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STATE OF MONTANA
Case Number: DA 25-0783

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0783

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 from the Montana Eighth Judicial District Court, Cascade County
Cause No. DV-7-2013-0813, the Honorable Amy Eddy, Presiding

APPELLEE'S RESPONSE BRIEF

BENJAMIN R. GRAYBILL
RAPH GRAYBILL
GRAYBILL LAW FIRM, P.C.
300 4th Street North
Great Falls, MT 59403
ben@graybilllawfirm.com
raph@graybilllawfirm.com

LAWRENCE A. ANDERSON
ATTORNEY AT LAW, P.C.
300 4th Street North
Great Falls, MT 59403
laalaw@me.com

DEEPAK GUPTA*
JONATHAN E. TAYLOR*
GREGORY A. BECK*
GUPTA WESSLER LLP
1400 16th Street, NW
Suite 225
Washington DC 20036
deepak@guptawessler.com

*pro hac vice

Attorneys for S.W.

MAXON R. DAVIS
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
P.O. Box 2103
Great Falls, MT 59403
Max.davis@dhhtlaw.com

SARAH MAZANEC
STATE OF MONTANA
RISK MANAGEMENT AND TORT DEFENSE
1625 11th Ave
Helena, MT 59604
sarah.mazanec@mt.gov

ERIC BROOKS
MOORE, COCKRELL, GOICOECHEA & JOHNSON, P.C.
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell, MT 59904
ebrooks@mcglaw.com

THOMAS J. LEONARD
BOONE KARLBERG P.C.
201 W. Main, Suite 300
P.O. Box 9199
Missoula, MT 59807
tleonard@boonekarlberg.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other authorities

INTRODUCTION

The last time this case came to the Court, the State asked for a chance to persuade a jury that it should not be held accountable for its failure to protect four-month-old S.W. from abuse. It has now had that chance and, on remand, lost once again. Over a weeklong trial, the jury learned how the State's deeply flawed investigation and failure to act despite ongoing danger to S.W. led directly to her injuries. The jury found the State responsible, as this Court's previous decision made clear it was entitled to do. Undeterred, the State invites the Court to retry this case on appeal and overrule the jury's verdict. The Court should decline.

The verdict was supported by ample evidence at trial. The evidence showed that, in December 2008, child-protection specialist Cari Davids received a doctor's report that S.W. had been the victim of "child abuse," suffering multiple severe bruises to her abdominal wall. Only three people had access to S.W. when the abuse occurred: S.W.'s mother had her for a brief supervised visit, while S.W.'s father and his girlfriend had unrestricted access. S.W.'s mother was never left alone with S.W., and Davids found no "credible information" that she was responsible.

That left either S.W.'s father or his girlfriend, Alicia Hocter, as the abuser—a conclusion bolstered by the couple's conflicting accounts of S.W.'s injuries and third-party reports that S.W. was unsafe in their care. Still, against the Department's own policy, Davids concluded that S.W. was "safe"—despite not investigating S.W.'s primary caretakers or determining who abused her. The consequence was both tragic and, as the jury decided, foreseeable: Just weeks later, Hocter slammed S.W.'s head into her crib, leaving her blind and with severe brain damage. Now seventeen, S.W. still wears diapers and requires help to perform even the most basic tasks.

The State asks this Court to reverse the jury's verdict for insufficient evidence of causation. To prevail, the State must overcome the most deferential standard of review recognized by this Court. It can't. The State's own witness admitted that it would have removed S.W. from Hocter's care had S.W. been declared unsafe, as would have happened but for the State's negligence. The State's other objections likewise disregard the trial evidence, this Court's decision in the prior appeal, and the appropriately demanding standard of review for overturning a jury's findings of fact.

The State separately asks this Court to impose a $750,000 cap on S.W.'s compensatory damages. The statute on which the State relies, however, governs only claims for which the State, "if a private person, would be liable." Section 2-9-101(1), MCA. That plain language does not apply here, where the duty at issue is unique to the State and there is no possibility that a private person could face liability. The State's contrary construction would violate S.W.'s fundamental rights to a jury's determination of damages and to equal protection.

This Court should bring this case to a close by affirming the decision below.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the jury's factual findings on causation are "impossible to believe."

2. Whether the State's challenges to foreseeability are barred by law of the case, and, if not, whether it was foreseeable that S.W. would be abused again after CFSD failed to take any remedial action or properly investigate following the December abuse.

3. Whether the District Court abused its discretion when it gave a superseding intervening cause instruction consistent with this Court's prior opinion.

4. Whether the District Court abused its discretion by giving a permissive adverse inference jury instruction after the State lost or destroyed photographs of S.W.'s injuries, despite its duty to preserve them.

5. Whether the District Court abused its discretion in denying for-cause challenges to prospective jurors who demonstrated they could be fair and impartial.

6. Whether § 2 9 108, MCA, applies to claims arising from duties uniquely owed by the State, and whether that application would be constitutional.

7. Whether judgment interest may be awarded.

STATEMENT OF THE CASE

S.W. brought this case to seek redress for the severe injuries that resulted from the State's failure to investigate and protect her. After years of litigation, the District Court granted S.W. summary judgment on liability and the case went to trial on damages. *S.W., by & through Ferguson v. State by & through Montana Dep't of Pub. Health & Hum. Servs.*, 2024 MT 55, ¶¶ 12-13, 415 Mont. 437, 578 P.3d 551.[1] A jury awarded S.W. $16 million.

On appeal, this Court affirmed in part and reversed in part, deciding three issues relevant here. First, while finding summary judgment improper, the Court held there was sufficient evidence for a jury to find her subsequent injuries foreseeable. *Id.* ¶ 45. Second, the Court explained that the District Court should instruct the jury that the State's conduct caused S.W.'s injuries "if, in a natural and continuous sequence, it helped produce" the injuries, while also recognizing that the court had discretion to "tailor[]" this instruction to the particular "circumstances" of the case. *Id.* ¶ 46. Third, the Court held that the District Court abused its discretion in precluding the State from making any argument about missing photos of S.W.'s bruising because it was not clear whether the destruction took place after a duty to preserve arose or whether it caused any prejudice. *Id.* ¶ 59. Recognizing that the record may change, this Court made "no determination as to how the State's loss of the photos should be handled at trial on remand." *Id.*

On remand, the case was tried to a second jury. It returned a verdict in S.W.'s

[1] Unless otherwise noted, internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations.

favor and awarded $11,237,500 in damages.

STATEMENT OF THE FACTS

A. After S.W. suffers "child abuse" in December, her mother is presumed the abuser.

On December 28, 2008, an emergency room doctor reported to the Child and Family Services Division of DPHHS that a four-month-old infant—S.W.—had suffered "6 or 7 small bruises across her abdominal wall . . . 24 to 48 hours old." Ex. 511; July 7-9 Tr. 583. The doctor explained that the bruises lacked a "linear pattern" that could suggest an innocent explanation. Ex. 511. His written report, available to CFSD, diagnosed the bruises as "child abuse." July 7-9 Tr. 571. And a second pediatrician confirmed that S.W. had been physically abused. Ex. 514, July 7-9 Tr. 669.

