

2016

**Sharrol Anderton, Mary Blanchard, Terry Christensen and Duane Boren, Jr., Appellants/Plaintiffs, vs. David L. Boren and sherr.on L. Boren, as Individuals and as Trustees of the Duane Boren Family Living Trust, as Amended, Appellees/Defendants.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<p>SHARROL ANDERTON, MARY BLANCHARD, TERRY CHRISTENSEN AND DUANE BOREN, JR.,</p> <p>Appellants/Plaintiffs,</p> <p>vs.</p> <p>DAVID L. BOREN and SHERRON L. BOREN, as individuals and as Trustees of the DUANE BOREN FAMILY LIVING TRUST, as amended,</p> <p>Appellees/Defendants.</p>	<p><b>APPELLANTS' REPLY BRIEF TO DEFENDANT DAVID L. BOREN</b></p> <p>Appellate Case No. 20160145</p> <p>Appeal from: District Court Case No. 143000048</p> <p>District Court Judge Samuel P. Chiara</p>
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**APPELLANT'S REPLY BRIEF TO DEFENDANT SHERRON L. BOREN**

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## **I. PLAINTIFFS HAVE STANDING**

### **1. Defendant Sherron L. Boren Was Granted A Testamentary Special Power of Appointment**

The power of appointment granted to Defendant Sherron L. Boren is one that is to be exercised upon her death. Until it is determined that Defendant Sherron L. Boren's properly exercised her power of appointment, the terms of the Trust documents control the distribution of the Trust assets.

Paragraph 6.22 of the Master Trust states:

“[W]hen Settlor's Spouse is no longer living and no child of Settlor is living who is under age twenty-one(21), the entire principal of the trust shall be distributed to or for the benefit of any one or more of Settlor's issue, or Spouses of Settlor's deceased issue, as Settlor's Spouse shall appoint by exercise of a testamentary exclusive special power of appointment, which power shall be exercised by a will made after Settlor's death which specifically refers to the power of appointment herein given to Settlor's Spouse. Any appointment by Settlor's Spouse may be of such estates and interest upon such terms, trusts, conditions, powers and limitations as Settlor's Spouse shall determine. Any appointment may exclude any one or more of the beneficiaries of the class. If, or to the extent that, Settlor's Spouse does not exercise said testamentary special power of appointment at the death of the Settlor's Spouse, said principal shall pass according to the terms governing ultimate distribution set forth in Paragraph 7 of the Joinder Agreement. (000150).

The above language requires multiple steps before Defendant Sherron L. Boren's testamentary special power of appointment can be deemed to be valid. Until those events occur, the terms of the Trust control the distribution of the Trust assets.

Defendant Sherron L. Boren relies on Montrone v. Valley Bank and Trust Co., 875 P.2d 557 (Utah Ct. App. 1994). The facts in Montrone are clearly different from this case. In Montrone, Anna Montrone set up a revocable trust with herself as the sole beneficiary during her lifetime. Ms. Montrone retained the absolute power to modify, alter or revoke the trust at anytime by notifying the Trustee in writing. Ms. Montrone subsequently exercised that power by directing the Trustee not to distribute certain information to the residuary beneficiaries of the Trust. The Court of Appeals found that because Ms. Montrone, as the Settlor, retained the general power of appointment, she retained the right to negate the Trustee's duty to account to the residuary beneficiaries of the Trust. Defendant Sherron L. Boren lacks that general power.

The facts in this case are more closely analogous to those in Burgess v. Poulsen, 836 P.2d 1386, 1389-90 (Utah App. 1992). In that case, Dr. J. Paul Burgess, a widower with three sons, married Mala Poulsen. Mala

Poulsen had no children. Dr. Burgess executed a will which created a marital trust if Mrs. Burgess survived him. In the trust provisions of his will, Dr. Burgess granted to Mrs. Burgess a general power of appointment over the Marital Trust which would enable her to distribute the Marital Trust estate through her will stating:

“Upon the death of Mala P. Burgess, the remaining principal, including any uncollected and/or undistributed income shall be paid over, delivered, assigned, transferred or conveyed to and among such appointee or appointees, including her estate, and in any proportions and in any manner as she shall direct by Will in expressly intending to exercise this power by making specific reference therein to said power....”

