IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 13-0752

MARK FERGUSSON,

Plaintiff/Appellant

vs.

ADAM ESCH and SOURDOUGH FIRE DEPARTMENT,

Defendants/Respondents

SOURDOUGH FIRE DEPARTMENT,

Third-Party Plaintiff/Respondent

vs.

MARK FERGUSSON on behalf of S.F., a Minor,

Third-Party Defendant/Respondent

ANSWER BRIEF OF RESPONDENTS ADAM ESCH AND SOURDOUGH FIRE DEPARTMENT

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY CAUSE NO. DV-12-149B,
THE HONORABLE HOLLY BROWN, PRESIDING

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STATEMENT OF THE ISSUES

1. Did the District Court correctly deny Mark Fergusson's (Mark) motion for summary judgment in light of the substantial evidence that Savannah Fergusson (Savannah) was required to yield to Sourdough Fire Department's (SFD) emergency vehicle?

2. Is there substantial evidence to support the verdict?

3. Did the District Court properly allow the jury to resolve the authorized emergency vehicle issue?

4. Did the District Court properly conclude that Savannah was a party, and was not prejudiced in the case?

STATEMENT OF THE CASE

Mark originally asserted a $6,000 property loss in this case. There were no bodily injury or emotional distress claims made. SFD timely filed its answer and third-party complaint against Savannah on April 19, 2012. SFD asserted that Mark's claim was barred by comparative fault, as he instructed Savannah to drive around the emergency vehicle rather than yield. In its third-party complaint against Savannah, SFD asserted she was the negligent cause of her father's property damage when she drove into an emergency vehicle rather than yielding. The pleading specifically stated, "S.F. is a negligent cause of the accident," and was served upon Mark. (Docket 4.) Initially SFD did not serve Savannah, hoping it would not be required to serve a 16-year-old. The third-party complaint did not seek damages against Savannah, only contribution and indemnity; that Mark's

damages would be reduced by her negligence under Mont. Code Ann. § 27-1-703. But on October 22, 2012, Mark filed his answer to the third-party complaint, making clear that service would be necessary. (Docket 36.) Upon learning that Mark intended to require service on his daughter, SFD had a third-party summons issued on December 20, 2012. (Docket 67.) Savannah moved to dismiss on February 6, 2013, eight months before trial.

As for the claim of surprise and prejudice, every pleading was served on Savannah's father's lawyer, Mr. Geoffrey Angel. During the entire case, Savannah lived in the same home with her father, Mark. Mr. Angel prepared Savannah's *pro se* pleadings until she became represented by Steve Reida. On February 22, 2013, Mark filed an objection to the service of process on Savannah. (Docket 74.) On May 3, 2013, over four months before trial, the District Court denied Savannah's motion to dismiss. (Docket 80.) Savannah filed her "*pro se*" answer on May 20, 2013, listing her address as the same as Mark's, and filed the answer upon a pleading with a type and font identical to the pleadings prepared in Mr. Angel's office for Mark. Eventually Allstate retained Mr. Reida to represent Savannah. Mr. Reida was given the opportunity to seek a continuance on Savannah's behalf, given his late arrival in the case. He declined. On Savannah's behalf, Mr. Reida requested no additional time or discovery before trial, although he clearly could have. (Transcript of Final Pretrial Conference, 17:6-7.) Through Mr. Reida, Savannah submitted eight contentions to be included in the pretrial order; each was identical to her father Mark's contentions. Savannah submitted no

exhibits at trial. She called no witnesses. Savannah never moved to continue the trial date in order to conduct discovery.

SFD moved for the dismissal of its employee, Adam Esch, as he was a governmental employee immune from suit under Mont. Code Ann. § 2-9-305. Mark resisted the motion, contending Esch criminally violated the traffic statutes. (Docket 13, p. 3.) After SFD affirmed that Esch was acting in the course and scope of his employment, it renewed its request that Esch be dismissed. In response, Mark asserted that "SFD is not a governmental entity." (Docket 41, p. 1.) This required SFD to provide evidence to the District Court of its charter as a political subdivision of the State of Montana. (Docket 44.)

Mark moved for partial summary judgment on liability. In his brief, he never referenced the District Court to the applicable statute requiring motorists to yield the right of way to emergency vehicles. (Docket 17.) SFD timely filed an opposition brief, pointing out Savannah's violation of the law requiring her to yield. After that, Mark never asked the Court for a hearing on his motion for partial summary judgment. The Court eventually denied the motion, citing fact issues as to driving violations in the Fergusson vehicle. The Court also denied Mark's request for "strict liability" for the accident, noting that Mark had not cited any authority for this claim. (Docket 71.)

At the accident scene, the drivers exchanged insurance information. Mark contended in pretrial pleadings that this action constituted an admission of fault by SFD. (Docket 49.) Mark never explained to the District Court how, if his theory

were true, he would be exempt from such an admission, as he also provided his Allstate insurance information at the scene.

