

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 22-0456

IN THE MATTER OF THE ESTATE OF:

HORATIO W. BURNS,

Deceased.

On Appeal from Montana Sixth Judicial District Court, Sweet Grass County
Cause No. DP 2018-10, Hon. Brenda R. Gilbert Presiding, District Court Judge

APPELLEE'S RESPONSE BRIEF

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STATEMENT OF THE ISSUES

Petitioner and Appellant Lindsay Burns Barbier (“Lindsay”)¹ appeals from the September 13, 2021 Order Denying Petitioner’s Motion to Strike and For Stay (Dkt. 187), the April 5, 2022 Order Regarding Alison Burns Memorandum of Costs and Disbursements (Dkt. 277), the April 7, 2022 Order Regarding Alison Burns’ Motion for Attorneys’ Fees (Dkt. 282), the November 7, 2022 Final Judgment (Dkt. 338), and the March 28, 2023 Decision and Order Regarding Lindsay Burns Barbier’s Motion to Stay Execution of Judgment (Dkt. 357) issued by the Sixth Judicial District Court, Sweet Grass County. The District Court orders permitted Alison Burns (“Alison”) to defend the will at issue, denied Lindsay’s motion for new trial based on alleged juror misconduct, awarded Alison attorneys’ fees and costs incurred in defending the validity of the will, and determined the post-judgment interest rate in Montana must reset each year as of January 1.

The issues presented for appeal are:

1. Whether the District Court abused its discretion by denying Lindsay’s Motion for New Trial.
2. Whether the District Court abused its discretion by allowing Alison to defend the Will.
3. Whether the District Court erred by awarding Alison her reasonable

¹ The Estate refers to the parties by first name because many of the individuals involved in this matter have the same last name.

attorneys' fees and costs incurred defending the will.

4. Whether the District Court correctly determined the post-judgment interest rate imposed under § 25-9-205, MCA, must be reset as of January 1 each year.

The Estate will not address Lindsay's appeal of Alison's ability to defend the 2016 Will and the District Court's award of her attorneys' fees and costs (Issues 2 and 3) because those issues do not affect the Estate's interests.

STATEMENT OF THE CASE

Horatio W. Burns ("Horatio") died on August 20, 2018, at 87 years old, while domiciled in Sweet Grass County. Dkt. 231 (Agreed Facts 1-2). Cameron H. Burns ("Cameron") opened the probate of Horatio's estate on September 12, 2018, and filed Horatio's Last Will and Testament, which Horatio signed on January 15, 2016 (the "2016 Will"). Dkt. 231 (Agreed Fact 6). The 2016 Will identified Cameron as personal representative of Horatio's Estate. Dkt. 231 (Agreed Fact 7).

The District Court appointed Cameron as personal representative of the Estate. Dkt. 3. The Estate was administered informally until August 30, 2019, when Lindsay filed a Verified Petition Objecting to Probate of Will (the "Petition"). Dkt. 32. The Petition alleged Horatio lacked testamentary capacity and was unduly influenced by Cameron (Horatio's son) and Alison (Cameron's wife).

On September 23, 2019, Cameron, as personal representative, filed the Estate's verified response to the Petition in support of the 2016 Will. Dkt. 36. On April 22, 2021, Alison, a named beneficiary in the 2016 Will, filed her verified response to the Petition. Dkt. 110. Lindsay moved to strike Alison's response as untimely. Dkt. 155. The District Court denied Lindsay's motion and permitted Alison to defend the 2016 Will. Dkt. 187.

The Estate filed a motion for summary judgment seeking the following determinations: 1) Horatio duly executed the 2016 Will; 2) because the 2016 will was duly executed, a legal presumption existed that Horatio was competent and of sound mind at the time of execution of the 2016 Will; and 3) Lindsay bore the burden of overcoming that presumption at trial. Dkt. 137. The District Court granted the Estate's motion, stating:

The Estate will be entitled to a jury instruction to the effect that Lindsay has the burden of overcoming the presumption that the Decedent was competent and of sound mind at the time of execution of the Will and that Lindsay must prove her claims regarding lack of capacity and undue influence by a preponderance of the evidence at trial.

Dkt. 196. Lindsay does not appeal the order or the associated jury instruction. Dkts. 311, 343, 358.

The case proceeded to a seven (7) day jury trial in Sweet Grass County. Dkt.

239. The jury entered a Special Verdict upholding the 2016 Will. Dkt. 244.

Post trial, the Estate and Alison timely filed memoranda of costs, Dkts. 246, 248, and moved, under § 72-12-206, MCA, to recover their attorneys' fees incurred in successfully defending the 2016 Will. Dkts. 245, 247. The District Court ordered the Estate and Alison were entitled to recover costs, Dkts. 277, 278, and attorneys' fees against Lindsay. Dkts. 281, 282. Following a reasonableness hearing, the District Court set the amount of Estate and Alison's recoverable attorneys' fees. Dkt. 335.²

On May 20, 2022, Lindsay filed a motion for a new trial alleging jury misconduct. Dkt 296. The bases for the motion were affidavits from Lindsay, Stephanie Baucus (Lindsay's counsel), Ms. Baucus' paralegal, Hannah Willson, Seth Burns ("Seth") (Lindsay and Cameron's brother), and two jurors. Dkt. 297. The motion was fully briefed on June 20, 2022. The District Court did not rule on Lindsay's motion within sixty (60) days and, accordingly, the motion was denied under M. R. Civ. P. Rule 59(f).

Final Judgment was entered on November 7, 2022. Dkt. 338.

² Lindsay only appeals the District Court's award of attorneys' fees and costs to Alison. Lindsay does not appeal the District Court's award of attorneys' fees and costs to the Estate or the District Court's calculations of the Estate and Alison's recoverable attorneys' fees and costs.

Lindsay filed a motion to stay execution of the judgment pending appeal, Dkt. 351, which the District Court granted. Dkt. 357. Lindsay appeals the District Court's determination of the post-judgment interest rate applicable to the Final Judgment.

* * * * *

The only appeal issue that could undo the Special Verdict upholding the 2016 Will is Lindsay's appeal of the District Court's denial of her motion for new trial. If the District Court's denial is affirmed, the 2016 Will stands.

STATEMENT OF FACTS

Horatio's estate planning began over twenty (20) years before his death with the formation of the H.W. Burns Family LLC (the "LLC"), in which Horatio and each of his children (Cameron, Lindsay, and Seth) initially owned a twenty-five percent (25%) share. Tran., 2/8/2022, 24:8-13 (Seth); Tran., 2/14/2022, 192:1-193:2 (Cameron). Although all four family members owned the LLC, Horatio managed the LLC's ranch operations continuously up until shortly before his death in 2018. Tran. 2/10/2022 101: 7-8 (Jolly); Tran., 2/11/2022, 181:6-21 (Zullo); *id.*, 206:25-207:5, 208:7-8, 212:11-214:6, 223:21-25 (Monfross); Tran., 2/14/2022, 193:3-10.

Horatio's previous will (the "2010 Will") divided his estate among his adult

children equally. Exhibit 83. Many circumstances changed over the next six years before he executed the 2016 Will. He was faced with ongoing prostate cancer diagnosed in 1997, Dkt. 231 (Agreed Fact 18), his second wife, Judith “Pachy” Burns, died suddenly in a car accident on January 6, 2013, *id.* (Agreed Fact 19), on March 20, 2013, he suffered an ischemic stroke which caused serious physical disabilities, *id.* (Agreed Fact 20), and, on July 16, 2015, he received notice of Seth’s intent to dissociate from the LLC. *Id.* (Agreed Fact 21); Exhibit 61.