The doctor relayed that S.W.'s father, Jacob Arnott, accused her mother, Kendra Bernardi, of being responsible. Ex. 511. This was the second time that Arnott had accused Bernardi: Two months earlier, Arnott reported that Bernardi was not taking care of S.W. (by, for example, failing to change her diaper enough). Exs. 506, 511. Child-protection specialist Cari Davids investigated that report and cleared both Bernardi and her boyfriend. *Id.* Nurses from new-mother programs Bernardi participated in remarked that Bernardi was "very nurturing" and "very appropriate." *Id.* Davids concluded Bernardi and her boyfriend were "protective" caretakers. *Id.*

Bernardi had also lodged a similar complaint about Arnott. When that report came in, Davids concluded the dueling accusation reflected a "custody issue" between exes. Exs. 503, 507.

After the emergency room report, however, Davids assumed "that S.W. was safe with dad" and focused on Bernardi. July 7-9 Tr. 547, 637-38. But Arnott's story quickly unraveled. The doctor reported that the bruises were 24-48 hours old, yet during that period, Bernardi had only seen S.W. for a three-hour supervised visit (under the terms of a parenting plan Arnott secured ex parte). July 7-9 Tr. 344-45, 689. Bernardi was never alone with S.W., and the supervisor "did not see" any harm. July 7-9 Tr. 468. Davids concluded that no abuse occurred during Bernardi's visit. July 7-9 Tr. 379, 499; Ex. 512. She found "no" "credible information" Bernardi was responsible. July 7-9 Tr. 379, 499; Ex. 512.

Only two other people had access to S.W. during the other 45 hours before the ER visit: Arnott and Hocter. July 7-9 Tr. 689-91. Davids never investigated either one, contrary to DPHHS's policy requiring investigators to assess any caretaker residing in the home. July 7-9 Tr. 328-29, 653-54, 764. Davids marked Arnott as "protective" simply because he took S.W. to the doctor and was "compliant" when asked to meet. July 7-9 Tr. 685-86; Ex. 512. And Davids did nothing to investigate Hocter, though she was S.W.'s "primary caretaker." July 7-9 Tr. 693-97; July 11 Tr. 168-69. Davids marked S.W. "safe" without determining which caretaker abused her, again contrary to DPHHS policy. Ex. 512, STATE00091; July 11 Tr. 165.

Hocter and Arnott were the only people with unsupervised access to S.W., and, as this Court previously noted, they provided "conflicting stories" about the abuse. *S.W.*, ¶ 6; July 7-9 Tr. 665-66. They told the ER doctor that Arnott was with Bernardi during her visit and, after briefly leaving, returned to find S.W. crying. July 7-9 Tr. 661-63. But they told Davids that they were in the bedroom, not with Bernardi, and that Hocter checked on S.W. after hearing crying that was not "out of the ordinary." Ex. 512, STATE00088. And they told the pediatrician still another story (in Davids' presence): that Hocter and Arnott were in the bedroom when they heard S.W. crying and thought nothing of it. Exs. 512, 514, July 7-9 Tr. 665. They also first told Davids they took S.W. to the hospital because of blood in her stool, but told the pediatrician (again with Davids present) that they took her because of the bruises. Exs. 512, 514.

Still, contrary to State policy, July 7-9 Tr. 328-29, Davids never gave Hocter a closer look. Her report concluded there was "no" concern that the "[c]aretaker has an unconvincing or insufficient explanation" for the abuse. Ex. 512. Davids didn't ask whether the State's own records would have revealed that Hocter had been abused as a child—a known risk factor for abuse. July 11 Tr. 161. And while she asked nurses from new-mother programs about Bernardi, she never contacted the nurse who knew Hocter. Thus, Davids never learned (until it was too late) that Hocter didn't act like a "normal mom" towards S.W. and complained less than two weeks before the abuse that S.W. "cries, and cries, and cries": "when she got the bottle," "when she got her diaper changed," just "crying, crying, and crying." July 11 Tr. 124, 137. Hocter's behavior toward S.W. was so unusual that the nurse was "not surprised" when she later heard that Hocter nearly killed S.W. July 11 Tr. 137.

Davids' myopic focus on Bernardi didn't shift even after additional reports about Arnott and Hocter came in—despite Department policies requiring her to assess S.W.'s safety over time. July 7-9 Tr. 361. A week after the first abuse, an anonymous caller reported twice smelling a "strong odor of marijuana" outside their apartment and hearing a "child crying inside." Ex. 517. Then, when Hocter gave birth two weeks later, Arnott left S.W. alone "numerous times" at the hospital, prompting staff to repeatedly "confront[]" him. Ex. 518. A nurse was so disturbed that she filed a report with CFSD. Ex. 518.

Despite all this, Davids admitted she "stopped assessing S.W.'s safety" on January 15, not even three weeks after the December abuse. July 11 Tr. 184. Her report concluded that S.W. was "safe" even though Davids hadn't identified the abuser, investigated Hocter, or closed her investigation. Ex. 512, STATE00090; July 7-9 Tr. 764-65. Davids left blank the field for "plans for further assessment of any unknown information," Ex. 512, despite the Department's ordinary view that "[i]f it is not known which of the baby's caretakers abused the baby a CFSD child protection specialist must protect the baby from all caretakers," July 7-9 Tr. 556. Davids simply left S.W. where she was abused.[2]

Instead, Davids remained fixated on Bernardi. She even showed up at a February 2009 hearing about setting aside Arnott's ex parte parenting plan. Ex. 3. Davids tried "to convince" Bernardi's lawyer "not to continue to represent Bernardi" by showing him photos (which have disappeared) of S.W.'s bruising from the first day of the investigation, claiming that "Kendra had caused" them. July 11 Tr. 48-49. The bruising in the photos was so severe that the lawyer said S.W. "needed to be removed immediately" from Arnott and Hocter's care. July 11 Tr. 49, 55. Davids did nothing.

Davids also interfered with the police investigation. She failed to timely respond to calls or provide the doctor's report, causing another case worker to (inaccurately) convey that the bruising could have been from "being hugged too hard." Ex. 526 p.7; July 7-9 Tr. 737. She also never shared her notes, which would have revealed that Arnott and Hocter told the police yet another conflicting story. Ex. 526 p.8-9. And when Davids finally called back six days later, she told the officer she had "already investigated th[e] complaint" and while she couldn't prove anything, Bernardi had "anger control issues." Ex. 526 p.8.

Those failures shaped the police investigation and, with it, the county attorney's

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[2] The State suggests that it investigated by conducting an "unannounced" visit in January. July 7-9 Tr. 643. But that visit, in violation of Department policy, was not documented as unannounced. July 7-9 Tr. 574-75. The jury was thus entitled to reject Davids' self-serving claim.

evaluation. The county attorney recognized that the seriousness of the abuse warranted intervention, but on the facts presented to him, recommended that the police only interview Bernardi and continue contact with the family. Ex. 526 p.10.

B. Hocter slams S.W.'s head into her crib.

Just one week after Bernardi's lawyer warned Davids to remove S.W., Hocter, apparently having had enough of S.W.'s crying, repeatedly "banged" S.W.'s head "against the crib." July 7-9 Tr. 756. The police report described "severe head injuries" and "possible death." July 7-9 Tr. 755-56.