After Dr. Burgess died, Ms. Burgess executed a will and a codicil. Neither instrument specifically mentioned the power of appointment under the Marital Trust. The Court of Appeals found that although Ms. Burgess may have intended to exercise her power of appointment, her failure to strictly comply with the instructions of Dr. Burgess to specifically reference the power of appointment meant that her attempts to exercise that power failed.

The *Burgess* case is important to the standing issue of the Plaintiffs for two reasons. First, there is no evidence in the record that Defendant

Sherron L. Boren executed the necessary testamentary documents to validly exercise her special power of appointment. Absent that evidence, the terms of the Trust are presumed to control and the Plaintiff remain beneficiaries of the Trust. Second, the power to appoint that was conveyed to Defendant Sherron L. Boren is a testamentary power. That power may only be exercised on the death of Defendant Sherron L. Boren. Until her death, her exercise of the power is speculative and transitory. Defendant Sherron L. Boren may at anytime revoke or change her power of appointment. Her attempts to exercise that power may ultimately be determined to be invalid by a court. Until Defendant Sherron L. Boren's death, the only controlling exercise of power are the terms of the Trust documents. Again, under the terms of the Trust the Plaintiffs remain beneficiaries and they retain their rights and thus have standing to protect those rights.

## **2. The Plaintiffs Maintain the Necessary Interest for Standing .**

Plaintiffs' complaint raised questions regarding the circumstances surrounding the execution of the First and Second Amendments to the Trust. Plaintiffs requested declaratory judgment concerning their respective rights and obligations under the Trust. Plaintiffs' Complaint paragraphs 8, 9 and



56. (000001-000011). The provision of the Master Trust which purportedly reserves the right to amend or revoke the Trust is somewhat confusing. The applicable paragraph repeatedly references the Trust being an Unfunded Life Insurance Trust. Paragraph 4 of the Master Trust (000145). When the Master Trust was executed, the Settlor also executed a Joinder Agreement. (000157). The Joinder Agreement was signed by Duane Boren, Sharrol Ann Anderton, Duane Boren, Jr., Mary Ellen Blanchard and Terry Lee Monks. There is no language in the Joinder Agreement concerning whether the Settlor reserved the exclusive right to make amendments or modifications to the Joinder Agreement.

It is well settled that the parties to a contract may modify all or any portion of that contract. Western Sur. Co. v. Murphy, 754 P.2d 1237, 1239 (Utah App.1988) (quoting Rapp v. Mountain States Tel. & Tel. Co., 606 P.2d 1189, 1191 (Utah 1980)). In order to consider the enforcement of a modified contract, the Court must find that there has been “a meeting of the minds of the parties, which must be spelled out, either expressly or impliedly, with sufficient definiteness.” Pingree v. Continental Group of Utah, Inc., 558 P.2d 1317, 1321 (Utah 1976). Although there is evidence that the Settlor intended to reserve the right to unilaterally modify the Master

Trust Agreement through the confusing language of paragraph 4 of the Master Trust Agreement, there is no evidence within the Joinder Agreement that the Settlor intended to reserve that same right regarding amendments or modifications of the Joinder Agreement. Absent an unambiguous provision allowing modification by the Settlor, the Joinder Agreement could only be modified by the parties to that agreement. Two subsequent amendments were made to the Joinder Agreement. (000161-000167). Both amendments were purportedly signed by Duane Boren and Sherron Lea Boren. Neither amendments were signed by the other parties to the Joinder Agreement, Duane Boren, Jr., Mary Ellen Blanchard and Terry Lee Monks. Whether the amendments are valid is a matter for the Trial Court to decide first, not the appellate courts. Because their rights under the Trust will be significantly impacted by the Trial Court's determination of rights under the Trust documents, the Plaintiffs' have standing to protect those rights.

