IN THE SUPREME COURT OF IOWA

NO. 18-1416

HAROLD YOUNGBLUT,
Plaintiff-Appellee,

vs.

LEONARD YOUNGBLUT,
Defendant-Appellant.

Appeal from the Iowa District Court in and for Black Hawk County
The Honorable Andrea J. Dryer
No. CVCV 127065

DEFENDANT-APPELLANT'S FINAL REPLY BRIEF

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I. HAROLD'S ARGUMENTS FAIL TO ADDRESS THE OVERWELMING AUTHORITY AGAINST APPLICATION OF *HUFFEY* TO THIS CASE.

Even when *Huffey v Lea*, 491 N.W.2d 518 (Iowa 1992) was decided, the holding was out of step with almost all other jurisdictions. "The vast majority of Courts require a plaintiff to first institute a will contest in probate before plaintiff is allowed to pursue a claim for tortious interference with bequest." *Huffey*, 491 N.W. 2d at 524 (J. McGivern, dissenting). "Our *Frohwein* case, 264 N.W.2d 792, puts Iowa in a distinctly minority position of not requiring a plaintiff to first bring a will contest." *Id.* Indeed, the *Huffey* majority was able to find only one supporting case that seemed to be relevant. *Huffey*, 491 N.W.2d at 521. The *Huffey* holding now has been called into further question as to whether it, and thus *Frohwein*, still stand as good law in this Court and it expressly contrary to the RESTATEMENT (THIRD) OF TORTS.

1. Harold incorrectly asserts that *Villarreal* impacts only *Huffey* but not *Frohwein*.

In *Villarreal v. United Fire & Cas. Co.*, 873 N.W.2d 714 (Iowa 2016), this Court held that, under the claim preclusion doctrine, a final judgment on a claim for breach of an insurance contract bars a subsequent bad-faith lawsuit against the insurer because the plaintiff could have raised both claims in the initial action. The Court observed that claim preclusion applies to different actions based on the same

transaction or series of transactions despite the actions having different harms, substantive theories, measures or kinds of relief. *Id.* at 721 (citing REST. 2nd OF JUDGMENTS § 24 cmt. c). "While a first-party bad-faith claim will always require some *additional* proof, such a claim nonetheless challenges the same basic conduct as the underlying breach-of-contract claim." *Id.* at 729.

Similarly, a tortious interference with bequest claim involving a will is based on the same transactions that give rise to a will contest, just with the additional element of the tortfeasor's intent and consequential damages. *Huffey*, 491 N.W.2d at 521.[1] Casting serious doubt on the continued viability of *Huffey*, Justice Appel wrote:

> In *Huffey*, we considered whether a beneficiary could bring an action for tortious interference with a will after the beneficiary had previously litigated a will contest involving the same parties. We concluded that claim preclusion did not bar the subsequent action, emphasizing the state of mind required to support a tortious-interference action which was absent from the will contest. The majority opinion in this case essentially adopts the view

[1] Tortious interference claims involving a will require causation either in the form of the tortfeasor's undue influence actually affecting the testator or the tortfeasor taking advantage of the testator's lack of capacity (*i.e.*, the focus on the testator's state of mind involved in a will contest). Therefore, while the elements of tortious interference will not always support a will contest such as in the case of a tortiously procured *inter vivos* transfers, the facts supporting a will contest necessarily will always support a tortious interference claim with only the addition of the tortfeasor's intent. *See* Defendant-Appellant's Brief at pp. 40-41.

> espoused by the *Huffey* dissent. **Whether *Huffey* is good law after today is unclear.**
>
> *Id*. at 737, n.8 (Appel, J., dissenting) (internal citations omitted and emphasis added).[2]

Harold correctly acknowledges that *Villarreal* impacts *Huffey* but incorrectly argues that *Villarreal* spares *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978). *Huffey* was derived from *Frohwein* and both cases applied the same claim preclusion analysis that was rejected by *Villarreal*. *See Huffey*, 491 N.W.2d at 523-27 (McGivern, C.J., dissenting) (discussing the majority's application of the *Frohwein* claim preclusion analysis) and *In re Estate of Bader*, 803 N.W.2d 672 (Table), 2011 WL 2694714, at *3 (Iowa App. 2011) ("Both Frohwein and Huffey addressed the question of claim preclusion.").

