

## IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 22-0456

IN THE MATTER OF THE ESTATE OF:

HORATIO W. BURNS,

Deceased.

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**On Appeal from the Montana Sixth Judicial District Court  
Sweet Grass County  
Hon. Brenda R. Gilbert Presiding**

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**APPELLANT'S REPLY BRIEF**

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### III. INTRODUCTION

Appellant Linday Burns Barbier (“Lindsay”) respectfully appeals from, among other things, two types of rare and extraordinary issues: (1) jury misconduct and irregularities—including internet research by jurors during deliberations, which yielded definitions of undue influence materially different from the jury instructions, and biased jurors failing to disclose pre-existing opinions of the decedent’s testamentary capacity based on the juror’s own prior, in-person observations and implied bias in the case of another juror; and (2) the district court permitting an interested party, who did not participate for 20 months and who had not been sued, to defend the offered “Alleged Will” alongside the Estate at trial.

Reading the response briefs filed by the Estate of Horatio W. Burns (“the Estate”) and Alison Burns (“Alison”), however, one might not know that those are the two main appellate issues.

Instead, Appellees’ attempt to distract the Court with information bearing no relevance to the appellate issues, impermissibly raise new arguments on appeal, openly flout the Rules of Civil Procedure, and baselessly insinuate that Lindsay’s counsel and jurors engaged in improper conduct.

Appellee Estate begins with 10 pages of cherry-picked “facts,” which largely relate to testamentary capacity, which Lindsay disputes, and which conveniently ignore undue influence facts and jury issues. The primary thrust of

the Estate’s response to these significant jury issues, which Alison incorporates by reference, is that inapplicable evidentiary objections should prevent the grant of a new trial. As explained herein, however, they do not. In addressing the remaining appellate issues, either the Estate or Alison respond by raising new arguments on appeal, conflating other issues, and ignoring Lindsay’s most significant arguments.

For these reasons, those outlined in Lindsay’s Opening Brief (the “Brief”), and others addressed herein, this Court should reverse the judgment and remand for a new trial without Alison’s participation as a party.

#### IV. ARGUMENT

##### **A. The District Court Abused Its Discretion in Denying Lindsay’s Timely Motion for New Trial, Given Clear and Admissible Evidence of Juror Misconduct.**

As explained in the Brief, the district court abused its discretion in administratively denying Lindsay’s timely new trial motion under Mont. R. Civ. P. 59(f), which presented clear and admissible evidence of juror misconduct and irregularities, summarized below in §§ IV.A.3-7. Nothing in Appellees’ arguments, including evidentiary arguments or baseless allegations of impropriety addressed in §§ IV.A.1-2 and 8, *infra*, should change this conclusion.<sup>1</sup>

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<sup>1</sup> Aside from their legal arguments, Appellees spend time accusing Lindsay, juror April Mauland, and opposing counsel of impropriety or violations of Mont. R. Prof. Conduct 3.5. (Est. Resp., 14, 18-19, 21, 24, 26, 29-31). Preliminarily, “the Montana Rules of Professional Conduct are not to be... used—or rather abused—by opposing parties as procedural weapons to gain a tactical or strategic advantage

***1. Appellees’ Hearsay Objections are Flawed.***

Appellees’ evidentiary arguments, primarily about hearsay, are red herrings that do not even address all the pieces of Lindsay’s evidentiary support. Most of the paragraphs of her juror affidavits are not “out of court statements,” but rather are observations, recollections, or other facts. To the extent there are “out of court statements,” those statements, analyzed specifically below, either were not hearsay as they were not offered for “the truth of the matter asserted,” under Mont. R. Evid. 801, or fell into applicable hearsay exceptions under Rules 803 and 804.

*i. Evidence of Internet Research.*

It is not disputed that one of only two claims asserted by Lindsay was a claim for undue influence. It is also undisputed that, during deliberations, jurors conducted internet research on the meaning of “undue influence” and “undue.” *See*

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in litigation *Schuff v. A.T. Kloemens & Son*, 2000 MT 357, ¶ 61, 303 Mont. 274, 16 P.3d 1002. Substantively, however, neither Lindsay nor anyone on her behalf called any jurors until days *after* the verdict. Additionally, Lindsay first learned of juror misconduct when Moulton paralegal Hannah Willson called jurors for routine professional feedback from trial. (Doc. 297, Ex. E). Except for a call that attorney Stephanie Baucus *received from juror* Ryan Wood on April 7, 2022, who was returning a call from Willson, and one voicemail that Baucus left for juror Matthew Carroccia on April 4 or 5, 2022, *no attorneys from Moulton* called or talked with any members of the jury. (*Id.*, Ex. C). Further, *no one from Moulton had or placed any calls to jurors after early April 2022*. (Doc. 302, n. 2). While the District Court did issue two orders, *sua sponte*, directing counsel not to communicate with certain jurors, those orders were dated May 31, 2022, and June 8, 2022, approximately *8-9 weeks after Willson’s post-trial interviews*. It is an enormous leap to suggest that Lindsay’s conduct prompted those orders. Indeed, Appellees fail to acknowledge that they, too, contacted jurors—calls that occurred much closer in time to the juror-contact orders.

§ IV.A.3, *infra*. This particular misconduct was detailed in jurors Ryan Wood and April Mauland’s affidavits, Doc. 297, Exs. D, F,<sup>2</sup> as well as elsewhere. Significantly, the misconduct was not disputed by Appellees’ own juror affidavits. See Doc. 299, Ex. A (Lehman Aff.), ¶ 5; Ex. B (Isaacs Aff.), ¶ 5; Ex. D (Agnew Aff.), ¶ 7.

