted" Arnott, but with little effect. *Id.* He displayed so little concern for Sera that, even without any knowledge of the previous reports, a nurse felt compelled to alert the Department that Sera was at risk. The Department, however, designated the nurse's report "Priority: 0" (the lowest possible priority). App. 119. It then quickly closed the file, taking at face value Arnott's claim that Sera was "never left alone"—notwithstanding the contradictory report of a nurse with nothing to gain from a false accusation. App. 121.

3. A parallel police investigation concludes that Sera was the victim of "assault."

On the same day as the report of marijuana smoke, Detective Art Schalin of the Great Falls Police was assigned to investigate Sera's case. Schalin called Davids first thing that morning. App. 103. She wasn't in, so Schalin left a message requesting that Davids call him back "at her earliest convenience." App. 103. Two days later,

on January 8, Schalin still hadn't heard back. He tried again and left another message. App. 104. Four more days passed before Davids finally returned his call.

Working off information shared by Davids, Schalin placed a phone call to Arnott and Hocter, which, as noted, turned up another inconsistent story from the pair. App. 105. He then conducted in-person interviews with Bernardi and her boyfriend, William Wilson. Despite being interviewed separately, Bernardi and Wilson gave consistent answers. App. 108. Both denied that Bernardi harmed Sera, and contrary to what Arnott and Hocter had reported, both informed the detective that Wilson had also been present at the December 27 visit. App. 107. That meant that Bernardi had never actually been alone with Sera. Schalin concluded that the incident was an "assault," without determining who committed it. App. 109.

4. Hocter repeatedly slams Sera into her crib, blinding her and inflicting permanent brain damage.

On February 18—a month after Arnott left Sera alone in the hospital—Hocter had had enough of six-month-old Sera's crying. She snapped, picking up Sera and slamming her head into her crib "two or three times" before throwing her down again. App. 74. She then left the room, turning on a radio to drown out the sound of crying. *Id.* But even the radio couldn't muffle Sera's continued "gurgling," which grew loud enough that Hocter brought her into the living room, where she remained until Arnott arrived and called an ambulance. *Id.*

When detectives arrived at Arnott and Hocter's apartment later that day, they found that it wasn't just "messy"; it was "extremely filthy." App. 73. Dirty diapers littered the living room, "dirty dishes covered in mold" filled the sink, and trash was "scattered" everywhere. *Id.* Sera's room was worse: "Urine soaked bedding" lay on the floor, her crib mattress had no sheets, and dirty diapers littered the room. *Id.*

Doctors diagnosed Sera with a hematoma on her forehead, swelling of the brain, bleeding on her right retina, and "two linear bruises going from her right temple to her right eye." App. 72. She is now permanently blind, receives nutrition through a feeding tube, and suffers from severe learning disabilities. Trial Tr., Vol. 1, 192, 195. At thirteen—her age at trial—she still used diapers and was on a first-grade curriculum. Trial Tr., Vol. 1, 195. Sera can perform the most basic tasks only with repeated verbal prompting. To put on a shirt, for instance, she must be reminded, "This is your shirt. Put it on. It goes over your head." Trial Tr., Vol. 2, 40. And everyday disruptions like snow on a sidewalk or blowing wind can throw off the limited ability she retains to navigate her environment. Trial Tr., Vol. 1, 207. She requires "24/7 care" and will for the rest of her life. Trial Tr., Vol. 2, 60.

C. Procedural background

Sera's guardian, Jeffrey Ferguson, sued the Department on her behalf, alleging that the agency committed negligence under Montana law when it failed to "meet reasonable standards of care, resulting in the breach of its duties to protect [Sera]

from abuse." App. 64. Following discovery, the district court granted the plaintiff's motion for partial summary judgment on the issue of the state's liability. Doc. 59. Although holding that genuine issues of material fact precluded summary judgment on common-law negligence, the court concluded as a matter of law that the state's undisputed failure to fulfill its duties under § 41-3-202(1)(a), MCA, constituted negligence per se. Doc. 59 at 7–11, 17–18. In a subsequent order, the court also granted partial summary judgment to the plaintiff on the issue of causation. The court rejected the state's argument that Hocter's criminal conduct was an intervening cause that severed the chain of causation, holding that the undisputed facts showed that further abuse was foreseeable. Doc. 86.

The district court also rejected the state's motion for summary judgment on grounds of immunity. The plain language of § 41-3-203, MCA, it held, does not immunize the Department from liability for violating its statutory duty to protect children from abuse and neglect. Doc. 59 at 21–26. Likewise, the court concluded, the plain language of § 2-9-108(1), MCA, does not cap damages against the Department for violating its government-specific duty to Sera. Doc. 59 at 26–29.

The court then conducted a jury trial on the remaining issue of damages. In a two-day trial, Sera's guardian presented testimony and video evidence demonstrating Sera's profound and lifelong disabilities. On the trial's conclusion, the jury awarded the plaintiff $16,652,538 in compensatory damages reflecting Sera's

future medical expenses, impairment of future capacity, and mental and emotional suffering. Doc. 125. The district court entered judgment on the jury's verdict. Doc. 127.