On the second day of trial, the jury answered the first question on the verdict form and returned it, concluding that SFD was not negligent. (Docket 153.) The jury never reached the question of whether Savannah or Mark was negligent. There was both substantial and overwhelming evidence to support the verdict, obviously reached upon the conclusion that an emergency vehicle with lights activated is entitled to maneuver in the road during an emergency call.

STATEMENT OF FACTS

SFD is a rural fire department in the Gallatin Valley and a political subdivision of the State of Montana. (Tr., 140:10.) SFD possesses a utility fire truck referred to as "utility 7 or "U-7," an official response fire vehicle of the department. (Tr., 140.) U-7 is listed in the CAD system, a Gallatin County computer dispatch system that lists and tracks emergency responder assets. (Tr., 141.)

On the day of the accident, U-7 was dispatched from the SFD station to "Four Corners," an intersection connecting the road to Big Sky and the main east/west road connecting Main Street in Bozeman to the intersection.[1] (Tr., 143, 144.) U-7 was selected to respond. (Tr., 144:20.) Adam Esch, a young pre-med student at MSU, was an EMT (Tr., 227:9) and volunteer at SFD; he responded to

[1] The intersection of Highways 191, 84, and 85, approximately five miles west of Bozeman.

the call with U-7. (Tr., 145.) Esch had successfully completed the state training program for emergency vehicle drivers. (Tr., 146.) As Esch reached the intersection of South 19th and Goldenstein, he received a call from the station to return and pick up another firefighter. (Tr., 147-148.) In returning to the station, Esch was still officially responding to the emergency call for assets at the Four Corners accident scene. (Tr., 148:16.) It was an emergency call and not a service call. (Tr., 227:7-19.) As U-7 was maneuvering with its emergency lights activated across both lanes of South 19th in order to return to the station, a 16-year-old driver with 2½ weeks of legal driving experience managed a T-bone collision with U-7 on a straight and level road, on a clear and dry day. The following photo says it all:

Savannah testified she had been a driver for a "few years, around there" at the time of the accident. (Tr., 53:22.) However, she had only possessed a learner's permit for "a couple months, around there" at the time of the accident. (Tr., 54:1.) Savannah informed the jury she had been driving before she had a permit to do so. (Tr., 55:6.) Savannah would "drive around the block." (Tr., 55:15.) This was obviously on public roadways in her neighborhood. (Tr., 69:23 - 70:1.) So, Savannah began her testimony in court by explaining to the jury that she illegally drove on the public roadways before having either a license or even a permit to do so. Savannah had been *legally* driving her father's truck for 2½ weeks at the time of the accident. (Tr., 58:4.)

South 19th is straight and level, with no obstructions, and Savannah could see U-7 a half mile away as she approached. (Tr., 70:11.) As she approached, Mark told Savannah to slow down. (Tr., 60:22.) So she slowed to "25 or 30." (Tr., 62:25.) Savannah was a little past Patterson Street when she saw the emergency lights. (Tr., 61:12.) She "didn't think much of it" as she approached. (Tr., 73:25.) She admits she did not watch U-7 the entire time as she approached it. (Tr., 75:18.) She agrees she should have watched U-7 the entire time she approached. (Tr., 75:22.) Savannah's father, Mark, "maybe" said "he's just sitting there; go around." (Tr., 76:6.) Savannah agrees she abided by Mark's instructions. (Tr., 76:9.) She did not think about yielding. (Tr., 76:2.) Savannah did not know what type of vehicle was ahead. (Tr., 61;15.) U-7 was moving "back and forth" in and out of her lane. (Tr., 62:3.) She agrees she did not know

what U-7 was doing in the road. (Tr., 68:4.) Then U-7 came to a rest and "was just sitting there." (Tr., 62:19.) When she slowed down to 25 to 30, she "had her foot off the accelerator hovering over the brake being cautious." (Tr., 63:3.) Her evasive action, she said, consisted of "being cautious"; she did not swerve at all. (Tr., 63:18-25.) She agrees her "cautious" speed in passing an emergency vehicle in the roadway with its emergency lights illuminated was "25 or 30." (Tr., 62:25.)

Savannah did not recall if U-7 parked in her lane. (Tr., 64:1-7.) Savannah was not comfortable stating the position of U-7 in the road. (Tr., 66:13-16.) However, she claims U-7 had its rear wheels in the sloped gravel shoulder off the pavement. (Tr., 70:12-25.) Yet, just days after the accident she stated U-7 was positioned in "both lanes." (Tr., 80:19.) She admits that "maybe" she was in a position to see U-7 start to move and appreciate the need to stop. (Tr., 72:8.) Savannah "maybe" saw the 911 decal on U-7 200 feet from the accident. (Tr., 72:16.) She admits she saw the flashing lights. (Tr., 72:19.) She didn't know what U-7 was going to do. (Tr., 72:21.) Savannah "doesn't know" if with 2½ weeks of legal driving experience she had the ability to approach the situation at 25 to 30 miles per hour. (Tr., 72:25.) She agrees it "maybe" would have been better for her to have slowed down to 5 to 10 miles per hour. (Tr., 73:4.) Savannah "maybe" agrees that U-7 would have cleared her path in 30 to 60 seconds had she simply stopped and waited for it to move away. (Tr., 73:9.) She agrees she learned in driver's training to yield to emergency vehicles. (Tr., 73:15.) She doesn't know if a siren would have mattered to her. (Tr., 73:22.) Savannah

testified the accident was in no way her fault. (Tr., 76:15.)

