

HON. NICKOLAS C. MURNION  
DISTRICT JUDGE  
16<sup>th</sup> Judicial District, Dept. 2  
P.O. Box 107  
Forsyth, Montana 59327  
(406) 346-6109

DATE May 17, 2017  
CLERK OF DISTRICT COURT  
BY Shalene Bell

**MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY**

DREW JENRICH, as Successor Personal  
Representative of the Estate of STARLA  
GIESICK, formerly known as STARLA  
ROCHELLE ROGERS, deceased,

Plaintiff,

vs.

STEVEN GIESICK, and DOES 1-5,  
Inclusive,

Defendants.

Cause No. DV-16-15

**MEMORANDUM AND ORDER  
GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
PLAINTIFF'S REQUEST TO AMEND  
COMPLAINT**

Before the Court is Defendant's motion for summary judgment. On December 30, 2016, Defendant, STEVEN GIESICK, filed a Motion for Summary Judgment and a Brief in Support of his Motion for Summary Judgment. On January 19, 2017, Plaintiff filed a Reply and Brief in Opposition to Defendant's Motion for Summary Judgment Pursuant to Rule 56, Mont. R. Civ. P. and Request to Allow Amendment of Complaint to Include a Count for Fraud Against Plaintiff Under 72-1-111 MCA. On February 3, 2017, Defendant filed his Combined Reply Brief in Support of Motion for Summary Judgment and Opposition to Plaintiff's Request for Amendment to Include Fraud Count, and a Request for Hearing on Motion for Summary Judgment.

The Court held oral argument on the motion on April 12, 2017, at the Rosebud County Courthouse in Forsyth, Montana. In light of arguments presented by counsel at the hearing, and

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after due consideration of the briefs submitted by the parties, together with the applicable law, the Court determines the following:

(1) Defendant's Motion for Summary Judgment, Pursuant to Rule 56, Mont. R. Civ. P., is GRANTED; and

(2) Plaintiff's Request to Amend the Complaint to Include a Count for Fraud against Defendant under 72-1-111, MCA, is DENIED.

### **FACTUAL BACKGROUND**

The decedent, Starla Giesick ("Starla") was badly injured in a motorcycle accident which occurred on April 2, 2013 and she died on April 8, 2013 as a result of her injuries. Steven Giesick ("Giesick") was Starla's husband and surviving spouse. Drew Jenrich (Jenrich) is Starla's son. Giesick was appointed as Personal Representative of Starla's estate in intestacy on May 8, 2013 in Rosebud County Cause No. DP-2013-11. Giesick filed a "Notice and Information to Heirs and Devisees" on May 13, 2013 which was presumably mailed to Drew Jenrich. The other heir is Heather Higgenbotham, Starla's daughter, who is not a party to this suit. The estate received policy limits of \$100,000.00 for Starla's death from State Farm Mutual Insurance Company, the motorcycle liability insurer. The parties agree that Giesick slowly doled out the \$100,000.00 between Jenrich, and his sister, Heather Higgenbotham, who has not joined in with Jenrich in this action. Giesick also received the sum of \$200,000.00 from a Life Insurance Policy, which was not part of the probate proceeding. The probate proceeding was closed informally by the filing of a sworn statement on November 18, 2013.

Jenrich commenced this action by filing an Application For Re-Opening of Probate, Appointment of Successor Co-Personal Representative, and Complaint For Wrongful Death and For Damages on March 24, 2016. At the time of the filing, Jenrich was not the Personal Representative of the Estate of Starla Giesick.

Jenrich filed an Application to Re-open the Probate of the Estate of Starla on April 11, 2016. After a hearing on an Order to Show Cause held on May 23, 2016, the Court granted the Application for Re-opening the probate and appointed Jenrich as successor personal representative. The Court found good cause to re-open the probate in order for Jenrich to have standing to pursue a civil action for the wrongful death of decedent in Rosebud County District Court.

Jenrich has brought this action claiming that Giesick caused the wrongful death of Starla by his operation of a motorcycle which was involved with the accident on April 2, 2013, causing injury to Starla who died on April 8, 2018. Drew is also alleging that Giesick caused personal injury to Starla.