Unsurprisingly, Appellees try to downplay this startling conduct by attacking Lindsay’s own affidavit and Lindsay’s counsel’s unrelated affidavit,<sup>3</sup> and by accusing Mauland of inciting jurors to conduct internet research, Est. Resp., p. 29, and by relegating discussion of the Rule 606(b) juror affidavits to later portions of their briefing.

Obviously, admissions under oath from Wood and Mauland confirming that internet research occurred do not include out of court statements at all, and the definitions that they recalled are not being offered for the truth of the definitions themselves. Appellees even acknowledge that “juror Wood’s description of his own personal conduct is not hearsay testimony.” (Est. Resp., 23).

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<sup>2</sup> Notably, it is clear from these affidavits (Doc. 297, Exs. D, F), that at least two jurors were searching for definitions on their phones and that both “undue influence” and “undue” were researched, as Mauland recalls asking a male juror to look up both “undue influence” and “undue,” and the screenshot attached to Wood’s affidavit only shows a search for “undue.”

<sup>3</sup> As to juror misconduct, Baucus’s affidavit primarily detailed an encounter with witness Monfross on a break during trial when he proclaimed that Lindsay’s claims were “silliness” within earshot of juror Agnew. Lindsay has not presented any argument in relation to this conduct on appeal.

Significantly, under controlling precedent, these juror admissions alone are enough for a new trial. In the seminal case of *Allers v. Riley*, after the jury conducted research on terminology (proximate cause and prudence), just as the jurors did here (undue and undue influence), this Court ordered a new trial because the jury imposed its own definitions on a “critical element” of a claim. 273 Mont. 1, 8, 901 P.2d 600, 604. While they cite *Allers* for other points, Appellees do not attempt to distinguish it from this case. (Est. Resp., 15, 28).

Considering *Allers*, even if the Court identified any hearsay in the affidavits, *see* §§ IV.A.1.v, *infra*, or in other evidence, it would not matter. The Wood and Mauland affidavits conclusively establish that 1) internet research occurred and 2) jurors were exposed to external definitions of “undue” and “undue influence” that did not match the Court’s instruction. *See* §§ IV.A.3, *infra*.

*ii. Evidence of Juror Carroccia’s Reliance on Undisclosed Opinions Regarding Lindsay’s Capacity Claim.*

Lindsay has produced other admissible evidence demonstrating misconduct, including juror Matthew Carroccia’s not disclosing during *voir dire* his pre-existing opinions on the decedent’s capacity. *See infra* §§ IV.A.4-6. Affidavits from Lindsay, Seth Burns, and paralegal Hannah Willson recounted post-trial conversations each had with Carroccia about his visit with Horatio shortly before his death and his specific opinions about Horatio’s capacity.

Notably, Lindsay was only forced to recount Carroccia's opinions through other affidavits because, 1) after initially agreeing to provide an affidavit,<sup>4</sup> Carroccia changed his mind, *See* Doc. 297, Ex. E, ¶¶ 20-32; Exs. 1-2 to Ex. E., and 2, the district court did not grant Lindsay's request to hold an evidentiary hearing where jurors could have testified.

Relatedly, despite Appellees' characterizations (Est. Resp., 19), Lindsay did not rely on Carroccia's "unexecuted affidavit." Rather, Lindsay provided all evidence from post-trial Carroccia communications, including the draft affidavit. Indeed, even though Carroccia's response email contained self-serving and contradictory comments, Lindsay shared all communications in the interest of full disclosure. Conspicuously, Appellees did not provide an affidavit from Carroccia rebutting any information Lindsay provided.

Substantively, Appellees are wrong to suggest that Lindsay's, Seth's, and Willson's statements are inadmissible. Carroccia's statements to Lindsay (that Horatio Burns seemed "with it" to him, *see* Doc. 297, Ex. A, ¶ 12), to Willson (that he believed Horatio had capacity based on his visit, *see* Ex. E, ¶¶ 14-15), and to Seth (that Horatio seemed to be "with it to him," *see* Ex. G, ¶ 10) were not offered for the truth of the matters, as Lindsay obviously disputes that her father had capacity. They were offered to show that Carroccia had a pre-existing opinion of

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<sup>4</sup> Ironically, it was Carroccia who first shared with Lindsay's law firm that jurors were looking "undue influence" up on their phones. (Doc. 297, Ex. E, ¶ 18.)

capacity based on his personal observations of Horatio. Accordingly, they are not hearsay under Rule 801(c).

Alternatively, the statements would fall under Rule 803(1)'s exception for "[p]resent sense impression[s]" or, as Carroccia refused to provide an affidavit, if he were to refuse or be unavailable to testify, under Rule 804(b)(3)'s exception for "[s]tatements against interest," as they evidence Carroccia's misconduct.

*iii. Evidence of Thomas Agnew's Undisclosed Bias Against Lindsay's Undue Influence Claim.*

Willson's affidavit also contained evidence demonstrating juror Thomas Agnew's biases, with him admitting that he "had a prejudice against cases like this or claims like Lindsay's." (Doc. 297, Ex. E, ¶ 7).

Again, these statements would fall under hearsay exceptions for "present sense impressions" and/or "[s]tatement against interest." See Rules 803(1) and 804(b)(3).

*iv. Evidence of Mike Monfross' Belittling Lindsay's Claims During Trial.*

Finally, Lindsay provided evidence of witness Mike Monfross belittling Lindsay's claims during trial, with juror Mauland indicating she heard during trial that Monfross was gossiping about how Lindsay supposedly makes lots of money and is "greedy." (Doc. 297, Ex. D, ¶ 6). See § IV.A.7, *infra*.

