

2016

Sharrol Anderton, Mary Blanchard, Terry Christensen and Duane Boren, Jr., Plaintiffs and Appellants, v. David L. Boren and Sherron L. Boren, as Individuals and as Trustees of the Duane Boren Family Living Trust, as Amended, Defendants and Appellees.

Utah Court of Appeals

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IN THE
UTAH COURT OF APPEALS

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

Plaintiffs and Appellants,

v.

DAVID L. BOREN AND SHERRON L. BOREN, AS INDIVIDUALS AND AS
TRUSTEES OF THE DUANE BOREN FAMILY LIVING TRUST, AS AMENDED,

Defendants and Appellees.

BRIEF OF APPELLEE SHERRON L. BOREN

On appeal from the Eighth District Court, Duchesne County, Case Number 143000048

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ORAL ARGUMENT REQUESTED

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Sharrol Anderton, Mary Blanchard, Terry Christensen, and Duane Boren, Jr.
v.
*David L. Boren and Sherron L. Boren, as Individuals and as Trustees of the Duane
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STATEMENT OF JURISDICTION

Appellants do not have standing, as will be discussed below. Absent that fact, jurisdiction would be appropriate 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. Should the Appellants' case be dismissed for lack of standing?

The traditional rule to determine standing requires that 1) the interests of the parties must be adverse; and 2) the parties seeking relief must have a legally protectable interest in the controversy. See, *Forsberg v. Bovis Lend Lease, Inc.*, 2008 UT App 146, P8, 184 P.3d 610, 612.

2. Did the trial court appropriately strike the Duane Boren Jr.'s declaration opposing the Motion for Summary Judgment?

The standard of review for striking a declaration is abuse of a broad grant of discretion. See, *Murdock v. Springville Mun. Corp.*, 1999 UT 39, P25, 982 P.2d

65, 72; and *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, P4, 314 P.3d 1069, 1071.

3. Did the trial court properly grant summary judgment, dismissing the Plaintiffs' Complaint where 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, P46, 361 P.3d 63, 73-74.

4. Did the trial court properly award the Defendants legal fees, based on Utah Code Ann. §75-7-1004?

The standard of review is abuse of discretion. *Hughes v. Cafferty*, 2004 UT 22, P20, 89 P.3d 148, 152.

5. Should the Appellees be awarded reasonable attorney fees incurred on appeal, as 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, P63, 319 P.3d 711, 732.

APPLICABLE STATUTORY PROVISIONS

Utah Code Ann. §75-7-104:

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., (hereinafter "Mr. Boren") husband of Defendant Sherron L. Boren (hereinafter "Mrs. Boren") and father of the Plaintiffs and Defendant David Boren, died on December 27, 1992. R. 139-142. The probate court, based on Mr. Boren's will, transferred various assets into a trust Mr. Boren had created. R. 168, 175. The income beneficiary of the trust was Mrs. Boren, and David was the trustee. R. 139.

Over 20 years later, the Plaintiffs sued their brother David and their mother, alleging on "information and belief" that David and Mrs. Boren 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 Mrs. Boren, both filed answers to the Plaintiffs' Complaint and initial disclosures consisting of accountings, tax returns, inventory information and back up documents. David and Mrs. Boren also deposed the Plaintiffs. R. 18-24, 30-35 and 41. The Plaintiffs elected not to depose David, but did depose Mrs. Boren

In their depositions, the Plaintiffs all admitted that they had no facts to support the allegations in their Complaint. They all indicated they had not looked at the tax returns and annual accountings, which 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, David and Mrs. Boren moved for summary judgment. R. 64. Plaintiff, Duane Boren, Jr. (hereinafter "Junior") then filed a declaration, attempting to raise issues of fact to prevent summary judgment. R. 214. Junior's

declaration contradicted his own deposition testimony, as well as that of the other Plaintiffs. None of the other Plaintiffs attempted to withdraw or change their testimony that they had no facts to support the allegations in their Complaint.

David and Mrs. Boren moved to strike Junior's declaration. R. 612.

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 legal fees, pursuant to Utah Code Ann. §75-7-1004. R. 815-819.

FACTS

1. Mr. and Mrs. Boren 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. Mr. and Mrs. Boren prepared the Master Trust Agreement and a Joinder Agreement The Duane Boren

Family Living Trust (hereinafter "Trust"), dated March 20, 1980. The only asset in the trust when it was created was a life insurance policy. R. 139-142.

3. Paragraph 6.22 of the Duane Boren Family Living Trust ("Trust") granted Mrs. Boren broad powers of appointment entitling her to change the provisions of the Trust at any point and in any manner that she chose, after the death of Mr. Boren. R. 150.

4. On January 25, 1985, Mr. and Mrs. Boren signed an Amendment to the Duane Boren Family Living Trust. Paragraph 4 of the Trust appointed Mrs. Boren as trustee. Later, Mr. Boren crossed out Mrs. Boren's name and wrote in David Boren (hereinafter "David"). R. 139-142, 161-163.

5. On August 28, 1990, Mr. Boren signed a Second Amendment to the Trust, designating David as successor trustee and changing the distribution of the assets. R. 139-142, and 164-167.

6. After Mr. Boren'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.

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

8. According to the terms of the Trust, after Mr. Boren's death, the Trust was divided in half with Mrs. Boren owning an undivided one half interest in the properties, and the other one half interest of the Trust was distributed to David as the Trustee. R. 147-155.

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

10. The Trust assets were to be used for the benefit of, and at the direction of Mrs. Boren, during her life. R. 139-142, and 166.

11. From 1993 to the present, David, as trustee, has managed the Trust properties as well as the properties owned by his mother, Mrs. Boren. She has

been actively involved in the decisions regarding the Family Trust and its assets. Decl. of David L. Boren and Decl. of Sherron Lea Boren. R. 134-138, and 139-142.

12. From 1993 until October 2, 2012, 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, P20 and P37 (did not ask for information); and Depo. of Duane Boren Jr., R. 118-129, P32 (never ask for accountings).

13. On October 2, 2012, Daniel Sam, an attorney for the Plaintiffs sent a letter asking for information. Within two months, the Plaintiffs, through counsel, were provided an inventory of the Trust, accountings for the Trust and tax returns for 2008 through 2011. Since that date, accountings and tax returns for 2012, 2013 and 2014 have also been provided. Finally, the backup documents for the accountings and tax returns were made available for examining and copying. Decl. of David L. Boren. R. 134-138.