Giesick argues that the claim by Jenrich is barred by the three year statute of limitations for claims for negligence, wrongful death, survivorship, and negligent infliction of emotional distress. §27-2-204, M.C.A. Giesick further claims that the three year statute of limitations for wrongful death ended on April 11, 2016. Giesick contends that Jenrich did not have standing to sue when he filed the Application for Re-Opening of Probate, Appointment of Successor Co-Personal Representative, and Complaint For Wrongful Death and For Damages on March 24, 2016.

Jenrich responds that on March 7, 2016, he discovered that Geisick may have committed fraud and asks for permission to amend his complaint to include a cause of action of fraud. Jenrich argues that the statute of limitations for a fraud claim is two years after the fraud is discovered and that time has not expired. §72-1-111, M.C.A.

### **STANDARD OF REVIEW**

Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. The initial burden is on the party seeking summary judgment, to inform the court of the basis for its motion and to identify those portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986).

Once the moving party has made this showing, the non-moving party must come forward with material, specific facts showing that there is a genuine issue for trial. *Motarie v. Northern Montana Refuse and Disposal District*, 274 Mont. 239, 242, 907 P.2d 154 (1995). Once the burden has shifted, the non-moving party is held to a standard of proof about equal to that imposed upon the moving party under Rule 56(c). *Kelly v. Widner*, 236 Mont. 523, 526, 771 P.2d 142, 144 (1989) (citing *Harland v. Anderson*, 169 Mont. 447, 548 P.2d 613, 615 (1976)).

A disputed fact is material if it inheres in an element of the cause of action or defense at issue. *State Med. Oxygen v. American Med. Oxygen*, 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994). Such facts must be of a material and substantial nature, rather than fanciful, frivolous, gauzy, or mere expressions of suspicion. *Westlake v. Osborne*, 220 Mont. 91, 94, 713 P.2d 548, 550 (1986) (citing *Silloway v. Jorgenson*, 146 Mont. 307, 310, 406 P.2d 167, 169 (1965)). “Unsupported conclusory or speculative statements do not raise a genuine issue of material fact. Further, the trial court has no duty to anticipate possible proof.” *Benson v. Diehl*, 228 Mont. 199, 203, 745 P.2d 315, 317 (1987). If the non-moving party fails to meet its burden with an appropriate evidentiary showing, summary judgment or partial summary judgment in favor of the moving party must be granted as a matter of law. Rule 56(c), Mont. R. Civ. P.

## DISCUSSION

### 1. *The Survival and Wrongful Death Claims are barred by the Statute of Limitations.*

The statute of limitations for claims of negligence, wrongful death, survivorship, and negligent infliction of emotional distress is three years. An action must be “commenced,” if at all, prior to the expiration of the limitations period. Mont. Code Ann. § 27-2-204; *Estate of Woody v. Big Horn Cty.*, 2016 MT 180, ¶ 9, 384 Mont. 185, ¶ 9, 376 P.3d 127, 128 (Mont. 2016). An action is “commenced” when a complaint is filed. Mont. Code Ann. § 27-2-102(b); Rule 3, Mont. R. Civ. P. The limitation period begins to run when the claim accrues, which is when all elements of the claim “exist or have occurred.” *Estate of Woody*, (citing Mont. Code Ann. § 27-2-102). For a “typical” personal injury claim, the elements of the tort happen and the cause of action accrues, at the same moment in time. *Orr v. State*, 2004 MT 354, ¶ 57, 324 Mont. 391, ¶ 57, 106 P.3d 100, 113 (Mont. 2004). In this instance, Starla’s personal injury happened and accrued on April 2, 2013, when she was injured in the motorcycle accident. In order to beat the running of the statute of limitations, a survival claim for Starla’s personal injury must have been filed prior to April 4, 2016.