Of course, Lindsay is not offering these statements for the truth of the matters asserted, so they are not hearsay under Rule 801(c). However, even if they were, they would fall under the hearsay exception in Rule 803(21) for a “[r]eputation as to character.”

v. *Even if Lindsay’s Affidavits Contained Some Hearsay, this Would Not Prevent Their Consideration Altogether.*

Finally, Appellees argue that “Lindsay’s affidavits could not be considered,” insinuating that entire affidavits should not be considered if any portions contain inadmissible hearsay. (Est. Rep., 20). This is incorrect. *Even if the Court finds certain paragraphs to contain inadmissible hearsay, the remaining portions should still be considered.* See *Hartley v. Guthmann*, 532 N.W.2d 331, 334, 335-37 (Neb. 1995).

**2. *Mont. R. Evid. 606(b) does not Prohibit Consideration of Lindsay’s Juror Affidavits.***

Besides their hearsay arguments, Appellees baselessly claim that Mont. R. Evid. 606(b) prevents the Court from considering the Mauland and Wood affidavits and attempt to drastically narrow the scope of Rule 606(b)’s exceptions. (Est. Resp., 24-30). While ironically offering their own juror affidavits as evidence, see Doc. 299, Ex. A (Lehman Aff.), ¶¶ 4-5; Ex. B (Isaacs Aff.), ¶¶ 4-5; Ex. C (Deboer Aff.), ¶ 6; Ex. D (Agnew Aff.), ¶ 7, *Appellees’ position seems to be*

that juror affidavits are per se inadmissible to impeach jury verdicts.<sup>5</sup> Their position would make Rule 606(b) useless and is in direct odds with Rule 606(b)'s exception language, which permits testimony on “extraneous prejudicial information” and “outside influences” and with this Court’s existing precedent.

Rule 606(b) generally bars evidence of “internal” influences on jurors—testimony “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 juror to assent or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.” This Court has provided examples of evidence of “internal influences,” including personal beliefs and general observations. *See., e.g., Williams Feed, Inc. v. Dep’t of Transp.*, 2007 MT 79, ¶ 30, 336 Mont. 493, 155 P.3d 1228 (juror’s observation during lunch break); *State v. Kelman*, 276 Mont. 253, 262-63, 915 P.2d 854, 862-63 (1996) (juror comment that defendant owned a “strip club”).

Critically though, Rule 606(b) contains exceptions for “external” influences—testimony about statements and events occurring during deliberations that reflects “extraneous prejudicial information was improperly brought to the

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<sup>5</sup> Appellees cannot have it both ways. If their affidavit statements—concerning what influences were or were not brought to bear on the jury’s votes—are admissible under Rule 606(b), then so are Lindsay’s. Indeed, in light of *Stebner* and *Allers*, both Appellant’s and Appellees’ affidavit statements are admissible.

jury's attention" or that "any outside influence was brought to bear upon any juror." Rule 606(b)(1)-(2) (emphasis added).

In distinguishing between "external" and "internal" influences under Rule 606(b), this Court has struck an important balance. When largely adopting the 1972 federal rule in 1976, the Commission quoted the federal Advisory Committee: "[t]he values sought to be promoted by excluding [juror affidavits] include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.... On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations." Rule 606 Comm'n. Comment.

Several Montana Supreme Court cases establish that evidence of external influences, whether occurring during jury deliberations or not, falls squarely within Rule 606(b)'s exceptions. See e.g., *Allers*, 273 Mont., 6-9, 901 P.2d at 604-05 (considering juror affidavit discussing jury's resort to dictionary definition of "proximate cause" and suggesting testimony regarding such research was an "external influence"); *Stebner v. Associated Materials, Inc.*, 2010 MT 138, ¶ 20, 356 Mont. 520, 234 P.3d 94 (juror affidavit statements about internet research on "preponderance" amounted to "external influence" and were admissible, but

finding no prejudice because the definition did not add any new requirements to the jury instruction).

If Mauland's and Wood's statements, which primarily recount the "external" internet research and explain how the jury turned to the internet, do not amount to evidence of "extraneous prejudicial information" or "outside influence," it is difficult to imagine what kind of evidence could be external. Appellees ignore these statements, as there is simply no viable argument as to how they could be inadmissible under Rule 606(b).

Incidentally, Wood and Mauland both believed the jury's internet research had an impact on their votes. Mauland shared that "[a]fter the internet definitions were shared with the group, [the jurors] discussed the claim more, and then [they] voted on Lindsay's undue influence claim based on [their internet] research and understanding of the facts." (Doc. 297, Ex. D, ¶ 14) (emphasis added). Likewise, Wood indicated that, after the jury discussed the definition of "undue" he found on google, they all thought "there was some level of influence, but, based on [their internet] research and understanding of the facts from the trial, most of [them] did not think it hit the level of undue influence." (Doc. 297, Ex. F, ¶ 11) (emphasis added).

3. *The Jury's Consideration of Internet Definitions at Odds with Montana Law Necessitates a New Trial.*

After their unpersuasive evidentiary arguments, Appellees present few arguments about Lindsay's main appellate issue—the jury's misconduct in reviewing internet definitions of “undue influence” and “undue.” (Est. Resp., 31-35).

Likely recognizing that *Allers* controls, Appellants ignore its definitional analysis and instead attempt to persuade the Court that the instant case is like *Stebner*, arguing that the jury's internet research supposedly “did not prejudice Lindsay sufficiently to render the jury's verdict manifestly unjust to warrant the granting of a new trial.” (Est. Resp., 34). However, these arguments fall flat.

*Stebner* is easily distinguishable, and *Allers* is directly on point. In *Stebner*, one juror researched the definition of “preponderance” on the internet, located a definition that “matched the jury instruction[,]” and commented about it after the jury had already voted 11-1—resulting in no “new information” being presented to the jury. 2010 MT 138, ¶¶ 5, 21. Additionally, “preponderance” is merely part of the burden of proof in all civil cases and not part of a substantive claim.

