

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0485

DAREN ENGELLANT,
Individually and acting as personal representative of the
ESTATE OF GREGORY ENGELLANT,

Plaintiff, Appellant, and Cross-Appellee,

v.

CROWLEY FLECK, PLLP and DANIEL N. MCLEAN,

Defendants, Appellees, and Cross-Appellants.

CROWLEY FLECK, PLLP and DANIEL N. MCLEAN,

Third-Party Plaintiffs and Cross-Appellants,

v.

KENNETH ENGELLANT and SHANA DIEKHANS,

Third-Party Defendants and Cross-Appellants.

KEVIN ENGELLANT,

Intervenor and Appellant.

BRIEF OF APPELLANT

On appeal from the Montana First Judicial District Court, Lewis and
Clark County, the Honorable Christopher D. Abbott, Presiding

Exhibit B

APPEARANCES:

JAMES REAVIS

Netzer, Krautter & Brown, P.C.
301 N 27th St #100
Billings, MT 59101
james@nkbattorneys.com
(406) 433-5511

ATTORNEY FOR PLAINTIFF,
APPELLANT, AND CROSS-
APPELLEE DAREN ENGELLANT

MIKEL L. MOORE

Moore Resolutions, PLLC
305 Mountain Gateway Dr.
Kalispell, MT 59904

ERIC M. BROOKS

Moore, Cockrell, Goicoechea &
Johnson, P.C.
145 Commons Loop
Kalispell, MT 59904

ATTORNEYS FOR DEFENDANTS,
APPELLEES, AND CROSS-
APPELLANTS CROWLEY FLECK,
PLLP AND DANIEL MCLEAN

MICHAEL L. RAUSCH

Browning, Kaleczyc, Berry & Hoven
Liberty Center, Ste 302
9 Third St. N
Great Falls MT 59401

EMILY MARJORIA MCCULLOCH

Browning, Kaleczyc, Berry & Hoven
201 West Railroad St., Ste 300
Missoula MT 59802

ATTORNEYS FOR THIRD-PARTY
DEFENDANT AND CROSS-
APPELLANT KENNETH
ENGELLANT

WILLIAM JOSEPH LEVINE

Marra, Evenson & Levine, P.C.
P.O. Box 1525
Great Falls MT 59403

ATTORNEY FOR THIRD-PARTY
DEFENDANT AND CROSS-
APPELANNT SHANA DIEKHANS

KEVIN ENGELLANT

554 Fox Ridge Dr.
Dillion MT 59725

INTERVENOR AND APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW	12
SUMMARY OF THE ARGUMENT	12
ARGUMENT	13
CONCLUSION.....	21
CERTIFICATE OF COMPLIANCE.....	22

TABLE OF AUTHORITIES

Cases

<i>Ballas v. Missoula City Board of Adjustment</i> , 2007 MT 299, 340 Mont. 56, 172 P.3d 1232.....	13, 14
<i>Folsom v. Montana Public Employees Ass’n.</i> , 2017 MT 204, 388 Mont. 307, 400 P.3d 706.....	15
<i>Harland v. Anderson Ranch Co.</i> , 2004 MT 132, 321 Mont. 838, 92 P.3d 1160.....	13
<i>Harris v. Smartt</i> , 2003 MT 135, 316 Mont. 130, 68 P.3d 889	12
<i>H-D Irrigating, Inc. v. Kimble Properties</i> , 2000 MT 212, 301 Mont. 34, 8 P.3d 95.....	13, 14
<i>HSBC Bank USA, N.A. v. Anderson</i> , 2017 MT 257, 389 Mont. 106, 406 P.3d 416.....	15
<i>In re Estate of Stone</i> , 236 Mont. 1, 768 P.2d 334, (1989).....	14
<i>In re K.B.</i> , 2016 MT 73, 383 Mont. 85, 368 P.3d 722.....	12
<i>In re Marriage of Di Pasquale</i> , 220 Mont. 497, 716 P.2d 223 (1986).....	14
<i>Marias Healthcare Services v. Turenne</i> , 2001 MT 127, 305 Mont. 419, 28 P.3d 491.....	15
<i>Meadow Lake Estates Homeowners Ass’n. v. Shoemaker</i> , 2008 MT 41, 341 Mont. 345, 178 P.3d 81	16
<i>Philadelphia Indemnity Ins. Co. v. O’Leary</i> , 2024 MT 235, 418 Mont. 306, 557 P.3d 946.....	13
<i>Sterrett v. Milk River Production Credit Ass’n.</i> , 234 Mont. 459, 764 P.2d 467, (1988)	14, 15
<i>Weaver v. State</i> , 2013 MT 247, 371 Mont. 476, 310 P.3d 495.....	15, 16, 21