Since death is a critical element in a wrongful death action, a claim for wrongful death accrues at the time of the decedent’s death. *Carroll v. W.R. Grace & Co.*, 252 Mont. 485, 488, 830 P.2d 1253, 1255 (Mont. 1992). Here, the wrongful death action accrued on April 8, 2013, when Starla died of the injuries she sustained in the motorcycle accident. The three year limitation period for commencing a wrongful death claim ended on April 11, 2016.

2. *Jenrich did not have standing to sue when he filed the initial complaint on March 23, 2016.*

Standing to sue is a “threshold, jurisdictional requirement” of any judicial proceeding. 5 *Lucas v. Stevenson*, 2013 MT 15, ¶ 16, 368 Mont. 269, ¶ 16, 294 P.3d 377, 381 (Mont. 2013). Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue, not whether the issue is justiciable, and standing is determined as of the time the action is brought. *Chipman v. Northwest Healthcare Corporation*, 2012 MT 242, ¶ 25, 366 Mont. 450, ¶ 25, 288 P.3d 193, 201 (Mont. 2012).

A wrongful death claim can be pursued only by the personal representative of the decedent’s estate. Mont. Code Ann. § 27-1-513. A survival cause of action belongs to the decedent’s estate and must be combined with the wrongful death claim into one legal action. As with a wrongful death claim, a survival action may only be pursued by the personal representative of the estate. Mont. Code Ann. § 27-1-501; *In re Estate of Lambert*, 2006 MT 16 229, ¶¶ 14, 15, 333 Mont. 444, ¶¶ 14, 15, 143 P.3d 426, 429-430 (Mont. 2006); *accord Runstrom v. Allen*, 2008 MT 281, ¶ 19, 345 Mont. 314, ¶ 19, 191 P.3d 410, 413 (Mont. 2008). Any person other than the appointed personal representative of the estate lacks standing to bring a wrongful death action. *Renville v. Fredrickson*, 2004 MT 324, ¶ 23, 324 Mont. 86, ¶ 23, 101 20 P.3d 773, 778 (Mont. 2004).

Here, in order to avoid the statute of limitations bar, the survival claim had to have been commenced on or before April 4, 2016, and the wrongful death action on or before April 11, 2016. Jenrich apparently contends that he commenced both actions by filing his Application for Re-opening of Probate on March 23, 2016, because that is the only document he filed within the limitations periods. However, only a personal representative of Starla could file those claims, and Jenrich was not a personal representative at that time.

On March 23, 2016, Jenrich had no authority to act on behalf of his mother’s estate. A person serving as personal representative (or successor personal representative) does not acquire powers until he is appointed and letters of appointment are issued. (Mont. Code Ann. § 72-3-103.) Letters of appointment were not issued to Jenrich until June 9, 2016. By that time, the limitations period on each claim had passed.

Jenrich lacks standing. Standing is determined as of the date the action is brought, and Jenrich had no standing to sue on March 23, 2016. Prior to June 9, 2016, Jenrich did not possess the threshold, jurisdictional requirement of being a proper litigant entitled to have the Court decide

the merits of his dispute. An action brought by a person without standing is subject to disposition on summary judgment. *See, e.g. Lucas*, 2013 MT at ¶ 24.

3. *Jenrich failed to respond to Defendant's arguments concerning statute of limitations.*

As noted above, the Court has concluded that the statute of limitations has run thereby barring Jenrich's claims of wrongful death and survivorship. However, even if the Court had not so concluded, Defendant's Motion for Summary Judgment is properly granted given Jenrich's failure to address Defendant's arguments in his opposition brief. In his response pleading, entitled "Reply and Brief in Opposition to Defendant's Motion for Summary Judgment," Plaintiff did not address Defendant's motion or arguments in any way, thereby conceding that the statutes of limitations have run, and the wrongful death and survival claims are time-barred. The failure to address those issues is an admission under Rule 8(b)(6), Mont. R. Civ. P., and Montana Uniform District Court Rule 2(b), that the statute of limitations and standing defenses asserted by Defendant, are well taken. Accordingly, summary judgment is properly entered on this alternative ground in favor of Defendant on all counts in the Amended Complaint. Further, Plaintiff, in his Reply, admitted that he had no standing to bring the action in the first place. (Plaintiff's Reply, p. 2, 26 lines 9-11.)