Horatio’s revised estate planning intent was clearly expressed in the 2016 Will. In Article I, Horatio enunciated that each of his children had already received twenty-five percent (25%) of the LLC, that each child had received four years of prep school and paid tuition for college, and that each child received funds from an account in their respective names. Exhibit 53. The 2016 Will left nothing from his personal estate to Lindsay or Seth. *Id.* The 2016 Will expressly provided: “Rather, I want my estate to enhance the continuation of the H. W. Burns Family LLC as explained in further detail below.” *Id.* He bequeathed his membership interest in the LLC to Cameron and devised his interest in a property known as the Iverson property, consisting of 2,732 acres, to Alison. Dkt. 231 (Agreed Facts 24-25). At the time of his death, Horatio’s membership interest in the LLC had increased to 35.10% (primarily because of Seth’s dissociation), which Horatio devised to

Cameron. Dkt. 231 (Agreed Facts 23-24).

Jennifer Farve, the Bozeman attorney Horatio retained to modify his estate plan in July 2015, had no concerns about Horatio's competency when revised his will. Tran., 2/10/2022, 55:11-20 (Farve). Farve observed no indication of confusion in Horatio about his previous 2010 Will or in his ability to clearly understand and express the changes he desired to make in the 2016 Will. *Id.*, 45:8-13, 47:3-8, 54:8-12, 65:16-22. Horatio clearly explained to Farve why he wanted to change his estate plan and execute the 2016 Will. *Id.*, 58:17-60:18.

Quickly following his stroke in March 2013, except when hospitalized or being treated away from home, Horatio managed and operated the ranch with Mike Monfross as his foreman. Tran., 2/10/2022, 101:7-17 (Jolly); Tran., 2/11/2022, 212:11-214:6 (Monfross); Tran., 2/14/2022, 154:8-21 (Frazer). Indeed, his first concern when he first woke up after his stroke was whether the wool from his sheep ranch in Oregon had been sold. Tran., 2/14/2022, 198:2-200:2 (Cameron).

In the months following his stroke, Horatio underwent intense physical and occupational therapy, and, with the aid of his caregivers, Horatio made marked progress in his physical rehabilitation. Tran., 2/10/2022, 107:21-109:3 (Jolly); Tran., 2/11/2022, 109:12-112:2, 133:12-22 (Capehart); *id.* 221:21-222:7 (Monfross); Exhibit 1081. Horatio retained his usual mental sharpness, maintained his own

written records, including writing checks to caregivers based on their hours worked, Tran., 2/10/2022, 79:17-20, 96:12-22 (Jolly); Tran., 2/11/2020, 22:11-224:23 (Monfross); Tran., 2/14/2022, 207:17-22 (Cameron); and directly engaged in ranch operations. Tran., 2/10/2022, 101:5-17 (Jolly); Tran., 2/11/2022, 212:11-214:6 (Monfross). Horatio regularly met for coffee with a group of friends from 2013 to 2018 and engaged in insightful conversations, Tran., 2/10/2022, 101:18-104:4 (Jolly); Tran., 2/11/2022, 216:6-217:25 (Monfross), kept regular detailed handwritten notebooks containing details about the family ranch and cattle herd, Tran., 2/10/2022, 104:18-106:8 (Jolly); Tran. 2/11/2022, 225:8-231:24 (Monfross); Exhibit 59, pp. 174-198, 253-262, and prepared a detailed plan for ranch's operation after his death. Tran., 2/11/2022, 214:16-216:4 (Monfross); Exhibit 85. Horatio also scheduled reservations and collected funds from fisherman and guides who paid to fish the pond situated on the ranch. Tran., 2/10/2022, 241:4-20 (Jolly); Tran., 2/11/2020, 225:2-226:3 (Monfross); Tran., 2/14/2022, 215:7-219:2 (Cameron); Exhibits 59, 1067. He remained actively engaged in these ranch related efforts from shortly after he had his stroke until shortly before his death. Tran., 2/11/2022, 206:25-207:5, 208:7-8, 223:21-25 (Monfross). While Horatio's stroke caused him physical limitations, it did not limit his mental abilities or make him weak of mind. Tran., 2/11/2022, 222:11-223:25, 233:22-234:21

(Monfross) (“You didn’t, you don’t influence [Horatio] ... He made, he did what he wanted to do period.”); Tran., 2/10/2022, 71:6-15 (Jolly); Tran., 2/11/2022, 144:1-11, 146:8-22 (Capehart).

Horatio’s close friend and local attorney, William Frazier, and other witnesses, described Horatio before and after the 2016 Will as a person who was well read, well informed, and engaged openly and maintained social contacts. Tran., 2/14/2022, 144:21-167:16 (Fraizer); Tran. 2/10/2022, 106:15-12, 110:8-111:20 (Jolly); Tran., 2/11/2022, 216:6-217:25, 218:21-220:3, 222:11-224:23 (Monfross).

Dr. Lawrence Klee, Horatio’s treating urologist for his prostate cancer, was uniquely situated to observe Horatio’s mental state, and his ability to understand and communicate, for over thirteen years while serving as his sole urologist. Tran., 2/10/2022, 171:4-12 (Klee). Dr. Klee met with Horatio numerous times, both before and after execution of the 2016 Will, and had no concerns about Horatio’s cognitive abilities. *Id.*, 177:21-178:1. Horatio communicated with Dr. Klee clearly and understood his treatments: *Id.*, 178:9-11 (“So, in my mind he understood exactly what we were talking about.”). Horatio directed his own course of treatment with Dr. Klee after Horatio’s stroke and continuing until June 2018, before he died. *Id.* 178:12-18, 179:21-25, 180:1-6, 22-25, 181:1-3, 11-15. Dr. Klee

never had concerns about Horatio's mental abilities. *Id.*, 193:5-8.

Dr. Douglas Wadle practiced internal medicine for 20 years with most of his patients being over the age of 65. *Tran.*, 2/11/2022, 46:1-7, 47:13-20 (Wadle). Horatio was Dr. Wadle's patient from September 2014 to his death in August 2018. *Id.*, 47:25-54:5. When Horatio started working with Farve to revise his will, Dr. Wadle stated Horatio had "made strides with his strength" and noted Horatio had no cognitive difficulties and was "proactive and made it very clear exactly what his thoughts were" about his healthcare. *Id.*, 60:23-63:2. Following Horatio's admission to the hospital for a UTI on December 31, 2015, Exhibit 1082, p. 985, Dr. Wadle noted that as of January 3, 2016, Horatio had improved, they had a "good talk", and further described Horatio as "appropriately interactive and that we were able to talk about things we would normally talk about" and was getting back to his normal self. *Id.*, 69:7-71:7. Dr. Wadle saw Horatio again on January 12, 2016, and observed Horatio to be "clearly doing well" with no confusion or cognitive impairment and his speech was clear and coherent. *Id.*, 78:4-23; Exhibit 1082, p. 655. That appointment occurred just three days before Horatio executed the 2016 Will. Exhibit 53.

Horatio's awareness of his daily activities, medical appointments, and ranch operation details were expressed in his own handwritten notes. Exhibit 59. Indeed,

his hand-written calendar contained specific written notations about the very day he executed the 2016 Will. His January 15, 2016, entry stated: “Josephson, bath, conf. call.” Exhibit 59, p. 128.³

The same day he executed the 2016 Will, Horatio participated in a telephone conference with Cameron, Lindsay, and Farve to discuss complicated details regarding Seth’s upcoming dissociation from the LLC. Tran., 2/11/2022, 232:8-233:8 (Monfross); Tran., 2/10/222, 246:4-248:7 (Lindsay); Exhibits 59, p. 128, 147, 148. About two weeks later, Horatio executed numerous documents effectuating Seth’s dissociation from the LLC. Tran., 2/14/2022, 229:4-25 (Cameron); Exhibits 61, 62.