Hocter's abuse transformed a healthy child's life into one of disability and dependency. S.W. is blind, brain damaged, and wears diapers. July 10 Tr. 82, 101. She cannot dress herself, open a door without assistance, or hold a normal conversation. July 10 Tr. 72, 77, 91, 105, 108; Ex. 2. She depends on a feeding tube. July 10 Tr. 149. She needs "24/7 personal care" and, eventually, must move into a facility that cares for severely disabled people. July 10 Tr. 130, 136.

During the investigation into S.W.'s injuries, Hocter "all but confessed" to what an appropriate investigation into the initial abuse would have shown: She was the one responsible for the December abuse, too. July 7-9 Tr. 739; Ex. 526 p.20.

STANDARD OF REVIEW

This Court reviews the denial of a motion for judgment as a matter of law de novo and the denial of a new trial motion, jury instructions, and for-cause challenges for abuse of discretion. *See Collins v. Whitefish Hous. Auth.*, 2026 MT 19, ¶ 16, 426

Mont. 222, 583 P.3d 970.

SUMMARY OF THE ARGUMENT

Causation. In challenging the sufficiency of the evidence supporting the jury's finding of but-for causation, the State faces an exacting standard of review. Only if the finding is "impossible to believe" will this Court set it aside. *Morgan v. Great Falls Sch. Dist. No. 1*, 2000 MT 28, ¶ 9, 298 Mont. 194, 995 P.2d 422.

The State's own witness precludes that showing. Its trial representative testified that the State would have removed S.W. from Arnott and Hocter's care had she been declared unsafe—something that didn't happen only because the State failed to reasonably evaluate and investigate the information in front of it. That testimony, alone, is sufficient proof that the State's negligence caused S.W.'s injuries.

The State's complaint that there was no *additional* evidence that Arnott and Hocter would have acquiesced to S.W.'s removal is mistaken. Under the standard of review, no more is needed. But regardless, there was such evidence here, including that the jury repeatedly heard how "compliant" and "cooperative" Arnott and Hocter were with Davids.

That evidence also renders the State's focus on whether the county attorney would have filed a petition for removal irrelevant. But this argument, too, is flawed. The jury heard that the county attorney wanted to intervene and that an adequate investigation would have provided a robust case of probable cause to do so.

Foreseeability. The State's attack on the evidence underlying the jury's finding that the second assault was foreseeable fails at the threshold under law of the case. This Court held in the prior appeal that there was sufficient evidence to make that finding. *S.W.*, ¶ 45. At any rate, the jury heard that someone inflicted six deep, bruising squeezes to cause pain to a crying infant and that an abused child left in the same circumstances is likely to be abused again. That's sufficient evidence to find the second assault foreseeable.

The State also argues that it owed S.W. no duty because it could not have foreseen the precise nature of the abuse or the abuser's identity. That not only ignores the evidence, but misunderstands the inquiry. The foreseeability question for purposes of duty asks only if the plaintiff was a foreseeable victim of the State's negligence. S.W. undoubtedly was.

Causation instructions. The District Court gave, verbatim, the causation instruction that this Court required in the prior appeal. The State nonetheless takes issue with an additional instruction that explained the parties' competing theories of the case and clarified that superseding causation is an affirmative defense. The State's arguments, to the extent they are not waived, depend on unnatural readings of the instruction at odds with the abuse-of-discretion standard.

Spoliation instruction. This Court left to the District Court's discretion whether to fashion a spoliation sanction if the record on remand warranted one. It unambiguously did. The State complains that the District Court erred in finding a duty to preserve based on the State's policy manual, but that decision follows a body of case law that the State ignores. The State also claims that the Court's mild sanction—telling the jury it "may" view the missing photos as unfavorable while allowing the State to argue otherwise—was too harsh. But the State's witness on causation relied on a self-serving (and disputed) characterization of the photos to claim that no intervention was warranted, and the District Court found there was no adequate substitute for the photos.

Alleged juror bias. The State complains that two jurors should have been removed for cause, but the jurors insisted they would be fair and needed to hear the evidence. And for one, the State didn't even use a peremptory strike, precluding a showing of prejudice.

Damages. Contrary to this Court's existing case law, the State attempts to limit the compensation that the jury awarded based on a damage cap that governs only "claims" for which the State, "if a private person, would be liable." Section 2-9-101(1), MCA. That has no application when, as here, the duty at issue is unique to the State and has no private analogue.

The State's contrary interpretation renders the cap unconstitutional. In a common-law negligence case like this, Article II, Section 26 provides an "inviolate" right to have a jury decide the amount of damages. As numerous state supreme courts have held, that right cannot remain "inviolate" if the legislature can supersede the jury's judgment. The State's interpretation would also violate the Equal Protection Clause by discriminating based on the severity of victims' injuries in a way that infringes on fundamental rights—again, as numerous state supreme courts have held. Accordingly, the State must satisfy strict scrutiny to justify the cap. It has not even attempted to do so.

ARGUMENT

I. The jury's causation-in-fact finding was plainly supported by the record, not "impossible to believe."

The State's lead argument—that there was "no evidence" supporting the jury's finding that the State's conduct "helped produce" S.W.'s injuries—faces an exacting standard of review. "It is only in rare cases that a jury verdict should be set aside" for insufficient evidence. *Magart v. Schank*, 2000 MT 279, ¶ 4, 302 Mont. 151, 13 P.3d 390. This Court "will not disturb" the jury's factual findings "unless they are *inherently impossible* to believe." *Morgan*, ¶ 9 (emphasis added). That's because this Court does "not decide whether a jury verdict was correct," *Wise v. Ford Motor Co.*, 284 Mont. 336, 343, 943 P.2d 1310, 1314 (1997), but only whether the evidence, taken "in the light most favorable to the" verdict, can support it. *Morgan*, ¶ 8.

The State ignores this demanding standard. It argues that to succeed on causation, S.W. had to prove that, had the State acted reasonably, a county attorney would have sought an order of protection and also that a judge would have granted the order. But the standard for causation is not so narrow. This Court has been clear about the standard: The "defendant's conduct is a cause of the [injury] if, in a natural and continuous sequence, it helped produce it and if the [injury] would not have occurred without it." *S.W.*, ¶ 46.

Here, the State's own trial representative, April White, admitted that CFSD would have provided a safe placement for S.W. if it had determined, as a proper investigation would, that S.W. was unsafe. She testified that, if the State had declared S.W. "was unsafe in the home, she would have been placed in either kinship and/or foster care." July 11 Tr. 185. White's testimony, alone, was sufficient evidence for the jury to conclude that CFSD would have protected S.W. absent a negligent investigation—whether by engaging the county attorney to secure a court order or through another safety plan.

The State writes this off as "speculation." But, as this Court has long explained, "the jury may make logical inferences from the facts which are proved." *State v. Barick*, 143 Mont. 273, 287, 389 P.2d 170, 177 (1964). It is "logical," not speculative or "inherently impossible," for the jury to infer that competent State officials would have taken the necessary steps to protect a vulnerable infant. Ms. White said so. To hold otherwise is to hold that the jury could not reasonably infer that the State is capable of successfully doing its job.