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[2] At page 33 of his Brief, Harold lists several unreported Court of Appeals cases that cite to *Huffey,* but they all are inapplicable to his argument. *In re Estate of Boman*, 898 N.W.2d 202 (Table) 2017 WL 512493 (Iowa App. 2017) and *Matter of Estate of Erickson*, 922 N.W.2d 105 (Table) 2018 WL 3471093 (Iowa App. 2018) both involved a will contest. *Bronner v. Randall*, 867 N.W.2d 195 (Table) 2015 WL 2089360 (Iowa App. 2015), *Stalzer v. Smith*, 886 N.W.2d 107 (Table) 2016 WL 4384184 (Iowa App. 2016), *Cich v. McLeish*, 928 N.W.2d 152 (Table) 2019 WL 1056804 (Iowa App. 2019) and *Shea v. Lorenz*, 869 N.W.2d 196 (Table) 2015 WL 4158781 (Iowa App. 2015) all involved inter vivos transfers or account designation changes. *New Hope Methodist Church v. Lawler & Swanson, P.L.C.*, 791 N.W.2d 710 (Table) 2010 WL 4484355 (Iowa App. 2010) was part of a malpractice claim and *In re Estate of Bader*, 803 N.W.2d 672 (Table) 2011 WL 2694714 (Iowa App. 2011) distinguished *Huffey* in limiting its holding to question of fact on a limitation question.

This Court need not outright overrule *Huffey* and *Frohwein* to reach the right application of law to reverse the District Court because this case is so dramatically distinguished based on, *inter alia*, Harold's acceptance of the benefits of the 2014 Will. Nonetheless, this case presents proper cause to overrule or substantially modify *Huffey* and *Frohwein* because it demonstrates how the rulings have set Iowa law down the wrong path. *State v. Williams*, 895 N.W.2d 856, 867 (Iowa 2017) ("we cannot always rely on our venerable doctrine of stare decisis. . . The course we must follow is not to ignore our mistakes, but to correct them.").

Agnes wished for Leonard to keep his YFL stock and receive a share of her estate cash residue in her 2011 Will. Agnes wished for Leonard to have the South Farm in peace with Harold under her 2014 Will. It seems most unlikely that the *Huffey* and *Frohwein* courts intended or contemplated that their opinions would be distorted to allow Harold to defeat Agnes' wishes in *both* wills. This potential for *Huffey* to be tactically weaponized to cause injustice is among the reasons why, as discussed next, the *Huffey* reasoning has fallen in even further disfavor since it was decided.

2. RESTATEMENT (THIRD) OF TORTS now expressly disapproves of *Huffey*.

Harold agrees that *Frohwein* and *Huffey* based tortious interference with an inheritance on REST. 2nd OF TORTS §774B (1977) which states:

> One who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift.

The REST. 2nd did not address the current set of facts where Harold deliberately let the limitation on filing a will contest expire while accepting all the benefits of Agnes' 2014 Will before filing a tortious interference with a bequest claim. This very situation, however, *is* addressed by RESTATEMENTS (THIRD) OF TORTS; LIABILITY FOR ECONOMIC HARM, which makes clear that a claim for interference with an inheritance or gift is not be available where the plaintiff could have sought a remedy for the same claim in probate court:

> §18 Interference with Inheritance or Gift
>
> 1. A defendant is subject to liability for interference with an inheritance or gift if:
>   a. the plaintiff had a reasonable expectation of receiving an inheritance or gift;
>   b. the defendant committed an intentional and independent legal wrong;
>   c. the defendant's purpose was to interfere with the plaintiff's expectancy;
>   d. the defendant's conduct caused the expectancy to fail; and
>   e. the plaintiff suffered injury as a result.
> 2. ***A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court.***
>
> REST. 3RD OF TORTS; LIAB. FOR ECON. HARM § 18 TD (2018) (June 2019 Update) (emphasis added).[3]

[3] The American Law Institute Approved the REST. 3RD OF TORTS: LIAB. FOR ECON. HARM as its official position in May of 2018. https://www.ali.org/news/articles/

Section § 18 is intended to provide relief only when the plaintiff has *no* remedy available in probate. *Id.,* cmt. a. "Thus, if the defendant coerced the decedent into executing a will that excluded the plaintiff, the plaintiff's appropriate response is a claim to that effect in the probate court where the will is tested. A claim in tort is not available." *Id.,* cmt. c.

