IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA-23-0170

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MONTY CLARENCE PETERSEN,

*Plaintiff and Appellant,*

*v.*

JENNIFER J. SIMON, APRN,

*Defendant and Appellee.*

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# APPELLEE JENNIFER J. SIMON'S RESPONSE BRIEF

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On Appeal from the Fourth Judicial District Court, Missoula County, Montana
Cause No. DV-20-112
Honorable Leslie Halligan, Presiding

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## STATEMENT OF ISSUES

1. Whether the district court correctly concluded that the service deadline statute applicable to medical malpractice suits, Montana Code Annotated § 25-3-106**{** TA \l "Montana Code Annotated § 25-3-106" \s "§ 25-3-106" \c 1 **}**, does not limit the court's authority to dismiss a case *with* prejudice if the defendant has appeared and other substantive law supports a with-prejudice dismissal.

2. Whether the district court was correct that filing a new suit based on the same claim would be futile:

   a. because dismissal without prejudice under § 25-3-106**{** TA \s "§ 25-3-106" **}** would erase any tolling effect from the filing of the original Complaint, resulting in the expiration of Montana Code Annotated § 27-2-205(1)**{** TA \l "Montana Code Annotated § 27-2-205(1)" \s "§ 27-2-205(1)" \c 1 **}**'s two-year statute of limitations in January 2020; or, alternatively,

   b. because the two-year statute of limitations was tolled by the filing of the original Complaint, but the clock resumed running when the time limit for service under § 25-3-106**{** TA \s "§ 25-3-106" **}** elapsed, resulting in the expiration of the limitation period in July 2020.

3. Whether the district court correctly concluded that the five-year statute of repose for medical malpractice claims under Montana Code Annotated § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}** applies and time-bars this claim.

4. Whether the district court correctly concluded that the "savings" statute, Montana Code Annotated § 27-2-407**{** TA \l "Montana Code Annotated § 27-2-407" \s "§ 27-2-407" \c 2 **}**, affords Plaintiff-Appellant Monty Petersen no relief because he failed to diligently prosecute his claim and the court's Order Dismissing and Closing Case was a final judgment on the merits.

## STATEMENT OF THE CASE

This is a medical malpractice case that was dismissed with prejudice by the district court on the motion of Defendant-Appellee Jennifer Simon, APRN ("Simon") under Montana Rules of Civil Procedure 12(b)(5)**{** TA \l "Montana Rules of Civil Procedure 12(b)(5)" \s "Rule 12(b)(5)" \c 4 **}** and (6)**{** TA \l "Montana Rule of Civil Procedure 12(b)(6)" \s "Rule 12(b)(6)" \c 4 **}**. The court held § 25-3-106's six-month time limit for serving medical malpractice complaints**{** TA \s "§ 25-3-106" **}**, required dismissal of the Complaint because Plaintiff-Appellant Monty Petersen ("Petersen") effected service over 29 months late. The dismissal was with prejudice because the court held filing a new complaint would be futile: the dismissed Complaint could not be considered to toll the statute of limitations, so the limitations period expired January 28, 2020. Other courts have held that a complaint that is subject to dismissal for untimely service ***does*** toll the statute of limitations, but only until the time limit for service expires. Under either approach, the statute of limitations in this case ran in 2020, and now the five-year statute of repose has also

run. Petersen cannot seek refuge in the savings statute because he failed to diligently prosecute this action and the dismissal with prejudice was a final judgment on the merits.

## STATEMENT OF FACTS

Simon is an Advanced Practice Registered Nurse who treated Petersen after an L4-L5 decompression interbody fusion on January 25, 2018. Compl. & Demand Jury Trial ¶¶ 2, 4–5, 10–11, Jan. 27, 2020 (Dist Ct. Doc. No. ("Doc.") 1). The Complaint alleges that Simon prescribed Petersen a medication that caused him to develop a post-operative epidural hematoma. Doc. 1, ¶¶ 5–11. On this basis, the Complaint alleges she breached her "profession[al] duty of care while providing him medical services and treatment." Doc. 1, ¶¶ 10–13. The parties agree the Complaint alleges a claim of medical malpractice and that, for purposes of a motion to dismiss, the allegations must be accepted as true. Appellant's Opening Br. 3, July 24, 2023 ("Appellant's Br.").

According to the Complaint, Petersen discovered his injury the day he presented to the Emergency Department and a hematoma was diagnosed. Doc. 1, ¶¶ 6–7. Although the Complaint is silent as to the date, Petersen has repeatedly admitted in briefing that he discovered the injury January 28, 2018. Appellant's Br. 7 n.1; Pl.'s Resp. Def.'s Mot. Dismiss 1–2, Feb. 16, 2023 (Doc. 6).

Petersen filed the Complaint January 27, 2020, which he concedes was one

day before the two-year statute of limitations was to expire. Doc. 1; Appellant's Br. 7 n.1. Under § 25-3-106**{** TA \s "§ 25-3-106" **}**, Petersen had six months to timely serve the Complaint. However, he did not serve it by July 27, 2020. In fact, the Summons was not even issued until October 31, 2022, and service was not effected until January 9, 2023—over 29 months after the service deadline elapsed and nearly five years after Petersen was allegedly injured. Summons Issued Jennifer J. Simon, Oct. 31, 2022 (Doc. 2); Cert. Costs & Return Serv., Jan. 9, 2023 (Doc. 4). Petersen has offered no explanation for the delay in service, Appellant's Br. 3, and he did not seek an enlargement of time under Montana Rule of Civil Procedure 6(b)**{** TA \l "Montana Rule of Civil Procedure 6(b)" \s "Rule 6(b)" \c 4 **}**.

Simon moved to dismiss due to the delay in service and asked for dismissal with prejudice because refiling would be futile due to the expiration of both the statute of limitations and the statute of repose. Mot. Dismiss Def. Simon & Br. Support 2, Feb. 2, 2023 (Doc. 5). The district court agreed, entering an Order Dismissing and Closing Case on March 10, 2023. *See* Petersen App. 2: Order Dismissing & Closing Case, Mar. 10, 2023 ("Order") (also Doc. 9). The case was dismissed with prejudice, and judgment was entered March 15, 2023, Doc. 11. This appeal followed.

For reference, the pertinent dates are restated below:

//

| Date | Description |
|---|---|
| January 25, 2018 | Petersen's surgery |
| January 28, 2018 | Injury diagnosed/discovered |
| January 27, 2020 | Complaint filed |
| July 27, 2020 | Six-month service deadline |
| October 31, 2022 | Summons issued |
| January 9, 2023 | Complaint served |
| March 10, 2023 | Complaint dismissed |

## STANDARD OF REVIEW

A de novo standard of review applies to each of the issues raised by this appeal. District court rulings on motions to dismiss under Montana Rule of Civil Procedure 12(b)(5)**{** TA \s "Rule 12(b)(5)" **}** are reviewed for correctness. *Nolan v. RiverStone Health Care*, 2017 MT 63, ¶ 16, 387 Mont. 97, 391 P.3d 95**{** TA \l "*Nolan v. RiverStone Health Care*, 2017 MT 63, 387 Mont. 97, 391 P.3d 95" \s "Nolan" \c 1 **}**. District court rulings on motions to dismiss under Montana Rule of Civil Procedure 12(b)(6)**{** TA \s "Rule 12(b)(6)" **}** are also reviewed de novo. *Tai Tam, LLC v. Missoula Cnty., by and through Bd. of Cnty. Comm'rs*, 2022 MT 229, ¶ 8, 410 Mont. 465, 520 P.3d 312**{** TA \l "*Tai Tam, LLC v. Missoula Cnty., by and through Bd. of Cnty. Comm'rs*, 2022 MT 229, 410 Mont. 465, 520 P.3d 312" \s "Tai Tam" \c 1 **}**. The Court will uphold a district court's order of dismissal '"when the complaint on its face establishes that the claim is barred by the statute of limitations."' *Selensky-Foust v. Mercer*, 2022 MT 97, ¶ 7, 408 Mont. 488, 510 P.3d 78**{** TA \l "*Selensky-Foust v. Mercer*, 2022 MT 97, 408 Mont. 488, 510 P.3d 78" \s

"Selensky-Foust" \c 1 **}** (quoting *Beckman v. Chamberlain*, 673 P.2d 480, 482 (1983)). The Court also reviews de novo whether the district court interpreted and applied statutes correctly. *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 12, 390 Mont. 352, 413 P.3d 813**{** TA \l "*Hines v. Topher Realty, LLC*, 2018 MT 44,12, 390 Mont. 352, 413 P.3d 813" \s "Hines" \c 1 **}** (citing *State v. Triplett*, 2008 MT 360, ¶ 13, 346 Mont. 383, 195 P.3d 819).