Though no more is needed, the State is also incorrect that there was no evidence that Arnott and Hocter would have agreed to a safety plan. At trial, the State's witnesses repeatedly sought to justify their failure to investigate Arnott and Hocter by pointing to how "cooperative" and "compliant" they were. July 7-9 Tr. 473, 686. The State "should not be shielded from liability simply because [its] own negligence makes it impossible to prove today what the parties would have done in [voluntary] negotiations years ago." *Labair v. Carey*, 2016 MT 272, ¶ 24, 385 Mont. 233, 383 P.3d 226.

The State's other arguments all depend on the fallacy that causation required proving a court would have ordered removal. The State asserts that, under the "suit-within-the-suit" doctrine, the jury had no evidence to conclude a petition for removal would have been successful. Assuming the doctrine applies, it would only require the jury to "determine whether a reasonable" factfinder "could find for the plaintiff." *Labair*, ¶ 17. This Court's prior determination that there was probable cause already answered that sufficiency question. *S.W.*, ¶ 45; Section 41-3-427(1)(d), MCA (probable cause of abuse is sufficient for court to order removal). And there's no question here that the county attorney saw the necessity of intervention; he was just never presented with the existing probable cause because of the State's negligence. Supra 9-10. The State's contention that causation depends on an "un-asserted underlying legal action" is the result of the State's own negligent failure to petition for removal.

The jury also heard how, following S.W.'s later abuse in February, the county attorney promptly sought an order for removal, and a court promptly granted it. Applying the State's theory on causation, then, the question becomes *how much* abuse S.W. must suffer before a jury may infer that the county attorney will seek and a court will grant protection. The jury easily could have decided there was more than enough here. It heard Davids admit S.W.'s injuries were "serious." July 7-9 Tr. 675. And it heard S.W.'s expert explain that a child who is abused is likely to be abused again and that all signs pointed to S.W. being unsafe. July 7-9 Tr. 807, 811-13, 822-23. Based on all this, the jury could have concluded that S.W. suffered enough abuse to set the removal process in motion.

Next, the State suggests that the jury had no basis to conclude that, even if removed initially, S.W. would have "remained outside Arnott/Hocter's household through" the date of the assault. But the jury could reasonably infer that a judge wouldn't return S.W. to an abusive environment. *See* July 11 Tr. 163 (no practice of sending "children back to their abusers").

Finally, the State asserts that the jury's causation finding is precluded by Corbally's testimony that she would not have recommended filing a petition. But it was the county attorney, not Corbally, who would have decided whether to file a petition. July 11 Tr. 97, 98-99. And the jury was entitled to reject Corbally's dubious testimony (as a $250-per-hour paid consultant) anyway. July 7-9 Tr. 805; July 11 Tr.

108, 111 (Corbally testifying, to support her claims, that the bruises to S.W.'s abdominal wall looked like only "pinpricks").

The State is likewise wrong to claim that this issue "fell outside the expertise" of every witness but Corbally. The District Court—in an order the State has not appealed—permitted Corbally to testify only as a fact witness. Doc. 195 at 3; July 11 Tr. 112. It was right to do so. *E.g.*, *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 972-74 (2001).[3]

II. The State's foreseeability-based arguments are barred by law of the case and meritless.

The State's claim that there was insufficient evidence of foreseeability to support the jury's causation finding or imposition of a duty also requires this Court to view the evidence in the light most favorable to the verdict. *Morgan*, ¶ 8.

But on causation, it need not do even that because law of the case precludes the State's argument. "The doctrine encompasses" determinations about the "sufficiency of the evidence." *VanBuskirk v. Gehlen*, 2021 MT 87, ¶ 15, 404 Mont. 33, 484 P.3d 924. So long as the evidence considered sufficient in the first appeal is "substantially the same" as the evidence in the second, the first appeal controls. *Carlson v. N. Pac. Ry. Co.*, 86 Mont. 78, 281 P. 913, 914 (1929). Here, this Court previously held that

[3] The State suggests that this Court should review the orders denying summary judgment and judgment after S.W.'s case-in-chief. Those orders are unreviewable post-trial. *See, e.g.*, *Ortiz v. Jordan*, 562 U.S. 180, 183-84, 131 S. Ct. 884, 888 (2011).

there was sufficient evidence of foreseeability. *S.W.*, ¶ 45. That same evidence (and more) was presented at retrial. *Supra* 6-8. The first appeal therefore controls.

Law of the case aside, the State's challenge still fails. An intervening act is foreseeable, and does not sever the causal chain, if "the defendant might reasonably anticipate [it] under the circumstances." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 48, 350 Mont. 538, 208 P.3d 836. Here, the jury heard not just the evidence this Court previously considered, *S.W.*, ¶ 45, but additional evidence on the bedrock principle at the heart of child protection—the very impetus for the agency at issue in this appeal—that a child is "likely to be abused again" (and at a "much greater risk") if the circumstances that led to her abuse remain unchanged. July 7-9 Tr. 807; July 10 Tr. 56. The jury also heard that an investigation would have turned up information that Hocter complained intensely about S.W. *Supra* 8. That is not "no evidence."

Against all this, the State contends that "superficial abdominal bruising" did not render the "brutal assault by Hocter" foreseeable. But a defendant need not "foresee the specific injury." *S.W.*, ¶¶ 39, 47. Courts routinely reject foreseeability-based challenges when injuries like bruising escalate into life-threatening abuse. *See, e.g.*, *D.C. v. Harris*, 770 A.2d 82, 92 (D.C. 2001). That includes when the investigator is unable to "identify the perpetrator" of the initial abuse. *See Kaho'ohanohano v. Dep't of Hum. Servs., State of Haw.*, 178 P.3d 538, 582 (Haw. 2008). At any rate, as already explained, the jury did have sufficient evidence. S.W.'s injuries were caused by six or more deliberate, deep contusions *designed to cause pain* to a four-month-old infant, repeatedly, over her cries and protests—not by what the State remarkably *still* continues to minimize as a "superficial" injury. July 7-9 Tr. 681-82. Severe abuse was thus foreseeable.

The State's challenge to the District Court's finding of a duty fails, too. The State does not dispute that public policy warrants imposing a common-law duty to S.W. *See Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38. Nor does it contest that the statutory framework imposes a duty, as courts considering comparable schemes have consistently held. *See Kaho'ohanohano*, 178 P.3d at 568. Instead, it argues only that it owed no duty to protect S.W. from this *specific* injury and abuser. That misunderstands the inquiry: "[I]n the duty context," this Court asks whether "the injured party was within the scope of risk." *Samson v. State*, 2003 MT 133, ¶ 22, 316 Mont. 90, 69 P.3d 1154. The question, in other words, "is, was the injured party a foreseeable plaintiff?" *Id.* S.W. obviously was.

III. The District Court properly instructed the jury on causation.

A District Court has "broad discretion" to instruct the jury. *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7. The question "is whether the trial court acted arbitrarily" or "exceeded the bounds of reason resulting in substantial injustice." *Id.*

The District Court gave three instructions on causation. Instructions 22 and 23 told the jury that S.W. bore the burden of proving causation and set forth the standard: The State's conduct caused S.W.'s injuries "if, in a natural and continuous sequence, it helped produce it and if the injury and damage would not have occurred without it." Instruction 24 instructed the jury on the State's affirmative defense that the subsequent abuse by Hocter was an unforeseeable superseding cause. It presented the parties' competing positions—the State "claim[ed]" it had "no reason to anticipate" the abuse, while S.W. "claim[ed]" the State could have "reasonably anticipated" it—and instructed that the State was "not liable" if it proved its theory. Doc. 226, ins. 24.