> A proceeding in probate is considered available, for purposes of this Section, even *if it offers less generous relief than would be attainable in tort*. *Nor does a probate court become unavailable because the limitations period has expired for pursuing a claim there*. If a claim falls within a probate court's jurisdiction, or would have if timely, a vindication of the claim by a suit in tort is not appropriate**.**
>
> *Id.,* cmt. c. (emphasis added).

The RESTATEMENT offers an illustration that is directly on point:

> Father makes a Will that leaves his entire estate to Daughter. Father later creates a second Will that leaves half of his estate to Daughter and half to Housekeeper. Father dies. Father's second will is the subject of a probate proceeding. Daughter participates but does not challenge the second Will. She therefore inherits half of her Father's estate. Daughter then sues Housekeeper in Tort, claiming that Housekeeper used undue influence to cause Father to write the second Will. *Daughter's Tort claim fails because she had recourse in Probate*: she could have offered Father's first Will and attacked the second one.
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> *Id.,* Illustration 3 (emphasis added).[4]

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american-law-institute-membership-approves-restatement-law-third-torts-liability-economic-harm/ (June 17, 2019). It was, however, being relied by this Court even before then. *See e.g., Dinsdale Construction, LLC v. Lumber Specialties, Ltd.*, 888 N.W.2d 644, 652, notes 11 and 12 (Iowa 2016).

[4] The illustration is based on *DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981), *Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988) (Delaware law), *Robinson v. First State Bank of Monticello*, 454 N.E.2d 288 (Ill. 1983), and J*ohnson v. Stevenson*, 152

The RESTATEMENT expressly calls out *Huffey* with disapproval and

> . . . adopts the position, first, that a suit in tort is not appropriate when a probate court has the power to address the plaintiff's claim [and] also takes the position that claims in tort are foreclosed by the availability of probate, not by the "adequacy" of probate. This language is chosen to avoid decisions that make a tort claim available because a plaintiff can obtain a larger recovery in tort than in probate.
>
> *Id.,* Reporter's Note c.

The vast majority of other jurisdictions would hold that Harold's opportunity to file a will contest precludes a tortious interference claim all together. Notably, Harold's argument is conspicuously silent on *McMullin v. Borgers*, 761 S.W.2d 718, 719–20 (Mo. App. 1988), which is cited in Leonard's opening Brief and is by far the most factually on point case in this matter. Iowa should not remain in the criticized minority of jurisdictions by allowing a tortious interference claim despite the availability of a probate remedy; if it does, *Villarreal* at least required both claims to be brought together and Harold's failure to file a will contest within the limitations period of §633.309 bars his tortious interference claim. *See further* Defendant-Appellant's Brief at pp. 38-43.

S.E.2d 214 (N.C. 1967). *See* REST. 3RD OF TORTS; LIAB. FOR ECON. HARM § 18, Reporter's Note c.

3. Harold's claim that he did not have a claim until after Len conveyed his YFL stock is factually and legally flawed.

Factually, Harold did not, as he now argues, believe he had no claim until after Leonard exercised his option to keep the South Farm. On the contrary, the record is crystal clear that Harold was unhappy with the 2014 Will but (with advice of counsel) consciously chose to not file a file will contest because he feared the *in terrorem* clause could cause him to lose Agnes' YFL stock, which he inherited under it. (App. 340 at 11:19-20; App. 434-435 at 290:25-291:9; App. 433 at 281:21-22). After Agnes' death, he retained attorney Mark Rolinger to visit with Theresa Hoffman about the circumstances of the 2014 Will and learned that Ms. Hoffman would not support his claim. (App. 432 at 273:12-21; App. 434 at 290:6-24; App. 486 at 407:4-17). Harold also at that time knew the four month deadline for challenging the 2014 Will was in October of 2014. (App. 435 at 291:10-20). In fact, Harold knew every fact that supported his tortious interference claim at the time of Agnes' death, (App. 358-375 at 100:5-117:25, App. 446 at 306:2-9, App. 431-432 at 272 - 273:11, App. 445 at 303:12-22, App. 450-452 at 324:6-326:5, App. 547 at 566:16-25), he simply chose to not timely assert them because he wanted to first secure the YFL stock from Agnes and Leonard.

Legally, the interference to Harold's inheritance expectation, which is necessary for a will contest as well as a tort claim, was present on the day Agnes died. Agnes' 2011 Will left Harold the South Farm in fee without any conditions.

