

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-23-0666

IN THE MATTER OF THE ESTATE OF
MARTIN W. MACLAY,

DECEASED.

APPELLEE JESSE MACLAY'S RESPONSE BRIEF

On Appeal from Montana Fourth Judicial District Court
Missoula County, Cause No. DV-21-270
Honorable John W. Larson

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STATEMENT OF THE ISSUES

1. The District Court correctly concluded that the doctrine of judicial estoppel precludes Shari Maclay (“Shari”) from arguing that she should have been a party to Jesse Maclay (“Jesse”) and Michael Maclay’s (“Mike”) Settlement Agreement.
2. The District Court’s Order may alternatively be affirmed under the doctrine of waiver.
3. Jesse should be awarded her attorney fees on appeal.

STATEMENT OF THE CASE

Decedent Martin Maclay (“Marty” or “Decedent”) passed away on November 13, 2021, from Covid-19 after a two week stay in the hospital. He left behind his two adult children, Mike and Jesse, and his new wife, Shari. Before being put on a ventilator, Marty signed a new Will disinheriting Jesse and giving Shari a life estate in his residence. The 2021 Will was marred by problems. It was only witnessed by one person; the sole witness did not know she was witnessing a will; Marty signed on the witness line; Marty made significant changes contrary to his previously executed will; the 2021 Will named the incorrect personal representative; Marty did not notice the error when he signed the Will; and Marty was heavily medicated and lacking oxygen throughout the entire process.

Marty's son, Mike, filed for informal probate on November 18, 2021, and was appointed Personal Representative. On February 15, 2022, Shari and Jesse filed a joint Petition questioning the validity of Marty's 2021 Will. They were represented by the same attorney, Julie Sirrs. Shari was voluntarily dismissed from that Petition on August 30, 2022, after she hired new counsel, Don St. Peter. In the meantime, Jesse continued her will contest with her own new counsel, Nicole Siefert and Matt Rossmiller. Shari hired and fired Don St. Peter throughout this matter, all the while maintaining that she was "only an interested party."

During discovery and depositions, Shari supported Jesse's position that the 2021 Will was invalid. On May 10, 2023, Jesse filed her Motion for Summary Judgment seeking to invalidate Marty's 2021 Will and submit his prior will to probate. Shari supported Jesse's Motion. On June 26, 2023, Mike filed his response to Jesse's Motion and cross Motion for Summary Judgment seeking to validate Marty's 2021 Will. Shari opposed Mike's Motion. The parties engaged in mediation on July 18, 2023, prior to briefing being completed on the pending motions. Shari did not want to appear at the mediation and argued she should not have to pay for the same because she was only an interested party. A settlement was reached at mediation between Jesse and Mike, which resulted in the 2007 Will being admitted to probate. After two years of contentious and expensive litigation that tore a family apart, there was finally a resolution.

Shari filed her Motion to Set Aside Jesse and Mike’s Settlement Agreement on August 9, 2023, arguing that Jesse and Mike failed to take her life estate listed in the 2021 Will into account. Jesse responded to the Motion on August 16, 2023, and Mike’s response was filed two days later. Shari filed her Reply in support of her Motion on August 28, 2023. A hearing was held on Shari’s Motion on September 19, 2023. Following the hearing, the District Court afforded Shari the opportunity to submit supplemental briefing. She did so on October 3, 2023. Jesse filed a response to Shari’s supplemental briefing on October 6, 2023. The District Court denied Shari’s Motion to Set Aside on November 2, 2023, and this appeal followed.

STATEMENT OF FACTS

1. Marty passed away on November 13, 2021. (Doc. 19, ¶ 1.)
2. Marty had two adult children at the time of his death, Jesse and Mike.
3. Marty married his new wife, Shari, on December 17, 2020 (less than a year before Marty’s death).
4. Marty was first admitted to St. Patrick’s Hospital in Missoula on October 30, 2021, after experiencing 4-5 days of weakness, fatigue, cough, and testing positive for Covid-19 three days prior. (Doc. 54, Ex. 2.) Marty would never leave the hospital following his admission.
5. Marty’s diagnosis consisted of Covid pneumonia with hypoxia. (*Id.*, p. 21.)

6. Marty's condition worsened to the point where he had to be moved to the intensive care unit. (*Id.*, p. 47.)

7. On November 5, 2021, Marty handwrote a document titled "Will & Testament." The document directed Marty's son, Mike, to "carry out his wishes" and to have Mike add his name to Marty's accounts to ensure bills were paid. (Doc. 54, Ex. 3.)

8. Mike delivered the document entitled Will & Testament to attorney Kevin Jones, who had performed some services for Marty in the past. (*Id.*, Ex. 4, 60:1-20.)

9. Upon seeing the handwritten "Will and Testament," Mr. Jones advised that it was more akin to a power of attorney and would not work as a will. (*Id.*)

10. Mr. Jones had a phone call with Marty after Mike delivered the handwritten document. (*Id.*, Ex. 5, 22:17-23:13.)

11. During the call, Marty provided a list of provisions he wanted in the new will, including that he wanted Mike to serve as his personal representative. (*Id.*, 24:13-25:11.) Mr. Jones then proceeded to draft a new will for Marty, which was completed within three hours of the phone call ending. (*Id.*, 26:7-20.)

12. The purported 2021 Will was drafted by Mr. Jones and delivered to Marty for his signature on November 8, 2021. (*Id.*, Ex. 6.)

13. In addition to the 2021 Will, Mr. Jones also sent a list of instructions explaining how to execute the same. (*Id.*, Ex. 7.)

14. The purported Will was “witnessed” by Emile Pribyl (formerly Angelo), a nurse who oversaw Marty during his time in the ICU. (*Id.*; Ex. 8, 16:4-6.)

15. Ms. Pribyl did not know that the document she witnessed was intended to be a will. (*Id.*, Ex.8, 51:8-17.)

16. The 2021 Will also incorrectly named Shari as Marty’s personal representative, an error Mr. Jones acknowledged as contrary to Marty’s wishes. (*Id.*, Ex. 5, 41:25-42:6.)

17. The purported Will had other errors, including that Marty signed on the witness line, it was only witnessed by one person instead of two, and Marty did not acknowledge the error of the improperly listed personal representative. (*Id.*, Ex. 6.)

18. Mike admitted the purported Will to probate on November 18, 2021 following Marty’s death. (Doc. 2.)

19. Petitioner Jesse and then Co-Petitioner Shari, represented jointly by Julie Sirrs of Boone Karlberg, filed a joint Petition for Formal Probate to Determine Will and Heirs and Appointment of Personal Representative. (Doc. 11.)

