

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0555

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ESTATE OF ROBERT SEVERSON,

Appellant,

vs

LYNN SEVERSON, SEVERSON FAMILY MINERAL TRUST,  
STOCKMAN BANK OF PLENTYWOOD, INC.,  
AND DOES 1 THROUGH 10, INCLUSIVE,

Appellees.

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**APPELLANT'S BRIEF**  
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On Appeal from the

Montana Fifteenth Judicial District Court, Sheridan County

The Honorable Katherine Bidegaray Presiding

COUNSEL OF RECORD:

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### **I. STATEMENT OF THE ISSUES**

1. Did the district court err by granting defendants' motion for summary judgment?
2. Did the district court err by ruling that Plaintiff's claims were barred by the statute of limitations?
3. Did the district court err by awarding Defendant Lynn Severson and Severson Family Mineral Trust Rule 11 sanctions?
4. Did the district court err by awarding attorneys fees to Defendants Lynn Severson and Severson Family Mineral Trust?

### **II. STATEMENT OF THE CASE**

The Estate of Robert Severson, Plaintiff, brought this action in the district court seeking a money judgment plus interest against the Defendants. The Defendants filed motions for summary judgment which were granted by the district court. Defendants Lynn Severson and the Severson Family Mineral Trust also filed for Rule 11 sanctions that was also granted by the district court. As a result of the

Rule 11 sanctions, the district court awarded the Defendant Lynn Severson attorney fees. From these orders, the Estate of Robert Severson appeals.

### **III. STATEMENT OF FACTS**

Most of the pertinent facts are set forth in the preceding Statement of the Case and the rest can be summarized quite briefly.

Robert Severson died on September 21, 2015. Approximately, three years before his death, Robert suffered a stroke, heart attack, Parkinson's disease and his brother Lynn Severson, managed Robert Severson's financial affairs due to Robert's failing health. See Kelly Ross Affidavit Page 1 (Supp Appx Tab 8), Frank Piocos Affidavit Para 2 (Supp Appx Tab 9), Lynn Severson Affidavit P1 L25-P2 L1. (Supp Appx Tab 10)

The Plaintiff, the Estate of Robert Severson, during the probate process, discovered that Defendant Lynn Severson failed to obtain a power of attorney from his brother (see record Lynn S. Depo Page 8 lines 22-24), used his brother's funds for his own personal use (see checks attached to Estate's Brief Objecting to Summary Judgment located in Supp Appx behind Affidavit of F.Piocos Tab 9), obtained a personal loan from Stockman's Bank of Plentywood using Robert's name ( see Supp Appx Tab 6 Lynn. S. Depo Ex. N), had Robert designate him as the sole beneficiary of his IRA account (see Supp Appx Tab 13 Lynn S. Affidavit

Ex G), and designate him a joint owner and sole beneficiary of Robert's savings and checking accounts. See Lynn S. Aff. attachment Ex "D" and F. Piocos Aff. Para 9 and 19. In addition, that the Defendant Severson Family Mineral Trust failed to make distributions in accordance with the trust and that the Severson Family Mineral Trust failed to provide Robert Severson and his estate timely requested and required documentation. See Affidavit of Kelly Ross pages 1-2, Affidavit of F. Piocos paragraphs 10, 11, 13 and 19. In addition, that defendant Stockman Bank of Plentywood approved a loan in Robert Severson's name when they knew or should have known that Lynn Severson or some other person used Robert's signature on a loan document. See Supp Appx Tab 6 L.S. Depo Ex. N.

All defendants filed a motion for summary judgment. (See motions for Summary Judgment of Defendant Stockman Bank, and Defendant Lynn Severson and Severson Family Mineral Trust) Defendant Lynn Severson and Severson Family Mineral Trust also filed for Rule 11 sanctions and for attorney fees. (See record Defendant's Motion for Rule 11 Sanctions, and Supp Appx last item) The district court granted Defendants' motions for summary judgment. (See record orders of June 12, and June 13, Appendix Tabs 1-2) The district court dismissed the sanctions and attorney's fees when Severson's attorney failed to appear for hearing and then upon motion of Severson reversed itself. (See record bench order July 13, and Order of August 10 Appx. Tab 3) Then the district court granted

sanctions and attorney's fees against Plaintiff and its attorneys of record. See record order of September 19, Appendix Tab 4) This appeal followed.