At trial, Lindsay offered three witnesses who contended Horatio lacked testamentary mental capacity and was subject to undue influence: Lindsay (Tran., 2/10/2022, 123:1-5), Seth (Tran., 2/8/2022, 87:6-7), and Dr. Beata Kis (Tran., 2/9/2022, 277:18-20, 281:13-14). Lindsay and Seth were personally motivated to invalidate the 2016 Will because they would receive assets from Horatio’s estate under the 2010 Will.

Lindsay’s medical expert, Dr. Kis, specialized in internal medicine and

³ Horatio executed the 2016 Will at attorney Mark Josephson’s office in Big Timber for convenience. Tran., 2/10/20, 5:25-6:12 (Josephson); *id.*, 63:16-64:19 (Farve).

geriatric medicine. Tran., 2/9/2022, 169:2-6 (Kis). She attended medical school in Hungary and began her residency in 2010. *Id.*, 173:12-174:11. She completed her geriatrics fellowship in June 2020, the same month she formulated her opinions in this case. *Id.*, 72:1-7. She was board certified in internal medicine, but not in geriatrics, hospice, and palliative care. *Id.*, 72:21-25, 73:1-3. Dr. Kis opined Horatio suffered from vascular dementia following his stroke and, therefore, did not have testamentary capacity to execute his Will. *Id.*, 277:18-20, 281:13-14. However, Dr. Kis admitted not even one of Horatio's twenty-five health care providers, nor over twenty thousand pages of Horatio's medical records from 2013-2018, indicated Horatio had vascular dementia. *Id.*, 87:1-3, 88:19-22, 89:2-25.

When Horatio's treating physician, Dr. Wadle, was asked about Dr. Kis' after-the-fact diagnosis of vascular dementia, and whether he ever diagnosed Horatio with vascular dementia, he directly replied: "No". Tran., 2/11/2022, 80:1-6 (Wadle). When asked why, he stated: "Because he [Horatio] didn't have it." *Id.*, 80:7-19.

The Estate and Alison presented expert testimony from Bozeman physician Dr. Collette Kirchhoff. Dr. Kirchhoff practiced medicine for thirty-three years, was board certified in family medicine, hospice, and palliative medicine, and was a director with the WWAMI/University of Washington Medical School. Exhibit 63;

Tran., 2/14/2022 49:13-16, 52:18-25, 53:1-19 (Kirchhoff). She routinely instructed medical students on cognitive capacity, informed consent, and diagnosing dementia. *Id.*, 54:8-19, 55:11-19. Further, most of her patients, numbering in the thousands, were geriatric patients. *Id.*, 57:16-22.

Dr. Kirchhoff opined Horatio's health care providers were in the best position to determine his mental competency at the time of treatment. *Id.*, 57:24-58:5. She also opined Dr. Kis' opinions were not sound and she disagreed with Dr. Kis' conclusion that Horatio had dementia and lacked mental capacity. *Id.*, 59:1-20. Based on her review of Horatio's complete medical records, it was Dr. Kirchhoff's opinion Horatio possessed testamentary capacity "from the time, shortly after he had his stroke up until the time of his death," *id.*, 61:2-7, and she had "no concerns" about Horatio's cognitive abilities except for a "short period of confusion" shortly after his stroke. *Id.*, 61:20-62:3. In sum, Dr. Kirchhoff agreed with Dr. Klee—Horatio did not have dementia and had full decision-making capacity both before and after his stroke. *Id.*, 65:22-66:11.

Dr. Kirchhoff's opinions were consistent with the numerous medical and fact witnesses who observed Horatio daily during the relevant periods. Their testimony vividly described Horatio as an extremely intelligent, stubborn man with high mental acuity during their interactions who was never weak of mind or subject

to the influence of others. Tran., 2/10/2022, 102:6-104:5, 110:8-111:14 (Jolly); Tran., 2/11/2022, 45:17-89:2 (Wadle); *id.*, 106:18-147:18 (Capeheart); *id.*, 175:17-182:5 (Zullo); *id.*, 186:7-198:11 (Brunckhorst); *id.*, 204:16-240:4 (Monfross).

Lastly, Horatio wrote a letter in his own hand on April 26, 2018, four months before his death, affirming his testamentary intent more than two years after he executed his 2016 Will. Exhibit 43.

Based upon the overwhelming evidence, the jury found Horatio had testamentary capacity to execute the 2016 Will and was not subject to undue influence from Cameron and Alison.

II. Lindsay's motion for new trial.

Facing the overwhelming evidence supporting the jury's verdict, Lindsay turned to attacking the conduct of specific jurors. Dkt. 296. Her central arguments contend: 1) jurors Thomas Agnew and Matthew Carroccia's failed to disclose biases during voir dire; 2) witness Mike Monfross, the Burns family ranch manager, communicated with juror Agnew during the trial and made a comment to an undisclosed friend of the husband of juror April Mauland; and 3) jurors employed the use of external information in determining their verdict. *Id.*

Lindsay's motion improperly relied on affidavits replete with rank hearsay and evidence of internal juror deliberations as the basis for a new trial.

STANDARD OF REVIEW

The decision to deny a motion for a new trial is within the discretion of the Court and will not be disturbed absent a showing of manifest abuse of discretion. *Cooper v. Hanson*, 2010 MT 113, ¶ 28, 356 Mont. 309, 234 P.3d 59. “The standard requires that the abuse of discretion be so significant as to materially affect the substantial rights of the complaining party.” *Id.* This Court “will give considerable weight to the determination of the district court because it is in the best position to observe the jurors and determine the potential prejudice when allegations of jury [] misconduct are raised, the district court will have significant latitude when ruling on these matters. *Allers v. Riley*, 273 Mont. 1, 4, 901 P.2d 600, 602 (1995) (citations omitted).

The District Court’s interpretation and construction of the interest rate applied post-judgment under § 25-9-205, MCA, is reviewed “de novo to determine whether the district court’s interpretation and construction of the statute is correct.” *State v. Weaver*, 2008 MT 86, ¶ 10, 342 Mont. 196, 179 P.3d 534 (citations omitted).

SUMMARY OF ARGUMENT

The District Court did not manifestly abuse its discretion by denying Lindsay’s motion for new trial because Lindsay’s motion was premised upon

inadmissible affidavits and failed to demonstrate sufficient prejudice to render the Special Verdict manifestly unjust.

The District Court correctly determined the statutory post-judgment interest rate under § 25-9-205, MCA, resets each year on January 1 because a different interpretation would render the Legislature's amendments to that statute superfluous.

ARGUMENT

I. Lindsay' motion for new trial was properly denied.

Post-trial attacks on jury verdicts are disfavored in American jurisprudence.

Over 100 years ago, the United States Supreme Court aptly stated:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267, 35 S. Ct. 783, 784, 59 L. Ed. 1300 (1915). To

hold otherwise encourages harassment of former jurors by losing parties as well as

the possible exploitation of disgruntled ex-jurors. Consequently, a jury's verdict will always be "the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive...." *Bateman v. Donovan*, 131 F.2d 759, 765 (9th Cir. 1942) (examining Montana law) (emphasis added).