20. In the Joint Petition, the parties listed why the Will admitted to probate was not valid, including the fact that the Will was not witnessed by two individuals,

named Shari as the Personal Representative, and was signed while Marty was ill in the hospital with COVID to which he would ultimately succumb five days later. (*Id.*)

21. It soon became apparent that Jesse and Shari had vastly different legal positions which amounted to a conflict of interest. As such, Julie Sirrs withdrew as counsel for both parties on July 25, 2022. (Doc. 31.)

22. Shari filed an unopposed motion to dismiss her Petition. The Motion stated, “Shari Maclay is not contesting the Last Will and Testament of Martin W. Maclay dated November 8, 2021.” Shari’s Motion was granted. (Docs. 35 and 36.)

23. Jesse continued with the will contest and discovery ensued. In the meantime, Shari filed a notice stating she would be representing herself and filed a Demand for Notice pursuant to Mont. Code Ann. § 72-3-106 on January 5, 2023. (Doc. 41.)

24. Despite her representation that she would be representing herself, Shari has been represented by counsel at various stages in this proceeding, including during her deposition and at mediation. (Doc. 52 and 57.1.)

25. Although Shari withdrew her Petition contesting the November 2021 Will, Shari testified as follows during her deposition:

Q. You did testify previously that it’s your opinion Marty was not competent to execute the will; is that correct?

A. I believe under the circumstances of the influence of the drugs he was under, his competency would have been questionable.

Q. His competency would have been questionable is your testimony?

A. Right.

Q. You're not testifying he was incompetent?

A. I wasn't there, so I can't pass judgment.

Q. And you understand if the November 8, 2021, will was invalidated, you would lose your life estate; is that correct?

A. I understand.

(Doc. 67, Ex. 1, 99:13-100:4.)

26. After reviewing the medical records and seeing the drugs Marty was on, Shari testified that she does not believe he was thinking clearly on the day he signed the purported Will. (*Id.*, 41:5-24.)

27. Shari testified that she does not believe that Marty would have disinherited Jesse. (*Id.*, 42:5-7.)

28. Shari understood that if the 2021 Will was invalidated, she would be an omitted spouse, and that testifying that Marty was not competent to sign a new will is not in her best interest. (*Id.*, 42:8-10.)

29. Shari further testified that she does not believe Marty would ever have signed a will disinheriting Jesse. (*Id.*, 42:19-21.)

30. Shari's only desire, according to her testimony, is for "justice to be served in this case, period." (*Id.*, 42:22-25.)

31. Shari testified that if it was up to her, she would give Jesse half of Marty's estate. (*Id.*, 70:6-8.)

32. Jesse filed a Motion for Summary Judgment seeking to invalidate Marty's November 2021 Will on June 5, 2023. (Doc. 54.) Mike, in turn, filed a cross Motion for Summary Judgment on June 23, 2023, seeking, *inter alia*, a determination that the November 2021 Will was valid. (Doc. 58)

33. Shari did not oppose Jesse's Motion for Summary Judgment to invalidate the 2021 Will. (Doc. 62.) Shari did oppose Mike's Motion for Summary Judgment seeking to validate the 2021 Will. (Doc 67, Ex. 2.)

34. As previously discussed, Shari represented herself *pro se* for much of this case, and would reach out to all parties via email when outside the scope of her counsel's limited notices of appearance.

35. On April 11, 2023, Shari emailed Jesse's counsel giving a summary of her relationship with Marty and her opinion on the facts of the case. In pertinent part she wrote:

I feel like you're at a disadvantage, because you don't know the whole story. I realize this could jeopardize my position in the case, but feel it's necessary to share everything with you to get "justice" which is what I want.

(*Id.*, Ex. 3.)

36. On June 1, 2023, Shari emailed Jesse's counsel asking why the parties were mediating the case.

Why is this coming into play? You are going to win this case; Mike and his lawyers are not going to back down, so why bother with Mediation? It's going to go to trial. This is just another "transfer the money from the client's bank

accounts to the legal system's bank accounts move, and I personally, am getting very weary of this game. Just like the fellow that Judge Larson appointed, and we're all supposed to pay his fees - really??? ***I am ONLY an INTERESTED PARTY to this case - that means I want to be kept informed of what is going on. That's all.***

(*Id.*, Ex. 4) (bold and italic emphasis added).

37. On June 1, 2023, Jesse's counsel emailed Shari asking if she opposed Petitioner Jesse's Motion for Summary Judgment, which would invalidate the 2021 Will. Shari responded, "I am in total agreement with your motion." (*Id.*, Ex. 5.)

38. On June 4, 2023, Shari emailed counsel for Mike and blind copied Jesse's counsel. Shari wrote:

Hi:

I've been thinking about this over the weekend . . . why are you going through the motions of mediation? You and Mike aren't backing down, Nicole and Jesse aren't backing down, I'm just an interested party on the sidelines - what is the point of this exercise? Besides costing a whole bunch of money for something we all know is going to be a waste of time (and money)????

Shari Lynn Maclay

(*Id.*, Ex. 6.)

39. On June 5, 2023, Shari emailed all counsel, stating that she did not believe she should have to pay for the mediation because she is only an "interested party." (*Id.*, Ex. 7.)

40. On June 7, 2023, after reading Jesse's Motion for Summary Judgment, Shari emailed Jesse's counsel and wrote:

Good Morning Nicole:

I just finished reading your Motion - I love it! You are brilliant.

Shari

(*Id.*, Ex. 8.)

41. The parties attended mediation on July 18, 2023. Shari was represented at the mediation by Don St. Peter. (Doc. 57.10.)

42. At mediation, Jesse and Mike agreed to probate Marty's prior 2007 Will. The parties further agreed as to the distribution of Estate property. (Doc. 63.) Shari was not a party to the settlement agreement as she had taken the unequivocal position that she was "just an interested party" who only wanted "justice" and believed Marty's purported 2021 Will was invalid, as described above.

43. Shari filed her Motion to Set Aside Settlement Agreement on August 9, 2023. (Doc. 65.) The District Court denied Shari's Motion on November 2, 2023 following a hearing and supplemental briefing by the parties. (Doc. 82.)

STANDARDS OF REVIEW

The District Court's application of judicial estoppel is a conclusion of law reviewed for correctness. *Fiedler v. Fiedler*, 266 Mont. 133, 137-38, 879 P.2d 675, 678 (1994).

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The District Court's application of waiver is also a conclusion of law which is reviewed for correctness. *Collection Bureau Servs. v. Morrow*, 2004 MT 84, ¶ 6, 320 Mont. 478, 87 P.3d 1024 (citation omitted).