STANDARD OF REVIEW

This Court reviews a grant or denial of a summary judgment motion de novo. *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, ¶ 8, 324 Mont. 366, 103 P.3d 535. It reviews the district court's rulings on the admissibility of evidence for abuse of discretion. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 52, 345 Mont. 12, 192 P.3d 186.

SUMMARY OF ARGUMENT

I. The state's first and primary argument on appeal is its claim of immunity from liability under § 41-3-203, MCA, which immunizes "[a]nyone" who reports or investigates child abuse. In *Newville v. State*, this Court flatly rejected that precise argument, holding that "anyone" under § 41-3-203 means any of the "persons" that the statute requires to report and investigate child abuse. 267 Mont. at 269, 883 P.2d at 812. The legislature and the Department itself both understood the statute as preserving the Department's liability for negligence in performing its statutory duties. To hold otherwise would severely undermine the legislature's preeminent interest in protecting vulnerable children in the state.

The state's reliance on the statutory definition of "person" gets it no further because § 41-3-203 never uses that word. And the state's argument ignores

Montana's constitutional guarantee that "governmental entities shall have no immunity from suit" absent the legislature's express provision to the contrary. Mont. Const. art. II, § 18. The state does not, and cannot, argue that § 41-3-203's language *expressly* immunizes the Department here.

II. The state contends that the Department cannot be held to have proximately caused Sera's injuries because those injuries resulted from an intervening act of criminal child abuse. But an intervening event, even if a criminal act, can only break the causal chain if it is unforeseeable. The district court correctly applied that test in concluding—as a matter of law—that continued abuse was the foreseeable result of the Department's failure to act here. The Department cannot be excused from liability based on the occurrence of the very abuse it was charged with preventing.

III. The state challenges the district court's conclusion that the Department's failure to investigate Sera's abuse was negligence per se. But the state does not dispute the district court's conclusion that it failed even in its undisputed duty to adequately *assess* the information reported to it. And, in any event, the state is wrong that the statute requires nothing more than an initial assessment. Section 41-3-202(1)(a), MCA, states in mandatory terms the Department's duty to carry out the "response *required*" and the "timeframe within which action *must be initiated*." (emphasis added). Otherwise, the Department would have no duty to respond even in cases where the

agency *itself* finds serious abuse or neglect. That cannot be what the legislature intended.

IV. The state argues that the Montana Tort Claims Act imposes a cap on the plaintiff's damages. The statute, however, only limits damages on a "claim" for which "a private person … would be liable." Section 2-9-108, MCA. Because the plaintiff's claims are based on statutory duties unique to the Department, a "private person" could never be liable for violating them. Thus, the cap does not apply.

That conclusion does not, as the state claims, render the damages cap a "nullity" because the cap would continue to apply to ordinary negligence claims. Nor is there anything "absurd" about the legislature's decision to cap the state's liability for ordinary negligence cases but not for violations of the state's duty to protect the public welfare. That legislative choice advances Montana's distinctive policy—enshrined in the Montana Constitution—disfavoring governmental immunity.

V. The district court acted well within its broad discretion in excluding the conclusory opinion of the state's expert that the Department acted with "reasonable care." The expert's opinion never even articulated the standard of care under which she made that determination. And it improperly attempts to supplant the court in resolving the ultimate issue of the state's liability.

VI. The district court also did not abuse its discretion in imposing a mild remedy for the state's spoliation of key photographic evidence. The state's duty to preserve that evidence did not, as the state asserts, turn on its receipt of formal notice of Sera's claims. It was enough that litigation against the Department was reasonably foreseeable—as the district court reasonably determined it was here. The court's carefully tailored remedies for the state's spoliation—allowing the plaintiff to explain why the photos were missing and preventing the state from excusing their loss—were "reasonably proportional" to the prejudice the plaintiff suffered from loss of material evidence of Sera's injuries. And in any event, the state suffered no prejudice from that mild sanction because the photographic evidence played no role at trial.

VII. The state's final argument—that the district court erred in admitting evidence of Sera's medical expenses—is waived. The state never argues the issue in its brief, and its attempt to incorporate its briefs below is a plain violation of the appellate rules. Regardless, the district court did not abuse its discretion in admitting evidence of Sera's medical expenses, which are relevant, at a minimum, to the nature and severity of her injuries.

ARGUMENT

I. The Department has no immunity from liability for its negligence in carrying out its statutory duties.

The state's lead argument (at 13) is that the legislature immunized it from liability for negligence under § 41-3-203, MCA, which grants immunity—absent gross

negligence or bad faith—to "[a]nyone investigating or reporting any incident of child abuse or neglect under 41-3-201 or 41-3-202." But, as this Court recognized in *Newville v. State*, that section "does not immunize the Department from tort liability." 267 Mont. at 269–270, 883 P.2d at 812. "This immunity is not intended for the Department," the Court held; "rather, it is intended to protect individuals such as teachers, doctors, and psychologists who are required to report suspected abuse" *Id.* Section 41-3-201, MCA, the Court explained, requires these and other classes of "professionals and officials" to report abuse and neglect to the Department. *See id.* Likewise, § 41-3-202, MCA, gives responsibility for investigating such a report to "a child protection specialist"—that is, an "employee of the department who investigates allegations of child abuse, neglect, and endangerment." Section 41-3-102(8), MCA. Section 41-3-203, MCA's plain language only provides immunity to these "*persons* required to report and investigate child abuse under the provisions of §§ 41-3-201 and 41-3-202." *Newville*, 267 Mont. at 269, 883 P.2d at 812 (emphasis added).

