

2016

**Sharrol Anderton, Mary Blanchard, Terry Christensen and Duane Boren, Jr., Appellants/Plaintiffs, vs. David L. Boren and Sherron 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

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SHARROL ANDERTON, MARY  
BLANCHARD, TERRY CHRISTENSEN  
AND DUANE BOREN, JR.,

Appellants/Plaintiffs,

vs.

DAVID L. BOREN and SHERRON  
L. BOREN, as individuals and  
as Trustees of the DUANE  
BOREN FAMILY LIVING TRUST,  
as amended,

Appellees/Defendants.

Appellate Case No. 20160145

Civil No. 143000048

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**BRIEF OF APPELLEE DAVID L. BOREN**

---

Appeal from a Final Judgment of the Eighth Judicial  
District Court of Duchesne County, Utah  
Honorable Judge Samuel Chiara

---

Attorneys for Appellants  
RUSSELL T. MONAHAN (9016)  
COOK & MONAHAN, LLC  
323 S. 600 E., Suite 200  
Salt Lake City, Utah 84102  
Telephone: 801-595-8600  
Telefax: 801-595-8614  
Email: [russ@cooklawfirm.com](mailto:russ@cooklawfirm.com)

Attorneys for Appellee  
David L. Boren  
CLARK B. ALLRED (0055)  
BRAD D. BROTHERRSON (10914)  
ALLRED, BROTHERRSON &  
HARRINGTON, P.C.  
148 S. Vernal Ave. Suite 101  
Vernal, Utah 84078  
Telephone: 435-789-7800  
Email: [roosevelt@abhlawfirm.com](mailto:roosevelt@abhlawfirm.com)

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Attorneys for Appellants  
RUSSELL T. MONAHAN (9016)  
COOK & MONAHAN, LLC  
323 S. 600 E., Suite 200  
Salt Lake City, Utah 84102  
Telephone: 801-595-8600  
Telefax: 801-595-8614  
Email: [russ@cooklawfirm.com](mailto:russ@cooklawfirm.com)

Attorneys for Appellee  
David L. Boren  
CLARK B. ALLRED (0055)  
BRAD D. BROTHERRSON (10914)  
ALLRED, BROTHERRSON &  
HARRINGTON, P.C.  
148 S. Vernal Ave. Suite 101  
Vernal, Utah 84078  
Telephone: 435-789-7800  
Email: [roosevelt@abhllawfirm.com](mailto:roosevelt@abhllawfirm.com)

Co-Attorneys for Appellee  
Sherron L. Boren  
Diana J. Huntsman (6750)  
Sherri L. Walton (14072)  
Jack D. Smart (15737)  
HUNTSMAN|LOFGRAN, PLLC  
623 E. Fort Union Blvd.  
Ste. 108  
Midvale, UT 84047  
Telephone: 801-838-8900  
Email: [sherri@huntsmanlofgran.com](mailto:sherri@huntsmanlofgran.com)

Co-Attorney for Appellee  
Sherron L. Boren  
D. Karl Mangum (2070)  
MANGUM & HOLT  
P.O. Box 1878  
Vernal, UT 84078  
Telephone: 435-789-3535  
Email: [karlmangum@ubtanet.com](mailto:karlmangum@ubtanet.com)



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None



## STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this case pursuant to Utah Code Ann. §78A-3-102(3)(j). The case was assigned to the Utah Court of Appeals pursuant to Utah Code Ann. §78A-4-103(2)(j).

## ISSUES PRESENTED FOR REVIEW WITH STANDARDS OF REVIEW

1. May Plaintiff, Duane Boren, Jr. claim ignorance at his deposition and then file a declaration opposing a motion for summary judgment that contradicts his deposition testimony, without explanation, and contains no relevant admissible evidence? Addendum 3 and 4.

The trial court struck the declaration. The standard of review when a trial court strikes a declaration is abuse of a broad grant of discretion. See *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 25, 982 P.2d 65; *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4, 314 P.3d 1069.

2. Did the trial court properly grant summary judgment, dismissing the Plaintiffs' Complaint when all the Plaintiffs admitted, under oath, that they had no facts to support their complaint?

The standard of review is correctness. See *Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶ 46, 361 P.3d 63.

3. Did the trial court properly award the Defendants the legal fees they had incurred based on Utah Code Ann. §75-7-

1004?

The standard of review is abuse of discretion. *Hughes v. Cafferty*, 2004 UT 22, ¶ 20, 89 P.3d 148.

4. Should the Appellees be awarded reasonable attorney fees incurred on appeal since they were awarded fees at the trial court?

The settled rule is that the appellate court will award the prevailing party the fees incurred on appeal when the party was awarded fees at the trial court. *Warner v. Warner*, 2014 UT App. 16, 63, 319 P.3d 711.

#### **APPLICABLE STATUTORY PROVISIONS**

Utah Code Ann. §75-7-1004:

In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party . . . .

#### **STATEMENT OF THE CASE**

**Nature of the Case:** Duane Boren, Sr., ("Duane") father of the Plaintiffs and Defendant David Boren ("David") and husband of Defendant Sherron L. Boren ("Sherron"), died on December 27, 1992. R. 139-142. The probate court, based on Mr. Boren's will, transferred his assets, an undivided one half interest in some real property, mineral rights and some equipment, into a trust that Duane had created. R. 168, 175. The beneficiary of the trust was Sherron, and David was the trustee R. 139.



Over 20 years later, the Plaintiffs sued their brother, David, and their mother, Sherron, alleging on "information and belief" that David and Sherron had stolen and embezzled assets from the trust, forged documents, failed to account, and that David had coerced his mother, commingled property and failed to administer the trust in a prudent manner. R. 1-11.

**Proceedings Below:** Defendants, David and Sherron both filed answers to the Plaintiffs' Complaint and provided, again, the accountings, tax returns, inventory and back up documents as initial disclosures. David and Sherron also deposed the Plaintiffs. R. 18-24, 30-35. Sherron was also deposed. R. 41. The Plaintiffs elected not to depose David. In those depositions, the Plaintiffs all admitted that they had no facts to support the allegations in their Complaint and that they had not even looked at the tax returns and annual accountings that they had been provided to them prior to the lawsuit being filed. R. 82-98, 99-109, 110-117, and 118-129.

After discovery was completed, R. 25, David and Sherron moved for summary judgment. R. 64. Plaintiff, Duane Boren, Jr. (herein referred to as "Junior") then filed a declaration attempting to raise issues of fact to oppose the motions for summary judgment. R. 214, Addendum 3. That declaration contradicted the deposition testimony of Junior and the other Plaintiffs. David and Sherron moved to strike Junior's

declaration. R. 612. None of the other Plaintiffs attempted to withdraw or change their deposition testimony that they had no facts to support the allegations in their Complaint.

**Disposition at the Trial Court:** The trial court struck Junior's declaration and granted the motion for summary judgment, dismissing the Complaint. R. 710-719. The court also awarded the Defendants the legal fees they had incurred pursuant to Utah Code Ann. §75-7-1004. R. 815-819; Addendum 2.

### **FACTS**

1. Duane and Sherron had six children: Plaintiffs, Sharrol Anderton, Mary Blanchard, Terry Christensen, Junior, Defendant, David, and Lucky Boren. Lucky died on April 1, 2001. Decl. of Sherron Lea Boren. R. 139-142.

2. Duane and Sherron prepared a Master Trust Agreement and a Joinder Agreement, dated March 20, 1980. The only asset in the trust, when it was created, was a life insurance policy. R. 139-142.

3. Duane and Sherron, on January 25, 1985, signed the First Amendment to the trust agreement changing Paragraph 4 of the joinder agreement to appoint Sherron as trustee. Later, Duane crossed out Sherron's name and wrote in David. R. 139-142, 161-163.

4. On August 28, 1990, Duane signed a Second Amendment to the Trust Agreement, designating David as successor trustee

and changing the distribution of the assets. R. 139-142, 164-167.

5. After Duane's death, on December 27, 1992, the family met, the will was read, and all family members were provided a copy of the will and trust. R. 134-138, 139-142.

6. Duane's estate was probated in Duchesne County, Utah. Sherron was appointed personal representative, and, based on the terms of Duane's will, the assets were distributed to David as Trustee of the Duane Boren Trust. R. 139-142.

7. Duane owned an undivided one half interest in the properties distributed to the Trustee. The other one half interest was owned by Sherron. R. 139-142.

8. The properties distributed to the Trustee were undivided interests in real estate, some farm equipment and mineral rights. Decl. of Sherron Lea Boren with attached Distribution Order. R. 139-142.

9. The trust assets were to be used for the benefit of and at the direction of Sherron during her life. R. 139-142.

10. From 1993 to the present, David, as trustee, has managed the trust properties as well as properties owned by his mother, Sherron, with her input. Decl. of David L. Boren and Decl. of Sherron Lea Boren. R. 134-138, 139-142.

11. From 1993 until October 2, 2012, when Daniel Sam, an attorney for the Plaintiffs, sent a letter asking for

information, none of the Plaintiffs had made any request for an accounting from David. Decl. of David L. Boren. R. 134-138; Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 20, lines 3-16, p. 37, lines 15-17 (stating she did not ask for records before 2012); Depo. of Duane Boren Junior, R. 118-129, p. 32, line 15 (declaring he never asked for accountings prior to the summer of 2012).

12. The Plaintiffs, through Mr. Sam were, within two months, provided an inventory of the trust, accountings for trust and tax returns from 2008 through 2011. Since that date, accountings and tax returns for 2012 through 2015 have been provided. In addition, the back up documents for the accountings and tax returns were made available for examining and copying. Decl. of David L. Boren. R. 134-138.

13. In 2014, the Plaintiffs filed this lawsuit. The Plaintiffs, in their complaint, make numerous allegations of improper or illegal acts by David and their mother, Sherron. Those allegations are generally alleged to be based "Upon information and belief." R. 1-11.

14. On January 19 and January 20, 2015, the depositions of the Plaintiffs were taken regarding the allegations in the Complaint. None of the Plaintiffs could provide any facts to support their allegations in their complaint. R. 82-129.

15. The Plaintiffs' Complaint alleges, at Paragraph 20,



that the Defendants had "stolen and embezzled money from the Trust." In response to that allegation, all four Plaintiffs admitted in their depositions that there were no facts to support the allegation. Depo. of Terry Christensen, R. 99-109, p. 30, line 7 through p. 31, line 31 ("No, I didn't say that."); Depo. of Duane Boren Junior, R. 118-129, p. 22, line 12-14 (stating he had no facts to support the allegation); Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 26, lines 13-16 (asserting she had "no facts" to support the claim); Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 38, lines 6-16 (claiming "we have no proof" that David may have stolen and embezzled from the Trust).

16. Paragraph 22 of the Complaint alleges that David forged documents. At their depositions, the Plaintiffs admitted there were no facts to support that claim. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 40, lines 1-3 (stating "I don't know of any [forged documents] no."); Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 30, lines 18-20; Depo. of Terry Christensen, R. 99-109, p. 33, lines 11-12; Depo. of Duane Boren Junior, R. 118-129; Addendum 4, p. 27, lines 16-23 (claiming "I feel like [David] has forged his name . . ." but providing no evidence).

17. Paragraph 22 of the Complaint alleges that David coerced Sherron to sign documents. At the depositions, the

Plaintiffs admitted no facts supported that claim. All the children also agreed that their mother is and was competent. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 30, lines 8-14 (asserting she never claimed her mother was not competent and that her mother "knew what was going on."); Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 30, line 24 through p. 31, line 8; Depo. of Terry Christensen, R. 99-109, p. 33, lines 13-18; Depo. of Duane Boren Junior, R. 118-129, p. 55, line 11 ("I don't think that mom is incompetent no I do not."). In addition Sherron denied that she has been coerced in signing any document. Decl. of Sherron Lea Boren. R. 139.

18. At Paragraph 23 of the Complaint, Plaintiffs alleged that David gave himself an unauthorized salary, paid for equipment for his own needs out of the Trust property, and caused a diminution of Trust assets. None of the Plaintiffs had facts to support those allegations. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 60, line 4 ("I feel like [twelve hundred dollars a month to David to run the farm] is fine."); Depo. of Terry Christensen, R. 99-109, p. 35, lines 4-6 ("I don't know about that."); Depo. of Duane Boren Junior, R. 118-129, p. 30, lines 8-20 (claiming the mere fact that David took a salary shows it was unauthorized).

19. At Paragraph 24 of the Complaint, Plaintiffs allege that the accountings were untruthful, unenforceable and

inaccurate and that David had failed to provide receipts and account for all monies taken from the Trust property. R. 1-11. At Paragraphs 30 and 35 of the Complaint the Plaintiffs further alleged that the Defendants failed to keep adequate records and failed to keep the Plaintiffs reasonably informed of the Trust and failed to provide accountings. R. 1-11. At their depositions, the Plaintiffs admitted that they had not even looked at the accountings or the backup documents and there were no facts to support their claims. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 20, lines 3-16, p. 37, lines 15-17 (stating she did not ask for records before 2012), p. 22, line 22 through p. 23, line 3 (acknowledging she received accountings, an inventory of assets, and tax returns), p. 43, line 16 (stating she did not know how the accountings were untruthful and inaccurate), p. 44-45 (admitting that she merely "glanced through" the documents and put them in her file, but did not thoroughly review accountings or ask for back up documents); Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 21, lines 16-21 (acknowledging she received accountings, tax returns, and title reports); Depo. of Duane Boren Junior, R. 118-129, p. 20, lines 20-14 (stating that he did not look at documents he received from his first attorney, but simply put them in a file or sent them on to his second attorney), p. 22, lines 3-11 (admitting he only "skimmed over

the documents" he requested), p. 32, line 32 (admitting he had never asked for an accounting prior to the summer of 2012), p. 34, lines 4-9 (claiming it is not his responsibility to review all back-up documentation to the accountings or receipts).

20. At Paragraphs 31 and 32 of the Complaint, the Plaintiffs complain that the Trustees did not administer the Trust solely for the benefit of the beneficiaries. R. 1-11. The Plaintiffs admit that their mother Sherron is presently the only income beneficiary. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 56, line 21. Sherron agrees with David that the Trust is being administered for her benefit and at her direction and input. Decl. of Sherron Lea Boren, R. 139-142.

21. At Paragraphs 33 and 42 of the Complaint, the Plaintiffs allege that the Defendants have failed to administer the Trust as a prudent person. R. 1-11. Again the Plaintiffs had no proof for those allegations. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 46, line 2; Depo. of Terry Christensen, R. 99-109, p. 38, line 17; Depo. of Duane Boren Junior, R. 118-129, p. 39, lines 16-20 (admitting he had no facts to support his "opinion" and feelings that David had not acted as a prudent investor of trust assets).

22. As a fourth cause of action, the Plaintiffs allege that the Defendants "negligently misrepresented to the



Plaintiffs facts regarding the administration of the Trust." R. 1-11. In their depositions, the Plaintiffs admitted there were no facts to support that cause of action. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 50-51; Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 38, lines 24-25 (admitting that she did not have any facts showing that either David or her mother had both made misrepresentations about the trust); Depo. of Terry Christensen, R. 99-109, p. 41, lines 9-12 (admitting that her mother had not made any misrepresentations to her and that David had not because she "ha[d not] talked to David"); Depo. of Duane Boren Junior, R. 118-129, p. 39. In fact, the Plaintiffs admitted they had never talked to David about the trust or its assets. Depo. of Duane Boren Junior, R. 630, p. 40, line 18; Depo. of Terry Christensen, R. 99-109, p. 41, line 12.

23. In an effort to avoid having the case dismissed the Plaintiffs, in opposition to the Defendants' Motion for Summary Judgment filed a document entitled Declaration of Duane Boren Jr., R. 241; Addendum 3, and attached to the declaration 370 pages of documents. The Declaration is signed by counsel for the Plaintiffs. It consists of fourteen paragraphs (allegations) copied from the Complaint, (compare Paragraphs 6 through 21 of the Complaint to Paragraphs 5 through 21 of the Declaration) and unsupported opinions and

suppositions, and concludes with a statement that the Plaintiffs are going to hire an accountant. There is no foundation testimony to support or show the admissibility of the 370 pages of attached documents or any explanation as to the purpose of those documents.

24. The trial court struck the Declaration. R. 710; Addendum 1.

### **SUMMARY OF ARGUMENTS**

1. All the Plaintiffs' arguments turn on whether the Court properly struck Junior's Declaration. Plaintiffs do not dispute that in their depositions they all agreed there were no facts to support the allegations of their Complaint. Junior attempted to have the court ignore his deposition testimony by filing a declaration, contradicting his testimony at his deposition. None of the other Plaintiffs have attempted to contradict their testimony that there are no facts supporting their complaint. Plaintiffs' attorney's explanation of the discrepancy between Junior's deposition testimony and his Declaration was that Junior was waiting on his attorney to review the documents. That is something that should have been done prior to filing the lawsuit. The trial court properly struck the declaration.

2. Junior's declaration contains no explanation as to why he is contradicting his deposition testimony as required

by case law. The declaration contains allegations copied from the complaint and suppositions and opinions which are inadmissible. To have accepted the declaration would have allowed the Plaintiffs to ignore the discovery process. The trial court properly exercised its discretion when it struck the declaration.

3. The Plaintiffs all testified that they had no facts to support the allegations in their Complaint. Furthermore, neither the terms of the trust agreement nor the law supports the Plaintiffs' allegations in their complaint regarding accountings, and alleged misuse of trust assets and the Plaintiffs lack standing to sue because they have not suffered any injury. The trial court properly granted summary judgment dismissing the Complaint.

4. The Defendants were awarded their legal fees and costs by the trial court and, as prevailing parties, should be awarded the fees incurred on appeal.