#### **IV. STANDARD OF REVIEW**

The standard review in a district court's summary judgment ruling is de novo. (using same Rule 56, M.R.Civ.P. criteria as the district court. *Montana Metal Buildings, Inc. v. Shapiro* (1997) citing (*Clark v. Eagle Systems, Inc.*) (Mont. 1996), 927 P.2d 995, 997, 53 St.Rep. 1150, 1151 (citations omitted).

The standard of review for Rule 11 sanctions is abuse of discretion. *Shull v. First Interstate Bank*, (1994), 269. Mont. 32, 39, 87 P.2d 193, 197.

#### **V. SUMMARY OF ARGUMENT**

The district court erred in granting summary judgment as there were genuine issues of material fact, including but not limited to: when the statute of limitations started, who signed the loan document (Tab 6), whether the decedent Robert Severson properly executed the "Account Agreement" in favor of his brother Lynn, and if Lynn's actions constituted breach of trust.

II. The district court invaded the province of the trier of fact, and applied the wrong statutes when it granted summary judgment and dismissed Plaintiff's

Complaint based upon statute of limitations, ignoring Lynn Severson's breach of trust, and other issues of material fact.

The district erred in granting sanctions under Rule 11 as Plaintiff's Complaint was filed in good faith, and without a wilfull violation. In doing so the District court ignored Lynn Severson's breach of trust, and other material facts in dispute.

## **VI. ARGUMENT**

- I. Whether the district court erred in granting Defendants' motion for summary judgment.
  - a. There were genuine issues of material fact.
- II. Whether the Plaintiff's claims were barred by the statute of limitations?
- III. Whether the district court erred in granting sanctions.

### **I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT.**

Rule 56(c), M.R.C.P., provides, in pertinent part, that [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.*



- II. Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists. *Clark*, 927 P.2d at 997 (citations omitted).
- III. The party seeking summary judgment must establish, in light of the pleadings and other evidence before the court, the absence of any genuine issue of material fact which would allow the nonmoving party to recover and entitlement to judgment as a matter of law. *Id.* at 997-8. (citations omitted). If, but only if, the party seeking summary judgment meets this burden, the nonmoving party must come forward with substantial and material evidence raising a genuine issue of material fact. *Id.* at 998. (citation omitted). “[A]ll reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposed summary judgment *Id.*

#### **LOAN DOCUMENTS:**

At this deposition, Defendant Lynn Severson was asked whose signatures were on the loan documents? (Another issue of obfuscation by the Defendant Lynn Severson.)

BY MR. DEFELICE:

Q. I want to follow up on Exhibit N. I will try to be as brief as possible. I'm showing you Exhibit N again, and on the second page there's a signature. Do you recognize the handwriting?

A. That's mine. Yeah, I was looking at this before, kind of looked like my writing in a way.

Q. What's the date?

A. In '12 he bought something, what was it?

Q. What would be the date on the loan there on the one?

A. 9-17 of 2012.

Q. And ah, I'm going to show you page two and the first page of M.

A. You know, this is Robert's signature here.

Q. And what was the date on. . .

A. 11-5 of 2012.

Q. Okay, so that was about ah, a month, about three weeks after the other document?

A. See ah, this has kind got me confused here. Well, we get some copies and the bank will can probably figure some of this out.

MS. CHRISTOFFERSEN: Just for the record, I'm not sure Lynn you would be able to get copies of these documents because they are clearly in Robert's name alone.

A. (By Deponent) Yeah, it's possible.

MR. PIOCOS: Did you notice that the signature differences?

A. Yeah, that's . . .

MR. PIOCOS: What's the difference between the signatures?

A. This one kind of looks half way like mine with the S you know.

Unless someone else?

MR PIOCOS: What about the other one?

A. This is definitely Robert.

MR PIOCOS: With the one that's definitely Robert's, what Exhibit is that?

A. Exhibit M most definitely.

MS. CHRISTOFFERSEN: Exhibit M?