14. In 2014, the Plaintiffs filed this lawsuit. In their complaint, the Plaintiffs make numerous allegations of improper or illegal acts by David and their mother, Mrs. Boren, "upon information and belief." R. 1-11.

15. 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 the allegations. R. 82-129.

16. Paragraph 20 of the Complaint alleges, that the Defendants had "stolen and embezzled money from the Trust." In response to questions about that allegation, all four Plaintiffs admitted there were no facts to support the allegation. (No I didn't say that), Depo. of Terry Christensen, R. 99-109, P30 lines 7 through page 31 line 31; (no facts to support the allegation), Depo. of Boren Jr., R. 118-129, Page 22 line 12 through 14; ("no facts" to support the claim), Depo. of Mary Ellen Boren Blanchard, R. 110-117, Page

26 lines 13 through 16; and ("just speculation"), Depo. of Sharrol Ann Boren Anderton, R. 82-98, P38 lines 6 through 16.

17. 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, P40; Depo. of Mary Boren Blanchard, R. 110-117, P30; Depo. of Terry Christensen, R. 99-109, P33; Depo. of Duane Boren Jr., R. 118-129, P28.

18. Paragraph 22 of the Complaint alleges that David coerced Mrs. Boren to sign documents. At the depositions, the Plaintiffs admitted there were no facts to support that claim. All the children also agreed that their mother is and was competent. Depo. of Sharrol Ann Boren Anderton, R. 82-98, P30; Depo. Of Mary Ellen Boren Blanchard, R. 110-117, P30; Depo. of Terry Christensen, R. 99-109, P33 lines 13-18; and Depo. of Duane Boren Jr., R. 118-129, P55.

19. In addition, Mrs. Boren denied that she has been coerced into signing any document. Decl. of Sherron Lea Boren. R. 139.

20. Paragraph 23 of the Complaint 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 have any facts or evidence to support this allegation. Depo. of Sharrol Ann Boren Anderton, R. 82-98, P60 line 4 ("I feel like [twelve hundred dollars per month to David to run the farm is fine]"); Depo. of Terry Christensen, R. 99-109, P35 lines 4-6 ("I do not know about that."); and Depo. of Duane Boren Jr., R. 118-129, P30 lines 8-20 (claiming the mere fact David took a salary showed it was unauthorized).

21. Paragraph 24 of the Complaint alleged that the accountings were untruthful, unenforceable and inaccurate and that David had failed to provide receipts and account for monies taken from the Trust property. R. 1-11. Similarly, Paragraphs 30 and 35 of the Complaint alleged that the Defendants failed to keep adequate records, failed to keep the Plaintiffs

reasonably informed of the Trust, and failed to provide accountings. R. 1-11.

22. At their depositions, the Plaintiffs admitted that they had not looked at the accountings or the backup documents provided to them, and that there were no facts to support their claims. Depo. of Sharrol Ann Boren Anderton, R. 82-98, P20 lines 15-17 (stating she did not ask for records before 2012); P22 line 22 through P23 line 3 (acknowledging she received accountings, an inventory of assets, and tax returns); P43 line 16 (stating she did not know how the accountings were untruthful and inaccurate); PP44-45 (admitting that she merely "glanced through" the documents and put them in her file, but did not thoroughly review the accountings or ask for back up documents); Depo. of Mary Ellen Boren Blanchard, R. 110-117, P21 lines 16-21 (acknowledging she received accountings, tax returns and title reports); Depo. of Duane Boren Jr., R. 118-129, P20 lines 20-24 (stating he did not look at the documents he received from his first attorney, but simply put them in a file or sent them on to his second attorney); P22 lines 3-11

(admitting he only "skimmed over the documents he requested); P32 line 32 (admitting he had never asked for an accounting prior to the summer of 2012); P34 lines 4-9 (claiming it is not his responsibility to review all back-up documentation to the accountings or receipts).

23. Paragraphs 31 and 32 of the Complaint allege that the Trustees did not administer the Trust solely for the benefit of the beneficiaries. R. 1-11. However, at their dispositions, the Plaintiffs admitted that their mother, Mrs. Boren, is presently the only income beneficiary. Depo. of Sharrol Ann Boren Anderton, R. 82-98, P56 line 21. At Mrs. Boren's deposition, she testified that the Trust is being administered for her benefit, at her direction, and with her input. Decl. of Sherron Lea Boren, R. 139-142.

24. Paragraphs 33 and 42 of the Complaint allege that the Defendants have failed to administer the Trust as a prudent person would. R. 1-11. Again the

Plaintiffs had no proof for those allegations. Depo. Of Sharrol Ann Boren Anderton, R. 82-98, P46 line 2; Depo. of Terry Christensen, R. 99-109, P38 line 17; and Depo. of Duane Boren Jr., R. 118-129, P39 lines 16-20 (admitting he had no facts to support his "opinion" and feelings that David had not acted as a prudent investor of the Trust assets).

25. 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, PP50-51; Depo. of Mary Ellen Boren Blanchard, R. 110-117, P38 lines 24-25 (admitting that she did not have any facts showing that either David or Mrs. Boren had made misrepresentations about the Trust); Depo. of Terry Christensen, R. 99-109, P41 lines 9-12 (admitting that her mother had not made any misrepresentations to him, as she "had not talked to David"); and Depo. of Duane Boren Jr., R. 118-129, P39.

26. In fact, two of the Plaintiffs admitted they had never talked to David about the Trust or its assets. Depo. of Duane Boren Jr., R. 630, P40 line 18; and Depo. of Terry Christensen, R. 99-109, P41 line 12.

27. In an effort to avoid having the case dismissed, the Plaintiffs filed a document entitled Declaration of Duane Boren Jr., in opposition to the Defendants' Motion for Summary Judgment. R. 241. Plaintiffs attached 370 pages of documents. However, the Declaration is signed only by counsel for the Plaintiffs, not by Mr. Boren. It consists of 14 paragraphs (allegations) copied from the Complaint, (compare paragraphs 5 through 21 of the Complaint to paragraphs 5 through 21 of the Declaration), along with unsupported opinions and suppositions. It concludes with the 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 nor any explanation as to the purpose of those documents.