The statute's legislative history confirms its plain text and this Court's holding in *Newville*. In testimony leading up to adoption of the immunity provision, both the legislature and the Department recognized that the amendment "wouldn't increase or decrease liability" because, "[a]s the entity responsible for investigating [child-abuse] reports, the department has liability" for negligence performing that duty. Executive Action on SB 116 Before the Mont. H. Comm. on Human Servs., at 97.

Indeed, testimony from the Department's director made clear the agency's understanding that—even if individual employees are immunized from liability—the "department has liability" for failing to protect children from abuse or neglect. *Id.* To extend the statute's protection beyond individuals to the Department itself would leave *nobody* liable for failure to keep children safe. That, as this Court explained in *Newville*, would undermine the "stated public policy of Montana … 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.'" 267 Mont. at 270, 883 P.2d at 812.

Although *Newville* is directly on point, the state barely addresses it. The state merely asserts (at 18) that "post-*Newville* amendments" to the statutory scheme "make clear that immunity under § 41-3-203 applies to the State." But it neither identifies these amendments nor explains how they affect *Newville*'s holding. In fact, the language of the statute at issue in *Newville* was substantively identical to the current version. As now, the statute applied to "[a]nyone investigating or reporting any incident of child abuse or neglect." Section 41-3-203, MCA. The Court's holding that "anyone" excludes the Department thus remains unchanged today.

The state relies on *Weber v. State* for the proposition that immunity under § 41-3-203, MCA, extends to the state "to the same extent" that it extends to state officials. 2015 MT 161, ¶ 13, 379 Mont. 388, 352 P.3d 8. But that was the holding of the *district*

court in *Weber*—not the holding of this Court. And because the plaintiff did "not appeal that ruling," *id.*, this Court never passed on the issue, limiting its discussion to the question whether individual state officials were grossly negligent. Moreover, as the court explained in *Green v. Mont. Department of Public Health and Human Services*—another case on which the state relies (at 17–18)—*Weber* involved claims that a child-protection specialist negligently *removed* children from the plaintiff's home. 2014 WL 12591 835, at *2 (D. Mont. June 13, 2014). Nothing in *Weber* can be read to undermine *Newville*'s clear holding that § 41-3-203 "does not immunize the Department" from liability for *failing* to protect children. 267 Mont. at 270.[1]

The state also relies on the legislature's definition of "person" in § 1-1-201(1)(b), MCA to include an "entity as well as a natural person." But the immunity provision at issue here—§ 41-3-203, MCA—does not use the word "person," so the legislature could not have meant to invoke that statutory definition. *See Chicago, M., St. P. & P.R. Co. v. Custer Cnty.*, (1934) 96 Mont. 566, 32 P.2d 8, 10 (explaining that the "Legislature must be assumed to have meant precisely what the words of the law, as commonly understood, import"). In any event, the definition

[1] This Court did not hold otherwise in *Gudmundsen v. State*, on which the district court in *Weber* relied. 2009 MT 56, ¶ 24, 349 Mont. 297, 203 P.3d 813. The state points to *Gudmundsen*'s holding that, "where Montana law protects private citizens from liability, it also protects the State." *Id.* But *Gudmundsen* was about the government's immunity under the Tort Claims Act, not § 41-3-203. And even under that statute, the decision has nothing relevant to say about this case. *See* Part IV, *infra*.

does not apply when "the context requires otherwise." Section 1-1-201(1)(b), MCA. And in the context of the state's immunity to liability, the legislature narrowly defined "state" to mean "the state of Montana" or an "instrumentality of the state"—not a natural person. Section 2-9-101(7), MCA.[2]

More fundamentally, the state's statutory arguments ignore the Montana Constitution's background guarantee that "governmental entities shall have no immunity from suit for injury to a person or property, except as may be *specifically* provided by law by a 2/3 vote of each house of the legislature." Mont. Const. art. II, § 18 (emphasis added). This Court thus "strictly construe[s] any attempted governmental immunity," requiring "every act expanding statutory immunity" to be "clearly expressed" in the statute's plain language. *B. M. by Burger v. State,* (1982) 200 Mont. 58, 62, 649 P.2d 425, 427 (1982). Even under the state's reading of § 41-3-203, MCA's language, the statute never *expressly* immunizes the Department from liability; at best, that immunity would merely be implied. *But see* § 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

[2] The State's reliance (at 20) on § 2-9-305, MCA, is even more of a stretch. That provision immunizes government *employees* from suit by plaintiffs who have previously recovered from the employing governmental entity. Section 2-9-305(5), MCA; *see Story v. City of Bozeman*, (1993) 259 Mont. 207, 220, 856 P.2d 202, 210, *overruled on other grounds by Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 54, 318 Mont. 103, 79 P.3d 250. It says nothing about immunity of the state itself.

omitted or to omit what has been inserted."). Without such "a clear statutory declaration granting immunity, it is [this Court's] duty to permit rather than to deny an action for negligence." *B. M. by Burger*, 200 Mont. at 63, 649 P.2d 427.