A. (By Deponent) Yep, that's definitely Robert's no question. This one, 15 I just . . .Page 40, Line 13-

It is important to note that none of the Defendants admit or deny whether Lynn Severson signed his brother's name on the loan document (referenced as Exhibit N in the deposition transcripts and is attached to Plaintiff's Objection to Summary Judgment as Exhibit 10, and affidavit's of Stockman's Bank employees attached Stockman's Bank Motion for Summary Judgment. This is another factual dispute for the trier of fact.

"In the fall of 2012 Robert Severson entered into two loans with Stockman Bank . . ." p. 3, Line 7 of Defendants' Motion for Summary Judgment. This is disputed by the Plaintiff. It's Plaintiff's contention that Robert Severson only entered into one of these loans with Stockman Bank. And that Lynn Severson signed his brother's name on the other loan. The Defendants' wiggle around this issue several times in their Motion for Summary Judgment and it's mindboggling. Defendants seem to deny early in their brief that Lynn Severson signed a loan document using his brother's name and then:

"In this particular instance, Lynn Severson does not recall signing the promissory note for \$15,075, but does not deny he may have." P.11, Line 21 of Defendants' Motion for Summary Judgment. "It is disputed who signed the loan." p.3, Line 10 of Defendants' Motion for Summary Judgment. This is a genuine issue of material fact.

Defendants (Severson) refers to Section 30-3-404, M.C.A. on page 12 of their Motion for Summary Judgment but doesn't recite it. Section 30-3-404(1), M.C.A. provides in pertinent part: "Unless otherwise provided in this chapter, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value." Stockman's Bank did not act in good faith, the bank knew Lynn Severson, knew Robert Severson, and were aware of what their signatures looked like. Stockman's Bank could have just looked at the signature cards or even the signature differences on the loan documents. Section 30-3-404, M.C.A. does not apply as it doesn't absolve the Defendants from civil or criminal liability. See Section 30-3-404(3), M.C.A. Subsection (3) provides: "The civil and criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter..." See, Section 30-3-404, M.C.A. Defendants are not even willing to admit that it was an "unauthorized signature" and therefore should be estopped from arguing such. Defendants have provided no proof that Robert Severson signed the loan document in question. In addition, there is no proof that Robert Severson even knew about the loan in question. So how could he have objected? Again, Plaintiff's Exhibit 1 attached to Plaintiff's Objection to Summary Judgment establishes that Lynn Severson paid back the loan with Robert Severson's money. This also begs the question why were there two separate loans

when either Robert or Lynn Severson could have just got one loan for a larger amount? Plaintiff argues that Robert Severson received the liability for the loan. But Lynn Severson received the benefit of the loan.

Based upon the foregoing, none of the three elements the Defendants argued in page 14, citing *Safeco*, 200 Mont. at 453, 652, P.2d at 1163, of their motion for summary judgment are satisfied.

“On December 31, 2012 after receipt of final mineral trust payment the loans were repaid in full from Robert’s Severson’s Account.” P. 3, Line 17, of Defendants’ Motion for Summary Judgment. Plaintiff agrees with this statement. However, the loans were re-paid on December 19, 2012, not December 31, 2012. See Exhibit 1 attached to Plaintiff’s Objection to Summary Judgment. December 19, 2012, was also the mineral trust check date. This check was not endorsed by the payee Robert Severson. See Exhibit A attached to Gary Nelson’s Affidavit in support of Defendant’s Motion for Summary Judgment.

Defendants (Severson) argue that Lynn Severson was joint owner right of survivorship and a beneficiary designation. Defendant’s Sum Judgment Motion p. 4, Line 16. This is also disputed by the Plaintiff, as Robert did not initial the “Beneficiary Designation” Lynn did. Robert Severson passed away in September of 2015. Even if Lynn Severson had a valid right of survivorship and beneficiary

designation he had no right to transfer assets to himself before Robert Severson's death. Robert Severson could have changed the right of survivorship and beneficiary designation any time before his death. In addition, due to undue influence and that the documents were not properly initialed the validity of said documents is in question.