28. The trial court struck Junior's Declaration. R. 710.

SUMMARY OF ARGUMENTS

1. Plaintiffs do not have standing, and the court does not have jurisdiction over this case because Plaintiffs' complete interest in the Trust is subject to Defendant Mrs. Boren's power of appointment. Thus, they do not have a legally protectable interest in this controversy.

2. Plaintiffs do not have standing, and the court does not have jurisdiction because the allegations in Plaintiff's complaint do not address any of their future interests in the Trust. Thus, they do not have a legally protectable interest in this controversy.

3. Neither the facts, the terms of the Trust agreement, or the law support the Plaintiffs' allegations in their complaint regarding accountings and alleged misuse of Trust assets.

4. Plaintiffs' arguments turn on whether the Court properly struck Junior's Declaration. In Plaintiffs' depositions, they each agreed there were no facts to

support the allegations of their complaint. However, Junior subsequently filed a declaration directly contradictory to his own testimony, and the other plaintiffs' testimony, in an attempt to create an issue of fact and avoid summary judgment. None of the other Plaintiffs have reversed their testimony. The trial court properly struck Junior's declaration.

5. 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, as well as 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.

6. The Defendants were appropriately awarded their legal fees and costs by the trial court; as prevailing parties, they should be awarded the fees they have incurred on this appeal.

ARGUMENT

I. THE PLAINTIFFS LACK STANDING

"[S]tanding is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties. Under the traditional test for standing, the interests of the parties must be adverse and the parties seeking relief must have a legally protectable interest in the controversy." *Jones v. Barlow*, 2007 UT 20, P 12, 154 P.3d 808, 811 (alteration in original) (citations and internal quotation marks omitted); see also, *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983) ("[T]he moving party must have standing to invoke the jurisdiction of the court."). *Forsberg v. Bovis Lend Lease, Inc.*, 2008 UT App 146, P8, 184 P.3d 610, P612.

"Either party, or the court on its own motion, may properly raise the issue of standing for the first time on appeal." *Wade v. Burke*, 800 P.2d 1106, 1108 (Utah App. 1990), cert. denied, 800 P.2d 1105 (Utah 1990);

accord, Terracor v. Utah Bd. Of State Lands, 716 P.2d 796, 798 (Utah 1986) (stating that appeals court can address standing issue sua sponte); and *Sierra Club v. Department of Env'tl. Quality*, 857 P.2d 982, 984 (Utah App. 1993) (same).

Here, Appellants lack standing to bring this case before the court, as they do not meet both required parts of the test, which are:

- 1.The interests of the parties must be adverse;

and

- 2.The parties seeking relief must have a legally protectable interest in the controversy.

Forsberg v. Bovis Lend Lease, Inc., 2008 UT App 146, P8, 184 P.3d 610, 612. Specifically, the Appellants do not have a legally protectable interest in the controversy based on either of the following two arguments.

1. Appellants Lack Standing Because Settlor Granted His Spouse the Power of Appointment to Change the Terms of the Trust.

Appellants lack standing because their father, the settlor, included a provision in his Trust that granted their mother, Defendant Mrs. Boren power of appointment; thus, they do not have a legally protectable interest in the Trust. The power of appointment granted to Mrs. Boren is broad. It gives her the ability to change the Trust drastically, to the point of completely disinheriting each of Appellants. R. 150. This power makes Appellants' interest contingent upon future events. Thus, Appellants are not presently current beneficiaries.

Moreover, regardless whether Appellants were current beneficiaries, the mere existence of the power of appointment means Appellants do not have standing. See, *Montrone v. Valley Bank & Trust Co.*, 875 P.2d 551, 557 (Utah App. 1994).

In *Montrone*, summary judgement was granted and affirmed because the trial court found that the Plaintiff/beneficiary lacked standing to bring the suit to demand an accounting of the Trust, as the Settlor retained the power of appointment. As such, the beneficiary's interest was subject to that power and could change or be eliminated. In *Montrone*, the Settlor chose to instruct the trustee not to provide an accounting to any of the beneficiaries, which was her right given the fact had power of appointment over the Plaintiffs' interests in the trust. *Id.* at 551.

The legislators stated in Utah Code Ann. §75-1-108, "For purposes of consenting to modification . . . of a trust or to deviation from its terms, the sole holder . . . of a presently exercisable general power of appointment, including one in the form of a power of amendment . . . [is] deemed to act for beneficiaries to the extent their interest . . . are subject to the

power." Based thereon, the *Montrone* Court, quoting the editorial board of the Utah Code found,

Under §75-1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person." We recognize the important public policy of holding trustees accountable to beneficiaries for the administration of a trust. However, **it is also important that a trustee not unnecessarily deplete trust funds by being required to account to every contingent or remote beneficiary whose interest is subject to a power of revocation** by a living settlor. This policy is at the heart of Section 75-1-108.

Id., at 558-559 (*emphasis added*).

Here, the Trust grants Appellee, Mrs. Boren, complete power over Appellants' interest in the Trust, **including** the power of revocation of that interest.

The entire principal of the trust shall be distributed to or for the benefit of any one or more of Settlor's issue or Spouses of Settlor's deceased issue, as Settlor's Spouse shall appoint by exercise of a testamentary exclusive special power of appointment, which power shall be exercised by a will made after Settlor's death which specifically refers to the power of appointment herein given to Settlor's Spouse. **Any appointment by Settlor's Spouse may be of such estates and interest and upon such terms, trusts, conditions, powers and limitations as**

Settlor's Spouse shall determine. Any appointment may exclude any one or more of the beneficiaries of the class. If, or to the extent that, Settlor's Spouse does not exercise said testamentary special power of appointment at the death of Settlor's Spouse, said principal shall pass according to the terms governing ultimate distribution set forth in Paragraph 7 of the Joinder Agreement.

The Duane Boren Family Living Trust, R. 150.

This power of appointment is not held by a "living settlor," nor is it a "general" power of appointment; however, Mrs. Boren's special power of appointment is so broad that the Appellants' complete future interest is subject to her granted powers. As such, Mrs. Boren's power has the same effect over Appellants' interests as a general power of appointment, and prevents the appellants from having a legally protectable interest in this controversy.

Just as the Plaintiff in *Montrone* did not have standing to bring suit against the trustee, the Appellants in this case do not have standing to bring suit against a trust in which their interests are

subject to their mother's ability to completely disinherit them at any time she so chooses.

2. Appellants Lack Standing Because They Do Not Have Interest in the Trust for the Causes of Action Raised in Their Complaint.