Before Savannah testified in her deposition in August of 2012, she met with her father's attorney, Mr. Angel. (Tr., 79:10.) Mr. Angel explained the process. (Tr., 79:13.) At that time and at all times since her deposition, Savannah lived with the plaintiff, her father, in their family home. (Tr., 79:16.) Her father "somewhat" kept her informed as to the case development. (Tr., 79:19.) Savannah was free to ask her father any questions she had about the case. (Tr., 79:22.)

As they approached, Mark admits he saw flashing lights from the passenger seat. (Tr., 88:24.) Mark thought it could have been a "cable TV truck." (Tr., 89:11.) That it might have been a fire truck never came into his mind. (Tr., 131:25.) Mark had lived near the Sourdough Fire Department for 15 years. (Tr., 126:23.) Mark estimates Savannah slowed to 25, maybe 30. (Tr., 90:17; 124:6.) Twenty-five feet before the collision, Mark agrees Savannah was still going 20 to 30 m.p.h. (Tr., 133:19.) Mark told her "just go through." (Tr., 91:7.) Mark agrees it would have been no inconvenience to stop and wait 60 seconds for U-7 to clear. (Tr., 132:10.) Mark agrees the public ought to yield to emergency vehicles. (Tr., 133:10.)

The SFD fire chief gave Mark his card and said, "If you need anything, rental car or whatnot, just call me." (Tr., 87:1.) Later, Mark claims an SFD volunteer said, "Well, I don't know" if the vehicle would be fixed, and also that "obviously, it's our fault." (Tr., 86:22.)

The investigating Montana Highway Patrol officer testified as to his conclusions about the accident. Officer Brown testified in Mark's case in chief, at Mark's request. Officer Brown stated, "My conclusion was the fire truck was responding to an emergency call . . . its lights were on and activated." Officer Brown had also just been at the Four Corners crash to which U-7 had been called. (Brown dep., 9:23.)[2] Brown stated, "witnesses corroborated that [SFD's] lights were on. So to me that's an emergency response." (Brown dep., 10:18.) There was no question U-7 was a properly-marked, government vehicle. (Brown dep., 23:2.) Officer Brown concluded both vehicles were contributing factors to the accident. (Brown dep., 15:23-16:8.) Brown acknowledged that emergency vehicles will sometimes disregard normal traffic rules in response to a call, which is "legitimate." (Brown dep., 23:18-24:1.) In Officer Brown's view, as the officer who responded to the Four Corners crash, fire departments provide a useful service at an accident scene. (Brown dep., 24:9.) Sometimes troopers like Brown need the assistance of the fireman at the accident scene. (Brown dep., 24:20.)

When asked if Mark did anything wrong, Officer Brown stated, "I would expect him to be providing guidance on how to drive, approach an intersection with a fire truck with its lights on." (Brown dep., 16:15.) Brown stated as to Mark's responsibility for the accident, "by him not telling her what to do in that situation, as she's a new driver and doesn't have her full driver's license, he erred

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[2] Deposition cites are provided instead of trial transcript cites when the witness's testimony was read into the record from the deposition.

in that fashion." (Brown dep., 16:24-17:2.)

Adam Esch, the driver of U-7, testified. While Esch agreed that Savannah was an immediate hazard as Mark notes in citing his testimony, he also believed she would yield to an emergency vehicle. Esch did not support Mark's version of the accident that he abruptly pulled out at the last second, leaving Savannah no opportunity to brake and yield:

> Q: Is it possible from what you can recall that you pulled in front of this truck and that's why they hit you?
>
> A: No.

(Esch dep., 14:13-16.) Esch did not admit fault. (Esch dep., 17:21; 53-54.) He explained:

> I believe that they saw my lights, were slowing down, and that's why I moved forward. I thought they acknowledged my presence and understood that they couldn't continue to travel in that lane.

(Esch dep., 21:5-9.)

Dan Ketteman testified. Kettman was in the vehicle behind Savannah. Kettman was a forest service employee at the time of the accident who had been working up in the Hyalite Canyon. (Kettman dep., 4-5.) Kettman saw a red fire truck up ahead with flashing lights, perpendicular in the road. It looked like the fire truck was trying to turn around. (Kettman dep., 5-6.) Kettman stated, "When I noticed the flashing lights, I slowed down and stopped because that's what you are supposed to do when you see an emergency vehicle, slow down and stop." (Kettman dep., 7:14-18.) Kettman decided "to slow down and stop a safe distance away so he could do his thing." (Kettman dep., 8:21.) Kettman observed, "And

meanwhile, the white truck in front of me did not stop." (Kettman dep., 7:19.) He observed the fire truck continue to maneuver and Savannah's vehicle run into it. (Kettman dep., 7-8.) It was Kettman's impression watching this that "it seemed like it would not be a good idea to go – to try to weasel by." (Kettman dep., 10:19.)