- I. THE TRIAL COURT APPROPRIATELY STRUCK DUANE BOREN, JR.'S DECLARATION BECAUSE 1) THE DECLARATION CONTRADICTED HIS DEPOSITION TESTIMONY, 2) THE DECLARATION PROVIDED NO EXPLANATION FOR THE CONTRADICTION, 3) THE DECLARATION CONTAINS NO RELEVANT ADMISSIBLE EVIDENCE, AND 4) TO ALLOW THE DECLARATION WOULD DEFEAT THE PURPOSES OF DISCOVERY, DEPOSITIONS, AND SUMMARY JUDGMENT MOTIONS.

The determining issue in this case is whether the trial court properly exercised its discretion when it struck Junior's declaration. When faced with a motion for summary

judgment the Plaintiffs filed a document entitled Declaration of Duane Boren Jr. R. 214 Addendum 3. That declaration was not signed by Junior, but rather by his counsel. R. 220. The Declaration attempts to contradict the deposition testimony of Junior. Without that declaration there is no alleged factual dispute as the evidence that remains is the testimony of all the Plaintiffs admitting that they have no facts to support the allegations of their complaint. None of the other Plaintiffs have attempted to disclaim their deposition testimony.

The trial court held that:

The Plaintiffs allege that Duane Boren Jr. had only skimmed the documents concerning the Trust, and was relying on counsel to review the documents and find the facts to support his claim.

The problem with the Plaintiffs' argument is that it promotes a deponent's ignorance during a deposition when he is subject to cross examination. According to Plaintiffs, by merely claiming no knowledge during a deposition, a person could later provide his statement through affidavit, without the threat of cross examination. The Court finds that the general rule outlined in *Webster* was not intended to create such a result. A person cannot avoid being deposed and avoid answering questions by claiming no knowledge, only to subsequently file a self-serving affidavit in order to avoid summary judgment. The Court also finds that Duane Boren Jr. did take a clear position in his deposition. His position was he had no facts to support his claims.

R. 710; Addendum 1. The Court should affirm this ruling unless it finds that the trial court abused its "broad grant of discretion," *Murdock*, 1999 UT 39, ¶25, 9862 P.2d 65, or, in other words, if "there was no evidentiary basis for the trial



court's ruling." *Portfolio Recovery Assocs.*, 2013 UT App 255, ¶4, 314 P.3d 1069.

This ruling should be affirmed for the following reasons: 1) The declaration contradicts the deposition testimony, 2) the declaration contains no explanation as to the reason it contradicts the deposition testimony, 3) the declaration consists of inadmissible opinions and suppositions, and 4) to allow one to claim ignorance at their deposition and then to submit a declaration once discovery is completed violates the rules and policies regarding discovery. Each of these points will be discussed below.

1. The Trial Court Properly Struck the Declaration of Duane Boren, Jr., Which Attempted to Contradict the Testimony He Gave at His Deposition.

"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." *Legacy Res., Inc. v. Liberty Pioneer Energy Source, Inc.*, 2013 UT 76, ¶ 29 n.10, 322 P.3d 683; *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983).

In this case, Junior took a clear position in his deposition; to quote the trial judge, "His position was he had no facts to support his claims," R. 710-719. Junior's deposition testimony was that he had not reviewed any of the

accountings, tax returns, inventory and back up documents he had been provided and therefore he had no information and no facts to support the Complaint. This was consistent with the deposition testimony of his sisters, the other Plaintiffs. Like the plaintiff in *Webster*, Junior testified directly on the issues of the case several times. Addendum 4. David's and Sherron's attorneys went through every allegation made in the Complaint and directly asked what facts Junior had to support the allegations of his complaint. Junior responded by admitting, among other things, that he had no idea who was the trustee, R. 622 (p. 5 through 7 of Junior's deposition), that he was not involved in the probate of the estate, R. 622 (p. 5 of Junior's deposition), that he never requested any information until October 2012, R. 628, 629 (p. 32, 36 of Junior's deposition), that he had not read the accountings, inventory, tax returns that were provided to him, R. 625, 629 (p. 20, 21-22, 33, 34 of Junior's deposition), that he was not aware of what assets were distributed by the court to the trustee, R. 626 (p. 24 of Junior's deposition), that he had no facts that David had not acted as a prudent investor, R. 630 (p. 39 of Junior's deposition), and that he had no facts to support the numerous acts of wrongdoing alleged in the complaint. R. 626-627, 631 (p. 22-26, 41 of Junior's deposition).

The only time Junior ever changed an answer was when David's attorney asked some follow up questions to those posed by Sherron's attorney, and then, all Junior changed was that his earlier statement that he agreed with most of the Complaint should be that he agreed with all of it. R. 637 (p. 66 of Junior's deposition). Junior's attorney did not question him to clarify any of his answers, R. 636, 637, so there was no modification of answers that would have made Junior's statements unclear. *Cf. Magana v. Dave Roth Constr.*, 2009 UT 45, 215 P.3d 143. Junior also had the chance to review his deposition after it was printed, and he signed it making no changes. R. 620, Addendum 4.

The trial court properly exercised its broad discretion in granting the Motion to Strike the Declaration. *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4, 314 P.3d 1069.

2. The Declaration of Duane Boren, Jr. Contains No Explanation for the Change in Testimony.

The trial court properly struck Junior's Declaration because the Declaration contained no explanation, under oath, for the change in testimony as required by the law. "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." *Legacy Res., Inc.*, 2013 UT at ¶ 29 n.10, 322 P.3d at ¶ 29 n.10 (emphasis added). The Utah Supreme Court has repeatedly looked for the explanation in the affidavit itself. See *Legacy Res., Inc.*, 2013 UT at ¶ 29 n.10, 322 P.3d at ¶ 29 n.10 ("[Plaintiff company's president]'s affidavit offered no such explanation, so we take as undisputed his deposition statement that he offered input on marketing materials."); *Magana v. Dave Roth Constr.*, 2009 UT 45, ¶ 39 n. 33, 215 P.3d 143 ("In a subsequent affidavit, [the plaintiff] explained that in regard to his answer that he was not sure whether he saw someone help rig the load, there was either a mis-translation or he had misunderstood the question."); *Brinton v. IHC Hosps., Inc.*, 973 P.2d 956, 973 (Utah 1998) ("[T]he district court correctly held that for purposes of the parties' motions for summary judgment, [the plaintiff]'s affidavit, as a matter of law, cannot contradict his prior sworn statement and testimony, which was clear and unequivocal, because the affidavit fails to state an adequate reason for the contradiction."); and *Webster*, 675 P.2d at 1173 ("The plaintiff's affidavit wholly failed to explain the discrepancy between the deposition and the affidavit.").

Junior's declaration contradicted his deposition testimony. Instead of explaining this discrepancy under oath, as the law requires, Junior's declaration remained silent. The



only explanation for the contradiction is contained in argument in the Plaintiffs' memorandum opposing the Motion to Strike. The explanation, by Junior's counsel, was that Junior "had only skimmed over the documents that he had been provided" and that he "was relying on his attorney to review the documents ..." R. 668. Junior had the accountings and tax returns since the Fall of 2012. He and his attorney had plenty of time to review and prepare for the deposition. The district court, therefore, did not abuse its discretion in striking the declaration and subsequently dismissing the case. Rather, it strictly adhered to the law.

3. Duane Boren, Jr.'s Declaration Is Void of Admissible Facts.

This Court should further affirm the district court's decision to strike Junior's declaration on the grounds that it contains no admissible facts, but consists of inadmissible opinions and conclusory statements. The trial court stated "the Declaration does not provide facts on the pertinent issues, but merely the opinion of Duane Boren Jr." R. 710; Addendum 1. The court referred to several of the final paragraphs<sup>1</sup> that were merely unsupported claims or

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<sup>1</sup>The trial court did not refer to any paragraph in the Declaration prior to paragraph 20. This is presumably because paragraphs 5-21 were merely copied and pasted from the Complaint. Compare Comp. ¶¶ 6-21, R. 1-11, with Decl. of Duane Boren Junior ¶¶ 5-21, Addendum 3.

conclusions. *Id.* It identified paragraph 27 as being a conclusion that was not supported by the exhibit it referred to. *Id.* Ultimately, the court concluded: "even if the Court were not striking the Declaration based on the general rule that an affidavit cannot be used to contradict deposition testimony, the Court would not find any issue of material fact raised by the Declaration." *Id.*

The trial court did not abuse its broad grant of discretion in reaching that decision. Rule 56(c)(4) of the Utah Rules of Civil Procedure requires that "[a]n affidavit or declaration used to support or oppose a motion . . . set out *facts* that would be admissible in evidence . . . ." (emphasis added). See also *Shiozawa v. Duke*, 2015 UT App 40, ¶20, 344 P.3d 1174; *Sunridge Development v. RB&G Engineering*, 2013 UT App 146, ¶16-17, 305 P.3d 171; *D&L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989). Moreover, Rule 701 of the Utah Rules of Evidence permits opinion testimony by lay witnesses only when that testimony is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." See also *State v. Sellers*, 2011 UT App 38, ¶26-27, 248 P.3d 70.

Here, the opinions do nothing to help the fact-finder

understand Junior's testimony or determine a fact in issue. The Declaration haphazardly states opinions and directs the fact-finder to some documents, meanwhile providing nothing to show how the documents support the opinions and suppositions in the Declaration. The Declaration does not show which facts or information in the documents support the opinion; indeed, the document referred to in paragraph 27 does not even support the statement made in the paragraph. It was not the duty of the trial court to try and discern what facts Junior was claiming is shown by the documents to support his suppositions and opinions. See, e.g., *Taft v. Taft*, 2016 UT App 135, ¶22-24, 816 Ut. Adv. Rep 40.

Furthermore, the opinions expressed by Junior were based on "specialized knowledge [of tax returns and accounting] within the scope of Rule 702" and were therefore expert opinions. Junior concedes this by stating that the documents have been delivered to an accountant for its opinion. R. 214-22, ¶33. The test for determining whether testimony must be provided by an expert is "whether an average bystander would be able to provide the same testimony." *State v. Rothlisberger*, 2006 UT 49, ¶34, 147 P.3d 1176. In his declaration, Junior opines that (1) David, prior to the commencement of this litigation "consistently operated the Farm at a substantial loss," *Id.*, ¶30; (2) "[t]he losses to

the Family Trust were incurred by Defendant David L. Boren, because he was using the Family Trust to pay the expenses of the whole Farm while he reaped the individual financial benefit of the Farm," *Id.*, ¶31; and (3) David's bookkeeping was "sloppy and incomplete." *Id.*, ¶33. Moreover, Junior insinuates that there have been instances of "financial malfeasance," and speculates that more will be uncovered when an expert completes a review of the records David provided in his accounting. *Id.*, ¶34. An average bystander would be hard pressed to reach the same conclusions Junior did without any specialized knowledge of tax returns or accounting. Thus, under Rule 701 of the Utah Rules of Evidence, Junior's opinions should not be admitted. See *Rothlisberger*, 2006 UT App 49, ¶29, 147 P.3d 1176.

Furthermore, there is nothing in the Declaration that provides foundational support to make any of the 370 pages of attached documents admissible. The documents cannot be considered and relied on unless they are admissible. To be admissible, there needs to be foundational support authenticating the document. See Utah R. Evid. Rule 901. The Plaintiffs cannot simply attach documents, give no explanation or foundation and expect the trial court to divine the meaning and relevance of the documents. See *Taft*, 2016 UT App at ¶22-24, 816 Ut. Adv. Rep 40.

4. Allowing Duane Boren, Jr.'s Declaration Would Undermine the Purposes of Discovery, Depositions, and Summary Judgment Motions.

To allow Plaintiff's declaration based on his attorney's explanation for the discrepancy would defeat the purpose of discovery and depositions, and the reason for summary judgment motions. See *Webster*, 675 P.2d at 1173; *Jimenez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253-254 (3d Cir. 2007). Courts that have considered arguments similar to the Plaintiffs have rejected those arguments. See *Mitchael v. Intracorp., Inc.*, 179 F.3d 847, 854-55 (10th Cir. 1999) (holding that a plaintiff's affidavit produced after the close of discovery that "arguably contradicted his deposition" was appropriately struck because its submission "represent[ed] an attempt to create a sham issue of fact" and plaintiff's were "deliberately sandbagging defendants."); *Juarez v. Utah*, 263 F. App'x 726, 735-36 (10th Cir. 2008) (holding that the trial court did not abuse its discretion when it struck the whole of plaintiff's affidavit, which was put forth after the close of discovery and arguably contradicted her earlier deposition testimony, on the grounds that the timing of the affidavit "place[d] the defendant at a disadvantage," and because it was "not feasible to exclude only parts of the affidavit" because "the portions of the affidavit consistent with the deposition [were] too enmeshed with unsupported assertions to allow the

court to reasonably parse through and redact only the groundless portions."); *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2007 UT App 407, ¶38, 175 P.3d 572 (holding that a deponent making a mistake in a deposition is not sufficient reason to consider a declaration that contradicts the deposition testimony).

In this case, Junior claimed ignorance at this deposition stating he had not reviewed the accountings and had no facts to support his claims. After the discovery deadline had passed and motions for summary judgment were filed, he then filed a declaration attempting to contradict his testimony that he had no facts to support the complaint. Junior had the accountings and tax returns since the Fall of 2012. Reviewing the documents was a duty both Junior and his attorney had prior to even filing the lawsuit. See UCRP Rule 11(b). This is a case of sandbagging and should not be condoned by this Court. The district court, therefore, did not abuse its discretion in striking the declaration and subsequently dismissing the case.

II. THE TRIAL COURT APPROPRIATELY GRANTED THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSED THE PLAINTIFFS' COMPLAINT BECAUSE THE PLAINTIFFS ADMITTED THAT THEY HAD NO FACTS TO SUPPORT ANY OF THEIR ALLEGATIONS, THE LAW AND THE TERMS OF THE TRUST DOCUMENT DOES NOT SUPPORT THEIR CLAIMS, AND THE PLAINTIFFS LACK STANDING TO SUE.

Plaintiffs' brief argues that the trial court erred in dismissing their claims for breach of fiduciary duty, breach



of trust, request for accounting and declaratory judgment.<sup>2</sup> The short answer to that argument is that the Plaintiffs have all admitted they have no facts to support those claims. Based on the Plaintiffs' deposition testimony the Defendants moved for summary judgment. The result is that the facts admitted to in the Plaintiffs' depositions and the affidavits filed by the Defendants are undisputed. Based on those facts, especially the Plaintiffs admitting they had not facts to support their allegations, the trial court properly granted the motions for summary judgment and dismissed the Complaint. Furthermore, the law and the terms of the trust documents do not support their claim.

1. Plaintiffs Have Been Provided Accountings, Tax Returns, and Back up Documents for the Trust.

Plaintiffs complain that they did not receive accountings, which is a false statement. Plaintiffs further fail to point out that the trust agreement does not require accountings be provided to contingent beneficiaries, that they never requested accountings or any other information until 2012, at which time they were provided accountings from 2008

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<sup>2</sup>Plaintiffs, apparently, are conceding that their claims of misrepresentation, fraud, coercion, embezzlement, theft are without merit since they have not addressed those on appeal.

to the present,<sup>3</sup> and that they all admitted in their depositions that they never took the time to review the accountings provided to them. Depo. of Sharrol Ann Boren Anderton, R. 82-98, p. 22, line 22 through p. 23, line 3 (acknowledging she received accountings); Depo. of Mary Ellen Boren Blanchard, R. 110-117, p. 21, lines 16-21 (acknowledging she received accountings) Depo. of Duane Boren Junior, R. 118-129 p. 22, lines 3-11 (admitting he only "skimmed over the documents"). See also Fact No. 19 supra.

The law and the terms of the Trust Agreement do not require the Trustee to provide to the Plaintiffs any accounting until a request is made. When this trust was funded in 1993, a statute different from the present one governed. The present trust statutes were adopted in 2004. At the time the Trust was funded and David appointed as trustee, the statute, Utah Code Ann. §75-7-303(3), stated "Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee." Plaintiffs admitted in their depositions that they never requested any accounting until October 2, 2012 at which time accountings and tax returns for 2008 to the present were immediately provided.

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<sup>3</sup>The records prior to 2008 were destroyed by rodents. Bank records prior to 2008 were requested and provided. See R. 136.

Moreover, Paragraph 9 of the Trust Agreement states:

Accounting by Trustee. The Trustee 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.

In this case, the only current income beneficiary is the other defendant, Sherron. She has been kept fully advised of the trust and its assets and supports David as trustee. Under the terms of the trust, the Plaintiffs, who are only contingent beneficiaries after the death of their mother, have no right to complain about an accounting.

Even the present statute does not support the Plaintiffs. It states at Utah Code Ann. §75-7-811(3) "A trustee shall send to the qualified beneficiaries *who request it*, at least annually . . . a report of trust properties . . ." (emphasis added). In 2012, when the first request was received for information, the trustee provided to each of the Plaintiffs, starting with the year 2008, an inventory, detailed accountings for each year, copies of tax returns, copies of title searches showing how the property was titled, bank statements and back up documents were provided to Plaintiffs for inspection and copying. None of the Plaintiffs or their attorneys made any effort to examine the documents provided or the back up information and Plaintiffs admit they never even reviewed the information that was provided to them.

2. Defendants have Properly Managed the Trust Assets.

The Plaintiffs claim that David has breached the trust agreement and his fiduciary duties in how the trust property, a farm, was managed<sup>4</sup> and that he commingled or was self-dealing in trust assets. When the Plaintiffs were deposed, they all admitted they had no facts to support those claims. Depo. of Sharrol Ann Boren Anderton R. 82 p. 47, Mary Blanchard R. 110 p. 36, Terry Christensen deposition R. 99 p. 39, Duane Boren Jr. deposition R. 118 p. 36. They further admitted there were no facts showing any reduction in the value of the trust assets. R. 628, p. 31 of Junior's deposition.