(App. 143-144 at Division VII(B)(2)). Agnes' 2014 Will gave the South Farm to Leonard with the condition that Leonard conveyed his YFL shares to Harold. (App. 152 at Division III(B)). While Harold *might* still have received the South Farm under the 2014 Will, that possibility was entirely up to Leonard's complete discretion and Leonard had extremely strong reasons to elect to keep the South Farm. The future possibility, however improbable, that Leonard might choose to allow Harold to get the South Farm under the 2014 Will is a far cry from the certain expectancy of immediately receiving the South Farm unconditionally under 2011 Will. It was incumbent upon him to contest the 2014 Will if he wanted to restore his inheritance expectancy.

Harold's own conduct demonstrates that he immediately knew that his inheritance expectancy under the 2011 Will was interfered with by the 2014 Will. When he learned about the conditional bequest of the South Farm to Leonard in the 2014 Will, he inquired with an attorney about whether he could prevent the conditional bequest of the South Farm from ever taking effect by convincing Leonard to sell his YFL shares before Agnes and Earl died. (App. 427-428 at 265:7-266:25). Harold's argument that he was not injured until Leonard conveyed his YFL stock after the four month will contest deadline ran only illustrates the deliberateness of Harold's actions: he could not risk a bad result in a will contest because he might lose the YFL stock in addition to the South Farm.

Foreseeing that Harold would be immediately upset about Leonard's option to receive the South Farm (App. 474-475 at 385:24-386:6; App. 495-496 at 421:15-422:10), it was Earl and Agnes who wanted the *in terrorem* clause (App. 480 at 395:19-21). Leonard's not exercising the option to sell his YFL stocks until after the §633.309 deadline did not necessitate Harold's interference claim. Harold's made the calculated decision to let the will contest limitation expire, take advantage of the 2014 Will benefits, and tactically stage a tortious interference claim to file immediately after Leonard conveyed his YFL stock to Harold for $1. This case is an obvious attempt by Harold to end-run his mother's intentions.

4. The running of a statute of limitation triggers claim preclusion.

Contrary to Harold's argument, a dismissal based upon the running of the statute of limitations is a valid and final adjudication for purposes of claim preclusion.

> We have previously held that a dismissal based upon the running of the statute of limitations is an "adjudication" for purposes of claim preclusion. We find a dismissal on statute of limitations grounds is a final and valid judgment for purposes of issue preclusion.
>
> *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 399 (Iowa 1998) (voluminous citations omitted).

Thus, the expiration of the will contest statute of limitation constitutes a prior adjudication for claim preclusion to apply to the tortious interference claim. Harold's conscious choice to let the will contest limitation expire does not change

the preclusive consequences of a will contest being nonetheless available to him had he timely filed one:

> Nor does a probate court become unavailable because the limitations period has expired for pursuing a claim there. If a claim falls within a probate court's jurisdiction, or would have if timely, a vindication of the claim by a suit in tort is not appropriate**.**
>
> REST. 3RD OF TORTS; LIAB. FOR ECON. HARM § 18, cmt. c.

When the deadline under § 633.309 passed, that became an adjudication for claim preclusion purposes. *See Penn*, 577 N.W.2d at 399. A tortious interference claim being available under the facts here renders § 633.309 meaningless. Allowing an interference claim without an underlying will contest would simply allow dissatisfied beneficiaries to always get what they can under a last will and then seek even more under an interference claim. Any finality provided by § 633.309 will be no more.

5. The *in terrorem* clause did not preclude Harold from contesting the 2014 Will.

The only evidence in the record is that it was *Earl and Agnes' idea* to put a "no-contest" clause in their wills because they knew there was discord in the family and they did not want Harold, Leonard, *or anyone else* contesting their estate plans. (App. 474-475 at 385:24-386:6; App. 480 at 395:19-21; App. 495-496 at 421:15-422:10). Harold's suggestion that Agnes did not want peace among her children (Brief at p. 47) is most remarkable to the say the least. Harold had the

option of contesting the 2014 Will and the *in terrorem* clause would not be enforced if the 2014 Will was set aside. The *in terrorem* clause had the effect that Agnes wanted, she just could not have anticipate that Harold would scheme to circumvent her wishes through this lawsuit.

II. HAROLD'S ACCEPTANCE OF THE BENEFITS OF AGNES' 2014 WILL ESTOPPED HIM FROM MAKING *ANY* CLAIM INCONSISTENT WITH THE 2014 WILL, NOT JUST A CLAIM AGAINST AGNES' ESTATE.

