IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0555

ESTATE OF ROBERT SEVERSON,

Appellant,

vs

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

Appellees.

APPELLANT'S REPLY BRIEF

On Appeal from the

Montana Fifteenth Judicial District Court, Sheridan County

The Honorable Katherine Bidegaray Presiding

COUNSEL OF RECORD:

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I. SUMMARY OF ARGUMENT

A. The District Court erred in granting summary judgment as there were genuine issues of material fact related to the statute of limitations, who signed for the promissory note, whether the note was ratified, and the nature and extent of Robert's health problems.

B. The District Court erred in awarding sanctions as the Plaintiff's Complaint was not frivolous and was filed in good faith.

II. ARGUMENT

A. THE PLAINTIFF'S COMPLAINT WAS TIMELY FILED AND NOT BARRED BY THE STATUTE OF LIMITATIONS

The Appellant's argument regarding the statute of limitations is more fully set forth in their opening brief. The gist of Appellant's argument is that the statute of limitations should start running from the date of discovery not one year after death. If this Court were to adopt the one year after death as the appropriate statute of limitations time it would encourage individuals and legal entities to stonewall, obstruct and delay the discovery of the malfeasance which is exactly what happened in this case. In addition, it may take over a year and even years for a personal representative to be appointed. Should this Court adopt Appellees' arguments regarding statute of limitations, it would deprive future estates of any legal recourse.

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. Applying the Appellees' arguments regarding statute of limitations would also be against public policy. To have statutes of limitation expire while criminal liability still persists is an unjust policy.

18 U.S. Code § 1344.Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—
(1) to defraud a financial institution; or
(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S. Code § 3293.Financial institution offenses

No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate—

(1) section 215, 656, 657, 1005, 1006, 1007, 1014, 1033, or 1344; ...

(3) section 1963, to the extent that the racketeering activity involves a violation of section 1344;

unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

To cut civil liability off before criminal liability expires is against public policy and the administration of justice. Additionally, if the courts were to adopt Appellees' 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.

B. 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 (9th Cir. 1988).

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.

> "Where are you finding all these papers?" (Emphasis added).
> (Deposition of Lynn Severson, Page 30, Line 22 to Page 31, Line 3).

It begs the question—if Lynn Severson was providing these financial documents to Robert why would he say this at his deposition? In addition, if the trust, Lynn Severson, and Lynn Severson's counsel were so forthcoming with documents, requested or otherwise, why did Robert Severson's Estate have to

subpoena records, write letters and emails demanding discovery, depose Lynn Severson, etc.? The defendants, and all of them, could have provided this information willingly. The defendants had from October 2015, when the estate started requesting these documents until the complaint was filed in December of 2017 to provide these documents. They did not. They decided to stonewall instead and decided not to provide these documents until they were issued a subpoena, subpoena duces tecum, notice of deposition, and discovery demand. Most of the documents Appellant received wasn't until after the civil complaint was filed. Appellees try to shift the statutory burden in 72-38-813(1), M.C.A. to timely provide documents to trust beneficiaries by arguing that the ESTATE had a duty to investigate. The statue is clear and provides no such requirement. Again that the estate had to use legal process to obtain them is proof that that the estate was damaged by the Trust and Trustee's breech, that that the statute of limitations has not run on that duty and therefore the estate is entitled to damages. If the estate is entitled to even one cent of damages there should be no sanctions.

There are factual disputes as to who signed for the promissory note and whether the note was ratified and the nature and extent of Robert's health problems. Again, the Appellees, and all of them, neither admit nor deny whether Lynn Severson forged his brother's name on the loan in the amount of $15,075.

Appellee further argues that regardless of whether Lynn Severson forged this brother's signature on the loan Robert Severson ratified the loan.

> On Page 19 of Appellee's Lynn Severson's Answer Brief cite the following:
>
> "Three criteria are required to prove ratification:
>
> For the principal to ratify the agent's action, three criteria must be met: (1) the principal accepts the benefits of the act, (2) with full knowledge of the facts and (3) either the circumstances or an affirmative election indicate the principal's intention to adopt the unauthorized arrangement. Safeco, 200 Mont. At 453, 652 P.2d at 1163." Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Finance & Investments, L.L.C., 203 P.3d 744, 756, 349 Mont. 207, 223, 2009 MT 36, 43 (Mont., 2009)"
>
> Appellant argues that none of the criteria are met. In this case, Lynn Severson took out a loan using his brother's name, deposited the funds in Robert Severson's account, Lynn Severson then spent the funds, and then used monies Robert Severson later received to pay back the loan. Robert Severson, therefore, did not accept or receive any benefit from the loan. Lynn Severson benefited from taking out the loan (using his brother's name) and spending the funds. These funds are owed to Robert Severson's estate. (It is unclear why Lynn took out a loan in his brother's name rather than in his own name. It is also unclear why Lynn did not have Robert sign for the loan. These are factual issues for the trier of fact to address)

The second and third criteria are not met as Robert Severson was not in full knowledge of the facts and did not authorize the arrangement. There is a factual

dispute of whether and when documents were provided to Robert Severson. In addition, there is a factual dispute as to the nature and extent of Robert Severson's health problems. The Appellee argues that "knowledge is imputed to him because the monies went into his account and he never objected after receipt of his statement." P. 19 of Answer Brief. Appellant argues that Robert Severson was unaware of the note in the amount of $15,075, the parties differ on whether Robert was aware of the $15,075 loan. As such, this is a factual dispute for the trier of fact to decide. In addition, the Appellee's seem to down play Robert Severson's health. Appellee's state that Lynn Severson managed Robert's finances because of Robert's ailing health. See, Appellant's Brief page ... But later argue that should have known. Either Robert Severson was competent enough to manage his financial affairs or not. Appellees can't have it both ways. Furthermore, had a hearing on summary judgment been held the Plaintiff could have provided evidence at the summary judgment hearing regarding the nature and extent of Robert Severson's health problems. This could have been accomplished by calling his doctors and family members to testify. There are factual disputes as to what documents Robert Severson received from Lynn Severson. There are factual disputes as to the nature and extent of Robert Severson's health. Other than making his brother beneficiary of his Stockman Bank accounts, Robert Severson did no estate planning. Is it not right to question this wholly unnatural

distribution? Appellant's have been seeking the truth and justice in this matter. See Estates Brief Paragraph 2 page 5 through Paragraph 1 page 6 citing Appellant's Supplemental Appx Tab 13, Lynn S. Affidavit ex "G" and Lynn S. attachment ex"D" and F. Piocos Aff para 9 and 19. Therefore, should not be penalized for such. Therefore, the district court erred in granting summary judgment and sanctions.

III. CONCLUSION

For the reasons stated above, the district court's award of sanctions must be reversed and vacated. The district court's granting of summary judgment must be reversed and remanded for a trial on the merits.

Respectfully submitted this 5th day of April, 2019.

_____/S/_____
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 2,084 words.

_____/S/_____

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2019, a copy of the foregoing was served prepaid United States Mail to the following:

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