SUMMARY OF THE ARGUMENT

Shari's argument that judicial estoppel only prohibits parties from taking inconsistent positions in different cases, rather than in the same case in which the positions were taken, is based upon a single sentence in *Stevens v. Novartis Pharms. Corp.* The issue, however, is not that straightforward. The development of Montana's judicial estoppel doctrine contains no indication that the doctrine was ever intended to be limited to different cases. It is also worth noting that judicial estoppel does not contain, and has never contained, an element requiring that the inconsistent positions be taken in different cases. To the contrary, the Court has affirmed the use of the doctrine to prohibit parties from taking inconsistent positions in the same case. As such, the sole sentence relied upon by Shari in *Stevens* is an outlier in Montana law with no clear indication of its source, and Jesse respectfully suggests that it should be overruled. Notwithstanding the fact that limiting the application of judicial estoppel to different cases has no basis in the law, implementing such a limitation would be arbitrary and unworkable in practice.

The District Court correctly concluded that Shari is judicially estopped from asserting she should have been a party to Jesse and Mike's Settlement Agreement.

Shari did not advocate for her life estate until she filed her Motion to Set Aside the Settlement Agreement. In fact, she did the opposite. Shari showed enthusiastic support of Jesse's efforts to invalidate Martin's 2021 Will to the point where any reasonable person would believe that was her desired result. Moreover, Shari continually held herself out as "just and interested person" who wanted to be kept informed of what was going on. Despite the fact that she had ample opportunity to advocate for her interest, Shari repeatedly took action adverse to the same. By now changing her position, Shari is trying to play fast and loose with the courts, which is precisely what judicial estoppel is intended to prevent. Alternatively, the District Court may be affirmed on the basis that Shari waived her right to be a party to the settlement agreement. Regardless of which doctrine the Court determines to be applicable, the District Court reached the right result and its Order denying Shari's Motion to Set Aside should be affirmed.

Finally, Jesse regretfully requests the Court award her attorney fees incurred on appeal due to Shari's continuous disregard of facts and law which are detrimental to her argument. Shari makes multiple representations which are readily disproven by her own communications sent while representing herself. As a result, Jesse has been forced to spend time educating the Court on issues which should have been addressed in Shari's Opening Brief. Had Shari done so, this appeal would be far less

convoluted and may have been negated altogether. Accordingly, Jesse respectfully requests her fees incurred on appeal.

ARGUMENT

I. The District Court correctly concluded that Shari is judicially estopped from arguing she should have been a signatory to Jesse and Mike’s Settlement Agreement due to her support of Jesse’s efforts to invalidate Marty’s purported 2021 Will.

A. *Stevens v. Novartis Pharms. Corp.* and *In re Raymond W. George Trust* should be overruled to the extent they suggest the doctrine of judicial estoppel is only applicable in separate lawsuits.

Shari asserts “[t]his Court has consistently held that the doctrine of judicial estoppel binds a party to his or her judicial declarations and precludes a party from taking a position inconsistent with them in a subsequent action or proceeding.” (Shari’s Opening Br., pp. 13-14) (emphasis omitted). While Shari is correct insofar as the Court has held this to be the purpose of the doctrine, she fails to acknowledge the conflict in the Court’s jurisprudence regarding the scope and meaning of the phrase “subsequent action or proceeding.” The elements of judicial estoppel are: (1) the estopped party must have knowledge of the facts at the time the original position is taken; (2) the party must have succeeded in maintaining the original position; (3) the position presently taken must be actually inconsistent with the original position; and (4) the original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Fiedler*, 266 Mont. at 140, 879 P.2d at 679-80. Notably, there is no requirement that

the positions be taken in separate lawsuits, as Shari and the lone sentence in *Stevens* she relies on suggests.

As further discussed herein, there are two cases in which the Court has implied that judicial estoppel bars a party from taking an inconsistent position only in a different case from which the original statement was made. The first is *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, 358 Mont. 474, 247 P.3d 244. The second is *In re Raymond W. George Trust*, 1999 MT 223, 296 Mont. 56, 986 P.2d 427. In multiple other cases, however, the Court has held that judicial estoppel prevents a party from taking inconsistent positions of fact and law at different points in the same litigation. Not only is the later view consistent with other jurisdictions, including the U.S. Supreme Court, but it also makes the most sense from a public policy perspective.

Limiting the application of judicial estoppel only to separate lawsuits from which the party's judicial declarations were made would not be an arbitrary distinction, but would also ignore the plain meaning of the terms "action" and "proceeding." Although *stare decisis* is a fundamental doctrine which reflects the Court's concerns for stability, predictability, and equal treatment, it does not require the Court to follow a decision that is manifestly wrong. *Formicove, Inc. v. Burlington N.*, 207 Mont. 189, 194-195, 673 P.2d 469, 472 (1983) (citations omitted). To the extent that *Stevens* and *George Trust* suggest that judicial estoppel

is only applicable in separate lawsuits, they are outliers and inconsistent with how the Court has applied the doctrine in numerous other cases. Accordingly, Jesse respectfully suggests that *Stevens* and *George Trust* be overruled to that extent.

1. This Court has held that judicial estoppel prevents a party from taking inconsistent positions in the same litigation.

The Court's first substantive discussion expressly identifying the doctrine of judicial estoppel appears to have come in 1986 in *Rowland v. Klies*, 233 Mont. 360, 726 P.2d 310 (1986). Although there is one prior mention of the doctrine by that name, the Court merely quoted the Corpus Juris Secundum and then conducted its analysis and decision under equitable estoppel. *Metcalf v. Barnard-Curtiss Co.*, 120 Mont. 50, 57, 180 P.2d 263, 266-67 (1947)¹. In *Rowland*, Appellant Rowland entered into an agreement with Respondent Klies in which Klies would build and furnish a cabin on his land for Rowland to live in for the rest of his life, and in return Rowland would look over Klies's property and prevent trespassers from damaging other cabins or cutting firewood. *Rowland*, 233 Mont. at 362, 726 P.2d at 312. As time passed, the relationship between the two men soured and a second agreement

¹ In the interest of completeness, the quote from *Metcalf* reads as follows: "Under the doctrine of judicial estoppel as applied in at least one jurisdiction, on grounds of public policy, a party or a witness who states facts under oath, whether in a deposition or during the course of the trial, is estopped to deny such facts in a subsequent suit to which he is a party, although the parties to the second suit may not be the same. . . ." (quoting 31 C.J.S., *Estoppel*, sec. 122. 392). The mention on the lack of a need for mutuality of parties is more akin to the doctrines of *res judicata* and judgment by estoppel, and such a requirement has never resurfaced in the Court's discussion of judicial estoppel. See *Beckman v. Chamberlain*, 673 P.2d 480, 481 (1983).

was made in which Rowland would be allowed to stay on the property until 1981, at which point Rowland vacated the premises. *Id.*, 233 Mont. at 364, 726 P.2d at 313.