II. Hocter's actions did not break the causal chain because they were plainly foreseeable as a matter of law.

The state next contends that the Department's failure to investigate did not proximately cause Sera's injury because Hocter's criminal assault was an intervening cause that severed the causal chain. But an intervening event can only break the causal chain if it is not "reasonably foreseeable that plaintiff's injury may be the natural and probable consequence of that conduct." *Thayer v. Hicks*, (1990) 243 Mont. 138, 155, 793 P.2d 784, 795. The defendant need not foresee the plaintiff's "specific injury"; it is enough that it "might reasonably anticipate under the circumstances" that something like the intervening act could occur. *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 40, 41, 342 Mont. 335, 181 P.3d 601. Here, as the district court recognized, it is plainly foreseeable that a child who has suffered past physical abuse and is left where she suffered the abuse is likely—in the absence of intervention—to continue suffering abuse in the future.[3]

[3] The question whether "the chain of causation has been severed by an independent, intervening cause" involves a "two-tiered analysis." *Labair v. Carey*, 2012 MT 312, ¶ 22, 367 Mont. 453, 291 P.3d 1160. Courts ask first "whether the defendant's negligent act was a cause-in-fact of the plaintiff's injury," and, second, "whether the defendant's act was a proximate cause of the plaintiff's injury." *Id.* The state's argument that Hocter's abuse of Sera was not foreseeable is relevant only to the

The district court did not, as the state claims (at 26), "discard" the foreseeability requirement. To the contrary, the court expressly recognized that "foreseeability is … the focus when considering whether an intervening superseding cause defense will be permitted." Doc. 86 at 9–10 (citing *Fisher*, ¶ 39); *see also id.* ("Foreseeability is the key."). As the court explained: "When a defendant asserts that the causation chain has been interrupted by a superseding, intervening cause, the court … must determine whether the act or omission was the proximate cause of the injury." *Id.* at 9 (citing *Cusenbary*, ¶ 26). And that is so because "[f]oreseeable intervening facts or conduct do not break the chain of causation." *Id.* The court applied that test here to "analyze[] [Hocter's actions] in the context of foreseeability," concluding that "Hocter's assault was not an unforeseeable superseding, intervening cause." *Id.* at 13, 15.[4]

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second question (proximate cause). *See Cusenbary*, ¶ 26 (holding that the proximate-cause inquiry is "determined by foreseeability"). Because the state does not argue the first question (cause-in-fact), we do not further address that issue here.

[4] The state's remaining quibbles about the district court's articulation of the proper test fare no better. The state criticizes (at 21) the district court's application of the "substantial factor" test in evaluating causation. But it was the state that raised that issue below, arguing that "[i]ts conduct was not a substantial factor in causing injuries to" Sera. Doc. 86 at 2. The district court properly rejected that argument, and the state does not challenge that holding on appeal. The state also criticizes the district court's discussion of other non-party defenses, which it argues are irrelevant to the issue of intervening cause. But the court never suggested otherwise. The court's consideration of those issues does nothing to undermine its extensive discussion of foreseeability—a discussion that the state simply ignores. *Id.* at 8–13.

The state also argues (at 25–26) that the district court should have let a jury decide whether Hocter's conduct was foreseeable. As the state acknowledges (at 24), however, a district court "may properly award summary judgment and determine foreseeability as a matter of law on issues of intervening cause when reasonable minds may reach but one conclusion." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 48, 350 Mont. 538, 208 P.3d 836. This Court regularly applies that standard to hold intervening causes foreseeable as a matter of law in circumstances far more attenuated than those here. In *Larchick*, for example, the Court held it reasonably foreseeable that a student would hit another with a lacrosse stick even when the school's rules expressly prohibited students from doing so. The school, the Court held, should have "expected that there would be instances where students would exceed the bounds of the game." *Larchick*, ¶ 50; *see also, e.g.*, *Faulconbridge v. State*, 2006 MT 198, ¶ 92, 333 Mont. 186, 142 P.3d 777 (holding that a driver's intoxication and excessive speed did not excuse the state's failure in its duty to remedy dangerous road conditions); *Prindel v. Ravalli Cnty.*, 2006 MT 62, ¶ 45, 331 Mont. 338, 133 P.3d 165; *Cusenbary*, ¶ 39; *Fisher*, ¶ 42.

Although, as the district court recognized, "people are generally entitled to presume others will not commit crimes, the context is key." Doc. 86 at 11 (citing *Est. of Strever v. Cline,* 278 Mont. 165, 924 P. 2d 666 (1996)). Here the relevant "context is that the [defendant] is a State agency charged with protecting children from abuse and

neglect, which often, and frequently, involves criminal acts of those caring for them." *Id.* As the court noted, the "laws under which the Department operate were enacted in recognition of the enormous number of children who are annually victimized by abuse and neglect in the hands of their caregivers." *Id.* The statute thus requires the agency to investigate a report of abuse specifically to prevent "further threat[s]" from "those responsible for the children's care and protection." Section 41-3-101(a), MCA.