Appellants do not have the necessary interests in the Duane Boren Family Living Trust for the causes of action raised in their Complaint, which all surround the general operation of the farm and on accounting for farm expenses and assets.

In Appellants' Brief, Statement of Facts, number 19 reports to be providing allocation information from the Trust, and states:

The Family Trust portion includes the principal of an undivided one-half (1/2) interest of property and mineral interests, to be administered in equal shares to the beneficiaries, Trustor's six (6) children, DAVID L. BOREN, DUANE BOREN, JR., SHARROL ANN BOREN nka SHARROL ANN ANDERSON, MARY BOREN nka MARY BLANCHARD, and TERRY BOREN nka TERRY CHRISTENSE. Rec 000166.

However, this is not an accurate statement of the allocation of Trust assets. Rather, the Second Amendment to the Trust Agreement, executed by the

Settlor on August 28, 1990, prior to his death, changed the distribution of the Trust assets to the following:

R. 165.

(1) Trustee shall distribute all agricultural equipment, all livestock, all water rights and the surface rights to all cultivated, pasture or hay ground (all real estate other than "waste ground") to DAVID LEN BOREN and LUCKY J. BOREN in equal shares, per stirpes.

(2) Trustee shall distribute all "waste ground" in four (4) equal shares among SHARROL ANN ANDERTON, DUANE BOREN, JR., MARY ELLEN BLANCHARD and TERRY LEE MONKS in per stirpes shares.

(3) Trustee shall distribute all mineral rights as follows: Fifty percent (50%) shall be distributed equally to DAVID LEN BOREN and LUCKY J. BOREN in per stirpes shares. The remaining fifty percent (50%) shall be distributed equally among Settlor's following four (4) children: SHARROL ANN ANDERTON, DUANE BOREN, JR., MARY ELLEN BLANCHARD and TERRY LEE MONKS.

(4) Trustee shall distribute all the rest, residue and remainder of the estate in six (6) equal shares among Settlor's six (6) children named above, with the provision that if any of the children are not then surviving, his or her share shall pass to his or her issue per stirpes.

In simpler terms, David Boren and his deceased brother's heirs have received all rights to the farm, equipment, livestock, water rights and surface rights to the farm, including all cultivated, pasture or hay ground. The only interests in the Trust assets allocated to the Appellants are the "waste ground," 50% of the mineral rights, and the rest, residue, and remainder of the estate, excluding the farm. See, *Second Amendment to The Duane Boren Family Living Trust*, R. 166.

Given Appellants lack of any interest in the farm, they do not have standing to complaint about its operation.

The waste ground and mineral rights remain available to be distributed to the Plaintiffs on their mother's death; if she does not exercise her power of appointment.

As for the rest, residue, and remainder, it is impossible for Appellants to have a current interest in

the rest, residue, and remainder of the estate, as it is unknown if there will be any rest or residue on remainder after their mother's death. Regardless, even if Mrs. Boren does not exercise her powers of appointment and disinherit Appellants; they have only a future interest in the "waste ground" and the mineral rights, they have no interest in the farm.

Plaintiffs lack any standing to complain about accountings and records regarding property that they do not have an interest in. See, *Haymond v. Bonneville Billing & Collections, Inc.*, 2004 UT 27, P8, 89 P.3d 171, 173-174.

II. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT

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); and Utah R. Civ. Pro. 56(c). The facts and evidence are to be viewed in the light

most favorable to the nonmoving party. *American Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989).

In the case at hand, the issue before the trial court on Defendants' summary judgement motion was simply whether Appellants had provided evidence to support their claims, sufficient to proceed to trial. The trial court found that the Appellants had not provided sufficient evidence, based on the facts before it and the standard set forth in *Webster v. Sill*. As the *Webster* Court stated, "The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion." *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983).

Appellants' Complaint asserted a variety of claims. The case went through discovery, including depositions of each of the Plaintiffs, and ended with the trial court granting Defendants' Summary Judgment Motion. At

no time during this process did Plaintiffs provide proper evidentiary foundation to support the assertions in their Complaint, thus the court properly granted summary judgment, dismissing the case.

Appellants' have asked this Court to review the trial court's decision based on the *facts in the record*; however in the next sentence they complain that the trial court provided limited legal analysis' of their *claims* and instead relied on the Court's finding that no admissible evidence existed. Appellant's Brief, P36. Appellees agree that this Court's review should be focused on the *facts in the record*.

The Plaintiffs each admitted in their respective depositions that they had no evidence to support any of the claims in their complaint R. 710-719. Discovery ended on May 30, 2015. R. 25. However, after the deadline for discovery, in objection to the Defendant's Motion for Summary Judgment, Junior submitted an

affidavit contradicting his deposition testimony. R. 214-220.

Rule 56(c)(4), Utah R. Civ. Pro., 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, PP16-17, 305 P.3d 1174, 1181, and *D&L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989).

Utah R. Evid. Rule 701 states,

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that 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, PP26-27, 248 P.3d 70, 80.

Utah R. Evid. Rule 401 states,

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Appellants claim in their Brief that Junior's Declaration and supporting exhibits provided admissible facts, sufficient to overcome summary judgment. However, as trial court correctly points out, Junior's Declaration did not set forth facts that would be admissible as evidence under Rules 701 or 401. See, Utah R. Evid. Rule 701 and 401.

Rather, Junior's Declaration was full of unsupported suppositions, conclusions, and opinion testimony by a lay witness; none of which offered anything to help the fact-finder understand or determine any claimed fact at issue.

Additionally, the Declaration directed the trial court to documents without providing any foundational information for these documents, and without explaining

how those documents were relevant or supported Junior's opinions and suppositions.

Further, Junior's opinions were based on supposed specialized knowledge of tax returns and accounting. Under Utah R. Evid. Rule 702, such matters require the opinion of an expert; however, Junior was qualified only as a lay witness. Thus, such opinions were inadmissible under Utah R. Evid. Rule 701.

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, P34, 147 P.3d 1176, 1185-1186.

In his declaration, Junior opines that (1) David, prior to the commencement of this litigation "consistently operated the Farm at a substantial loss," *Id.*, at P30; (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.*, at P31; and (3) David's bookkeeping

was "sloppy and incomplete." *Id.*, at P33. 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.*, at P34.