Rowland proceeded to sue Klies under a variety of legal theories, the relevant theory here being a claim for violation of the employer-employee relationship and a claim for employer deception and misrepresentation. *Id.*, 233 Mont. at 367, 726 P.2d at 315. Rowland's first complaint was filed in May 1982, with the employment claims seemingly added via an amended complaint in April 1983. *Id.*, 233 Mont. at 364, 726 P.2d at 313. Rowland filed an affidavit in February 1983, after he filed his first complaint but before the filing of his amended complaint, in which he swore, *inter alia*, that: (1) he was not "employed" by Klies; (2) that the use of the word "hired" in his complaint was not intended to convey an employer-employee relationship; (3) that he was not hired as an employer hires an employee; and (4) that the word hired as used in the complaint did not mean that Klies was paying a wage for services rendered by Rowland. *Id.*, 233 Mont. at 367, 726 P.2d at 315. The district court, in considering Klies's motion for summary judgment on Rowland's employment claims, stated that Rowland was attempting to work a fraud upon the court by suddenly claiming damages from any employment status. This Court agreed. *Id.*

In opening its discussion regarding judicial estoppel, the Court quoted the following:

The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is frequently referred to as “judicial estoppel,” it more properly is a rule which estops a party to play fast-and-loose with the courts. . .

Although the rule . . . may be regarded as a form of estoppel, it is not strictly one of estoppel, but partakes rather of positive rules of procedure based on manifest justice and, to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation . . .

. . . those elements such as reliance and injury, or prejudice to the individual, which are generally essential to the operation of equitable estoppel, may not enter into judicial estoppel, at least not to the same extent . . . In order to work a judicial estoppel, the position first assumed must have been taken knowingly and free of inducement by the opposite party.

. . . the doctrine of judicial estoppel applies with particular force to admissions or statements made under sanction of oath . . .

Id., 233 Mont. at 367-68, 726 P.2d at 315 (quoting 31 C.J.S. *Estoppel*, Section 117B (1964)). After reviewing other courts’ holdings regarding the doctrine, this Court noted that Rowland shifted his position regarding the existence of an employment relationship to suit his legal maneuvering at the time. *Id.* When Rowland filed his first complaint, he was advancing a property law theory that Klies had granted him a life estate in his cabin. *Id.* It was not until the district court rejected that theory that Rowland changed his position and asserted the existence of an employment relationship. *Id.* The Court held that he was estopped from doing so and contradicted his prior affidavit. *Id.*

Although *Rowland* represents the Court’s first express discussion on judicial estoppel, the prohibition on parties taking inconsistent positions throughout

litigation—whether that be in the same or different action—has a longstanding history in Montana law. The issue, however, is that this prohibition has often been referred to by variety of names under the general umbrella of “estoppel.” For example, in *Colwell v. Great Falls*, 117 Mont. 126, 157 P.2d 1013 (1945),² a taxpayer sued for an injunction to prohibit the city from leasing the auditorium of a civic center, arguing that the civic center was to be used for public purposes. *Id.*, 117 Mont. at 129, 157 P.2d at 1014. The plaintiff argued, among other things, that the city was estopped from asserting that the auditorium was not dedicated or to be held in trust for a specific purpose based upon a position taken by the city in a different case. *Id.*, 117 Mont. at 138, 157 P.2d at 1019. The plaintiff’s estoppel argument was described as follows:

In support of his position as to estoppel, the plaintiff cites 21 C. J., p. 1223, Estoppel, Sec. 227, in part as follows: “A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. It is necessary, however, that the claim or position previously asserted or taken should have been successfully maintained that it should be actually inconsistent with the position presently taken, and that it should not have been taken through the fault of the adverse party.” However, Section 227 further states: “It is essential also that the party claiming the estoppel should have been misled by his opponent’s conduct, that he should have acted in reliance thereon, and that his rights would be injuriously affected if his opponent were permitted to change his position. When no wrong is done a change in position should and will be allowed. The rule has no application where the knowledge or means of knowledge of both parties is equal, nor in case of mistake. Also the rule has no application to change of position with respect to matters of law.

² *Colwell* was overruled on other grounds not concerning estoppel.

Id., 117 Mont. at 138-39, 157 P.2d at 1019.

The Court then analyzed the plaintiff's argument as one under equitable estoppel and ultimately concluded that it was not material to the view the Court took in the case. *Id.*, 157 P.2d at 139-40, 157 P.2d at 1019. The elements discussed above more closely resemble modern day judicial estoppel rather than the six-element test for equitable estoppel. *Cf. Turner v. Wells Fargo Bank*, 2012 MT 213, ¶ 30, 366 Mont. 285, 291 P.3d 1082. Moreover, the Court has cited *Colwell* in discussing the elements of judicial estoppel. *DeMers v. Roncor, Inc.*, 249 Mont. 176, 180, 814 P.2d 999, 1001-02 (1991). *Colwell* likely represents the inception of the Court's four-part test for judicial estoppel regardless of the fact that it does so while referring to "equitable estoppel," which is demonstrative of the lack of clarity surrounding the doctrine.³ Pertinent to this case, however, is that nothing in *Colwell* or *Rowland* suggests that judicial estoppel is limited in the manner suggested by Shari, i.e., that it is only applicable in separate cases.

Where the cases from which Montana's judicial estoppel doctrine grew contain no such limitation, it naturally follows that the doctrine has been utilized to stop parties from taking inconsistent positions in the same case. *See Fiedler, supra*,

³ To the best of Jesse's ability to ascertain, *DeMers* appears to be the first instance in which the Court listed the four-element test for judicial estoppel. Although the doctrine was mentioned in several cases between *Rowland* and *DeMers*, any such mention was in dicta and not substantive. *See First Nat'l Bank v. Quinta Land & Cattle Co.*, 238 Mont. 335, 341, 779 P.2d 48, 52 (1989); *Cleasby v. Security Fed. Sav. Bank*, 243 Mont. 306, 308, 749 P.2d 697, 698 (1990).

266 Mont. at 138-39, 879 P.2d at 678-79 (applying judicial estoppel where a party claimed real property was owned and operated by a partnership at the beginning of litigation and subsequently attempted to claim otherwise later in the same case on appeal). The Supreme Court of the United States takes a similar view and has described judicial estoppel as a rule which “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S. Ct. 2143 (2000)).