Paragraph 8 of the Joinder Agreement to The Duane Boren Family Trust agreement states:

8. Particular Instructions Regarding Settlor's Business. Notwithstanding anything contained in this Joinder Agreement or the Master Trust Agreement to the contrary, if at the time of Settlor's death, Settlor owns or otherwise controls an interest in an agricultural business, which passes to Trustee, and Settlor's spouse survives Settlor, then Settlor's spouse shall have the right: To direct Trustee to retain the said business or any part thereof; to direct Trustee to retain the said business or any part thereof; to direct Trustee at any time to sell or otherwise dispose of the business or any part thereof; to direct Trustee at any time to rent or lease the business or any part thereof; and to

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<sup>4</sup>However, in their Complaint, the Plaintiffs state that the value of the trust assets have increased from \$430,293.00 to \$934,003.00. R. 1. This increase does not include the monies paid to the income beneficiary.

direct Trustee at any time to hire a certain individual as general manager of the business at such salary as Settlor's spouse shall determine. If or to the extent Settlor's spouse shall not exercise any of the rights herein conferred, the said rights shall be exercised by Trustee in Trustee's sole discretion.

All actions regarding the operation of the farm have been done with the full input and support of the Settlor's surviving spouse, co-Defendant Sherron Boren. R. 139, ¶17-19.

Plaintiffs go as far as to complain that it was self-dealing that David was paid a salary to serve as trustee and manage the trust property. Appellant Br., 33, 41. Both the Trust Agreement at Section 5.20 and the statute Utah Code Ann. §75-7-708 authorize the trustee to be paid reasonable compensation.

Plaintiffs' provide no facts to support their claims of self-dealing, just suppositions. The Plaintiffs claim all facts are in David's possession and therefore they do not need to prove the self-dealing. Appellant Br., 38, 42. Plaintiffs admit that neither they nor their legal counsel ever read the tax returns and accountings, they fail to inform the court that they never deposed David and inquired about those issues, and they never hired an expert, such as an accountant, to go through the accountings and tax records. If they had done their due diligence they would have discovered that David and his mother were properly managing the assets of the trust.

Plaintiffs also complain that there has been commingling of assets. Commingling is not self-dealing and is not prohibited. The trust only owns an undivided one half interest in the trust assets (real property, mineral rights, and old equipment). R. 168. The other undivided one half interest was owned by Sherron, who has deeded some of her property to her son, David. As a result, most of the property is owned jointly in undivided interests by David, Sherron and the Trust. It is not unusual for a trust to own property jointly with other beneficiaries. See, e.g., *Aagard v. Jorgensen (In re Anna Blackham Aagard Tr.)*, 2014 UT App 269, 339 P.3d 937.

In *Rapela v. Green (In re Estate of Kampros)*, 2012 UT 57, 289 P.3d 428, the plaintiff sought removal of the trustee, Mr. Green, on the basis that he owned an interest in the LLCs that were the trust assets and therefore he had a conflict of interest and it constituted impermissible self-dealing. *Id.* at ¶¶ 24, 30. The court denied the request, stating that personally owning an interest in a property (LLC) owned by the trust did not prevent one from acting as trustee and was entirely compatible. *Id.* at ¶28 (citing Utah Code Ann. §75-7-802(8)(f) ("[C]ollecting, holding, and retaining trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made, even though the assets include an asset in which the trustee is personally



interested[,]” is not precluded by section 75-7-802.)). The court further ruled that such joint ownership did not violate the duty of loyalty unless it was shown that the Trustee acted in bad faith or unfairly. *Id.* at ¶34.

In this case, it has been obvious, from the beginning, that since Sherron owned an undivided one half interest in the property that the Trust would own the property jointly with Sherron. The current income beneficiary, Sherron, supports David’s operations of the property and in fact has entrusted him to operate her personal interests in the property. There has been no evidence from the Plaintiffs that David is acting in bad faith or unfairly. If the Plaintiffs would have reviewed the accountings and the back up documents before filing the lawsuit they would have determined that David is operating as requested by his mother, that he pays the Trust for any personal livestock he and his mother graze on trust property, and that he uses his own equipment to operate the trust property since the trust equipment wore out years ago. R. 567, responses 4, 8.

3. Plaintiffs Lack the Standing to Sue Because They Are Only Awarded the Waste Ground in The Trust and Therefore Will Incur No Damages Even if What They Allege is True.

Plaintiffs have no standing to complain about the

operation of the trust property.<sup>5</sup> The terms of the Trust Agreement provides that on Sherron's death, the only assets distributed to the Plaintiffs will be the waste ground. See the Second Amendment to the Trust, R. 164. There is no claim that the waste ground has been transferred from the trust. It is still available to be distributed to the Plaintiffs on their mother's death. Plaintiffs lack any standing to complain about accountings and records regarding property that will never be distributed to them. See *Haymond v. Bonneville Billing & Collections, Inc.*, 2004 UT 27, ¶8, 89 P.3d 171.

III. THE TRIAL COURT APPROPRIATELY GRANTED THE DEFENDANTS' MOTION FOR ATTORNEY'S FEES BASED ON UTAH CODE ANN. § 75-7-1004.

Utah Code Ann. §75-7-1004(1) provides that:

In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses including reasonable attorney's fees, to any party, to be paid by another party ....

The trial court analyzed the factors set forth in *Shurtleff v. In re United Effort Plan Trust*, 2012 UT 47, ¶23, 289 P.3d 408 and found that the Defendants were "clearly the prevailing party," that all of Plaintiffs' claims had been dismissed, that there was no evidence to support the Plaintiffs' claims, that Plaintiffs had failed to reasonably

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<sup>5</sup>This issue was raised in the Defendants' Reply Memorandum R. 658 but was not addressed by the trial court.

investigate their claims and in fact had not even reviewed the accountings, tax returns and other information provided to them prior to filing the lawsuit and their claims were without merit. R. 815; Addendum 2. Based on those findings, the court awarded the Defendants the legal fees and costs they had incurred.

The Plaintiffs concede that the trial court acted properly and only argue that the fee award should be reversed if this Court reverses the decision of the trial court to strike the Declaration and grant summary judgment. The trial court properly exercised its discretion and found that justice and equity required the awarding of fees which award should be upheld.

IV. THE DEFENDANTS SHOULD BE AWARDED THE FEES THEY INCUR ON THIS APPEAL BECAUSE THEY WERE AWARDED FEES BY THE TRIAL COURT.

The trial court awarded David and Sherron the legal fees and costs they incurred defending against the Plaintiffs' claims. R. 815, 852, 857. The settled rule is that the appellate court will award the prevailing party the fees incurred on appeal when the party was awarded fees at the trial court. See *Warner v. Warner*, 2014 UT App 16, ¶63, 319 P.3d 711. Appellees should therefore be awarded the fees they have incurred on appeal.

### CONCLUSION

Appellees, David L. Boren and Sherron Boren, request that the decision of the trial court be affirmed, that the Court award the Appellees the fees incurred on appeal and remand the case to the trial court to enter judgment for the fees incurred on appeal.

DATED this 10 day of August, 2016.

ALLRED, BROTHERRSON & HARRINGTON, P.C.  
Attorneys for Appellee/Defendant  
David L. Boren

By:



Clark B Allred

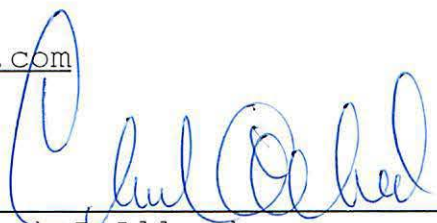
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of August, 2016,  
two copies of the foregoing BRIEF OF APPELLEE/DEFENDANT were  
served via U.S. Mail, postage prepaid, on the following:

RUSSELL T. MONAHAN (9016)  
COOK & MONAHAN, LLC  
Attorney for the Appellants\Plaintiffs  
323 S. 600 E., Suite 200  
Salt Lake City, Utah 84102  
Telephone: (801) 595-8600  
Telefax: (801) 595-8614  
Email: [russ@cooklawfirm.com](mailto:russ@cooklawfirm.com)

Diana J. Huntsman (6750)  
Sherri L. Walton (14072)  
Jack D. Smart (15737)  
HUNTSMAN|LOFGRAN, PLLC  
Co-Attorneys for Appellee  
Sherron L. Boren  
623 E. Fort Union Blvd.  
Ste. 108  
Midvale, UT 84047  
Telephone: 801-838-8900  
Email: [sherri@huntsmanlofgran.com](mailto:sherri@huntsmanlofgran.com)

D. Karl Mangum (2070)  
MANGUM & HOLT  
Co-Attorney for Appellee  
Sherron L. Boren  
P.O. Box 1878  
Vernal, UT 84078  
Telephone: 435-789-3535  
Email: [karlmangum@ubtanet.com](mailto:karlmangum@ubtanet.com)

  
\_\_\_\_\_  
Clark B. Allred  
Attorney for Appellee/Defendant  
David L. Boren

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, I hereby certify that this Brief contains 7,646 words, exclusive of the items set forth in Rule 24(f)(1)(B), and therefore complies with the type-volume limitation set forth in Rule 24(f)(1)(A). I relied on the word count function in WordPerfect X5 to perform this calculation. This Brief complies with the typeface requirements of Utah R. App.P.27(b) because this Brief has been prepared in a proportionately spaced typeface using WordPerfect X5 in font size 13 and style Courier New.

  
\_\_\_\_\_  
Clark B Allred



### ADDENDUM

Addendum 1 - Ruling and Order dated September 4, 2015, granting the motions for summary judgment. R. 710

Addendum 2 - Ruling and Order dated November 30, 2015, granting the request for attorneys fees. R. 815

Addendum 3 - Declaration of Duane Boren, Jr. (without attachments), R. 214

Addendum 4 - Deposition of Duane Boren, Jr., R. 620

# ADDENDUM 1

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IN THE EIGHTH JUDICIAL DISTRICT COURT  
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

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Sharrol Anderton, Mary Blanchard, Terry Christensen, and Duane Boren, Jr.,  Plaintiffs,  vs.  David L. Boren, and Sherron L. Boren, as individuals and as Trustees for the Duane Boren Family Trust, as amended,  Defendants.	RULING AND ORDER       Case No. 143000048  Judge SAMUEL P. CHIARA
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This matter is before the Court on the Defendants' Motion for Summary Judgment. The Court will also consider the Defendants' Motion to Strike the Declaration of Duane Boren Jr.

The Defendant David L. Boren is represented by counsel, Mr. Clark Allred. The Defendant Sherron L. Boren is represented by separate counsel, Mr. Joel Berrett. The Plaintiffs are jointly represented by counsel, Mr. Russell Monahan. The Defendants filed separate Motions for each issue, the Summary Judgment and the Motion to Strike. The Defendants' positions and arguments on the Motions are largely the same. Therefore, the Court will treat them as one Motion coming from the Defendants combined. The Motions have been fully briefed, and no oral argument was requested. The Court has reviewed the Motions and the pertinent law and is prepared to rule.

First, the Court will decide the Defendants' Motion to Strike Declaration of Duane Boren Jr. The Plaintiffs' depositions were taken, including Duane Boren Jr.'s, on January 19 and 20,

2015. All of the Plaintiffs testified that they were unaware of any facts that would support their claims. The Plaintiffs were asked by opposing counsel for facts to support the specific allegations set forth in their Complaint. The Plaintiffs admitted they did not have any support for the allegations, or admitted that they had not reviewed the accountings and supporting documents provided to them concerning the trust. On that basis, the Defendants moved for summary judgment.

In opposition to the Motion for Summary Judgment, the Plaintiffs' provided the declaration of Duane Boren Jr., attempting to create a dispute of material fact concerning whether the Defendants acted improperly in administering the Trust. The Defendants argue that the Plaintiff cannot now contradict his testimony by affidavit. The Defendants cite to case law which disallows affidavits made after sworn testimony which contradicts that testimony. See *Webster v. Still*, 675 P.2d 1170 (Utah 1983). "[T]he general rule in Utah is that an affiant may not raise an issue of fact by his own affidavit which contradicts his deposition unless he can provide an explanation of the discrepancy." *Gaw v. State*, 798 P.2d 1130, 1140 (Ut. App. 1990). The Plaintiffs argue that according to *Webster*, the general rule only applies when a party "takes a clear position in a deposition." *Webster*, 675 P.2d at 1172-73. The Plaintiffs argue that Duane Boren Jr. did not take a clear position during the deposition. The Plaintiffs allege that Duane Boren Jr. had only skimmed the documents concerning the Trust, and was relying on counsel to review the documents and find the facts to support his claim.

The problem with the Plaintiffs' argument is that it promotes a deponent's ignorance during a deposition when he is subject to cross examination. According to Plaintiffs, by merely claiming no knowledge during a deposition, a person could later provide his statement through affidavit, without the threat of cross examination. The Court finds that the general rule outlined

in *Webster* was not intended to create such a result. A person cannot avoid being deposed and avoid answering questions by claiming no knowledge, only to subsequently file a self-serving affidavit in order to avoid summary judgment. The Court also finds that Duane Boren Jr. did take a clear position in his deposition. His position was he had no facts to support his claims.

Alternatively, the Declaration does not provide facts on the pertinent issues, but merely the opinions of Duane Boren Jr. For instance, Duane Boren Jr. asserts as fact paragraph 20: "After reviewing the information provided by the attorney for the Trustee, it is apparent that Defendant David L. Boren has used the assets of the Family Trust for his own benefit in violation of fiduciary duty to the remaining beneficiaries." That is not a fact but a claim made by the Plaintiff. The Plaintiffs claim that the facts following paragraph 20 are the support for his opinion. However, facts 21-25, even if true do not support the claims. Paragraph 27 is a conclusion that is not supported by the exhibit it refers to. The exhibit shows a payment for a four wheeler but there is no evidence that the four wheeler was not owned by the Trust. Paragraphs 28-34 are mere conclusions, with no facts, or where facts are stated, those facts do not support the cause of action. Therefore, even if the Court were not striking the Declaration based on the general rule that an affidavit cannot be used to contradict deposition testimony, the Court would not find any issue of material fact raised by the Declaration.

The Defendants' Motion to Strike Declaration of Duane Boren Jr. is granted.

#### Undisputed Material Facts

1. Duane Boren and his wife Sherron Lea Boren had 6 children, Sharrol Anderton, Mary Blanchard, Terry Chirstensen, Duane Boren Jr., David Boren and Lucky Boren. Lucky Boren died April 1, 2001.
2. Duane Boren and his wife, Defendant, Sherron Lea Boren prepared a Master Trust

Agreement, dated March 20, 1980. Duane Boren was the Settlor and the Agreement is signed by Sherron Lea Boren and Duane Boren. There was also prepared a Joinder Agreement dated March 20, 1980, which was signed by Mr. Boren. The only asset in the trust when it was created was a life insurance policy.

3. Duane Boren and Sherron Lea Boren, on January 25, 1985, signed the First Amendment to the trust agreement changing paragraph 4 of the joinder agreement to appoint Sherron Lea Boren as trustee. Later Duane Boren crossed out Sherron Lea Boren and wrote in David Boren.
4. On August 28, 1990, Duane Boren signed a Second Amendment to the Trust Agreement designating David Boren as successor trustee and changing the distribution of the assets.
5. Duane Boren died on December 27, 1992.
6. After the death of Duane Boren the family met and his will was read and all family members were provided a copy of the will and trust documents.
7. Duane Boren's estate was probated in Duchesne County Utah as case number 933800004. Sherron Boren was appointed personal representative and based on the terms of Duane Boren's will the assets set forth in the inventory were distributed to David Boren as Trustee of the Duane Boren Trust.
8. Duane Boren owned an undivided one half interest in the properties distributed to the Trustee. The other one half interest was owned by Sherron Lea Boren.
9. The properties distributed to the Trustee were undivided interests in real estate with some equipment and mineral rights.
10. The trust assets were to be used for the benefit of and at the direction of Sherron Lea Boren during her life.



11. From 1993 to the present David Boren, as trustee, has managed the trust properties as well as properties owned by his mother, Sherron Lea Boren with her input.
12. From 1993 to 2012 none of the Plaintiffs made any request for an accounting from David Boren.
13. Sherron Lea Boren was involved in the decisions regarding the trust and its assets from 1993 to the present.
14. In 2012 Daniel Sam, an attorney for Duane Boren Jr. and possibly the other Plaintiffs requested information from the trustee.
15. Mr. Sam and all of the Plaintiffs were provided an inventory of the trust, accountings for trust and tax returns from 2008 through 2011. Since that date accountings and tax returns for 2012, 2013 and 2014 have been provided. In addition the back up documents for the accountings and tax returns were made available for examining and copying.
16. Accountings for time periods prior to 2008 were not provided as the trustee does not have records for those earlier time periods. Efforts were made to obtain bank records and what records the bank still had were provided to the Plaintiffs.
17. In 2014 four of the children (the Plaintiffs) sued their brother, David Boren, and their mother, Sherron Lea Boren.
18. On January 19 and January 20, 2015, the depositions of the Plaintiffs were taken regarding the allegations in the complaint.
19. The Plaintiffs' complaint alleges at paragraph 20 that the Defendants had stolen and embezzled money from the Trust. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation.
20. Paragraph 22 of the complaint alleges that the Defendants forged documents. All four

Plaintiffs admitted during their depositions that there were no facts to support the allegation.