"Robert Severson received the benefit of the two promissory notes taken out in his name . ." p. 4. Line 9 of the Defendants' Motion for Summary Judgment. This is also disputed by the Plaintiff. Robert Severson could have used his other accounts to pay any alleged expenses rather than take out a loan. It is Plaintiff's contention that Lynn Severson did not want to use Robert Severson's other accounts to pay expenses as Lynn Severson thought he would receive the funds from these accounts after Robert Severson's death. Therefore, Plaintiff contends that Lynn Severson did not want these accounts to pay expenses. Lynn Severson did in fact empty these accounts shortly after Robert Severson's death. In addition, it is also Plaintiff's contention that Lynn Severson used some of the proceeds from the loan (not signed by Robert Severson) for Lynn Severson's own benefit then Lynn Severson used the proceeds Robert Severson received from the mineral trust to pay back both notes. Lynn Severson did get the benefit of these proceeds. See, Exhibits 2-7, (checks) attached Plaintiff's attached to Plaintiff's Objection to Summary Judgment.

Robert did not object and paid back both loans.” p. 10, Line 3 of Defendants’ (Severson) Motion for Summary Judgment. Plaintiff disputes this as well. Lynn Severson signed the check paying back both loans. See Plaintiff’s Exhibit 1 attached to Plaintiff’s Objection to Summary Judgment.

There are genuine issues of material facts in this case. Therefore, the District court erred by granting summary judgment.

### **COLLATERAL ESTOPPEL**

Defendants (Severson), in their Motion for Summary Judgment, contend that one of the accounts in question was a joint account with a right of survivorship when it benefits them. See, Page 4, Line 16. Then argues on Page 9, Line 24, that it’s Robert Severson’s account when it doesn’t benefit them. See, Page 9, Line 24, of Defendants’ Motion for Summary Judgment.

In addition, Defendants argue that Robert Severson received the documents and knew what was going on. But then argue that Lynn Severson handled Robert Severson’s business and financial affairs because “he was in tough shape.” P. 11, Line 15 through 20, citing Lynn Severson’s deposition Page 43, Line 21-26. It’s either one or the other! Defendants should be collaterally estopped from making contradictory arguments such as these.



The bank records were also sent to Lynn Severson in Plentywood, Montana. At this time, Robert Severson resided in Saco, Montana. It is Plaintiff's contention that due to Robert Severson's health he could not take care of himself or manage his affairs the last three and a half years of his life. And that Lynn Severson exercised undue influence over his brother Robert Severson keeping him in the dark regarding operations of the Severson Family Trust and Hanks Wheat Ranch and even Robert Severson's personal finances. An example of this is seen in Mr. Nelson's Affidavit, Attachment C of their Motion for Summary Judgment, the IRS form K-1 shows it was sent to Hank's Wheat Ranch 100 Risa, Reserve, MT, rather than Saco, Montana, where Robert Severson resided. It is abundantly clear who is and who is not aware of what is happening to Robert Severson's finances. Another example of this is Lynn signing an IRS authorization form to file Robert's tax return! See Depo Exhibit "I." How is this even possible without a POA? This includes failure to provide documents to Robert Severson.

MS. CHRISTOFFERSEN: It's 20 after 12.

Q. (By Mr. Piocos) Do you want to break for lunch and he can do his thing and eat?

MS. CHRISTOFFERSEN: Well how long do you have left? Because I have other stuff to do this afternoon.

Q. (By Mr. Piosos) I'm guessing maybe another 45 minutes to an hour.

MS. CHRISTOFFERSEN: I'd rather keep going because.

**A. (By Deponent) Where are you finding all these papers? (Emphasis added.)**

MS. CHRISTOFFERSEN: Most of these are ones that we sent in response to their request. Deposition of Lynn Severson, Page 30, Line 22 to Page 31, Line 3

Defendants claim that Robert Severson was provided these documents. The above statements refute that claim and beg the question why would Lynn Severson ask, "Where are you finding all these papers?" When he allegedly, as Defendants' argue, provided these documents to Robert Severson while he was alive? In addition, why would the estate request documents they already had?