Carl Finocchiaro testified. Mr. Finocchiaro is an engineer with extensive experience in accident reconstruction, and was a timely-disclosed expert witness. Mr. Finocchiaro employed standard coefficient of friction and time and distance calculations to evaluate the descriptions of the accident. (Finocchiaro dep., 14.) Mr. Finocchiaro testified that after running engineering calculations, he came to the conclusion that "the science and the evidence supports both scenarios equally." (Finocchiaro dep., 39:9.) Mr. Finocchiaro did not accept the repeated suggestion that he was attempting to decide which witness to believe: "I wouldn't characterize myself as someone that would point the finger, who's telling the truth, who's not telling the truth." (Finocchiaro dep., 46:1.) Rather, Mr. Finocchiaro explained, "I'm saying my engineering opinion is that his characterization – it's an interpretation of a characterization, and my interpretation is one where it is my opinion that his characterization is more closely associated with the scenario offered by Mr. Esch and less so by the Fergussons." (Finocchiaro dep., 48:7.)

Fireman JD Engle testified for SFD. Engle called Mark after the accident and asked if he needed any information. (Tr., 151.) Engle did not state the accident was SFD's fault. (Tr., 152:6.) No one at SFD extended an admission of

fault to Mark. (Tr., 153.) Engle testified that Esch's actions in activating his emergency lights to turn around on South 19th were appropriate and did not need prior approval from a supervisor. (Tr., 175:22-176:1.) Engle stated that U-7 is slow and heavy, and could not abruptly maneuver out of the "farmer's turnout" at the intersection. (Tr., 178:13-179:1.)

Fireman Chris Kent testified for SFD. Kent told Adam to return to the station to pick up another firefighter. (Tr., 186:3.) It is a safety factor for Esch to have returned to acquire additional personnel. *Id.* Esch did not violate policy in activating his lights to turn around on the road; Kent was not critical of him for having done so. (Tr., 187.) Kent went to the accident scene between. Kent did not in any way state that the accident was Esch's fault. (Tr., 188.) Of that, Kent was "dang certain." (Tr., 189:9.) Kent stated that even if U-7 had been on a service call, it could activate its lights and block traffic for a moment. (Tr., 199:1.)

Jason Revisky, the current fire chief for SFD, testified. (Tr., 224.) Revisky was called to an accident at Four Corners on August 11, 2011, and was incident commander of that accident. (Tr., 224.) Revisky explained that U-7 was called to the accident because it has breathing apparatus in case there is a fuel spill, and because it has a full array of medical equipment. U-7 also carried extra diesel so if the other assets are on scene for an extended time, they can refuel from U-7. (Tr., 225.) The accident at Four Corners was a "0 alarm," which is issued on all calls unless mutual aid is required or the entire valley is requested to bring "everything" on a 3 alarm response. Zero alarm certainly does not mean "no emergency." (Tr.,

227:5.) Revisky testified that U-7 is a very heavily-loaded vehicle with extra fuel, ladders, and equipment. It is not a fast accelerating vehicle. (Tr., 228-29.)

STANDARD OF REVIEW

A jury verdict will not be disturbed where there is substantial evidence to support it. Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Johnston v. Palmer,* 2007 MT 99, ¶ 26, 337 Mont. 101, ¶ 26, 158 P.3d 998, ¶ 26 (citation omitted). When determining whether substantial evidence exists to support the jury verdict, the evidence is reviewed in the light most favorable to the party which prevailed at trial. *Silvis v. Hobbs* (1992), 251 Mont. 407, 412, 824 P.2d 1013, 1015. The Court "cannot reweigh the evidence or disturb the jury's findings unless the findings are inherently impossible or improbable as not to be entitled to belief." *Id.*, 251 Mont. at 412, 824 P.2d at 1016. Further, "[i]t is within the jury's province to adopt testimony presented on behalf of one side at the exclusion of the other." *Id.*

The Montana Supreme Court "will not reverse a civil cause by reason of any error where the record shows that the same result would have been attained had the error not been committed." *Pula v. State,* 2002 MT 9, ¶ 35, 308 Mont. 122, ¶ 35, 40 P.3d 364, ¶ 35. "[W]hether a particular error is harmful or harmless depends on the facts of the case under review." *State v. Straight* (1959), 136 Mont. 255, 264, 347 P.2d 482, 488. As such, "[w]hen the trial court makes an

error, but sufficient facts are otherwise established by independent evidence and substantial justice has been done such that the error is harmless, this Court will not disturb the ruling of the lower court." *Renner v. Nemitz,* 2001 MT 202, ¶ 28, 306 Mont. 292, ¶ 28, 33 P.3d 255, ¶ 28.

