IN THE SUPREME COURT OF THE STATE OF MONTANA

DAREN ENGELLANT, individually and acting as Personal Representative of THE ESTATE OF GREGORY ENGELLANT, Plaintiff/Appellant/Cross-Appellee, vs. CROWLEY FLECK, PLLP, a Montana professional limited liability partnership; and DANIEL N. MCLEAN, an individual, Defendants/Appellees/Cross-Appellants.	DA 24-0485
CROWLEY FLECK, PLLP, a Montana professional limited liability partnership; and DANIEL N. MCLEAN, an individual, Third-Party Plaintiffs, vs. KENNETH ENGELLANT and SHANA DIEKHANS, Third-Party Defendants.	

APPELLEES/CROSS-APPELLANTS CROWLEY FLECK, PLLP, AND DANIEL MCLEAN'S COMBINED ANSWER/CROSS-APPEAL BRIEF

On Appeal from the Montana First Judicial District Court
Lewis and Clark County District Court Cause No. DDV-2020-922
The Honorable Christopher Abbott, Presiding

September 25, 2025

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1. Should the jury's verdict and the District Court's Final Judgment be affirmed?

2. Should Kevin's appeal of the denial of his Motion to Intervene be summarily dismissed or, in the alternative, did the District Court correctly deny Kevin's Motion to Intervene?

3. Did the District Court incorrectly deny Crowley Fleck's statute of limitations summary judgment motion as to Daren's claims on behalf of the Estate?

STATEMENT OF THE CASE

Daren Engellant ("Daren"), solely as Personal Representative of the Estate of Gregory Engellant ("Greg"), appealed the Final Judgment entered after a jury's verdict. Doc. 298. The jury determined Daren failed to prove the essential causation element of his negligence claim against Daniel McLean of Crowley Fleck, PLLP (collectively, "Crowley Fleck"). Doc. 275.

Daren's negligence claim was tried to a jury over the course of eight days. The jury, employing a verdict form to which all parties, including Daren, agreed without objection, returned a verdict that Greg's 2012 will was his valid last will and testament at the time he died. *Id.* Based upon the jury's verdict, the District Court correctly entered judgment in Crowley Fleck's favor because Crowley Fleck's conduct could not have caused damage to the Estate and, therefore, Daren's

negligence claim failed as a matter of law. Doc. 287.

Crowley Fleck cross-appealed the District Court's denial of summary judgment. Crowley Fleck's Notice of Cross-Appeal, August 29, 2024.

Putative intervenor Kevin Engellant appealed the denial of his Motion to Intervene (Doc. 290), which Motion was filed after the jury's verdict and the entry of Final Judgment. Docs. 291, 306.

STATEMENT OF THE FACTS

Greg Engellant executed a holographic will on January 6, 1978, which devised his entire estate in equal shares to his brother Ken's children—Shana Diekhans, Daren Engellant, and Kevin Engellant. Appellees/Cross-Appellants Crowley Fleck, PLLP, and Daniel McLean's Appendix ("Appendix") 1-2.

On June 8, 2012, Greg, represented by Crowley Fleck, executed a new will. Appendix 21-23. In this will, Greg stated he intended to give his shares of Engellant Ranch Co. stock to Ms. Diekhans during his life. *Id.* In case he did not give her those shares during his life, the will devised them to Ms. Diekhans on his death. *Id.* The will devised the residue of Greg's Estate in equal shares to Daren, Kevin, and Shana. *Id.* In addition to consulting with Crowley Fleck, Greg also consulted with Mike Lamb regarding updating his estate plan. Appendix 54-78 (18:16 – 42:6); Appendix 3-10. Mr. Lamb is a long-time attorney who is not affiliated with Crowley Fleck. *Id.* Crowley Fleck and Mr. Lamb each independently assessed that Greg had

testamentary capacity and that Greg was not unduly influenced to update his estate plan. *Id.*; *see also* Appendix 180-181 (156:10 – 157:24), 186-187 (162:18 – 163:17), 198-201 (174:15 – 177:10).

As he explained to Mr. Lamb and to Crowley Fleck, Greg changed his will and gave his stock to Shana in 2012 because he wanted the family ranch to remain a working ranch and he wanted it to remain in the family. Appendix 7, 42-51 (17:17 – 18:11, 19:13-17, 45:11 – 46:20, 87:20 – 89:13, 116:7-13, 191:16 – 192:25), 200-201 (176:14 – 177:10); 259-266 (28:2 – 29:23, 39:17 – 40:11, 104:13 – 105:6, 110:25 – 111:25). When Greg gifted his ranch stock to Shana, Shana and her immediate family had been working the ranch continuously, as their primary vocation, since 1999. Appendix 551-559 (93:7 – 101:3). Neither Daren nor Kevin had been involved with the ranch for years. *Id.* Greg knew this and wanted the ranch to go to Shana so she could work it and, hopefully, pass it onto her own children one day. Appendix 42-51 (17:17 – 18:11, 19:13-17, 45:11 – 46:20, 87:20 – 89:13, 116:7-13, 191:16 – 192:25), 200-201 (176:14 – 177:10); 259-266 (28:2 – 29:23, 39:17 – 40:11, 104:13 – 105:6, 110:25 – 111:25).

On September 21, 2012, Greg gifted his Engellant Ranch Co. stock to Shana. Appendix 12.

On November 14, 2014, Daren and Kevin filed a petition in Greg's guardianship/conservatorship action, seeking to undo Greg's stock gift and Greg's

2012 will. Dkt. 64, Exhibit to Plaintiff's Response Brief, pp. 231-234.

On March 29, 2015, Daren met with Greg. Appendix 358-359 (210:21 – 211:8). Only Daren and Greg were present for this meeting. Appendix 359-370 (211:9 – 222:17). During this meeting, Greg told Daren, regarding his last will and testament, that he wanted to make sure Shana and her family stayed on the ranch. *Id.*; *see also* Trial Exhibit 441. Despite this intent, Daren tricked Greg into executing four separate documents purporting to revoke his 2012 will. *Id.*; *see also* Appendix 13-16.

Daren took all four of these documents with him when he ended his March 29, 2015, meeting with Greg. *Id.* He did not leave them with Greg. *Id.* He provided them only to his attorneys and his brother, Kevin, and possibly to his wife. *Id.* He did not provide them to Daniel McLean, Crowley Fleck PLLP, or anyone else. *Id.*

On December 20, 2018, Benjamin Graybill, another Montana attorney, was appointed as Greg's guardian and conservator. Appendix 255 (24:6-12). Mr. Graybill testified that, based upon his interactions with and observations of Greg as his guardian/conservator, he was convinced Greg independently made the decision to change his will in 2012 and that Greg's 2012 will expressed Greg's testamentary intent. Appendix 258-259 (27:10 – 28:13).

Greg died on April 5, 2019. Appendix 255 (24:21-23). Soon after Greg's death, and more than four years after Daren's March 29, 2015, meeting with Greg,

on May 20, 2019, Daren filed a Petition for Formal Probate of Will, Determination of Testacy and Heirs and Appointment of Personal Representative, relative to Greg's Estate. Appendix 17-24.