4. *Plaintiff's request to amend complaint to add fraud count is denied.*

Plaintiff's sole response to Defendant's Motion for Summary Judgment was his Request to Amend the Complaint, by which he seeks leave to change course and assert that Defendant perpetrated a fraud on him. However, Plaintiff petitioned to re-open the probate, and for his appointment as successor personal representative, for the sole purpose of pursuing "an action for wrongful death." Plaintiff's Application to Re-Open Probate, Sworn Statement to Re-Open Probate . . .; and Motion and Brief . . ., each states that the estate re-opening and appointment of successor personal representative were sought in order "to bring a wrongful death action . . ." Further, this Court's May 23, 2016, Order Re-Opening the Estate specifically states that the good cause which existed to re-open the estate and appoint a successor personal representative was "to pursue a civil action for the wrongful death of the decedent . . ." The Court was never asked to address, and did not address, the propriety of pursuing an action for "fraud." While Rule 15, Mont. R. Civ. P. permits leave to be "freely given" for an amended pleading when "justice so requires," leave should not be given when

such amendment would be futile or legally insufficient to support the requested relief. *Hawkins v. Harney*, 2003 MT 58, 17 ¶¶ 39-43, 314 Mont. 394, ¶¶ 39-43, 66 P.3d 305, 311-312 (Mont. 2003); *Deschamps v. Treasure State Trailer Court, Ltd.*, 2010 MT 74, ¶¶ 17, 21-22, 356 Mont. 1, ¶¶ 17, 21-22, 230 P.3d 800, 803-804 (Mont. 2010). Here, it would be futile to allow Plaintiff's amendment in this circumstance, for two reasons: (a) Jenrich has stated no facts constituting fraud; and (b) the statute of limitations has run on any fraud claim.

- a. *It is not fraudulent for a tortfeasor from whom the Estate may recover, to serve as personal representative.*

Jenrich has cited no authority for his position that Giesick engaged in fraudulent conduct by serving as Starla's Personal Representative when he, as the driver of the motorcycle, was a tortfeasor bearing some responsibility for her death. Other jurisdictions have considered whether a tortfeasor is barred from bringing a wrongful death or survival action against himself while serving as the Personal Representative of a decedent's estate, and have concluded that there is no such bar. *See, e.g., Bagley v. Bagley*, 2016 UT 48, \_\_\_ P.3d \_\_ (Utah, 2016), where the trial court had erred when it dismissed a personal representative's wrongful death and survival suit against herself, as tortfeasor, for damages due to the death of her husband, the decedent. In the *Bagley* matter, the decedent (Barbara Bagley's husband, Bradley Vom Baur) died from injuries he sustained when he was thrown from a vehicle, driven by his wife, which "flipped" after she lost control. Bagley had been driving the vehicle; Vom Baur was a passenger. Bagley survived the accident, was appointed as Von Baur's Personal Representative, and filed wrongful death and survival actions against herself. Under wrongful death and survival action statutes nearly identical to Montana's, the Utah Supreme Court concluded that both the wrongful death statute and the survival statute allow an heir or personal representative to pursue a claim, through litigation, even if the decedent's death was caused by the wrongful act or neglect of that heir or personal representative. A New York court had reached the same conclusion on similar facts over seventy years ago. *See Rozewski v. Rozewski*, 181 Misc. 793, 46 N.Y.S.2d 743, 745-747 (Sup. Ct. 1944).

- b. *Jenrich has not properly pled any fraud claim.*

In alleging fraud, a pleader is obliged to "state with particularity the circumstances constituting fraud . . ." Rule 9(b), Mont. R. Civ. P. A party asserting a claim of fraud must establish the following elements:

- a. representation;
- b. the falsity of that representation;
- c. the materiality of the representation;
- d. the speaker's knowledge of the representation's falsity or ignorance of its truth;
- e. the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated;
- f. the hearer's ignorance of the representation's falsity;
- g. the hearer's reliance upon the truth of the representation;
- h. the hearer's right to rely upon the representation; and
- i. the hearer's consequent and proximate injury or damages caused by their reliance on the representation.