## SUMMARY OF ARGUMENT

In 2015, the Montana Legislature reduced the statute of limitations for medical malpractice actions from three years to two, § 27-2-205(1)**{** TA \l ", § 27-2-205(1)" \s ", § 27-2-205(1)" \c 1 **}**, and enacted a six-month time limit for serving medical malpractice complaints, § 25-3-106**{** TA \s "§ 25-3-106" **}**. This case concerns the interplay between these statutes, as well as § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}**'s statute of repose and Montana's "savings" statute, § 27-2-407**{** TA \s "§ 27-2-407" **}**. Can a plaintiff unilaterally extend the statute of limitations by filing a complaint and then failing to timely serve it? Having taken no action to prosecute his claim for nearly three years, can he now avail himself of even more time by falling back on the savings statute? Statutory construction, the policies behind the deadlines, this Court's precedent, and persuasive authority from other state and federal courts counsel against such an absurd result.

Yet that is exactly what Petersen seeks here. He concedes his Complaint was

subject to mandatory dismissal because he failed to serve it within the six-month time limit provided under § 25-3-106**{** TA \s "§ 25-3-106" **}**. Doc. 6 at 2. But he insists that the statute of limitations has been tolled ever since he filed the Complaint on January 27, 2020, and that § 25-3-106**{** TA \s "§ 25-3-106" **}** required that the dismissal be *without* prejudice.

A plain reading of § 25-3-106**{** TA \s "§ 25-3-106" **}** shows the statute does not preclude a court from dismissing a case with prejudice when a defendant has appeared and such relief is proper under other substantive law. Petersen's attempt to rewrite the statute should be rejected and regular rules of statutory construction applied. The Legislature made clear that failure to comply with § 25-3-106**{** TA \s "§ 25-3-106" **}** does not, on its own, support a with-prejudice dismissal—unlike prior service deadlines interpreted by this Court—but a defendant may seek, and a court consider, other grounds for a final judgment on the merits. In this case, the two-year statute of limitations and five-year statute of repose for medical malpractice actions enacted at § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}** have both expired.

Although a statute of limitations is tolled by the commencement of an action, Montana statutes are silent as to what happens to the limitations clock when a plaintiff fails to effect service by the statutory deadline. The district court reasoned that the dismissal mandated under the service statute, § 25-3-106**{** TA \s "§ 25-3-106" **}** ("[if service is not timely effected], the court, on motion or on its own

initiative, ***shall dismiss*** the action . . . "), would render the Complaint a legal nullity, erasing any tolling effect it would have had if Petersen had timely served it. Doc. 9 at 9. Thus, the two-year statute of limitations elapsed January 28, 2020, making refiling the claim in 2023 futile.

The district court could have reached the same result by means of a different calculation. This alternative approach was recently followed by the Flathead County District Court, which held that a medical malpractice complaint that was not timely served tolled the statute of limitations during the service period, but the clock resumed running after those six months elapsed. Under this reasoning, the two-year statute of limitations in this case would have expired July 28, 2020.

Under either calculation, Petersen's suit is time-barred. Both approaches comport with this Court's treatment of other service deadlines. The Court has repeatedly interpreted such deadlines to have meaning and teeth. The deadlines are intended to promote the diligent prosecution of actions and to suppress stale claims. Allowing a plaintiff's lack of diligence and failure to comply with a clear, statutory deadline to "pause" the statute of limitations indefinitely would be contrary to the purpose of both the service deadline and the limitations period. When a complaint is not served by the deadline, the suit is not properly placed at issue, and the statute of limitations continues to run, either without stopping or when the service deadline passed. Both approaches are also supported by federal and state case law from other

jurisdictions.

This suit is also barred by the five-year statute of repose applicable to medical malpractice actions. The alleged injury occurred January 25, 2018, and Petersen has not alleged any of the bases for tolling the statute under § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}**. Furthermore, Petersen can find no sanctuary in the savings statute. His failure to serve his Complaint on time or refile it within the two-year statute of limitations was a failure to prosecute his claim within the timeframes set by the Legislature, and dismissal with prejudice due to the expiration of the statute of limitations and the statute of repose is a judgment on the merits of the case.

The district court's judgment in this case should be upheld, and the proper approach to construing these statutes clarified. Simon is not responsible for Petersen's lack of diligence and should not be forced either to re-brief these issues in response to a second complaint or to litigate a stale claim.

## ARGUMENT

In 2015, the Montana Legislature enacted the Montana Health and Economic Livelihood Partnership (HELP) Act, S.B. 405, 2015 Leg., 64th Reg. Sess., Ch. 368 (MT 2015)**{** TA \l "Montana Health and Economic Livelihood Partnership (HELP) Act. S.B. 405, 2015 Leg., 64th Reg. Sess., Ch. 368 (MT 2015)" \s "HELP Act" \c 3 **}**. In relevant part, the HELP Act**{** TA \s "HELP Act" **}** shortened the statute of limitations for medical malpractice actions from three to two years, *id.* § 21**{** TA \s "HELP Act" **}**, and instituted a six-month time limit for serving medical malpractice complaints, *id.* § 19**{** TA \s "HELP Act" **}**. These time limits were in place, respectively, when Petersen discovered his injury on January 28, 2018, Mont. Code Ann. § 27-2-205(1) (2017)**{** TA \l "Montana Code Annotated § 27-2-205(1) (2017)" \s "Mont. Code Ann. § 27-2-205(1) (2017)" \c 1 **}**, and when he filed his Complaint January 27, 2020, Mont. Code Ann. § 25-3-106 (2019)**{** TA \l "Montana Code Annotated § 25-3-106 (2019)" \s "Mont. Code Ann. § 25-3-106 (2019)" \c 1 **}**.

Petersen filed the Complaint within the statute of limitations, with one day to spare. Appellant's Br. 2, 7. However, he failed to serve the Complaint within the six-month time limit prescribed by § 25-3-106**{** TA \s "§ 25-3-106" **}** and, as Mr. Petersen concedes, the district court was "bound to dismiss this matter" under that

statute. Doc. 6 at 2.[1] At issue below and on appeal is what effect the untimely service had on the statute of limitations and statute of repose found at § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}**. Petersen contends both were tolled from the moment he filed the Complaint, allowing him one day to refile once this appeal is concluded. He also insists Montana's savings statute, § 27-2-407**{** TA \s "§ 27-2-407" **}**, allows him yet another year beyond that before he is required to refile. As held by the district court, however, statutory construction, legislative policy, this Court's precedent, and persuasive authority from other jurisdictions do not allow a plaintiff to use his own lack of diligence to unilaterally extend the Legislature's chosen time limits for pursuing a suit.

The interplay between these time limits is an issue of first impression for this Court. Although raised in a writ for supervisory control, the writ was denied, and that case is still proceeding in district court. *Sironi v. Mont. 2d Jud. Dist. Ct.*, 401

[1] Petersen argues on appeal that he satisfied the service time limit under Montana Rule of Civil Procedure 4(t)**{** TA \l "Montana Rule of Civil Procedure 4(t)" \s "Rule 4(t)" \c 4 **}**, but he failed to raise this argument below. Regardless, Rule 4(t)**{** TA \s "Rule 4(t)" **}** does not apply since a specific statute, § 25-3-106**{** TA \s "§ 25-3-106" **}**, lays out an inconsistent procedural rule for medical malpractice suits. *Buck v. Buck*, 2014 MT 344, ¶ 19, 377 Mont. 393, 340 P.3d 546**{** TA \l "*Buck v. Buck*, 2014 MT 344, 377 Mont. 393, 340 P.3d 546" \s "Buck" \c 1 **}** (holding "court-made rules. . . cannot confer jurisdiction or nullify inconsistent statutory provisions") (citations omitted); *Sharp v. Eureka Town Council*, 2014 MT 216, ¶ 11, 376 Mont. 221, 331 P.3d 840**{** TA \l "*Sharp v. Eureka Town Council*, 2014 MT 216, 376 Mont. 221, 331 P.3d 840" \s "Sharp" \c 1 **}**; *In re Est. of Spencer*, 2002 MT 304, ¶ 13, 313 Mont. 40, 59 P.3d 1160**{** TA \l "*In re Est. of Spencer*, 2002 MT 304, ¶ 13, 313 Mont. 40, 59 P.3d 1160" \s "In re Est. of Spencer" \c 1 **}**.