In this Petition, Daren asserted Greg's 1978 will was Greg's last valid will, that he (Daren) should be appointed the Personal Representative of Greg's Estate, and he asked the Court for an Order to that effect. *Id.*

Daren attached to his Petition copies of Greg's 1978 will, Greg's 2012 will, and only one of the four 2015 documents (Appendix 16), claiming the 2015 document was a revocation of Greg's 2012 will, even though Daren did not believe any of the 2015 documents were valid wills. Appendix 17-24; Appendix 366-367 (218:17 – 219:4). Daren's Petition makes no mention of the other three documents Greg signed on March 29, 2015, and Daren failed to reveal to the Probate Court the existence of these three other documents (Appendix 13-15). Appendix 17-24.

Shana testified Daren did not disclose the existence of the other three March 29, 2015, documents (Appendix 13-15) to her before she agreed to admit Greg's 1978 will to probate. Appendix 588-590 (144:2 – 146:11). She testified Daren represented to her that Exhibit 81 revoked Greg's 2012 will. *Id.* Shana had no reason to think Exhibit 81 was invalid, because she was not aware of Exhibits 78-80. *Id.* Daren obtained Shana's agreement to admit the 1978 will to probate, even though she otherwise believed Greg's 2012 was his valid last will and testament,

because Daren misled her regarding Exhibits 78-81 and threatened her with further litigation if she did not agree. *Id.*

In October 2019, the probate court, with no knowledge of Daren's conduct (1) misleading Greg into signing four different "will" documents, (2) misleading Shana concerning the status of the 2012 will, and (3) without a full record, granted Daren's uncontested Petition, admitted the 1978 will to probate, and appointed Daren as Personal Representative of Greg's Estate. Appendix 320-379 (172:17 – 231:18).

Daren sued Crowley Fleck in his individual capacity and as Personal Representative of the Estate. Doc. 1. The District Court granted Crowley Fleck summary judgment on Daren's individual-capacity claims because they were barred by the statute of limitations. Doc. 164. Daren has not appealed that ruling and his individual capacity claims are not at issue in this appeal.

The District Court denied Crowley Fleck's statute of limitations motion as to the Estate's claims. Docs. 55, 56, 64, 97, 121, 122, 164. This denial is the subject of Crowley Fleck's cross-appeal.

Daren's negligence claim against Crowley Fleck was tried before a jury over eight days, from June 3, 2024, to June 12, 2024.

During trial, the District Court entered judgment as a matter of law on all of Daren's theories of liability and damages except for his negligence claim related to Greg's 2012 estate plan and, more specifically the claim that Greg's Estate should

have had ownership of the ranch stock after Greg's death. Doc. 270. In his Opening Brief, Daren does not assign error to the District Court's entry of judgment as a matter of law on all the other issues. Daren has therefore waived any appeal of these other issues.

STANDARD OF REVIEW

A district court's conclusions of law are reviewed for correctness. *Anderson v. Larson*, 2018 MT 155, ¶6, 392 Mont. 29, 420 P.3d 1018.

A district court's evidentiary rulings are reviewed for abuse of discretion. *State v. DuBray*, 2003 MT 255, ¶67, 317 Mont. 377, 77 P.3d 247. An abuse of discretion occurs if the district court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason. *Enz v. Raelund*, 2018 MT 134, ¶42, 391 Mont. 406, 419 P.3d 674 (internal citation omitted).

Jury instructions are also reviewed for abuse of discretion. *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶10, 395 Mont. 432, 443 P.3d 369. Jury instructions are to be considered in their entirety, with the other instructions given and the evidence introduced at trial. *Id.* Refusal to give an offered jury instruction, or giving an objected-to jury instruction, only constitutes reversible error when it affects the substantial rights of the party proposing or opposing, respectively, the instruction. *Id.* The party assigning error must show prejudice. *Id.* "[F]ailure to object to a jury instruction at trial constitutes waiver of the opportunity to raise the

objection on appeal." *Seltzer v. Morton*, 2007 MT 62, ¶54, 336 Mont. 225, 154 P.3d 561 (internal citation omitted).

A party cannot raise issues for the first time on appeal; the Supreme Court will not review an issue that was not raised in the district court. *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶37, 321 Mont. 364, 91 P.3d 569.

SUMMARY OF ARGUMENT

After more than ten years of efforts to defeat Greg's 2012 will, four years of contentious and active litigation against Crowley Fleck, and an eight-day jury trial, the jury concluded Greg wanted Shana to have his Engellant Ranch Company stock. The jury's conclusion confirmed Daren failed to meet his burden of proving causation and damage, essential elements of his negligence claim against Crowley Fleck.

By concluding that Greg wanted Shana to have all of Greg's Engellant Ranch Company stock instead of Daren, Kevin and Shana receiving the stock in equal shares, the jury rejected Daren's persistent efforts to serve his self-interest through championing Greg's 1978 will.

Daren expressly waived, or failed to argue in the District Court, any of Daren's assignments of error, with the limited exception of claimed errors that were not error, or harmless in any event.

Daren's effort to employ mis-named "issue jurisdiction" as a surrogate for

collateral estoppel should be rejected. Daren's argument for the preclusive effect against Crowley Fleck of the Cascade County District Court's admission, unopposed and under questionable circumstances, of Greg's 1978 will to probate is wrong. None of the required elements of collateral estoppel can be met.

"Issue jurisdiction," which seeks to ensure procedural fairness to the parties when properly applied, confirms the District Court's decision to allow Crowley Fleck to defend itself against Daren's negligence claim.

The jury's verdict and the District Court's Judgment should be affirmed. Daren's efforts to undo Greg's estate plan should be ended. Greg's most ardent and unwavering wish to transfer to Shana his ownership of Engellant Ranch should be honored and this intra-family dispute finally laid to rest.

Kevin's appeal should be summarily denied because his brief fails to address intervention, the only issue on which he had standing to appeal. All of Kevin's arguments – essentially identical to Daren's arguments – also fail for the reasons Daren's arguments fail.

Regarding Crowley Fleck's cross appeal: The District Court's denial of Crowley Fleck's motion seeking summary judgment on the Estate's claims based on the statute of limitations should be reversed. After correctly concluding that the Estate's negligence claim against Crowley Fleck was time barred, the District Court mis-applied the doctrine of equitable tolling to save the Estate's claim. The District

Court applied equitable tolling in a manner directly contrary to a controlling Montana statute and in circumstances where this Court has never applied equitable tolling.

ANSWER BRIEF ARGUMENT

I. The Judgment Of The District Court Should Be Affirmed.

A. The Validity Of Greg's 2012 Will Was Central To Daren's Claims For The Alleged Value of Engellant Ranch Co. Stock.

1. The District Court had "issue jurisdiction."

Daren argues the District Court lacked "issue jurisdiction" to determine whether Greg's 2012 will was Greg's last valid will and testament at the time of his death because the Cascade County District Court had, based on Daren's incomplete, incorrect and misleading petition, admitted Greg's 1978 will to probate in October 2019. Daren seeks to employ "issue jurisdiction" as a surrogate for collateral estoppel and, through application of his version of the principle, deprive Crowley Fleck of the due process the principle seeks to preserve.