The Court will not reverse a district court's choice of instructions absent an abuse of discretion. *Murphy Homes, Inc. v. Muller,* 2007 MT 140, ¶ 74, 337 Mont. 411, ¶ 74, 162 P.3d 106, ¶ 74. In doing so, the instruction is considered in its entirety, as well as in connection with the other instructions given and the evidence introduced at trial. *Id.* "A showing of prejudice is required to reverse a verdict because of an alleged improper instruction." *Stockman Bank of Montana v. Potts*, 2006 MT 64, ¶ 80, 331 Mont. 381, ¶ 80, 132 P.3d 546, ¶ 80. Prejudice does not exist if the jury instructions in their entirety state the applicable law of the case. *Murphy Homes* at ¶ 74.

Further, an instructional error which plays no role in the jury's ultimate verdict is also harmless. *Joseph Eve & Co. v. Allen*, 1998 MT 189, ¶ 28, 290 Mont. 175, ¶ 28, 964 P.2d 11, ¶ 28 (instructing jury on contract enforceability, when issue had previously been resolved on summary judgment, was harmless error); *Pula, supra,* at ¶ 33 (instruction of superceding intervening cause was harmless where jury found that defendant's negligence was not a cause of plaintiff's injury); *Upky v. Marshall Mountain, LLC*, 2008 MT 90, ¶ 19, 342 Mont. 273, ¶ 19, 180 P.3d 651,¶ 19 (no prejudice resulting from submitting the question of his contributory negligence to the jury where the jury found the defendant was

not negligent); *Harris v. Hanson*, 2009 MT 13, ¶ 40, 349 Mont. 29, ¶ 40, 201 P.3d 151, ¶ 40 (no reversible error predicated on damage instructions where the jury did not reach the issue of damages).

"Prejudice is never presumed on appeal . . . In order to reverse, it must affirmatively appear that the error has affected substantial rights of the defendant regarding the merits of the case." *Winslow v. Montana Rail Link, Inc.*, 2005 MT 217, ¶ 25, 328 Mont. 260, ¶ 25, 121 P.3d 506, ¶ 25. It is appellant's burden to explain how he has been prejudiced by an instructional error, and the Court "is not obligated to develop such an argument on behalf of the [appellant]." *Seltzer v. Morton,* 2007 MT 62, ¶ 55, 336 Mont. 225, ¶ 55, 154 P.3d 561, ¶ 55. Nor will the Court assume a jury's decision has been affected by an instructional error when the evidence provides other possible explanations for the jury's decision. *Pula, supra*, at ¶ 33.

In *Pula v. State*, the Montana Supreme Court found the district court's error in instructing the jury on intervening or superseding causes was harmless because the special verdict form indicated that the jury found defendant's negligence was not the cause of plaintiff's injury, and therefore, the jury never reached the question of superseding intervening cause. *Id.* While the plaintiff argued that the jury verdict only made sense if the jury had found the inmate's conduct to be an intervening cause of plaintiff's injury, the Court refused to assume the jury considered superseding/intervening causes because the question remained unanswered on the special verdict form, and the evidence presented at trial

provided other possible explanations for the jury's determination that the state's negligence was not a cause of plaintiff's injury. *Id.*

Given a district court's broad discretion to determine whether evidence is relevant and admissible, the Montana Supreme Court will not overturn such a determination absent a showing of abuse of discretion. *State v. Larson,* 2004 MT 345, ¶ 29, 324 Mont. 310, ¶ 29, 103 P.3d 524, ¶ 29. Even then, an abuse of discretion in an evidentiary ruling does not necessarily constitute reversible error. "A reversal cannot be predicated upon an error in admission of evidence, where the evidence in question was not of such character to have affected the result." *In re A.N.,* 2000 MT 35, ¶ 55, 298 Mont. 237, ¶ 55, 995 P.2d 427, ¶ 55.

SUMMARY OF ARGUMENT

SFD is a political subdivision of the State of Montana and a duly charted fire agency organized under Mont. Code Ann. Title 7, Chapter 33. U-7 is a fire truck officially listed in the Gallatin County CAD system and is designated and authorized by SFD as an authorized emergency vehicle. U-7 meets the definition of an authorized emergency vehicle. Mont. Code Ann. § 61-8-102(a). Although one statute requires a siren (§ 61-9-402(2)(a)), the preceding statute provides that an authorized emergency vehicle "may" be equipped with a siren. Mont. Code Ann. § 61-9-401(4). As an authorized emergency vehicle, U-7 was responding to an emergency call according every witness who testified in the case. Only Mark's counsel is of the opinion that U-7 was not on an emergency call at the time of the accident. Mont. Code Ann. § 61-8-107(2)(d) provides that an authorized

emergency vehicle may, when responding to an emergency call, "disregard regulations governing the direction of movement or turning in specified directions." This law is vital to the amount of time our emergency responders must take in getting to an accident scene, which may save a life. U-7 was therefore authorized under the law to conduct a maneuver in the road, as it did. Savannah and Mark saw U-7 a quarter mile ahead on a straight and level road, on a clear day, in broad daylight, with its emergency lights flashing. Savannah had been driving, legally, for 2½ weeks, and only slowed to 25 m.p.h. Mark said, "go around," and she drove into the middle of U-7. The motorist immediately behind Savannah, Dan Kettman, saw the emergency lights and maneuvering, and stopped to yield. Motorists must yield to emergency vehicles. Mont. Code Ann. § 61-8-346 is a law enthusiastically endorsed by the public. They know that the ability of our first responders to quickly and safely reach accidents to potentially save lives depends on these laws.