And as this Court has explained, "if one of the reasons that makes a defendant's act negligent is a greater risk of a particular harmful result occurring, and that harmful result does occur, the defendant is generally liable." *Cusenbary*, ¶ 25. In *Cusenbary*, for example, the Court rejected a tavern's claim of an intervening cause where its patron—who appeared to be "physically incapable to drive a vehicle" and "under the complete care and supervision of his family"—nevertheless took control of a car and injured another customer. *Cusenbary*, ¶ 37. Because the purpose of the law at issue (the Dram Shop Act) was to protect the public from drunk drivers, the accident was "foreseeable as a matter of law" notwithstanding the patron's apparent physical inability to operate a car. *Cusenbary*, ¶ 37.

For similar reasons, other jurisdictions have held that, when a state agency has notice of a child being abused, it is reasonably foreseeable that the abuse is likely to continue. In *Horridge v. St. Mary's County Department of Social Services*, for example, Maryland's high court held that the abuse of a baby did not break the causal chain

of the Department's failure to "make a thorough investigation" of previously reported bruises. 382 Md. 170, 175, 195 (2004). When "the actionable duty is to protect another from harm," the court explained, "proximate cause must be judged in terms of the foreseeability of such harm being inflicted." *Id.* at 194; *see also D.C. v. Harris*, 770 A.2d 82, 92–93 (D.C. 2001) (holding that, after Child Protective Services failed to act on a report of children being abused, "further assault upon the children was foreseeable"); *Albertson v. State*, 191 Wash. App. 284, 298–299 (2015) (holding that a baby's fractured skull was not an unforeseeable "superseding cause" because it "was precisely the kind of harm that would ordinarily occur as a result of a faulty or biased investigation of child abuse"). The district court did not err in reaching the same conclusion here. Hocter's foreseeable abuse of Sera cannot, as "a matter of law," "sever the State's potential liability" for its failure to prevent that abuse from occurring. *Faulconbridge*, ¶ 92.

III. The Department's failure to fulfill its statutory duty to assess and investigate abuse constituted negligence per se.

The state next challenges the district court's conclusion that it committed negligence per se by failing to fulfill its statutory responsibilities under § 41-3-202, MCA. All that the statute requires, it argues, is that the Department "assess" reports of abuse or neglect and "determine" the appropriate response; it does not require the Department to actually *act* on those determinations. The agency's initial

assessment of the reports here, the state concludes (at 30), thus "fully satisfied the State's obligations" under the statute.

But even on the state's cramped view of the Department's statutory duties, however, the agency's response here fell short. As the district court explained, there "is no genuine factual dispute as to the material facts that the Department failed to promptly assess all of the information" from the reports of abuse and neglect it received. Doc 59 at 11. In response to the December 2008 report of "unusual" bruising, the Department concluded that there was no "serious, inflicted, physical harm" and that "no follow up [was] required"—but it did so without assessing the reports of the emergency-room doctor, pediatrician, or investigating detective. App. 81, 85. And, as the district court noted, there is "no evidence" at all "of an investigation or an assessment" of two later reports of abuse or neglect made in January 2009. Doc. 59 at 11.

In sum, Department failed to make any reasonable assessment or to determine the level of response required based on the information reported to it. As in *Newville*, those undisputed facts show a "failure of the agency to follow procedures that would enable the agency to make a decision" based on all the information. 267 Mont. at 268, 883 P.2d at 811. In these circumstances, the "discretion afforded" the Department by statute "was never exercised." *Newville*, 267 Mont. at 267, 883 P.2d at 811.

In any event, the state is wrong that the statute requires nothing more than an initial assessment. Section 41-3-202(1)(a), MCA, not only mandates that the Department "shall" determine the appropriate response to reports of abuse and neglect; it also states in mandatory terms the Department's duty to *carry out* that response—requiring the Department to determine the "level of response *required* and the timeframe within which action *must be initiated*." Moreover, once the Department determines that an investigation is necessary, the statute requires that it "*shall* promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child and perform a safety and risk assessment to determine whether the living arrangement presents an unsafe environment for the child." Section 41-3-202(1)(c), MCA (emphasis added).

Here, the state concedes (at 30–31) that the Department's December 28 and January 6 determinations "required action be initiated within 14 days." After those determinations, the statute's plain language required that the Department "must" initiate that action within the "required" timeframe. To hold otherwise would mean that the Department has no duty to respond even in cases where it has found serious abuse or neglect of a child. That would fall far short of vindicating the legislature's important interest in protecting vulnerable children. *See* section 41-3-101(2), MCA; *Newville*, 267 Mont. at 270, 883 P.2d at 812. Where, as here, the Department *itself* has found a need to act on a report of abuse, no conceivable policy reason justifies

allowing it to look the other way while the abuse continues. *See Bullock v. Fox*, 2019 MT 50, ¶ 52, 395 Mont. 35, 435 P.3d 1187 ("When interpreting a statute, [this Court's] objective is to implement the objectives the legislature sought to achieve." (citation omitted)).