Harold's denial that he was trying to "have his cake and eat it too" insincerely ignores the facts. Harold wanted Agnes and Leonard's YFL stock under Agnes' 2014 Will, and Harold wanted the value of the South Farm that he received under the 2011 Will. Indeed, Harold even wanted to obtain the South Farm itself through a constructive trust. (App. 16, (requesting a constructive trust on the South Farm)).

1. Acceptance of benefits under the 2014 Will, *per se*, estopped Harold from this current action.

Harold does not dispute that he accepted the benefits of the 2014 Will, he only tries to distinguish this case from the well-settled authority against him by arguing that he has not taken adverse action against Agnes' Estate. (Brief at pp. 50-51). After accepting the benefits of a will, however, equitable estoppel not only applies to bar adverse action against the estate, it applies to bar *any position inconsistent with the will.* Harold's attempt to distinguish the authority against him

on the grounds that he did not file a will contest is without consequence because *none* of those cases involved a will contest – similar to this case, they all involved claims against one other than the estate.

For example, in *Hainer v. Iowa Legion of Honor*, 43 N.W. 185 (Iowa 1889), the decedent designated his mother, Josephine, as a beneficiary of his group life insurance. He later drafted a will that provided for Josephine to only receive the income from half of the life insurance benefits for her life with the rest passing to his daughter, but left his residence to Josephine. Josephine accepted and enjoyed the decedent's residence under the will but then intervened in a case against the Iowa Legion of Honor seeking all of the life insurance. It was not a will contest or other action against the estate. The Court found that the Josephine was estopped from her life insurance claim because she knew about the will terms that left most of the life insurance to the decedent's daughter and, *through her mere silence*, induced the *decedent* into believing that all the provisions in his will would be carried out. *Id.* at 186. The same may be said of Harold.

Moreover, Josephine accepted the decedent's house under the will. The court noted that "she should not now be permitted to avail herself of the provisions of the will as far as they are favorable to her, and deny them so far as they are adverse." *Id.* at 187 (citation omitted).

> A man shall not be allowed to approbate and reprobate. One who has taken a beneficial interest under a will is thereby held to *have confirmed and ratified*

> *every other part of the same*, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, *which would defeat or in any way prevent the full operation of the will*. It is an exceedingly stubborn principle that no one shall be permitted to claim under, and adverse to, a will. If the testator assumes to dispose of property belonging to a devisee or legatee, the latter, accepting the benefit, must also make good the testator's attempted disposition. . . he who accepts a benefit under deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it.
>
> *Id.* at 187 (emphasis added, internal citations and quotations omitted).

"The principles of the doctrine of equitable estoppel as stated in *Hainer* . . . have been consistently followed by this court." *Hart v. Worthington*, 30 N.W.2d 306, 314 (Iowa 1947).

Harold's attempt to distinguish the other law against him, by arguing this is not a will contest, likewise falls flat. *Bogenrief v. Law,* 271 N. W. 229, 232 (Iowa 1937) involved an attempt in bankruptcy proceedings to take a position inconsistent with accepting benefits under a will, not a will contest or other action against the estate. *Koep v. Koep*, 123 N.W. 174 (Iowa 1909) involved a real estate partition action inconsistent with acceptance under a will, not a will contest or other action against the estate. *Elberts v. Elberts*, 141 N.W. 57 (Iowa 1913) involved a real estate partition action inconsistent with acceptance under a will, not a will contest or other action against the estate. *Hart,* 30 N.W.2d 306 involved an action to recover real estate inconsistent with prior conduct, not a will contest or other action against the estate.

The forgoing authority makes clear accepting the benefits of the 2014 Will estopped Harold from taking *any* position, regardless of how he frames it, that is inconsistent with the 2014 Will. Obviously, a claim that the bequest to Leonard of the South Farm was the product of tortious conduct is inconsistent with the terms of the 2014 Will.

Harold's observation that the law against him was decided prior to *Frohwein*, 264 N.W.2d 792 only underscores the fact that the *Frohwein* plaintiff did not accept the benefits under the will against which he was taking an inconsistent position.

> A beneficiary must take what the will gives him and *relinquish all claim to what it gives another*, even though it be his own property, or he must relinquish all claim to the benefits provided for him and take the chance of making good his claim to the estate in opposition to the will. . .
>
> 13 IA. PRAC., PROBATE § 11:48 (emphasis added).