21. Paragraph 22 of the complaint alleges that David Boren distributed property to himself. The Plaintiffs provided no evidence in support of the allegation. The title reports provided to all the Plaintiffs showed real property titled in the trust.
22. Paragraph 22 also alleges that David Boren coerced his mother Sherron Lea Boren to sign documents. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation. All children also agreed that their mother is and was competent. Mrs. Boren denies that she has been coerced in signing any document.
23. At paragraph 23 of the complaint Plaintiffs alleged that David L. Boren gave himself an unauthorized salary, paid for equipment for his own needs out of the Trust property and caused a diminution of Trust assets. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation.
24. At paragraph 24 of the complaint Plaintiffs allege that the accountings were untruthful, unenforceable and inaccurate and that David Boren had failed to provide receipts and account for all monies taken from the Trust property. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation. In fact, the Plaintiffs admitted at their depositions that they had not reviewed the accountings or the documents that were provided.
25. At paragraphs no. 30 and 35 of the complaint, concerning an alleged failure to account and communicate, the Plaintiffs allege that the Defendants have failed to keep adequate records and failed to keep the Plaintiffs reasonably informed of the Trust and failed to provide accountings. All four Plaintiffs admitted during their depositions that there were

no facts to support the allegation, and that they had not reviewed the accountings and tax returns provided to them.

26. At paragraphs 30, 32, 35, 42 of the complaint, the Plaintiffs allege that the Trustees commingled Trust property with their own property. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation.
27. At paragraphs 31 and 32 the Plaintiffs complain that the Trustees did not administer the Trust solely for the benefit of the beneficiaries. The Plaintiffs admit that their mother Sherron Lea Boren is presently the only income beneficiary. Sherron Lea Boren agrees the Trustee has administered the Trust for her benefit and at her direction and input.
28. At paragraphs 33 and 42 the Plaintiffs allege that the Defendants have failed to administer the Trust as a prudent person. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation.
29. As a fourth cause of action the Plaintiffs allege that the Defendants negligently misrepresented to the Plaintiffs facts regarding the administration of the Trust. All four Plaintiffs admitted during their depositions that there were no facts to support the allegation.

#### Analysis

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Ehlers & Ehlers Architects v. Carbon County*, 805 P.2d 789, 791 (Utah App. 1991); Utah R. Civ. P. 56(c). The facts and evidence are viewed in a light most favorable to the nonmoving party. *America Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989).

The basis for the Defendants' Motion for Summary is that the Plaintiffs have provided no

evidence to support their allegations in their Complaint. Further, the Defendants argue that there is no obligation to provide accountings to the Plaintiffs under either the Trust or statute. The Defendants argue the Plaintiffs have provided no evidence the Defendant David Boren's management of the farm was in violation of the terms of the Trust. Finally, the Defendants argue that the Plaintiffs' complaint of commingling is not supported factually and is without merit according to law.

The Court agrees with the Defendants' argument. The Plaintiffs have not provided evidence to support their claims. The Plaintiffs do not even attempt to argue that there is evidence to support their claims of forgery, coercion and misrepresentation. As for accounting, the Defendant has provided an accounting to the Plaintiffs after they made their statutory request for the year 2012. The Defendant also provided accountings for all years back to 2008. However, the Trust Agreement does not require the Trustee to provide accountings to the Plaintiffs. According to the Trust Agreement paragraph 9: "The trustee 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." The Plaintiffs are not income beneficiaries. Consequently, under the terms of the trust, they are not even entitled to the accounting they have received.

Next, the Plaintiffs' claim that the Trustee failed to title property in the name of the Trust is directly contradicted by the exhibits attached to the Plaintiffs' opposition. The exhibits are title reports from the Daggett and Duchsene County recorder's offices showing property titled in the name of the Trust. Further, the bank account records attached to the Plaintiffs' opposition are titled in the name of the Trust. The Plaintiffs have furnished no evidence of equipment, property,

or money that belongs to the Trust which is not titled in the name of the Trust.

The Plaintiffs have offered no evidence or argument that the Defendant has commingled property with the Trust contrary to law or the terms of the Trust. The Defendant owns a percentage interest of farm land which is owned or shared with the Trust and the Defendant Sherron Boren. Undoubtedly, the Defendant has commingled his own assets, in livestock and land, with the Trust. However, there is no showing by the Plaintiffs the Defendant's actions are unlawful. The Trust provides for the Defendant's actions, and the authorization of the Defendant Sherron Boren, in allowing the farm to be operated the way has been. The pertinent statute does not disallow the Defendant's actions. Consequently, the Plaintiffs have failed to show any wrongdoing on the part of the Defendants in their operation of the farm.

Finally, there is no evidence offered to support the Plaintiffs' claim of bad faith concerning the management of the farm. The Joinder Agreement to the Trust Agreement allows the Defendant Sherron Lea Boren to make decisions concerning the operation of the farm, including paying a salary to a manager of the farm. There is no evidence to support the argument that the farm has been operated in contravention to Defendant Sherron Lea Boren's wishes, or that the salary paid to the Defendant David Boren for managing the Trust was not appropriate. The fact the farm had a tax loss, without more, does not support a claim of mismanagement. Ultimately, there are no facts to support the Plaintiffs' claims.

The Defendants' Motion for Summary Judgment is granted.

Dated this 4 day of September, 2015.

BY THE COURT:

A handwritten signature in cursive script, reading "Samuel Chiara", written over a horizontal line.

SAMUEL P. CHIARA, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 143000048 by the method and on the date specified.

EMAIL: CLARK B ALLRED vernal@abhlawfirm.com

EMAIL: JOEL D BERRETT jdblaw@ubtanet.com

EMAIL: RUSSELL T MONAHAN russ@cooklawfirm.com

09/08/2015

/s/ KELLY SNOW

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk



# ADDENDUM 2

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IN THE EIGHTH JUDICIAL DISTRICT COURT  
IN AND FOR DUCHESNE COUNTY, ROOSEVELT DEPARTMENT, STATE OF UTAH

---

Sharrol Anderton, Mary Blanchard, Terry  
Christensen and Duane Boren, Jr.,

Plaintiffs,

vs.

David L. Boren and Sherron L. Boren, as  
individuals and as Trustees of the Duane  
Boren Family Living Trust, as amended,

Defendants.

RULING AND ORDER

Case No. 143000048

Judge Samuel P. Chiara

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This matter is before the Court on the Defendants' Motion to Award Fees.

The Plaintiffs' Complaint contained a number of claims against Defendants alleging illegal and improper management of the Trust. After the close of discovery, the Defendants moved for summary judgment on all of the claims. By Ruling and Order dated September 8, 2015, the Court granted the Defendants' Motion for Summary Judgment, finding that there was no evidence to support the Plaintiffs' claims.

Here, the Defendants request that their attorney's fees and costs expended in this litigation be awarded pursuant to Utah Code Ann. §75-7-1004(1) and/or §78B-5-825(1).

Utah Code Ann. §75-7-1004(1) states:

In a judicial proceeding involving the administration of a trust, the court may, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the

subject of the controversy.

In determining whether to award costs and attorney's fees under the statute, the following factors are considered:

- (a) reasonableness of the parties' claims, contentions, or defenses;
- (b) unnecessarily prolonging litigation;
- (c) relative ability to bear the financial burden;
- (d) result obtained by the litigation and prevailing party concepts; and
- (e) whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in bringing or conduct of the litigation.

*Shurtleff v. United Effort Plan Trust*, 2012 UT 47, ¶23, 289 P.3d 408; (quoting *Atwood v. Atwood*, 25 P.3d 936 (Okla. Civ. App. 2001)).

The litigation was not unnecessarily prolonged, and there is no evidence before the Court on the Plaintiffs' relative ability to bear the financial burden of the litigation costs and attorney's fees. The Defendants were clearly the prevailing party in the matter. The Court dismissed all of the Plaintiffs' claims on summary judgment. In ruling on summary judgment, the Court specifically found no evidence to support the Plaintiffs' claims. Furthermore, the Court found that the Plaintiffs failed to reasonably investigate whether their claims were supported by evidence, even when they had the relevant accountings and discovery materials to review. The Plaintiffs admitted they neglected to review the Trust account statements, tax returns, title reports, etc., in order to ensure their claims were supported by facts. The Court will again rely on the findings made in the September 8, 2015, Ruling and Order, and find the Plaintiffs' claims and contentions were not reasonable. As a consequence, the Court will award the Defendants'

attorney's fees and costs expended in defending against the Plaintiffs' Complaint, pursuant to Utah Code Ann. §75-7-1004(1) .

The Court does not find that in addition, or in the alternative, the Defendants' attorney fees and costs can be awarded under Utah Code Ann. §78B-5-825(1). Utah Code Ann. §78B-5-825(1) states:

In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith . . . .

While the Defendants have likely shown the Plaintiffs' claims were without merit, they have not provided any evidence that the Plaintiffs' brought them in bad faith. Bad faith requires the Defendants show the Plaintiffs did not hold "an honest belief in the propriety of the activities in question." *Warner v. Warner*, 2014 UT App 16, §37, 319 P.3d 711 (quoting *Still Standing Stable, LLC v. Allen*, 2005 UT 46, § 12, 122 P.3d 556). The Defendants have offered no evidence of the Plaintiffs' subjective intent. Therefore, the Court does not find that the Plaintiffs brought the claims in bad faith.

The Defendants' Motion to Award Fees is granted.

Dated this 30 day of Nov, 2015.

BY THE COURT:



SAMUEL P. CHIARA, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 143000048 by the method and on the date specified.

EMAIL: CLARK B ALLRED vernal@abhlawfirm.com

EMAIL: JOEL D BERRETT jdblawn@ubtanet.com

EMAIL: RUSSELL T MONAHAN russ@cooklawfirm.com

Date: 11-30-2015

Rt Mullins

Deputy Court Clerk

# ADDENDUM 3



RUSSELL T. MONAHAN USB NO. 9016  
COOK & MONAHAN, LLC  
Attorneys for Plaintiffs  
323 South 600 East, Suite 200  
Salt Lake City, Utah 84102  
Telephone: (801) 595-8600  
Telefax: (801) 595-8614  
E-Mail: russell@cooklawfirm.com

**IN THE EIGHTH JUDICIAL DISTRICT COURT  
OF DUCHESNE COUNTY, STATE OF UTAH**

<p>SHARROL ANDERTON, MARY BLANCHARD, TERRY CHRISTENSEN AND DUANE BOREN, JR.,</p> <p>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>Defendants.</p>	<p><b>DECLARATION OF DUANE BOREN, JR.</b></p> <p>Civil No. 143000048</p> <p>Judge Samuel P. Chiara</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------

STATE OF UTAH                    )  
                                              : ss  
COUNTY OF SALT LAKE    )

DUANE BOREN, JR., being first duly sworn upon oath, deposes and states as follows:

1.       Affiant is the Plaintiff in the above matter. Affiant is over the age of 18 years, familiar with the contents of this Affidavit, and competent to testify as to the matters set forth herein. The contents of this Affidavit are set forth upon Affiant's own

personal knowledge except, specifically, those matters that are set forth "upon information and belief." Affiant will use the first person throughout this Affidavit for ease of reading.

2. My father, Duane Boren, Sr. died on December 27, 1992.

3. At the time of my father's death I had five siblings, Plaintiffs Sharrol Anderton, Mary Blanchard, Terry Christensen, Defendant David L. Boren and Lucky Boren.

4. My brother Lucky Boren died prior to these proceedings.

5. On February 15, 1993, my mother, Sherron L. Boren was appointed as the personal representative for Informal Probate proceedings, filed as Case No. 933800004 in the Eighth District Court, Duchene County, Utah.

6. Duane Boren, Sr. left a Pour-Over Will transferring the remainder of his residuary estate to the "Duane Boren Family Living Trust" (hereafter "Trust" and attached as Exhibit A), which Trust was created by Settlor, Duane Boren, Sr. on March 20, 1980.

7. A Joinder to the Trust was executed by Duane Boren, Sr. (hereafter "Joinder" attached as Exhibit B). Several handwritten strike-outs confuse the issue as to who is the actual Trustee of the Trust. The original Trust named Settlor's children, Sharrol Ann Anderton, Duane Boren, Jr., and Mary Ellen Blanchard as Co-Trustees. The name of Terry Lee Monks is added in handwriting, and the successor co-trustee paragraph is marked with a large "X". See Exhibit

8. On January 25, 1985, the Trust was amended to replace Co-Trustees with

Sherron L. Boren as Trustee. (First Amendment, Exhibit C). But later, a strike-out is handwritten in to replace Sharron L. Boren with David L. Boren as Trustee, further confusing the issue of who was actual Trustee.

9. On August 28, 1990 Duane Boren signed a Second Amendment to the Trust Agreement designating David Boren as successor trustee and changing the distribution of the assets. (Second Amendment, Exhibit D).

10. Although I question the validity of the Joinder and the First and Second Amendments to the Trust, nevertheless, upon the death of the Settlor in 1992, Defendant David Boren assumed the duties as "de facto trustee," primarily because during informal probate, acting Personal Representative, Defendant Sherron L. Boren, named Defendant David L. Boren, as Trustee, as authorized per paragraph 6.29 of the Trust.

11. Plaintiffs, as qualified beneficiaries, trusted that their brother, Defendant David L. Boren, would act as Trustee in accordance with his fiduciary duties to protect the Trust.

12. The Trust properties and asset interests were distributed to Defendant David L. Boren, as Trustee.

13. Defendant David L. Boren, was directed to deliver and distribute title and possession of Trust assets in the amount and manner set forth in the Schedule of Distribution.

14. The Trust provides that, if the Spouse survives, the Trustee shall divide the Trust assets into two (2) separate trusts, designated as the "Marital Deduction Trust" and "The Family Trust."

15. The Martial Deduction Trust had, as its initial corpus, a “fractional” share of all of the Trust assets. After dividing the Trust assets, the Trustee was to pay, to Settlor’s spouse, net income during the spouse’s lifetime, with discretion to apply principal for spouse’s benefit.

16. The Family Trust portion includes the principal of an undivided one-half (½) interest of real property, mineral interests and personal property.

17. In September of 2002, additional property was added to the Trust for the purpose of including certain real property and water rights which were omitted from probate.

18. As qualified beneficiaries under Utah Code 75-7-103, Plaintiffs, through their attorney, requested an accounting from Defendants, “to the fullest extent allowed by law, per Utah Code 75-7-811(2) and (3), copies of all trust documents and an accounting of the assets (including all acquisitions and transfers thereof), revenues, and expenses (including, but not limited to, compensation to trustees), from the date of the death of Duane Boren, Sr. in 1993 to present.” See Exhibit E.

19. It has taken approximately two years, for the Trustee to provide tax returns for the years 2008-14 and accounting. Plaintiffs 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.

20. After reviewing the information provided by the attorney for the Trustee, it is apparent that Defendant David L. Boren has used the assets of the Family Trust for his own benefit in violation of fiduciary duty to the remaining beneficiaries.

21. On October 4, 2011, Defendant David L. Boren, acting as Trustee, entered into a "Farm Agreement" assigning him as "Farmer entitled" to sole distributions.

Defendant David L. Boren paid himself multiple distributions for labor; \$1,200.00 in 2008, 2009, 2010, and 2011 to operate the farm. See Exhibit F and G.

22. The Family Trust owns half of the property which comprises of the Farm. Sherron Lea Williamson Boren Givens has a quarter percent interest and Defendant David L. Boren has a quarter percent interest. See Exhibit H.

23. Through my conversations with my mother and with Defendant David L. Boren I know that Defendant David L. Boren owns or did own substantial cattle which grazed on the Farm.

24. The Farm owns substantial Farm equipment which is used in the farming operation.

25. Despite the Farm owning its own equipment, Defendant David L. Boren leased farm equipment for the operation of the Farm. See Exhibit I.

26. Despite the Family Trust owning only a 50% interest in the Farm, the Family Trust has incurred 100% of the costs for the labor of Defendant David L. Boren and the lease of the Equipment. See Exhibits J.

27. Defendant David L. Boren has used the assets of the Family Trust to purchase other items for his personal use, including but not limited to; 4 wheelers, camp trailers, motorbikes and snowmobiles. Exhibit K.

28. I have reviewed the tax returns for the years 2008 through 2014.

29. The Family Trust receives substantial income from oil and gas royalties.

See the Family Trust Tax returns for 2008 through 2014. Exhibit L.

30. Prior to the commencement of this litigation, Defendant David L. Boren consistently operated the Farm at a substantial loss. Exhibit L.

31. The losses to the Family Trust were incurred by Defendant David L. Boren, because he was using the Family Trust to pay the expenses of the whole Farm while he reaped the individual financial benefit of the Farm.

32. It is my understanding that the Family Trust has no ownership interests in horses, yet the accounting provided by Defendant David L. Boren shows substantial expenditures for horses. Exhibit G. It is my understanding that Defendant David L. Boren does own several horses.

33. Because of the sloppy and incomplete bookkeeping by Defendant David L. Boren, Plaintiffs have hired the accounting firm of Armstrong and Duke to review the records provided by Defendant David L. Boren.

34. I believe that further instances of financial malfeasances will be uncovered once they have completed their review of the records.

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

DATED: June 29, 2015.

/s/ Duane Boren Jr.

DUANE BOREN, JR.

Plaintiff

*Signed by Attorney Russell T. Monahan*

*With permission by Duane Boren Jr.*



## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on all other e-filers in this case, and as identified below, a true and exact copy of the following described document, via the Court's electronic filing process. Any party not currently subscribed as an e-filer has been served by regular U.S. Mail on Monday, June 29, 2015.