Mont. 555, 472 P.3d 1150 (2020) (Table)**{** TA \l "*Sironi v. Mont. 2d Jud. Dist. Ct.*, 401 Mont. 555, 472 P.3d 1150 (2020) (Table)" \s "Sironi" \c 1 **}**; *see* Order, *Sironi v. Mont. 2d Jud. Dist. Ct.*, No. OP 20-272, 2020 WL 4334900 (Mont. July 28, 2020)**{** TA \l "*Sironi v. Mont. 2d Jud. Dist. Ct.*, No. OP 20-272, 2020 WL 4334900 (Mont. July 28, 2020)" \s "Sironi 2" \c 1 **}**; *see also* Register of Action, *Hamner v. St. James Healthcare*, No. DV-16-262 (Mont. 2d Jud. Dist. Ct.)**{** TA \l "*Hamner v. St. James, Healthcare*, No. DV-16-262 (Mont. 2d Jud. Dist. Ct.)" \s "Hamner" \c 1 **}**, FullCourt Enterprise, https://dcportal.pubcourts.mt.gov/fullcourtweb/start.do, (search Court field by "Butte-Silver Bow District Court" and then search Last Name field for "Sironi"). The issue was also raised, but not reached, in *Laedeke v. Billings Clinic*, 2022 MT 171N, ¶ 12, 515 P.3d 836 (Table)**{** TA \l "*Laedeke v. Billings Clinic*, 2022 MT 171N, ¶ 12, 515 P.3d 836 (Table)" \s "Laedeke" \c 1 **}**. Recently, the issue was also addressed by Judge Heidi Ulbricht in the Eleventh Judicial District; her orders dismissing an untimely-served complaint with prejudice due to the expiration of the statute of limitations have also been appealed, but no briefs have yet been filed. *See* Simon Supp. App. 1: Order & Rationale on [Def.'s] Mot. Dismiss Prejudice at 5, *Estate of Greg Phillips v. Anna Robbins, M.D.*, No. DV-2022-032(C) (Mont. 11th Jud. Dist. Ct. Apr. 28, 2023)**{** TA \l "*Estate of Greg Phillips v. Anna Robbins, M.D.*, No. DV-2022-032(C) (Mont. 11th Jud. Dist. Ct. Apr. 28, 2023)" \s "Estate of Greg Phillips" \c 1 **}**; Simon Supp. App. 2: Order & Rationale on Pl.'s Mot. Alter, Amend,

Set Aside Order, *Estate of Greg Phillips{* TA \s "Estate of Greg Phillips" *}* *v. Anna Robbins, M.D.*, No. DV-2022-032(C) (Mont. 11th Jud. Dist. Ct. June 23, 2023).

To give effect to the time limits established by the Legislature, the Court should uphold the district court's dismissal of this case with prejudice. The case also presents an opportunity to clarify whether Montana parties and courts should employ the approach adopted by the Honorable Leslie Halligan, or that adopted by the Honorable Heidi Ulbricht, when evaluating the interplay between the service deadline and statute of limitations for medical malpractice actions.

## I. The district court correctly concluded that § 25-3-106{ TA \s "§ 25-3-106" } does not limit a court from dismissing a case with prejudice when the defendant seeks such relief and it is supported by other substantive law.

Petersen contends that the service-deadline statute for medical malpractice actions "precludes" a court from ever dismissing a case with prejudice when a plaintiff has failed to timely effect service. Appellant's Br. 9. He insists the statute does not "confer[] authority to a district court to dismiss with prejudice." Appellant's Br. 12 (emphasis removed). Petersen misapprehends the source of the court's authority. The service-deadline statute contains no language ***restraining*** a court from dismissing a case with prejudice if such relief is sought by the defendant and is authorized by ***other*** substantive law. In this case, the statute of limitations and statute of repose for medical malpractice actions, § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}**, allow for dismissal with prejudice because Mr. Petersen can no longer state a claim

upon which relief can be granted.

In interpreting statutes, the Court's "function . . . is to effectuate the intent of the legislature." *In re Denial of Appl. for Issuance of One Original (New) On-Premises Consumption Beer/Wine License, Town Pump of Wolf Point*, 267 Mont. 298, 301, 883 P.2d 833, 835 (1994)**{** TA \l "*In re Denial of Appl. for Issuance of One Original (New) On-Premises Consumption Beer/Wine License, Town Pump of Wolf Point*, 267 Mont. 298, 883 P.2d 833, (1994)" \s "In re Denial of Appl. for Issuance of One Original (New) On-Premises Consumption Beer/Wine" \c 1 **}**. '"[The] primary tool for ascertaining the legislature's intent is the plain meaning of the words used."' *Id{* TA \s "In re Denial of Appl. for Issuance of One Original (New) On-Premises Consumption Beer/Wine" ***}***. (citation omitted). Statutes are read and construed as a whole, both to give effect to the purpose of the statute and to avoid an absurd result. *City of Missoula v. Pope*, 2021 MT 4, ¶ 10, 402 Mont. 416, 478 P.3d 815**{** TA \l "*City of Missoula v. Pope*, 2021 MT 4, 402 Mont. 416, 478 P.3d 815" \s "Pope" \c 1 **}**.

The service-deadline statute provides:

> A plaintiff in a medical malpractice action shall accomplish service within 6 months after filing the complaint. If the plaintiff fails to do so, the court, on motion or on its own initiative, ***shall dismiss the action without prejudice unless the defendant has made an appearance***.

Mont. Code Ann. § 25-3-106**{** TA \s "§ 25-3-106" **}** (emphasis added). The district court correctly concluded that the phrase "the court . . . shall dismiss the action

without prejudice" is modified by the attached, subordinating phrase, "unless the defendant has made an appearance." That is, the second sentence of § 25-3-106**{** TA \s "§ 25-3-106" **}** states that an untimely-served complaint "shall be" dismissed "without prejudice" ***except***, if the defendant has made an appearance, the dismissal is not required to be without prejudice.[2]

Moving the modifying phrase, "unless the defendant has made an appearance," to the front of the ***preceding*** sentence in the statute, as Petersen proposes, is not a "reasonable" interpretation of the statute. Appellant's Br. 10. "Unless" is a subordinating conjunction that indicates the phrase it introduces modifies and indeed provides an exception to the dependent phrase, to which it is conjoined. *See Town Pump of Wolf Point***{** TA \s "In re Denial of Appl. for Issuance of One Original (New) On-Premises Consumption Beer/Wine" ***}***, 883 P.2d at 835 (holding that an "'unless' clause . . . constitutes a condition precedent" to the modified phrase). *See also* Bryan A. Garner & Antonin Scalia, J., *Reading Law: The Interpretation of Legal Texts*, 126–27 (Thomson West, 2012)**{** TA \l "Bryan A.

[2] The Legislature's inclusion of language clarifying that failure to timely serve a complaint does not automatically result in a "with prejudice" dismissal was likely intended to distinguish the consequences of violating this service deadline from the consequences of violating earlier service deadlines. *See, e.g.*, *First Call, Inc. v. Cap. Answering Serv., Inc.*, 271 Mont. 425, 428, 898 P.2d 96, 97-98 (1995)**{** TA \l "*First Call, Inc. v. Cap. Answering Serv., Inc.*, 271 Mont. 425, 428, 898 P.2d 96, 97-98 (1995)" \s "First Call" \c 1 **}** (construing then-effective Rule 41(e)**{** TA \l "Montan Rule of Civil Procedure 41(e)" \s "Rule 41(e)" \c 4 **}** to prevent refiling of a complaint that was not timely served even if the statute of limitations had not yet run).