The State argues that instruction 24 was improper for three reasons, but only one was even arguably preserved. July 14 Tr. 8 (vaguely objecting to what must be "reasonably foreseeable"). The State contends instruction 24 should have instructed the jury to consider, specifically, the foreseeability of Hocter slamming S.W.'s head into the crib. Instruction 24 did just that by referencing S.W.'s abuse "in February of 2009." Doc. 226, ins. 24. Regardless, the State "need not [have] foreseen the specific injury." *S.W.*, ¶ 39. "The test," instead, is whether the "criminal act at issue"—here, child abuse—was reasonably foreseeable. *Id.* ¶ 47. Because the instruction posed that question to the jury, the District Court did not abuse its "broad discretion." *Cybulski*, ¶ 34.

The State also contends that instruction 24 "direct[ed] the jury" to find causation unless the State proved it had "no reason to anticipate" the abuse. The State never raised this objection below. July 14 Tr. 8. It is therefore waived. *See, e.g., State v. Norman*, 2010 MT 253, ¶ 24, 358 Mont. 252, 244 P.3d 737. It is also wrong. Instruction 24 states that, if the State failed to prove its affirmative defense, it "*may* be held liable." Doc. 226, ins. 24 (emphasis added). That is, the jury may hold the State liable only *if* S.W. also met her burden under instructions 22 and 23. *See State v. Farnes*, 171 Mont. 368, 375, 558 P.2d 472, 476 (1976) (instructions must be read "as a whole"). By contrast, instruction 24 told the jury that it must find the State "is not liable" if it met its burden.

The State's final argument is that instruction 24 misstated the State's "burden of proof" by telling the jury that the State would not be liable if it had "no reason to anticipate" S.W.'s injuries. The State contends that "no reason" is more demanding than "reasonably foreseeable" because it required the State to show it lacked even a far-fetched basis to anticipate the assault. But the only thing the State said about burdens below is that "we don't object to" bearing the "burden of persuasion." July 14 Tr. 8. This argument is thus also waived.

But there was no abuse of discretion here either. No Montana court has ever held that "no reason to anticipate" and "not reasonably foreseeable" are legally distinct or create different outcomes. Both are simply alternative formulations of the same objective foreseeability inquiry and equally express that a risk fell outside what ordinary care required the defendant to guard against. Indeed, this Court has used the challenged formulation. *E.g.*, *Moffatt v. Univ. of Mont.*, 254 Mont. 285, 287, 837 P.2d 401, 402 (1992) (defendant not liable where "he had no reason to anticipate the possibility of harm").

Nor is there any indication the jury's verdict could have turned on the State's manufactured distinction. It is the State's burden to show prejudice, not to merely assert it. *See Walden v. State*, 250 Mont. 132, 139, 818 P.2d 1190, 1194 (1991). The State has not identified any "unreasonable reason" on which the jury's verdict could have theoretically rested, let alone that there is a realistic possibility the jury decided on that basis rather than on the obvious: an abused child is likely to be abused again if her circumstances do not change.[4]

IV. The District Court's spoliation instruction was not an abuse of discretion.

The State challenges a modest spoliation instruction telling the jury it "may" consider missing photos of S.W.'s bruising to be "unfavorable." The State claims it had no duty to preserve the photos and that the permissive sanction was too severe. This Court reviews for abuse of discretion. *See Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541. There was

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[4] The State asserts the word "anticipate" "injected confusing legal terminology." But that everyday term is unlike the jargon this Court has disapproved. *See Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139 (1996). Indeed, even the State's own proposed instructions used it. Doc. 229 at 5, 15.

none.

The State contends that a "party only has a duty to preserve evidence" if it may be relevant to reasonably foreseeable litigation. It thus argues that the District Court applied the "wrong standard" in finding a duty based on the "terms of [the State's] policy manual." But courts around the country applying the federal rules—which this Court generally follows, *see MSU*, ¶ 28—have held that a regulatory requirement to preserve records also gives rise to a duty to preserve when the party harmed by the destruction is within the "general class of persons" that the requirement "sought to protect." *Talavera v. Shah*, 638 F.3d 303, 311-12 (D.C. Cir. 2011) (collecting cases).

The State never argues that the District Court abused its discretion in finding this standard satisfied. Any such argument is now waived. Regardless, the test is met here. The State's manual, incorporating a statutory requirement, mandated that the State preserve the photos once there were multiple reports (which occurred before the photos were last seen at the custody hearing). *See* Ex. 523, STATE03122-23; Section 41-3-202(c), MCA.

Moreover, litigation *was* reasonably foreseeable as of the February assault. By then, the State knew it had left S.W. unprotected without investigating the abuser. Given the severity of S.W.'s injuries and CFSD's failure to take any steps to protect her, litigation was plainly foreseeable. It makes no difference that the District Court did not pinpoint when the photos were destroyed given that Davids still had them (at the custody hearing) a week before the February assault, when the duty arose. Moreover, the State has affirmatively argued that Davids' electronic copies of the photos were destroyed *after* the assault. July 7-9 Tr. 786; July 11 Tr. 200.

The State's challenge to proportionality fares no better. This Court "generally defer[s] to the district court" on remedy "because it is in the best position to determine . . . which sanctions are most appropriate." *Nolan v. Billings Clinic*, 2020 MT 167, ¶ 8, 400 Mont. 326, 467 P.3d 545. Negligent spoliation "is sufficient to warrant a merits-based sanction" if there is a "reasonable probability" the lost evidence is "material[]" to "an essential element" of a claim. *MSU*, ¶ 26. Here, Corbally relied on the photos—which she claimed showed only "pinpricks" insufficient to warrant intervention—to support her testimony on causation. July 11 Tr. 103, 108, 111-12. Although the State contends later-in-time police photos could serve as a substitute to disprove Corbally's claim, the District Court noted the poor "quality" of those photos, July 14 Tr. 6; Davids was told to investigate "ASAP" precisely because "bruising will be [time] limited," July 7-9 Tr. 456; and Bernardi's lawyer testified that the missing photos showed "severe" bruising, not "pinpricks," creating a credibility dispute. Under these circumstances, the District Court did not abuse its discretion in instructing that the jury "may" find the photos unfavorable while allowing the State to argue the opposite.

V. The District Court did not abuse its discretion in declining to dismiss two jurors for cause.

The State appeals the denial of two for-cause challenges. This Court reviews that denial for abuse of discretion. *State v. Morales*, 2020 MT 188, ¶ 11, 400 Mont. 442, 468 P.3d 355. There was none.

"[I]t is not uncommon for prospective jurors to come to court with preconceived biases and fixed opinions." *State v. Johnson*, 2019 MT 68, ¶ 10, 395 Mont. 169, 437 P.3d 147. But a potential juror must be removed for cause "only when he has formed fixed opinions on the guilt or innocence of the defendant which [he] would not be able to lay aside" or "when a serious question arises about [his] ability to be fair and impartial." *State v. Anderson*, 2019 MT 190, ¶ 15, 397 Mont. 1, 446 P.3d 1134.