DOCUMENT SERVED: **DECLARATION OF DUANE BOREN, JR.**

PERSONS SERVED: via Electronic Filing

Clark Allred  
Attorney for David L. Boren

Joel D. Berrett  
Attorney for Sherron L. Boren

/s/ Russell T. Monahan  
RUSSELL T. MONAHAN

# ADDENDUM 4

## CORRECTIONS

**Deposition of: Duane Boren, Jr.**

**Date Taken:** January 20, 2015

**Case No:** 143000048

**Case Name:** Sharrol Anderton, Mary Banchard, Terry Christensen, Duane Boren vs David & Sherron Boren

Page

Line

## Correction

Reason

**Signature**

Date 2-23-15

**Please read your deposition and indicate any corrections to be made by specifying the page and line number, the correction to be made, and the reason. Then sign the deposition before a notary public. Please do not make any marks on the original transcript with the exception of the deponent's certificate.**

1 IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY  
2 STATE OF UTAH, ROOSEVELT DEPARTMENT  
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4  
5 SHARROL ANDERTON, MARY  
6 BLANCHARD, TERRY CHRISTENSEN  
7 AND DUANE BOREN JR.  
8 Plaintiffs,  
9  
10 vs. Civil No. 143000048  
11 DEPOSITION OF:  
12 DUANE BOREN JUNIOR  
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15 DAVID L. BOREN and SHERRON L.  
16 BOREN, as individuals and as  
17 Trustees of the DUANE BOREN  
18 FAMILY LIVING Trust, as  
19 amended.  
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21 Defendants.  
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BE IT REMEMBERED that on Tuesday, January 21,

2015 the Deposition of DUANE BOREN JUNIOR was taken by  
Richard C. Tatton, a Certified Shorthand Reporter and  
Notary Public in and for the State of Utah at the Law  
Office of Clark B. Allred, 72 North 300 East 123-14,  
Roosevelt, Utah 84066.

1 A P P E R A N C E S  
2  
3 For the Plaintiffs: Mr. Russell T. Monahan  
4 Attorney at Law  
5 323 South 600 East, Suite 200  
6 Salt Lake City, Utah 84102  
7  
8 For the Defendant  
9 David L. Boren: Mr. Clark B. Allred  
10 Attorney at Law  
11 72 North 300 East 123-14  
12 Roosevelt, Utah 84066  
13  
14 For the Defendant  
15 Sherron L. Boren: Mr. Joel D. Berrett  
16 Attorney at Law  
17 P.O. Box 262  
18 Roosevelt, Utah 84066  
19  
20 Also Present: Ms. Sharrol Anderton  
21 Ms. Sherron L. Boren  
22 Mr. David L. Boren  
23 Ms. Terry Christensen  
24 Ms. Mary Ellen Boren Blanchard  
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P R O C E E D I N G S

DUANE BOREN JUNIOR

called as a witness by and on behalf of David Boren was  
sworn by the Court Reporter to tell the truth and nothing  
but the truth was examined and testified as follows:

EXAMINATION  
2

1 BY MR. ALLRED:  
2 Q. Mr. Boren would you state your full name please?  
3 A. Duane Boren Junior.  
4 Q. And your mailing address?  
5 A. 5128 West 6000 North.  
6 Q. Are you presently employed?  
7 A. No.  
8 Q. Retired, disabled?  
9 A. That is none of your business.  
10 MR. MONAHAN: You have to answer.  
11 THE WITNESS: Disabled, retired both.  
12 BY MR. ALLRED:  
13 Q. It is not real critical. The last time that I knew  
14 that you were with the Roosevelt City Police Department but  
15 I haven't seen you there recently.  
16 A. I had a heart attack then.  
17 MS. SHARROL ANDERTON: Mr. Monahan can we talk to  
18 you for a moment?  
19 MR. ALLRED: Lets take a break here for a moment.  
20 (WHEREUPON, a brief break was taken.)  
21 MR. ALLRED: Back on the record.  
22 BY MR. ALLRED:  
23 Q. Prior to when our dad died had you had any contact  
24 or discussion with him or your mother about what their  
25 estate plan was?

1 A. Not really.  
2 Q. Well, not really does that mean a little bit?  
3 A. I knew that they were having a Trust drew up.  
4 Q. Did they discuss with you the terms of the Trust?  
5 A. Pardon.  
6 Q. Did they discuss with you the terms of the Trust?  
7 A. No.  
8 Q. You just knew that they had something done?  
9 A. Yes.  
10 Q. After your father died the testimony of your  
11 sisters was that there was a meeting where the Will and  
12 Trust were read were you at that meeting?  
13 A. No.  
14 Q. Were you aware of that meeting?  
15 A. Probably.  
16 Q. Do you know why you didn't attend the meeting?  
17 A. I was probably working.  
18 Q. Have you ever seen a copy of your father's will?  
19 A. Yes.  
20 Q. When did you first see that?  
21 A. I got a copy from one of these girls.  
22 Q. Shortly after your dad died?  
23 A. Shortly?  
24 Q. When did you get a copy from one of your sisters?  
25 A. It has been within the last six years.

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1 Q. Okay, have you seen your dad's Trust and the  
2 amendments to the Trust?  
3 A. Yes.  
4 Q. And when did you first see that?  
5 A. At the same time.  
6 Q. Within the last six years?  
7 A. Yes.  
8 Q. When one of your sisters gave you a copy?  
9 A. Yes.  
10 Q. Had you ever asked to see a copy of the Will or  
11 Trust prior to getting a copy from one of your sisters?  
12 A. No.  
13 Q. Were you aware that your father's estate went to  
14 what is called probate back shortly after he died?  
15 A. No.  
16 Q. Did you have any discussion with any of your  
17 siblings about the meeting that was held shortly after your  
18 dad died?  
19 A. No.  
20 Q. Did you just not have any interest?  
21 A. I trusted the Trustee.  
22 Q. How did you know and I assume the Trustee that you  
23 trusted was Dave?  
24 A. No.  
25 Q. Who did you think was the Trustee?

1 A. Mom.  
2 Q. Why did you think that?  
3 A. Because it is stated in the Trust that she is the  
4 Trustee.  
5 Q. But you hadn't seen that until six years ago you  
6 said.  
7 A. No.  
8 Q. So for the fifteen years from your dad's death  
9 until you saw the Trust why did you think your mother was  
10 the Trustee?  
11 A. I just did.  
12 Q. Did you see any documents regarding your dad's  
13 probate?  
14 A. No.  
15 Q. Do you recall signing any document with the court  
16 saying that?  
17 A. Let me rephrase that. I was informed by Daniel  
18 Sam that here was a probate two years or so ago. That was  
19 the first knowledge that I had of there ever being a  
20 probate.  
21 Q. You don't recall getting copies of any documents?  
22 A. I didn't.  
23 Q. You didn't get any copies of the probate?  
24 A. No.  
25 Q. Did you sign anything waiving notices of the

1 probate?  
2 A. No.  
3 Q. When did you first realize that David was the  
4 Trustee of the Trust?  
5 A. When he came and told me that he was.  
6 Q. When was that?  
7 A. Right after dad died.  
8 Q. But you didn't believe him?  
9 A. No.  
10 Q. Tell me about when this meeting with David when  
11 he told you that he was a Trustee.  
12 A. It wasn't a meeting.  
13 Q. What happened?  
14 A. I can't recollect when some years ago exactly the  
15 wording or the date. He impressed me that he was the  
16 Trustee.  
17 Q. Was there a reason he was telling you that?  
18 A. Probably at the time.  
19 Q. You don't remember what it was?  
20 A. Yes, I do.  
21 Q. What was it?  
22 A. He was trying to get mom totally out of the place.  
23 Q. Tell me about that. How was he trying to get your  
24 mom out of the place?  
25 A. He was trying to get these amendments that will and

1 that rewritten removing mom from any of it.  
2 Q. Were there some documents that he presented to you?  
3 A. No, that is just what he said. He told me that he  
4 was trying to figure a way to get mom totally out of it.  
5 Q. When was this?  
6 A. What?  
7 Q. How long ago was it that this conversation took  
8 place?  
9 A. That was shortly after dad died.  
10 Q. Within a year?  
11 A. I can't tell you. It was within the first few  
12 years.  
13 Q. Okay. Was there anything else said other than that?  
14 A. Not really.  
15 Q. Was he asking you to assist him or why was he  
16 telling you that?  
17 A. He seemed to be trying to figure a way to  
18 accomplish that.  
19 Q. So was he asking you for your input?  
20 A. Presumably yes.  
21 Q. So what did you say?  
22 A. I told him that he wasn't the only kid that dad  
23 that he gave a damn about.  
24 Q. Anything else that you said?  
25 A. Not that I can recollect.

1 Q. Anything else that you can remember about that  
2 conversation?  
3 A. I remember that he was upset at Mary and Terry  
4 because they were trying to see the books or have an  
5 accounting or something of that concerning the Trust.  
6 Q. What did he tell you about that?  
7 A. He didn't tell me much about it. He just said that  
8 he was upset because Mary and Terry wanted to see the  
9 books. He didn't feel like that they had the right to.  
10 Q. Anything else he said to you?  
11 A. No.  
12 Q. Anything else that you said to him?  
13 A. Not that I can remember.  
14 Q. You didn't believe that he was the Trustee any way?  
15 A. No.  
16 Q. Have you been to any meeting with the family  
17 members about your dad's estate and his Trust?  
18 A. I discussed some stuff with my sisters.  
19 Q. When was the first time that you discussed with  
20 your sisters your dad's estate?  
21 A. Shortly before I went and got Daniel Sam to look  
22 into this.  
23 Q. That would have been in 2012 when he sent the first  
24 letter?  
25 A. Probably right before that.

1 Q. So was it 2012 that you first retained Daniel Sam?  
2 A. I think so.  
3 Q. So shortly before that you talked to your sisters?  
4 A. Yes.  
5 Q. By surely are we talking within months, a year?  
6 A. A year.  
7 Q. Who did you talk to?  
8 A. To Mary and Sharrol and Terry.  
9 Q. Were all four of your together?  
10 A. No.  
11 Q. You just talked to each one of them separate?  
12 A. I think I talked to Mary and Sharrol together.  
13 Terry was separate.  
14 Q. So what did you talk to Mary and Sharrol about?  
15 A. Just what they knew about the trust, what paperwork  
16 they had because I didn't have any. And to get copies of  
17 the Trust and the Will.  
18 Q. Did Mary and Sharrol have copies of the Trust and  
19 Will?  
20 A. Mary did and Sharrol did. I took Mary's copy. I  
21 don't think she has a copy any more.  
22 Q. Any other documents that they provided to you?  
23 A. Sharrol provided those land deeds that you sent was  
24 it April of last year.  
25 Q. Now the conversation that we are talking about you

1 said occurred about a year prior to when you retained  
2 Daniel Sam?  
3 A. Rephrase that.  
4 Q. The conversation that I understand that we are  
5 talking about you said occurred between you and Mary and  
6 Sharrol within a year of the time that you retained Daniel  
7 Sam in 2012?  
8 A. Now that was probably the total of it.  
9 Q. So the only documents you remember you gave him  
10 were the copies of the Trust documents and the Will?  
11 A. Yes.  
12 Q. Anything else that you talked about?  
13 A. No.  
14 Q. Were your sisters Sharrol and Mary concerned about  
15 the Trust?  
16 A. Yes.  
17 Q. What were their concerns?  
18 A. That it wasn't being handled right.  
19 Q. And what did they say wasn't being done right?  
20 A. There has never been an accounting.  
21 Q. So they said that there wasn't an accounting.  
22 Anything else that they felt wasn't right?  
23 A. David's treatment of mom.  
24 Q. What was David's treatment of mom?  
25 A. I was told that mom needed dentures and that she

1 had asked David for money for the dentures and he refused  
2 to give her money for the dentures.  
3 Q. Anything else that your sisters told you of their  
4 concerns?  
5 A. No, not that I know of.  
6 Q. Then you said that you talked to Terry after that?  
7 A. Yes.  
8 Q. And what did you discuss with Terry?  
9 A. Just how she felt about the Trust. If she felt like  
10 it was valid.  
11 Q. Did Terry indicate she had a copy of the Trust?  
12 A. No, I didn't ask her.  
13 Q. But you discussed whether she thought it was valid?  
14 A. Yes, I think so.  
15 Q. What caused you to think that it was not valid?  
16 A. Several things.  
17 Q. Okay, tell me what they are.  
18 A. That second amendment.  
19 Q. Okay, what is not valid about it?  
20 A. It is not signed.  
21 Q. What else did you think was not valid about the  
22 second amendment?  
23 A. Mom wasn't here at the time. How could that be  
24 drawn up and her have knowledge of it and agree to it when  
25 she was not here.



1 Q. So you don't think she was present when the second  
2 amendment was prepared?  
3 A. No, I don't.  
4 Q. What else did you think was not valid about the  
5 second amendment?  
6 A. That is pretty much it. I don't agree that if that  
7 second amendment is not valid then he is not the Trustee.  
8 Q. Anything else that you discussed about the second  
9 amendment with Terry?  
10 A. No.  
11 Q. Anything else that you discussed about the other  
12 documents, the other trust documents for the Will?  
13 A. I don't recall. I have had a lot of discussions  
14 about it and I couldn't tell you who I discussed what with.  
15 Q. Anything else you recall discussing with Terry?  
16 A. No.  
17 Q. When you talked to Mary and Sharrol had they  
18 expressed concerns about the second amendment?  
19 A. Not that I can recall.  
20 Q. When you talked to Terry and discussed the second  
21 amendment did it appear to you that she had read it and  
22 understood what it said?  
23 A. I don't know.  
24 Q. Was she able to converse with you about what the  
25 concerns were with the second amendment?

13

1 A. I really don't remember.  
2 Q. Any other conversations with your sisters before  
3 you retained Mr. Sam?  
4 A. No, not really.  
5 Q. Now is Mr. Sam representing just you or was he  
6 representing also your sisters?  
7 A. He was representing all of us.  
8 Q. From the beginning?  
9 A. From the beginning. Can I elaborate on that?  
10 Q. Sure.  
11 A. My sisters were scared of David. So their names  
12 weren't listed on that at my request to Daniel Sam. They  
13 were in fear of retaliation from David so I had myself as  
14 the sole person listed.  
15 Q. What made you think that your sisters were scared  
16 of David?  
17 A. They told me.  
18 Q. When you talked to him at the discussion that we  
19 just had or when did they tell you that they were scared of  
20 David?  
21 A. All along every time I talked to them even if we  
22 weren't discussing the Trust or anything else they were  
23 paranoid of David.  
24 Q. Well, remember that I had asked you about  
25 conversations that you had with your sisters about the

14

1 Trust. You indicated that the first one was about a year  
2 before you retained Daniel Sam so that would have been  
3 sometime in 2011.  
4 A. Yes.  
5 Q. We had gone through that conversation and you  
6 indicated that you had told me everything about it. What I  
7 am trying to find out is when did you have a conversation  
8 with your sisters when they told you that they were scared  
9 of David?  
10 A. Almost every time that I talked to them whether it  
11 was regarding the Trust or not.  
12 Q. Why were they scared of David?  
13 A. What?  
14 Q. Why were they scared of David?  
15 A. According to Mary, David pulled her hair and  
16 threw her down and Sharrol the same thing.  
17 Q. This was when they were adults?  
18 A. What?  
19 Q. Was this when they were adults?  
20 A. Yes.  
21 Q. Okay, anything else that they told you that they  
22 would be scared of David?  
23 A. That they were afraid and voiced their concerns  
24 that in trying to get this ended and pursuing this and  
25 going through the Trust and making sure it was done legally

15

1 and right that he would retaliate against them where he is  
2 working for the Sheriff's department.  
3 Q. How would he retaliate against them?  
4 A. I have no idea. I have tried to tell them that is  
5 not something that they need to worry about but they are  
6 still worried.  
7 Q. Have you ever had confrontations with any of your  
8 sisters?  
9 A. Have I had conversations with them?  
10 Q. Confrontations, disputes.  
11 A. Confrontations?  
12 Q. Confrontations, disputes with them?  
13 A. Not that I know of.  
14 Q. Never argued with any of your sisters?  
15 A. No, not really.  
16 Q. Have you ever had any disputes with David?  
17 A. Yes, I have.  
18 Q. Have you had any arguments with him?  
19 A. Yes.  
20 Q. Have you had any physical altercations with David?  
21 A. Yes.  
22 Q. How many?  
23 A. One.  
24 Q. When was that?  
25 A. That was when I was going through a divorce with

16



1 Erica, my wife. I had given her a Dodge Ram pickup to drive  
2 and she had brought it back and taken my personal pickup we  
3 had it as marital property but she had traded the Dodge  
4 truck for my truck.

5 I called David and told him that she had taken my  
6 truck and he told me that I needed to keep my mouth shut  
7 before I went to jail.

8 I went down there. He was down to Lucky's in his  
9 driveway and I went down there and got out. I can't  
10 tolerate his wife. He opened the door of the truck and I  
11 reached in to tell him to come on to where we could talk  
12 out of her presence. He hauled off and busted me and the  
13 fight was on and I got hauled to jail.

14 Q. And this was while Lucky was still alive?

15 A. Yes.

16 Q. Any other times that you have had a physical  
17 confrontation with any of your siblings?

18 A. Not that I know of.

19 Q. Did you get charged with any crime for that  
20 confrontation?

21 A. Disorderly conduct.

22 Q. And what was the result?

23 A. I was charged with disorderly conduct.

24 Q. What was the result of that charge were you found  
25 guilty, pled guilty, dismissed what happened to the charge?

1 A. I pled guilty to it.

2 Q. Have you ever talked to David about the Trust?

3 A. No.

4 Q. Ever talked to your mother about the Trust?

5 A. I have tried.

6 Q. When did you try and talk to her about the Trust?

7 A. For the last two years we have discussed or I have  
8 tried to talk to her about the Trust.

9 Q. So since 2012?

10 A. Yes.

11 Q. How about before then?

12 A. No.

13 Q. Since 2012 you have had Daniel Sam as your attorney  
14 representing you on the Trust correct?

15 A. Yes.

16 Q. Did he provide you with the documents that he had  
17 requested that we provided to him?

18 A. I am pretty certain that you provided those copies  
19 to him but he did not provide them to me. I finally went  
20 after I decided to go with Mr. Monahan and requested copies  
21 of everything that he had.