An average bystander would be hard pressed to evaluate losses, financial maleficent, personal financial benefit, and computations of book keeping without specialized knowledge of tax returns or accounting. Thus, the court correctly found that under Utah R. Evid. Rule 701, Junior's opinions were inadmissible. See, *Rothlisberger*, 2006 UT App 49, P29, 147 P.3d 1176, 1184.

Plaintiffs did not obtain the help of an expert prior to discovery closing.

The trial court found that, not only did Junior's Declaration fail to provide any facts to support the asserted claims in the complaint, but it contradicted Junior's own deposition testimony. R. 710. This issue will be discussed later.

In conclusion, the trial court addressed the assertions in Junior's Declaration and found that each of them lacked evidentiary support. As a result, the trial court correctly concluded that there was insufficient evidence to overcome summary judgment, even taking the evidence in the light most favorable to the Plaintiff.

1. Appellants Provided no Relevant Evidence in Support of Their Claim That a Trust Accounting Did Not Occur.

Junior argued that Defendants failed to provide a Trust accounting, under Utah Code Ann. §75-7-103. However, based on the deposition testimony of the other Plaintiffs, the court found that the Defendants had, in fact, provided Trust accountings. R. 717.

Junior's only exhibit supporting his accusation to the contrary was his own request for an accounting, dated October 2, 2012. R. 136. However, this request did not constitute evidence that an accounting was withheld. Rather, his own and other testimony

established that after the accounting was requested, it was provided. Thus, summary judgement on this issue was appropriate.

When the Trust was funded in 1993 and David was named as trustee, 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 an accounting until 2012, at which time accountings and tax returns for 2008 through 2012 were provided. Plaintiffs testified that they did not review the accounting provided in 2012, 2013 or 2014, either prior to, or following, the filing of their complaint. Plaintiffs' Depo. of Sharrol Ann Boren Anderton, R. 82-89, P22 line 22 through P23 line 3 (acknowledging she received accountings); Depo. of Mary Ellen Boren Blanchard, R. 110-117, P21 lines 16-21 (acknowledging she received accountings); and Depo. of

Duane Boren Jr., R. 118-129, P22 lines 3-11 (admitting he only "skimmed over the documents"). See also, Fact No. 19, *supra*.

If the Plaintiffs had additional requests for information beyond the hundreds of pages they received in 2012, then they could have sought those answers through another informal request, or through discovery.

Even though the Plaintiffs received an accounting, they were not entitled to it, according to the Trust Agreement. The Trust specifies what accounting is to be provided, stating:

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.

Paragraph 9 of the Trust R. 154 (*emphasis added*).

Defendant Mrs. Boren is, and has always been, the only income beneficiary. She testified to having received and approved the required accountings. See,

Trust Document paragraph 9 of the Trust R. 154 and deposition of Ms. Boren. R. 139-142. Plaintiffs are merely contingent beneficiaries; no annual accounting is granted to them by the Trust. Regardless, as all Plaintiffs admitted in their depositions, an accounting was provided to them shortly after their request in 2012, and has been provided annually since their initial request.

The trial court appropriately granted summary judgment on the issue of a Trust accounting, as Plaintiffs failed to provide any evidence to support their claim, and a Trust accounting was provided to Plaintiffs (even though it was not required by the Trust).

2. Appellants Provided No Relevant Evidence to Support Their Breach of Trust Claim.

Appellants have attempted to argue their claims, as opposed to focusing on the true issue of whether summary judgement was appropriate due to the lack of supporting evidence for those claims. As the trial

court noted, "The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion." *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983).

Defendants all admitted in their depositions that they had no evidence to support their breach of trust claims. Depo. of Sharrol Ann Boren Anderton, R. 82 P47; Dep. of Mary Blanchard, R. 110, P36; Depo. of Terry Christensen, R. 99, P39; and Depo. of Duane Boren Jr., R. 118, P36. They further admitted there were no facts showing any reduction in the value of the Trust assets. Depo. of Duane Bowen Jr., R. 628, P31.

Then, in his Declaration, Junior offers mere assertions that an issues of fact exist, for example he said,

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.

Depo. of Duane Boren Jr., R. 118, P20.

Junior referred to his Exhibits F-I as support for his claims. Exhibit F is the Farm Agreement, which specifies terms for operating the farm, and compensation for running it. Trust, R. 249-250. No explanation of how these documents allegedly supported Plaintiff's claims was provided; as such, the trial court appropriately found they did not support Plaintiff's claim for breach of trust.

Exhibit G is a copy of the Trust account and income and expense reports for the Trust prepared by David and approved by Mrs. Boren. There is nothing in those reports that supports Plaintiffs' claims. Nor did Junior explain the relevance of those documents or provide foundation for them. R. 254-295.

Exhibit H contains copies of commitments for title insurance for the various sections of land in the farm, which show the appropriate percentage owned by the Trust. Again, no explanation was given to how these

documents supposedly support Plaintiffs' claims. R. 299.

Exhibit I is a copy of several checks written from the Trust bank account which Plaintiffs assert support their claim that farm equipment was leased from David L. Boren, despite the allegation that the farm previously owned the farm equipment. However, no evidence was submitted establishing what equipment the payment was for; establishing who owned that particular equipment; or in any other way suggesting wrongful payment from the Trust's account. See, Plaintiff's Exhibit I, attached to this brief.

In paragraph 26 of Junior's declaration, he claims that the Trust paid 100% of the costs for Defendant David L. Boren's labor and the lease of the equipment; Junior provided Exhibit J as evidence of this alleged wrongdoing. His statement is an unsupported conclusion, as Exhibit J is a bill from the Bureau of

Land Management that has nothing to do with labor or equipment costs. R. 424-426.

In paragraph 27 of Junior's declaration, he claims that Defendant David L. Boren used trust assets to inappropriately purchase items for his personal use. He provided Exhibit K as supposed evidence of these purchases. Exhibit K is merely an unmarked page from what appears to be a bank account; presumably, the Trust bank account. R. 428. The account shows the purchase of a 4-wheeler; however, there is no evidence that the 4-wheeler was purchased for David L. Boren, as opposed to being purchased for the Trust. Moreover, Plaintiffs' Exhibit G reflects Ms. Boren approved of this expenditure. See, Exhibit G, R. 272-295.

Paragraphs 28-31 contain unsupported conclusions made by Junior. These conclusions refer to Exhibit L for support. Exhibit L contains the Trust tax returns from 2008 through 2014. No explanation is provided to

show how these tax returns supposedly support a claim for breach of trust.