### **PAROL EVIDENCE AND THE SIGNATURE CARDS**

Plaintiff argues that to enforce a contract it has to be signed and initialed by the party who it is to be enforced against, which would be Robert Severson's interest. The account was originally Robert Severson's. Exhibit "D" of Lynn Severson's Affidavit is the account agreement in dispute. Defendants Lynn Severson and The Severson Family Mineral Trust argues that no Parol Evidence should be admitted. But then on Page 18 of their brief informs us that the bank will be supplementing the record. Then, in fact, Defendant Stockman's Bank attempts

to submit Parol Evidence in the form of affidavits from its employees in its Motion for Summary Judgment. It appears that Defendant Severson is making the Stockman's arguments so that the Bank can attempt to introduce parol evidence without risking being estopped from making the other part of the argument.

### **OTHER FACTUAL DISPUTES:**

Here are some of the other genuine issues of material fact in this case that all Defendants have failed to answer and would be addressed at jury trial:

1. Why is that The Severson Family Mineral Trust checks deposited in Robert Severson's sole account in Malta are endorsed by Robert Severson. But the mineral trust checks put into the Stockman account in Plentywood Lynn Severson claims to be joint owner and beneficiary on are not endorsed?
2. Why do the signatures not match on the loan documents?  
See deposition exhibits M, and N. Who signed Robert Severson's name regarding the September 2012 Promissory Note?

3. Why did Lynn Severson initial on Checking Account Authorization Card where Robert Severson was supposed to initial?
4. Why did Lynn Severson represent that he had a Power of Attorney (POA) for Robert Severson. But didn't.
5. Why is the mineral trust 2012 K-1 sent to 100 Risa Road in Reserve, Montana, when Robert Severson was residing in Saco, Montana, at that time?
6. Robert Severson has money in a Stockman IRA and Savings Account. But his checking account goes negative on October 3, 2014, until \$2,000 is transferred from savings on October 8, 2014.
7. Why were loans taken out (the two Promissory Notes) to pay alleged expenses when there were funds in his Savings Account and IRA? Both of which name Lynn Severson as beneficiary.
8. Why does a man (Robert) with two natural children and another adopted child who are struggling financially make his childless, bachelor, financially-well off brother beneficiary of an IRA, Savings, and Checking Account?

9. Did Lynn exert undue influence over Robert to obtain control and beneficiary status over the Stockman accounts?
- Are the beneficiary designations voidable because of undue influence?

These are just some of the genuine issues of material fact that would need to be addressed at trial. As such the district court erred by granting summary judgment

## **II. PLAINTIFF'S CLAIMS WERE NOT BARRED BY THE STATUTE OF LIMITATIONS**

Section 27-2-202(1), M.C.A. provides: "The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years." Section 27-2-202(1), M.C.A.

Section 27-2-102(1)(b), M.C.A. provides: "an action is commenced when the complaint is filed."

**27-2-213. Actions against banks.** (1) Except as provided in subsection (2), there are no time limitations on the commencement of actions to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association, or society.

(2) Any action to obtain, set aside, or question in any manner any stated or settled account between any bank, banker, trust company, or savings and loan corporation, association, or society and any depositor with the bank, banker, trust company, or savings and loan corporation, association, or society must be commenced within 5 years from the date of the statement of the account. Any action based upon or arising from the payment by any bank, banker, trust company, or savings and loan corporation, association, or society of a forged,

raised, or otherwise altered check, order, or promissory note out of the deposit, money, or property of the plaintiff must be commenced within 3 years from the day on which the plaintiff or the plaintiff's agent, assignee, or personal representative was notified of payment or received the check, order, or note marked "paid".

In this case, the Plaintiff's Complaint was filed on December 4, 2017.

Defendants Lynn Severson and the Severson Family Mineral Trust breached the written trust in 2011 and 2012. Because breach of a written contract is eight years the Plaintiff the Complaint was timely filed.

The discovery rule provides that a limitations period does not begin until the party discovers, or in the exercise of reasonable diligence would have discovered, the facts constituting the claim. Section 27-2-102(3), M.C.A. However, this rule only applies when the facts constituting the claim are concealed, self-concealing, or when the defendant has acted to prevent the injured party from discovering the injury or cause. Section 27-2-102(3), M.C.A. In *McCormick v. Brevig*, 1999 MT 86, 294 Mont. 144, 980 P.2d 603, the Montana Supreme Court held that an accountant's withholding of information from a client rendered the client's potential malpractice claim self-concealing. The Montana Supreme Court noted that the discovery statute "protects plaintiffs against the harsh results of having their claims barred before they even know they exist." *McCormick* at 100. In this case, the Defendants concealed documents. The Plaintiff is the Estate of Robert Severson. Robert Severson passed away in September 21, 2015. The probate