Having accepted the benefits of the 2014 Will, Harold relinquished all claims based on South Farm passing the Leonard under that will. Harold's interference claim, however, is in derogation of that 2014 Will; to find otherwise, one would need to reach the impossible conclusion that Agnes wanted Leonard to receive the South Farm in exchange of conveyance of his YFL stock to Harold *and* have Leonard pay Harold for the value of the South Farm. Harold's own pleadings confirm that he is trying to contravene the 2014 Will. (Supp. App. 9, ¶ 7(i))

("…Harold's loss of inheritance damages was the value of the [South Farm]…") and App. 16-17 (requesting a constructive trust on the South Farm)). While the inconsistency of Harold's position with the 2014 Will is, *per se*, enough to defeat his claim, he likewise fails to remove this case from the specific elements of equitable estoppel.

2. The particular elements of equitable estoppel are satisfied.

In all of the above cases involving a testamentary bequest, the fact that the plaintiff accepted benefits under a will was so dispositive that the Courts did not even find it necessary to delve in the specific elements of equitable estoppel. Harold nonetheless attempts to sidestep the first element, a false representation or concealment of material fact, by arguing that he did not specifically tell Leonard that he was not going to file a tortious interference claim when he declined to bring a will contest. (Brief at p. 50).[5]

Harold's claim that he made no false representations flies in the face of his words and deeds. First, Harold affirmatively indicated that he was accepting the 2014 Will as final. He accepted the benefits of the 2014 Will by taking Agnes' YFL stock and tendering a check for $1 to Leonard as provided for in the 2014 Will. Harold's conveyance of the $1 check and acceptance of other provisions

[5] Harold's Brief does not dispute that the remaining elements of equitable estoppel (Leonard's lack of knowledge, Harold's intention that the conduct be relied upon, and Leonard's actual reliance to his prejudice) are satisfied.

under the 2014 Will were affirmative manifestations to induce Leonard to reasonably believe that, once Leonard conveyed his YFL stock to Harold under Agnes' 2014 Will, it would be the end of his disputes with Harold over the South Farm and over Harold's mismanagement of YFL as well.

Harold's Brief devotes considerable attention the vocal nature of Leonard's complaints about Harold's management of YFL, but that only emphasizes how valuable Leonard's YFL stock rights were to Leonard (above the Estate's $443,000 valuation) and how valuable getting that stock out of Leonard's hands was to Harold.[6] Harold's tender of the $1 check, his acceptance of Leonard's shares, and his acceptance of Agnes' shares, all under the 2014 Will, constitute affirmative false representations regarding his intentions.

Moreover, Harold's silence about his intentions of filing this lawsuit itself satisfies the false representation element of equitable estoppel.

> The false representation essential to the defense of equitable estoppel arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable

[6] Harold's strident argument that Leonard should not "profit" from his own bad conduct overlooks the fact that Leonard's legitimate objections were born from Harold's own bad conduct. *See* Defendant-Appellant's Brief at pp. 25-27. Agnes loved both of her sons regardless of the deep disagreements between them. Agnes' desire to end family conflict extended so far as to protect Harold from his own misconduct by compelling Leonard to surrender his YFL stock so that he would no longer be able to pursue valid claims against Harold for his self-dealing. Her 2014 Will creatively achieved her (and Earl's) goals of leaving a farm to both sons while allowing them to part ways in peace. In any event, Harold's entire line of argument is completely irrelevant to the legal issues before this Court.

> negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.
>
> *Manson State Bank v. Diamond,* 227 N.W.2d 195, 201 (Iowa 1975) (internal quotation omitted).

For example, failing to mention that a security interest extended to certain accounts receivable being sold amounted to a misrepresentation. *Manson,* 227 N.W.2d at 201. The Court of Appeals described another analogous case as follows:

> There is sufficient evidence in this case that Affiliated Foods induced Gold Buffet to believe that Gold Buffet would be given second priority, after the Bank. Gold Buffet had clearly made its belief about the priority positions known to Affiliated Foods, yet Affiliated Foods failed to disclose its own prior security agreement with Roger McGinley. Instead, Affiliated Foods permitted Gold Buffet to complete the sale transaction under the belief that Gold Buffet would get second priority. Such action by Affiliated Foods constitutes a false representation or concealment.
>
> *Affiliated Foods, Inc. v. McGinley*, 426 N.W.2d 646, 647–48 (Iowa App. 1988).