The statute's legislative history makes clear that the legislature intended no such result. Before 2001, § 41-3-202, MCA, required the Department to conduct a "thorough investigation" of *every* report of abuse or neglect. Executive Action on SB 116 Before the Mont. H. Comm. on Human Servs., at 99. To lessen the burden on the agency, the legislature amended the statute in 2001 to allow it to forgo investigations in cases where it is "clear from the facts that there isn't an abusive situation." *Id.* at 93. As the bill's backers explained, however, that does not mean that the Department does "not have to do anything about *meritorious* calls and valid complaints." *Id.* at 111 (emphasis added). The amendments, in other words, allow the Department to determine "if" a report's allegations satisfy the statutory definitions of abuse or neglect. Section 41-3-202(1)(c), MCA. When the Department does find abuse or neglect, however, it is not free to ignore it. And typically, it does not. But the Department in Sera's rare case failed this duty, implicating the preservation of liability the legislature understood and intended when enacting the 2001 amendments.

IV. The plain language of the statutory damages cap excludes these claims.

The state briefly argues (at 34) that § 2-9-108, MCA, of the Montana Tort Claims Act imposes a $750,000 damages cap on the plaintiff's claims. Once again, the state's argument flies in the face of the plain statutory language. That language is straightforward: Section 2-9-108, MCA, limits the government's liability to $750,000 for each "claim," and § 2-9-101(1), MCA, defines "claim" as a "claim against a governmental entity … under circumstances where the governmental entity, *if a private person*, would be liable to the claimant for the damages" (emphasis added). Here, the plaintiff's claim is based on acts and omissions that violate the statutory duties of the *Department*—not of a private person. As the district court explained, "[p]rivate persons have no duty to investigate abuse of children, keep them safe, and protect them from abuse by caregivers." Doc. 59 at 27–28.

This Court has held that § 2-9-108, MCA's cap "only applies to those tort actions which constitute a 'claim' as defined in § 2-9-101(1)." *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 23, 354 Mont. 181, 222 P.3d 618. In *Delaney*, for example, the Court held that a plaintiff's claim for lost profits against the City of Bozeman was not a "claim" subject to the cap. *Id.* The statutory definition of "claim," the Court noted, includes only claims for "damages because of personal injury or property damage." *Id.* ¶ 20. Because the plaintiff's claim for lost profits involved neither, the plaintiff had "made no 'claim' against Bozeman as that term is defined in § 2-9-101(1), MCA." *Id.*

¶¶ 20–25. Though Sera's injuries are far more brutal than the plaintiff's in *Delaney*, *Delany* controls for the same reason: The basis for liability—the State's failed duty to protect Sera—does not apply to any "private person." And because a "private person," in these circumstances, would not be "liable to the claimant for damages," the plain language of § 2-9-101(1), MCA inapplicable. Thus, the "$750,000 limit on damages in § 2-9-108(1), MCA, does not apply." *Delaney*, ¶¶ 20, 25.

The state offers no plausible alternative interpretation of the statute's plain language. In the state's reading (at 35), the statute's reference to a "private person" "merely confirms" that "governmental entities are not liable for claims for which a private person would not be liable." But nothing in the Tort Claims Act limits the liability of government entities in that way. Rather § 2-9-102, MCA, "holds *every* governmental entity in Montana subject to liability for its torts." *Kent v. City of Columbia Falls*, 2015 MT 139, ¶ 38, 379 Mont. 190, 350 P.3d 9 (emphasis added). That broad waiver of sovereign immunity includes claims "arising out of a governmental … function." Section 2-9-102, MCA. And "governmental functions," this Court has explained, are government duties "employed in administering the affairs of the state and promoting the public welfare"—duties, that, by their nature, do not apply to private citizens. *Hagfeldt v. City of Bozeman*, (1988) 231 Mont. 417, 420–21, 757 P.2d 753, 755. The Tort Claims Act includes several sections defining the state's liability for violating such uniquely governmental duties. *See* §§ 2-9-111 to 114, MCA. Section 2-9-

114, MCA, for example, grants governmental immunity for the acts of "local elected executives" in "vetoing or approving ordinances or other legislative acts." Those provisions would be rendered worthless if, as the state claims, "governmental entities are not liable" in circumstances where a private person would not be. *See Delaney*, ¶ 22 ("A whole act must be read together and where possible, full effect will be given to all statutes involved.").

This Court's decision in *Gudmundsen* does not hold otherwise. The state points to the Court's holding there that "state liability attaches under the Tort Claims Act only where a private person similarly would be liable." *Gudmundsen*, ¶ 24. But the plaintiff's claim in *Gudmundsen* was not based on a governmental function but on a duty applicable to "*any* mental health professional" in the state. Section 27-1-1103, MCA (emphasis added). Under those circumstances, the Court was correct to hold that, where the statute "protects private citizens from liability, it also protects the State." *Gudmundsen*, ¶ 24; *see also Drugge v. State*, (1992) 254 Mont. 292, 295, 837 P.2d 405, 407 (finding no state liability because the statute at issue imposed no duty on the state to "warn of hazards on rivers"). But nothing in *Gudmundsen* undermines the Tort Claims Act's plain language waiving sovereign immunity for uniquely governmental functions. *See, e.g.*, *Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394 (holding that a sheriff's failure to comply with a mandatory notice statute stated a claim for negligence per se).