Garner & Antonin Scalia, J., *Reading Law: The Interpretation of Legal Texts*, 126–27 (Thomson West, 2012)" \s "Bryan A. Garner & Antonin Scalia, J., Reading Law: The Interpretation of Legal Texts, 126–27 (Thomson West, 2012)" \c 3 **}**. Moving the "unless clause" to a different sentence violates the canon of statutory construction (and basic grammar) that a modifier "normally applies only to the nearest reasonable referent"—here, dismissal without prejudice. Garner**{** TA \l "Garner" \s "Garner" \c 3 **}**, *supra*, at 152. The Court must interpret the statutes as written by the Legislature, not as rewritten by Petersen.

Moreover, it is absurd to argue that the Legislature only intended the six-month service deadline to apply if the defendant never appeared. *See* Appellant's Br. 10 (proposing the Court construe the statute to read: "Unless the defendant has made an appearance, a plaintiff in a medical malpractice action shall accomplish service within 6 months after filing the complaint."). The Montana Supreme Court has repeatedly recognized that service rules "are mandatory and must be strictly followed." *Cascade Dev., Inc. v. City of Bozeman*, 2012 MT 79, ¶ 14, 364 Mont. 442, 276 P.3d 862**{** TA \l "*Cascade Dev., Inc. v. City of Bozeman*, 2012 MT 79, ¶ 14, 364 Mont. 442, 276 P.3d 862" \s "Cascade Dev." \c 3 **}**. But under Petersen's rewrite, the time limit would have neither meaning nor teeth—once a defendant appeared because the plaintiff eventually effected service, the case could just carry on as though there were no delay or statutory violation. It would also be absurd

because the plain language of § 25-3-106{ TA \s "§ 25-3-106" } contemplates motions for its enforcement: a court must dismiss a complaint that was not timely served "***on motion*** or on its own initiative." As Petersen recognizes, such a motion would typically be made by the defendant. Rewriting the statute is not proper, and Petersen's proposed revision does not make sense.

Section 25-3-106{ TA \l "Section 25-3-106" \s "Section 25-3-106" \c 1 } contains no language restricting a court's authority to enter a dismissal ***with prejudice*** based on ***other*** substantive law ***if*** a defendant has made an appearance and moved for such relief. Petersen's reading to the contrary inserts terms the Legislature did not include and rearranges those it did. Mont. Code Ann. § 1-2-101{ TA \l "Montana Code Annotated § 1-2-101" \s "§ 1-2-101" \c 1 }. But Petersen is incorrect that the district court's interpretation of § 25-3-106{ TA \s "§ 25-3-106" } compels a dismissal to be with prejudice once a defendant has appeared, as Petersen suggests. *See* Appellant's Br. 11. If other substantive law did not support a final judgment on the merits, a without-prejudice dismissal would be proper. In other words, the statute makes clear that a lack of timely service on its own does not support dismissal with prejudice, and the court should not reach other grounds for dismissal sua sponte. However, § 25-3-106{ TA \s "§ 25-3-106" } does not preclude a defendant who has appeared from asserting, or the district court from considering, other grounds for dismissal with prejudice.

Under the circumstances, dismissal with prejudice was warranted by the applicable statute of limitations and statute of repose and the district court did not make that determination sua sponte, but on Simon's motion. Accordingly, the district court complied with § 25-3-106**{** TA \s "§ 25-3-106" **}**. Since refiling the Complaint would be futile, dismissal with prejudice was appropriate to avoid further waste of the parties' or court's time and resources.

## II. The Complaint was properly dismissed with prejudice because the statute of limitations lapsed long ago, making refiling futile.

The district court correctly concluded that given Petersen's failure to timely serve the Complaint and its required dismissal under § 25-3-106**{** TA \s "§ 25-3-106" **}**, the statute of limitations ran in 2020. Accordingly, Petersen cannot state a claim upon which relief could be granted and refiling would be futile. As correctly stated by the district court, the legal authority cited by Simon from other jurisdictions, "the well-established Montana preference for diligent prosecution of claims once a suit is filed," and the legislative intent behind the time limits for filing and serving medical malpractice suits support this determination. Petersen App. 2 at 8–9 (Doc. 9).

Although she did not elaborate on her choice, Judge Halligan adopted one of two approaches that courts have taken when calculating the interplay between a service deadline and a statute of limitations. She held:

> Because Petersen's case is being dismissed due to his failure to serve it within the allowed time, ***the Court cannot consider its existence to toll the two-year limitations period*** provided by Mont. Code Ann. § 27-2-205(1). He will not have one more day to file after the dismissal to satisfy the two-year limit. That limit has long expired.

Petersen App. 2 at 9 (Doc. 9) (emphasis added). Essentially, the district court held that § 25-3-106**{** TA \s "§ 25-3-106" **}**'s mandatory dismissal for Petersen's failure to timely serve the Complaint rendered the Complaint a legal nullity, erasing any tolling effect it would have had if it had been timely served. Under this calculation, the statute of limitations for Petersen's claim expired January 28, 2020.[3]

Alternatively, this Court could determine the district court reached the correct result, but that the statute of limitations ***was*** tolled by the filing of the Complaint, then resumed running when the time limit for service expired. This was the approach recently taken by Judge Heidi Ulbricht in Flathead County. Simon Supp. App. 1, 2. Under this calculation, the statute of limitations for Petersen's claim was paused by the filing of the Complaint on January 27, 2020, resumed running on July 27, 2020

[3] Petersen has repeatedly admitted in briefing that he discovered his injury on January 28, 2018. Appellant's Br. 7 n.1; Doc. 6 at 1-2. An unequivocal concession of fact made by a party or his counsel "at any point during the litigation process" is a judicial admission. *Kohne v. Yost*, 250 Mont. 109, 112-13, 818 P.2d 360, 361–62 (1991)**{** TA \l "*Kohne v. Yost*, 250 Mont. 109, 112-13, 818 P.2d 360, 361–62 (1991)" \s "Kohne" \c 1 **}**. Accordingly, for purposes of this briefing, Simon treats January 28, 2018, as the date Petersen's claim accrued. However, even if the Court considers only the allegations in the Complaint itself, the two-year statute of limitations has elapsed regardless of when Petersen's hematoma was discovered prior to his filing of the Complaint on January 27, 2020.

when the time for service expired, and elapsed on July 28, 2020.

Both approaches give effect to the time periods enacted by the Legislature for filing and serving medical malpractice claims. They also address the concerns identified by this Court when construing other service deadlines and promote the Court's interest in the diligent prosecution of filed claims. On this point, Judge Halligan's approach also prevents the potential under the alternative calculation that a plaintiff could exploit the process by filing, failing to serve, and then dismissing without prejudice multiple successive complaints, extending the statute of limitations by six months each time.

Petersen's position, in contrast, means the service deadline has no effect on the statute of limitations whatsoever and there is no real consequence for a plaintiff who chooses to flout it. Indeed, he argues a plaintiff can, by his own lack of diligence and violation of the deadline, unilaterally toll the statute of limitations indefinitely—even for years, as in this case. This runs counter to the Legislature's enactment of the time limits in the HELP Act**{** TA \s "HELP Act" **}** and sound reasoning from this Court and other jurisdictions.

### A. Interpreting the statutes to effectuate the intent of the Legislature and give meaning to the service deadline and statute of limitations requires that failure to effect timely service have some effect on the limitations clock.

In Montana, medical malpractice actions "must . . . be commenced within 2 years after the date of injury or within 2 years after the plaintiff discovers or through

the use of reasonable diligence should have discovered the injury, whichever occurs last . . . .” Mont. Code Ann. § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}**. Montana Code Annotated § 27-2-102(1)**{** TA \l "Montana Code Annotated § 27-2-102(1)" \s "§ 27-2-102(1)" \c 1 **}** generally explains that an action is “commenced” when a complaint is filed. However, neither statute addresses what happens to the statute of limitations if a plaintiff commences an action on time, but then fails to prosecute it by serving the complaint within the time limit provided by the Legislature, resulting in its mandatory dismissal.