This Court need not even address this issue because Daren waived any argument concerning "issue jurisdiction" or collateral estoppel. Daren never argued "issue jurisdiction" or collateral estoppel before the District Court. He did the opposite. Before the jury trial, Crowley Fleck, Ken, and Shana moved to stay the trial to permit the probate court time to resolve a pending challenge to the admission of Greg's 1978 will, instead of his 2012 will, to probate. Docs. 219-222, 225-227.

Though he now contends the probate court was the only court with "issue jurisdiction," Daren opposed the motion to stay. Doc. 223. The District Court agreed with Daren and granted him the relief he requested. This case proceeded to trial without the probate court resolving which will – his 1978 holograph or his 2012 will—was Greg's valid last will and testament. Doc. 229. Having objected to the stay and having failed to raise "issue jurisdiction" or collateral estoppel below, Daren is judicially estopped from asserting now, and has waived any argument that, the District Court lacked "issue jurisdiction" over the issue of will validity for purposes of this negligence action, or that collateral estoppel applied to this issue. *Simpson v. Simpson*, 2013 MT 22, ¶27, 368 Mont. 315, 294 P.3d 1212 (internal citations omitted); *In re K.J.*, 2010 MT 41, ¶19, 355 Mont. 257, 231 P.3d 75 (internal citation omitted).

Daren incorrectly argues "[c]hallenges to jurisdiction cannot be waived." Opening Brief, p. 20. Daren fails to acknowledge that only challenges to *subject matter* jurisdiction cannot be waived. *Harris v. Smartt*, 2003 MT 135, ¶11, 316 Mont. 130, 68 P.3d 889. This Court has never held challenges to other types of jurisdiction are non-waivable; to the contrary, this Court has specifically held challenges to personal jurisdiction are waivable. *See, e.g., Garza v. Forquest Ventures, Inc.*, 2015 284, ¶43, 381 Mont. 189, 358 P.3d 189.

This Court has recognized the phrase "issue jurisdiction" is a misnomer and

that the "issue jurisdiction" inquiry is, fundamentally, whether the opposing party had sufficient notice of the issue to be tried, prior to trial, to comport with the requirements of constitutional due process of law. *Steab v. Luna*, 2010 MT 125, ¶24, 356 Mont. 372, 233 P.3d 351 ("We pause to note that a number of our cases have, unfortunately, also identified this problem as one of 'issue jurisdiction' … we take this opportunity to clarify that the reversible error in cases [involving what was previously called 'issue jurisdiction'] concerning the lack of notice and opportunity for a meaningful hearing was one of constitutional due process of law."). Subject matter jurisdiction concerns a court's power to hear a cause. Issue jurisdiction concerns procedural fairness to litigants. *Id*. Issue jurisdiction can be waived.

Notwithstanding Daren's waiver and misapplication of "issue jurisdiction," Crowley Fleck agrees this Court has stated "[i]ssue jurisdiction is the power to grant relief on the issues presented by the pleadings." Opening Brief, p. 24 (citing *H-D Irrigating, Inc. v. Kimble* Properties, 2000 MT 212, ¶22, 301 Mont. 34, 8 P.3d 95).

The pleadings here presented a negligence claim against Crowley Fleck. Remarkably, Daren's Opening Brief omits any mention or discussion of the elements he was required to prove: duty, breach, causation, and damages. *See, e.g., Labair v. Carey*, 2016 MT 272, ¶16, 385 Mont. 233, 282 P.3d 226. The issue of whether Greg's 2012 will was Greg's last valid will and testament is not just relevant to, but dispositive of, the causation element of Daren's negligence claim.

The essence of Daren's negligence claim, as presented to the jury, was that Crowley Fleck's assistance with Greg's 2012 estate plan, including Greg's 2012 will and the gift of ranch stock, unreasonably failed to fulfill Greg's intent for disposition of his Engellant Ranch ownership interest and the 2012 will and stock gift are invalid for other reasons. Appendix 609-636 (8:5 – 35:12).

Daren presented evidence and argued to the jury that, because Crowley Fleck breached the standard of care, the Estate was damaged because it did not have ownership of Greg's ranch stock after his death. He further contended that because the Estate did not have ownership of the ranch stock after Greg's death, the Estate would be unable to distribute the ranch stock in equal 1/3 shares to Daren, Kevin and Shana, as Greg had intended in his 1978 holographic will. *See, e.g.,* Appendix 635-636 (34:12 – 35:5).

In defense, Crowley Fleck presented evidence and argued it had acted reasonably to fulfill Greg's wishes for the disposition of his property, including the Engellant Ranch ownership interest and that Greg's 2012 will and gift of ranch stock were valid expressions of Greg's intentions. Appendix 638-687 (37:19 – 86:25).

Crowley Fleck also contended that even if it had breached the standard of care concerning the gift of stock, which it did not, no breach caused damage to the Estate because Greg's intent for the disposition of his ownership in Engellant Ranch – transfer of the stock to Shana – was fulfilled on his death through the 2012 will,

which gives all of Greg's ranch stock to Shana. *Id.* Crowley Fleck contended Daren's negligence claim failed for lack of causation because the stock was in Shana's possession (by way of the gift), and Greg intended for Shana to have the stock whether through the gift or the 2012 will. *Id.* If Greg's 2012 will was his last valid will and testament, it would confirm Greg intended for Shana to have his Engellant Ranch stock after his death, instead of the Estate retaining the stock to distribute in 1/3 shares in accordance with Greg's 1978 holographic will. *Id.* If the jury agreed with Crowley Fleck's evidence and argument, Daren's claim of damage to the Estate would fail for want of causation; because Greg is now deceased and Shana is entitled to the stock under Greg's 2012 will, the Estate has no damages related to the stock gift. *Id.*

At the time of trial, it was undisputed the stock was not lost or destroyed but, rather, was still in the possession of Shana Diekhans. Doc. 205, Exhibit C, p. 14, Response to Request for Admission No. 23; Appendix 589 (145:16), 597-599 (200:2 – 202:20). It is also undisputed, and Daren conceded, that Greg suffered no consequential damages of any kind from not possessing the stock for the remainder of his life after he gifted it to Shana. Appendix 546-547 (203:12 – 204:13); Doc. 270

All parties to the proceedings below, and the District Court, understood and acknowledged the dispositive connection between the validity of Greg's 2012 will

and Daren's damage claim for the alleged lost value of the stock. The District Court correctly held the validity of the 2012 will "is relevant to the elements of Daren's causes of action because it affects the elements of damages and causation… whether the 2012 will was valid bears on the extent to which the estate can be harmed by a stock gift that went precisely where it would have gone upon Gregory's death under that will." Doc. 257, p. 5; *see also* Appendix 548-549 (222:15 – 223:3).