Mont. Code Ann. § 28-2-405. *Franks v. Kindsfather*, 2005 MT 51, ¶ 17, 326 Mont. 192, 1962, 108 P.3d 487, 490 (Mont. 2005).

Here, Jenrich failed to address those elements. The only allegation of fraud in his "Reply" to Giesick's motion is a single, conclusory statement that "[by obtaining appointment as her Personal Representative, [Giesick] committed a fraud . . . by effectively barring [the Plaintiff's] ability to bring a wrongful death action against him . . ." Plaintiff makes no reference to any representation of any sort (let alone any false or material one), made by Giesick, that Plaintiff contends he relied upon to his damage.

In his Reply, Plaintiff also charges "that [Giesick] did not own up to the fact that as the tortfeasor, he could not maintain the fiduciary role of Personal Representative of the Estate of Starla Giesick." Plaintiff's contention seems to be that Giesick committed fraud by administering his wife's estate while he had a conflict of interest. However, Jenrich cites no authority for the bald assertion that Giesick was somehow barred from serving as Personal Representative, nor does he suggest that there is any law which would obligate Giesick to "own up" to anything.

While there is the potential for a conflict of interest when the personal representative of a decedent is also the tortfeasor whose actions contributed to the decedent's death, any such conflict of interest may constitute grounds for seeking the removal of a personal representative "for cause." However, a conflict of interest does not *mandate* the removal of a personal representative, much less equate to "fraud." *In re Estate of Zempel*, 2000 MT 283, ¶ 18, 302 Mont. 183, ¶ 18, 14 P.3d 441, 443 (Mont. 2000). Nor is the mere fact that a personal representative's decision not to pursue (or, in this case, further pursue) a claim in and of itself represent a violation of his fiduciary responsibility. *See, In re Estate of Long*, 225 Mont. 429,



435-437, 732 P.2d 1347, 1351-1352 (Mont. 1987). Simply because Jenrich does not agree with Cause No. CV-16-15 how the claim was handled does not mean that the personal representative improperly administered the estate. *Long*, 732 P.2d at 1352.

Jenrich further admits that he was well aware of the circumstances of his mother's death and his stepfather's involvement in the accident, and that he was notified of the important steps in the estate administration, including Giesick's appointment and the receipt of insurance proceeds as the result of the motorcycle accident. If Jenrich believed Giesick had a conflict of interest regarding any part of the estate, he could have requested a formal, rather than informal, administration (Mont. Code Ann. § 72-3-303, 304), and he could have requested either a successor administrator, as he eventually did, or the appointment of a special administrator for purposes of assessing a wrongful death claim. He did none of those things.

c. *The statute of limitations has run on any fraud claim.*

Jenrich references two limitations statutes (Mont. Code Ann. § 27-2-203 and Mont. Code Ann. § 72-1-111) which he contends might apply to his fraud claim against Giesick, both of which require commencement of an action within two (2) years. Both, however, are "discovery" type statutes. The first, §27-2-203 (Actions for relief on ground of fraud or mistake), states that a cause of action shall "not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud . . ." The other, §72-1-111 (Remedies for fraud-statute of limitations) reads: "Any proceeding must be commenced within 2 years after the discovery of the fraud . . ." Even though just what it is that Jenrich contends is fraud is inscrutable, the Title 72 statute does not seem to apply. That statute deals with "fraud . . . perpetrated in connection with any proceeding or in any statement filed under [the Uniform Probate Code] or if fraud is used to avoid or circumvent the provisions of the code . . ." Accordingly, the statute which applies to Jenrich's allegation is § 27-2-203. The result, however, is the same under either statute: the claim is time-barred.

Whether there has been a "discovery" of facts sufficient to start the running of the statute of limitations is a question of law, for the Court to decide. *Holman v. Hansen*, 237 Mont. 198, 203, 773 P.2d 1200, 1203 (Mont. 1989).