This Court “has observed that statutes of limitation serve the purpose of ensuring ‘basic fairness’ to parties.” *Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, ¶ 16, 364 Mont. 77, 273 P.3d 825**{** TA \l "*Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, 364, Mont. 77, 273 P.3d 825" \s "Burley" \c 1 **}** (citation omitted). They provide a “reasonable period of time in which wronged parties can initiate suit and obtain redress” while achieving the goal of suppressing stale claims so as not to keep causes of action “forever lurking in the distance.” *Id**{*** TA \s "Burley" ***}***.; *Linder v. Missoula Cnty.*, 251 Mont. 292, 298, 824 P.2d 1004, 1007 (1992). The limitation period for medical malpractice actions has been governed by its own statute since 1971. *Wilson v. Brandt*, 2017 MT 290, ¶ 14, 389 Mont. 387, 406 P.3d 452**{** TA \l "*Wilson v. Brandt*, 2017 MT 290, 389 Mont. 387, 406 P.3d 452" \s "Wilson" \c 1 **}**. When the Montana Legislature reduced the

limitation period from three years to two years and enacted the six-month service deadline, it demonstrated a clear intent to reduce—not extend—the time periods for pursuing medical malpractice claims.

Petersen's interpretation that filing a complaint can toll the limitation period indefinitely fails to give any meaning to the service deadline. Further, his interpretation runs contrary to the purposes underlying statutes of limitations generally and the Legislature's intent to reduce medical malpractice time periods in particular. His argument takes away the Legislature's prerogative to determine the "reasonable period of time in which wronged parties can initiate suit ***and obtain redress***," *Burley***{** TA \s "Burley" ***}***, ¶ 16 (emphasis added), and creates a situation where stale claims can linger for months or—as in this case—even years beyond the usual limitation period, with no notice to the named defendants. In order to construe the service deadline and statute of limitations together, and to give effect to the purposes of both statutes, the failure to timely serve a complaint must affect the limitation clock. *Pope***{** TA \s "Pope" ***}***, ¶ 10 (statutes must be construed to give each effect and avoid an absurd result). This conclusion is supported both by Montana case law and the decisions of other courts.

**B. *Webb v. T.D.* is inapposite.**

Petersen relies exclusively on *Webb v. T.D.*, 275 Mont. 243, 912 P.2d 202 (1996)**{** TA \l "*Webb v. T.D.*, 275 Mont. 243, 912 P.2d 202 (1996)" \s "Webb" \c 1

**}**, for his contention that the statute of limitations has been tolled continuously ever since he filed his Complaint January 27, 2020, one day before the limitation period was set to expire.

*Webb**{*** TA \s "Webb" ***}*** does support the general proposition that commencement of an action tolls the statute of limitations. *Webb**{*** TA \s "Webb" ***}***, 912 P.2d at 207 (citing Mont. Code Ann. § 27-2-102(1)(b) and Mont. R. Civ. P. 3). However, *Webb**{*** TA \s "Webb" ***}*** does not answer the main question here: how Petersen's failure to effect or even attempt service by the statutory deadline impacts tolling. Indeed, the Court in *Webb**{*** TA \s "Webb" ***}*** specifically distinguished the circumstances it was presented with from those in *First Call*, 898 P.2d 296**{** TA \s "First Call" **}**, in which the plaintiffs had failed to serve their summons within the applicable time limit and the district court therefore dismissed the complaint:

> We held [in *First Call*] that when a district court dismisses a complaint because of a failure by the plaintiff to serve the summons within three years, the action may not be refiled. In this case, however, the court did not dismiss the complaint, and Webb did not fail to serve her summons within three years from the date on which she filed her complaint. In fact, the service of Webb's summons and *second complaint* was accomplished within three years from the date on which the first complaint was filed. *First Call* and Rule 41(e) are, therefore, inapplicable to this case.

*Webb**{*** TA \s "Webb" ***}***, 912 P.2d at 206–07 (emphasis in original). Thus, *Webb*'s**{** TA \l "*Webb*'s" \s "Webb's" \c 1 **}** holding that the filing of a complaint tolls both the statute of limitations and the statute of repose expressly did not address cases

where the plaintiff failed to effect timely service.

*Webb{* TA \s "Webb" *}* is also distinguishable because it relied on "specific tolling provisions uniquely applicable to medical and chiropractic malpractice cases pending before the malpractice panels," which are not at issue here.[4] *Webb{* TA \s "Webb" *}*, 912 P.2d at 207. Specifically, when Webb voluntarily dismissed her original complaint, which she had filed in district court, her claim was already pending before the chiropractic legal panel. The Court determined that the legal panel's tolling provisions created "a continuous tolling 'bridge' between the first complaint and the subsequently filed complaint . . . ." *Id.{* TA \s "Webb" *}* Here, in contrast, Petersen did not, after he filed his Complaint, pursue his claim before the Montana Medical Legal Panel, and he did not "voluntarily dismiss" his own district court complaint because he was pursuing it in a different venue. Rather, Petersen's Complaint was filed only in district court, where it was subject to mandatory dismissal since July 28, 2020, due to his own failure to timely serve it. *Webb{* TA \s

[4] Petersen did not file a claim before the Montana Medical Legal Panel ("Panel"). Under Montana Rule of Procedure for the Medical Legal Panel 6(j)**{** TA \l "Montana Rule of Procedure for the Medical Legal Panel 6(j)" \s "MMLP Rulel 6(j)" \c 4 **}**, he should have brought a Panel claim against Simon's employer, Providence Health & Services - Montana, before pursuing this action in district court. Though a nurse practitioner is not a "health care provider" subject to the Panel, the Panel is intended to "prevent where possible the filing in court of actions against health care providers ***and their employees*** . . . ." Mont. Code Ann. §§**{** TA \l "Montana Code Annotated § 27-6-103(3)" \s "§ 27-6-103(3)" \c 2 **}** 27-6-102**{** TA \l "Montana Code Ann § 27-6-102" \s "§ 27-6-102" \c 2 **}{** TA \s "§ 27-6-102" **}**, -103(3) (emphasis added). However, this independent grounds for dismissal was not raised below so is not at issue now.

"Webb" ***}***'s holding is inapposite.

Further, as noted by the district court, *Webb* is incompatible with the Court's later holding in *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 73, 951 P.2d 1, 9 (1997)**{** TA \l "*Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 951 P.2d 1 (1997)" \s "Blackburn" \c 1 **}**, that the medical malpractice statute of repose "is not subject to tolling" absent specific statutory language to the contrary. Thus, *Webb*'s conclusion that commencement of an action tolls the statute of repose has been overturned.

To the extent *Webb**{*** TA \s "Webb" ***}*** has any applicability here, the district court correctly determined that "most of the factors cited in [*Webb*'s] totality of the circumstances analysis weigh against tolling in this case." Petersen App. 2 at 9 (Doc. 9). Petersen's claim has not been "pending before a tribunal with authority to entertain [his claim], and in a manner that tolled the statute of limitation and repose." *Webb**{*** TA \s "Webb" ***}***, 919 P.2d at 209. Because he failed to serve his Complaint by the statutory deadline, it has been subject to mandatory dismissal ever since July 28, 2020. And unlike the defendants in *Webb**{*** TA \s "Webb" ***}***—who were named in and participated in original Panel proceedings in 1991 and were named as necessary parties in the subsequent panel proceedings against another provider in 1993—Simon had no notice of this action at all until she was served in January 2023. Finally, while Webb was able to point to the unexpected death of her attorney after

the filing of the first complaint and then the omission of a necessary party who had to be taken through another panel proceeding, *Webb{* TA \s "Webb" *}*, 912 P.2d at 204, Petersen has shown no cause whatsoever for his failure to pursue his Complaint in a timely manner. *Westland v. Weinmeister*, 259 Mont. 412, 416, 856 P.2d 1374, 1376–77 (1993)**{** TA \l "*Westland v. Weinmeister*, 259 Mont. 412, 416, 856 P.2d 1374, 1376–77 (1993)" \s "Westland" \c 1 **}** (holding "unreasonable delay raises a presumption of prejudice to the defendant and shifts the burden to the plaintiff to show good cause or a reasonable excuse for his inaction").

As the district court correctly held, *Webb{* TA \s "Webb" *}* simply does not apply.

### C. When enforcing statutory deadlines, this Court is concerned with effecting Legislative intent, promoting diligent prosecution, and achieving the just, speedy, and inexpensive determination of lawsuits.