In addition, to protecting their rights under the original Trust documents, the Plaintiffs do retain interests even under the subsequent amendments. The Defendant acknowledges that the Plaintiffs have an interest in the waste ground, a portion of the mineral rights and the rest, residue and remainder of the estate. Defendant's Brief page 26-27. A

significant portion of the Plaintiffs' complaints have centered on Defendant David L. Boren, using Trust assets to subsidize his personal obligations in running the farm. Defendant David L. Boren has repeatedly operated the farm at a loss. The Trust has significant income from oil and gas leases. Defendant David L. Boren used the royalties from the oil and gas leases to subsidize his operation of the farm. See Plaintiffs' Opening Brief pages 33-34. The money from the royalties should either be distributed to the income beneficiary or place in a bank account to be available to the residuary beneficiaries of the Trust. The money should not be used by Defendant David L. Boren to subsidize his personal expenses as they relate to the operation of the farm. The Plaintiffs have a significant interest in obtaining an accounting of these funds along with the operation of the farm because they have a right to the residual estate.

Because the Plaintiffs retain an interest in their rights under the Trust and because the Plaintiffs retain their specific right to the residual estate, the Plaintiffs have standing to pursue this matter. The Court should deny Defendant Sherron L. Boren's challenge to the Plaintiffs' standing.

## **II. SUMMARY JUDGMENT**

Plaintiff Duane Boren, Jr. submitted not only a Declaration which

properly stated that facts necessary to defeat summary judgment, he included 12 Exhibits that also supported his claims. The Defendants have never challenged the authenticity or the accuracy of any of those exhibits. These exhibits included the following:

Exhibit A- The Master Trust Agreement (000221-233)

Exhibit B- The Joinder Agreement (000234-238)

Exhibit C-The First Amendment to the Trust (000239-241)

Exhibit D-The Second Amendment to the Trust (000242-245)

Exhibit E- Letter to Clark Allred requesting an accounting (000246-247)

Exhibit F-The Farm Agreement (000248-250)

Exhibit G- Ledger provided by the Trust from 2008 to 2014 (000253-295)

Exhibit H-Title Commitments for the real estate associated with the Trust (000296-419)

Exhibit I – Checks signed by Defendant David L. Boren (000420-422)

Exhibit J-BLM Bill Summaries (000423-426)

Exhibit K- Ledger Entries showing the purchases and expenditures of the Trust (000427-428)

Exhibit L-Trust Tax Returns for 2008 through 2014 which shows the Farm Losses to the Trust along with the Oil and Gas Royalties paid to the Trust (000433-566)

Exhibit M-Defendant David L. Boren's discovery responses (000567-589).

The Plaintiffs provided over 350 pages of documents. The Defendant argues that a review of these documents require specialized knowledge and that Plaintiff Duane Boren, Jr. lacked the necessary expertise. The Court should reject the Defendants argument that Duane Boren, Jr. cannot testify matters contained in the ledger and tax returns. "[N]o expert testimony is required if the matter at issue in the case is one which ... is within the knowledge of the average trier of fact, or if the other evidence is such as to present the issues in terms which the jury can be expected to understand." State, in interest of K.C., 2013 UT App 201, 309 P.3d 255, 259 (Utah Ct. App. 2013) quoting State v. Payne, 964 P.2d 327, 332 (Utah Ct.App.1998) A layperson can review the ledger and tax returns provided by Defendant David Boren. A person can then compare that information against the additional information provided by Defendant David Boren. Line 5 of 2008 Tax Return shows Royalties in the amount of \$38,210. Line 6 shows Farm

losses in the amount of \$51,107. (000434). The same return has two schedules showing both the income (Schedule E 000437) and the losses (Schedule F 000438). To ascertain this information a person has to have the ability to read, nothing more.

Plaintiffs requested “all documents which negate Plaintiffs’ claims in their Complaint, including breach of Trust and commingling of Trust property and personal property”. Plaintiffs also requested “all documents relating to an accounting of the Trust property” in their discovery requests. On April 9<sup>th</sup> 2015, Defendant David Boren replied to the Plaintiffs’ requests with: “All such documents were provided in the Plaintiffs and Defendant’s Initial Disclosures and in the Defendant’s First Supplemental Initial Disclosures.” (000587). Defendant David Boren, provided all relevant documents relating to the accounting and commingling of Trust property. A layperson is capable of reviewing the ledger which shows that Trust funds were used to purchase a dirt bike and a 4 wheeler. A layperson is also capable of reviewing the documents provided in discovery and determining that there are no documents which show a dirt bike or a 4 wheeler titled in the name of the Trust. This information requires no expertise nor is it opinion testimony. If Duane Boren, Jr. was incorrect in his statement, it

would have easily been refuted by Defendant David Boren producing the titles.