22 Q. So Mr. Sam didn't give you all of those accountings  
23 and all of those tax returns and title reports and  
24 inventories?

25 A. No.

1 Q. Did you see the letters that he would send to me in  
2 response to those documents?

3 A. I think he sent me one of your responses.

4 Q. Okay.

5 A. I don't remember which one it was.

6 Q. So your discussion with your mother would have been  
7 in the last two years?

8 A. Yes.

9 Q. And that was after you had an attorney?

10 A. Yes.

11 Q. So that is why you are being represented by an  
12 attorney?

13 A. That is after I was represented by an attorney?

14 Q. Correct.

15 A. Yes.

16 Q. Look at Deposition Exhibit No. 1 on top there that  
17 is in front of you. (Indicating)

18 A. Okay.

19 Q. I take it that you did not see that since you  
20 didn't see any probate documents and you had not seen that  
21 when the probate was going on?

22 A. (No answer)

23 Q. Well, let me just ask. Did you see that back in  
24 1993 Deposition Exhibit No. 1?

25 A. No.

1 Q. Have you seen it since this lawsuit has been filed?

2 A. Actually no. I probably was furnished a copy of it  
3 but I didn't go through it.

4 Q. Okay, they why don't you look at Deposition Exhibit  
5 No. 6.

6 A. Okay.

7 Q. Did Daniel Sam provide a copy of that to you?

8 A. Honestly I couldn't tell you if he did or he  
9 didn't.

10 Q. Well, if Daniel Sam sent you stuff did you look at  
11 it or just put it in a file?

12 A. I just put it in the file.

13 Q. A round one that the garbage went out with?

14 A. No, most of it I sent to Mr. Monahan.

15 Q. So you may have gotten it from Mr. Sam but hadn't  
16 looked at it? Your testimony is that you may have  
17 gotten it from Mr. Sam but you don't remember?

18 A. That I may have what?

19 Q. That you may have received this from Mr. Sam?

20 A. I may have yes. If you sent it to him he probably  
21 had it in those files that I got copies of.

22 Q. Have you looked through that Deposition Exhibit  
23 No. 6?

24 A. No, I have not.

25 Q. So you don't know if there are things in the Trust

1 that you think are missing or not?  
 2 A. I know that there is a lot of farm equipment that  
 3 is missing. I wonder if it is valid for him to set his self  
 4 up with funds from the Trust. I wonder if mom has control  
 5 of her assets or who has control of those. None of that  
 6 information has been provided in the last two years.  
 7 Q. You just told me that you haven't looked at  
 8 anything that Mr. Sam or your present counsel has given  
 9 you?  
 10 A. When I went and visited with him a few times and we  
 11 went over a few subjects and one of them was the accounting  
 12 which I don't consider to be a valid accounting and he did  
 13 not either.  
 14 Q. Mr. Sam didn't?  
 15 A. No.  
 16 Q. But you have indicated that you have not read the  
 17 inventory?  
 18 A. No.  
 19 Q. Did you read the tax returns?  
 20 A. Some of them yes.  
 21 Q. Did you read the accountings or just go through it  
 22 with Mr. Sam?  
 23 A. No, I didn't go through them with Mr. Sam. When I  
 24 got copies from him before I sent them to Mr. Monahan I  
 25 looked through them or skimmed through them.

1 Q. What you have done is basically just skimmed over  
 2 the documents that you had requested?  
 3 A. Yes.  
 4 Q. But your objection is that you haven't been  
 5 provided information that you think you need?  
 6 A. No, I haven't.  
 7 Q. No, you don't?  
 8 A. No, I haven't been provided with the information  
 9 that I was wanting.  
 10 Q. But you only skimmed over what you have got?  
 11 A. Yes.  
 12 Q. Your complaint alleges tat David has stolen and  
 13 embezzled Trust assets. What facts support that claim?  
 14 A. The lack of facts.  
 15 Q. Do you have any facts showing that David has stolen  
 16 or embezzled Trust assets?  
 17 A. No.  
 18 Q. You also allege that David has distributed Trust  
 19 assets to himself. What Trust assets has David distributed  
 20 to himself?  
 21 A. Water rights, the brand, cows, hay, equipment.  
 22 Q. Anything else?  
 23 A. Probably but I can't think of them.  
 24 Q. What water rights has he distributed to himself?  
 25 A. All of them according to his statement from the

1 director at the time.  
 2 Q. So what you are relying on is the statement from  
 3 Kim Anderton which is Deposition Exhibit No. 13?  
 4 A. Yes.  
 5 Q. Any other facts that you have other than Deposition  
 6 Exhibit No. 13?  
 7 A. Dan Sam requested that I go to Dry Gulch and  
 8 request a copy of whose name the water rights were in at  
 9 this time. They refused saying that it was a privacy act or  
 10 something that they couldn't furnish that information.  
 11 Q. Anything else?  
 12 A. No.  
 13 Q. You say that David disbursed the brand from the  
 14 Trust?  
 15 A. It is in his name.  
 16 Q. Has it ever been in the name of the Trust?  
 17 A. What.  
 18 Q. Do you know if it has ever been in the name of the  
 19 Trust?  
 20 A. It is in dad's name.  
 21 Q. That was my question. Was it ever in the name of  
 22 the Trust?  
 23 A. I have no idea.  
 24 Q. Have you looked at the inventory of the probate  
 25 that said what went into the Trust?

1 A. No, I haven't.  
 2 Q. What about cows? Why do you say that David  
 3 disbursed cows to him?  
 4 A. He is claiming in some of that stuff that he  
 5 furnished to Daniel Sam that he owns twenty head of cows.  
 6 Q. Do you know if any cattle were ever in the name  
 7 of the Trust?  
 8 A. Supposedly all of them.  
 9 Q. What do you base that on?  
 10 A. What?  
 11 Q. What do you base that on?  
 12 A. Just that is what I figured that dad wanted. Why  
 13 would he not?  
 14 Q. The probate inventory does it provide for any  
 15 livestock going into the Trust?  
 16 A. I don't know.  
 17 Q. What hay has he taken from the Trust?  
 18 A. He is feeding twenty head of cows of the Trust  
 19 ground then that is to his benefit, isn't it.  
 20 Q. Your claim is that he has disbursed hay to himself  
 21 because he has fed it to cattle?  
 22 A. Yes.  
 23 Q. Anything else?  
 24 A. Tell me what the questions was again, the original  
 25 question.

1 Q. Well, you have said that he has disbursed Trust hay  
2 to himself. I asked you what and you said that he had fed  
3 it to cattle. I am just asking you if there is any other  
4 facts other than that to support your claim that he  
5 disbursed hay to himself?  
6 A. It is the matter of a quonset hut type workshop  
7 that was on Trust ground that he picked up and moved over  
8 on his ground.  
9 Q. Anything else on the hay other than he has fed it  
10 to cattle?  
11 A. Is there anything else on the hay?  
12 Q. Yes, any other facts that you have that he  
13 disbursed hay to himself?  
14 A. No.  
15 Q. What equipment do you claim that he has disbursed  
16 to himself?  
17 A. There was a Peterbilt truck, aluminum bull wagon, a  
18 low boy trailer, dad's pickup.  
19 Q. Anything else?  
20 A. Not that I can think of right now.  
21 Q. What facts to you have that David disbursed those  
22 to himself?  
23 A. They are gone.  
24 Q. They are gone. How does that show that they went to  
25 him if they are gone?

25

1 A. How does he show that it didn't.  
2 Q. You are answering the questions and I am asking the  
3 questions. How do you surmise that those went to David just  
4 if they are gone?  
5 A. (No answer)  
6 Q. This Peterbilt would be some forty years old  
7 wouldn't it?  
8 A. I couldn't tell you.  
9 Q. Forty year old Peterbilts generally are worn out  
10 and gone?  
11 A. This one we were using to haul cattle to the  
12 mountain and back with so it was sufficient for that.  
13 Q. So any facts other than it is gone that you think  
14 those items of equipment went to David?  
15 A. Yes.  
16 Q. What?  
17 A. What?  
18 Q. What are the facts?  
19 A. Lack of facts.  
20 Q. I am asking what facts you have. I am asking did  
21 you have any other facts other than those items that are  
22 gone?  
23 A. No.  
24 Q. And ten you say the quonset hut has been moved?  
25 A. Yes.

26

1 Q. How does that show that is David's and not still in  
2 the Trust if it was ever in the Trust?  
3 A. How can you say that he was never in the Trust?  
4 Q. You don't know what is in the Trust because you  
5 never read the inventory.  
6 A. No, but I know what was there when dad died.  
7 Q. So how does the quonset hut being moved from one  
8 parcel to another mean it belongs or David has disbursed it  
9 to himself?  
10 A. If you take something and put it in your garage and  
11 you are the only one that has access to it.  
12 Q. Any other facts?  
13 A. No.  
14 Q. And you claim that David has forged documents. What  
15 documents has he forged?  
16 A. I feel like he has forged his name I guess you  
17 could call that fraud on the Trust.  
18 Q. On one of the Trust documents?  
19 A. Yes.  
20 Q. What Trust documents has he forged his name on?  
21 A. He has crossed mom's name out and wrote his in.  
22 Q. Anything else that you claim that he has forged?  
23 A. No, I can't think of anything right now.  
24 Q. Then you claim that he has coerced your mother to  
25 sign documents. What documents has he coerced your mother

27

1 to sign?  
2 A. I know in discussing stuff with mom she will tell  
3 me one thing one time and something else the next. That she  
4 hasn't signed any documents. My concern is that is she in  
5 control of her assets and her funds or is David. We have  
6 not been provided any facts, any accounting to that. I am  
7 concerned about mom. That is probably the biggest share of  
8 what this is all about because mom needs to be in control  
9 of her assets and being able to take care of herself  
10 without having to ask David for anything.  
11 Mom owns fifty percent according to everything that  
12 you said yesterday. She can do whatever she wants with her  
13 fifty percent. If he has coerced and it winds up that stuff  
14 has been signed over to him that could be classified as  
15 elderly abuse. Mom is over sixty-five years old. She is  
16 heavily on pain medication. She is heavily medicated and  
17 has had a lot of health problems. She doesn't need to deal  
18 with having to rely when she already having to rely on  
19 David to support her.  
20 The Trust according to what I read in the Trust, the  
21 Trust stipulates that it is to take care of her if she  
22 needs it.  
23 Q. Back to my question. What documents has David  
24 coerced your mother to sign?  
25 A. I don't have any.

28



1 Q. Do you agree that your mother is entitled to do  
2 whatever she wants to do with her half of the property?  
3 A. I agree.  
4 Q. But you don't think for the past twenty plus years  
5 that she has done what she wants to do with her property?  
6 A. I don't feel like she has no.  
7 Q. You think for the past twenty years she doesn't  
8 know what she has been doing?  
9 A. What?  
10 Q. Do you think for the past twenty years she doesn't  
11 know what she has been doing?  
12 A. No, that is why I think she has been coerced.  
13 Q. You don't think that your mother is competent?  
14 A. Mom has told me herself that she has no idea of  
15 what she has signed or what she hasn't signed. That she  
16 didn't pay any attention to the document.  
17 One thing is your responsibility as an attorney to  
18 make sure that she does understand all that stuff. Mom is  
19 the one that told me that she didn't.  
20 Q. Do you think that maybe she told that just to get  
21 you off her back?  
22 A. What?  
23 Q. Do you think she told you that just to get you off  
24 her back?  
25 A. I wasn't on her back. I was discussing it with her.

1 Q. It also alleges that David has taken an  
2 unauthorized salary. What unauthorized salary has he taken?  
3 A. Who authorized it?  
4 Q. Now you answer my question. You and your sisters  
5 want to answer everything with a question. The process is  
6 that you have sat here for three depositions yesterday so I  
7 know that you know the process.  
8 I ask the question and you answer it. So the question  
9 is what facts do you have that David took an unauthorized  
10 salary?  
11 A. The fact is that he is taking one.  
12 Q. You don't think that he is entitled to a salary for  
13 managing the Trust assets?  
14 A. It would depend on who decided the salary.  
15 Q. Anything else that you have in your position that  
16 he took an unauthorized salary?  
17 A. You are talking way too fast Clark.  
18 Q. Any other facts supporting your claim that he took  
19 an unauthorized salary?  
20 A. No.  
21 Q. Then you allege that he has paid for equipment out  
22 of the Trust property. What equipment has he paid for out  
23 of Trust property?  
24 A. Some of that verification or whatever you sent to  
25 Daniel Sam states that he has drawn up a Farm Agreement and

1 the Trust is to pay a certain amount of money to lease that  
2 equipment.  
3 Q. Anything else?  
4 A. No.  
5 Q. Then you claim that he has caused a reduction and  
6 the word here is diminution of Trust assets. What has he  
7 done to reduce the value of Trust assets?  
8 A. I feel like to do what? To reduce them?  
9 Q. Yes.  
10 A. I don't think I follow you on that one.  
11 Q. Do you have any facts showing that David did  
12 something that would cause a reduction in the value of  
13 Trust assets?  
14 A. No, I don't.  
15 Q. Then you claim that the accountings are untruthful  
16 and inaccurate.  
17 A. Yes.  
18 Q. But you earlier just testified that you just  
19 skimmed over those accountings? So is it your position that  
20 they are inaccurate and untruthful based on that. You also  
21 earlier said Mr. Sam told you he didn't think that they  
22 were accurate?  
23 A. The copies of what you sent or that he sent them or  
24 who sent them from Zion's Bank have the date and the amount  
25 not what they are for. In my opinion that is not

1 accounting.  
2 Q. Are you through?  
3 A. Yes, I am through.  
4 Q. So you are concerned about the checks from Zion's  
5 Bank?  
6 A. I am concerned about an accounting from the day dad  
7 died until now.  
8 Q. So is your position similar to that of your  
9 sisters. That is that the accountings are inaccurate and  
10 untruthful because they don't start from 1993 and come all  
11 the way forward?  
12 A. That and they are incomplete.  
13 Q. But you had never asked for an accounting prior to  
14 the summer of 2012 had you?  
15 A. No, I hadn't.  
16 Q. How do you claim that the accountings are  
17 incomplete?  
18 A. They are inadequate, totally inadequate.  
19 Q. Well, those are opinions. Tell me what facts or  
20 what you say is inadequate about them?  
21 A. I went to court with a District Court Judge David  
22 Sam and I provided my tax returns as proof of an accounting  
23 and he stated and rejected it stating that they were not a  
24 valid accounting.  
25 Q. Was that in some divorce action?

1 A. Pardon.  
 2 Q. Was that in some divorce action that you were in?  
 3 A. Yes.  
 4 Q. Anything else that supports your position that the  
 5 accountings are not complete?  
 6 A. There is nothing to them.  
 7 Q. Anything else?  
 8 A. No.  
 9 Q. In fact all you have done is skim over then haven't  
 10 you?  
 11 A. Yes, that is why I have Mr. Monahan.  
 12 Q. Also you claim that the Trustee failed to provide  
 13 receipts. Do you know if Mr. Sam ever asked for receipts?  
 14 A. Yes, and I couldn't tell you for sure but I think  
 15 he specifically did because he was aggravated that and  
 16 stated that maybe he needed to get to the first grade level  
 17 with you to get you to understand what he wanted.  
 18 Q. Do you have any letter from Mr. Sam asking for  
 19 receipts?  
 20 A. Pardon.  
 21 Q. Do you have a copy of any letter from Mr. Sam  
 22 asking for receipts?  
 23 A. I think there is some copies in the stuff I sent to  
 24 him.  
 25 Q. You have seen the letters yesterday where or two

1 letters where I offered to make not only available to Mr.  
 2 Sam but to any family member all the back-up documentation  
 3 to the accountings?  
 4 A. We are not Trustees. We are not accountable for all  
 5 that stuff. We are not and I don't know how to say it but  
 6 we are not responsible to provide that stuff or to go  
 7 through that stuff.  
 8 Q. Did anybody ask you to provide any of that?  
 9 A. You are asking us to come in and dig through it.  
 10 Q. Well, you are complaining in your complaint that  
 11 you didn't get any receipts. What I am asking is did you  
 12 not in fact receive two letters saying that here they are  
 13 and nobody made any effort to come and look.  
 14 A. Maybe Daniel Sam didn't.  
 15 Q. I can tell you that he didn't.  
 16 A. Okay.  
 17 Q. Whatever Mr. Sam wanted he was provided wasn't he?  
 18 A. I have no idea.  
 19 Q. What else do you claim that David has done or he  
 20 has failed to administer the Trust?  
 21 A. Well, he has plowed two hay fields up that hasn't  
 22 been plowed for two years now. He plowed the other one last  
 23 year. To the best of my knowledge at this point and time  
 24 the cows have had no feed so far this winter.  
 25 He did along this fall replant one of those hay fields

1 and let it get up high enough that the cows could go on it  
 2 and expecting spring wheat.  
 3 We got quite a bit of rain and those cows are pulling  
 4 the spring wheat. If you are expecting spring wheat it has  
 5 to come up from the root and they will pull that root right  
 6 out of the ground when they graze over the top of it and  
 7 you are not going to get a crop next spring. So next summer  
 8 those two hay fields are going to be non-productive.  
 9 Q. Anything else?  
 10 A. Yes, and I had it just a second ago. The other  
 11 thing is that there is twenty head of heifers that is  
 12 running the country around my house with a little bull in  
 13 them, first calf heifers.  
 14 I know that you are probably not a cattleman but you  
 15 don't have a bull in with fresh calf heifers this time of  
 16 year because you are going to have some late, late calves  
 17 next year going into the wintertime.  
 18 I don't know if they are his personal cows or the  
 19 Trust cows.  
 20 Q. Anything else?  
 21 A. No.  
 22 Q. And you allege that he failed to keep records. Any  
 23 other facts other than what we talked about that you  
 24 thought there ought to be records from 1993 to present?  
 25 A. No.