matter was filed shortly thereafter. Kelly Severson, the court-appointed Personal Representative, requested documents from Stockman's Bank of Montana. Defendant Stockman's Bank refused to provide the banking documents. The Personal Representative's attorney had to obtain a Subpoena to get the decedent's bank records from Stockman's Bank. Mr. Piocos didn't receive those documents until about **December 10, 2015**. Mr. Piocos also requested documents from Lynn Severson and his attorney that were not provided until after the deposition on October 19, 2017. Some documents were not even received until after the complaint was filed. See, Affidavit of Frank A. Piocos, Attorney At Law paragraphs 8- 13.

The Montana Supreme Court has held "that when material issues of fact exist about when a party discovered or reasonably should have discovered all the facts necessary to make out a claim, that issue is a question of fact for a jury. *Young v. Datsopoulos*, 249 Mont. 466, 473, 817 P.2d 225, 229 (1991). In this case, the parties have raised genuine issues of material fact regarding when the estate knew or should have known all the facts necessary to make a claim against the Defendants. When the estate discovered, with the exercise of reasonable diligence, the facts constituting their claims is a question of material fact that a jury must resolve. See, *Id.* None of the claims against the Defendants are time barred by the statute of limitations. All claims against the Defendants were filed within two years

from the discovery by the estate. Defendants, all of them, concealed documents from the estate, by failing to timely provide documents to the estate when requested. Thereby forcing the estate to obtain subpoenas and conduct a deposition—further delaying discovery of claims by the estate. In addition, pursuant to *Young v. Datsopoulos*, 249 Mont. 466, when the date of discovery is disputed it is a question of fact for a jury. *Id.*

In addressing the issues of the applicable statute of limitations it is important to look at the timeline of events in this case. The Estate of Robert Lester Severson, as an entity, did not come into existence until October of 2015, a month after Robert Severson's death. The estate received the bank records from the Stockman Bank of Plentywood in December of 2015, after Stockman Bank initially refused to provide them and only after the estate obtained a Subpoena Duces Tecum. The estate requested documents from Defendants Lynn Severson and the Severson Family Mineral Trust in 2015, 2016 and 2017. Despite repeated requests for the documents the Defendants did not provide the requested documents until after the Plaintiff's Complaint was filed in December of 2017 or after the deposition of Lynn Severson in October of 2017. As a trustee, Lynn Severson had a duty to provide the documents to Robert Severson. Additionally, Stockman Bank of Plentywood was ordered to provide these documents pursuant to the Subpoena Duces Tecum issued in December 2015. As such, Defendants, and all of them, are



partially at fault for failing to timely provide the requested documents to the Estate of Robert Severson and answer the concerns that the estate had regarding Lynn Severson's handling of his brother's financial affairs prior to and after his death. For example, at the deposition Plaintiff's counsel requested additional documents from Lynn Severson through his attorney Laura Christoffersen. See Pages 44-46 of Lynn Severson's Deposition. This was the response:

MR. PIOCOS: The um, how many do you need to supplement for the record for those documents that we requested? 30 days?

MS. CHRISTOFFERSEN: I'm going to be gone all of November, so I'll get working on it. I can't promise you I will get them until early December. If they come back sooner, my office can send them out.

MR. PIOCOS: Okay do you have um, like a goal date?

MS. CHRISTOFFERSEN: **December 10<sup>th</sup>**. I'm gone from 6<sup>th</sup> of November through the 26<sup>th</sup> of November.

MR. PIOCOS: Could you have somebody else look into this?

MS. CHRISTOFFERSEN: I'll try, we'll try. Matt and Kate are both gone at the same time.

MR. PIOCOS: Because that's October and all of November and then December.

MS. CHRISTOFFERSEN: I can't help it. I'm going to be in Europe and my partners both Kate and Matt are going to Australia and New Zealand. We will do our best, but I don't have anybody with any authority. I will get it going before I go and if they come in, certainly I will have my staff warned to send them on to you.

Page 46, Line 16. Further admission that defendant failed to timely provide discovery.