As such, Shari’s reliance on *Stevens v. Novartis Pharms. Corp.* as proof of the District Court’s alleged error is misplaced, and the law is not as straightforward as she portrays. The development of judicial estoppel in Montana has been complicated by loose application of everchanging terminology. What is apparent, however, is that a conflict exists between the sentence Shari relies upon in *Stevens* and how the doctrine has been applied in numerous other cases. As discussed below, the implication in *Stevens* that judicial estoppel only applies in separate lawsuits is not only inconsistent with the development and purpose of judicial estoppel but also carries unworkable practical implications.

2. ***Stevens* is inconsistent with Montana law to the extent it suggests judicial estoppel prohibits parties from taking inconsistent positions only in separate lawsuits.**

Stevens was a complex medical malpractice and products liability case regarding the prescription of a drug called Zometa manufactured by the Novartis Pharmaceutical Corporation. *Stevens*, ¶ 13. One of the nine issues on appeal following a jury trial was whether the district court erred in excluding statements in prior pleadings that were allegedly inconsistent with Novartis' liability. *Id.*, ¶ 7. Specifically, Novartis contended that it was deprived of a fair trial by the district court's exclusion of a statement made by plaintiff Stevens in her complaint, and a statement by Stevens' doctor in his response to her complaint before the Montana Medical Legal Panel. *Id.*, ¶ 68. With respect to the present case, only the issue of Stevens' statement in her complaint is relevant.

The statement in question alleged that Stevens' doctor was aware of the risks associated with Zometa and was negligent in failing to communicate those risks. *Id.*, ¶ 73. Novartis argued that Stevens' statements in her complaint were judicial admissions, or that in the alternative she should be judicially estopped from denying the statements in her prior pleadings. *Id.*, ¶¶ 74, 76. The Court held that Stevens' statements were not judicial admissions because they were expressions of opinion and conclusions of law as opposed to statements of fact. *Id.*, ¶ 75. The Court further rejected Novartis' judicial estoppel argument on three grounds: (1) that "the present case is not a 'subsequent action or proceeding. . .'"; (2) that Novartis had failed to show how it was misled by Stevens' prior positions; and (3) that Novartis had failed

to show that Stevens had knowledge of the facts at the time she took her original position. *Id.*, ¶ 76.

The second and third reasons for the Court’s rejection of Novartis’ judicial estoppel argument make sense given that they are express elements of the claim which have been present since the inception of the doctrine in *Colwell*. The source of the first reason, however, is more difficult to ascertain. As previously mentioned, there is no element of judicial estoppel requiring that the inconsistent positions sought to be estopped be taken in separate cases. Nor did the Court cite any authority in support of its first reason for dismissing Novartis’ judicial estoppel argument. The only potential source of this reasoning, that Jesse is able to locate, is *In re Raymond W. George Trust*, which was cited and discussed two paragraphs earlier in the *Stevens* opinion. *Stevens*, ¶¶ 74-75.

In *George Trust*, the Court stated “[t]he doctrine of judicial estoppel binds a party to his or her judicial declarations and precludes a party from taking a position inconsistent with them *in subsequent cases*.” *George Trust*, ¶ 51 (citing *Fiedler*, 226 Mont. at 139, 879 P.2d at 679) (emphasis added). This limitation, however, is a miscite of *Fiedler*. The *Fiedler* Court did not state that judicial estoppel precludes a party from taking inconsistent positions in subsequent cases, but rather that it “precludes a party from taking a position inconsistent with [a party’s judicial declarations] in a subsequent action or proceeding.” *Fiedler*, 266 Mont. at 139, 879

P.2d at 679 (citation omitted). Further, as noted above, *Fiedler* concerned the application of judicial estoppel **within the same case** to preclude a party from taking a position inconsistent with the one he took at the beginning of litigation. *Id.*, 266 Mont. at 140, 879 P.2d at 680. *Fiedler*, therefore, cannot stand in support of the Court's implication that judicial estoppel is only applicable in different case in *George Trust*. As such, both *Stevens* and *George Trust* stand alone as anomalies in the Court's judicial estoppel jurisprudence with no indication of the origin of their implication that the doctrine is only applicable in separate cases.

This Court should reject such an implication not only because it is inconsistent with, and unfounded in, Montana law, but also for practical reasons. Limiting judicial estoppel to separate cases would be contrary to the phrase "subsequent action or proceeding." "Action" means a lawsuit brought in a court. *Action*, Black's Law Dictionary 28 (6th ed. 1990). This comports with Montana law. *See* M. R. Civ. P. 2. "Proceeding" means "the form and manner of conducting judicial business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps *in an action* from its commencement to the execution of judgment." *Proceeding*, Black's Law Dictionary 1204 (emphasis added). Although Shari attempts to use the two terms interchangeably, it is apparent that they mean different things. By definition, an action is comprised of proceedings. As such,

judicial estoppel's bar on inconsistent positions "in subsequent actions or proceedings" naturally must encompass positions taken within the same lawsuit.

Moreover, applying judicial estoppel in the manner suggested by Shari would result in an arbitrary and unworkable rule in practice. Nothing good would be gained by concluding that parties are free to change and take inconsistent positions based on whatever suits their legal maneuvering at the time as long as they do so within the same case—especially when the Court expressly rejected such a strategy in cases like *Rowland* and *Fiedler*. Such a rule would be a license to play fast and loose with the courts, resulting in more contentious, prolonged, and expensive cases, i.e., exactly what the doctrine of judicial estoppel is intended to prevent. Basic concepts of fairness and justice require that judicial estoppel prohibit inconsistent positions taken within the same lawsuit in order to "secure the just, speedy, and inexpensive determination of every action and proceeding." M. R. Civ. P. 1.