Although this Court has not addressed the interplay between § 25-3-106**{** TA \s "§ 25-3-106" **}** and § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}** specifically, it has previously considered cases involving plaintiffs' failure to meet other service deadlines. Its concerns have been consistent even as rules have changed.

In *First Call{* TA \s "First Call" *}*, for example, the Court held failure to effect timely service under the now-repealed Montana Rule of Civil Procedure 41(e)**{** TA \s "Rule 41(e)" **}** (1995) merited dismissal with prejudice not only because of the

unambiguous language of the rule itself, but also because allowing refiling would "completely defeat[] the purpose of the Rule to promote the diligent prosecution of claims once suit is filed and to bar the further prosecution of lached lawsuits." *First Call***{** TA \s "First Call" **}**, 898 P.2d at 98. Similarly, in *Rich v. State Farm Mutual Automobile Insurance,* 2003 MT 51, ¶ 22, 314 Mont. 338, 66 P.3d 274**{** TA \l "*Rich v. State Farm Mutual Automobile Insurance,* 2003 MT 51, ¶ 22, 314 Mont. 338, 66 P.3d 274" \s "Rich" \c 1 **}**, the Court held that allowing a plaintiff who had not met the service deadline to dismiss his lawsuit without prejudice would render then-Rule 41(e)**{** TA \s "Rule 41(e)" **}** "in effect meaningless" and conflict with the purpose of the rule to "require diligent prosecution of lawsuits because an inactive plaintiff would be rewarded by doing nothing for over three years, even though that plaintiff was evidently pursuing a complaint." Although the Court's "decisions interpreting Rule 41(e) have limited relevance here as they interpret a now abolished rule," *Pesarik v. Perjessy*, 2008 MT 337, ¶ 19, 346 Mont. 236, 194 P.3d 665**{** TA \l "*Pesarik*" \s "Pesarik" \c 1 **}**, they demonstrate the Court's historical commitment to giving teeth to time limits and its disinclination to reward a plaintiff who has not diligently prosecuted his suit.

This Court has reflected similar concerns when construing successor rules, including Montana Rule of Civil Procedure 4 E (2007)**{** TA \l "Montana Rule of Civil Procedure 4 E (2007)" \s "Rule 4 E (2007)" \c 1 **}** and the current Rule 4(t)**{**

TA \s "Rule 4(t)" **}**. In *Pesarik*, the Court affirmed the district court's determination that the plaintiff failed to demonstrate "excusable neglect" sufficient to warrant an extension of the Rule 4 E**{** TA \l "Rule 4 E" \s "Rule 4 E" \c 4 **}** service time limit under Montana Rule of Civil Procedure 6(b)**{** TA \s "Rule 6(b)" **}**. Even though the plaintiff in that case missed the three-year service deadline by just days, attempted service in the month prior to the deadline, and the defendant was unavailable that month, the Court held mere forgetfulness and "the press of other business" did not excuse the delay in the prior months. *Pesarik**{*** TA \s "Pesarik" ***}***, ¶¶ 19, 22, 25. It emphasized the excusable-neglect standard is more demanding than the "good cause" standard employed in most jurisdictions. *Id**{*** TA \s "Pesarik" ***}***.¶¶ 18, 23–24. Although Rule 6(b) relief was available in the right case, the service time limit had meaning and was not to be extended absent a showing of excusable neglect.

More recently, this Court has considered what effect a failure to meet the three-year deadline for service under Rule 4(t)(1)**{** TA \l "Montana Rule of Civil Procedure 4(t)(1)" \s "Rule 4(t)(1)" \c 4 **}** had on a temporary restraining order (TRO) that had been issued by the district court in a dissolution action. *In re Estate of Corrigan*, 2014 MT 337, ¶¶ 13, 22, 377 Mont. 364, 341 P.3d 623**{** TA \l "*In re Estate of Corrigan*, 2014 MT 337, ¶¶ 13, 22, 377 Mont. 364, 341 P.3d 623" \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" \c 1 **}**. The deceased husband had filed for dissolution of his marriage in 2008, and the district

court issued a Summons and TRO as required by Montana Code Annotated § 40-4-121(3)**{** TA \l "Montana Code Annotated § 40-4-121(3)" \s "§ 40-4-121(3)" \c 2 **}**. *Id.{* TA \l "*Id.*" \s "In re Estate of Corrigan" \c 1 *}{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}* ¶ 4. But the husband never served them on his wife. *Id.{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}* Four years later, he changed the beneficiaries of his IRA from his wife to his adult children. *Id{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}*. ¶ 5. During the probate, his wife petitioned to be recognized as the true beneficiary, contending that the TRO issued by the court in 2008 restrained her husband from changing his beneficiaries. *Id{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}*. ¶ 6. Her efforts were rebuffed. The Court held that since the TRO and Summons were not served in the allotted three years, the dissolution petition "was never placed at issue" and the TRO was automatically "rendered ineffective." *Id{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}*. ¶ 22. The husband was therefore free to change his beneficiaries because the TRO was, in effect, nullified.[5] *Id.{* TA \s "In re Estate of Corrigan, 2014 MT 337,

[5] Although Justice McKinnon's special concurrence raises concerns about the automatic nullification of a district court order, *In re Estate of Corrigan{* TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" *}*, ¶ 24 (McKinnon, J., specially concurring), no court order is at issue here, and the equitable principles she favored support the same result: lacking any basis for extending the deadline for

13, 22, 377 Mont. 364, 341 P.3d 623" ***}***

Although these cases are not directly applicable to § 25-3-106**{** TA \s "§ 25-3-106" **}**'s service deadline for medical malpractice actions, this Court has consistently held that a plaintiff's failure to effect timely service has real consequences. Like the plaintiff in *Pesarik**{*** TA \s "Pesarik" ***}***, Petersen has not shown "excusable neglect" for failing to serve the Complaint within the deadline, much less for delaying service until 29 months after that deadline elapsed. And, as in *Rich*, dismissing the Complaint without prejudice would render both the statute of limitations and service deadline for medical malpractice actions "in effect meaningless," and reward Petersen for sitting on his rights and obligations at Simon's expense. *Rich**{*** TA \s "Rich" ***}***, ¶ 22.

*In re Estate of Corrigan**{*** TA \s "In re Estate of Corrigan, 2014 MT 337, 13, 22, 377 Mont. 364, 341 P.3d 623" ***}*** also provides an apt analogy. Before the failure of service by the statutory deadline, the TRO was an enforceable court order. But when the petitioner failed to pursue the dissolution action by timely serving the TRO and Summons on his wife, the TRO was rendered ineffective. Likewise, here, the tolling of the statute of limitations should be seen as ineffective and void once the service deadline lapsed. There are ramifications for failing to comply with the

service, Petersen's Complaint has been subject to mandatory dismissal since July 28, 2020, and should not serve to extend the statute of limitations.

statutory deadline.

### D. Federal court precedent concerning the effect of without-prejudice dismissals supports the district court's holding that Petersen's Complaint cannot be considered to have tolled the statute of limitations.