On February 15, 2022, following seven trial days, the jury entered its Special Verdict upholding the validity of the 2016 Will. Dkt. 244. The jury unanimously found Horatio did not lack testamentary capacity when he executed his 2016 Will and, on a 10-2 vote, his 2016 Will was not the result of undue influence by Cameron and Alison.

Upon entry of a special verdict, "the court must promptly approve the form of the judgment, which the clerk must promptly enter...." M. R. Civ. P. 58(b)(2). The jury's Special Verdict was entered by the clerk the following day, February 16, 2022. Dkt. 244. A motion for a new trial must be filed no later than 28 days after the entry of judgment. M. R. Civ. P. 59(b).

Lindsay filed her motion for a new trial over three months after the Special Verdict was docketed. Dkt. 296. Lindsay baldly claimed her motion was timely. Dkt. 297. Presumably, it was Lindsay's position no final judgment was ever entered on the Special Verdict and, thus, Lindsay's time for filing a motion for new trial was extended indefinitely.

After repeated communications with jurors by Lindsay, Lindsay's brother (Seth), Lindsay's counsel (Stephanie Baucus), and Baucus' paralegal (Hannah Willson), Lindsay presented the District Court a hearsay-laced story about why she contended this case was the rare circumstance when the jury's verdict should be undone, and a new trial should be entered, because of so-called "jury irregularities or juror misconduct." Dkt. 297. In addition to most of Lindsay's argument being premised upon inadmissible hearsay evidence under Rule 802, M. R. Evid., and improper examinations of internal juror conduct in violation of Rule 606(b), M. R. Evid., the intensity of Lindsay's engagement of ex-jurors to support her claim for a new trial was troubling. Indeed, the District Court was forced to issue an order, *sua sponte*, directing counsel for the parties not to communicate with one juror. Dkt. 298 (ordering counsel "not communicate, in any way, with [a] juror [] concerning this matter").

During questioning by Lindsay's legal team, juror Thomas Agnew "bec[a]me upset and defensive," and asked "[Ms. Willson] if [she] was 'fishing for information for a new trial.'" Dkt. 297, Ex. E, ¶ 8. Worse yet, juror Matthew "Rocco" Carroccia, after numerous contacts by Willson, Baucus, Lindsay, and Seth, frustratingly demanded Lindsay's team stop twisting his words and stop contacting him:

I have read the affidavit your office created and sent. I will not sign it, it absolutely does not represent my discussion with you and Lindsay, or my recollections concerning jury deliberations. I do not appreciate my honesty being manipulated and contorted to serve your agenda. Please do not request any more voluntary information from me.

Dkt. 297, Exhibit E, Attachment 2 (emphasis added).⁴ Nonetheless, Lindsay still offered the unexecuted affidavit Lindsay's legal team prepared juror Carroccia as evidence. *Id.*, Attachment 1.

Apart from the questionable propriety of Lindsay and her team's incessant contacts with the jurors after trial, Lindsay's motion for new trial failed for numerous reasons. First, most of the "evidence" presented by Lindsay was premised on inadmissible hearsay under Rule 802, M. R. Evid., and inadmissible juror affidavits surreptitiously obtained and offered in violation of Rule 606(b), M. R. Evid. Second, consistent with *Stebner v. Associated Materials, Inc.*, 2010 MT 138, 356 Mont. 520, 234 P.3d 94, a juror's internet search of the term "undue" did not prejudice Lindsay sufficiently to render the jury's verdict manifestly unjust to warrant the granting of a new trial. Third, there is no evidence that Monfross' interaction with Lindsay's counsel, innocuous conversation with a juror during a

⁴ Rule 3.5 of the Montana Rules of Professional Conduct provides: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or] (b) communicate ex parte with such a person except as permitted by law...."

break, or comments to an unidentified community member about the case caused any prejudice. Fourth, hearsay evidence about jurors' prior knowledge and experiences, especially those disclosed during voir dire, cannot justify a motion for a new trial because the arguments were waived. Finally, Lindsay's motion was untimely filed under M. R. Civ. P. 59(b).

A. Lindsay's affidavits could not be considered by the District Court.

1. Hearsay affidavits are not admissible to support a motion for a new trial.

“In conformity with the general rule of evidence excluding hearsay statements, hearsay evidence is not admissible in support of a motion for a new trial, and a new trial will not be granted on the basis of such evidence.” 66 C.J.S. New Trial § 228 (2022) (citations omitted); *see also Norman v. Deutsche Bank Nat. Trust Co.*, Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 56-2012-638, 2016 WL 10007403, *24 (Feb. 24, 2016) (Hon. Gustafson) (holding “rank hearsay” is not evidentiary basis for a new trial); *Sutton v. Lowry*, 39 Mont. 462, 104 P. 545, 547 (1909) (hearsay affidavits are incompetent for supporting a new trial).

Every affidavit offered by Lindsay to support her motion, including her two juror affidavits, contained rank hearsay. Nearly the entirety of Lindsay's current Statement of Facts is premised upon inadmissible hearsay. *See Appellant's*

Opening Brief, pp. 8-12. Each affidavit offered by Lindsay is addressed separately.

The Affidavit of Lindsay Burns Barbier (“Lindsay Affidavit”) set forth Lindsay’s recollection of multiple conversations she had with her brother, paralegal Willson, and juror Carroccia. Dkt. 297, Exhibit A, ¶¶ 4, 6-24. Lindsay purported to describe conversations Seth, Willson, and Lindsay had with juror Carroccia about the jury’s deliberations and Carroccia’s alleged experience of having dinner with Horatio prior to Horatio’s death. *Id.* Lindsay’s hearsay statements were inadmissible because they were offered to prove the truth of matters asserted about what Carroccia and others said. Also, Lindsay completely ignored that juror Carroccia chastised her legal team for “manipulating and contorting” his honesty to serve their agenda. Dkt. 297, Exhibit E, Attachment 2.

The Affidavit of Stephanie Baucus (“Baucus Affidavit”) described Baucus’ alleged recollection of a conversation she had with witness Monfross⁵ during the trial. Dkt. 297, Exhibit C, ¶¶ 5-9. Her statements about her conversation with Monfross are offered to prove the truth of the matters asserted and, therefore, are inadmissible hearsay.

Lindsay offered the Affidavit of April Mauland (“Mauland Affidavit”).

⁵ Baucus refers to Monfross as “one of the Estate’s witnesses.” Baucus Affidavit, ¶ 4. To be clear, Monfross was identified as a witness by both the Estate and Lindsay. Dkt. 231, p. 21 (setting forth Lindsay’s trial witnesses).

Mauland was a juror in this case. Dkt. 297, Exhibit D. In addition to delving into matters prohibited by M. R. Evid. 606(b) (addressed below), the Mauland Affidavit described out-of-court statements allegedly made by her to the Bailiff, *id.*, ¶¶ 3, 6, the Bailiff to her, *id.*, ¶ 5, Monfross to an unidentified friend of her husband, *id.*, ¶ 6, and an unidentified juror during deliberations. *Id.*, ¶ 12. Regarding Monfross' alleged statement in the community to an undisclosed person, there were multiple layers of hearsay prohibiting admissibility. The Mauland Affidavit regurgitated what Monfross allegedly told her husband's unidentified friend, what her husband's friend told her husband, and then what her husband relayed to juror Mauland. *Id.*, ¶ 6.