Winslow v. Montana Rail Link, Inc., 2005 MT 217, 328 Mont. 260, 121 P.3d 506.....16

Statutes

Mont. Code Ann. § 72-3-10217
 Mont. Code Ann. § 72-3-31718
 Mont. Code Ann. § 72-3-60117
 Mont. Code Ann. § 72-3-60417
 Mont. Code Ann. § 72-3-61017

Rules

M. R. Civ. P. 15(a)(2)20
 M. R. Civ. P. 814
 M. R. Civ. P. 8(b) 14, 15
 M. R. Civ. P. 8(c) 14, 15, 16
 M. R. Evid. 202(b)(6)18

STATEMENT OF THE ISSUE

In an attorney malpractice case involving a deceased plaintiff, did the district court lack issue jurisdiction to determine whether the plaintiff's will was valid when the plaintiff's will had already been probated in a different district court?

STATEMENT OF THE CASE

Daren Engellant, personal representative of Gregory Engellant, sued Crowley Fleck, PLLC in Lewis and Clark County for attorney malpractice on the basis that Gregory's attorney for that firm, Daniel McLean, committed malpractice when he gifted away the bulk of Gregory's fortune of \$1,762,500 in Engellant Ranch stock to Gregory's niece and Daren's sister Shana Diekhans. (Doc. 1; Ex. 217-5.) Crowley Fleck brought in Shana and her father Kenneth Engellant into the litigation as third-party defendants. (Docs. 12, 13, 32, 36.)

Gregory died as a Cascade County resident prior to bringing litigation. (Doc. 13, Ex. F.) When he died in 2019, two wills were available for probate, a will from 1978 prior to Gregory's infliction of a traumatic brain injury, or a will from 2012, after the injury. (Doc. 13,

Ex. F.) Daren, Kenneth, and Shana all agreed to probate the 1978 will. (Doc. 13, Ex. F; Ex. 426.) The district court in Cascade County, cause number CDP-19-114, probated the 1978 will and appointed Daren as personal representative. (Doc. 56, CF Appendix at 319-320; *also see* Doc. 97 at 6.)

Daren relied on the 1978 will prior to filing suit against Crowley Fleck as the terms of the 1978 will divided the assets equally between Daren, Shana, and their brother Kevin Engellant. (*See* Doc. 13, Ex. F, 6/4/24 Tr. 33.) The 2012 will, drafted by McLean, provided Shana would receive Gregory's Engellant Ranch stock and land upon his death. (Doc. 13, Ex. F.) Therefore, if the 2012 will controlled, there would have been no damages. (*See* Doc. 13, Ex. F, 6/4/24 Tr. 33.) The district court stated the 1978 will was the probated will as a stipulated fact in its pretrial order. (Doc. 258 at 8.)

As trial approached, the defendants argued over Daren's objection the 2012 will controlled instead. (Docs. 241, 243, 250, 252, 253.) The defendants did not explain how the district court's jurisdiction in a Lewis and Clark County attorney-negligence case had the power to determine the validity of a prior probated will in Cascade County. (*See*,

e.g., Docs. 250, 252.) The defendants did not move to amend the pleadings to add the will contest as an affirmative defense. (Docs. 250, 252.) “Crowley Fleck respectfully submits that the identified contentions and issues of fact are negative defenses, not affirmative defenses. Therefore, no modification to the pretrial order as submitted is required.” (Doc. 250 at 16.) The district court allowed trial to move forward without amending the pleadings. (Doc. 257, attached as Exhibit B.)

The defendants also sought to delay trial in Lewis and Clark County to engage in probate litigation in Cascade County, but the district court denied their request. (Docs. 220, 221, 222, 229.) The district court stated that while the probate court in Cascade County could remove Daren as personal representative, the court was “unwilling to upend its schedule in this long pending matter” to allow the probate court to hear the case. (Doc. 229 at 6.)