Here, in contrast to *Stebner*, the definitions found by jurors did not match the court's instruction. Mauland recalled a shared definition that “undue influence” meant “something to the effect of being malicious or malicious sounding,” and Wood recalled hearing that “undue influence” was like “forcing someone to do

something or that it was hard pressure or a lot of pressure one way.” (Doc. 297, Ex. D, ¶ 13, Ex. F, ¶ 8.). After researching “undue,” Wood shared a definition that, to be undue, something had to be “unwarranted or inappropriate because excessive or disproportionate.” (Doc. 297, Ex. F, ¶ 10.)

First, the word “undue” is not specifically defined in the Court’s instructions or in Montana’s law on undue influence claims. Thus, the definition the jurors researched imposed additional requirements that the law does not. Second, to prove undue influence, Montana law requires proof of taking an unfair advantage of a weakness of mind, of necessities, or of distress, as shown by the presence of any of five factors (confidential relationship, physical limitations, mental limitations, unnatural disposition of property, and demands and importunities on a testator). *See Jury Instr. No. 16 (not requiring proof of anything “malicious,” “hard pressure,” or “excessive or disproportionate” influence).*

Appellees endeavor to argue that proving “unwarranted or inappropriate because excessive or disproportionate” is a lesser burden than proving taking an unfair advantage of a weakness of mind, necessities, or distress through the five factors. *See Est. Resp*, p. 35. Lindsay disputes that would be a lesser burden, but either way, the fact remains—the external definitions considered are materially different from the Court’s instruction and Montana law.

Indeed, Appellees themselves recognize how significant differing definitions of “undue influence” would be, as they initially filed a Notice of Cross Appeal on an undue influence jury instruction. Likely recognizing that parsing apart undue influence definitions would undercut their current arguments that the internet definitions were similar enough to the jury instructions not to cause Lindsay prejudice, Appellants have since dismissed their cross appeal.

In *Allers*, this Court explained that delving into individual jurors’ thought processes was not necessary because prejudice is presumed under the facts. *See* 273 Mont. at 8-9 (emphasis added) (“probable prejudice and potential injury was apparent from the fact that the jury used extraneous materials—two dictionaries—to redefine a critical element of [the] negligence case” through the words “proximate cause” and “prudence.”); *see also In re Collins’ Will*, 15 A.2d 98, 99-100 (N.J. Cir. Ct. 1940) (granting new trial where jury used dictionary to look up “undue influence” and suggesting prejudice from such conduct was “more than probable”); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 921-26 (10th Cir. 1992) (affirming new trial grant where jury researched “discriminate” and “prejudice” definitions, even though several jurors testified that “they did not remember having seen or heard these definitions”); *Tapanes v. State*, 43 So.3d 159, 163 (Fla. Dist. Ct. App. 2010) (holding district court abused its discretion in declining to grant new trial where juror conducted internet research on meaning of

“prudent,” and there was “no reasonable possibility that the juror’s misconduct...did not affect the verdict”); *Wisconsin v. Ott*, 331 N.W.2d 629, 631 (Wis. 1983) (emphasis added) (ordering new trial where juror researched “depraved” and located definitions that *in “all likelihood* centered on words such as ‘perverted,’ ‘corrupt,’ or ‘morally bad,’” and were therefore “*sufficiently broader* than the technical meaning embodied in the [jury] instruction to probably prejudice” criminal defendant); *Fulton v. Callahan*, 621 So. 2d 1235, 1247-1250 (Ala. 1993) (new trial where jurors found alternate definitions for key words in jury’s charge on punitive damages, including “oppressive,” “conspiracy,” “waste,” and “wantonness,” that were considered by some jurors).

Significantly, Appellees admit the jury’s internet research prejudiced Lindsay, *see* Est. Resp., p. 34, they simply contend the prejudice was not “sufficient[] enough” to warrant a new trial. *See id.* However, as explained by *Allers*, 273 Mont. at 8-9, and the other cases discussed in the preceding paragraph, improper *prejudice should be presumed* here.

Moreover, while a few jurors have contended the internet definitions did not affect their vote, *see* Est. Resp., p. 34 (relying on Doc., 299, Ex. A, ¶¶ 4-5, Ex. B, ¶¶ 4-5; Ex. C, ¶ 6; Ex. D, ¶ 7), it is impossible to separate whether the extrinsic information impacted their vote or not. *See Putro v. Baker*, 147 Mont. 139, 410 P.2d 717 (1966), *superseded on other grounds* by *Allers* (explaining extrinsic

evidence warranted new trial because “[t]here is no practicable method to so analyze the mental operation of the jurors to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court.”).

Finally, jurors Wood (who voted with Appellees) and Mauland (who voted with Appellant) both explained they did, in fact, rely upon the internet definitions in voting. See Doc. 297, Ex. F, ¶ 11; Ex. E, ¶ 14. Regardless of whether jurors believed the internet research impacted them, prejudice should be presumed.

**4. *Juror Carroccia Engaged in Misconduct by Considering External Information.***

Separate from juror internet research, juror Carroccia had a pre-existing opinion about Horatio’s capacity.

While Appellees primarily attack this argument on evidentiary grounds, see Est. Resp., pp. 21-23, possibly recognizing the weakness of their evidentiary arguments, Appellees suggest that Carroccia’s misconduct would not have warranted a new trial and that Lindsay somehow waived these arguments by not raising them during trial. See Est. Resp., pp. 37-39.

On the latter point, Appellees gloss over the fact that, because Carroccia did not disclose his pre-existing opinion during voir dire, it would have been impossible to challenge him for cause on that basis. Lindsay did not waive this argument.

Of course, Appellees likely advance this argument because they understand that, if the argument was not waived, it could warrant a new trial. *See Hartley*, ¶¶ 7, 11-12 (new trial when jury was exposed to brochure about harmful impacts of smoking, “the material or information relate[d] to an issue submitted to the jury,” and there was a “reasonable possibility that the brochure combined with evidence of plaintiff’s tobacco use during trial affected the jury’s verdict to plaintiff’s detriment”).