In short, Plaintiffs did not provide foundation for the evidence they submitted or an explanation of the relevance of those exhibits, as required in Rule 401. Utah R. of Evid. Rule 401. Further the documents do not appear to support Plaintiffs' claims. Thus, Plaintiffs failed to provide evidence of their claim for breach of trust, and summary judgment was appropriate.

3. Appellants Failed to Show Any Wrongdoing in the Operation of the Farm.

Plaintiffs claim that the trial court acknowledged that Defendant, David Born, "commingled his own assets, in livestock and land, with the Trust," and that it found there was nothing illegal about this commingling. Appellants' Brief pg. 37. However, this is not an accurate statement of the trial court's findings. The trial court found, "there is no showing by the Plaintiffs that Defendant's actions are unlawful," and

"Consequently, the Plaintiffs have failed to show any wrongdoing on the part of the Defendants in their operation of the farm." R. 718.

Plaintiffs admitted in their depositions that there was no evidence of commingling. Depo. of Sharrol Anderton, R. 82 P47; Depo. of Mary Blanchard, R. 110 P36; Depo. of Terry Christensen, R. 99 P39; and Depo. of Duane Boren Jr., R. 118 P36.

Junior's declaration makes claims regarding a Farm Agreement, Defendants' cattle grazing on the farm, and the lease of farm equipment. He provided Exhibits F-I, as outlined above, as support for his assertion that Defendants illegally commingled personal property with Trust property. However, these exhibits do nothing to support Junior's claim. No foundation for the relevance of these exhibits was provided by Junior and his statements are merely unsupported conclusions and suppositions.

There is nothing in Junior's Declaration explaining the purpose of the 370 pages, nor was there any expert

testimony analyzing the documents, nor is it possible to simply divine the intended meaning of those documents. See, *Taft v. Taft*, 2016 UT App 135, P22-24, 816 Ut. Adv. Rep 40 (party must explain relevance of exhibit to summary judgment motion).

The trial court correctly granted summary judgment, as all the Plaintiffs admitted, under oath, that they had no facts to support their complaint, and Junior's Declaration did not provide any admissible evidence to the contrary.

III. THE TRIAL COURT CORRECTLY STRUCK DUANE BOREN, JR.'S DECLARATION

This Court should affirm the trial court's ruling striking Junior's declaration, unless it finds that the trial court abused its "broad grant of discretion;" or, in other words, if "there was no evidentiary basis for the trial court's ruling." *Murdock*, 1999 UT 39, P25, 9862 P.2d 65, 72; and *Portfolio Recovery Assocs.*, 2013 UT App 255, P4, 314 P.3d 1069, 1071.

In this case, as mentioned above, each of the Plaintiffs, including Junior, testified at their

depositions that they had no facts to support the allegations in their complaint. However, when faced with Defendants' motion for summary judgment, Junior filed a declaration attempting to contradict that testimony. Declaration of Duane Boren Jr., R. 214. None of the other Plaintiffs have rescinded their deposition testimony.

In considering Junior's declaration, the trial court held:

"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.

The trial court's ruling striking Junior's Declaration 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) to allow one to claim ignorance at their deposition and then submit a declaration once discovery is completed violates the rules and policies regarding discovery; and 4) the declaration consists of inadmissible opinions and suppositions, as previously discussed.

1. Duane Boren Jr. Attempted to Contradict His Deposition and Declaration Testimonies.

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, P29 n.10, 322 P.3d 683, 690; and *Webster v. Sill*, 675 P.2d 1170, 1172-73 (Utah 1983).

Here, Junior took a clear position in his deposition. Junior's deposition testimony was that he had not reviewed any of the accountings, tax returns, or inventory and back-up documents he had been provided. 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.

Defendants' attorneys went through every allegation in the Complaint and asked what facts Junior had to support each of those allegations of his complaint. Junior responded by admitting, among other things, that he had no idea who the Trustee was, (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 (PP32-36 of Junior's deposition)), that he had not read the accountings, inventory, or tax returns that were provided to him (R. 625, 629 (PP20-22, and 33-34 of Junior's deposition)), that he was not aware of what assets were distributed by the court to the Trustee (R. 626 (P24 of Junior's deposition)), that he had no facts to support his claim that David had acted imprudently as an investor (R. 630 (P39 of Junior's deposition)), and that he had no facts to support the allegations in the complaint, (R. 626-627, and 631 (PP22-26 and 41 of Junior's deposition)).

Junior only changed an answer once, when David's attorney asked follow-up questions to those posed by Sherron's attorney. His only change was that his earlier statement, that he agreed with "most" of the Complaint, should be changed to show that he agreed with "all" of the Complaint. R. 637 (P66 of Junior's deposition). There were no other modifications to Junior's answers that would have made his statements unclear. See, *Magana v. Dave Roth Constr.*, 2009 UT 45, P39, 215 P.3d 143, 152. Junior had the opportunity to

review his deposition after it was printed; however, he signed it without making changes.

As Junior's deposition testimony and his Declaration contradicted one another, the trial court properly exercised its broad discretion in granting the Defendants' Motion to Strike the Declaration. *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, P4, 314 P.3d 1069, 1071.

2. The Declaration Contains No Explanation for the Change in Testimony.

The law requires that any explanation for a change in testimony be included in the declaration that seeks to contradict the deposition. *See, Legacy Res., Inc.*, 2013 UT at P29 n.10, 322 P.3d 683, 690.

Appellants argue that the circumstances in this case are like the facts in *Gaw v. State*, where the trial court used the rule in *Webster* to strike an affidavit objecting to Summary Judgment because the affidavit contained discrepancies from the affiant's deposition, and the Court of Appeals found the trial court's decision to be in error. *Gaw v. State*, 798 P.2d 1130, 1140 (Utah App. 1990).

However, in *Gaw*, the court found that Gaw had provided an explanation for the discrepancies between his deposition and his affidavit. The trial court had apparently not believed Gaw's explanation, However, the Court of Appeals held that "As long as it [the explanation] is plausible, the fact finder should be allowed to weigh the credibility of the explanation." *Id.*, at 1140.