Here, the two challenged potential jurors expressed no fixed opinions, insurmountable bias, or serious question about their ability to be fair. Juror I.A. initially stated that she would "probably" lean toward S.W., but noted that it was "hard to decide anything without hearing everything." July 7-9 Tr. 135-36. When asked directly if she would "give the State a fair shake," she stated, "[y]eah, I would listen to both sides and decide." *Id.* at 138. When asked again by the State if she thought she could be fair, she replied, "[y]eah, I think I could be." *Id.* at 139.

As for juror N.W., the State cannot show prejudice because it did not use a peremptory strike. *State v. Deveraux*, 2022 MT 130, ¶¶ 25, 28, 409 Mont. 177, 512

P.3d 1198. Additionally, N.W. repeatedly stated she intended to act impartially and follow the judge's instructions. July 7-9 Tr. 202, 205. It does not matter that she, at other times, expressed uncertainty about being impartial. *See State v. Falls Down,* 2003 MT 300, ¶¶ 25-27, 318 Mont. 219, 79 P.3d 797 (no abuse of discretion in seating juror who "assume[d]" defendant was guilty when she "first read" about case and twice said she was "not sure" she could be fair and impartial). Her answers, considered as a whole, never expressed the type of impermissible bias or "fixed opinion" of the State's culpability that would mandate removal. *State v. Jay*, 2013 MT 79, ¶ 23, 369 Mont. 332, 298 P.3d 396.

Moreover, "[t]he determination of whether a juror should be allowed to serve must be 'left largely to the sound discretion of the trial court' because the court has the advantage of observing his or her demeanor." *Peterson-Tuell v. First Student Transp., LLC*, 2014 MT 307, ¶ 20, 377 Mont. 113, 339 P.3d 16. The District Court here did just that, observing both potential jurors express initial trepidation but later certainty that they could be unbiased. July 7-9 Tr. 138 (deferring immediate judgment on I.A.). There was no abuse of discretion.

VI. The damages cap does not apply.

A. The damages cap's plain language excludes the claims in this case.

This Court reviews the State's argument that the Montana Tort Claims Act ("MTCA") imposes a $750,000 damages cap de novo. *State v. Payne*, 2021 MT 256,

¶ 14, 405 Mont. 511, 496 P.3d 546. The statute's plain language forecloses the State's argument. "Where the language of a statute is clear," this Court "look[s] no further." *State v. Long*, 274 Mont. 228, 237, 907 P.2d 945, 950 (1995). There is no ambiguity here: Section 2-9-108(1), MCA, limits the State's liability to "$750,000 for each *claim*." (emphasis added). 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." (emphasis added); *see Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 23, 354 Mont. 181, 222 P.3d 618 (holding that this damages cap "only applies to those tort actions which constitute a 'claim' as defined in § 2-9-101(1), MCA").

The legislature's definition of "claim" is a technical one that is narrower than its ordinary meaning may suggest. For example, because the definition covers only claims for "personal injury or property damage," this Court has held that a claim for lost profits is not subject to the cap. *Id.* ¶¶ 20-25. Likewise, because the definition covers only claims for which a "private person" in the State's position may be "liable . . . for the damages," S.W.'s claim that the State failed to protect her is not a "'claim' as defined in § 2-9-101(1), MCA." *Id.* ¶ 23. A private person could never be liable in a tort action like S.W.'s because the duty allegedly violated is unique to the State. 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.

By its plain language, the "$750,000 limit on damages in § 2-9-108(1), MCA, thus does not apply." *Id.* This Court need go no further. When the legislature defines a term, the Court is "bound to construe [its] choice as deliberate." *Bates v. Neva*, 2014 MT 336, ¶ 24, 377 Mont. 350, 339 P.3d 1265.

The State's contrary reading—that the definition "merely confirms governmental entities are not liable for claims for which a private person would not be liable"—contradicts the statute's text and structure. The word "claim" cannot plausibly be read to limit the State's liability, because the MTCA's liability-establishing provision, § 2-9-102, MCA, nowhere includes the word "claim." Instead, "claim" appears in the damages cap provision, § 2-9-108, MCA, as a limit on the scope of the cap itself (limiting damages to "$750,000 for each claim"). The definition of "claim" thus does not limit the scope of the State's *liability*, but the scope of the *cap*.

It is true, as the State says, that it is entitled to "all liability protections available to private persons." But that limit comes not from the definition of "claim," but from § 2-9-102, MCA, which makes the government "subject to liability for its *torts*." (emphasis added). Given that language, the State is not "liab[le] when the action complained of does not fall within the definition of a tort." *Small v. McRae*, 200 Mont. 497, 517, 651 P.2d 982, 993 (1982). When a generally applicable defense is available, there is "no actionable tort" and "no legal entitlement to recover." *Id.* at 517-

18, 651 P.2d at 993. The State's argument that the definition of "claim" "merely confirms" this independent limit renders the definition's text superfluous.

The cases on which the State relies are not even about the damages cap. It points, for example, to *Gudmundsen v. State*, which stated that "liability attaches . . . only where a private person similarly would be liable." 2009 MT 56, ¶ 24, 349 Mont. 297, 203 P.3d 813. The plaintiff's claim in *Gudmundsen* was not, like this one, based on a duty unique to the government, but on one applicable to "any mental health professional." *Id.* ¶ 17. Under those circumstances, the Court correctly held that, where the statute "protects private citizens from liability" on a tort claim, "it also protects the State." *Id.* ¶ 24; *see also Drugge v. State*, 254 Mont. 292, 295, 837 P.2d 405, 406-07 (1992) (finding no State liability because the statute at issue imposed no duty on the State to "warn of hazards on rivers"). *Gudmundsen* thus stands for the straightforward proposition that the State has the same tort defenses available to it as a private party would have defending the same claim. Nothing about that holding, or the holdings of the other cases on which the State relies, bears on the issues here.

Even if the State's reading were plausible, it would be foreclosed by Montana's constitutional and statutory guarantee that "governmental entities shall have no immunity from suit . . . except as may be *specifically provided*" by a supermajority of the legislature. Mont. Const. art. II, § 18 (emphasis added); *see also* § 2-9-102, MCA. Given that requirement, this Court "strictly construe[s] any attempted governmental immunity," requiring that the legislature's intent be "clearly expressed." *B. M. by Burger v. State*, 200 Mont. 58, 62, 649 P.2d 425, 427 (1982). The State's reading, even if plausible, would at most create an alternative interpretation, rendering the statute ambiguous. And without "a clear statutory declaration granting immunity, it is [this Court's] duty to permit rather than to deny an action for negligence." *Id.* at 63, 649 P.2d at 427.

The requirement that the legislature's intent be "clearly expressed" also dooms the State's attempt to rely on canons of construction to derive its preferred meaning. Those arguments are also wrong. The State argues that—because *all* liability under the MTCA is "for acts within the scope of governmental employment or duties"—a definition of "claim" excluding those acts would "eviscerate[]" the cap. That misses the point. Nobody is claiming that the cap excludes ordinary negligence actions against the State. *See, e.g.*, *Breuer v. State*, 2023 MT 242, 414 Mont. 256, 539 P.3d 1147 (car accident); *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*, 2012 MT 302, 367 Mont. 414, 291 P.3d 1129 (premises liability). In these prototypical MTCA cases, a "private person" in the same circumstances would face liability, and the cap therefore applies. But in the rare case, such as this one, where a plaintiff's claims are based on duties unique to the government, a "private person" could never be found liable.