The trial involved consideration of McLean’s negligence as well as a dispute over whether the 2012 will or the 1978 will was the operative will. (*See, e.g.*, 6/12/24 Tr. 12-14, 25, 37-38, 49-50.) The jury concluded the 2012 will was the operative will and never reached the question of

McLean's negligence. (Doc. 275.) The district court issued judgment for the defendants. (Doc. 287, attached as Exhibit A.) Daren timely appealed. (Docs. 287, 299.)

STATEMENT OF THE FACTS

Daren Engellant is the nephew and personal representative of Gregory Engellant, who died in 2019. In the 1970's, Gregory was an actively involved part-owner of Engellant Ranch, a 4,000+ acre agricultural property outside of Geraldine, Montana, along with his brother Kenneth Engellant, who is the father of Daren Engellant, Kevin Engellant, and Shana Diekhans. (6/5/24 Tr. 7-10, 12-13, 23, 40; Ex. 9 at 9-5.) Arnold Engellant was the father of Gregory and Kenneth. (6/5/24 Tr. 29.) When Arnold died, he passed half his shares to Gregory but disinherited Kenneth. (6/5/24 Tr. 30.) Arnold instead passed the shares to Kenneth's children under a complex trust and contract structure. (6/5/24 Tr. 30-32, 208.)

In 1978, before traveling to Alaska to work at a farm, Gregory wrote a holographic will that equally divided his estate between Kenneth's children. (6/5/24 Tr. 11; Doc. 13, Ex. F.)

Gregory suffered a traumatic brain injury in 1983 in Alaska when his body was thrown into a farming combine, nearly killing him. (6/5/24 Tr. 13-14.) He stayed in a coma for over six weeks. (6/5/24 Tr. 14.) When he woke up, Gregory's mental status was forever changed. (See 6/5/24 Tr. 15.) "[H]e was not the same person. He had a little bit of the same personality but he couldn't run the farm." (6/5/24 Tr. 17.) Gregory could no longer manage his own financial affairs or the ranch. (See 6/5/24 Tr. 36-39; 6/6/24 Tr. 16; 6/7/24 Tr. 126-127.) Kenneth became his guardian and conservator. (6/5/24 Tr. 34.)

Gregory had sizeable assets from being a half-owner of the ranch, owning about 320 acres of his own land adjacent to the ranch, and receiving a sizeable settlement from the farming combine accident. (6/5/24 Tr. 30, 34-35, 42-43.) For a number of years Kenneth managed Gregory's assets and filed regular accountings, however, Kenneth eventually stopped filing those accountings. (6/5/24 Tr. 70.) Kenneth once used financing from First State Bank, but he got tired of paying a higher interest rate, so he started taking out loans from Gregory's estate to pay for ranch operations instead. (6/5/24 Tr. 174.)

In 2012 the Lutt property—which bordered Engellant Ranch—came up for sale. (6/5/24 Tr. 125.) This was a good business opportunity and meant a large expansion for the ranch. (6/5/24 Tr. 128; 6/11/24 Tr. 108-109.) Daren, who has an accounting degree and an interest in the ranch from Arnold's bequest, had concerns about how the purchasing loans would be structured. (6/7/24 Tr. 147-152; 6/5/24 Tr. 30-32, 208.) He was worried about how Gregory's money would be used and if this would put his uncle into debt. (6/7/24 Tr. 147-148.)

The Engellants had a family meeting where Daren drew on a whiteboard to figure out what was going on, but the family reacted with disdain and confusion instead. (6/7/24 Tr. 149-151). They just wanted Daren to get on board and said the matter was none of his business. (6/7/24 Tr. 150.)

Ultimately the Lutt land deal went through and Daren was bought out of his shares. (Ex. 6; 6/5/24 Tr. 127; Ex. 430.) However, hurt feelings remained. (6/5/24 Tr. 131.) Seventeen days after the Lutt purchase closed, Kenneth called attorney Michael Lamb and told him that Gregory wanted to change his will. (Ex. 6; Ex. 9; 6/6/24 Tr. 20.)

Lamb told Kenneth that he did not draft wills, but he knew another attorney, Daniel McLean with Crowley Fleck, who did. (Ex. 9 at 9-4.)

On May 29, 2012, Kenneth, Gregory, McLean, and Lamb met together to discuss what Gregory wanted. (Ex. 9 at 9-5; 6/6/24 Tr. 20-22.) Gregory, in Kenneth's and Lamb's presence, said he wanted his interest in the ranch to go to Shana because she was living there, but he also wanted Kevin and Daren to inherit the cash that remained in his accounts after his death. (6/6/24 Tr. 27; Ex. 9 at 9-6.)