Daren, through counsel, also acknowledged the import of the validity of the 2012 will to the element of causation:

> Mr. Rhoades: The way I read your ruling is you're going to give Crowley Fleck the opportunity to say notwithstanding the probate of any will, his [Greg's] real intent was the 2012 will. And since his real intent was the 2012 will, there's no causation. That's how I read your ruling.
>
> I don't necessarily disagree with that. I mean, we stated our position and our position remains, but it's something that we can deal with and have dealt with in the presenting of our case when it goes that far.
>
> … I understand that they're going to contend that it [the 2012 will] was valid and they're going to have their evidence to show that there was no undue influence and there was full capacity and this made all the sense in the world. That's fine. We anticipated that. That's consistent with your ruling and it's been consistent with their case throughout. That's what we're prepared to do…

Appendix 37 (39:2-21); *see also*, Appendix 605 (271:17-18).

Daren was not only on notice he needed to prove Greg's 2012 will was invalid to prove causation, he expressly stated (1) he anticipated that issue, (2) that Crowley

Fleck's position on this issue has been consistent throughout its case, and (3) that Daren was prepared to address the issue. *Id.*

Further, Daren agreed with, and did not object to, Jury Instruction No. 17 (Doc. 276, p. 24), which expressly admits that "the validity or invalidity of the 2012 will is relevant to whether this [Crowley Fleck's alleged breach of its duty of care in connection with the 2012 gift of stock to Shana] caused damage to the Estate of Gregory Engellant…" Appendix 601-604 (246:24 – 249:18). Daren agreed with, and did not object to, the verdict form that requested the jury resolve, as its first question, "Was Gregory Engellant's June 8, 2012, Last Will and Testament his valid Last Will and Testament at the time he died?" Appendix 608 (4:2-20); Doc. 275.

Even in this appeal, Daren contends "the estate's malpractice claim sought to recover what Gregory lost when Crowley Fleck and McLean's negligence caused his corporate interest to be diverted to unintended heirs." Opening Brief, p. 38 (emphasis added). Shana is the alleged "unintended heir" to whom Daren refers. Daren contends Greg did not intend for Shana to receive Greg's Engellant Ranch Co. stock, as she indisputably would have under the 2012 will, but instead that Greg intended for Kevin, Shana, and himself to receive the stock in equal shares under the 1978 will. This contention infuses with dispositive importance the issue of whether the 1978 will or the 2012 will reflects Greg's valid testamentary wishes.

The District Court had "issue jurisdiction" over the validity of the 2012 will

because the validity of Greg's 2012 will determined the essential causation element of Daren's negligence claim.

2. Crowley Fleck was not collaterally estopped from contesting the essential causation element of Daren's negligence claim.

Although Daren couches his argument in terms of "issue jurisdiction," he is really arguing collateral estoppel. The only error Daren assigns to the District Court is that it "acted outside its issue jurisdiction when it placed the question of the validity of Gregory's will before a jury in a tort case." Opening Brief, p. 29. Daren argues "[t]he validity of the 1978 will was not up for debate" because "the Cascade County court judge had ordered the 1978 will to be probated and its ruling remained unchanged at the time of trial." *Id.* These statements articulate Daren's collateral estoppel argument against Crowley Fleck.[1]

The District Court correctly concluded Crowley Fleck was not precluded from litigating the validity of the 2012 will. Collateral estoppel requires Daren to prove:

> (1) The identical issue raised was previously decided in a prior adjudication;
> (2) A final judgment on the merits was issued in the prior adjudication;
> (3) The party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication;
> (4) The party against whom preclusion is asserted was afforded the opportunity to obtain a full and fair adjudication of the issue in the initial action.

[1] Despite discussing law regarding affirmative versus negative defenses, Daren's Opening Brief does not argue the issues regarding the validity of Greg's 2012 will were, in any way, an affirmative defense. As addressed above, and unchallenged by Daren in this appeal, the District Court correctly concluded that the issue of which will was Greg's valid last will and testament at the time he died goes directly to the element of causation in this case and is not an affirmative defense or avoidance that must be pled. Doc. 257, p. 7.

Baltrusch v. Baltrusch¸ 2006 MT 51, ¶18, 331 Mont. 281, 130 P.3d 1267 (internal citations omitted). None of the elements of collateral estoppel are met. Element (1) fails because which will was Greg's valid last will and testament was not "decided" in the probate action. Ken and Shana currently contend in the probate proceeding that Daren employed fraud and/or misrepresentation to obtain Shana and Ken's agreement to the admission of Greg's 1978 will to probate. Doc. 219-222.

Element (2) fails because there has been no final judgment on the merits in the probate action, and the admission of Greg's 1978 will to probate was and is being actively challenged right now. *Id.* Elements (3) and (4) fail because Crowley Fleck, PLLP, and Daniel McLean were neither parties to the probate action nor privies with parties to the probate action. They had no say in what will was admitted to probate in the probate action, no standing to contest that issue in the probate action, and no notice of what will was admitted to probate until long after it occurred.

Precluding Crowley Fleck from litigating the validity of the 2012 will or asserting that the 2012 will was and is Greg's valid last will and testament in this case would violate Crowley Fleck's fundamental right to due process. *Blonder-Tongue Labs. v. University of Illinois Found.*, 402 U.S. 313, 330, 91 S.Ct. 1434, 1443, (1971) 28 L.Ed.2d 788 (internal citations omitted); *Richards v. Jefferson County*, 517 U.S. 793, 794, 116 S.Ct. 1761, 1764, 135 L.Ed.2d 76, 81 (1996) (internal citation omitted).

B. The District Court Did Not Abuse Its Discretion When It Declined To Instruct The Jury That The 1978 Will Had Been Admitted To Probate, And The Lack Of This Instruction Was Harmless In Any Event.

The predicate for Daren's argument on this issue is the same as his argument regarding "issue jurisdiction." Daren relies on the questionably obtained probate of the 1978 will in October 2019. As discussed in Section I.A., above, admission of the 1978 will to probate in October 2019 had no binding effect on Crowley Fleck and did not relieve Daren of his burden to prove all elements of his negligence claim. Admission of the 1978 will to probate in October 2019 was not material to the resolution of Daren's negligence claim and instructing the jury on this issue posed a danger of misleading the jury and confusing the issues.

Moreover, the jury received undisputed evidence that the 1978 will was admitted to probate. Daren repeatedly testified the 1978 will was the will that was probated. Appendix 321 (173:1-3) ("Q. Right. You believe the valid will is the 1978 will? A. That's the one that was probated, that's correct."); 180:22-23 (referring to the 1978 will, "A. … I'm probating the will that was admitted…"), 329 (181:1-4) ("Q. … The will, Daren, that you're trying to probate right now is Greg Engellant's 1978 handwritten will, true? A. I'm not trying to, I am."), 375 (227:15-20); 387 (12:18) ("A. That's why we probated the 1978 will…"). Daren's counsel stated in opening that the 1978 will had been admitted to probate. Appendix 31 (9:6-14). There was no evidence adduced that the 1978 will had not been admitted to

probate or otherwise contradicting Agreed Fact No. 20 from the final pretrial Order (Doc. 258, p. 3, ¶ 20). Daren could not have suffered any prejudice from the Court not instructing on a fact that, though immaterial, the jury was plainly aware of and which was not in dispute.