The Affidavit of Hannah Willson (“Willson Affidavit”) set forth the substance of multiple conversations paralegal Willson had with jurors Agnew and Carroccia after the trial and incorporates an unsigned affidavit that was drafted by Lindsay's team for juror Carroccia. Dkt. 297, Exhibit E. The affidavit was laced with “rank hearsay.” For example, Willson attributed quoted language to juror Agnew about his thought processes during his deliberations. *Id.*, ¶¶ 7-11. Also, juror Agnew notably refuted Lindsay's claim that anything untoward occurred between himself and Monfross during the trial. Dkt. 299, Exhibit D (Affidavit of Thomas Agnew, ¶ 6). Similarly, Willson attributed statements to juror Carroccia

about his deliberations and attempts to introduce an unsigned affidavit prepared by Lindsay's legal team containing Willson's version of what juror Carroccia allegedly told her. Dkt. 297, Exhibit E, ¶¶ 12-32. As noted above, juror Carroccia rejected Willison's proposed affidavit, saying: "It absolutely does not represent my discussions with you and Lindsay, or my recollections concerning jury deliberations." *Id.*, Attachment 2. This is precisely why hearsay statements are inadmissible—it is not proper for lawyers to put words into another person's mouth and call it evidence.

Lindsay offered the Affidavit of Ryan Wood ("Wood Affidavit"). Dkt. 297, Exhibit F. While juror Wood's description of his own personal conduct is not hearsay testimony, his statements about the colloquy between jurors during their deliberations were inadmissible and could not be considered. Juror Wood's testimony about what other people said, *id.*, ¶ 3, the substance of conversations during deliberations, *id.*, ¶¶ 4-9, why jurors made their individual decisions, *id.*, ¶ 11, could not be accepted for the truth of the matters asserted. Additionally, juror Wood's guesses about why he believed jurors made their decisions the way they did are speculation of which he has no personal knowledge. Rule 602, M. R. Evid.

Finally, Lindsay offered an affidavit from her brother, Seth. Dkt. 297, Exhibit G. Seth also improperly relayed the substance of a conversation he allegedly had

with juror Carroccia. *Id.*, ¶¶ 9-10.

2. Rule 606(b), M. R. Evid., strictly limits the admissibility of juror affidavits.

In an improper attempt to impeach the jury's verdict, Lindsay submitted affidavits from jurors Mauland and Wood. Rule 606(b), M. R. Evid., prohibits consideration of surreptitiously obtained juror affidavits to support a motion for new trial. *State v. Marker*, 2000 MT 303, ¶ 17, 302 Mont. 380, 15 P.3d 373; *State v. Kelman*, 276 Mont. 253, 262, 915 P.2d 854, 860 (1996). Just like her motion and supporting briefs below, Lindsay's opening appeal brief fails to offer any analysis of Rule 606(b).

Rule 606(b), M. R. Evid., bars testimony and affidavits of jurors for the purpose of impeaching their verdict. *Sandman v. Farmers Ins. Exch.*, 1998 MT 286, ¶ 27, 291 Mont. 456, 969 P.2d 277. Rule 606(b) provides a juror's affidavit cannot be received by the District Court, "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the jury to assent or dissent from the verdict or indictment or concerning the juror's mental process in connection therewith." Rule 606(b), M. R. Evid. "Hence, the affidavit of a juror cannot be admitted to show anything relating to what passed in the jury room during the investigation of the case, or the effect of colloquy between the court and a juror, or

the arguments made to a juror by a fellow juryman.” *Marker*, ¶ 15 (citation omitted). “[J]uror affidavits may not be used to impeach the verdict based upon internal influences on the jury, such as a mistake of evidence or misapprehension of the law.” *Sandman*, ¶ 31 (citing cases).

Three limited exceptions allow the use of juror affidavits to impeach a verdict:

a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury’s deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury’s attention; or (2) whether any outside influence was brought to bear upon any juror....⁶

Id. This Court has “long held that the exceptions stated in Rule 606(b) are exclusive, and are narrowly construed.” *State v. Clay*, 1998 MT 244, ¶ 21, 291 Mont. 147, 967 P.2d 370 (emphasis added) (citations omitted); *Stockman Bank of Montana v. Potts*, 2006 MT 64, ¶ 66, 331 Mont. 381, 132 P.3d 546 (citation omitted); *Fish v. Harris*, 2008 MT 302, ¶ 17, 345 Mont. 527, 192 P.3d 238. Also, “[e]xtraneous influence does not include knowledge and information shared by one juror with the others. In fact, jurors are expected to bring their own knowledge and

⁶ The third exception was excluded because Lindsay does not claim the jurors resorted to chance.

experience to the courtroom to aid in the resolution of the case.” *Williams Feed, Inc. v. State*, 2007 MT 79, ¶ 28, 336 Mont. 493, 500, 155 P.3d 1228, 1234, *overruled on other grounds by Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162P.3d 134 (emphasis added).

Public policy considerations necessitate strict compliance with Rule 606(b). The rule insures “the right to have a jury deliberate in camera, free from frivolous and recurrent invasions of that privacy by disappointed litigants.” Rule 606(b), M. R. Evid., Comm’n Comment; *State v. Lawlor*, 2002 MT 235, ¶ 10, 311 Mont. 493, 56 P.3d 863. Juror affidavits must generally be excluded because “experience has shown [they are] more likely to prevent than to promote the discovery of the truth” *Lawlor*, ¶ 10. If jurors may impeach verdicts after-the-fact, “the door would be thrown wide open to corrupt practices.” *Id.* (emphasis added). “After their discharge the jurors would be subjected to all sorts of tampering influences to induce them to repent of their decision and endeavor to change or revoke it by making affidavit to real or trumped-up irregularities. Thus, there would be no assurance that any verdict, however just, would be final.” *Id.*

How Lindsay obtained juror affidavits in this case illustrates the need for punctilious application of Rule 606(b). As noted, Lindsay’s team caused juror Agnew to become “upset and defensive,” and question whether Lindsay’s legal

team's motives. Dkt. 297, Exhibit E, ¶ 8. Lindsay's team also faced an accusation by juror Carroccia that they "manipulated and contorted" evidence to advance Lindsay's motion. Dkt. 297, Exhibit E. Despite juror Carroccia's protests, Lindsay's motion pressed the inaccurate narrative in hearsay affidavits, including attaching an affidavit juror Carroccia refused to sign to the Willson Affidavit. *Id.*

B. The exceptions to the prohibition against admissibility of juror affidavits under Rule 606(b), M. R. Evid., did not apply.

Rule 59(a), M. R. Civ. P., allows the court to grant a new trial on "all or part of the issues for any of the reasons provided by the statutes of the state of Montana." Sections 25-11-102(1) and (2), MCA, provide a new trial may be granted for misconduct of the jury or irregularities. However, not every act of jury misconduct mandates a new trial. "The alleged jury misconduct must affect a material matter that is in dispute and must prejudice the complaining party sufficiently enough to render the jury's verdict manifestly unjust." *Stebner*, ¶ 15.

Rule 606(b) prohibits juror affidavits from being used if they concern any matter or statement made during deliberations. In other words, juror affidavits may not be used to impeach the verdict based upon "internal influences" on the jury. *Harry v. Elderkin*, 196 Mont. 1, 8, 637 P.2d 809, 813 (1981). "Jurors are expected to bring to the courtroom their own knowledge and experience to aid in their resolution of the case." *Stebner*, ¶ 16, (quoting *Kelman*, at 262). Some examples of

internal influences are: a juror's comment she knew the defendant owned a strip bar with a bad reputation, *Kelman*, 276 Mont. at 261, 915 P.2d at 859; and a juror's report to the other jurors about observations he made while on a lunch break, *Williams Feed, Inc. v. Dept. of Transp.*, 2007 MT 79, ¶ 25, 336 Mont. 493, 155 P.3d 1228, *overruled on other grounds*, *Giambra v. Kelsey*, 2007 MT 158, 338 Mont. 19, 162, P.3d 134. In those examples, the court held the influence of those juror's knowledge and experience on the jury was internal, thus, the juror's affidavit could not be used to impeach the jury verdict. *Id.*, ¶ 30; *McGillen v. Plum Creek Timber Co.*, 1998 MT 193, ¶ 22, 290 Mont. 264, 964 P.2d 18.