1 Q. And you allege that he has failed to keep you  
 2 informed. Have you ever asked until you got Daniel Sam for  
 3 any information about the Trust?  
 4 A. I am not required to ask.  
 5  
 6 Q. So the answer is no that you have not asked?  
 7 A. No.  
 8 Q. Then there is an allegation that he has commingled  
 9 property. What has he commingled?  
 10 A. I thought that we went through that a few minutes  
 11 ago.  
 12 Q. So everything that you have got on commingling we  
 13 have talked about?  
 14 A. Yes.  
 15 Q. Then you claim that he has benefitted some  
 16 beneficiaries to the detriment of others. Who had he  
 17 benefitted to the detriment of the other family members?  
 18 A. Now what? I didn't understand it.  
 19 Q. Now you claim that he has benefitted certain  
 20 beneficiaries of the Trust to the detriment of other  
 21 beneficiaries. Who has he benefitted to the detriment of  
 22 other beneficiaries?  
 23 A. I know mom gave a tractor or David gave a tractor  
 24 one of them to Meitra, Lucky's widow.  
 25 Q. Whose widow?  
 A. Lucky's widow.

1 Q. So I didn't follow you. Who was the tractor given  
2 to?  
3 A. Lucky's widow.  
4 Q. Meitra?  
5 A. Yes.  
6 Q. Anything else?  
7 A. No.  
8 Q. Now earlier one of your sisters testified that she  
9 got twenty acres does that concern you?  
10 A. No, that was before the Trust was even made.  
11 Q. No, she testified it happened after the Trust was  
12 set up. Were you aware of that?  
13 A. No.  
14 Q. Were you aware of anything else other family  
15 members received from the Trust?  
16 A. I don't think that anybody has received anything  
17 from the Trust. Maybe some water which dad was okay with to  
18 water our lawns and our gardens or some hay. Other than  
19 that I am not aware of anything.  
20 Q. Have you received any property from the Trust?  
21 A. No.  
22 Q. Has the Trust transferred property to somebody else  
23 to get you out of a bind?  
24 A. Pardon.  
25 Q. Did the Trust transfer some real estate to another

1 party?  
2 A. I was in no bind on any of it.  
3 Q. Did you ask the Trust to do that to help you out?  
4 A. I did and they did.  
5 Q. When was that?  
6 A. A year ago I think. When dad gave me my ten acres  
7 for a wedding present him and I took it from the northwest  
8 boundary south ten acres.  
9 I wound up losing the house in the divorce. This  
10 Jensen evidently picked it up from the bank the six acres.  
11 To the best of my knowledge, six years was all that was  
12 tied up with the house. I left four acres in the back.  
13 These kids moved in there and drilled a well, build a shed  
14 and got electricity in there and didn't have a deed to that  
15 ground.  
16 According to these guys I had to have a deed showing  
17 that it as my ground. To avoid an issue with anybody I just  
18 had them deed the two point seven or two point six or  
19 whatever it was, acres to me and I deeded it to those kids  
20 or sold it to those kids.  
21 Q. Did your sisters know about that?  
22 A. Yes.  
23 Q. Did you talk to them about it?  
24 A. I did.  
25 Q. Anything else that you have received from the Trust

1 since your dad's death?  
2 A. No.  
3 Q. Anything gifted to you prior to your dad's death?  
4 A. Yes.  
5 Q. What?  
6 A. Forty acres of ground.  
7 Q. Did that include and just a few minutes ago you  
8 said that you got ten acres when you got married. Was that  
9 part of the forty or did you get ten acres plus this?  
10 A. It was part of that yes.  
11 Q. The ten acres was part of the forty?  
12 A. Yes, ten acres as given to me when I got married as  
13 a wedding gift. Then I was gifted thirty more acres.  
14 Q. How do you claim that David has not acted as a  
15 prudent investor of Trust assets?  
16 A. I don't feel like he has.  
17 Q. What facts support that?  
18 A. None.  
19 Q. Just your opinion?  
20 A. My opinion.  
21 Q. What misrepresentations has David made to you?  
22 A. Not me personally but I know that he has  
23 represented to some of the deputy sheriffs over in Duchesne  
24 County that the cow herd belongs to him. The mountain  
25 ground belongs to him. This ground up here belongs to him.

1 Q. When is the last time that you even talked to  
2 David?  
3 A. I couldn't tell you.  
4 Q. Was it back when you had the fight prior to 2002?  
5 A. You can say that yes.  
6 Q. What deputies do you claim that he has told these  
7 things to?  
8 A. Travis Tucker.  
9 Q. Who else?  
10 A. J.C. Hansen I believe. Jared Drury. That is it.  
11 Q. But to you personally he has made no  
12 misrepresentations then?  
13 A. Well, yes he has.  
14 Q. And you haven't talked since 2002?  
15 A. What.  
16 Q. You say that you haven't talked to him since 2002  
17 so when did he make a misrepresentation to you?  
18 A. He didn't.  
19 Q. Why don't you look at Deposition Exhibit No. 10  
20 first?  
21 A. Okay.  
22 Q. Have you ever seen that before?  
23 A. Yes, I think I have.  
24 Q. When did you first see it?  
25 A. I think I have seen that stuff that Daniel Sam got.



1 Q. Do you know who prepared Deposition Exhibit No. 10?  
 2 A. I don't.  
 3 Q. Look at Deposition Exhibit No. 11.  
 4 A. Okay.  
 5 Q. Have you ever seen Deposition Exhibit No. 11  
 6 before?  
 7 A. I don't think so. I could have but I don't recall  
 8 it.  
 9 Q. It is nothing that you have prepared?  
 10 A. What?  
 11 Q. You didn't prepare it?  
 12 A. No.  
 13 Q. Other than what we have just discussed here this  
 14 morning in your deposition is there anything else you claim  
 15 that David has done inappropriate as Trustee of the Duane  
 16 Boren Trust?  
 17 A. No.  
 18 Q. The second amendment to the Trust awards to the  
 19 four of you what is called waste ground. Have you ever had  
 20 any discussion with your sisters about what is the waste  
 21 ground?  
 22 A. No, I don't remember discussing it no.  
 23 Q. Earlier there was testimony from other witnesses  
 24 that there was a meeting where there was a map and people  
 25 went over what was the waste ground and who was to get

1 what. Were you involved in that meeting?  
 2 A. I don't think so.  
 3 Q. What do you think the waste ground is?  
 4 A. That would be hard to determine.  
 5 Q. What do you think it is?  
 6 A. Un-irrigated ground.  
 7 Q. Okay. Do you claim that you are entitled to  
 8 anything from the Trust from the time that your dad died  
 9 until now?  
 10 A. Supposedly yes.  
 11 Q. What?  
 12 A. One sixth share of that.  
 13 Q. Pardon?  
 14 A. One sixth share of that and I think that is what  
 15 it states in there.  
 16 Q. So you think as you sit here today that you are  
 17 entitled to one sixth share right now?  
 18 A. No, I don't. That is to take care of mom. I feel  
 19 like the Trust has been to take care of mom. Mom is the  
 20 one that counts here, not David, not me, not my sisters,  
 21 mom was dad's main concern.  
 22 Q. That is why you sued her?  
 23 A. Pardon.  
 24 Q. That is why you sued your mother?  
 25 A. Yes, it is.

1 Q. Okay, so back to my question from the day that your  
 2 dad died until the day your mother dies do you claim that  
 3 you are entitled to anything from the Trust?  
 4 A. No.  
 5 Q. After your mother dies you think you should get one  
 6 sixth?  
 7 A. Yes.  
 8 Q. Regardless of what the document said?  
 9 A. What document?  
 10 Q. The Trust, the Will, the amendments to the Will?  
 11 A. I don't think that they say counter to that.  
 12 Q. You think they provide that you get a sixth?  
 13 A. Yes.  
 14 Q. Do you agree that your mother can do what she wants  
 15 with her half?  
 16 A. I totally agree.  
 17 Q. You don't claim that you are entitled to a sixth of  
 18 her interest unless she decides to give it to you?  
 19 A. I could not care less what mom does with her part  
 20 of it.  
 21 Q. She could just give it to a charity or anybody?  
 22 A. Absolutely.  
 23 Q. And you have no problem with that?  
 24 A. No.  
 25 Q. And you agree that she is competent to do that?

1 A. Yes, I do. I think that mom is competent to take  
 2 care of her own affairs as long as he has those assets and  
 3 stuff to do it with.  
 4 Q. Well, lets take a short break and let me visit with  
 5 my client for a second and then we will come back.  
 6 MR. MONAHAN: That is fine.  
 7 MR. BERRETT: Okay.  
 8 (WHEREUPON, a brief break was taken.)  
 9 MR. ALLRED: Back on the record. I have nothing  
 10 further at this time.  
 11 MR. MONAHAN: I have nothing.  
 12 EXAMINATION  
 13 BY MR. BERRETT:  
 14 Q. If you can't hear me let me know.  
 15 A. If I can tie your face into what you are saying  
 16 but if you duck I can't understand it.  
 17 Q. Well, I will try and speak up.  
 18 A. Fine and speak slower.  
 19 Q. I represent your mother in this lawsuit.  
 20 A. I understand that.  
 21 Q. How old are you now?  
 22 A. Sixty.  
 23 Q. Are you married now?  
 24 A. Yes.  
 25 Q. And your house I guess is on the property that you



1 received before from your father or the Trust is that  
2 correct?  
3 A. Yes.  
4 Q. And you say that you have had a heart attack?  
5 A. Yes, I have had a couple.  
6 Q. How long ago?  
7 A. 2012 I had bypass surgery. It was last spring I had  
8 another one and I had stints put in.  
9 Q. How are you doing now?  
10 A. Good.  
11 Q. I asked your sisters questions about why your  
12 mother was listed as a defendant in this case.  
13 A. Yes.  
14 Q. Are you aware of any good reason why she was listed  
15 as a defendant?  
16 A. Yes, I think she should be the Trustee. From what I  
17 understand and I am just going off that as far as that  
18 amendment number two or whatever it is that is not a valid  
19 amendment.  
20 Q. Was this marked as an exhibit, the Joinder  
21 Agreement?  
22 MR. ALLRED: I don't think so.  
23 BY MR. BERRETT:  
24 Q. (WHEREUPON, Deposition Exhibit No. 15 was marked by  
25 the Court Reporter for identification.) I am going to hand

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1 to you what has been marked Deposition Exhibit No. 15  
2 entitled Joinder Agreement.  
3 A. Okay.  
4 MR. MONAHAN: Can I review it first?  
5 MR. BERRETT: Sure. I am going to have him look at  
6 paragraph four there on the first page.  
7 MR. MONAHAN: Okay.  
8 BY MR. BERRETT:  
9 Q. I am going to hand to you what has been marked as  
10 Deposition Exhibit No. 15 which is entitled a Joinder  
11 Agreement.  
12 A. Okay.  
13 Q. Have you ever seen that before?  
14 A. I think so.  
15 Q. Would you read paragraph four and you don't have to  
16 read it out loud. Just read through it.  
17 A. (Witness doing as requested.) Okay.  
18 Q. I am going to represent to you that this was signed  
19 at the same time as the Trust of your dad's was.  
20 A. Okay.  
21 Q. And does it say that the Trustees are Sharrol,  
22 Junior and Mary?  
23 A. I think that it des.  
24 Q. And someone has written in and Terry Lee Honks of  
25 Hyton, Utah do you see that there?

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1 A. Yes, I do.  
2 Q. Do you know whose handwriting that is?  
3 A. I don't.  
4 Q. Your mother is not listed in that is she as a  
5 Trustee?  
6 A. No.  
7 Q. (WHEREUPON, Deposition Exhibit No. 16 was marked by  
8 the Court Reporter for identification.) Let me show you  
9 what we have just had marked as Deposition Exhibit No. 16  
10 which is the Master Trust Agreement and just look at 2.2  
11 there.  
12 MR. MONAHAN: Can I see that also?  
13 MR. BERRETT: Yes.  
14 BY MR. BERRETT:  
15 Q. I am going to hand you this Deposition Exhibit No.  
16 16 which is entitled the Master Trust Agreement and would  
17 you read to yourself paragraph 2.2 on the front page  
18 entitled Trustee.  
19 A. (Witness doing as requested)  
20 Q. There is just one sentence there that I marked.  
21 A. Just the first sentence.  
22 Q. Okay, and doesn't it say that the Trustee in this  
23 document means that the individuals named as Trustee in the  
24 Joinder Agreement?  
25 A. I don't see anybody listed there.

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1 Q. Well, there isn't but doesn't it say the Trustees  
2 will be those that are named in the Joinder Agreement?  
3 A. That is what it says.  
4 Q. And that is the Joinder Agreement right there that  
5 names three of the children and then there is a handwritten  
6 notation?  
7 A. Okay.  
8 Q. (WHEREUPON, Deposition Exhibit No. 17 was marked by  
9 the Court Reporter for identification.) I am going to hand  
10 to you what has been marked as Deposition Exhibit No. 17  
11 which is entitled Amendment to the Duane Boren Family  
12 Living Trust. I am going to hand that to you. Have you seen  
13 that document before?  
14 A. I think that I have yes.  
15 Q. And is it true and excuse me for a minute.  
16 Paragraph four on the first page names your mother as the  
17 Trustee.  
18 A. That is what it looks like to me.  
19 Q. And someone has scratched out your mother's name  
20 and written it looks like David's name there. Do you  
21 recognize the handwriting?  
22 A. I don't.  
23 Q. So you don't know who did that?  
24 A. I don't.  
25 Q. And this apparently was prepared January 5, 1985

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1 and it is signed by your parents on page two is that  
 2 correct?  
 3 A. Yes.  
 4 Q. Then I am going to hand to you and this hasn't been  
 5 marked but in fact this Exhibit No. 2 the second amendment  
 6 to the Duane Boren Family Living Trust. Have you seen that  
 7 document?  
 8 A. Just have I seen it?  
 9 Q. Yes.  
 10 A. Yes, I have.  
 11 Q. Would you read to yourself paragraph five on the  
 12 first page?  
 13 A. (Witness doing as requested) Okay.  
 14 Q. Would it be fair to say that the children are  
 15 listed as the Trustees in the order that they are typed in  
 16 on this paragraph five as Trustees?  
 17 A. Let me look at that again. The children are  
 18 designated as the Trustees?  
 19 Q. Yes, but in the order listed. In other words you  
 20 are not serving together. David would be the first choice  
 21 and then if he doesn't perform then the second one is  
 22 Sharrol, is that correct?  
 23 A. Yes.  
 24 Q. Does it appear to be signed on page three by your  
 25 father and you can't see it very well but somebody has

1 signed there.  
 2 A. There are some marks on there and I don't know who  
 3 they are.  
 4 Q. But based on this would you agree with me that your  
 5 mother was not appointed as a Trustee affective after your  
 6 father passed away?  
 7 A. No, I won't agree to that.  
 8 Q. Do you think that this is invalid?  
 9 A. I do.  
 10 Q. Why?  
 11 A. Because it doesn't have her signature on it.  
 12 Q. So you believe this wasn't signed?  
 13 A. I don't think it was. There is no signature there.  
 14 Q. And I don't have any original documents I don't  
 15 believe but if we could come up with one of these that  
 16 clearly show the signatures would your mind be changed?  
 17 A. Yes, if mom's signature is on that yes I would.  
 18 The copies that I got from my sisters there is no  
 19 signature on those either.  
 20 Q. So you don't believe your father signed this  
 21 document?  
 22 A. I couldn't answer that because I don't know.  
 23 Q. If he did then you would believe it was valid I  
 24 guess and David was the Trustee of the Trust the entire  
 25 time?

1 A. Doesn't it require both of their signatures?  
 2 Q. I would have to think about that. It says here that  
 3 he was the settlor so he could change the Trustee without  
 4 the consent of the prior Trustee.  
 5 If somebody else can discuss that at a later time.  
 6 A. Okay.  
 7 Q. Now this complaint that you have filed did you read  
 8 that before it was filed?  
 9 A. I did.  
 10 Q. Did you agree with what was said in the complaint?  
 11 A. Most of it yes.  
 12 Q. My question to you is that your mother is named as  
 13 a defendant and as a Trustee of the Trust.  
 14 A. Yes.  
 15 Q. And certain allegations are made throughout the  
 16 Trust that she has misbehaved or done things she shouldn't  
 17 have or not done things that she should have.  
 18 A. Yes, I don't think she has misbehaved but she may  
 19 not have represented herself or the Trust the way that she  
 20 should have. Right now I am just trying to figure out and  
 21 why we have hired him as to what is going on with the  
 22 Trust. What has been done with the Trust. Twenty seven  
 23 years have elapsed with no accounting.  
 24 According to State Statute there is required an annual  
 25 accounting by the Trustee. When do we just ignore that?