The State's argument that S.W.'s reading would "nullify" provisions in a different part of the MTCA fails for the same reason. Again, applying the plain text of the statute only affects the rare case in which governmental conduct has absolutely no private equivalent. The fact that the State takes on projects like building roads, operating prisons, or regulating mines does not make such activities unique governmental functions. For example, the State's statutory duty to inspect mines to ensure a safe working environment is not unique to the State; private counterparts abound: Unregulated industrial facilities and large construction projects have employees or private contractors who inspect and take on other responsibilities to ensure site safety. By contrast, no private party has authority to investigate child abuse and protect abused children by gaining custody and removing them from their homes.

Regardless, the definition of "claim" already excludes many tort actions. It excludes, for example, actions claiming injury "in the nature of an intangible economic interest"—a category that sweeps in a broad range of business and economic torts. *Delaney*, ¶ 24. This Court has already embraced what the State incorrectly casts as flaws in the plain text of the statute.

B. The State's interpretation is unconstitutional.

Principles of constitutional avoidance counsel against adopting a reading of the statute that overrides the jury's damages award. Courts "should avoid constitutional issues whenever possible." *Merlin Myers Revocable Tr. v. Yellowstone Cnty.*, 2002 MT 201, ¶ 24, 311 Mont. 194, 53 P.2d 1268. The Court thus will "not rule on the constitutionality of a legislative act" if it can decide the case another way, *id.*, including by "constru[ing] statutes narrowly to avoid an unconstitutional interpretation." *Farrier v. Teacher's Retirement Bd.*, 2005 MT 229, ¶ 13, 328 Mont. 375, 120 P.3d 390.

The Court should follow that principle here and avoid deciding the serious constitutional issues wrought by the damages cap. Other state supreme courts have held that similar caps, by usurping the jury's authority to fix damages in common-law negligence cases, unconstitutionally infringe a range of constitutional provisions. *See, e.g.*, *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019) (damages cap violated right to jury trial); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (jury trial); *Moore v. Mobile Infirmary Ass'n,* 592 So.2d 156, 158-59 (Ala. 1991) (jury trial); *Smith v. Dep't of Ins.,* 507 So.2d 1080 (Fla. 1987) (open courts); *Wright v. Central Du Page Hosp. Ass'n,* 347 N.E.2d 736 (Ill. 1976) (equal protection); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (equal protection); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (equal protection); *Arneson v. Olson,* 270 N.W.2d 125 (N.D. 1978) (equal protection); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991) (due process); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (open courts); *Condemarin v. Univ. Hosp.*, 775 P.2d 348 (Utah 1989) (equal protection); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (jury trial).

Although some courts have gone the other way, this Court should not rush to adopt a construction that, at a minimum, raises grave doubts about the cap's constitutionality when its plain language supports (indeed, compels) an alternate reading. If, however, the Court adopts the State's interpretation, it should hold the cap unconstitutional.

1. The cap violates the right to trial by jury.

The Montana Constitution provides that the "right of trial by jury . . . shall remain inviolate." Mont. Const. art. II, § 26. This Court has held that for purposes of the jury-trial right, "the plain meaning of the constitution controls": Inviolate means inviolate. *Hammer v. Just. Ct. of Lewis & Clark Cnty.*, 222 Mont. 35, 38, 720 P.2d 281, 283 (1986).

In *Hammer*, for example, the Court held unconstitutional a statute requiring prepayment of civil jury fees because "the plain language of the constitution mandates it." *Id.* at 38, 720 P.2d at 283. "Any other construction," it wrote, "renders the language of the constitution meaningless." *Id.* at 38, 720 P.2d at 283. And the Court has likewise found other attempts to limit the right "not persuasive when measured against the language of Section 26." *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 1998 MT 320, ¶ 19, 292 Mont. 185, 972 P.2d 800; *see also, e.g., Finstad v. W.R. Grace & Co.*, 2000 MT 228, ¶ 16, 301 Mont. 240, 8 P.3d 778; *N. Cent. Servs., Inc. v. Hafdahl*, 191 Mont. 440, 444-45, 625 P.2d 56, 58-59 (1981); *State v. Porter*, 125 Mont. 503, 506, 242 P.2d 984, 986 (1952).

The scope of the jury-trial right extends to any case for which "a right of trial by jury existed at the date of the adoption of the Constitution." *Cunningham v. Nw.*

Improvement Co., 44 Mont. 180, 119 P. 554, 563 (1911). Negligence cases like this one fall into the heartland of that class. *See id.*, 119 P. at 563. Accordingly, the "jury is the tribunal under our legal system to decide questions of negligence." *Spillers v. Mont. Third Jud. Dist. Ct.*, 2020 MT 8, ¶ 18 n.4, 398 Mont. 323, 456 P.3d 560. Likewise, determination of "the amount of damages [was] triable by a jury before the adoption of the Constitution." *Chessman v. Hale*, 31 Mont. 577, 79 P. 254, 257 (1905); *see also Tappan v. Higgins*, 240 Mont. 158, 160, 783 P.2d 396, 397 (1989) (holding that "the amount [of damages] is solely within the province of the jury").

S.W. thus "had the right to have this case presented to and determined by a jury." *Chessman*, 31 Mont. at 577, 79 P. at 257. And applying the cap would infringe that right—a right that is particularly important in "personal injury actions" like this because "there is no measuring stick by which to determine the amount of damages to be awarded, other than the intelligence of a fair and impartial jury." *Pfau v. Stokke*, 110 Mont. 471, 103 P.2d 673, 674 (1940). As other state supreme courts have held, capping damages on common-law claims "tak[es] a jury's finding of fact and alter[s] it to conform to a predetermined formula." *Sofie*, 771 P.2d at 720; *see Nestlehutt*, 691 S.E.2d at 223 (cap "nullifies the jury's findings" and thus "undermines the jury's basic function"); *see also, e.g.*, *Smith*, 507 So.2d at 1080; *Lucas*, 757 S.W.2d at 687; *Moore*, 592 So.2d at 162. There is no way to "square a right specially designated by the people as 'inviolate' with the practical effect of the cap: substituting juries' factual determinations of actual damages with an across-the-board legislative determination." *Hilburn*, 442 P.3d at 523.

In response, the State relies on *Meech v. Hillhaven West, Inc.*, for the proposition that the legislature can "limit governmental liability" by redefining common-law remedies. 238 Mont. 21, 776 P.2d 488 (1989). *Meech*, however, was not about the right to a jury trial; it instead addressed the separate right to "full legal redress" under Article II, Section 16. *Id.* at 44, 776 P.2d at 502. In two prior cases, this Court held the MTCA's cap unconstitutional under that provision. *Pfost v. State*, 219 Mont. 206, 215, 713 P.2d 495, 500 (1985); *White v. State*, 203 Mont. 363, 369, 661 P.2d 1272, 1275 (1983). *Meech* overruled those decisions to the extent they held that the cap violated the right to full redress. But because the plaintiff there "allege[d] no other infringement of fundamental rights," *Meech* has nothing to say about whether a damages cap violates the jury-trial right. *Id.* at 44, 776 P.2d at 502.