**5. *Jurors’ Failing to Disclose Extrinsic Knowledge of the Claims and Opinions About Them in Voir Dire is Misconduct.***

On a separate but related point, Carroccia’s and Agnew’s failures to disclose pre-existing biases during *voir dire* provide separate grounds for a new trial. Despite pointed questions regarding connections to the Burns family and pre-existing thoughts on Lindsay’s claims, Lindsay did not learn until after trial that Carroccia had formed a belief about Horatio’s capacity from his own interactions or that Agnew had a prejudice against claims like Lindsay’s.

Appellees’ applicable hearsay objections and waiver arguments, *see e.g.*, Est. Resp., pp. 37-39, have been addressed above. *See* § IV.A.1.ii-iii and § IV.A.4, *supra*.

Substantively, Appellees do not argue that Carroccia and Agnew failing to disclose these opinions during *voir dire* would not be prejudicial, *nor could they*. *See infra* § IV.A.6. Indeed, “*voir dire* ‘serves to protect [the right to an impartial

jury].... The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.” *Gonzales v. Thomas*, 99 F.3d 978, 983 (10th Cir. 1996) (quoting *McDonough Power Equip., Inc., v. Greenwood*, 464 U.S. 548, 554, 104 S. Ct. 845, 849, 78 L.Ed.2d 663 (1984)).

The only substantive argument Appellees make as to why the failures to disclose were not misconduct is that their pre-existing opinions equate to the general type of “knowledge and experience” that all jurors “bring to the courtroom.” Est. Resp., p. 37. Unfortunately, Carroccia’s opinion was not just about capacity generally—it was specifically about Horatio, and it went to one of the two ultimate issues, which Carroccia had already decided before trial.

Similarly, while Agnew disclosed his own past negative experiences with will contests, he did not disclose his pre-existing “prejudice” against claims like Lindsay’s. *See* Doc. 297, p. 8. These are unique and discrete opinions—particular to this case—not general knowledge, and not disclosing them was misconduct.

**6. *Biased Jurors Deprived Lindsay of a Fair Trial.***

Further, Carroccia’s actual bias and Agnew’s implied biases prevented Lindsay from receiving a fair trial. Though “there are no perfect trials,” *Brown v. U.S.*, 411 U.S. 223, 231-32 (1973), due process requires “a jury capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

With respect to Carroccia, his pre-existing opinion on Horatio’s capacity is the equivalent of having a juror who had seen the civil defendant run the red light that led to the accident—and who then offers to share his opinion during the accident trial with his fellow jurors. Anyone with such knowledge could actually be a witness and surely should not be a juror—yet that is what Carroccia did. That level of actual bias requires no inference to see. Carroccia was not impartial.

Agnew’s implied bias against claims like Lindsay’s deprived Lindsay of a fair trial. *See Gonzales v. Thomas*, 99 F.3d at 987 (quoting *United States v. Scott*, 854 F.2d 697, 699 (5th Cir.1988)) (“Though a juror might honestly believe she can be impartial, she nevertheless may have ‘such a close connection to the circumstances at hand that bias must be presumed.’”). Had such information been disclosed by either Carroccia or Agnew, the Court could have excused either juror.

**7. *Statements Outside of Court Belittling Lindsay’s Claims Prejudiced Lindsay.***

Appellees did not refute that witness Monfross made derogatory out-of-court statements about Lindsay, which made their way to juror Mauland during trial.. They merely raised their evidentiary and waiver arguments. *See Est. Resp.*, pp. 36-37; *see* Lindsay’s evidentiary and waiver responses in § IV.A.1.4 and § IV.A.4, which apply here as well. Substantively, jurors hearing that Lindsay supposedly has a lot of money presumably impacted the jury’s decisions as to her will contest, which, if successful, would provide her and her brother Seth Burns with

inheritance equal to Cameron's, instead of being disinherited. Further, hearing that Lindsay is supposedly greedy presumably negatively impacted jurors' perceptions of Lindsay.

**8. *Lindsay's Motion was Timely, and No Timeliness Argument Was Raised Before the District Court.***

Finally, Appellees offer five lines in their brief to make a baseless argument that "Lindsay's motion for new trial was untimely[.]" Est. Resp., 40. They claim that because Lindsay did not move for a new trial within 28 days after the trial ended, her motion was time-barred under Rule 59.

The Court should disregard this argument for two simple reasons.

First, Appellees never presented this argument to the district court. As the Court knows well, it "does not consider arguments raised for the first time on appeal." *Mountain W. Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 13, 365 Mont. 276, 281 P.3d 600.

Second, even if the Court were to consider timeliness, their position is inconsistent with the language of Mont. R. Evid. 59(b), which provides, in relevant part that "[a] motion for a new trial must be filed no later than 28 days after the entry of judgment." (emphasis added). Here, while the jury rendered a verdict on February 15, 2022, final judgment was not entered until November 7, 2022. (Doc. 338). Lindsay filed her Motion for New Trial on May 20, 2022—well in advance of the Court's entry of judgment.

**B. The District Court Erred in Denying Lindsay’s Motion to Strike and in Ignoring Applicable Rules of Civil Procedure.**

Separate from the Estate’s new trial arguments, Alison asks this Court to affirm the Motion to Strike denial, claiming her own participation was justified and not prejudicial.

***1. Alison’s Rule 19 Joinder Arguments Are Improper and of Limited Applicability.***

First, Alison suggests that her status as a devisee under the Alleged Will rendered her a “required party under Rule 19.” (Alison Resp., 14). This argument is flawed for several reasons. Initially, Alison never presented this argument to the district court, so her new argument may not be considered now. *See Mountain W. Bank, N.A.*, 2012 MT 132, ¶ 13.