Likewise, Harold tendering the $1 check but failing to mention his intent to sue Leonard over the 2014 Will as soon as Leonard's conveyed his YFL shares constitutes a false representation or concealment. Whether viewed under the law specifically on accepting benefits under a will or analyzed under the individual elements of equitable estoppel, Harold was estopped from filing this action.

3. Harold's argument against estoppel by acquiescence is unpersuasive.

Harold incorrectly argues that *Markey* stands against application of estoppel by acquiescence in this case. (Brief at p. 54).

> [E]stoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. Although this doctrine bears an 'estoppel' label, it is, in reality, a waiver theory. Unlike equitable estoppel, estoppel by acquiescence does not require a showing of detrimental reliance or prejudice.
>
> *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) (internal quotations omitted).

While *Markey* articulates the applicable law, the outcome of the case is of no help to Harold. *Markey* involved child support, where the best interests of the child is the paramount consideration and the plaintiff's delay in bringing legal action was due exclusively to her financial inability to retain a lawyer. *Id.* at 22. Nothing similar can be said of this case.

The three elements estoppel by acquiescence are:

> (1) a party has full knowledge of his rights and the material facts;
> (2) remains inactive for a considerable time; and
> (3) acts in a manner that leads the other party to believe the act now complained of has been approved.
>
> *Markey*, 705 N.W.2d at 21.

The elements are readily satisfied. For the first element, Harold knew on the day Agnes died that, if he wanted to ensure that he received the South Farm, he had to make a successful challenge to Agnes' 2014 Will and he knew all the facts

supporting such a challenge. The 2011 Will gave Harold the South Farm and the 2014 Will gave it to Leonard with a condition; if Harold wanted to take the decision of what happened with South Farm out of Leonard's hands, Harold needed to challenge the 2014 Will so that he could receive the South Farm under the 2011 Will. Instead, he acquiesced to Leonard keeping in his hands the option to retain the South Farm under the 2014 Will and he cannot later complain about Leonard exercising that option, otherwise, the option was illusory.

For the second element, Harold remained silent and made it appear that he accepted the 2014 Will. The fact that Harold delayed filing suit "only a few months after Leonard exercised his option"[7] does not avoid application of the second element. Conduct that only *implies* an intent to waive a known right supports estoppel by acquiescence. *Markey*, 705 N.W.2d at 22.

> Estoppel by acquiescence is applicable where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right.
>
> *Anthony v. Anthony,* 204 N.W.2d 829, 834 (Iowa 1973) (internal quotation omitted).

The relevant time period began with Agnes' death on June 2, 2014. The four month deadline for a will contest was a "bright line" deadline to complain about

[7] Appellee's Brief, p. 54. Leonard announced his election on February 2, 2015 and Harold filed suit on April 2, 2015. (App. 482-483 at 398:21-399:3; App. 268-269 and App. 7-10).

the 2014 Will and it was known to everyone. Harold specifically inquired about a will contest then let the four month deadline pass in silence. Such conduct clearly implies an intent to abandon any grievances he had over the 2014 Will.

Finally, the third element is satisfied. Harold's acceptance of over $433,000 worth of stock for $1 in accordance with Agnes' wishes demonstrated that, regardless of what he thought of Leonard, he was accepting that the disposition of Agnes' estate under her 2014 Will was proper.

Harold knew exactly what he was doing. The *in terrorem* clause created potential consequences for filing a contest of Agnes' 2014 Will and losing, but it did not prevent him making the challenge. He had two options: 1) accept the 2014 Will, secure Agnes' YFL stock with certainty and live with the risk of Leonard electing to keep the South Farm, or 2) file a will contest before the § 633.309 deadline and make his case for the South Farm under Agnes' 2011 Will with the risk of losing Agnes' YFL stock if he did not prevail. He chose the first option. The probate court, other beneficiaries, the Estate administrators and Leonard all relied on Harold' conduct and his lack of a will challenge to complete the estate administration per the 2014 Will. Estoppel by acquiescence is established.