There is substantial evidence to support the verdict. The jury received unrebutted testimony from every witness that U-7 was an authorized emergency vehicle responding to an emergency call. The jury obviously concluded that U-7 had given motorists reasonable warning, considering Mark and Savannah's admission that they saw the emergency lights a quarter mile before the accident as did the motorist behind them. The jury understood that emergency vehicles operate every day with lights and no siren, and concluded that any technical violation of conflicting statutes as to sirens was not a cause of the accident.

Causation was for the jury to determine. Mark was not entitled to summary judgment on liability.

Savannah was not prejudiced. SFD sued only for contribution and indemnity, and a finding of negligence against her would not have affected her in the slightest – it would have only reduced her father's monetary recovery. The claim that she was prejudiced is belied by her living at home with her father, the plaintiff during the entire case, and that her "*pro se*" pleadings were prepared by Mr. Angel, her father's attorney. When she did receive counsel at Allstate's expense, she did not ask for a continuance or further discovery, she did not submit evidence or call witnesses at trial, and she contended nothing differently than did her father. As the jury never reached the question of her negligence, Mark asks for a reversal based on an issue the jury never addressed. This unfortunate case should be affirmed in all respects.

ARGUMENT

A. THE DISTRICT COURT PROPERLY DENIED MARK'S MOTION FOR SUMMARY JUDGMENT

Mark contends the District Court erred in denying his motion for summary judgment. (Mark's brief, pp. 18-30.) In the District Court, Mark asserted three reasons why he was entitled to summary judgment: (1) it wasn't a real emergency; (2) since U-7 was not equipped with a siren, ordinary citizen traffic laws applied; and (3) Esch was cited by the officer. Mark never even cited the emergency vehicle statutes to the District Court in his brief.

Mark's first argument – no real emergency – is simply jaw-dropping for its

audacity. (Mark's brief, pp.28-29.) No one other than Mark's counsel thinks U-7 was not responding to an emergency. To the contrary, every witness testified that U-7 was responding to an emergency including Mark's witness, Officer Brown. No wonder Mark only devotes one sentence of his appeal brief to this issue; although he argued it in earnest below.

Mark contended that the District Court should grant summary judgment because Esch was cited for a traffic violation. (Mark's brief, pp. 18-19.) Inexplicably, Mark offers the Court no explanation why this fact benefits him when Montana law clearly provides that traffic citations do not determine the cause of an accident in a civil case. *Hart-Anderson v. Hauck* (1989), 239 Mont. 444, 449, 781 P.2d 1116, 1119; *Smith v. Rorvik* (1988), 231 Mont. 85, 90, 751 P.2d 1053, 1056. Likewise, Savannah was also cited for a traffic violation, and the officer found both drivers to be a contributing cause of the accident.

Mark's brief in the District Court asserted that Esch violated the traffic statutes regarding U-turns and driving on the right side of the roadway. He never bothered to inform the District Court in his opening brief of controlling law that U-7was entitled to such maneuvers when responding to an emergency call. Mont. Code Ann. § 61-8-107(2)(d). Mark did not inform the District Court that U-7 was an authorized emergency vehicle within the meaning of Mont. Code Ann. § 61-8-102(a). As such, his entire briefing on the traffic laws that apply to citizens was a waste of the District Court's time, and actually, is a waste of this Court's time as

well.[3]

Judge Brown did not err on the issue of the siren. The definition of an authorized emergency vehicle does not contain a requirement of a siren. In our jurisprudence, the specific controls the general. Mont. Code Ann. § 1-2-102. Particular expressions qualify general expressions. Mont. Code Ann. § 1-3-225. The Hon. Holly Brown's role was to give effect to all the applicable statutes. Mont. Code Ann. § 1-2-101. If Judge Brown had read Mont. Code Ann. § 61-9-402 as nullifying § 61-8-102(a) and § 61-8-107(2)(d), she would have erred. That is what Mark asked District Court to do. No Montana case supported Mark's arguments, and he absurdly asked the District Court to declare U-7 an ***un***authorized emergency vehicle even though Gallatin County recognizes it as one, and uses it as one every day.

An alleged violation of the siren requirement was not a cause of the accident. The issue of a siren actually had nothing to do with the case before the jury. The argument that Mark and Savannah were entitled to disregard U-7's flashing emergency lights because it did not have a siren is ludicrous. Mark and Savannah had no idea U-7 was not equipped with a siren when they approached it. A violation of a statute must be a cause of the accident. The jury was instructed on causation law, and was free to reach the conclusion that a siren had nothing to do with the case. (Docket 151, Instruction Nos. 6 and 11.) The jury was properly

[3] Mark's citations to the law cited on pages 24 through 29 are irrelevant in light of Mont. Code Ann. § 61-8-107(2)(d).

instructed to evaluate whether any violation of a statute "was a cause of the plaintiff's injury." (Docket 151, Instruction No. 14.) Mark did not object to this instruction. A motorist must yield to an emergency vehicle when operating without a siren. As a proven tactic of law enforcement, emergency vehicles routinely run with lights and no siren. Mark asked the District Court to upend these realities upon a technical inconsistency in the statutes, and the District Court wisely declined to issue such a ruling. The District Court instructed the jury on the statute that requires emergency vehicles to have sirens. (Docket 151, Instruction No. 13.) That the legislature may write a statutory scheme poorly is not news to this Court. For these reasons, the law does not support reversing the District Court's denial of summary judgment, nor does it support remanding for a new trial.