Further, Alison likely only cited Rule 19 in an attempt 1) to convince the Court to apply an abuse of discretion standard and 2) to suggest her participation was somehow consistent with the Rules of Civil Procedure. As explained in the Brief, while decisions on motions to strike are typically reviewed for abuse of discretion, where a court’s decision on a motion to strike is grounded in a legal conclusion, *de novo* review is appropriate. *See Asset Recovery Contr., LLC v. Walsh Constr. Co.*, 980 N.E.2d 708, 732 (Ill. 1<sup>st</sup> DCA). Here, the district court’s denial of Lindsay’s Motion to Strike was grounded in several legal conclusions, namely that Alison did not have to intervene because she was an “interested

person” and because Lindsay made factual allegations involving her. Thus, *de novo* review remains appropriate.

Moreover, to the extent that Alison is trying to suggest her participation was somehow consistent with civil procedure, she fails to appreciate that Rule 19 joinder of non-parties is always “begun by the existing parties or the court.” *Corcon, Inc. v. Del. River Port Auth. of Pa.*, 2021 U.S. Dist. LEXIS 121297, at \*23, n. 10 (D.N.J. June 28, 2021).

Here, neither Lindsay nor the Estate moved to join Alison as a party, and while the Court did ultimately allow her participation, it took no action *sua sponte* to do so. Instead, Alison filed a late Response and summary judgment motion, without seeking permission from the Court. Lindsay moved to strike those filings, and then the Court denied that motion, reasoning that Alison was effectively a party.

Absent from the court’s discussion on Lindsay’s strike motion, however, is any citation to Rule 19, any indication of Alison being a “necessary party,” or any indication of joinder under Rule 19. Such joinder would not have been appropriate under Rules 19 or 20, given that Alison was already an interested party in the probate, her interests were represented by the Estate, and complete relief could be afforded without her, since no damages or equitable relief were sought.

**2. *Mont. R. Civ. P. 24 Intervention Requirements Still Apply to “Interested Persons” Like Alison.***

Next, Alison maintains that Rule 24 intervention requirements do not apply to her, as the Probate Code grants “interested persons” the “rights of application and petition,” including for an order of formal probate. (Alison Resp., 13) (citing § 72-3-105, MCA).

To begin, this argument directly conflicts with Alison’s arguments regarding Rule 19. In one breath, Alison suggests she was a non-party and the Court joined her under Rule 19, but in the next, she touts her status as an “interested person” and corresponding ability to file “petitions” that somehow rendered her a party to these proceedings to begin with.

Yet, even if the Court ignores the inherent conflict in these positions, Alison’s argument—that the Probate Code somehow granted her the right to move for summary judgment and file a response 20 months after Lindsay filed a Petition—strains logic. While § 72-3-105, MCA, grants “interested persons” such as Alison the right to “petition... for orders...,” notably absent from this provision is any suggestion that “interested persons” need not intervene to participate in will contests if they are not sued.

By contrast, “the rules of civil procedure... govern formal proceedings under [the Montana Uniform Probate Code].” § 72-1-207, MCA. Moreover, the

Probate Code, including the sections Alison cites, contains no indication that Rule 24 intervention requirements do not apply to “interested persons.”

Finally, Alison fails to appreciate that § 71-1-103(38), MCA, offers a specific and limited definition of “petition[,]” providing that such documents amount to “written request[s] to the court for an order after notice.” Certainly, in filing a Response to Lindsay’s Petition, Alison was not providing a written request to the Court for any sort of order. Instead, her actions were the *practical equivalent of someone who has not been sued filing an answer to a complaint in a civil case,* with Alison admitting or denying the allegations contained in Lindsay’s Petition. To the extent that the district court relied on Alison’s status as an “interested person,” and her corresponding ability to file petitions, in allowing her participation, it erred in doing so.

**3. *Lindsay Did Not Treat Alison as a Party, nor Did Lindsay’s Factual Allegations of Undue Influence Against Alison Make Her a Party.***

Alison claims that her participation was somehow justified given her centrality to “Lindsay’s legal theories and case” and because “Lindsay treated Alison as a party to her benefit.” (Est. Resp., 15-16). Apart from containing almost no citation to authority, these sections significantly misrepresent Alison’s role in this litigation.

Indeed, while Alison first claims her participation “directly resulted from Lindsay’s allegations and the contentions she raised in her Petition[,]” this

argument ignores that Lindsay only made *factual allegations of undue influence* involving Alison. *Lindsay did not seek any relief from her*, and Alison therefore was not defending against legal claims.

Further, while she was a devisee under the Alleged Will, any interests Alison had in these proceedings were adequately represented by her husband, in his capacity as PR of Horatio's Estate. Indeed, Cameron himself did not retain counsel to represent him individually as a beneficiary. The mere fact that Lindsay's Petition referenced Alison's and Cameron's actions hardly gave them rights to act as additional parties, participate in trial, and ultimately increase Lindsay's potential liability for attorney's fees in doing so.

Moreover, while Alison makes much of Lindsay serving discovery requests on her, she completely fails to mention that Lindsay only did so under protest and after Alison declared herself a litigation party. After Alison retained counsel in November 2020, Alison's counsel filed a notice of appearance on March 1, 2021. Alison then contended that she should be able to attend all depositions as a party, which Lindsay disputed.

In response, considering Alison's new position, and out of an abundance of caution as the district court had not yet considered Seth Burns' possible intervention or Alison's participation, Lindsay's counsel propounded discovery requests on Alison before the propound deadline "*under protest*," all while

maintaining that “subpoenas for documents and testimony [were actually] the proper vehicles through which she [could] request information...from Alison.” (Doc. 156, Ex. A). Lindsay most certainly did not “waive any objection to Alison’s participation.” (Alison Resp., 17).