McLean did not have a separate meeting with Gregory outside of Kenneth's presence. (6/6/24 Tr. 92-93.) McLean conceded this was not his usual practice when a relative with financial interests takes someone to a lawyer's meeting about a will. (6/6/24 Tr. 92-93.) McLean also drew the conclusion that Gregory was suggestible—meaning he “could be manipulated by someone else”—shortly after the meeting. (6/6/24 Tr. 67-72.) Nonetheless, McLean moved forward with drafting the 2012 will without further inquiries. (6/3/24 Tr. 63-64.) The will provided for a transfer of the ranch stock and the 320 acres of Gregory's own land to Shana. (Doc. 13, Ex. F; Ex. 601.)

Shortly after signing the 2012 will, McLean proceeded to help draft a gift transferring the ranch stock to Shana. (Ex. 33.) McLean did not undertake a review of Gregory's finances before arranging the gift until after the gift had been made. (6/6/24 Tr. 138-141.) The 50% interest in Engellant Ranch was the bulk of Gregory's fortune. (See 6/7/24 Tr. 30-31.) Shana testified she received her gift of stock unexpectedly. (6/11/24 Tr. 112.) She never thanked Gregory for receiving the gift nor did she discuss the gift with him, although they continued to have contact. (6/11/24 Tr. 149-150.)

Gregory's living situation deteriorated and he was living "spartanly" with unclear tangible assets or income. (6/7/24 Tr. 134-138.) Concerned for his welfare, Daren intervened and sought to remove Kenneth as conservator by filing a petition on November 14, 2014. (Doc. 97.) In 2015, Daren asked Gregory to sign four different documents as an experiment to show that Gregory would sign whatever was put in front of him. (6/10/24 Tr. 11-12, Doc. 251 at Ex. B, C, D, E.) Gregory did so. (Doc. 251 at Ex. B, C, D, E.) One of the documents purported to bequest Gregory's assets to Mickey Mouse and his fellow mouseketeers.

(Doc. 251 at Ex. E.) Daren later stated that none of these 2015 documents were valid wills. (6/7/24 Tr. 218-219.)

The effort to remove Kenneth as conservator took years but was eventually successful, and the court named Leo Graybill as Gregory's new conservator. (6/7/24 Tr. 19-20; Doc. 97 at 4-6.) Graybill examined Gregory's finances and concluded the stock transfer gift was inappropriate, irresponsible, and should not have been approved by Kenneth. (6/7/24 Tr. 20.) Graybill believed the stock transfer, valued at \$1.7 million, to be unlawful, so he prepared litigation to claw back the stock, but his role ceased when Gregory died in 2019. (6/7/24 Tr. 20-22; Ex. 217-5.)

When Gregory died, Daren informed Shana there were three documents: A 1978 will, a 2012 will, and one version of a 2015 document that put the 2012 will into question. (6/11/24 Tr. 144-145.) Daren proposed to Shana that to avoid formal probate and further litigation, everyone should agree to admit the 1978 will as the probated will. (6/11/24 Tr. 144-145.) Shana and Kenneth both agreed and signed. (6/11/24 Tr. 144-145.) The district court in Cascade County admitted

the 1978 will into probate and appointed Daren as personal representative. (Doc. 56, CF Appendix at 319-320.)

On April 27, 2022, Crowley Fleck deposed Daren on the multiple versions of the 2015 documents, including the document signed by Gregory that purported to leave his estate to Mickey Mouse and his fellow mouseketeers. (*See* Doc. 251 at 2, 4-5.) Daren stated he had done this to demonstrate whether Gregory had competency. (Doc. 251 at 5-6.)

None of the defendants moved to amend their pleadings over the next two years to raise a new affirmative defense. (*See, e.g.*, Doc. 251 at 2.) Instead, the defendants waited until one month before trial to detail their new defense when submitting proposals for a final pre-trial order. (*See* Doc. 209 at 7; Doc. 241 at 9, 11; Doc. 250 at 2; Doc. 251 at 1-2.) The defendants argued for relief from liability on the basis that the 2012 will controlled over the 1978 will. (Doc. 250 at 6; Doc. 251 at 3, 6, 8-9; Doc. 252 at 2, 4.) The defendants stated they did not need to amend the complaint because this defense was a negative defense as to causation or as a means to attack Daren's credibility. (Doc. 250 at 2-4; Doc. 251 at 2; Doc. 252 at 4-5.)