Finally, it is worth noting that the two sentences at issue in *Stevens* and *George Trust* can be overruled, or otherwise clarified by the Court, without disrupting the holdings of either case. As set forth above, both appeared without any clear tie to existing law. Shari contends that "the reason judicial estoppel did not apply [in *Stevens*] was because the case was not a subsequent action or proceeding, but rather, the same proceeding." (Shari's Opening Br., p. 15.) In essence, Shari asserts the *Stevens* Court rejected Novartis' judicial estoppel argument not on the elements of

the claim but instead on arbitrary criteria. Shari overlooks the fact that the *Stevens* Court expressly concluded two elements of judicial estoppel were not met. *Stevens*, ¶ 77. The removal of the subject sentence from *Stevens* would change nothing in the remainder of the opinion. The same is also true for *George Trust*.⁴

The development of the judicial estoppel doctrine in Montana has been far from straightforward, as demonstrated by the fact that *Colwell* referred to it as “equitable estoppel.” The various estoppel doctrines are susceptible to confusion because they are often referred to interchangeably and share multiple similarities. This may also explain the origin of the sentences at issue here, as the Court’s discussion of judicial estoppel in both *Stevens* and *George Trust* were bookended by discussions of other legal concepts such as judicial admissions, collateral estoppel, and res judicata. *Stevens*, ¶ 73; *George Trust*, ¶¶ 36, 42, 47. However, both *Stevens* and *George Trust* conflict with longstanding Montana law regarding judicial estoppel. There is nothing in the doctrine’s development that suggests it was intended to be limited to different cases, and as shown by cases like *Rowland* and *Fiedler*, it may appropriately be used to prohibit parties from changing their positions in the same case to suit their legal strategy of the day, just as what happened

⁴ The facts of *George Trust* are not relevant to this case and as such were not recited herein, however in that case the Court also concluded that the elements of judicial estoppel were not present because the proponent of the claim failed to show that an inconsistent position had been taken. *George Trust*, ¶ 53. There was no discussion as to whether the alleged positions were taken in the same or different case.

in the present matter. Accordingly, Jesse respectfully asserts that the two sentences in *Stevens* and *George Trust* discussed above are “manifestly wrong” and should be overruled to the extent they imply that judicial estoppel requires that inconsistent positions be taken in separate actions in order to be applicable.

B. The District Court correctly concluded that Shari is judicially estopped from changing her position regarding the applicability of Marty’s purported 2021 Will.

1. Shari’s characterization of her actions in this case is not accurate.

Turning to the present matter, clarification regarding Shari’s actions in this case is necessary before discussing the elements of judicial estoppel. Shari asserts the District Court erred by concluding she has maintained that Marty’s 2021 Will is invalid and that she has held herself out as an “interested party” that just wants to be kept informed. (Shari’s Opening Br., p. 16.) On the point that she is an “interested party,” Shari argues that designation merely by operation of Mont. Code Ann. § 72-1-103(25) and that until Jesse and Mike entered their settlement agreement “[she] has been content to let the legal process play out, and have the court make a determination regarding the validity of the Will.” (*Id.*, pp. 16-17.) Shari was not as docile as she portrays and sought to “interject herself into the Estate proceeding” well before Jesse and Mike entered their Settlement Agreement.

Shari claims “[s]ince her dismissal from the *Petition*, she has continuously voiced her wish to keep her life estate, and has fought Michael to prevent his

consistent attempts to limit its scope.” (Shari’s Opening Br., p. 21.) This statement is false. Shari did not advocate for her life estate throughout this case, and instead stated “I am ONLY an INTERESTED PARTY to this case – that means I want to be kept informed of what is going on. That’s all.” (Doc. 67, Ex. 4) (emphasis in original). Shari subsequently stated that she was “just an interested party on the sidelines. . .” (*Id.*, Ex. 6.) Shari’s reluctance to pay for mediation because of her status as “only an interested party” is also indicative of the fact that she has not sought to keep her life estate throughout this litigation. (*Id.*, Ex. 7.) At no point did Shari express any desire to keep her life estate prior to the filing of her Motion to Set Aside Settlement Agreement. (Doc. 65.) Shari never addressed these communications during the briefing of her Motion to Set Aside Settlement Agreement or in her Opening Brief on appeal. It is unclear why she has refused to do so.

What is more baffling is Shari’s claim that she has fought Mike’s “consistent attempts to limit [her life estate’s] scope.” Jesse does not know what Shari is referring to. Shari did assert the following in her Response to Mike’s Motion for Summary Judgment:

Finally, in Michaels *Motion* [for Summary Judgment] he continues his consistent attempts to limit Shari Malay’s life estate in the real property. If the Will is deemed valid, Shari is entitled to “a life estate” in Decedent’s “primary residence.” Throughout this matter, Michael has continuously attempted to limit the scope of this life estate, arguing that the “primary residence” should only include the home and area directly around it.”

(Doc. 62, p. 3.) Mike’s Motion for Summary Judgment did not seek to limit the scope of Shari’s life estate,⁵ and Jesse is unaware of any other such attempts in the record.

Moreover, Shari states “the only reason that [she] filed a formal objection to [Mike’s Motion for Summary Judgment] is because he sought attorney’s fees against her, and his *Motion* intentionally attempted to limit the scope of her life estate.” (Shari’s Opening Br., p. 20.) Again, Shari is ignoring her own statements made while she was representing herself. Mike’s counsel emailed Shari and asked, “Shari do you object to the filing of an overlength brief? Also, do you object to Michael’s motion for summary judgment ***that the November 8, 2021 will is valid?***” (Doc. 67, Ex. 2) (emphasis added). In response, Shari stated, “I do object to Mike’s motion for summary judgment re the November 8, 2021 Will; . . .” (*Id.*) Not only does this undermine Shari’s claim that her objection to Mike’s Motion for Summary Judgment was limited in scope, it undermines her claim that she has “continuously” voiced her wish to keep her life estate. To the contrary, she actively opposed Mike’s efforts to validate the 2021 Will, which is the only way Shari could keep her life estate.

⁵ Mike did describe one of Marty’s wishes as Shari being provided “a limited life estate in his residence, subject to certain conditions.” (Doc. 59, p. 2.) It is difficult to interpret this as an attempt to limit Shari’s life estate, especially considering the 2021 Will does place conditions upon the same. (Doc. 1.)

However, Shari did more than that. On the one hand, Shari claims she did not take any stance with regard to Jesse's Motion for Summary Judgment. (Shari's Opening Br., p. 20.) On the other hand, Shari enthusiastically supported Jesse's efforts to invalidate the 2021 Will, as demonstrated by the fact that she called Jesse's counsel "brilliant" after reading her Motion for Summary Judgment. (Doc. 67, Ex. 8.) Additionally, Shari sent Jesse's counsel a lengthy narrative because she felt it was necessary to get "justice," even though she recognized she could jeopardize her position in the case by doing so. (*Id.*, Ex. 3.)

In short, Shari's position in this case was never in favor of her life estate prior to the filing of her Motion to Set Aside Settlement Agreement. While Shari claims she advocated for her life estate in her Response to Mike's Motion for Summary Judgment, that claim is contradicted by her statement that she "has been content to let the legal process play out, and have the court make a determination regarding the validity of the Will," (Shari's Opening Br., pp. 16-17), and that she "does not take any stance with regards to Jesse Maclay's Motion." (*Id.*, p. 20.) As discussed below, Shari's attempt to enforce Mont. Code Ann. § 72-3-915(1) is inconsistent with the position she has taken throughout this matter.