Daren's argument further fails because Daren's assertion that "[t]he [final] pretrial order bound the parties to the validity of the 1978 will" is legally wrong for the reasons discussed above and misstates the record. Opening Brief, p. 31. The parties stipulated, in the final pretrial order, that the probate court, on October 25, 2019, admitted Greg's 1978 will to probate. Doc. 258, p. 3. Agreeing that the 1978 will was admitted to probate on October 25, 2019, is not the same as agreeing the 1978 will was Greg's valid last will and testament. The remainder of the final pretrial order makes it clear that Crowley Fleck, PLLP, Daniel McLean, Kenneth Engellant, and Shana Diekhans contended that Daren had secured the admission of the 1978 will to probate through fraud, deceit, or misrepresentation; that Ken and Shana had a pending petition before the probate court to admit the 2012 will to probate; and that the 2012 will was Greg's valid last will and testament at the time he died. Doc. 258, pp. 6-10, ¶¶ 14-18, 23-28, pp. 13-14, ¶¶ 22, 25-26, pp. 15-16, ¶¶ 7-11. There was never, at any point, any agreement or stipulation that Greg's 1978 will was his valid last will and testament. *Id.*

The District Court correctly understood that whether Greg's 2012 will or his

1978 will was his valid last will and testament was dispositive of the causation and damage elements of Daren's negligence claims. The District Court correctly determined the admission of the 1978 will to probate had no preclusive effect on Crowley Fleck in its defense of Daren's negligence claims. The District Court appropriately held that whether the 1978 will had been admitted to probate in October 2019 was not material to resolution of the matters at issue in this case. Doc. 257, p. 5; *see also* Appendix 27-29 (17:17 – 20:8), 32-40 (34:12 – 42:23), 548-549 (222:15 – 223:3).

The District Court also observed there was a danger of misleading and confusing the jury if they were instructed that the 1978 will had been admitted to probate in October 2019, unless the jury also received evidence that there was a pending challenge to that October 2019 admission. *Id.* The District Court thus concluded that, in addition to being immaterial, adducing evidence about the procedural status of matters in the probate proceeding would be misleading and confusing to the jury, a waste of time, or both. *Id.*

The District Court did not abuse its discretion in declining to instruct the jury that the 1978 will had been admitted to probate. And Daren cannot have been prejudiced by the District Court not instructing the jury on this issue, because the undisputed evidence before the jury established the 1978 will had, in any event, been admitted to probate.

C. The District Court Did Not Abuse Its Discretion When It Issued Jury Instruction No. 35.

Even if Daren's assignment of error to Jury Instruction No. 35 were meritorious, which it is not, it would be irrelevant and harmless. Daren alleges Jury Instruction No. 35 incorrectly states the capacity of a protected person to make a gift during his lifetime. Based upon the verdict, the jury never reached any issue implicating Greg's capacity to make the stock gift during his lifetime. Doc. 275.

Importantly, Daren only objects to the portion of Jury Instruction No. 35 regarding the capacity of a protected person to make a lifetime gift; he does not assign any error to the portion of Jury Instruction No. 35 regarding the capacity of a protected person to make a will. Daren does not argue Jury Instruction No. 35 incorrectly stated the capacity of a protected person to make a will. Because the jury addressed only the validity of Greg's 2012 will, and never reached the issue of his gift, the only portion of the instruction relevant to the jury's verdict is unchallenged.[2]

Moreover, as the District Court thoroughly explained on the record, Jury Instruction No. 35 correctly stated the capacity of a protected person to make a lifetime gift. Appendix 594-598 (197:20 – 201:21). The Court reasoned that, under

[2] In any event, Jury Instruction No. 35 correctly states the capacity of a protected person to make a will. *See,* M.C.A. § 72-5-421(5); M.C.A. § 72-5-316(3); *Stave v. Estate of Rutledge*, 2005 MT 332, ¶19, 330 Mont. 28, 127 P.3d 365); *In re Estate of Prescott*, 2000 MT 200, ¶47, 300 Mont. 468, 8 P.3d 88 (same); *Matter of Estate of West*, 269 Mont. 83, 95, 887 P.2d 222, 229 (1994) (same); *Montana Conference of Seventh-Day Adventist Church v. Estate of Miller*, 192 Mont. 468, 475-76, 628 P.2d 1100, 1104-05 (1981) (same).

Montana law, the relationship between a guardian and a protected person is analogous to the relationship between a custodial parent and an unemancipated minor. Appendix 597-598 (200:23 – 201:15). Just as a child can make a gift to another, subject to the gift being disaffirmed by the parent, a protected person who otherwise has capacity can make a gift, subject to the gift being disaffirmed by the guardian. *Id.* Daren agreed with, and did not object to, the District Court's ruling on the effect of the guardianship on Greg's gifting capacity. Appendix 600 (203:7-9) (Daren's counsel: "Well, with regard to the guardianship, I think that's probably true with respect to the gifts."). Regarding the effect of Greg's guardianship on his gifting capacity, the District Court was correct, and Daren waived any objection.

Addressing the impact of a conservatorship, as distinct from guardianship, on the ability of a protected person to make a lifetime gift, the District Court cited the official comments to M.C.A. § 72-5-425, "Unlike a situation involving appointment of a guardian, the appointment of a conservator has no bearing on the capacity of the disabled person to contract or engage in other transactions." Appendix 595-596 (198:21–199:6). The District Court also relied upon *In re Estate of Clark*, 237 Mont. 179, 772 P.2d 299 (1989), in which this Court, specifically addressing the ability of conservatees to make gifts and contracts, held that "[t]he institution of a conservatorship is not an adjudication of competency and has no effect on the protected person's capacity. Section 72-5-421(5), MCA. The protected person is

therefore presumed to have the capacity to contract with third parties." 237 Mont. at 185. Daren's argument that "the law presumes restriction on such acts [making gifts to third parties] by protected persons" is diametrically opposed to controlling law.

Jury Instruction 35 was irrelevant to the jury's verdict, harmless error, and correct.

D. The District Court Did Not "Conclude as a Matter of Law that it would allow the True Plaintiff to be Obscured and Confuse the Jury."

In an argument parallel to his argument that probate of the 1978 will precluded Crowley Fleck from defending against his negligence claim, Daren argues his status as the Personal Representative conclusively immunized him from challenge and precluded Crowley Fleck from introducing evidence and argument impeaching Daren's testimony as a witness. Daren is incorrect.

Daren's assignment of error on this issue is unclear because he cites no specific rulings by the District Court which he claims were incorrect. To the extent Daren contends the District Court erred by permitting introduction of evidence and argument showing Daren's bias, motive, and plan to defeat Greg's testamentary wishes in favor of his own personal interests, his argument fails.