Lacking viable plain-language interpretation, the state argues (at 34) that applying the statute as written would render the damages cap a "nullity." But that is simply wrong. Applying the statute's limited definition of "claim" confirms the damages cap is inapplicable only for those claims arising from uniquely governmental duties. The cap still applies, however, to ordinary negligence claims against the state and other torts for which a private party could also be held liable. And, contrary to the state's assertion (at 35), there is nothing "absurd" about the legislature's policy decision to cap the state's liability for ordinary accidents and similar negligence cases, while leaving liability unrestricted for violations of the state's core responsibility to "promot[e] the public welfare." *Hagfeldt*, 231 Mont. at 420–21, 757 P.2d at 755.

Indeed, that legislative choice directly furthers Montana's distinctive "policy that governmental immunity is not favored in this state." *Id.* at 422. Together, Article II, Section 18 of the Montana Constitution and the plain text of the Tort Claims Act articulate a clear policy against sovereign immunity, absent the express direction of a super-majority of the legislature. The legislature, at a minimum, did not *expressly* grant the Department sovereign immunity here.

V. The district court did not abuse its discretion in excluding the state's expert testimony for failing to articulate a standard of care.

The state (at 36) lobs a brief attack on the district court's decision to exclude the opinion of its expert—Dr. Judy Krysik—on the proper "standard of care" in this case. As the district court recognized, however, Dr. Krysik never offered an opinion on the proper standard of care. After "comb[ing]" through Dr. Krysik's expert disclosure, the court found "no disclosed opinions or facts addressing" such a standard. Doc. 55 at 7. In response, all the state points to (at 36) is Dr. Krysik's assertion that the Department "acted with reasonable care in its involvement with" Sera. But that claim is conclusory because it never identifies the standard of care—that is, the "degree of prudence, attention, and caution"—under which that determination is properly made. *Not Afraid v. State*, 2015 MT 330, ¶ 15, 381 Mont. 454, 362 P.3d 71.

The district court did not abuse its discretion in excluding that conclusory opinion on the state's "reasonable care." Trial courts are "vested with great latitude in ruling on the admissibility of expert testimony." *Cartwright v. Scheels All Sports, Inc.*, 2013 MT 158, ¶ 37, 370 Mont. 369, 310 P.3d 1080. This Court will not "substitute [its] judgment for that of a district court unless that court *clearly* abused its discretion." *Friedel, LLC v. Lindeen*, 2017 MT 65, ¶ 5, 387 Mont. 102, 392 P.3d 141. It is well within the trial court's discretion to avoid unfair surprise by excluding expert testimony that,

like Dr. Krysik's here, fails to disclose the "substance of the facts and opinions" on which the expert would testify. *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶ 10, 296 Mont. 197, 988 P.2d 1230. An expert's conclusory opinion is "an insufficient basis for this Court to reverse summary judgment." *Schwabe ex rel. Est. of Schwabe v. Custer's Inn Assocs., LLP*, 2000 MT 325, ¶ 48, 303 Mont. 15, 15 P.3d 903, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, ¶ 46, 338 Mont. 19, 162 P.3d 134. Thus, excluding such an opinion from the jury's consideration is also an insufficient basis to reverse.

In any event, Dr. Krysik's opinion that the Department "acted with reasonable care"—the only aspect of her opinion that the state defends on appeal—was not a proper subject for expert testimony. That goes to the state's ultimate liability in the case—a legal issue reserved for resolution by the finder of fact. An "expert opinion that states a legal conclusion or applies the law to the facts is inadmissible." *Perdue v. Gagnon Farms, Inc.*, 2003 MT 47, ¶ 28, 314 Mont. 303, 65 P.3d 570; *see, e.g.*, *Heltborg v. Mod. Mach.*, (1990) 244 Mont. 24, 28, 795 P.2d 954, 956 (holding that such testimony impermissibly expressed an opinion on "how to decide the case"). The district court did not err by excluding such an opinion here.

VI. The district court did not abuse its discretion in remedying the state's spoliation of key evidence.

The state next challenges (at 37) the district court's finding that it spoliated evidence when it failed to preserve photographs of the bruises on Sera's abdomen when she was first injured. But the state's failure to preserve that evidence precisely

fits the definition of spoliation: The state "lost evidence ... materially relevant to ... the plaintiff's immediate post-accident condition." *MSU-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 38, 392 Mont. 458, 426 P.3d 541. The district court did not abuse its discretion in finding spoliation in the same circumstances. Moreover, the state fails even to explain how it was prejudiced by the court's spoliation remedy. Because the case was tried only on the issue of damages, neither the photographic evidence nor the court's sanction played any role at trial.

The state nevertheless argues (at 38) that sanctions were inappropriate because it was under no duty to preserve the photographs until it received "formal notice" of the plaintiff's claims. But the state cites no authority for such a formal-notice requirement. As this Court has explained, a party has a duty to preserve evidence whenever it "knows or reasonably should know that existing … information may be relevant to … reasonably foreseeable litigation." *MSU-Bozeman*, ¶ 23. The "determination of when litigation became 'reasonably foreseeable'" thus does not hinge on a formalistic notice requirement, but "allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Id.*

Under the unique facts and circumstances here, the district court did not abuse its discretion in finding that the state had a duty to preserve the photographic evidence of Sera's bruising. District courts have "broad discretion to impose

discovery sanctions." *Id.* ¶ 15. It is the district court that 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." *Richardson v. State*, 2006 MT 43, ¶ 21, 331 Mont. 231, 130 P.3d 634. And the district court here was well within its discretion in concluding that multiple reports of child abuse and neglect—including a brutal attack leaving Sera with "[l]ifelong significant neurological problems and disability" after the state left her in the home where she suffered prior abuse—made litigation against the Department at least "reasonably foreseeable." Doc. 59 at 18–21.