B. THE DISTRICT COURT DID NOT ERR IN ALLOWING SAVANNAH TO BE A PARTY AGAINST WHOM LIABILITY COULD BE APPORTIONED, AND THE JURY DID NOT REACH THE QUESTION OF HER NEGLIGENCE

Mark has represented to this Court that the District Court "did not allow the jury to apportion fault to her." (Mark's brief p., 8.) Savannah's name was on the verdict form, and the jury could have apportioned fault to her, but it did not reach the question. So Mark is wrong in that representation to this Court.

Mark also claims the District Court refused Savannah discovery. (Mark's brief, p., 8.) The District Court's docket sheet is devoid of a motion from Savannah for a continuance in order to conduct discovery she desired, a motion which would have been granted. The evidence of her driving was coming in

whether or not she was a party. Savannah testified that she did not think about yielding, and did not think "too much" about the fact that there were flashing lights on a vehicle directly ahead of her as she approached. She did not keep her eyes on the emergency vehicle at all times as she approached, and attempted to go around it at 25 m.p.h. after 2½ weeks of legal driving and not knowing what the emergency vehicle was doing. (Statement of Facts, p. 7.)

Savannah could have had conducted, at Allstate's expense, any additional discovery she wanted. She did not make a request. Instead, it is only Mark who complains. Mark does not have standing to assert an alleged error that would have only prejudiced Savannah. Savannah was deposed in August of 2012, lived with her father during the entire time, and had some of her pleadings prepared by her father's attorney. The claim of prejudice and surprise is disingenuous to say the least. Attached is 16-year-old Savannah's "*pro se*" Notice and Objections (Docket 86, Appendix A), wherein she filed her "equal protection" and "due process" objections. The pleading was prepared by the same person preparing the pleading at Mr. Angel's office. (Docket 91, Appendix B.)[4]

Mark's claim of prejudice under Mont. Code Ann. §27-1-703 is unavailing because the jury never reached the question of Mark's or Savannah's negligence. There is no empty chair issue in this case. Savannah did sit in a chair as a party at trial, and her testimony was anything but helpful to Mark's cause. There is no

[4] Only the first and last page of Mark's pleading is attached to show it was prepared by the same person.

basis for the claim that Savannah's presence as a party to the case affected the jury's determination, except on the merits. The case could have been defended without bringing Savannah in as a third-party defendant. The jury could have found an absence of negligence by SFD without Savannah as a party, and the jury obviously did find an absence of negligence on SFD's part, regardless of Savannah. The connection exists only in the speculation of Mark's counsel. The sad irony of the case is that had Mark brought a claim against Savannah, he surely would have been quickly paid his full damages. Mark obviously did not want to do that under his own Allstate policy, because Savannah likely would have been cancelled off the policy.

Mark contends the District Court incorrectly applied the joint and several liability statute. (Mark's brief, p. 36.) The issue need not be considered on appeal because the jury never reached the issue of the third-party defendant's alleged negligence. There is only the speculation of Mark's attorney that it affected the jury's determination. Moreover, Savannah was a party, not a "non-participating third party" as Mark attempts to claim in order to shoehorn the situation into a *Newville/Plumb* violation. Savannah was a vehicle operator who allegedly caused Mark's property damage, just like SFD was a party allegedly responsible. The law must regard Savannah no differently than SFD. If one can be sued, the other can be sued; the law makes no exemption for one's daughter. Likewise, the law makes no distinction between a third-party defendant who can actually pay money damages, and a third-party defendant whose assigned negligence would operate

only to reduce the percentage of a co-defendant's alleged negligence under Mont. Code Ann. § 27-1-703.

Mark argues that SFD and Savannah are jointly liable for his damage. (Mark's brief p., 39.) That assertion is flatly refuted by the provisions of Mont. Code Ann. § 27-1-703. If a party is less than 50% at fault, the party is only severally liable for their own percentage of fault. Mont. Code Ann. § 27-1-703(2). Granted, joint liability may be found where two parties have "acted in concert," but it is absurd to suggest that two opposite drivers acted in concert. Mont. Code Ann. § 27-1-703(3). The purpose of "acting in concert" law is to prevent a tortfeasor from escaping liability when his conduct causes harm that is indistinguishable from the conduct and harm caused by another tortfeasor. In that case, neither tortfeasor can escape liability by proving the other tortfeasor's common or additional harm to the injured party. Here, SFD and Savannah had very different and distinct statutory duties, and it was clearly appropriate for the jury to separately consider their potential negligence. While SFD had a duty to drive "with due regard to the safety of all persons" (Instr. No. 16), Savannah had a duty to yield to an emergency vehicle (Instr. No. 17). Those very different duties do not equate to "acting in concert." The District Court adequately covered this matter with Instruction No. 7, which stated that more than one person may be liable, and may not escape liability by claiming that another helped cause the damage. If both drivers involved in the accident were always acting in concert, then there would never be a liability contest for a Montana accident. Mark is

simply incorrect in asserting that Savannah cannot be wholly at fault, when it was her obligation to yield to an emergency vehicle. Mark cites no law to support his argument.