Further, a factual predicate for Daren's argument is false. During the trial, there was no confusion or dispute over whether Daren was the Personal

Representative. The jury was instructed that Daren was the Personal Representative of Greg's Estate. Doc. 276, p. 15, ¶4. Daren testified that he was acting in his role as Personal Representative of the Estate in bringing the lawsuit. Appendix 320 (172:5-8). No evidence was presented disputing that Daren was the Personal Representative of Greg's Estate or that his standing to pursue the claims at issue was in that capacity and on behalf of Greg's Estate.

Importantly, if Daren contends impeachment evidence should not have been admitted, Daren was substantially in control of whether the evidence Daren now complains of was admitted at trial. The District Court, prior to trial, initially precluded the defendants from presenting evidence or argument about how Daren deceived Greg into executing multiple purported wills in 2015, and about how Daren deceived Shana and Ken into agreeing to probate the 1978 will instead of the 2012 will. Doc. 257. But the Court warned Daren, in writing and verbally on the record, that if he testified, the initially excluded evidence would, subject to review of his testimony, likely become "fair game for cross examination." *Id.*, p. 6; Appendix 26-29 (17:17 – 20:8); 32-40 (34:12 – 42:23).

Despite multiple warnings, rulings, and arguments of counsel on this issue, including on the record and made in Daren's presence, Daren decided to testify as a witness in support of his negligence claims—attacking Greg's 2012 will and advocating for the 1978 will. Appendix 267-381 (119:13 – 233:17), 383-545 (8:14

- 170:7). He testified at length. *Id.* He testified in his initial direct examination to alleged statements by Greg and his alleged impressions and observations of Greg, that, if credited by the jury, would have been supportive of Daren's claims and contrary to Crowley Fleck's defenses. Appendix 267-306 (119:19 – 158:3).

After Daren's initial direct testimony, Crowley Fleck, Ken, and Shana moved the Court, outside the presence of the jury, to permit inquiry into the initially excluded matters regarding Daren's deceitful conduct. Appendix 306-317 (158:18 – 169:6). The District Court, consistent with its pretrial ruling and after weighing Daren's initial direct examination testimony, ruled it was appropriate to permit inquiry into the initially excluded areas, because "[o]nce we have a witness [Daren] testify to facts that are crucial to the case that no one else has testified to, I think I need to allow them [defendants] a fair opportunity to rebut that, including by attacking credibility and let the jury sort out the credibility issues." Appendix 314, 166:7-11. This ruling was fair, correct, and not an abuse of discretion. *DuBray*, 2003 MT 255, ¶67.

E. The District Court Did Not "Misrepresent[] the Status of the Probate Order."

With this argument, Daren openly confesses his otherwise unspoken reliance on collateral estoppel – he argues the District Court erred by "fail[ing] to enforce the preclusive effect of the probate order." For the reasons already addressed, collateral estoppel did not apply and the October 2019 order admitting the 1978 will to probate

had no preclusive effect against Crowley Fleck.

Daren's related contention that the District Court was "confused" and "misrepresented" the status of the probate action are without support in the record. The statement by the Court that Daren quotes was made outside the presence of the jury. The District Court and jury were both aware, and it was undisputed, that the 1978 will had been admitted to probate. The District Court was also aware that there was a pending challenge to the 1978 will. When the District Court observed, to counsel outside the presence of the jury, that it did not "want to imply that there's been a decision," the Court was cautioning counsel, consistent with its prior rulings, to not elicit testimony implying the probate court had reached any final decision on the matters pending before it. This was an appropriate and accurate caution, because the probate court had not reached any final decision and, in any event, the admission of the 1978 will to probate in October 2019 was immaterial and potentially misleading because it had no preclusive effect.

The District Court did not abuse its discretion.

F. The District Court Did Not "Conclude as a Matter of Law that McLean Lawfully Represented a Protected Person Without Legal Authority," Etc.

Daren alleges "[t]he jury never heard that McLean was never lawfully retained, nor that his appearance was meant to neutralize scrutiny, not serve Gregory's interests. The court erroneously interpreted the law by failing to

acknowledge or present this context…" Daren is wrong again.

The District Court had no obligation to "acknowledge or present this [alleged] context." It was Daren's burden to present competent evidence in support of his claims. Fatal to this argument, Daren does not identify any instance in the record where he offered evidence on these matters that the District Court declined to admit. The record shows Daren conducted a lengthy examination of Mr. McLean, including a direct, redirect, and further redirect. Appendix 79-233 (55:23 – 209:1). The District Court sustained a total of five objections to questions Daren's counsel posed to Mr. McLean. Appendix 115 (91:1-6), 126 (102:13-25), 144 (120:13-25), 157 (133:14-18), 211 (187:11-20). None of the inquiries to which objections were sustained related to any of the issues Daren argues the District Court "fail[ed] to acknowledge or present." *Id.* Daren's failure cannot be assigned to the District Court.

The remainder of the matters Daren raises in this argument are not assignments of error to the District Court but, rather, an attempt to present matters to this Court that he failed to present or argue at the trial. Crowley Fleck does not agree with or concede any of Daren's various factual assertions or characterizations but does not further address them here because they are not properly part of this appeal. The purpose of an appeal is to review the litigation that occurred in the lower court, not to try a different case in this Court.

G. The District Court Did Not "Allow a Tri-Party Defense Aligned Against Plaintiff."

This argument is predicated on Daren's false assertion "that Crowley Fleck had no outstanding claims against Kenneth or Shana." Opening Brief, p. 48. Daren argues that Crowley Fleck settled and released its claims against Ken and Shana prior to trial. *Id.*; *see also* Appendix 572 (123:1-6), 581 (132:3-18). There is no factual or legal basis for Daren's argument.

The record confirms Crowley Fleck did not release its claims against Ken or Shana. As to Crowley Fleck's third-party claim for contribution against Ken, although the jury ultimately did not reach questions 4, 5, 6, and 7 on the verdict form, these were questions, consistent with instructions given by the District Court, that asked the jury to assess whether Ken breached his duty of reasonable care to Greg; if so, whether Ken's breach caused damages to the Estate; and, if so, what the amount of damages apportioned to Ken were. Doc. 275; Doc. 276, pp. 27, 31. Daren's counsel specifically addressed this defense in closing argument. Appendix 634 (33:14-23) ("Now, Crowley Fleck says if it wasn't for Ken's negligence none of this would have happened…").

As to Crowley Fleck's third-party claims for unjust enrichment against Ken and Shana, these were equitable claims for the Court to resolve. The Court, without objection by any party including Daren, determined it would only reach the equitable claims if the jury returned a verdict in favor of Daren, because there could be no

liability against Ken and Shana in the event of a verdict in favor of Crowley Fleck on Daren's claims. Appendix 566-567 (117:21-25, 118:4-24), 592-593 (176:13 – 177:22). Therefore, these claims were not addressed on the agreed-upon verdict form. The District Court never addressed them on the merits because the jury returned a verdict upon which the Court entered judgment in favor of Crowley Fleck.