A juror affidavit may only be used to impeach the verdict if it involves extraneous prejudicial information improperly brought to the jury's attention. Rule 606(b), M. R. Evid. Where extraneous prejudicial information is brought to the jury's attention, "juror affidavits can be the basis for overturning the judgment if either party was thereby deprived of a fair trial." *Harry*, 196 Mont. at 8, 637 P.2d at 813. "A rebuttable presumption of prejudice exists when jury misconduct stems from extraneous influence; however, the presumption is not absolute and the misconduct must show a 'natural tendency' to prejudice." *Stebner*, ¶ 17 (citing *Allers*, 273 Mont. at 8, 901 P.2d at 605. Further, the provisions in Rule 606(b) for challenging a jury verdict via juror testimony, including the "extraneous prejudicial

information” provision, are narrowly construed. *Stockman Bank*, ¶ 66.

1. **The Mauland Affidavit.**

Juror Mauland voted in the minority on the undue influence claim and, at Lindsay’s request, signed an affidavit to support her effort to overturn a verdict in which juror Mauland did not concur. The Mauland Affidavit presented numerous admissibility problems. First, as addressed above, it disclosed inadmissible hearsay statements allegedly made by Monfross to an unidentified friend of juror Mauland’s husband. Dkt. 297, Exhibit D, ¶¶ 3-6. Second, it inappropriately disclosed internal jury deliberations expressly prohibited by Rule 606(b), including the jury’s vote on capacity, *id.*, ¶ 7, the jury’s internal debate regarding alleged influence by Cameron and Alison, *id.*, ¶ 8, communications among jurors regarding the definition of “undue influence,” *id.*, juror Mauland’s request to an unknown person that he look up the word “undue” on his cell phone, *id.*, ¶¶ 3-13, and subsequent internal discussions among jurors. *Id.*, ¶ 14. None of juror Mauland’s affidavit is admissible under Rule 606(b).

Further, it was juror Mauland, one of only two jurors who voted in Lindsay’s favor on the undue influence claim, who instigated the alleged juror misconduct by encouraging another juror to conduct internet research on his phone. *Id.*, ¶ 8.

2. The Wood Affidavit.

Juror Wood voted in the majority. Nonetheless, the Wood Affidavit violates Rule 606(b) by inappropriately disclosing internal deliberations about testamentary capacity, *id.*, ¶ 4, internal discussions about whether a person may be influenced if they have capacity, *id.*, ¶ 5, internal deliberations about the term “undue influence,” *id.*, ¶¶ 6, 8, internal discussions about the Court admonitions, *id.*, ¶ 7, speculation about what other jurors’ conduct, *id.*, ¶ 7, and internal discussion that led to the jury’s ultimate conclusion—there was no undue influence. *Id.*, ¶ 12.

The only substance of the Wood Affidavit that may not violate Rule 606(b) is juror Wood’s admission that he, at juror Mauland’s request, searched the definition of the word “undue” on his cell phone during deliberations. However, as addressed below, juror Wood’s internet search did not prejudice Lindsay sufficiently to render the jury’s verdict manifestly unjust to warrant the granting of a new trial.

C. Admissible juror affidavits reveal the verdict was based upon the evidence presented at trial and the Court’s instructions, not extraneous sources.

As noted above, a jury’s verdict is “the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive....” *Bateman*, 131 F.2d 759, 765 (emphasis added). Further, as noted in *Lamlor*, an invitation for

jurors to engage in a public battle of the affidavits after trial is unbecoming and defeats the finality of verdicts. *Lawlor*, ¶ 10.

Unfortunately, given the extent Lindsay’s intrusions into the juror’s decision-making process to create the perception of jury misconduct, the Estate and Alison were compelled to present juror affidavits from jurors Norma Lehman, Steven Isaacs, Catherine DeBoer, and Thomas Agnew. Dkt. 299, Exhibit A (“Lehman Affidavit”), Exhibit B (“Isaacs Affidavit”), Exhibit C (“DeBoer Affidavit”), Exhibit D (“Agnew Affidavit”). These affidavits did not offer hearsay testimony, nor did they violate the sanctity of internal jury deliberations. *See* M. R. Evid. 802, 606(b). Instead, they clearly established each of these jurors based their verdict solely on the evidence presented at trial and the District Court’s instructions on the law; they were not influenced by extraneous sources, including another juror looking up the word “undue” on his phone. Lehman Affidavit, ¶¶ 4-5; Isaacs Affidavit, ¶¶ 4-5; DeBoer Affidavit, ¶¶ 4-6; Agnew Affidavit, ¶¶ 4-5, 7. Additionally, juror Agnew confirmed he did not discuss the case with witness Monfross, and his brief discussion with Monfross did not influence his verdict. *Id.*, Agnew Affidavit, ¶ 6.

D. Limited internet research does not warrant a new trial.

Even if juror Wood looking up the term “undue” on his cell phone

constitutes an external influence, it was not sufficiently prejudicial to require the parties to endure a new trial.

This precise issue was addressed in *Stebner*. Stebner brought a breach of warranty claim against Alside for replacement of an apartment complex's steel siding. Alside claimed the damage to the siding was not covered under the warranty. *Stebner*, ¶ 3. After hearing the evidence, the jury began deliberations at approximately 4:00 p.m. Before any deliberations, five jurors voted in favor of Alside, six voted in favor of Stebner, with one abstention. After about an hour of deliberations, the jurors voted six in favor of Stebner and six in favor of Alside. The jury was excused for the day at 5:00 p.m. The jury reconvened at 8:30 a.m. the next day and, within five minutes, they voted eleven to one in favor of Alside and delivered the verdict accordingly. *Id.*, ¶¶ 4-5.

After the verdict, Stebner learned some of the jurors were talking about the case outside of the jury room and one juror had researched the definition of "preponderance" on the internet. *Id.*, ¶ 5. Stebner filed a motion for a new trial, arguing a new trial was warranted to avoid manifest injustice due to juror misconduct. Stebner attached a juror affidavit to his motion, in which the juror said she heard three jurors discussing the case as they were walking outside of the courthouse. She said the jurors stopped discussing the case when they saw she was

listening to the conversation. The juror also testified that “[d]uring the course of deliberations, the jury used an outside resource to help determine the definition of the term ‘preponderance.’” *Id.*, ¶ 6 (describing an internet search of the definition of term “preponderance”).

Alside attached three juror affidavits to their response brief. In the first affidavit, the juror testified “[a]fter we took our vote, I commented that I thought the verdict was correct based on my understanding of ‘preponderance.’ I previously looked up the word ‘preponderance’ on the internet. My understanding of ‘preponderance’ matched the jury instruction that was submitted to us.” She also testified she based her decision on the evidence presented at trial and she voted in favor of Alside because the evidence submitted during the trial did not support a verdict in favor of Stebner. *Id.*, ¶ 7. The other two jurors testified they voted in favor of Alside and any comments about the term “preponderance” had no effect on their decision. They also testified they based their decision on the evidence presented at trial and they voted in favor of Alside because the evidence did not support a verdict in favor of Stebner. *Id.*, ¶8.