Jenrich's argument is that the statute of limitations did not begin running until "on or about" March 7, 2016, when he struck up a conversation with "Fred," last name unknown. The

conversation apparently concerned his mother's death and Giesick's handling of the estate, because "Fred" told him the Plaintiff that he needed to talk to an attorney. "Fred" gave him Robert Johnson's name and number. Plaintiff's position is that he did not discover "that he had a cause of action for fraud," that is, that he "did not know that [he] had any legal remedy" against Giesick until the "Fred" conversation took place. But a discovery statute begins running when the "defrauded" party learns of the *facts constituting the fraud* (27-2-203), not when he learns that he has a cause of action or when someone tells him he should talk to a lawyer. "Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation." Mont. Code Ann. § 27-2-102(2).

"A claim [for fraud] accrues when all the elements of the claim exist or have occurred . . . The question here is when [the party claiming to have been defrauded] discovered, or reasonably should have discovered, the facts allegedly establishing the alleged fraud . . ." *Deschamps v. Treasure State Trailer Court, Ltd.*, 2010 MT 74, ¶ 33, 356 Mont. 1, ¶ 33, 230 P.3d 800, 806 (Mont. 2010). All that is needed in order to begin the running of the statute of limitations for fraud, is that the party claiming to have been wronged has such information as would put him "on inquiry, which, if pursued, would result in knowledge. Notice of facts and circumstances which would impel a man of ordinary prudence and intelligence to make inquiry is equivalent to knowledge of the facts." *Lasby v. Burgess*, 88 Mont. 49, 289 P. 1028, 1032 (Mont. 1930). A more recent statement of the court on that point is:

It is not enough for the plaintiff merely to say that he was ignorant of the facts at the time of their occurrence, and has not come into knowledge of them until within two years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have knowledge of them, it being the rule that if he has notice or information of circumstances which would put him on inquiry which if followed would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of the facts.

*Mobley v. Hall*, 202 Mont. 227, 232, 657 P.2d 604, 606 (Mont. 1983).

Jenrich contends that Giesick "committed a fraud" by "obtaining appointment as [his mother's] Personal Representative." If that is, indeed, his contention, the two year statute of limitations has long since passed. The salient facts of Jenrich's claim are that (1) Jenrich's mother (Starla) was injured while riding as a passenger on a motorcycle driven by her husband, Giesick, and, shortly thereafter, died, (2) Giesick was appointed as personal representative of

Starla's estate. Regarding those, Jenrich knew that his mother had died and Giesick had been appointed as Personal Representative of her estate no later than May 13, 2013 – three days after the Notice and Information to Heirs and Devisees (which Jenrich admits receiving), was mailed to him. (Exhibit 5 to Giesick's Motion for Summary Judgment.)

Further, Jenrich would have likely known about his mother's death much earlier than May 13. When a person has notice of such facts and fails to exercise due diligence, the limitations period is not tolled. *Christian v. Atlantic Richfield Co.*, 2015 MT 255, ¶ 64, 380 Mont. 495, ¶ 64, 358 P.3d 131, 153 (Mont. 2015). Since Jenrich was in possession of all the facts necessary to "discover" his claim on or before May 13, 2013, the statute of limitations ran two years later, on May 13, 2015.

In his Affidavit which accompanied his Reply, however, Jenrich expressed a different position—that the "fraud" was not Giesick's appointment, but later, when Giesick "[suggested] that he had settled [Jenrich's claim]." In that same Affidavit, Jenrich admitted that he discussed the "settlement on the auto insurance for the motorcycle which was involved in the accident which caused [his] mother's death," with Giesick, so there was a conversation about it at some time. His affidavit fails to state when the conversation took place. However, regarding the auto policy insurance claim, Jenrich was also notified in writing that his mother's estate had come into possession of "the proceeds of an insurance claim of \$100,000." The document disclosing that information was the Personal Representative's Sworn Statement to Close Informal Probate, which was mailed to Jenrich on November 15, 2013. (Exhibit 5 to Giesick's Motion for Summary Judgment.) Jenrich would have received it on or before November 18, 2013. Certainly, that document would have prompted a reasonable person to make inquiry, triggering the beginning of the running of the limitations statute, even if nothing else had been received and no conversation had taken place. Under this theory that Giesick's "suggestion" that he had settled the auto insurance claim constituted the fraud, the two year statute ran out on November 18, 2015.