2. The District Court correctly concluded that the elements of judicial estoppel are satisfied.

Regarding the first element of judicial estoppel, Shari claims that she did not have knowledge of the facts when she took the original position because she "did

not have knowledge of the fact that she would lose her life estate as a party to the initial Petition, nor was she aware that by being included in the initial Petition, that she was contesting the validity of the Will.” (*Id.*, p. 21.) This point is immaterial. As noted by the District Court, Jesse and Mike argued that Shari’s Motion to Set Aside represented a departure from the position Shari has maintained since at least her deposition in April 2023. (Doc. 82, pp. 3-4.) As discussed above, Shari’s position in her deposition and during summary judgment briefing was that Marty’s 2021 Will is invalid.⁶ Shari explicitly stated that she understood she would lose her life estate if the 2021 Will were invalidated. (Doc. 67, Ex. 1, 42:8-10; 99:13-100:4.) Accordingly, Shari had knowledge of the facts at the time she took her original position. The first element of judicial estoppel is satisfied.

Shari asserts that the second element of judicial estoppel is not satisfied because no determination has been made regarding the 2021 Will’s validity. (Shari’s Opening Br., p. 21.) However, the acquisition of a judgment is not required to satisfy the second element of judicial estoppel. *Demers*, 249 Mont. at 181, 814 P.2d at 1002. Rather, “the party against whom the estoppel is sought must have at least been

⁶ Jesse acknowledges that judicial estoppel does not apply to a change of position regarding matters of law. *Colwell*, 117 Mont. at 139, 157 P.2d at 1019. Shari’s position regarding the validity of the 2021 Will was based upon her view that Marty was under the influence of drugs and Covid-19, as well as her belief that Marty would not have disinherited Jesse. Additionally, Shari’s support of Jesse’s Motion for Summary Judgment naturally means support of the factual bases for the same. As such, stating Shari’s position as one regarding the validity of the 2021 Will is intended as a paraphrase of the facts she adopted in reaching that position.

successful in arguing its original position against the party asserting the estoppel.”

Id. The present matter is analogous to cases like *Rowland* and *Fiedler* where a party maintained one position throughout litigation and then attempted to reverse course and take an inconsistent position at the eleventh hour. Shari undoubtedly supported Jesse’s efforts to invalidate the 2021 Will, which she benefited from because she did not have to spend time and resources drafting her own motion. At all other times, Shari maintained an air of nonchalance by holding herself out as “only an interested party” who just wanted “justice.” Given that Shari consistently acted contrary to her life estate until the filing of her Motion to Set Aside Settlement Agreement, the District Court correctly concluded that the second element is satisfied.

Shari contends that she has not taken inconsistent positions in this case. (Shari’s Opening Br., p. 22.) As previously discussed, she has. In order to make this statement, Shari had to deliberately ignore evidence showing her support of Jesse’s Motion for Summary Judgment, objection to Mike’s Motion for Summary Judgment, and assistance to Jesse. Shari argues that Jesse “took Shari’s deposition answers out of context and warped them to paint her as inconsistent in her stances” and “blatant[ly] mischaracterize[ed]” her testimony. (Shari’s Opening Br., pp. 18-19.) Shari offers no explanation as to how this is the case. Shari further asserts that various statements of hers are “general statements of opinion, not positions which can be estopped,” and “not judicial positions that can be held against Shari through

estoppel.” (*Id.*, pp. 18, 20.) Candidly, Jesse is unsure as to what Shari means. She does not offer any explanation as to the difference between a “general opinion” and “judicial opinion.” Nor does she offer any authority for her implication that parties cannot be bound by their “general opinions,” whatever those are. Shari’s inconsistency throughout this case has been discussed at length. The third element of judicial estoppel is satisfied.

With respect to the final element, Shari argues that no party has been misled by her position in this matter because she has “continuously requested and protected her right to her life estate in the Decedent’s residential premises.” (Shari’s Opening Br., p. 22.) As previously explained, this is not true. Shari goes on to state, “[w]hen she was invited to the mediation, she expected to be an active participant in the settlement discussions, and hoped the mediation would lead to a global resolution.” (*Id.*) Again, this is not true. Shari questioned why the mediation was occurring at all because she believed Jesse was going to “win this case” and that “Mike and his lawyers are not going to back down.” (Doc. 67, Ex. 4.) Shari also complained to Mike’s counsel and asserted that mediation was unnecessary. (*Id.*, Ex. 6.) She again emailed the parties and expressed her belief that she should not have to pay for mediation because she was “only an interested party.” (*Id.*, Ex. 7.) Shari’s latest depiction of eagerness and willingness to mediate this case is nothing more than an illusion.

The parties were misled by Shari's positions that she was (1) an interested party who only wanted to see justice done, and (2) that she opposed the validity of Marty's 2021 Will. Throughout this case, Shari gave the impression that she wanted the 2021 Will invalidated because she did not believe it represented Marty's true wishes. She did not advocate for her life estate. Instead, she opposed Mike's efforts to validate the only means of her keeping the same. With regard to Shari, the result of Jesse and Mike agreeing to settle this matter is the same as if Jesse were successful in her Motion for Summary Judgment, which Shari supported. Additionally, Jesse and Mike will be injuriously affected if Shari is now allowed to change her position.

In order for Shari to keep her life estate, the 2021 Will must be valid. If Shari's appeal is successful and the settlement agreement is set aside, then this matter will be remanded to the District Court where the will contest will continue. Because Jesse's and Mike's cross motions for summary judgment were not yet fully briefed at the time of mediation, the case would likely pick up there. This would put the parties and District Court in a unique quandary. On the one hand, Jesse and Mike will be forced to litigate a case they have already agreed to settle. On the other hand, Shari will have to argue for the validity of the 2021 Will even though up until that point she had done the exact opposite. Shari cannot accomplish such a goal with any sense of credibility because she is firmly entrenched in her position that the 2021 Will is invalid. The exercise would accomplish nothing but to waste time, money,

and judicial resources. As such, Jesse and Mike stand to be injuriously affected if Shari is allowed to change her position. All four elements of judicial estoppel are satisfied.

The purpose of judicial estoppel is to prevent parties from playing fast and loose with the courts. That is exactly what Shari is trying to do here. For the entirety of this case, Shari has held herself out not as a party, but as a mere “interested person” who wanted justice. In Shari’s words, that justice included a finding that the 2021 Will is invalid. Now, she has changed course and now seeks to argue the opposite. Shari should not be allowed to haphazardly change her position based on her legal maneuvering of the day. Even if her appeal is successful, she cannot credibly assert that she should be allowed to keep her life estate before the District Court. This is exactly the type of situation sought to be prevented by judicial estoppel. As such, equity demands that the District Court’s Order be affirmed.