The district court denied Stebner’s motion, holding the jury misconduct did not cause sufficient prejudice to render the jury’s verdict manifestly unjust. *Id.*, ¶ 9. Stebner appealed and this Court affirmed, holding Stebner was not prejudiced by

the juror’s internet research and subsequent understanding of the term “preponderance.” *Id.*, ¶ 21. The Court noted three jurors testified they based their vote on the evidence presented at trial. *Id.* Moreover, no new information was presented on the definition of “preponderance.” *Id.* Additionally, the Court held Stebner was not prejudiced by the extraneous juror discussions, and consequently, the district court did not manifestly abuse its discretion when it denied Stebner’s motion for a new trial. *Id.*, ¶ 23; *see also U.S. v. Wheaton*, 517 F.3d 350 (6th Cir. 2008) (holding juror’s use of personal computer during jury deliberation to research extrinsic evidence was harmless); *Sharpless v. Sim*, 209 S.W.3d 825 (Tex. App. Dallas 2006) (holding juror’s use of public data website to research party’s driving record did not rise to level of misconduct).

Like *Stebner*, juror Woods’ internet search of the term “undue” did not prejudice Lindsay sufficiently to render the jury’s verdict manifestly unjust to warrant the granting of a new trial. First, multiple jurors refuted Lindsay’s supposition that juror Wood’s internet search influenced their ultimate decisions. *See* Dkt. 299, Lehman Affidavit, ¶¶ 4-5; Isaacs Affidavit, ¶¶ 4-5; DeBoer Affidavit, ¶¶ 4-6; Agnew Affidavit, ¶¶ 4-5, 7 (each noting they did not rely on any extraneous sources). Second, the definition of “undue” revealed by juror Woods’ internet search was consistent with the jury instructions given on “undue influence.” Dkt.

241, Instruction Nos. 16-18. The definition researched by juror Wood defined the term “undue” as “unwarranted or inappropriate because excessive or disproportionate.” Dkt. 297, Exhibit F, ¶ 10. The undue influence instructions given to the jury stated, in part, “[u]ndue influence exists when a confidential relationship or a position of authority is used to take an unfair advantage of the testator’s weakness of mind, or take a grossly oppressive and unfair advantage of the testator’s necessities,” and “[t]he mere opportunity to exercise undue influence on a testator is not sufficient to prove undue influence” Dkt. 241, Instruction Nos. 16, 18. If anything, the definition of “undue” found by juror Wood, even if it was considered by the jury, diminished the threshold for proving undue influence in Lindsay’s favor. Further, other than self-serving testimony from Lindsay and Seth, and Lindsay’s paid expert who was overwhelmingly rebuffed by Horatio’s treating physicians, there was virtually zero evidence presented at trial establishing Horatio suffered from weakness of mind.

The District Court did not manifestly abuse its discretion by denying Lindsay’s motion for new trial because the definition of “undue” revealed by juror Agnew did not provide new information to the jurors on the definition of “undue influence” and, regardless, there was zero evidence the jurors actually relied on the definition to render their verdict.

E. Witness Monfross' interaction with Lindsay's counsel, innocuous conversation with juror Agnew, and alleged statement in the community do not warrant a new trial.

The Baucus Affidavit asserted Lindsay's counsel engaged in a conversation with witness Monfross and she witnessed Monfross briefly interact with juror Agnew during trial. Dkt. 297, Exhibit C, ¶¶ 4-13. However, the Willson Affidavit, submitted by Lindsay, and the Agnew Affidavit, submitted by the Estate, both confirm the brief conversation between Monfross and juror Agnew was an innocuous casual conversation that had nothing to do with the trial. Dkt. 297, Exhibit E, ¶ 11 ("just a casual conversation and nothing about the trial came up"); Dkt. 299, Agnew Affidavit, ¶ 6 (describing a "brief" discussion that did not involve the case or influence Agnew's votes).

Next, the Mauland Affidavit asserts, based upon multiple layers of hearsay, that witness Monfross spoke with an unidentified community member about Lindsay's bad reputation, and she speculates other jurors may have heard those comments. Dkt. 297, Exhibit D, ¶¶ 2, 3, 6. This hearsay testimony does not reveal improper conduct by Monfross; he is permitted to speak with community members about the case. Further, based upon her affidavit, it does not appear juror Mauland shared what she learned from her husband with other jurors. *Id.*

Lastly, if Lindsay had legitimate concerns about alleged conduct by witness

Monfross during trial, she should have raised them during the trial. *Geiger v. Sherrodd, Inc.*, 262 Mont. 505, 510, 866 P.2d 1106, 1009 (1993) (“plaintiff had an obligation to bring it to the District Court’s attention at a time when something could have been done about it. By failing to do so, he waived his right to raise this issue by post-trial motion or on appeal.”). Lindsay waived her objections to Monfross’ alleged misconduct by failing to raise them during trial.

F. Lindsay’s after-the-fact objections to jurors Agnew and Carroccia were waived and do not warrant a new trial.

Assuming, *arguendo*, Lindsay’s hearsay affidavits regarding conversations Lindsay, her counsel, her brother, and her paralegal had with jurors Carroccia and Agnew were admissible, those jurors were entitled “to bring to the courtroom their own knowledge and experience to aid in their resolution of the case.” *Stebner*, ¶ 16 (quoting *Kelman* at 262). Also, Lindsay’s after-the-fact objections about jurors Agnew and Carroccia were untimely and properly rejected.

A party waives any challenge for cause against a potential jury member unless the objection is made at the proper time. *State v. Diedtman*, 58 Mont. 13, 190 P. 117, 118 (1920) (“Neither do we think that the record discloses sufficient ground for challenge for cause; but, even if it did, any ground for such challenge may be waived, and is waived unless availed of at the proper time....”) (emphasis added). On this point, the Wyoming Supreme Court recently noted “[g]enerally, a failure

to challenge a juror, and then later acceptance of the panel at trial, waives any objection to the service of a particular juror.” *Lubing v. Tomlinson*, 2020 WY 105, ¶ 20, 469 P.3d 375 (internal quotations and citations omitted).

A failure to directly and plainly examine jurors with respect to a particular basis for bias or prejudice, which later is developed, constitutes a waiver of that ground. It is the obligation of the [parties] to examine jurors on voir dire and discover by proper investigation facts affecting their qualifications, and then to seasonably raise that objection with respect to any member of the panel.

Id., ¶ 22 (citing *Lopez v. State*, 544 P.2d 855, 861-62 (Wyo. 1976)) (brackets in original). Applied here, Lindsay’s post-verdict objections to alleged prejudices of jurors Carroccia and Agnew were waived.

Jurors Carroccia and Agnew disclosed their experiences and knowledge regarding the subject matter of this case during voir dire. In response to Lindsay’s counsel’s questioning about when juror Carroccia last dined with Horatio, Carroccia answered, “I think it was the summer that he died, but maybe it was the summer before. I don’t know. But he had had his stroke, yeah.” Trans., 2/7/2022, 101:6-9 (Voir Dire). Carroccia also disclosed social interactions he had with Lindsay, including their children playing together at his house. *Id.*, 101:16-19. Lindsay’s counsel chose to not to inquire further of juror Carroccia, presumably because counsel believed if juror Carroccia had any preconceived notions about the

case, they would be favorable to Lindsay given they socialized together. Lindsay's counsel's failure to examine Carroccia further, a juror who admitted he had dinner with Horatio after his stroke and after he signed the 2016 Will, cannot now be used as the basis for a new trial. It was Lindsay's obligation to properly investigate juror Carroccia's qualifications during voir dire and timely raise an objection before they passed the jury for cause.