Persuasive authority from numerous federal courts supports the district court's conclusion that dismissal under § 25-3-106**{** TA \s "§ 25-3-106" **}** erases any tolling effect the Complaint might have had on the statute of limitations. The general rule recognized by these courts is that "filing of a suit [tolls] the statute of limitations, ***though only contingently***." *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000) (emphasis added)**{** TA \l "*Elmore v. Henderson*, 227 F.3d 1009 (7th Cir. 2000) (emphasis added)" \s "Elmore" \c 1 **}**. If a suit is dismissed without prejudice, "the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing." *Id**{*** TA \s "Elmore" ***}***. The Seventh Circuit held this rule applied to both voluntary and involuntary dismissals without prejudice, "since a plaintiff can almost always precipitate a dismissal without prejudice, for example by failing to serve the defendant properly or by failing to allege federal jurisdiction, even if he does not move to dismiss it." *Id**{*** TA \s "Elmore" ***}***. The rule, accordingly, is that when a suit is dismissed without prejudice, the "statute of limitations is deemed unaffected by the filing of the suit, so that if the statute of limitations has run the dismissal is effectively with prejudice." *Id.**{*** TA \s "Elmore"

***}***

Under this approach, the dismissal without prejudice '"leaves the parties as though the action had never been brought."' *Favel v. Am. Renovation & Constr. Co.*, 2002 MT 266, ¶ 6 n.2, 312 Mont. 285, 59 P.3d 412**{** TA \l "*Favel v. Am. Renovation & Constr. Co.*, 2002 MT 266, 312 Mont. 285, 59 P.3d 412" \s "Favel" \c 1 **}** (citation omitted) (recognizing the effect of voluntary dismissal without prejudice in federal court). This principle is widely accepted in federal courts and some state courts. *See Elmore**{*** TA \s "Elmore" ***}***, 227 F.3d at 1011 (citing decisions from the First, Second, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeal); *Garrett v. Finander*, No. 2:18-cv-10754-AB-KES, 2019 WL 7879659, at *9 (C.D. Cal. Dec. 5, 2019)**{** TA \l "*Garrett v. Finander*, No. 2:18-cv-10754-AB-KES, 2019 WL 7879659 (C.D. Cal. Dec. 5, 2019)" \s "Garrett" \c 1 **}** (citing decisions from the Seventh and D.C. Circuit Courts of Appeals, district courts within the Ninth Circuit, and California state courts).

This appears to be the approach followed by the district court here, when it held that "[b]ecause Petersen's case is being dismissed due to his failure to serve it within the allowed time, the Court ***cannot consider its existence*** to toll the two-year limitations period provided by Mont. Code Ann. § 27-2-205(1)." Petersen App. 2 at 9 (Doc. 9) (emphasis added). As a result, the statute of limitations on Petersen's claim ran January 28, 2020.

### E. Other jurisdictions offer an alternative approach, recently followed by the district court in Flathead County, which would result in the statute of limitations clock resuming running when the time for service expires.

In briefing below, Simon also offered another approach followed by some other jurisdictions in calculating the statute of limitations upon expiration of a service deadline. This approach allows an unserved complaint to toll the statute of limitations, but only until expiration of the time limit for service. Flathead County District Court Judge Heidi J. Ulbricht adopted this approach in *Estate of Phillips v. Robbins**{*** TA \s "Estate of Greg Phillips" ***}***, in her April 28, 2023 Order and Rationale on Anna Robbins, MD, and Logan Health's Motion to Dismiss with Prejudice, and in her June 13, 2023 Order and Rationale on Plaintiff's Motion to Alter, Amend, or Set Aside Order, which case is also on appeal before this Court. Simon Supp. App. 1, 2. Under this approach, the limitations period on Petersen's claim would have expired one day after the expiration of the service deadline, July 28, 2020.

Generally, when a statute of limitations is tolled, the clock is merely paused, not reset. *Smith v. Sturm, Ruger & Co.*, 198 Mont. 47, 49, 643 P.2d 576, 577 (1982)**{** TA \l "*Smith v. Sturm, Ruger & Co.*, 198 Mont. 47, 643 P.2d 576 (1982)" \s "Smith v. Sturm" \c 1 **}**; *see also* Simon Supp. App. 1 at 5. The clock will resume after the tolling period ends. *See, e.g., Cobb v. Saltiel*, 2009 MT 171, ¶ 26, 350 Mont. 501, 210 P.3d 138. Under this second approach, the tolling period initiated by the commencement of an action pauses the limitations clock, but if service is not timely

made, the tolling period ends and the clock resumes. If there is insufficient service by the end of the restarted limitations period, the clock may expire.

Several courts employ this method. In ***{*** TA \l "*Miller v. Myers*, 38 So. 3d 648 (Miss. Ct. App. 2010)" \s "Miller" \c 1 ***}****Miller v. Myers*, the Mississippi Court of Appeals held, in a medical malpractice case, that after the 120-day time limit for service lapsed, the statute of limitations period resumed running and did not extend the limitations period to save a second lawsuit. *Miller v. Myers*, 38 So. 3d 648, 653–54 (Miss. Ct. App. 2010)**{** TA \s "Miller" **}** (citing *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005)**{** TA \l "*Owens v. Mai*, 891 So.2d 220 (Miss. 2005)" \s "Owens" \c 1 **}**). The court held summary judgment on the refiled suit was proper because it was filed nearly five months too late. *Id.****{*** TA \s "Miller" ***}*** And, in *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 287 (E.D.N.Y. 2000)**{** TA \l "*Amnay v. Del Labs*, 117 F. Supp. 2d 283 (E.D.N.Y. 2000)" \s "Amnay" \c 1 **}**, the United States District Court for the Eastern District of New York dismissed a case because the plaintiff filed suit nine days before the statute of limitations period but failed to serve it within nine days of the expiration of the 120-day service period. The court held the failure to complete timely service "ends the

tolling period, and the statute of limitations once again begins to run." *Id.*{ TA \s "Amnay" } (citations omitted).

Other courts employing this method have specifically held that dismissal of an original complaint *with prejudice* is appropriate when a plaintiff has failed to effect timely service and the dismissal also follows the expiration of the statute of limitations. *Moore v. Mount Carmel Health Sys.*, 164 N.E.3d 376, 384–85 (Ohio 2020){ TA \l "*Moore v. Mount Carmel Health Sys.*, 164 N.E.3d 376 (Ohio 2020)" \s "Moore" \c 1 } (citing cases); *Rencher/Sundown LLC v. Pearson*, 454 P.3d 519, 524 (Idaho 2019){ TA \l "*Rencher/Sundown LLC v. Pearson*, 454 P.3d 519 (Idaho 2019)" \s "Rencher/Sundown" \c 1 } (holding that even if dismissal with prejudice was improper for failure to meet a six-month service deadline, any error was harmless because the statute of limitations had expired); *Cardenas v. City of Chicago*, 646 F.3d 1001, 1008 (7th Cir. 2011){ TA \l "*Cardenas v. City of Chicago*, 646 F.3d 1001 (7th Cir. 2011)" \s "Cardenas" \c 1 }. The court in *Cardenas*{ TA \s "Cardenas" } noted that "it strikes us as eminently reasonable to hold the Plaintiffs accountable for their unexplained inaction in the face of their crucial burden to timely serve [the defendant] with process," and held there was no error in dismissing a case with prejudice where the statute of limitations expired after the service deadline lapsed. *Cardenas*{ TA \s "Cardenas" }, 646 F.3d at 1007-08 (noting that "'[I]f the statute of limitations has meanwhile expired it will be the limitations defense that greets [any]

new action, which will make the case just as dead as a disposition on the merits . . . .'" (quoting David Siegel, Practice Commentary on Fed. R. Civ. P. 4, C4–38, reprinted at 28 U.S.C.A. Fed. R. Civ. P. 4 at 211 (West 2008))). Dismissal with prejudice is appropriate to prevent frivolous and futile refiling.

Under this approach, the January 27, 2020 filing of Petersen's Complaint tolled the running of the statute of limitations for six months under § 25-3-106**{** TA \s "§ 25-3-106" **}**. Then, once that window closed on July 27, 2020, the statute of limitations began running again, expiring, in Petersen's case, the next day—July 28, 2020. There is no close call here. Petersen did not serve Simon until January 9, 2023, almost three years after he filed his Complaint.

### F. Either approach results in Petersen's Complaint being time-barred, enforces the Legislature's time limits, promotes diligent prosecution of actions, avoids litigation of stale claims, and provides consistency for parties.

A plaintiff bears the burden of timely effecting proper service of process, and strict compliance with the rules for service of process is mandatory. *Nolan**{*** TA \s "Nolan" ***}***, ¶¶ 1, 12.

Either of the above approaches to calculating the statute of limitations after a plaintiff fails to timely effect service prevents plaintiffs from sleeping on their rights and unilaterally extending the life of stale claims, gives effect to and allows for the enforcement of the Legislature's time limits, and avoids an absurd result. The approaches enhance predictability for all parties, because the time limits would not

depend on whether or when a district court noticed a medical malpractice suit had not been served. Both approaches also allow the district court to dismiss stale claims like Petersen's *with prejudice* based on the statute of limitations, avoiding wasteful refiling and rebriefing of issues. However, the approach taken by Judge Halligan below avoids the potential for another loophole, wherein a plaintiff could exploit the six-month tolling period allowed under the alternative approach by refiling, but not serving, successive complaints in order to prolong the statute of limitations. Regardless of the approach adopted, the statute of limitations has long since passed on Petersen's claim.