1 Q. I just represent your mother.  
 2 A. I understand that.  
 3 Q. Would you agree that your mother has never  
 4 functioned as a Trustee since the death of your father?  
 5 A. I don't know if she has ever functioned as a  
 6 Trustee or if she just was representing yourself. That is  
 7 why I am so concerned about this. That is why we were in  
 8 the middle of this. I don't know if she has been partially  
 9 acting as a Trustee with David. If David has been acting as  
 10 a Trustee himself and she is representing yourself for her  
 11 self only I don't know if she is in control of her own  
 12 assets or her own properties.  
 13 There has been so much deed changing and back and  
 14 forth with all of these deeds that how do you figure out  
 15 what is what? I am not an attorney. I don't know. That is  
 16 what we are trying to find out. I am not against anybody  
 17 here. I want to be able to say that I am satisfied with  
 18 that. I know that it has been handled.  
 19 I don't know what the big deal is about hiding or  
 20 refusing to produce documents that are more or less  
 21 required by the State. I know that I am asking a question  
 22 but why not comply. That comes with the job. The  
 23 responsibility comes with the job. They are accountable.  
 24 I may not be entitled to one single thing out of the  
 25 Trust and I don't care. I would like to be satisfied in my

1 mind that it was done the way it was designed to do.  
 2 Q. Well, you indicated to me that you don't know if  
 3 your mother has served as a Trustee.  
 4 A. I don't.  
 5 Q. Do you know that she has served as a Trustee?  
 6 A. I don't.  
 7 Q. Do you have a copy of the complaint in front of  
 8 you?  
 9 A. What complaint?  
 10 Q. That one right there. (Indicating) would you turn  
 11 to paragraph eighteen.  
 12 A. How far back.  
 13 Q. Well, it is on page four.  
 14 A. Okay.  
 15 Q. Paragraph eighteen.  
 16 A. Yes, do you want me to read it?  
 17 Q. No, just look at it. What it says is that you have  
 18 requested an accounting from Defendants. You really haven't  
 19 requested an accounting from your mother have you?  
 20 A. It depends.  
 21 Q. The letters that Mr. Sam wrote to Mr. Allred dealt  
 22 with David as the Trustee as I understand it however he  
 23 should have responded or didn't whatever isn't that fair to  
 24 say?  
 25 A. I don't know as I really understand what you are

1 saying.  
 2 Q. Did Mr. Sam request an accounting from your mother?  
 3 A. I don't know. I think he requested and as far as I  
 4 am aware he requested an accounting from the Trustee.  
 5 Q. And that was David?  
 6 A. I don't know.  
 7 Q. Do you believe that your mother has stolen or  
 8 embezzled money or property from the Trust?  
 9 A. I honestly don't. I don't think she has. I think  
 10 she has taken it out.  
 11 Q. When Mr. Allred questioned you about your mother  
 12 being coerced by David I think you speculated perhaps that  
 13 he had got your mother to give him some of her property?  
 14 A. An accounting would answer a lot of questions  
 15 wouldn't it?  
 16 Q. When you were answering Mr. Allred's questions you  
 17 were talking about your mother's personal property and  
 18 maybe David had coerced her to do something with her own  
 19 personal property?  
 20 A. Yes, it is possible.  
 21 Q. Even if that had occurred that is not part of this  
 22 lawsuit is it?  
 23 A. I would say yes it is. It doesn't just dismiss his  
 24 lawsuit because I don't feel like mom has any wrong doings.  
 25 I don't think mom understood or does understand. Mom

1 doesn't and she has told me yourself that she doesn't  
 2 understand.  
 3 Q. If you were going to make an issue of that you  
 4 would have to file some kind of a lawsuit alleging that  
 5 your mother was incompetent and have a conservator and a  
 6 guardian perhaps appointed to represent her but this  
 7 lawsuit doesn't do that does it?  
 8 A. I don't understand what you mean by a conservator.  
 9 Q. Well, if she was adjudged to be incompetent then  
 10 someone would be appointed to represent her?  
 11 A. I don't think that mom is incompetent no I do not.  
 12 Q. All right. These allegations about unauthorized  
 13 salary and paying for equipment and that they don't involve  
 14 your mother do they?  
 15 A. I don't think so.  
 16 Q. To your knowledge were the accountings prepared by  
 17 your mother or did she have anything to do with their  
 18 preparation?  
 19 A. I don't think that she did. I don't know.  
 20 Q. If your mother is not the Trustee then the duties  
 21 that are set forth in this complaint wouldn't apply to her  
 22 would they?  
 23 A. Probably not.  
 24 Q. There is an allegation here that the Trustees  
 25 failed to administer the Trust and that would be the same

1 wouldn't it if she is not the Trustee whatever was done or  
 2 wasn't done she wouldn't be responsible for?  
 3 A. I am not going to state right now that she is not  
 4 the Trustee but if it is deemed or we figure out that she  
 5 hasn't or has not been the Trustee at any time you are  
 6 correct.  
 7 Q. Record keeping would be the same type of a matter.  
 8 A. Yes.  
 9 Q. Commingling are you aware that she has mixed her  
 10 own property with Trust property at all?  
 11 A. I don't think so.  
 12 Q. She has not done anything that has created a  
 13 conflict of interest?  
 14 A. No.  
 15 Q. She has not done anything that has benefitted some  
 16 beneficiaries and not others?  
 17 A. Yes, she has.  
 18 Q. How has she done that?  
 19 A. I do know that she sends a lot of money to some  
 20 grandchildren and not others. That is none of my business.  
 21 Q. The grand children aren't beneficiaries of the  
 22 Trust right now are they?  
 23 A. I think that she considers them that way though.  
 24 Q. Do you think the law ought to step in and dictate  
 25 how she treats grandchildren?



1 A. No, I don't.  
 2 Q. If David were removed as the Trustee who do you  
 3 believe should serve as the Trustee?  
 4 A. I have no idea. I can't. Can I state my opinion?  
 5 Q. Sure.  
 6 A. If it has been set up in a corporation or everybody  
 7 as Trustees it could not have got into I mean even if  
 8 everybody didn't agree or it created an issue amongst  
 9 everybody it couldn't be any worse than this.  
 10 I actually think that mom as the Trustee where it was  
 11 set up by mom and dad. I could be wrong in the way I think.  
 12 They were to be each other's Trustees in the event that the  
 13 other one died.  
 14 I think that mom is perfectly capable of being a  
 15 Trustee. I do think that she would need some help in  
 16 understanding or maybe not understanding but getting  
 17 whatever she needs to to keep the Trust operating the way  
 18 it should be. That don't make sense I know.  
 19 Q. There is an allegation in here about defendants  
 20 making false statements. Has your mother made any false  
 21 statements to you about the Trust to your detriment?  
 22 A. I don't know.  
 23 Q. Do you love your mother?  
 24 A. Very much.  
 25 Q. Do you have any ill will towards her?

1 A. No, I have some hurt feelings.  
 2 Q. Because of what she has done?  
 3 A. No, because of some comments that she has made to  
 4 me.  
 5 Q. Have you ever expressed to her your displeasure  
 6 and unhappiness with some of these things?  
 7 A. I have.  
 8 Q. Did you mean what you said?  
 9 A. What?  
 10 Q. Did you mean what you said to your mother  
 11 A. Concerning what?  
 12 Q. This lawsuit and related matters?  
 13 A. Yes.  
 14 Q. You indicated that shortly after your father died  
 15 that you had a conversation with Dave and he was going to  
 16 try and get your mother out of the Will and all of these  
 17 Trusts and whatever. Are you aware of anything that he did  
 18 to further what you say he said to you?  
 19 A. I feel like I took an amendment. I don't feel like  
 20 dad either one of those amendments were dad's doing. Dad  
 21 for several years before dad died he even spent time out in  
 22 the hospital. He didn't know who anybody was. He didn't  
 23 know who he was. He didn't recognize anyone. He had to have  
 24 electric shock therapy. You don't go out with papers when  
 25 someone is having stuff like that.

1 I had a heart attack and I can't testify and that my  
 2 wife can too that I would have signed anything or said  
 3 anything before I went in for open heart surgery.  
 4 From what I can gather and I granted that I don't have  
 5 any proof of it but I have people stating that they were  
 6 there before dad went into surgery while he was having  
 7 heart attacks. Like I said under that medication you don't  
 8 know what you are doing and having him change papers. I  
 9 don't feel like that was appropriate. No, I don't.  
 10 Q. Are you aware of who prepared this document this  
 11 second amendment?  
 12 A. I am not.  
 13 Q. It appears to have been prepared probably by an  
 14 attorney doesn't it?  
 15 A. Well, I would surmise yes.  
 16 Q. Do you know when it was supposedly signed?  
 17 A. I don't.  
 18 Q. So when it was signed or allegedly signed your dad  
 19 may have been fully competent?  
 20 A. What?  
 21 Q. He may have been fully competent when this was  
 22 signed?  
 23 A. He could have. What is the date on that thing?  
 24 Q. Well, there is writing and it is kind of like the  
 25 signatures, 28th day of something and nineteen and does

1 anybody have a copy of that that you can see the dates and  
 2 the signatures?  
 3 MR. ALLRED: Not in my stuff I don't.  
 4 MR. BERRETT: Well, that is good enough.  
 5 BY MR. BERRETT:  
 6 Q. Other than this second amendment do you have any  
 7 quarrel with the rest of the terms of the Trust being  
 8 valid?  
 9 A. In what regard?  
 10 Q. Well, do you think that it was prepared according  
 11 to your father's wishes and signed by him?  
 12 A. I think it was prepared according to both wishes  
 13 not just dad. I think it was prepared for mom's.  
 14 Q. So you don't have any disagreement with the Trust  
 15 as it is written?  
 16 A. No, with the Master Trust I don't.  
 17 Q. Do you believe that your mother should remain a  
 18 party in this lawsuit? In other words that she should be a  
 19 defendant at the present time?  
 20 A. I don't know.  
 21 Q. I think all of the children love your mother.  
 22 A. It is not an issue of loving her.  
 23 Q. Well, it has been made an issue because she is a  
 24 party here. She is having to sit in here and listen to  
 25 this.

1 A. Does that mean that we don't love her?  
 2 Q. I am trying to find out if you think she ought to  
 3 remain a party? She has had to sit in here and listen to  
 4 this.  
 5 MR. MONAHAN: I would object that it calls for a  
 6 legal conclusion.  
 7 THE WITNESS: Pardon.  
 8 MR. BERRETT: Go ahead and answer it. Do you think  
 9 that she ought to remain a party to this lawsuit?  
 10 THE WITNESS: Until some more facts come out yes.  
 11 BY MR. BERRETT:  
 12 Q. Are you aware of any reason that she ought to be a  
 13 party right now?  
 14 A. I just answered that. It doesn't have anything  
 15 concerning my love for mom or wishing any ill will being on  
 16 her. I want to get this straightened out if we can for her  
 17 benefit and everybody else's.  
 18 If it takes mom and nobody is doing anything against  
 19 mom by including her in this lawsuit. We are not saying  
 20 that we don't love her and we are not going to have  
 21 anything to do with her. We are just trying to get down to  
 22 the facts and mom is a part of it and has been from the  
 23 very beginning.  
 24 To just exclude her if we need what she can offer to  
 25 get to the bottom of this mess yes I feel like she needs to

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1 be here.  
 2 Q. Well, usually when someone is sued it is because  
 3 whoever sues them believes that they either have done  
 4 something wrong or they haven't done something that they  
 5 should have.  
 6 MR. MONAHAN: Objection calls for legal  
 7 speculation now.  
 8 MR. BERRETT: I am not asking him a question. My  
 9 question to you is what has your mother done or not done  
 10 that warrants her being sued?  
 11 MR. MONAHAN: Objection calls for a legal  
 12 conclusion.  
 13 MR. BERRETT: Go ahead and answer it.  
 14 THE WITNESS: I don't know. That is what I am  
 15 trying to get to the bottom of.  
 16 BY MR. BERRETT:  
 17 Q. I guess your mother is next up for a deposition and  
 18 maybe you can get to the bottom of it at that time.  
 19 A. Nobody has anything against mom.  
 20 Q. I don't have any other questions.  
 21 MR. MONAHAN: I don't have any questions.  
 22 MR. ALLRED: I have some follow-up questions.  
 23 EXAMINATION  
 24 BY MR. ALLRED:  
 25 Q. Did I understand you right that you told Mr.

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1 Berrett that the house that you are presently living in is  
 2 on the forty acres that you got from your parents before  
 3 your dad died?  
 4 A. Yes, if the description is wrong it was dad and my  
 5 fault. According to Daniel Sam it is backwards that is why  
 6 you sent me that letter trying to coerce me into accepting  
 7 right-of-ways across it for the benefit of the Trust.  
 8 Q. Who is the present owner of the real estate on  
 9 which your house now sits?  
 10 A. Pardon?  
 11 Q. Who is the present owner of the real estate on  
 12 which your house that you are now living in sits?  
 13 A. Who is the present owner?  
 14 Q. Yes.  
 15 A. If my deed is valid then I am. If it goes through  
 16 probate and it is not then the Trust is.  
 17 Q. Who gets the tax notice for it?  
 18 A. I received it and he brought me down a delinquent  
 19 tax notice that was five years delinquent that I paid  
 20 three years ago and I requested that he give me that tax  
 21 return the next year which he has not done but it had let  
 22 it go delinquent for five years. I paid that and I have a  
 23 receipt at home to show that I paid the taxes on that.  
 24 I also received a check from mom or David from the  
 25 Trust for two hundred dollars for the seismograph going

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1 across that twenty acres.  
 2 Q. The property on which your house now sits is titled  
 3 in the name of the Trust isn't it?  
 4 A. According to your letter it is titled into Terry's  
 5 name.  
 6 Q. So you think that it is in Terry's name?  
 7 A. According to your letter.  
 8 Q. What letter is that?  
 9 A. The letter that you sent me.  
 10 Q. When?  
 11 A. Right after I tried to get that deed squared around  
 12 you sent me a letter. David come up with a deed that you  
 13 had drawn up requesting that I sign it with two  
 14 right-of-ways for the Trust to cross it. I refused. Then  
 15 you sent me a letter shortly after that saying that I  
 16 needed to accept that deed if I wanted my ground where my  
 17 house sits I needed to accept that deed with those two  
 18 right-of-ways across it and that it had already been deeded  
 19 to Terry Monks.  
 20 Q. That letter was sent to you on behalf of the Trust  
 21 wasn't it?  
 22 A. What?  
 23 Q. That letter was sent to you on behalf of the Trust  
 24 correct?  
 25 A. I don't know. I will get you a copy of that letter.

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2 Q. So I guess what I am hearing is that you don't know  
3 how the property is titled that you are living on?  
4 A. I guess not.  
5 Q. Did you get any permission from the Trustee to live  
6 on Trust property?  
7 A. No, I have a paper that mom signed giving me  
8 permission to go down there and build a house on that  
9 ground to where her and dad had given me that twenty acres  
10 down there.  
11 Q. Have you provided that to your attorney?  
12 A. I have not.  
13 Q. Will you do so so that he can produce it?  
14 A. Pardon?  
15 Q. Will you do so so that he can provide it?  
16 A. Yes.  
17 Q. Have you got any other documents that are relevant  
18 to this case that you have not provided to your attorney?  
19 A. Not that I am aware of right now.  
20 Q. Mr. Berrett asked you if you read the complaint  
21 before it was filed and you said yes. He asked you if you  
22 agreed with it and you said most of it. What did you not  
23 agree with?  
24 A. Read what?  
25 Q. The complaint. What did you not agree with in the

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2 A. Do you have a copy of it?  
3 Q. It is there in front of you. I think that it is  
4 right on top.  
5 A. I guess I agree with what I have read. I will just  
6 change my answer from most to yes I do.  
7 Q. You agreed with all of the complaint?  
8 A. Yes.  
9 Q. You also told Mr. Berrett that David had refused to  
10 produce any documents. Other than what we have talked about  
11 when I was questioning you is there any other facts that  
12 you have of him refusing to produce any documents?  
13 A. Has refused to produce any documents?  
14 Q. Yes, other than what you and I went through  
15 earlier, any other facts that David refusing to produce any  
16 documents?  
17 A. No.  
18 Q. And the documents have you looked over the fifteen  
19 hundred documents that we have produced in this case  
20 already?  
21 A. No.  
22 Q. Do you claim that your father was not competent  
23 when he signed the first amendment to the Trust?  
24 A. No, I don't declare that at all.  
25 Q. Do you claim that he was not competent when he

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1 signed the second amendment to the Trust?  
2 A. I don't know.  
3 Q. You just don't know. Do you have any facts that  
4 would indicated that he was not competent?  
5 A. At a certain point and time no he wasn't.  
6 Q. Was that when he signed the second amendment?  
7 A. I don't know.  
8 Q. When do you claim that he was not competent?  
9 A. What.  
10 Q. When do you claim he was not competent?  
11 A. When he was out there. He had some kind of brain  
12 infection or something. Dad did not know even who us kids  
13 were. He was there and they were giving him electric shock  
14 therapy and he didn't know anybody.  
15 Q. You say, you there, are you talking about a  
16 hospital?  
17 A. Yes.  
18 Q. What hospital?  
19 A. I don't remember.  
20 Q. So it was while he was in the hospital for some  
21 brain infection?  
22 A. I guess and I don't think that they ever determined  
23 what it was.  
24 Q. How long a time period was that?  
25 A. Quite a while.

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1 Q. What is quite a while? Over an hour is quite a  
2 while for me in a hospital.  
3 A. Dad was sick with that for over a year maybe two  
4 years.  
5 Q. What time period?  
6 A. It was right before he died.  
7 Q. He died in December of 1992?  
8 A. I think so.  
9 Q. So what 1991 or 1992 you don't think he was  
10 competent?  
11 A. No, no, no probably starting in 1988 or 1989.  
12 Q. So from 1988 to 1992 you don't think that your  
13 dad was competent?  
14 A. At times he was yes.  
15 Q. Okay. That is all that I have.  
16 MR. BERRETT: I don't have anything further.  
17 MR. MONAHAN: I don't have anything.  
18 (WHEREUPON, the deposition was concluded.)  
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23  
24  
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Richard C. Tatton, CSR, RPR 435-654-2416