**4. *Alison’s Response was Untimely.***

Further, as noted in the Brief, even if the Court concludes Alison did not need to intervene, it is unclear why the timing requirements for responsive pleadings imposed by Rule 12(a)(1)(A) would not apply to her. That is, to the extent she was permitted to respond, she was required to file her Response to Lindsay’s Petition within 21 days.

Nonetheless, despite these time limits, Alison again attempts to flout the Rules of Civil Procedure, arguing her response was timely under the holding of a case from more than a century ago and well before the adoption of the Uniform Probate Code. *See* Alison Resp., pp. 17. Indeed, Alison claims *Raleigh v. District Court of First Jud. Dist.*, 24 Mont. 306, 61 P. 991, 993 stands for the proposition that probate petitions and responses to petitions are authorized at any time “prior to the probate of a will.” (Alison Resp., p. 18). *It does not.*

First, the *Raleigh* Court held that “the statement of opposition to the probate of the will” may be filed at any time prior to the hearing of proof of the will. 24 Mont. 306, 61 P. 991, 993 (emphasis added). There is a fundamental difference

between filings opposing the probate of a will and filings responding to that opposition. There are statutorily prescribed times now for both, including under § 72-3-122, MCA, which governs contesting an informally probated will, and including Mont. R. Civ. Proc. 12(a), which applies to responding to a petition.

Second, the 1900 *Raleigh* court's holding has been limited by the adoption of the Probate Code, the timeframes provided therein, and by the Montana Rules of Civil Procedure.

In short, to the extent the district court concluded that *Raleigh* allowed for Alison's late-filed Response, despite Rule 12(a)'s requirements, it erred in so doing.

**5. *Lindsay's Motion Was Timely, or Alternatively, Should Have Been Permitted for Good Cause.***

Alison next asserts that, even if Lindsay's request to strike had merit, her Motion (filed within 20 days of knowing grounds for such a filing existed) was untimely under Rule 12(f); a position that is ironic given that Alison filed her own Response approximately 20 months late.

Mont. R. Civ. P. 12(f), which is identical to the corollary federal rule, provides that the "Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act (1) on its own; or (2) on motion made by a party" within 21 days of the pleading. However, Mont. R. Civ. P. 6(b), which is also identical to the corresponding

federal rule, provides that a “court may, for good cause, extend the time... (B) on motion made after the time has expired if the party failed to act because of excusable neglect.”

Here, the district court did not indicate its denial of Lindsay’s Motion to Strike was at all grounded on timeliness. However, even if the Court considered this argument, Lindsay filed her Motion to Strike within 21 days of learning of grounds for such a motion. Until the Court’s June 29, 2021, Order Denying Seth’s Motion to Intervene, the Court had not created the law of the case that Seth would not be allowed to participate because the Court found that the 2016 Alleged Will is not severable, reasoning that Lindsay could adequately represent Seth’s interests. Once Lindsay learned of that decision, however, it was clear those same reasons would support a motion to strike Alison’s filings. Accordingly, within 21 days of that Order, on July 19, 2021, Lindsay filed her Motion to Strike.

Indeed, Lindsay waiting until after the Court had ruled on Seth’s participation provided “good cause” under Rule 6(b) to extend the Rule 12(f) timeframes.

**6. *Alison’s Improper Participation Warrants a New Trial.***

To conclude her arguments, without any citation to authority, Alison baldly asserts that, even if “the District Court should have granted [Lindsay’s] Motion to Strike, Lindsay would not be entitled to a new trial.” (Alison Resp., 20).

In fact, *the law provides the opposite*. Mont. R. Civ. P. 61 explains that error in lower court proceedings may serve as a basis for a new trial if that error affects a party's "substantial rights." See Rule 61 (discussing harmless error doctrine); see also *Prete v. Bradbury*, 438 F.3d 949, 959-960 (9th Cir. 2006) (applying harmless error analysis in considering whether erroneous grant of intervention warranted new trial).

Here, Lindsay's "substantial rights" were affected by Alison's participation. First, because Alison did not file a Response until 20 months after Lindsay initiated this Will Contest, because the motions filing deadline was June 22, 2021, and because the lower court did not determine Alison's status until September 13, 2021, Lindsay could not file any dispositive motions regarding Alison.

Second, and significantly, the Court's motion to strike ruling meant that Alison could attend the entire trial, hear testimony from other witnesses (including her husband, Estate PR Cameron), and polish and tailor her own testimony accordingly. Given that Alison was a key player in her father-in-law's estate planning decisions, and her actions were central to Lindsay's theory of undue influence, it is impossible to estimate just how much she benefited from this unique ability to prepare and strategize, when she would have otherwise been subject to a witness sequestration order. See *Hazlip v. Davis*, 2017 U.S. Dist. LEXIS 158541, at \*57 (S.D. Tex. Sept. 27, 2017) (witness sequestration serves to

“prevent witnesses from altering their testimony, consciously or not, based on other witnesses’ testimony”).

Third, despite the Estate’s assertion that Alison’s ability to defend the Alleged Will did “not affect the Estate’s interests” (Est. Resp., 2), logic reveals that having two parties, rather than one, to oppose Lindsay’s claims, allows for a cumulative impact that prejudiced Lindsay.

Certainly, these issues impacted Lindsay’s “substantial rights” under Rule 61, meaning that the Court’s mistake in allowing Alison to participate was not harmless and requires a new trial.

**C. The District Court Erred as a Matter of Law in Awarding Alison Costs and Attorney’s Fees, Thereby Punishing Lindsay for Bringing a Valid Will Contest.**

By seeking affirmation of the fees and costs award to her, Alison effectively asks this Court to punish Lindsay with almost \$100,000 more fees and costs owing than the Estate’s approximately \$450,000 claim, which is particularly inappropriate where the judgment does not include any damages and is entirely fees and costs.