The district court ruled the question of the will would be addressed as a negative defense but did not address issue jurisdiction. (Doc. 257.) The district court did acknowledge it could not remove Daren as personal representative. (Doc. 257 at 7.)

The Lewis and Clark County district court filed a pretrial order stating as a stipulated fact that the district court in Cascade County had probated the 1978 will. (Doc. 258 at 3.) At trial, Daren sought to bring the Cascade County judge's order to the jury's attention. (6/4/24 Tr. 38.) The district court barred Daren from doing so and excluded that undisputed fact from the jury instructions. (6/4/24 Tr. 38-39; 6/11/24 Tr. 218-219.)

Over the course of eight days the jury heard, in addition to the elements of negligence, arguments between the parties as to whether the 1978 will or the 2012 will controlled in the case. (See 6/12/24 10-25, 37-57.) Daren carried the burden to establish the validity of the 1978 will over the 2012 will. (Doc. 258 at 6-10, 14-16; Doc. 275.)

The first question on the jury's verdict form—before reaching the elements of negligence—was whether the 2012 will was the valid, probated will. (Doc. 275.) At closing argument, Crowley Fleck told the

jury the importance of the 2012 will was demonstrated by its position as the first question on the verdict form. (6/12/24 Tr. 37-38.) The jury decided the 2012 will controlled and did not reach the elements of the attorney negligence claim. (Doc. 275.) The district court found for Crowley Fleck and awarded costs. (Doc. 287.)

STANDARD OF REVIEW

Challenges to jurisdiction cannot be waived and can be raised at any time. *Harris v. Smartt*, 2003 MT 135, ¶ 11, 316 Mont. 130, 68 P.3d 889. Jurisdiction is a question of law and subject to de novo review. *In re K.B.*, 2016 MT 73, ¶ 10, 383 Mont. 85, 368 P.3d 722.

SUMMARY OF THE ARGUMENT

What should have been a trial for attorney malpractice instead became a will contest for a jury to deliberate over which two of the wills was the controlling will, despite the fact a will had already been probated and deemed to be the operative will of Gregory Engellant's estate. The Lewis and Clark County district court, sitting for an attorney malpractice case, did not have the issue jurisdiction to decide

which will controlled. That decision had already been made by a district court in Cascade County and it continued to remain in effect at the time of trial. A district court overseeing a tort does not have the issue jurisdiction to undo a probated will, nor to contravene it when deciding the outcome of a trial. The judgment must be reversed and the case remanded for a new trial.

ARGUMENT

Montana courts recognize three types of jurisdiction: subject matter jurisdiction, personal jurisdiction, and issue jurisdiction. *Ballas v. Missoula City Board of Adjustment*, 2007 MT 299, ¶ 15, 340 Mont. 56, 172 P.3d 1232. “Subject matter jurisdiction refers simply to a court’s power to hear and adjudicate a case.” *Ballas*, ¶ 12, citing *Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶ 31, 321 Mont. 838, 92 P.3d 1160. Personal jurisdiction is a court’s power to bring a party into its proceeding. *Philadelphia Indemnity Ins. Co. v. O’Leary*, 2024 MT 235, ¶ 8, 418 Mont. 306, 557 P.3d 946. Issue jurisdiction is the power to grant relief on the issues presented by the pleadings. *H-D Irrigating, Inc. v. Kimble Properties*, 2000 MT 212, ¶ 22, 301 Mont. 34, 8 P.3d 95.

Jurisdiction exists when “a court has cognizance of the class of cases involved, the proper parties are present, and the points to be decided are within the court’s powers.” *Ballas*, ¶ 15.

“With regard to issue jurisdiction, [a] judgment is conclusive only so far as it determines matters which by the pleadings are put in issue.” *In re Marriage of Di Pasquale*, 220 Mont. 497, 499, 716 P.2d 223, 225 (1986). A district court does not have issue jurisdiction to grant relief outside of the issues presented by the pleadings unless the pleadings are amended to conform to the proof. *H-D Irrigating*, ¶ 22. A district court that rules on a legal question not placed before the court in the pleadings is reversible error, and the remedy is a new trial on remand. *In re Estate of Stone*, 236 Mont. 1, 6, 768 P.2d 334, 337 (1989).