After reviewing the documents, Duane Boren, Jr.'s has the ability to state that the Defendant failed to provide "receipts or an accounting for the full cattle herd, mineral income distributions, sale of elk and deer permits, and details relating to property management fees." What required a larger degree of experience was in organizing the documents provided by the Defendants because of the haphazard manner in which they were provided. Likewise, the ledger shows multiple expenditures on horses. (000254, 000256-57, 000259, 000262-63, 000266), yet there is no evidence in the documents provided by Defendant David Boren that the Trust owns any horses. Duane Boren, Jr. can testify as to these matters after reviewing the documents. Further he is also competent to testify that his brother, Defendant David Boren, owns horses.

Duane Boren, Jr. is competent to testify that Defendant David Boren signed a Farm Agreement assigning to himself the benefits of the Farm because Duane Boren, Jr. also provided the Court with that Farm Agreement. (000218 paragraph 21 and 000248-50). Duane Boren, Jr. is also competent to testify that the Trust owns only 50% of the Farm, Sherron

Boren owns 25% and Defendant David Boren owns 25%. Duane Boren, Jr. can testify as to this matter because Duane Boren, Jr. provided the Court with the Title Reports showing that information. (000296-419). Yet despite this ownership breakdown, the ledger and the Farm Agreement provided by Defendant David Boren shows the Trust incurring 100% of the expenses for the Farm. A layperson is competent, if they are provided sufficient documents, to testify as to this arrangement. Although they were requested, there are no records showing the Defendant David Boren shared the expenses of the Farm. The statements contained in the Declaration of Duane Boren, Jr. were supported by competent evidence and were not outside the realm of an ordinary layperson.

### **1. A Proper Accounting is Still Required**

Defendant Sherron L. Boren asserts that no further accounting is required because the Plaintiffs failed to provide evidence that an accounting did not occur. There are two problems with this assertion. First, it requires that the Plaintiffs prove the negative. That an accounting did not occur. It is actually much easier to prove that an accounting did occur by providing the evidence of that accounting. Second, the argument is just plain wrong. As stated above, Plaintiff Duane Boren, Jr. state in his declaration that



Defendant David L. Boren failed to provide “receipts or an accounting for the full cattle herd, mineral income distributions, sale of elk and deer permits, and details relating to property management fees.” (000217)

Defendant Sherron L. Boren argues that the Plaintiffs are not entitled to an accounting. Defendant relies on paragraph 9 of the Trust Agreement and § 75-7-811(3) to support this assertion. The language of paragraph 9 mandates that the “Trustees shall keep all accounts and records of the trusts created herein and annually, or oftener, shall render to the current income beneficiaries statements showing all receipts, disbursements, and distributions of both principal and income of the trust estate.” Utah statute requires that

a trustee shall send to the qualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the amount of the trustee's compensation or a fee schedule or other writing showing how the trustee's compensation was determined, a listing of the trust assets and, if feasible, their respective market values. Utah Code Ann. § 75-7-811(3).

The language of the Trust and the language of the statute are not mutually exclusive. Under the Trust, Trustee is required to provide an accounting to the income beneficiary annually or oftener. Nothing in that paragraph's

language overrides, either directly or implicitly, the requirement that the Trustee provide an accounting to qualified beneficiaries when requested as required by the statute. The paragraph contains no restrictive language that restricts this information to the income beneficiary. Instead, the paragraph make it mandatory, regardless of any request of the income beneficiary.

Defendant also argues that the Trust was only required to provide the accounting as of the Plaintiffs' first request in 2012. This position misrepresents the obligations of a Trustee. The Trustee is obligated to maintain adequate records for the Trust regardless of whether any of the qualified beneficiaries request those records. See Utah Code Ann. § 75-7-808. Defendant David L. Boren is not liable for failing to provide the qualified beneficiaries with the requested information prior to 2012, however, once the information is requested, he was obligated to provide it. Because the Trustee is obligated to keep these records the Trustee cannot seek to limit his responsibilities for maintaining the records only to the time after the records were requested.