II. Waiver is an appropriate alternative basis for affirming the District Court’s Order.

Where the conclusion of the district court is correct, it is immaterial—for the purpose of affirmance on appeal—what reasons the district court gives for its conclusion. *Erker v. Kester*, 1999 MT 231, ¶ 21, 296 Mont. 123, 988 P.2d 1221. Waiver is the intentional and voluntary relinquishment of a known right, claim, or privilege. *Collection Bureau Servs. v. Morrow*, 2004 MT 84, ¶ 9, 320 Mont. 478, 87 P.3d 1024 (citation omitted). Anyone may waive the advantage of a law intended

solely for their benefit. Mont. Code Ann. § 1-3-204. Waiver may be proven by express declarations, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce the belief that it was her intention and purpose to waive. *Collection Bureau Servs.*, ¶ 11 (quoting *Northwestern F.&M. Ins. Co. v. Pollard*, 74 Mont. 142, 149, 238 P. 594, 596 (1925)).

Here, Shari faults the District Court for refusing to apply Mont. Code Ann. § 72-3-915(1) to invalidate Jesse and Mike's settlement agreement pursuant to the statute's plain language. (Shari's Opening Br., pp. 11-13.) Shari claims she did not waive her right to object to Jesse and Mike's settlement agreement because such a right did not exist until the agreement was executed. (Shari's Opening Br., p. 24.) That argument does not make sense, however, because Section 72-3-915(1) provides that Shari had the right to be a party to any distribution agreement. There is no language in the statute limiting when such agreements can be made, meaning they can be entered into at any time during the administration of an estate. As such, Shari's right to be a party to a distribution agreement was always in existence.

Logically, however, Shari would have had to believe that she had an interest in Marty's Estate in order for the same to be affected by Jesse and Mike's agreement. Although she does so now, as previously discussed, Shari took the exact opposite position throughout this case. Shari's claim that she "took no actions inconsistent

with her right to object pursuant to [the statute]” is simply wrong. (Shari’s Opening Br., p. 24.) Shari attacked her own interest by taking the position that Marty’s 2021 Will is invalid. By doing so, repeatedly, she acted inconsistently with her right to be a party to any subsequent distribution agreement. Again, Jesse and Mike’s Settlement Agreement carries the same affect for Shari as if Jesse had been successful in her Motion for Summary Judgment, which is what Shari wanted. It makes little sense to conclude that Shari is now allowed to exercise her right under Section 72-3-915(1) and complain she has been divested of an interest which, up until this point, she acted as though she did not want. Accordingly, if the Court concludes that judicial estoppel is not applicable in this matter, it should nevertheless affirm the District Court’s Order on the grounds that Shari has waived her right to be a party to Jesse and Mike’s settlement agreement.

III. The Court should impose a sanction against Shari pursuant to M. R. App. P. 19(5) and award Jesse her attorney fees on appeal.

This Court may, on a motion to dismiss, a request included in a brief, or sua sponte, award sanctions to the prevailing party in an appeal determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. Sanctions may include costs, attorney fees, or such other monetary or non-monetary penalties as the supreme court deems proper under the circumstances. M. R. App. P. 19(5). The Court found such sanctions

appropriate in *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶¶ 89-93, 337 Mont. 411, 162 P.3d 106.

There, a party attempted to circumvent the Court's page limitations by including information in an appendix which should have been included in the brief itself and improperly asked the Court to adopt and incorporate by reference into their brief more than 200 pages of facts; citations to deposition and trial testimony; authorities; and argument contained in their filings before the district court. *Id.*, ¶ 91. Further, the party's brief was convoluted and confusing because it listed eleven issues that did not correspond in any meaningful way to the 29 contentions set forth in the argument section of their brief and was "dominated by bald declarations of error by the District Court with little or no substantiation." *Id.* The Court concluded that many of the errors made by the party on appeal could have been avoided had they attempted to substantiate legitimate issues rather than using a "shotgun" approach to attempt to hit every conceivable issue and then failing to support those issues with proper analysis and legal authority. *Id.*, ¶ 92.

Here, Jesse makes this request begrudgingly and regrets that it is necessary. Jesse does not claim that Shari's brief in this matter is as egregious as the one in *Murphy Homes*. However, Shari's strategy of burying her head in the sand and disregarding everything that is detrimental to her case has resulted in an unfair incursion of fees on Jesse's behalf and cannot be considered a reasonable ground for

appeal. For example, Shari made multiple statements in her Opening Brief which are blatantly untrue and often contradictory, e.g., her claim that she has consistently voiced her desire to keep her life estate versus her claim that she was content to let the legal process play out and let the District Court make a determination regarding the validity of the 2021 Will. Shari also ignored her multiple emails which contradict these statements. Notably, these emails were attached to Jesse's Response to Shari's Motion to Set Aside Settlement Agreement, which were likewise ignored by Shari. (Doc. 67; Cf. Doc. 69.) They come as no surprise, but Shari has chosen to ignore their existence nonetheless.

Moreover, Shari ignored and failed to discuss relevant law, leaving that work to Jesse. For example, Shari cited *Fiedler* on page 14 of her Opening Brief, which directly contradicts her assertion that judicial estoppel is only applicable in separate cases. Shari did not discuss *Fiedler*, and instead relied upon a single sentence in *Stevens* for the near entirety of her argument. The length of this brief can largely be attributed to explaining facts and law that Shari ignored and disregarded in her Opening Brief. It is unfair for Jesse to incur the time and expense associated with educating the Court on issues which should have been addressed by Shari in the first instance. It is difficult to imagine Shari's reason for failing to acknowledge obvious facts and law that contravene her case. Rule 19(5) does not require such a consideration. Although there is a legitimate conflict in the Court's jurisprudence

surrounding judicial estoppel, that was not the basis of Shari's appeal. Instead, Shari's appeal was based on bald and unsupported assertions of error on the part of the District Court. Equity therefore requires that Jesse be afforded some relief for Shari's failure to base her appeal on a substantial and reasonable ground. Accordingly, and unfortunately, Jesse respectfully requests her attorney fees incurred on appeal.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's order.

DATED this 25th day of April 2024.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing RESPONSE BRIEF is proportionately spaced in 14-point roman, non-script text and contains 9984 words excluding brief's cover, table of contents, table of authorities, certificate of compliance and certificate of service.

DATED this 25th day of April 2024.

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