The District Court did not abuse its discretion in preventing Daren from presenting evidence regarding the confidential settlement involving Crowley Fleck, Ken, and Shana. The record establishes Crowley Fleck did not release its claims against Ken or Shana. The District Court heard argument from all parties regarding inquiry into the settlement. Appendix 568-587 (119:1 – 138:21). The Court received evidence regarding what the Court determined were the material terms of the settlement in a sealed hearing, to preserve the confidentiality of the settlement while permitting the Court to assess whether it should permit public inquiry into it. Appendix 582-585. After doing so, the Court performed a careful and detailed analysis under Rule 403, M.R.Evid. Appendix 586-587 (137:3 – 138:21). The Court held none of the terms of the settlement "materially would alter the bias or motive to testify [of Shana] in a manner favorable to the estate's position or Daren's position in a way that can't already be addressed through cross-examination about the really obvious thin[g] is that she's got, you know, $1.7 million riding on this stock." *Id.* The Court also considered the strong public policy in favor of settlements, including

confidential settlements. *Id.* The Court reasonably excluded inquiry into the settlement or its terms on the grounds of Rule 403. *Id.* This decision was appropriate under the circumstances and was plainly not an abuse of discretion.

Daren's Appeal should be denied and the judgment of the District Court affirmed.

II. Kevin's Appeal Should Be Denied.

Kevin's Opening Brief addresses the same issues as Daren's Opening Brief, in many instances including the same arguments word-for-word. Kevin's arguments fail on the merits for the same reasons as Daren's.

However, the Court should not reach the merits of Kevin's arguments. The only issue Kevin had standing to address in this appeal is the District Court's denial of his Motion to Intervene (Doc. 290). *Clark Fork Coalition v. Mont. Dep't of Envtl. Quality*, 2007 MT 176, ¶11, 338 Mont. 305, 164 P.3d 902 ("'[A]ppellant[] ha[s] never been part[y] to this action, since the court had denied [his] motion to intervene. Hence, [he] had no right to appeal from the judgment in order to obtain review of the merits of the controversy between those who were parties. The only relief that appellant[] could seek from this court was a review of the trial court's ruling which prevented [him] from becoming part[y] to the action.'") Kevin has waived any argument that the District Court incorrectly denied his intervention by not raising it in his Opening Brief. *Helvik v. Tuscano*, 2025 MT 150, 423 Mont. 85, 571 P.3d

1058. His appeal should be summarily denied, and the District Court affirmed, on that basis.

The District Court correctly held Kevin's motion was untimely and denied the Motion to Intervene. Doc. 291. Kevin's individual claims, if any, would fail if he were permitted to intervene. Kevin's interest in the litigation, to the extent he had any, was adequately protected by Daren. Four criteria govern intervention as of right. *Connell v. State Dep't of Soc & Rehab Servs.*, 2003 MT 361, ¶20, 319 Mont. 69, 81 P.3d 1279 (internal citation omitted). Kevin does not meet any of these criteria.

Kevin was aware of the underlying litigation for years. Kevin was deposed in this case on April 26, 2022, more than two years before trial. Doc. 106, Exhibit D, p. 2. His brother called him as a witness during trial. Appendix 233-253 (209:17 – 229:21). Kevin only tried to intervene in the District Court after Daren litigated and lost the underlying trial. Doc. 290. Kevin's Motion, filed after years of litigation that he was aware of and after an adverse verdict, was extremely untimely. *See*, *Estate of Schwenke v. Becktold*, 252 Mont. 127, 827 P.2d 808 (1992) (motion untimely when filed 16 months after initiation of lawsuit); *Grenfell v. Duffy*, 198 Mont. 90, 95, 643 P.2d 1184, 1187 (1982) (motion untimely when filed four-and-a-half months after would-be intervenor was on notice of the complaint); *Archer v. LaMarch Creek Ranch*, 174 Mont. 429, 433, 571 P.2d 379, 382 (1977) (motion

untimely when filed 2.5 years after becoming aware of promissory note at issue); *Continental Ins. Co. v. Bottomly*, 233 Mont. 277, 280, 760 P.2d 73, 75 (1988) (motion untimely when filed 3 years after initiation of lawsuit).

Granting Kevin's Motion, which also sought to vacate the judgment and order a new trial, would grossly prejudice Crowley Fleck which, after years of litigation, received a verdict in its favor. A belated Motion to Intervene is not a valid basis for Kevin, or Daren, to obtain a do-over of an adverse verdict.

Kevin did not have a legal interest in the subject matter of the suit, much less one that might be impaired by the outcome. The subject matter of the suit, as Daren has repeatedly stated on appeal, is a negligence claim that belongs to the Estate of Gregory Engellant, not to Daren or Kevin individually. And if Kevin did have any individual claims, which he does not, the District Court correctly concluded they would be time-barred for the same reasons and on the same bases as Daren's individual claims, if any, are time-barred, and that Kevin's interests, if any, were adequately represented by Daren. Doc. 291. Daren, as the Personal Representative of the Estate, was responsible for prosecuting legal claims on behalf of the Estate. And it is clear from the arguments Kevin raises in this appeal that Kevin's position is basically identical to Daren's.

Kevin's Appeal should be denied and the judgment of the District Court affirmed.

CROSS-APPEAL ARGUMENT

I. The District Court Correctly Concluded The Statute of Limitations Bars Daren's Claims.

"[T]he statute of limitations in a legal malpractice action does not begin to run until the negligent act was, or should have been, discovered, *and* all elements of the legal malpractice claim, including damages, have occurred." See, *Watkins Trust v. Lacosta*, 2004 MT 144, ¶40, 321 Mont. 432, 92 P.3d 620, (emphasis in original); *Estate of Carolyn Watkins v. Hedman, Hileman & Lacosta*, 2004 MT 143, ¶17, 321 Mont. 418, 91 P.3d 1264

The sole alleged basis for Daren's claims in this appeal is Daren's allegation that Crowley Fleck fell below the standard of care it owed to Greg when it assisted, in 2012, in Greg's gift of his shares of Engellant Ranch Company stock to his niece Shana. Doc. 1, ¶¶ 23, 24, 26, 27, 31.

The allegedly negligent stock transfer and any associated damages occurred on September 21, 2012. Appendix 12. All elements of Daren's legal malpractice claim on behalf of the Estate therefore accrued no later than September 21, 2012. In Daren's November 14, 2014, Petition for Removal of Conservator, he specifically alleged the stock transfer was invalid, against Greg's best interests, the result of undue influence, and Daren requested the Court invalidate the transfer. Dkt. 64, Exhibit to Plaintiff's Response Brief, pp. 231-234. Ken and Greg were parties to the action in which Daren filed the Petition. *Id.* Therefore, these claims accrued, and

Greg as Crowley Fleck's client, Ken as Greg's conservator, and Daren as an "interested person" in Greg's guardianship/conservatorship, discovered them, no later than November 14, 2014.