One component of the pleadings is the answer, which can assert defenses. M. R. Civ. P. 8. There are two types of defenses, negative and affirmative. A negative defense, contemplated by Rule 8(b), is a defense that controverts the plaintiff’s claim or an element of the claim. *Sterrett v. Milk River Production Credit Ass’n.*, 234 Mont. 459, 463-464, 764 P.2d 467, 469-470 (1988). An affirmative defense, contemplated by Rule 8(c), is concerned with pleading matters that are “not within the

claimant's prima facie case." *Id.*, see also, *Weaver v. State*, 2013 MT 247, ¶ 34, 371 Mont. 476, 310 P.3d 495. To expand issue jurisdiction beyond the plaintiff's claims in the proceedings, defendants need to raise affirmative defenses or counterclaims to expand matters beyond the plaintiff's presented prima facie case so they remain within the pleadings for the court to rule upon.

Negative defenses and affirmative defenses place the burdens of proof on different parties. A plaintiff has the burden of proving all essential elements of a tort claim by a preponderance of the evidence. *Folsom v. Montana Public Employees Ass'n.*, 2017 MT 204, ¶ 32, 388 Mont. 307, 400 P.3d 706. A negative defense is a disagreement that the element has been met and is satisfied by a general denial under Rule 8(b), with the plaintiff still on the hook to prove elements such as causation and damages. *Folsom*, ¶ 32. A defendant who raises affirmative defenses, however, bears the burden of proving them. *HSBC Bank USA, N.A. v. Anderson*, 2017 MT 257, ¶ 24, 389 Mont. 106, 406 P.3d 416. An affirmative defense must be raised under Rule 8(c) and is deemed waived if not raised in the pleadings. See, e.g., *Marias Healthcare Services v. Turenne*, 2001 MT 127, ¶ 9, 305 Mont. 419, 28

P.3d 491. “[A]n affirmative defense [is] waived if it is not raised in the answer to a claim.” *Winslow v. Montana Rail Link, Inc.*, 2005 MT 217, ¶ 38, 328 Mont. 260, 121 P.3d 506; *see also infra*.

This Court discourages litigants from submitting late arguments and defenses for issues that could have been addressed earlier in the pleadings. “This Court consistently has ruled against the circumvention of [Rule 8(c)’s] requirement that an affirmative defense be pled by answer.” *Meadow Lake Estates Homeowners Ass’n. v. Shoemaker*, 2008 MT 41, ¶ 29, 341 Mont. 345, 178 P.3d 81. In *Weaver*, a fire liability case, the State failed to raise the public duty doctrine as an affirmative defense for years, but then raised the issue in a trial brief and in a proposed pretrial order on the eve of trial. *Weaver*, ¶¶ 10, 12-13. The district court did not abuse its discretion when it denied the new issue because under the circumstances the Weavers were prejudiced. *Weaver*, ¶¶ 31, 35. “The affirmative pleading avoids surprise and eliminates the sweeping ambiguities of a general denial.” *Meadow Lake*, ¶ 28.

Before this underlying litigation was initiated, the district court in Cascade County had an important job to do: Gregory Engellant had died as a Cascade County resident and he had multiple wills. For a will to be

effective to prove the transfer of any property, the will must be declared valid by an order of informal probate by the clerk or an adjudication of probate by the court. Mont. Code Ann. § 72-3-102. With that order of the probated will comes the power to appoint a personal representative and the standing for the personal representative to sue on the decedent's behalf. Mont. Code Ann. §§ 72-3-601, 72-3-604. Had a different will been probated, the method and strategy to distribute the estate and resolve pending claims would have been rather different, as the personal representative must proceed in accordance with the probated and effective will. *See* Mont. Code Ann. § 72-3-610.

The judge in Cascade County had a petition for formal probate submitted by Daren and was informed that there was a 1978 holographic will, a 2012 will alleged to be invalid by undue influence or lack of capacity, and a 2015 instrument revoking the 2012 will. (Doc. 56, CF Appendix 307-308.) Daren named the other heirs of Kenneth, Kevin, and Shana and included signed waivers from each of them agreeing to probate the 1978 will. (Doc. 56, CF Appendix 307, 315-318.) The district court considered the facts submitted and ordered that the 1978 will had

not been revoked by Gregory and was in all respects valid as Gregory's will. (Doc. 56, CF Appendix 319-320.)