Likewise, juror Agnew disclosed during voir dire he was previously involved in a will contest where the contestant alleged the testator (Agnew's father) was "not in very good cognitive condition." *Id.*, 179:22-180:3. He disclosed his stepmother and stepsister, "who had very persuasive ulterior motives," were "successful in turning [his father's] Will upside down." *Id.* 179:22-180:20. Juror Agnew clearly disclosed his "own knowledge and experience" that would aid in his resolution of the case. If Lindsay believed juror Agnew's past, negative experience with a will contest was prejudicial, her counsel needed to challenge juror Agnew at the time the so-called prejudice was revealed. Lindsay waived any objection to juror Agnew by failing to raise it before empanelment of the jury.

In short, Lindsay cannot now claim jurors Carroccia and Agnew somehow poisoned the jury when Lindsay made the tactical decision to refrain from further examining those jurors for alleged biases and preexisting opinions during voir dire

and passed them for cause.

G. Lindsay’s motion for new trial was untimely.

M. R. Civ. P. Rule 59(b) requires a motion for a new trial be filed no later than 28 days after the entry of judgment. The Special Verdict was entered by the clerk on February 15, 2022, the day after the trial ended. Dkt. 244. Lindsay filed her motion for new trial on May 20, 2022. Dkt. 296. The motion was properly denied because it was untimely.

II. The District Court correctly determined the post-judgment interest rate.

This Court “evaluate[s] a statute’s plain meaning in the context of the statute as a whole, and in furtherance of the manifest purpose of the statutory provision and the larger statutory scheme in which it is included.” *Hillcrest Natural Area Found. v. Mont. Dep’t of Env’tl. Quality*, 2022 MT 240, ¶ 52, 411 Mont. 30, 521 P.3d 766 (internal citations and quotation marks omitted). “When interpreting a statute, this Court will not look beyond its plain language if the language is clear and unambiguous.” *State v. Jardee*, 2020 MT 81, ¶ 8, 399 Mont. 459, 461 P.3d 108 (citations omitted). As such, “the Court interprets a statute first by looking to its plain language and construes a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the legislature....” *Id.* Statutory construction should not lead to absurd results if a

reasonable interpretation can avoid it. *Id.* Finally, in construing a statute, “this Court presumes that the legislature intended to make some change in existing law by passing it.” *Id.*

Section 25-9-205(a), MCA, provides simple interest is payable on judgment awards and sets the interest rate at the “rate for prime loans published by the federal reserve system in its statistical release H.15 Selected Interest Rates” plus three percent. Section 25-9-205(b), MCA, provides interest payable under § 205(a) is set each year on January 1: “The rate for bank prime loans established in subsection (1)(a) must be set as of January 1 of each year and remain in effect until December 31 of each year.” (emphasis added). Thus, the interest payable on a judgment is constant during a given year but changes each successive year.

The statutory language specifies the interest rate in § 205(a) is established January 1 each year and is effective “until December 31 of each year.” § 25-9-205(b), MCA. When read together, §§ 25-9-205(a) and 205(b) require the rate of interest on each judgment after July 1, 2017, be reset each January 1, replacing the rate from the prior year. Then, § 25-9-205(b) describes how to determine the interest rate. Importantly, the phrase “remain in effect until” limits the rate, payable under § 205(a), making it terminate on the last day of each year, to be replaced by a new rate each new year that then becomes payable under § 205(a).

Section 205(b) does not provide that the interest on a judgment in any given year must remain the same year after year. Lindsay cannot add that language to the statute. § 1-2-101, MCA (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”). Section § 205(b) is clear that the interest rate on a judgment expires on December 31, and is replaced by a new rate on January 1 for the new year.

Lindsay’s proposed interpretation cuts against the purpose of the statute, which was amended in 2017. Prior to 2017, § 25-9-205, MCA, provided a flat interest rate of 10% per annum on all judgments. 2017 Mont. Laws Ch. 446, § 1. Testimony by the bill sponsor, Sen. Carey Smith, stated the main purpose of the bill was to make interest on judgments fair as to the cost of money. The bill was introduced to correct the 10% judgment interest rate, the prime rate in 1985 when that rate was set, and create a fair rate of interest, closer tracking market rates, be they higher or lower. Sen. Smith’s testimony indicates the Legislature’s concern that the interest rate on a judgment be tied to the actual cost of money in any given year. *See Montana House Judiciary Committee Hearing, Wednesday, March 22, 2017, 08:44.*⁷

⁷ Accessed at <http://sg001-harmony.sliq.net/00309/Harmony/en/>

The current version of the statute provides annual adjustments to the interest rate, allowing monetary judgments to retain their value as economic conditions change over time. Stated a different way, § 25-9-205(b)'s requirement that the interest rate change each year serves the policy that a judgment rendered should be worth the same in real dollars year-over-year, despite inflation.

Lindsay's interpretation would create a windfall for her. Interest on a monetary judgment is awarded to compensate the judgment creditor for the time value of money. *Stafford v. Fockaert*, 2016 MT 28, ¶ 31, 382 Mont. 178, 366 P.3d 673. While *Stafford* addressed the propriety of an award of prejudgment interest, the same policy that supports prejudgment interest also supports post-judgment interest. Post-judgment interest "serves to compensate the injured party for the loss of use of the money for a productive purpose and serves to compensate the injured party for the loss of use of her money...." *Id.* This is particularly true for an award of attorney fees, which the Estate and Alison have already incurred and paid.

Given present market conditions, Lindsay's argument would freeze the judgment interest rate at an artificially low amount in this case. The H.15 Selected Interest Rate on January 1, 2023, was 7.5%. Section 205(a) provides that judgments in Montana should accrue interest at a rate of 10.5% (prime plus three percent)

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during 2023. If the statutorily mandated adjustment is not made, the award to the Estate and Alison would be exposed to inflationary market conditions during the appeals process, degrading the value of the judgment by substantially reducing the total judgment interest when it is ultimately paid. For example, in 2023, Lindsay would save 3% on the judgment, denying the Estate and Alison full compensation in the amount of \$16,208.64 in 2023 (3% of \$540,287.96).

As the prime rate for 2024 will be set by the Federal Reserve, the interest rate that will apply to the judgment during 2024 is yet unknown. To fully secure the Estate and Alison in the judgment, and as inflationary conditions have shown little sign of improvement, it is safe to assume the rate set by § 25-9-205 is unlikely to decrease in 2024.

Post-judgment interest is not designed to penalize the judgment debtor, but to ensure that the judgment creditor receives the full value of the judgment awarded. The requirement in § 25-9-205 that the interest rate be reset as of January 1 serves the goal of responding to market conditions, adjusting the rate of interest accordingly.

The District Court's interpretation of § 25-9-205 was correct and should be affirmed.

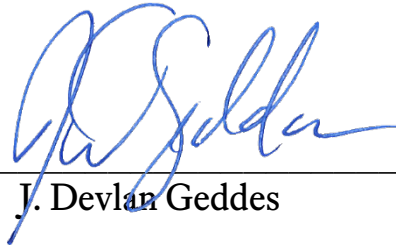
CONCLUSION

The District Court did not manifestly abuse its discretion by denying Lindsay's motion for a new trial. The District Court correctly interpreted § 25-9-205(a), MCA, as requiring the interest rate applied to judgments to adjust each year as of January 1. This Court should affirm the District Court's decisions.

Respectfully submitted, this 19th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Equity Text A text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 (9,955) words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 19th day of July, 2023.

GOETZ, GEDDES & GARDNER, P.C.

By:



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