## **2. Defendant David Boren Breached his Duty**

Defendant Sherron L. Boren argues that the evidence is insufficient to support the Plaintiffs' claims against Defendant David L. Boren. Brief of

Appellee pages 38-42. The Court should disregard Defendant Sherron L. Boren's arguments regarding the claims against Defendant David L. Boren. Plaintiffs have not sought any damage claims against Defendant Sherron L. Boren. She lacks standing to defend Defendant David L. Boren on these claims that he acted improperly as Trustee. See generally Haymond v. Bonneville Billing & Collections, Inc., 2004 UT 27, 89 P.3d 171. Even if Defendant Sherron L. Boren is found to have standing, there was sufficient evidence to support the Plaintiffs' claims against Defendant David L. Boren.

A trustee is not permitted to engage in self-dealing, or to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries. Wheeler By & Through Wheeler v. Mann, 763 P.2d 758, 759-60 (Utah 1988). Defendant David Boren has breached his duty in two manners at least. First, he has engaged in self-dealing to the extreme. In essence, he has run the Farm for his own benefit. There is no evidence that the Trust has received any benefit from Defendant David Boren's operation of the Farm. The tax returns actually show the opposite. Defendant David Boren actually drained assets of the Trust through his operation of the Farm. Between 2008 and 2012, the tax returns of the Trust showed losses of \$51,107(2008), \$21,301(2009), \$26,495(2010), \$35,010(2011),

\$46,449(2012). In each of those years, the Trust showed income from oil royalties in the amounts of \$38,210(2008), \$17,185(2009), \$25,507(2010), \$32,010(2011), \$39,626(2012). (000670-70). Each year, Defendant David Boren managed to lose money on the Farm in an amount slightly greater than then the reported oil income. It was only after the Plaintiffs began to inquire about Defendant David Boren's obligation as a Trustee that the business of the Farm miraculously turned around.

In addition to his operation of the Farm, Defendant David Boren failed to keep adequate records on the commingled assets of the Trust. Although it is questionable as to whether Defendant David Boren could be permitted to commingle his personal assets with those of the Trust, his failure to maintain adequate records of these commingled assets is itself a breach of his duty as Trustee under Utah Code Ann. § 75-7-808.

There is adequate evidence that Defendant David Boren breached his duty as the Trustee for the Family Trust. The Court should reverse the Trial Court on this issue and remand this matter for trial.

### **III. THE MOTION TO STRIKE**

#### **1. Duane Boren, Jr.'s Deposition and Declaration are consistent**

Despite the Defendants' assertions to the contrary, Duane Boren, Jr.'s Deposition and Declaration are actually consistent with each other. In his deposition, Duane Boren, Jr. stated:

A. I know that there is a lot of farm equipment that is missing. I wonder if it is valid for him to set his self up with funds from the Trust. I wonder if mom has control of her assets or who has control of those. None of that information has been provided in the last two years.(000676)

Q. But your objection is that you haven't been provide information that you think you need?

A. No, I haven't.

Q. No, you don't.

A. No, I haven't been provided with the information that I was wanting. (000677)

Q. Also you claim that the Trustee failed to provide receipts. Do you know if Mr. Same ever asked for receipts?

A. Yes, and I couldn't tell you for sure, but I think he specifically did because he was aggravated that and state that maybe he needed to get to the first grade level with you to get you to under what he wanted. (000678)

In his Declaration, Duane Boren, Jr. stated:

19. It has taken approximately two years, for the Trustee to provide tax returns for the years 2008-14 and accounting. Plaintiff still lack receipts or an accounting for the full cattle herd, mineral income distributions, sale of elk and deer permits, and details relating to property management fees.

In both his deposition and his Declaration, Duane Boren, Jr. complains that Defendant David Boren failed to provide a complete accounting of Trust

property and receipts. He acknowledge receipt of some information, but complained that Defendant David Boren withheld necessary information to make a full accounting of the Trust.