III. WITHOUT THE APPLICATION OF THE *PRO TANTO* CREDIT, HAROLD WOULD RECEIVE MORE THAN FULL COMPENSATION.

It must be underscored that this Court should never reach this issue because the District Court's failure to dismiss the case in entirety should be reversed. Nonetheless, Harold's assails the very Jury that he requested by arguing that he would not receive a double recovery because the Jury's damage award and his prior settlements do not exceed the amount he demanded. (Brief at p. 59). Jury Instruction 28 stated in relevant part:

> For Harold Youngblut, the damages in question are the following:
>
> 1. Damages to compensate him for the loss of the inheritance that he expected to receive, minus the value of the Youngblut Farmland, Ltd. stock that he received from Leonard Youngblut. . .
>
> In deciding what amounts, if any, to award for these kinds of damages,
>
> 1. Decide what damages, if any, have been proven, based upon the evidence. . .
>
> (App. 90).

Harold made his case for what he asserted was the entire value of the South Farm and what he asserted was the value of Leonard's YFL stock. After trial, and now, Harold argues that Leonard's stock was worth $376,710.46. (Brief at p. 59 and Supp. App. 9-10). Notably, Agnes' Estate valued Leonard's stock at $443,000 (App. 490-491 at 416:23-417:2) and at one point, Leonard thought the stock was worth much more. (Brief at 28).

The Jury was instructed on how to include its determination of the South Farm value in its assessment of damages and a Jury is presumed to obey instructions. *Hoekstra v. Farm Bureau Mut. Ins. Co.,* 382 N.W.2d 100, 110 (Iowa 1986). The Jury, as the finder of fact, is free to accept or reject evidence whatever evidence it chooses. *Johnson v. Knoxville Comm. Sch. Dist.*, 570 N.W.2d 633, 641 (Iowa 1997); *Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa App. 1997) (citing *Eckelberg v. Deere*, 276 N.W.2d 442, 447 (Iowa 1979)). Harold's claim that he was not fully compensated when he does not contest the damage instruction that the Jury used to assess his compensation essentially is an attack on the internal workings or impeachment of the Jury, which is impermissible. *See Weatherwax v. Koontz*, 545 N.W.2d 522, 524-525 (Iowa 1996).

The fact that the Jury awarded less than what Harold demanded does not diminish the fact that Harold accepted the benefits given by Agnes in the 2014 Will and the value of South Farm he expected to receive as determined by the Jury in its verdict. The Jury may have reached its assessment of his damages by finding that South Farm was worth less than the amount that Harold argued or that Leonard's stock was worth more than what Harold argued. Regardless, the Jury concluded that Harold's damages were $396,086.88 without consideration of $80,000 that he previously received from the settlements with his sisters. Without

application of the *pro tanto* credit, Harold would receive a double recovery in the amount of that $80,000.

Harold's attempt to procedurally distinguish this case from *Ezzone* likewise fails. In *Ezzone,* the Court held that the defendants' memorandum asking for the *pro tanto* credit was adequate for its application even where defendants never amended their answer to plead entitlement to the credit, offered no evidence to support it and the trial court made no finding of facts on the issue. *Ezzone v. Riccardi*, 525 N.W.2d 388, 402 (Iowa 1994). Harold had known of the claim for a *pro tanto* credit well over a year before trial (App. 58), and it was discussed out of the presence of the Jury during trial. (App. 552-553 at 607:19-608:5). Similar to the plaintiffs in *Ezzone,* Harold never objected to the *pro tanto* credit being decided by the District Court until Leonard requested application of the credit. (App. 92-95). Only then for the first time did Harold raise an argument on the pleadings, but claims that he was prejudiced or did not know of the defense were conspicuously absent then, and still are now.

While this Court should reverse the District Court on the merits of the entire case, this Court should apply the $80,000 credit should this case survive a final appellate ruling to any extent.

CONCLUSION

Defendant-Appellant Leonard Youngblut requests that this Court reverse the District Court's denial of his Motion for Summary Judgment, Motion for Directed Verdict and Motion for Judgment Not Withstanding the Verdict, and remand this case for dismissal of Plaintiff-Appellee's Petition and Amended Petition in entirety. In the alternative, Defendant-Appellant Leonard Youngblut requests that this Court reverse the District Court's denial of his motion for *pro tanto* credit and remand this case for application of the credit to the verdict.

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on July 25, 2019, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to counsel for Otter Creek Investments, LLC. Per IOWA RULE 16.315(1)(b), this constitutes service of the document for the purposes of the Iowa Court Rules

/s/ Philip A. Burian

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in IOWA R. APP. P. 6.903(1)(g)(1). It contains 6,342 words, excluding parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).*

This brief complies with the type-face requirements of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Philip A. Burian

July 25, 2019
Date