The statute of limitations required these claims be filed no later than November 14, 2017. M.C.A. § 27-2-206. The Complaint was not filed until June 11, 2020, almost three years after the statute of limitations expired. The District Court correctly concluded the statute of limitations bars Daren's claims. Doc. 97, pp. 7-20.

II. The District Court Incorrectly *Sua Sponte* Applied Equitable Tolling To Save Daren's Otherwise Time-Barred Claims On Behalf Of The Estate.

The District Court acknowledged that while Greg may have had other disabilities, he did not have a disability within the meaning of Montana's disability tolling statute, M.C.A. §27-2-401. Dkt. 97, p. 19. Notwithstanding, the District Court then *sua sponte* incorrectly applied equitable tolling to save Daren's claims on behalf of the Estate.

A limitations period is not subject to equitable tolling if tolling is "inconsistent with the text of the relevant statute." *Young v. U.S.*, 535 U.S. 43, 49, 112 S.Ct. 1036, 1040, 152 L.Ed.2d 79 (2002) (quoting *United States v. Beggerly*, 524 U.S. 38, 48, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998)). The District Court acknowledged that "statutes of limitations are legislative enactments, and due respect for the legislative branch's prerogatives requires that any equitable exception be narrowly construed."

Dkt. 97, pp. 18-19. The District Court's conclusion that equitable tolling permits Daren's claims is inconsistent with Montana's disability tolling statute.

M.C.A. § 27-2-401 permits tolling for only two disabilities: (1) Minority and (2) commitment pursuant to M.C.A. § 53-21-127. The District Court's ruling that Greg's non-enumerated disability additionally permits tolling is inconsistent with the language of the statute and canons of statutory construction. *See, High Country Paving, Inc. v. United Fire & Casualty Company*, 2022 MT 72, ¶11, 408 Mont. 202, 507 P.3d 1165 ("In construing a statute, this Court's task 'is simply to ascertain and declare what is in terms of substance contained therein, not to insert what has been omitted or omit what has been inserted.'") (internal citation omitted); *see also Dukes v. City of Missoula*, 2005 MT 196, 328 Mont. 115, 119 P.3d 61 ("Under the canon *expressio unius est exclusio alterius*, we interpret the expression of one thing in a statute to imply the exclusion of another.").

The District Court's insertion of an additional disability into the disability tolling statute also directly contravenes longstanding Montana law that "limitations statutes making exceptions in favor of persons under disability must be strictly construed and that courts will not read into statutes of limitation an exemption or disability which has not been embodied therein." *Levc v. Connors*, 171 Mont. 1, 4, 555 P.2d 750 (1976) (emphasis added). *Levc* controls, and the District Court's ruling on this issue cannot be squared with it.

Further illustrating error, an earlier version of M.C.A. §27-2-401 allowed tolling when a person was merely "seriously mentally ill" as opposed to committed under M.C.A. §53-21-127. *See, e.g., Bestwina v. Village Bank*, 235 Mont. 329, 331, 767 P.2d 338, 340 (1989) (quoting prior version of M.C.A. §27-2-401 which permitted tolling for persons who were "seriously mentally ill," and holding whether chronic bipolar disorder was sufficiently "serious" mental illness was issue for jury). The Legislature expressly removed tolling for "serious mental illness" from M.C.A. §27-2-401 and replaced it with "has been committed pursuant to M.C.A. 53-21-127." *See* Doc. 122, Exhibit A, p. 2. By concluding equitable tolling applied due to Greg's condition, the Order effectively un-did the Legislature's amendments to M.C.A. § 27-2-401 and reinstated tolling on the basis of "serious mental illness."

Montana law has never applied equitable tolling under circumstances like those alleged in this case. This Court has applied equitable tolling to permit filing an otherwise time-barred claim where the plaintiff previously filed substantially the same claim against the same defendant in another forum, the previous filing was timely, and the second filing was made in good faith and with reasonable conduct. *See, e.g., Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶¶ 24-32, 259 Mont. 77, 246 P.3d 704; *Lozeau v. Geico Indem. Co.*, 2009 MT 136, ¶¶ 13-21, 350 Mont. 320, 207 P.3d 316.

This Court has also "extended a narrow exception to the general equitable

tolling doctrine rule, recognizing that the doctrine may apply 'to those instances where a plaintiff is substantially prejudiced by a defendant's concealment of a claim, despite the exercise of diligence by the plaintiff.'" *Lake County v. State*, 2024 MT 284, ¶29, 419 Mont. 201, 559 P.3d 1263 (quoting *Schoof v. Nesbit*, 2014 MT 6, ¶35, 373 Mont. 226, 316 P.3d 831 (where County Commissioners concealed existence of meeting that was basis for claim for four years, and plaintiff filed claim within 30 days of learning of meeting, equitable tolling excused filing after 30-day deadline) (internal citation omitted).

Daren did not timely file the same claim against Crowley Fleck in another forum. Greg and Ken and Daren were on actual notice of the alleged bases for the claims Daren now asserts on behalf of Greg's Estate. The District Court correctly determined the accrual and discovery rules were satisfied no later than November 14, 2014. Dkt. 97, pp. 14-17. This is not a case like *Schoof*, where the basis for the claims was concealed.

Further, in assessing the equities, the District Court did not account for prejudice to Crowley Fleck caused by the delay in bringing these claims. *Lozeau*, ¶15. Greg Engellant, who would otherwise have been the primary witness to these claims, passed away. Were Greg alive, he could have testified he wanted Shana to receive his Engellant Ranch Co. stock because she was working the ranch, and it was enormously important to him that the ranch remain in the family. He could have

testified as to his testamentary intent and capacity, and that even if Shana had not received the stock while he lived, he wished her to receive it on his death. He could have testified to his concern that Daren was attempting to interfere with his estate planning – which concern, perversely, Daren continues in the current lawsuit. In short, tolling under these circumstances is *in*equitable, permitting the very sort of stale claim and loss of evidence the statute of limitations is designed to prevent.

Equitable tolling does not apply to this case. The District Court's Order applying equitable tolling to permit Daren's otherwise time-barred claims on behalf of the Estate to proceed should be reversed. Judgment should be entered in favor of Crowley Fleck, PLLP, and Daniel McLean on the basis that the statute of limitations bars all claims.

CONCLUSION

The jury's verdict was appropriately rendered based upon the evidence presented at trial and Montana law. Daren's assignments of error fail. Daren's claims are also barred by the statute of limitations. On either or both of these independently sufficient bases, Crowley Fleck is entitled to final judgment in its favor.

The District Court also appropriately denied Kevin's Motion to Intervene. Kevin fails to present any argument to the contrary. To the extent, if any, the Court reaches the merits of the arguments Kevin presents, those arguments fail for the same

reasons as Daren's.

DATED this 25th day of September, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Answer and Cross-Appeal Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows, is 9,662 words, excluding the table of contents, table of citations, certificate of service, certificate of compliance, and any appendix.

DATED this 25th day of September, 2025.

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