The *Gaw* Court cited *Kennett-Murray Corp. v. Bone* to exemplify its ruling. *Gaw v. State*, 798 P.2d 1130, 1141, (Utah App. 1990) (*citing, Bone*, 622 F.2d 887, 894 (5th Cir. 1980)). In *Bone*, the affiant's affidavit explained that the deposition responses were "given under the mistaken assumption that the questions concerned one document when they in fact concerned another." *Id.*, at 1140. The *Bone* Court found the explanation to be "at least plausible." *Id.*, at 887.

Unlike the facts in *Gaw* and *Bone*, where the court found the explanations given to be at least plausible, Junior did not provide **any** explanation for the contradiction between his deposition and declaration testimony.

The Utah Supreme Court looks for the explanation in the affidavit itself, absent which the deposition testimony is taken as being undisputed. See, *Legacy Res., Inc.*, 2013 UT P29 n.10, 322 P.3d 683, 690 ([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, P39 n. 33, 215 P.3d 143, 152 ("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 miss-translation or he had misunderstood the question."); and *Webster*, 675 P.2d at 1173 ("The Plaintiffs' affidavit wholly failed to explain the discrepancy between the deposition and the affidavit.").

Similarly, in *Brinton v. IHC Hosps., Inc.*, the Utah Supreme Court affirmed the trial court's decision, stating,

[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.

Brinton, 973 P.2d 956, 973 (Utah 1998);

In this case, Junior's declaration contradicted his deposition testimony. Instead of explaining this discrepancy under oath, as the law requires, Junior's declaration failed to address the contradiction.

The only explanation for the contradiction is contained in the Plaintiffs' Memorandum in Opposition to 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. However, this is not an explanation for the

contradiction; rather, it is an excuse that was offered outside of Junior's declaration, contrary to the requirements of the law.

Further, Junior had the accountings and tax returns in the fall of 2012. He subsequently filed this lawsuit in 2014. When Junior filed his declaration on June 29, 2015, the discovery cutoff date of May 30, 2015 had passed. R. 25. Both Junior and his attorney had an obligation to review the relevant documents prior to filing a lawsuit. See, Utah R. Civ. Pro. 11(b). The district court, therefore, did not abuse its discretion in striking Junior's declaration or in subsequently dismissing the case. Rather, it strictly adhered to the law.

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

To allow Plaintiffs' declaration based on his attorney's explanation for the discrepancies would defeat the purpose of discovery and depositions, and the reason for summary judgment motions. See, Webster,

675 P.2d at 1173. Courts that have considered arguments similar to the Plaintiffs' have rejected those arguments. See, *Traco Steel Erectors, Inc. v. Comtrol, Inc.*, 2007 UT App 407, P38, 175 P.3d 572, 579-580 (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 lack of knowledge 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 own testimony that he had no facts to support the complaint. However, Junior had the accountings and relevant information in 2012. He had more than adequate time to hire an accountant to review the documents for any wrongdoing.

Junior's repeated allegations of malfeasance against his brother and his own mother are reckless, if not defamatory, given his decision not to review the documents he was given in 2012 to determine if his accusations had merit. Such actions should not be condoned by this Court; rather, the trial court's decision to strike Junior's declaration should be affirmed.

IV. ATTORNEY FEES

1. The Trial Court Appropriately Awarded Defendants Attorney Fees.

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. . . .

The Utah Supreme Court case, *Shurtleff v. In re United Effort Plan Trust* (*In re United Effort Plan Trust*), is directly on point, as it pertains to legal fees in this case. *Shurtleff*, 2012 UT 47, P23, 289 P.3d 408, 415-16. The Court in *Shurtleff* found that in

order to determine how the term "justice and equity" applies, the court should analyze the following factors:

- (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 the bringing or conduct of the litigation.

Id.

Here, the trial court analyzed the *Shurtleff* factors 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 investigate their claims and 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. Based on those findings, the court awarded the Defendants the legal fees and costs they had incurred.

In this case, the Plaintiffs concede that the trial court appropriately used the *Shurtleff* factors. They ask only that the decision be reversed if the trial court's Ruling and Order are reversed. However, the trial court's ruling was correct and should be affirmed, as should its' finding that equity and justice would be served by awarding attorney fees to the Defendants.

2. The Defendants Should be Awarded Their Attorney Fees for the Necessity of Defending Against this Appeal.

The trial court awarded Defendants their legal fees and costs incurred defending against the Plaintiffs' claims. Rec. 815, 852, 857. The established rule is that the Appellate Court is to award the prevailing party the fees incurred on appeal when that party was awarded fees in the underling case. See, *Warner v. Warner*, 2014 UT App 16, P63, 319 P.3d 711, 732. However, Appellees should be awarded the fees they have incurred in defending against this appeal.

CONCLUSION

Appellees, David L. Boren and Mrs. Boren, request that this Court dismiss this case, based on Appellants' lack of standing; or in the alternative, that this Court affirm the trial court's ruling on Defendants' motion for summary judgment; and that this Court award attorney's fees.

DATED this 12th day of September, 2016.

Huntsman | Lofgran, PLLC



SHERRI L. WALTON

Attorney for the Appellees

SIGNATURE OF COUNSEL

Appellees respectfully submit the foregoing by and through their undersigned counsel of record, Sherri L. Walton, on this the September 12, 2016.

Huntsman | Lofgran, PLLC

A handwritten signature in black ink, appearing to read "Sherri L. Walton", written over a horizontal line.

SHERRI L. WALTON

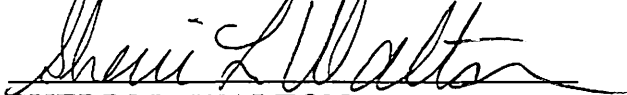
Attorney for the Appellees

REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument in order to answer questions concerning the arguments above.

DATED: September 12, 2016.

Huntsman | Lofgran, PLLC

A handwritten signature in black ink, appearing to read "Sherri L. Walton", written over a horizontal line.

SHERRI L. WALTON

Attorney for the Appellees

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND
TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of UT. R. APP. P.

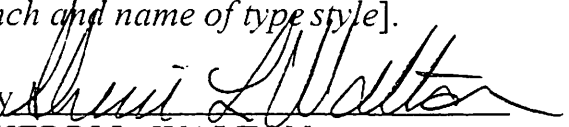
24(f)(1)(A) because:

- ☒ this brief contains 9,202 words, excluding the parts of the brief exempted by UT. R. APP. P. 24(f)(1)(B) or
- ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by UT. R. APP. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of UT. R. APP. P.