What the Cascade County judge did not do was resolve or rule upon Gregory's available legal claims. Such claims were not within the scope of the pleadings and were to be addressed by different courts. The Cascade County district court, ruling in a probate proceeding, issued a binding order probating the 1978 will as Gregory's valid will, along with all the powers that come with that decision under the Uniform Probate Code. "[A] formal testacy order . . . is final as to all persons with respect to . . . the question of whether the decedent left a valid will and to the determination of heirs," Mont. Code Ann. § 72-3-317.

Cascade County acted within its issue jurisdiction and had every expectation its order would be respected as law by all other courts. *See* M. R. Evid. 202(b)(6). Likewise, Cascade County would respect the outcome of any legal claims brought by or against the estate operating under the probated will.

The Lewis and Clark County district court, whose orders and judgment are the subject of this appeal, acted outside its issue jurisdiction when it placed the question of the validity of Gregory's will

before a jury in a tort case that was supposed to be about attorney negligence. The validity of the 1978 will was not up for debate; the Cascade County district court judge had ordered the 1978 will to be probated and its ruling remained unchanged at the time of trial. It was, as the district court acknowledged, a stipulated and undisputed fact that the 1978 will was the officially probated will. (Doc. 258 at 3.) Under the 1978 will in operation, Daren individually and as Gregory's personal representative was entitled to receive damages if the jury had found McLean to have acted negligently.

The district court, by acting outside of its issue jurisdiction, picked and chose which parts of Cascade County's proceeding to follow. The district court blocked the jury from even hearing the stipulated, uncontested fact that the 1978 will had been probated. The district court acknowledged it did not have the authority to remove Daren as personal representative—that was within the authority of the probate court—but the district court's actions put the probated 1978 will aside when it allowed the jury to find the 2012 will to be the valid will instead. (*See* Docs. 257, 287.) The district court's decision to re-adjudicate which will controlled ultimately stopped the jury from even

being able to consider the elements of negligence, the actual claim on the pleadings in Lewis and Clark County. By exceeding its issue jurisdiction, this district court has undermined the integrity and validity of the law already decided upon by the Cascade County district court.

The defendants wanted to assert that new facts had come to light since the order of formal probate in 2019, not known to the Cascade County judge at the time, which arguably place the validity of the 1978 will into question. Fair. That is why a pleading can be amended before trial for good cause when justice so requires. M. R. Civ. P. 15(a)(2). Everyone is put on notice, everyone has a chance to litigate the matter, surprise is prevented, and the court has an opportunity to rule within the pleadings, preserving issue jurisdiction.

Upon discovery of the additional 2015 documents, what the defendants decided not to do was amend the pleadings to bring in a new affirmative defense, despite having at least two years to do so. Instead, the defendants banked on the bet that challenging the will's validity would be ruled as a negative defense, taking the burden of proving will validity off their backs—Cascade County's order notwithstanding.

Then they sprung their unpleaded 2012 will defense onto the plaintiff a month before trial in a proposed pre-trial order, just like the defendants did in *Weaver*. That is certainly a trial strategy, but launching a last-minute negative defense is not a vestment of issue jurisdiction.

District courts must act within their jurisdiction, including issue jurisdiction. Acting outside their issue jurisdiction frustrates the intentions of the parties and undermines the actions of other courts. Daren brought a suit under the authority of the 1978 will and expected that will to be operating in his litigation. The Cascade County district court expected its order to be followed. Unless the pleadings are properly expanded to include matters beyond the plaintiff's prima facie case, the district court must stick to ruling on the claims in the pleadings before it. The district court in Lewis and Clark County acted outside its jurisdictional bounds.

CONCLUSION

Engellant respectfully requests this Court reverse the judgment of the district court and remand for a new trial.

Respectfully submitted this 16th day of June, 2025.

NETZER, KRAUTTER & BROWN, P.C.
301 N. 27th St. #100
Billings, MT 59101
james@nkbattorneys.com

By: /s/ James Reavis
JAMES REAVIS
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Adhering to Rule 11 of the Montana Rules of Appellate Procedure, I certify this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,265, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

By: /s/ James Reavis
JAMES REAVIS

APPENDIX

Judgment.....App. A

Second Order on Motions to Strike.....App. B