Duane Boren, Jr. also complained about missing farm equipment and self dealing by Defendant David Boren. Also in his deposition, Duane Boren, Jr. stated that Defendant David Boren distributed to himself water rights, the brand, cows, hay and equipment. (000677). When asked if there was anything else, he qualified his answer with “Probably but I can’t think of them. (000677). These deposition responses were consistent with Duane Boren, Jr.’s Declaration. In paragraph 21 of his Declaration, Duane Boren, Jr., provides evidence on the self dealing conducted by Defendant David Boren. (000218). Duane Boren, Jr. supported that paragraph by providing both the Farm Agreement executed by Defendant David Boren both in his capacity as Trustee and as the Farmer entitled to the sole distribution from the Farm under the Farm Agreement. (000248-000250). Likewise, Duane Boren, Jr.’s Declaration points to the Farm owning substantial equipment, yet Defendant David Boren leases the Farm equipment owned by Defendant David Boren. (Paragraph 24 and 25 at 000218) and (000259). Likewise, Duane Boren, Jr. stated that the Family Trust owns 50% of the property, yet

the Family Trust incurred 100% of the costs associated with running the Farm. (Paragraph 22 and 26 at 000218). Each of these statements were also supported by documents provided by Defendant David Boren in the discovery process, which were attached to the Declaration of Duane Boren, Jr. Likewise, Duane Boren, Jr. provided ledger provided by Defendant David Boren which shows purchases of a dirt bike (000254 entry on 3/5/2008) and 4 wheeler (000264 entry on 11/8/2010). Again, these documents support both Duane Boren, Jr.'s Declaration that Defendant David Boren was using Trust money to purchase items for his personal use. (000218 paragraph 27) and Duane Boren, Jr.'s deposition testimony that Defendant David Boren was using Trust assets for his own benefit. On the core issues the Defendant David Boren failed to provide a complete and accurate accounting and that Defendant David Boren was engaged in self dealing with Trust funds, Duane Boren, Jr's Declaration and Deposition are consistent. Because of that consistency, the Court abused its discretion when it struck the Declaration of Duane Boren, Jr.

**2. It is clear that Duane Boren Jr. did not take any clear positions.**

The Defendant Sherron L. Boren argues that Duane Boren, Jr.'s Declaration needed to offer an explanation as to why there is a discrepancy between his deposition testimony and his affidavit. Superficially, the Defendant's position may have some merit, except that in this case any discrepancy was already explained in the deposition. "The rule that a party may not rely on a subsequent affidavit that contradicts his deposition to create an issue of fact on a motion for summary judgment does not apply when there is some substantial likelihood that the deposition testimony was in error for reasons that appear in the deposition or the party-deponent is able to state in his affidavit an adequate explanation for the contradictory answer in his deposition." Webster v. Sill, 675 P.2d 1170, 1173 (Utah 1983)

If a deponent is confused in their deposition, they may point to the portion of the deposition which shows the confusion. Gaw v. State ex rel. Dep't of Transp., 798 P.2d 1130, 1138 (Utah Ct.App.1990). Under *Webster* a party may either point to a portion of their deposition which explains a discrepancy, or they may offer that explanation in their affidavit. In this case, Duane Boren, Jr. cited to the portions of his deposition showing that he had not reviewed the relevant documents at that point. That is a sufficient explanation for any discrepancy. In his Declaration, Duane Boren, Jr. did



state specifically that he had reviewed the information provided by the attorney of the Trustee and the tax returns of the Trust. (000218). Again, this information is sufficient to explain any purported discrepancies.

The cases relied on by Defendant Sherron L. Boren are distinguishable from this case. In each case, the Deponent in question did take a clear position in their deposition. That did not occur in this case. The Plaintiffs' Opening Brief cited to their Memorandum in Opposition to Defendant David L. Boren's Motion to Strike which contained the following exchange from Duane Boren, Jr.'s deposition:

A. I know that there is a lot of farm equipment that is missing. I wonder if it is valid for him to set his self up with funds from the Trust. I wonder if mom has control of her assets or who has control of those. None of that information has been provided in the last two years.

Q. You just told me that you haven't looked at anything that Mr. Sam or your present counsel has given you?

A. When I went and visited with him a few time and we went over a few subjects and one of them was the accounting which I don't consider to be a valid accounting and he did not either.

Q. Mr. Sam didn't?

A. No.

Q. But you have indicated that you have not read the inventory?

A. No.

Q. Did you read the tax returns?

A. Some of them yes.

Q. Did you read the accounting or just go through it with Mr. Sam?

A. No, I didn't go through them with Mr. Sam. When I got copies from him before I sent them to Mr. Monahan I looked through them or skimmed through them.