Nor did the district court abuse its discretion in its choice of remedy. The court declined to enter the severe remedy of a default judgment against the state, choosing instead a moderate sanction: The plaintiff would be permitted to inform the jury that the state destroyed evidence shortly after her injury, and the state would not be able to argue that the photos were "inconsequential, tangential, or cumulative," or to defend its spoliation. *Id.* at 21. That penalty was "reasonably proportional to the material prejudice" from the spoliation. *MSU-Bozeman*, ¶ 28. All it did was allow the plaintiff to explain why the photographic evidence was no longer available and prevent the state from trying to excuse its own misstep.

Nevertheless, the state argues (at 39) that the district court's sanction was disproportionate because there was insufficient evidence that the Department acted intentionally or in bad faith. But although a showing of willfulness or bad faith is

required to justify the extreme sanction of a default judgment, it is unnecessary to support a lesser sanction like the one the district court adopted here. *See Spotted Horse v. BNSF*, 2015 MT 148, ¶¶ 37–39, 379 Mont. 314, 350 P.3d 52 (holding that district court should have imposed a sanction even though Supreme Court could not determine whether destruction was intentional). Indeed, the district court would have erred if it had *not* entered a "meaningful sanction" for the state's spoliation. *See id.*

Finally, the state argues (at 39) that the plaintiffs suffered only "minor" prejudice from loss of the photos. But the district court concluded the opposite: that the evidence was a "smoking gun." Doc. 59 at 19. Because the Department's investigator could not recall the appearance of Sera's bruising, the lost photos would have been "material evidence of the severity of injuries seen by agents of the Department before the February 2009 assault." *Id.* Even if, as the state claims, the police department had additional photos from later in their investigation, photos from immediately after the injury would have provided "[e]vidence of bruise progression," giving a "better picture of the evidence and foreseeability of an escalation of violence." *Id.* In short, as the court rightfully concluded, this evidence was "at the very least material evidence favorable to" the plaintiff. *Id.*

VII. The district court properly admitted evidence of the plaintiff's medical expenses.

The district court below denied the state's motion to exclude evidence of the plaintiff's expenses for medical, home-based, and community-based services. On

appeal, the state never engages with the district court's reasons for doing so. Instead, it purports to incorporate by reference all the arguments it made on the issue below. But this Court has been clear that "appellate arguments must be contained within the appellate brief, not within some other document." *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463. The Montana Rules of Appellate Procedure "unquestionably preclude[] parties from incorporating trial briefs or any other kind of argument into appellate briefs by mere reference." *Id.* "To allow otherwise would unfairly advantage litigants who incorporate by reference, enabling them to circumvent and undermine the word count requirements of M. R. App. P. 11(4)(a)." *Slate v. Bozeman Deaconess Health Servs.*, 2017 MT 43N, ¶ 5, 387 Mont. 536, 391 P.3d 735. Here, for example, incorporation of all "the arguments … presented in Docs. 74 and 91" below, as the state requests (at 40), would put it at least several thousand words beyond its word limit.[5]

In any event, the district court did not err in admitting the medical expenses. This Court reviews a district court's decision on a motion in limine for abuse of discretion. *Meek v. Mont. Eighth Jud. Dist. Ct.*, 2015 MT 130, ¶ 9, 379 Mont. 150, 349 P.3d

[5] The state claims that its incorporation by reference was necessary to "honor" the district court's order sealing Sera's "private medical information." But the court did not seal the order that the state is appealing here, and the state need not include any private medical information to challenge that order. Even if such private information were necessary to the state's argument, the state could have filed a redacted or sealed brief under Rule of Appellate Procedure 10(7)(d).

493. The state argued below that the medical expenses were not admissible as evidence of damages where the plaintiff could have obtained reimbursement from Montana's Medicaid program. As explained in the plaintiff's briefs below (Doc. 77), the state is wrong about that. Montana's collateral-source statute requires that "the jury shall determine its award … without consideration" of collateral sources like Medicaid. Section 27-1-308(3), MCA.[6]

Even setting aside the plain text of the collateral-source statute and whether the state is right that Ms. Wilson's medical costs would be fully reimbursed by Medicaid—which, as the plaintiffs argued below, is purely speculative—the district court found the medical expenses to be "relevant evidence of the severity of the injuries, and of the medical procedures and treatments that were required." Doc. 59 at 19; *see Meek*, ¶¶ 14–15. Again, the state has no answer to that point on appeal. The district court plainly did not abuse its discretion.

CONCLUSION

This Court should affirm the district court's judgment in full.

Respectfully submitted,

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[6] The state suffered no prejudice from the court's decision to admit evidence of past medical expenses, because such evidence was never put in evidence at trial. Only the issue of *future* medical expenses was tried.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief compiles with Rule 11(4)(e) of the Montana Rules of Appellate Procedure for a brief produced with a proportional serif font. This brief contains 9,785 words.

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