Unlike the full-redress provision at issue in *Meech*, the right to a jury trial "cannot be revoked by legislative act." *Matter of C.L.A.*, 211 Mont. 393, 396, 685 P.2d 931, 933 (1984). Because the Constitution incorporated the common law as it existed at the time of adoption, *see id.*, 685 P.2d at 933, the right "simply cannot be removed by legislative action," *Sofie*, 771 P.2d at 720. For "a right to remain inviolate, it must not diminish over time" and be protected from "all assaults to its essential guarantees," including the guarantee that the jury "determine the amount of damages."

Id at 722. If the legislature could define away the jury's authority to award damages under the common law, the right to a jury trial would "mean[] nothing." *Id* at 720; *see Hammer*, 222 Mont. at 38-39, 720 P.2d at 283.

2. The cap violates the right to equal protection.

The damages cap also violates the fundamental right of equal protection, which prohibits treating "similarly situated persons in an unlike manner." *Caldwell v. MACo Workers' Comp. Tr.*, 2011 MT 162, ¶ 14, 361 Mont. 140, 256 P.3d 923. "On its face, the statute is discriminatory": Any "person who sustains damages of less than [$750,000] in value will be fully redressed if the tortfeasor is the State, but any person with catastrophic damages in excess of [$750,000] will not have full redress." *Pfost*, 219 Mont. at 215, 713 P.2d at 500 , *overruled on other grounds by Meech*, 238 Mont. 21, 776 P.2d 488.

Like other state caps declared unconstitutional, the cap here thus "creates classifications based upon the severity of the injury." *Moore*, 592 So.2d at 166-67. "Unlike the less severely injured," "the catastrophically injured victim ... is denied any expectation of compensation beyond the statutory limit." *Id.* at 169. And because that classification discriminates based on the fundamental right to trial by jury, it is subject "the highest level of scrutiny and, thus, the highest level of protection by the courts." *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1

(Nelson, J. concurring).[5]

3. The State cannot satisfy strict scrutiny.

The "rights to trial by jury . . . and equal protection of the laws" are "fundamental constitutional rights that deserve the highest level of court scrutiny and protection." *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶¶ 25-26, 349 Mont. 475, 204 P.3d 693. The State thus has the burden of showing that the cap survives the rigorous requirements of strict scrutiny. *See id.*

The State does not even attempt to satisfy that standard. Rather than showing that the cap is closely tailored to a compelling interest, *Montana Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 1999 MT 248, ¶ 63, 296 Mont. 207, 988 P.2d 1236, it asserts only that the cap "further[s] legitimate government interests in protecting the economic stability of public entities." That "bare assertion . . . falls far short of justifying a discrimination which infringes upon fundamental rights." *White*, 203 Mont. at 369, 661 P.2d at 1275 . Although the "government has a valid interest in protecting its treasury," the State has identified "no evidence . . . that the payment of such claims would impair the State's ability to function as a governmental entity or create a financial crisis." *Id.*, 661 P.2d at 1275. In any event, even assuming that "[c]ost

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[5] *Meech* held that a prohibition on punitive and noneconomic damages did not pose an equal-protection problem. 238 Mont. at 44, 776 P.2d at 502. But *Meech* applied the lowest level of constitutional scrutiny because the plaintiff "allege[d] no [] infringement of fundamental rights." *Id.*, 776 P.2d at 502.

containment . . . presents a legitimate governmental interest[,] . . . [c]ost alone does not justify the disparate treatment" even under the rational-basis standard. *Caldwell*, ¶¶ 34-35.

Moreover, state supreme courts have recognized that caps "impose[] unfair and illogical burdens on injured parties." *N. Broward Hosp. Dist. v. Kalitan*, 219 So.3d 49, 54 (Fla. 2017); *Carson*, 424 A.2d at 825; *Arneson*, 270 N.W.2d at 132; *Brannigan*, 587 A.2d at 166. Damages caps on common-law negligence claims "arbitrarily classif[y], and unreasonably discriminate[] against, the most seriously injured victims," leaving the burden of the cap to "fall[] exclusively on those . . . who most need financial protection." *Wright*, 347 N.E.2d at 741; *see also Moore*, 592 So.2d at 169; *Linder v. Smith*, 193 Mont. 20, 32, 629 P.2d 1187, 1193 (1981) (explaining, without deciding, that preventing "the most seriously injured plaintiffs . . . from full recovery" is a "persuasive equal protection argument").

Worse, unlike other states' damages caps that limit only non-economic or punitive damages, this one arbitrarily limits even *compensatory* damages, as it would here. Thus, the $750,000 damages cap—never adjusted since its adoption 40 years ago—denies the most seriously injured victims even the cost of their medical care. A cap that arbitrarily denies a jury's damage award to the most catastrophically injured victims—here, a child the State failed to protect—is precisely the kind of irrational infringement of fundamental rights that strict scrutiny forbids.

VII. Judgment interest is not at issue.

The judgment does not indicate that interest must be paid now, or anytime other than as required by the statute.

CONCLUSION

This Court should affirm.

Respectfully submitted,

s/ *Raph Graybill*
BENJAMIN R. GRAYBILL
RAPH GRAYBILL
GRAYBILL LAW FIRM, P.C.
300 4TH STREET NORTH
GREAT FALLS, MT 59403
ben@graybilllawfirm.com
raph@graybilllawfirm.com

LAWRENCE A. ANDERSON
ATTORNEY AT LAW, P.C.
300 4th Street North
Great Falls, MT 59403
laalaw@me.com

DEEPAK GUPTA*
JONATHAN E. TAYLOR*
GREGORY A. BECK*
GUPTA WESSLER LLP
1400 16th Street, NW
Suite 225
Washington DC 20036
deepak@guptawessler.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellee's Brief is printed with a proportionately spaced Baskerville text typeface of 14 points; is double spaced (except for footnotes and quoted and indented material); and that the word count, calculated by Microsoft Word, is 9,997 words, which does not exceed 10,000 words, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance.

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DATED this 2nd day of July, 2026.

/s/ Raph Graybill
RAPH GRAYBILL
GRAYBILL LAW FIRM, P.C.
300 4TH STREET NORTH
GREAT FALLS, MT 59403

Attorney for S.W

CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-02-2026:

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

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

Eric M. Brooks (Attorney)
145 Commons Loop
Kalispell MT 59904
Representing: State of Montana, Department of Public Health and Human Services
Service Method: eService

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

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

Deepak Gupta (Attorney)
2001 K Street NW, Suite 850 N
Washington DC 20006
Representing: Jeffrey Ferguson, S. W.

Service Method: E-mail Delivery

Gregory A Beck (Attorney)
2001 K Street NW, Suite 850 N
Washington DC 20006
Representing: Jeffrey Ferguson, S. W.
Service Method: E-mail Delivery

Johnathan E Taylor (Attorney)
2001 K Street NW, Suite 850 N
Washington DC 20006
Representing: Jeffrey Ferguson, S. W.
Service Method: E-mail Delivery

Thomas J. Leonard (Attorney)
Boone Karlberg P.C.
P. O. Box 9199
Missoula MT 59807
Service Method: eService
E-mail Address: tleonard@boonekarlberg.com

Electronically signed by Emma Edwards on behalf of Raphael Jeffrey Carlisle Graybill
Dated: 07-02-2026