24(f)(1)(A) and the type style requirements of UT. R. APP. P. 24(f)(1)(A) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Courier New, or
- ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

By 
SHERRI L. WALTON
ATTORNEY AT LAW

CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF APPELLEES was served by electronic mail on September 12, 2016 as follows:

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HUNTSMAN | LOFGREN PLLC



SHERRI L. WALTON

Attorney for the Plaintiffs

EXHIBIT I

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 10-22-2012

PAY TO THE ORDER OF: Mary Blanchard \$ 831.37

Eight hundred thirty one and 37/100 DOLLARS

ZIONS BANK

FOR: David Boren

1240000540 027 37136 B* 2484

Processed 10/29/12 \$831.37 Ch# 2484

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 10-27-12

PAY TO THE ORDER OF: Farm Bureau \$ 300.00

Three hundred and 00/100 DOLLARS

ZIONS BANK

FOR: 7154387 - Penas

1240000540 027 37136 B* 2489

Processed 11/08/12 \$300.00 Ch# 2489

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-5-2012

PAY TO THE ORDER OF: Moon Lake Electric \$ 32.00

Thirty two and 00/100 DOLLARS

ZIONS BANK

FOR: Corral Service

1240000540 027 37136 B* 2490

Processed 11/08/12 \$32.00 Ch# 2490

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-04-12

PAY TO THE ORDER OF: HCS \$ 128.65

One hundred twenty eight and 13/100 DOLLARS

ZIONS BANK

FOR: Willy For man

1240000540 027 37136 B* 2491

Processed 11/13/12 \$128.65 Ch# 2491

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-17-12

PAY TO THE ORDER OF: LFA \$ 264.74

Two hundred sixty four and 74/100 DOLLARS

ZIONS BANK

FOR: David Boren

1240000540 027 37136 B* 2492

Processed 11/19/12 \$264.74 Ch# 2492

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Alfred Battison & Hamilton P.C. \$ 602.70

Six hundred two and 70/100 DOLLARS

ZIONS BANK

FOR: David Boren

1240000540 027 37136 B* 2493

Processed 11/20/12 \$602.70 Ch# 2493

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Dry Catch Traylor \$ 760.00

Seven hundred sixty and 00/100 DOLLARS

ZIONS BANK

FOR: David Boren

1240000540 027 37136 B* 2494

Processed 11/23/12 \$760.00 Ch# 2494

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Angus USA LLC \$ 226.94

Two hundred twenty six and 94/100 DOLLARS

ZIONS BANK

FOR: David Boren

1240000540 027 37136 B* 2495

Processed 11/26/12 \$226.94 Ch# 2495

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Daggett County Treasurer \$ 84.88

Eighty four and 88/100 DOLLARS

ZIONS BANK

FOR: 2012 property taxes

1240000540 027 37136 B* 2496

Processed 11/21/12 \$84.88 Ch# 2496

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Moon Lake Electric \$ 32.00

Thirty two and 00/100 DOLLARS

ZIONS BANK

FOR: 2012 property taxes

1240000540 027 37136 B* 2497

Processed 11/23/12 \$32.00 Ch# 2497

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: David Boren \$ 15706.00

Fifteen thousand seven hundred six and 00/100 DOLLARS

ZIONS BANK

FOR: Equipment lease

1240000540 027 37136 B* 2498

Processed 11/20/12 \$15706.00 Ch# 2498

DUANE BORN TRUST
RT.1 BOX 1302
ROOSEVELT, UT 84066

DATE: 11-18-12

PAY TO THE ORDER OF: Duchesne County Treasurer \$ 1069.55

One thousand sixty nine and 55/100 DOLLARS

ZIONS BANK

FOR: 2012 property taxes

1240000540 027 37136 B* 2499

Processed 11/20/12 \$1069.55 Ch# 2499

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-4-13

PAY TO THE ORDER OF From Boren

AMOUNT 6915.56

ZIONS BANK

FOR 13612.08

Processed 11/04/13 \$13612.08

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-22-13

PAY TO THE ORDER OF From Boren

AMOUNT \$275.00

ZIONS BANK

FOR 754099

Processed 10/29/13 \$275.00 Ch# 2582

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 10/25/13

PAY TO THE ORDER OF Boren Vet Clinic

AMOUNT \$400.22

ZIONS BANK

FOR Con Boren

Processed 10/29/13 \$400.92 Ch# 2586

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-22-13

PAY TO THE ORDER OF Classic Pub

AMOUNT \$233.41

ZIONS BANK

FOR Dodge & Change

Processed 11/25/13 \$233.41 Ch# 2587

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-8-2013

PAY TO THE ORDER OF Allied Brothers & Harrington PC

AMOUNT \$80.00

ZIONS BANK

FOR Invoice #11520

Processed 11/08/13 \$80.00 Ch# 2588

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE Nov. 4, 2013

PAY TO THE ORDER OF David Boren

AMOUNT \$1200.00

ZIONS BANK

FOR Labr for David & Cheryl Boren

Processed 11/05/13 \$1200.00 Ch# 2589

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE Nov 5, 2013

PAY TO THE ORDER OF TER

AMOUNT \$49.32

ZIONS BANK

FOR Car Bill

Processed 11/06/13 \$49.32 Ch# 2590

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-5-13

PAY TO THE ORDER OF Duchene County Treasurer

AMOUNT \$1010.65

ZIONS BANK

FOR 2013 property taxes

Processed 11/07/13 \$1010.65 Ch# 2591

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-5-13

PAY TO THE ORDER OF Daggett County Treasurer

AMOUNT \$92.17

ZIONS BANK

FOR 2013 property taxes

Processed 11/08/13 \$92.17 Ch# 2592

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-5-13

PAY TO THE ORDER OF Dry Gulch Irrigation

AMOUNT \$885.00

ZIONS BANK

FOR Act 1219

Processed 11/08/13 \$885.00 Ch# 2593

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE 11-5-13

PAY TO THE ORDER OF David Boren

AMOUNT \$15706.66

ZIONS BANK

FOR Equipment lease

Processed 11/07/13 \$15706.66 Ch# 2595

DEPOSIT SLIP
DUANE BOREN TRUST
RT.1 BOX 1332
ROOSEVELT, UT 84006

DATE Nov. 6, 2013

PAY TO THE ORDER OF Sherron Green

AMOUNT \$5000.00

ZIONS BANK

FOR Sold calves

Processed 11/08/13 \$5000.00 Ch# 2596