Q. What you have done is basically just skimmed over documents that you had requested?

A. Yes.

Q. But your objection is that you haven't been provide information that you think you need?

A. No, I haven't.

Q. No, you don't.

A. No, I haven't been provided with the information that I was wanting.

Q. But you only skimmed over what you have got?

A. Yes.

Q. Your complaint alleges that David has stolen and embezzled Trust assets. What facts support that claim?

A. The lack of facts.

Q. Do you have any facts showing that David has stolen or embezzled Trust assets?

A. No.

Q. You also alleged that David has distributed Trust assets to himself. What Trust assets has David distributed to himself?

A. Water rights, the brand, cow, hay, equipment.

Q. Anything else?

A. Probably but I can't think of them. (000676-000677)

Later Duane Boren, Jr. provided the following testimony:

Q. Anything else that supports you position that the accounting are not complete?

A. There is nothing to them.

Q. Anything else?

A. No.

Q. In fact all you have done is skim over them haven't you?

A. Yes. That is why I have Mr. Monahan.(000678)

This exchange is important because it shows that Defendants were on notice that Duane Boren, Jr. had only skimmed the documents that had been provided. Duane Boren, Jr. specifically indicated that he was having his attorney review the documents. No rational person, having been told that information, could reasonably rely on Duane Boren, Jr.'s statements that no facts existed which would support the Plaintiffs' claims. It is only "when a party takes a clear position in a deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy." Webster v. Sill, 675 P.2d 1170, 1172-73 (Utah 1983). In this case, Duane Boren, Jr. did not modify his position on cross examination, he modified it on direct examination. He notified the Defendants that at the time of his deposition, he was waiting for his attorney to review the documents provided by the Defendants. The Defendants knew that Duane Boren, Jr. was not taking a clear position on what facts may exist until after the review of the documents.

The Court should reverse the Trial Court because Duane Boren, Jr. took no clear position in his deposition. Any discrepancy between his deposition and his declaration were explained during his deposition..

#### **IV. ATTORNEY'S FEES**

Because the Trial Court improperly struck the Declaration of Duane Boren, Jr. and because the Trial Court improperly granted summary judgment, this Court should reverse the Trial Court's grant of attorney's fees. Absent a complete affirmation of the Trial Court's orders, this Court should not grant additional fees on appeal.

#### **CONCLUSION**

The Plaintiffs have standing to pursue this matter. The Court of Appeals should reverse the Trial Court's ruling on the Motion to Strike the Declaration of Duane Boren, Jr. After considering the evidence contained within that Declaration, the Court of Appeals should reverse the Trial Court's grant of Summary Judgment. Finally, The Court of Appeals should reverse the Trial Court's grant of attorney's fees pending further resolution of this matter.

Dated: October 17, 2016.

  
\_\_\_\_\_  
RUSSELL T. MONAHAN  
Attorney for Plaintiffs

## CERTIFICATE OF SERVICE

RUSSELL T. MONAHAN hereby declares that he is the attorney for the Plaintiffs herein; and that he served the attached **APPELLANTS' REPLY BRIEF** upon:

Clark Allred  
Allred, Brotherson & Harrington,  
148 South Vernal Ave, Ste 101  
Vernal, UT 84078

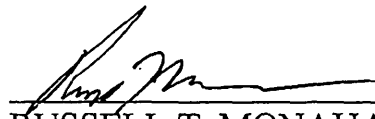
D. Karl Mangum  
Mangum & Holt  
P.O. Box 1878  
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Diana J. Huntsman  
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Midvale, UT 84047

by placing a true and correct copy thereof in an envelope and depositing the same, sealed, with first-class postage prepaid thereon, in the United States mail in Salt Lake City, Utah on: October 17, 2016.

Executed on: October 17, 2016.

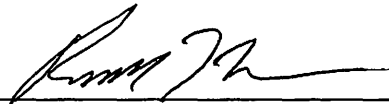
I declare under criminal penalty of the State of Utah that the foregoing is true and correct.

  
\_\_\_\_\_  
RUSSELL T. MONAHAN  
Attorney for Plaintiffs

### **Certificate of Compliance**

The undersigned does hereby certify that this Brief complies with the word count and font limitation. The Brief uses Times New Roman with a 14 point font. Based on the word count program of my Word program, this Brief contains 5238 words.

Dated: October 17, 2016.



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RUSSELL T. MONAHAN  
Attorney for Plaintiffs