Importantly, this outcome is entirely within the plaintiff's control, and the Rules of Civil Procedure allow for dismissal with prejudice if "'the plaintiff fails to prosecute"' the action or comply with the Rules of Civil Procedure. *Nolan**{*** TA \s "Nolan" ***}***, ¶ 11 (quoting Mont. R. Civ. P. 41(b)). Here, Petersen failed to abide by the procedural service rule prescribed by statute and "failed to exercise due diligence in bringing his case to a conclusion." *Shackleton v. Neil*, 207 Mont. 96, 100, 672 P.2d 1112, 1114 (1983)**{** TA \l "*Shackleton v. Neil*, 207 Mont. 96, 672 P.2d 1112 (1983)" \s "Shackleton" \c 1 **}**. The district court correctly dismissed this case with prejudice.

## III. The statute of repose under § 27-2-205(1){ TA \s "§ 27-2-205(1)" } also bars Petersen from refiling this claim.

The five-year statute of repose would also bar Petersen's claim if he were allowed to refile his Complaint. In Montana, "in ***no*** case may [a medical malpractice]

action be commenced after 5 years from the date of the injury." Mont. Code Ann. § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}** (emphasis added). This Court has held that a statute of repose "is not subject to tolling," absent specific statutory language to the contrary. *Blackburn**{*** TA \s "Blackburn" ***}***, 951 P.2d at 9.

The only exception to the statute of repose is inapplicable here. Section § 27-2-205(1) provides that "this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant." But no such failure has been alleged. Petersen App. 2 at 9-10. As in *Blackburn*, Petersen's claim is barred by the five-year statute of repose because the injury occurred more than five years ago. *Blackburn**{*** TA \s "Blackburn" ***}***, 951 P.2d at 10.

## IV. The "savings statute" § 27-2-407 affords Petersen no relief.

Montana's "savings statute" or "renewal statute," § 27-2-407**{** TA \s "§ 27-2-407" **}**, does not save Petersen as he failed to prosecute his claim and the district court issued a final judgment on the merits. The statute reads:

> If an action is commenced within the time limited for the action and . . . the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action for the same cause after the expiration of the time limited and within 1 year after a reversal or termination.

Mont. Code Ann. § 27-2-407**{** TA \s "§ 27-2-407" **}**. When weighing § 27-2-407**{** TA \s "§ 27-2-407" **}**, the district court correctly held that the disposition of Petersen's matter qualified as both a "dismissal for 'neglect to prosecute the action,"' and—because the dismissal was with prejudice—a '"final judgment on the merits."' Petersen App. 2 at 10 (Doc. 9).

### A. Petersen's inaction amounts to a failure to prosecute.

Petersen argues that his untimely service is not akin to a failure to prosecute, but merely establishes a lack of personal jurisdiction over Simon. *See* Appellant's Br. 16.[6] However, undisputedly, Petersen did not serve, or even attempt to serve, the Complaint within the six-month time limit for doing so. Instead, he waited 33 months until he even obtained a Summons, and over 35 months before he effected service. Doing nothing to pursue an action or put defendants on notice of claims or comply with statutory time limits for nearly three years is rightly construed as a failure to prosecute, and the court's dismissal under § 25-3-106**{** TA \s "§ 25-3-106" **}** and § 27-2-205(1)**{** TA \s "§ 27-2-205(1)" **}** precludes application of the savings statute.

Other courts have likewise refused to apply applicable savings statutes under these circumstances. In *Owens**{*** TA \s "Owens" ***}***, the Mississippi Supreme Court

[6] Once Simon appeared in the action, she consented to personal jurisdiction in this matter. Mont. R. Civ. P. 4(b)(1)(A)**{** TA \l "Montana Rule Civil Procedure 4(b)(1)(A)" \s "Rule 4(b)(1)(A)" \c 1 **}**.

held that when a 120-day service time limit elapsed without service, the three-year statute of limitations resumed and then ran out. When the plaintiff refiled the complaint months later, it was dismissed, and the Court upheld the lower courts' refusal to apply the savings statute. *Owens{* TA \s "Owens" *},* 891 So. 2d at 223–24. It reasoned that the savings statute was not designed to "extend the life of a cause of action beyond its original statute of limitation," and a dismissal for failure to serve is not a "jurisdictional matter" or "a matter of form" for purposes of the savings statute. *Id.{* TA \s "Owens" *}* at 223. Holding otherwise "would essentially allow plaintiffs who failed to serve process under [the relevant rule] to utilize the savings statute to preserve their claim(s) and/or extend the life of their claim(s)." *Id.{* TA \s "Owens" *}* Further, the court held "[t]he savings statute cannot save a complaint from the expiration of the applicable statute(s) of limitations" because "[t]o allow otherwise would circumvent the effect and purpose of statutes of limitations." *Id.{* TA \s "Owens" *}* at 223-24. Similarly, the Ohio Supreme Court has held that "[t]o apply the savings statute to revive the action [where the statute of limitations has lapsed following failure of timely service] . . . has the effect not of avoiding unnecessary procedural hoop jumping, but of extending the statute of limitations beyond the term set by the legislature." *Moore{* TA \s "Moore" *},* 164 N.E.3d at 381. *See also Passmore v. McCarver*, 395 P.3d 297, 300–01 (Ariz. Ct. App. 2017) (holding, analogously, that dismissal for failure to serve a preliminary expert

affidavit is for lack of prosecution, rendering the relevant savings statute inapplicable).

Dismissal for Petersen's own failure to serve his Complaint by the statutory deadline is properly treated as dismissal for failure to prosecute, and to hold otherwise would allow him to circumvent the applicable time limits established by the Legislature. He can find no relief in the savings statute.

**B. The district court's order was a final judgment on the merits.**

The district court's decision on Simon's Motion to Dismiss was also a final judgment on the merits because it was based not only on the service deadline, but also the statute of limitations. Petersen does little, if anything, to refute this in his briefing. "An order of dismissal with prejudice is a final judgment on the merits." *Hawkes v. Mont. State Dept. of Corr.*, 2008 MT 466, ¶ 19, 348 Mont. 7, 199 P.3d 260**{** TA \l "*Hawkes v. Mont. State Dept. of Corr.*, 2008 MT 466, 348 Mont. 7, 199 P.3d 260" \s "Hawkes" \c 1 **}**. As acknowledged by the district court, Petersen's claim was disposed of by its Order. Judgment was entered and the case was closed, without leave to refile. Accordingly, Petersen has no refuge in the saving statute because of the finality of the judgment against him.

All said, Petersen was dilatory in bringing his claim against Simon. The purpose of the savings statute is to protect diligent plaintiffs. *Allen v. Greyhound Lines, Inc.*, 656 F.2d 418, 422 (9th Cir. 1981)**{** TA \l "*Allen v. Greyhound Lines,*

*Inc.*, 656 F.2d 418 (9th Cir. 1981)" \s "Allen" \c 1 **}** (discussing Montana's savings statute). Petersen was anything but. He should not be rewarded for inaction at the expense of Simon's right to be protected from this stale claim. This squares with the intent of the Legislature when enacting the HELP Act**{** TA \s "HELP Act" **}**. The savings statute is unavailable here, and the district court was correct in so recognizing.

## CONCLUSION

Petersen's preferred approach would grant him another opportunity to serve the Complaint—over five and half years (and counting) after he was first on notice of his alleged injury. To ratify such an approach would be to reward Petersen at the expense of Simon and to ignore the clear intent of the Legislature. Fortunately, analysis of the applicable six-month service deadline, the statute of limitations, the statute of repose, and the savings statute all favor Simon. Regardless of the approach ultimately chosen by this Court, Petersen's claim is time-barred requiring dismissal *with prejudice*. Therefore, this Court should affirm the district court's Order Dismissing and Closing Case.

Respectfully submitted this 22nd day of September 2023.

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## CERTIFICATE OF COMPLIANCE

Under Montana Rule of Appellate Procedure 11(4)(e), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 360 is 9,278 words, excluding table of contents, table of citations, certificate of compliance, certificate of service or appendix.

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