Further, any claim of fraud based on the claim that Giesick's closing Starla's estate without suing himself for her wrongful death was the "fraudulent" action is without merit. Even if such claims were to rise to the level of fraud, which they don't, the limitations period would still have expired on November 18, 2015 – two years after the estate was closed and Jenrich was notified of its closure.

*d. Jenrich is barred by six month statute of limitations to bring an action against Geisick as Personal Representative of his mother's estate.*

In general, proceedings against a personal representative for breach of fiduciary duty are barred unless commenced within six months after the filing of the closing statement. Mont. Code Ann. §72-3-1011. The probate proceeding in which Geisick was appointed personal representative was closed informally by the filing of a sworn statement on November 18, 2013. The six month period within which Jenrich could have brought an action against Geisick as personal representative of the Estate of Starla R. Giesick, Cause No. DP-2013-11, expired on May 18, 2014. The rights barred do not include rights to recover for "fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate". Mont. Code Ann. §72-3-101. The Official Comments to this section explain that "claims relating to fraud, misrepresentation or inadequate disclosure relate to a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees" are not barred. Official Comments, Mont. Code Ann. §72-3-101. Giesick clearly identified that the Estate of Starla R. Giesick only had two assets which included the insurance claim of \$100,000.00 and a savings account of \$150.00. Giesick did not misrepresent that an insurance settlement was involved. Jenrich does not raise any issues that Giesick committed any fraud, misrepresentation or inadequate disclosure as personal representative of the estate. The six month statute of limitations would also apply to any contentions by Jenrich that Giesick had a conflict of interest as Personal Representative for not pursuing a wrongful death/personal injury claim against himself.

*e. No proposed Amended Complaint adding a Count of Fraud was ever submitted.*

This litigation is grounded upon Jenrich's Complaint, which alleges wrongful death and survival causes of action. No proposed Amended Complaint alleging fraud has yet been filed, and no proposed Amended Complaint accompanied Jenrich's Reply/Request to Amend. In that Reply/Request, in addition to an unusual suggestion that Giesick should be blamed for Jenrich's attempt to amend his complaint (because Giesick brought to the attention of this Court that the limitations period(s) had run on the wrongful death and survival claims), Jenrich also asserts § 25-1-301, M.C.A. as authority for this Court to allow him another ninety (90) days to plead fraud. While it is not clear what Jenrich is suggesting by that request, there is certainly no basis

or authority that § 25-1-301 can somehow renew or extend the running of statutes of limitation. It would be a futile gesture to allow Jenrich another 90 days to amend his pleading to add additional causes of action which are, like those already pled, also barred by the statutes of limitation.

*f. Principles of equity do not warrant the Complaint to be amended.*

Jenrich has urged that “the concept of equity necessitates a trial in this matter.” The contention that this Court and the parties should be burdened with trial proceedings on actions which are time-barred is without citation to authority, except a reference to § 72-31-326 of the Montana Code. That statute expressly applies only to “[that] part” of the Montana Code in which it is found (that being Part 3 of Chapter 31 of Title 72, or the Uniform Power of Attorney Act) which has nothing to do with this action. Even so, it does not support the proposition urged—that “concepts of equity” trump statutes of limitation.

### ORDER

#### THEREFORE, IT IS ORDERED:

1. Defendant’s Motion for Summary Judgment, Pursuant to Rule 56, Mont. R. Civ. P., is GRANTED; and
2. Plaintiff’s Request to Amend the Complaint to Include a Count for Fraud against Defendant under 72-1-111, MCA, is DENIED.
3. The Clerk of Court shall mail or deliver a copy of this document to counsel of record and to any parties not represented by counsel at their last known addresses.

Dated this 17<sup>th</sup> day of May, 2017.

cc: Jared Dahle  
Karen McMullen  
lb 5-17-2017



*Nickolas C. Murnion*  
NICKOLAS C. MURNION  
DISTRICT JUDGE