The discovery rule provides that a limitations period does not begin until the party discovers, or in the exercise of reasonable diligence would have discovered, the facts constituting the claim. Section 27-2-102(3), M.C.A. The Montana Supreme Court noted that the discovery statute "protects plaintiffs against the harsh results of having their claims barred before they even know they exist." *McCormick v. Brevig*, 1999 MT 86, 294 Mont. 144, 980 P.2d 603. In addition, pursuant to *Young v. Datsopoulos*, 249 Mont. 466, when the date of discovery is disputed it is a question of fact for a jury. *Id.* Furthermore, Montana law imposes a statutory duty upon trustees as stated in Section 72-38-813(1) M.C.A which states:

"A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. A trustee shall promptly respond to a qualified beneficiary's request for information that is reasonably necessary to enable the

qualified beneficiary to enforce the rights of the qualified beneficiary under the trust or to prevent or redress a breach of trust." Section 72-38-813(1), M.C.A.

"A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust". Section 72-38-1001(1), M.C.A. A trust "beneficiary" is defined a person "who has a present or future beneficial interest in a trust, vested or contingent;" in M.C.A. 72-38-103(3a) and a "Person" is defined in 72-38-103(12) as "an individual, ... , estate, ... or any other legal or commercial entity."

Section 72-38-1005 M.C.A sets forth Limitations of action against trustees as follows:

- (1) A beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.
- (2) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.
- (3) If subsection (1) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within 5 years after the first to occur of: (a) the removal, resignation, or death of the trustee; (b) the termination of the beneficiary's interest in the trust; or (c) the termination of the trust.

The allegations contained in the affidavits attached to Plaintiff's Objection to Defendants' Motion to Summary Judgment that the Trust and its' Trustee Lynn Severson failed to comply with requests for necessary documents including the Trust document upon reasonable request of the beneficiary Estate of Robert Severson were unchallenged by defendants.

Failure by the Trustee to comply with his duties to provide information to beneficiaries as mandated in Section 72-38-813(1) M.C.A is a breach of trust. Plaintiff's allege that said breach occurred after Robert Severson's death in September 2015. It appears that an action for breach of trust would be timely, within three (3) years from the request for information.

The allegations in Plaintiff's Complaint were therefore based upon existing statutory and case law.

Additionally, the arguments made by Defendants regarding the statute of limitations are also against public policy. If the courts were to adopt Defendants' arguments regarding the statute limitations in this case as law—it would encourage malfeasors to stonewall and obstruct until one year after the decedent's death. Thus, depriving the estate and heirs any legal recourse against the malfeasor.

The statute of limitations did not expire. The Complaint was timely filed. The district court erred in a rushed ruling as such.

#### **IV. THE DISTRICT COURT ERRED IN GRANTING SANCTIONS.**

“Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.” *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9<sup>th</sup> Cir. 1988).

Montana Rule of Civil Procedure requires that when an attorney signs a pleading the attorney has read it and that to the best of the attorney's knowledge formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for a change in existing law, and is not interposed for any improper purpose. Therefore, there are two grounds for imposing sanctions: the "frivolous clause," meant to cover pleadings not grounded in fact or law; and the "improper purpose clause," meant to cover pleadings filed for an improper purpose. *D'Agostino v. Swanson*, 240 Mont. 435, 445, 784 P.2d 919, 925 (1990). The "improper purpose clause" is addressed in Rule 11(b)(1), M.R.Civ. Pro. Rule 11(b)(1) provides: "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." See, Rule 11(b)(1), M. R. Civ. Pro. There has been no allegation from the Defendants that Plaintiff filed their Complaint to harass, delay or increase the cost of litigation to the Defendants. Therefore, the "improper purpose clause" is not at issue in this case. This brings the Court to the analysis under the frivolous clause under Rule 11.

The standard for determining whether a pleading is well grounded in fact for Rule 11 purposes is, according to *Hillsborough County v. A.E. Road Oiling Services, Inc.*, 160 F.R.D. 655, 659 (M.D. Fla 1995), "objectively reasonable under the circumstances." A filing meets this requirement if there is some evidentiary

basis for the position taken at the time the pleading is signed. Even if the factual assertions in a pleading are later disproven or are insufficient to survive a summary judgment motion, the pleading is not sanctionable.