**1. Alison is Not Entitled to Fees and Costs under § 72-12-206, MCA.**

Alison makes statutory construction and legislative intent arguments that recovery of her costs and fees was mandatory under the more than 100-year-old § 72-12-206, MCA, as she allegedly “defend[ed] the validity” of the will. (Alison Resp., 22-24).

Section 72-12-206, MCA, only allows recovery of costs and fees by those “defending the validity or probate of the will.” (emphasis added). Regarding possible will defenders, other portions of the Code clarify that the Estate PR has the duty to “prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate[.]” § 72-3-613(22), MCA (emphasis added); *see also McCannon v. McCannon*, 937 P.2d 1375, 1380 (Ariz. Ct. App. 1996) (the PR has the “duty to defend in a will contest.”); *In re Estate of Shaughnessy*, 702 P.2d 132, 135 (Wash. 1985) (same).

Here, as detailed in Brief and in the district court’s order permitting her participation (Doc. 187), Alison was allowed to participate to represent her interests as a beneficiary and/or to clear her name in factual allegations. She was not serving as the Estate PR, and any will defense she performed was duplicative. If this Court were to adopt the District Court’s interpretation, will contestants could be liable, not only to the Estate PR, but also to any number of would-be heirs, devisees, creditors, or anyone else who amounts to “interested persons” under § 72-1-103(25), MCA, and who may join in to “defend the will.”

**2. *In Re Baxter’s Estate Provides Analogous Precedent.***

In *Baxter’s Estate*, this Court considered whether a “mere devisee” who sought individual representation in a will contest could recover his attorney’s fees under then-Sections 10047 and 10372 of the Montana Code. *In re Baxter’s Estate*,

94 Mont. 257, 22 P.2d 182, 186-87 (1933). Section 10047 provided that “fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed.” *Id.*, 187. On the other hand, Section 10372 granted district courts discretion “to order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.” *Id.*

In determining whether the devisee could recover fees under Section 10047, the Court offered little analysis, but did note it was “plain that it [did] not justify the allowance of [the devisee’s] fee.” *Id.* As to Section 10372, the Court provided more analysis, noting “[t]he fact that an attorney’s services in managing a cause are as beneficial to another party as to his own client will not raise an assumption that such other party is liable therefor.” *Id.*, 188.

While *Baxter’s Estate* did involve a request under Section 10372, Alison completely misses that the case also involved a request for fees under Section 10047, the predecessor to § 72-12-206. Because the Court in *Baxter* denied recovery to an individual beneficiary under Section 10047, this Court should similarly deny recovery to Alison under § 72-12-206.

**3. *Montana Caselaw and Public Policy Do Not Support an Award of Fees and Costs to Alison.***

Further, while Alison suggests this Court more recently allowed recovery by multiple “defenders” in a will contest, she fails to realize that *In re Estate of Lande*

involved the award of costs and attorney's fees under § 72-12-206 to *co-personal representatives*. 1999 MT 179, ¶¶ 31-33, 295 Mont. 277, 983 P.2d 316.

Finally, Alison claims public policy considerations weigh in her favor, arguing that Lindsay's "failed will contest" should not reduce Horatio's gift to her. (Alison Resp., 30). To the extent Alison was worried about reducing her alleged devise (which is a piece of property, not dollars in a bank account) with legal costs, she did not have to involve herself voluntarily in the litigation, where the Alleged Will was already being defended by the Estate.

Put simply, if there is any sound public policy rationale underlying § 72-12-206, it is to require unsuccessful will contestants to replenish Estate funds incurred by an Estate during a will contest. An interpretation allowing individual beneficiaries to recover costs and fees stretches the statute beyond that rationale and punishes litigants who bring meritorious will contests, but who are unsuccessful.

**D. The District Court Erred in its Interpretation of § 25-9-205(a), MCA, thereby Punishing Lindsay with Rising Interest Rates.**

Finally, the Estate asserts that post judgment interest will fluctuate according to various prime rates in place during each calendar year of Lindsay's appeal—an approach that serves to punish Lindsay further with the risk of rising interest rates.

The Court is obligated to consider “the larger statutory scheme” of § 25-9-205(a). *See Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 66.

Appellees’ reading of § 25-9-205, MCA, completely ignores the statutory reference to the “day judgment is entered.” While subsection (b) does indicate that “[t]he 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[,]” subsection 1(a) fixes the rate “on the day judgment is entered”—to the rate that was in place on January 1 of the year judgment is entered. Appellees offer no explanation as to why this reference would exist if it did not result in a fixed interest rate, and there is no such explanation.

Moreover, while Appellees claim legislative history somehow supports their interpretation, their citations are selective at best. *See* Brief, § VIII.D. Plainly, Senate Bill 293 was meant to do away with unusually high post-judgment interest rates. Indeed, while judgment interest is intended to compensate a judgment creditor, its purpose is also “not to punish a debtor for exercising his right to appeal.” *Stephenson v. Leboeuf*, 2003 Tex. App. LEXIS 7967, at \*9 (Tex. Ct. App. Sept. 11, 2022). Additionally, the Estate argues that Lindsay would be receiving a “windfall” from interest-savings, Est. Resp., 44, but she could have easily suffered under their approach if interest rates went down.

## V. CONCLUSION

For the reasons discussed in the Brief and reiterated herein, this Court should reverse the district court on the four issues presented on appeal. And in particular, given the significant evidence of juror misconduct presented by Lindsay, and the prejudice she suffered as a result of Alison's participation, the Court should remand for a new trial without Alison acting as a party.

**RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of September, 2023.

MOULTON BELLINGHAM PC

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## CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 7,520 words, excluding the Appendix, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

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Service Method: eService

Electronically signed by Carrie Nance on behalf of Bobbi K. Owen  
Dated: 09-01-2023