C. THE DISTRICT COURT PROPERLY CONSIDERED MARK'S FAULT

Mark contends his own negligence was improperly considered. (Mark's brief, p. 8.) Both the facts and the law supported the claim. Yet, it is not a proper issue for appeal because the jury never reached the question.

Highway Patrol Officer Brown testified that Mark erred in instructing Savannah to proceed around the emergency vehicle while she was on a probationary license. (Statement of Facts, p. 9.) Mark admitted he told her, "just go through." (Statement of Facts, p. 8.) This Court held that a parent can be liable for a minor's actions for failing to exercise reasonable care in controlling the minor. § 316 of the Restatement (Second) of Torts provides the following:

> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

§ 316 does not make a parent liable for the torts of a child but rather imposes a liability on a parent for his/her own failure to exercise reasonable care and then carefully and defines the circumstances in which this duty arises. The parent must first know that he/she has the ability to control their child and second, the parent must understand the necessity to do so. A parent's failure under these circumstances creates an unreasonable risk of harm to third persons.

This Court in *Crisafulli* adopted § 316 of the Restatement (Second) of Torts as a reasonable expression of a parent's duty in Montana. *Crisafulli v. Bass*, 2001 MT 316, ¶23, 38 P.3d 842, 846. Thus, a parent who knew he had the ability to control his minor child operating a vehicle and knew of the necessity and opportunity to exercise such control and fails to do so, could be found negligent.

Mark next contends that the District Court failed to specifically instruct on what duties Mark owed as a passenger. (Mark's brief, p., 43.) However, Mark offered the Court no such instruction, and no such instruction was refused. Neither was it error for the District Court to instruct the jury that Mark owed a duty of only reasonable care under the circumstances.

Finally, there is no basis in the record below for Mark to contend any of these alleged errors affected the jury's deliberations. There was substantial evidence in the record to support the jury's conclusion even if Mark and Savannah had not been parties against whom liability could have been apportioned. The evidence overwhelmingly supported the jury's ability to conclude that U-7 was entitled to maneuver in the northbound lane of 19th with its emergency lights on during an emergency call and expect other motorists to yield briefly until it completed its actions. Upon this basis alone, the jury could return a defense verdict with no additional consideration of Mark's or Savannah's fault. The alleged error did not affect the outcome of the case, and Mark is not entitled to a new trial upon the speculation that it did.

D. ACCIDENT RECONSTRUCTION ENGINEER FINOCCHIARO'S TESTIMONY WAS NEARLY NEUTRAL AND PROPERLY ADMITTED AS TO WEIGHT

Mark contends the District Court erred in admitting the testimony of engineer Carl Finocchiaro on the ground that he claimed one witness's testimony "was true." (Mark's brief, pp. 8, 41.) Mark is wrong, and Mr. Finocchiaro's testimony flatly refutes Mark's contention. (Statement of Facts, p. 11.)

Mark contended that Esch's version of the events was impossible. Finocchiaro reviewed the accident data available and rendered a very limited, mostly neutral opinion that the engineering reconstruction science would support either party's version of the accident. (Statement of Facts, p 11.) He was careful to make clear he was not commenting on which witness should be believed. *Id.* The admission of expert testimony rests within the sound discretion of the District Court, and the Court did not abuse that discretion. A statement that one witness's version of an accident is more consistent with reconstruction physics analysis is neither out of the ordinary nor improper.

CONCLUSION

Mark lost this case against SFD because he never should have filed it. There was overwhelming evidence to support the verdict, and the siren requirement found in one statute obviously did not matter to this accident. The claim that Savannah was prejudiced while Mark's attorney was preparing her "*pro se*" pleadings is beyond disingenuous. The jury's determination of liability for this accident was entirely unaffected by any error of law. It should be affirmed.

DATED this 10th day of April, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that Answer Brief of Respondents is printed with a proportionately-spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by WordPerfect 13 is 7,180 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 10th day of April, 2014.

_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of April, 2014, a copy of the foregoing **ANSWER BRIEF OF RESPONDENTS** was duly served by first class mail, postage prepaid, upon the following:

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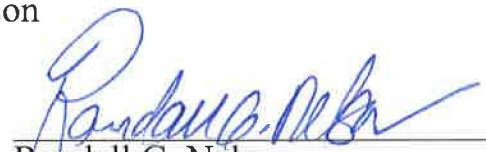

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