Plaintiff alleged and Defendants have not disputed the following:

- 1) That it was not Robert Severson's signature on one of the loan documents. Plaintiff's argue that Lynn Severson signed his brother's name on one of the loan documents. Defendants neither admit or deny who signed that loan document. See, Depo Exhibit N and Defendant's Motion for Summary Judgment.
- 2) That Lynn Severson used the funds from the loan and the proceeds from the Severson Family Mineral Trust for his own personal use, ie purchase of firearms, etc. See, Affidavit of Kelly Severson & Affidavit of Frank A. Piocos, Attorney At Law attached to Plaintiff's Brief in Support of Plaintiff's Motion Objecting to Defendant's Motion for Summary Judgment and Motion Objecting to Rule 11 Sanctions.
- 3) That Lynn Severson represented the Severson Family Trust and the interests of Robert Severson at the same time posing a conflict of interest. See, copy of the Severson Family Mineral Trust & Affidavit of Frank A. Piocos, Attorney At Law & Affidavit of Kelly Severson. That Lynn Severson in his capacity as Trustee has an ongoing duty to provide

information to beneficiaries of the trust. See, Section 72-38-813(1)

M.C.A

- 4) That Robert Severson did not endorse two of the checks from the Mineral Trust that were deposited into the Stockman Bank account.
- 5) Whether Robert Severson wanted the funds from the Severson Family Mineral Trust deposited at the Stockman Bank of Plentywood or the Malta State Bank. This is still a factual dispute.
- 6) That Plaintiff's previously requested key discovery from the Defendants was not received until after the Plaintiff's Complaint was filed. This included previously requested documents regarding the creation and holdings of The Severson Family Mineral Trust.
- 7) Laura Christoffersen attorney for Defendants Lynn Severson and Severson Family Mineral Trust failed to appear at the July 13, 2018 hearing regarding the award of monetary sanctions. The court ruled that Defendants would take nothing as they failed to timely appear.  
  
The court later upon Christophersen's motion set aside its earlier ruling and granted defendants another hearing based upon Christophersen's good standing with the court ie " rarely misses hearing, the Court is willing to accept Severson's counsel's misinterpretation of communication from the court" Paragraph 3 page 3 of August 10, 2018

order. This reasoning would not afford other attorney's not regularly practicing before the court the same privilege.

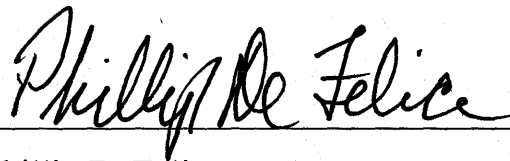
The issues upon which the parties disagree include the following: that the account where two of the checks were deposited was not a valid joint account as Robert Severson did not properly initial the signature card regarding that account.

In this case, the Plaintiff obtained bank records, interviewed witnesses, including the decedent's heirs, accountant, and personal representative, deposed a key witness, Lynn Severson and requested he produce certain documents. As such, Plaintiff conducted an adequate investigation before timely filing their Complaint. The court in its' September 19, 2018 order erred in monetary sanctions and completely ignored the issue of whether Trustee Lynn Severson complied with his statutory duties to provide information in a timely manner.

## **VII. CONCLUSION**

For the reasons stated above, the district court's granting of summary judgment must be reversed and remanded for further proceedings. The district court's award of sanctions as to Plaintiff, and its attorneys of record, must be reversed and vacated. The district court's award of attorney's fees as sanctions against Plaintiff and its attorneys of record must also be reversed and vacated. Respectfully resubmitted this 22nd day of February, 2019.



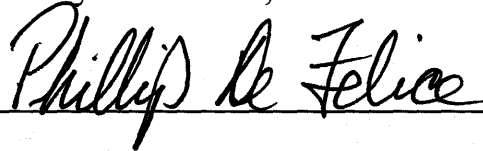


Phillip DeFelice

Attorney for Appellant

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is proportionately spaced, together with Times New Roman, 14 point font with a word count calculated by Word of 7,334 words.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 22 day of February, 2019, a copy of the foregoing was served prepaid United States Mail to the following:

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