IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 20

WCC No. 9308-6867

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

FRANK C. RICHTER

Respondent.

ORDER DENYING SUMMARY JUDGMENT

The Court has under consideration an Amended Motion for Summary Judgment of respondent, Frank C. Richter (Richter), and a Cross-motion for Summary Judgment of the petitioner, State Compensation Insurance Fund (State Fund).

The motions are supported by affidavits of Willem Visser and Frank C. Richter. The parties also refer to, and the Court takes judicial notice of, the proceedings in ***State v. Sharon F. Young,*** *Thirteenth Judicial District Court, No. DC 91-028* and the decision on appeal, ***State v. Young,*** *259 Mont. 371, 856 P.2d 961 (1993)*.

While parties have requested oral argument, I find oral argument unnecessary. For the reasons set forth in the following discussion, both motions for summary judgment are **denied** and this matter is set for trial.

Introduction

The State Fund is attempting to recover amounts paid to Frank Richter, an attorney, out of a workers' compensation settlement he negotiated on behalf of Sharon Young. The settlement was based on an alleged injury Sharon suffered on May 4, 1983. It was negotiated and executed in 1987. Richter was paid $9,862.50 for his efforts. He was paid out of, not in addition to, the amounts due Young.

Sharon Young was thereafter criminally prosecuted for conspiracy to commit felony theft. The prosecution arose out of the benefits she obtained for her alleged May 4, 1983 industrial injury. The criminal information charged, and a jury found, that her 1983 claim was fraudulent. The conviction was upheld on appeal in ***State v. Young,*** *259 Mont. 371, 856 P.2d 961 (1993)*.

Following Young's conviction the State Fund petitioned this Court on August 10, 1993 to recover the attorney fees Richter received for representing Young. On August 26, 1993, Richter filed a Motion to Dismiss for Lack of Jurisdiction, which was denied. He filed a renewed motion to dismiss and a motion for summary judgment on October 5, 1993. These motions were also denied. On November 8, 1993, he again renewed his motion for summary judgment. On December 1, 1993, the State Fund filed a cross-motion for summary judgment. These later motions are now ready for decision.

Issues Presented

The Court's earlier denials of Richter's motions were without prejudice except as to his challenge to this Court's subject matter jurisdiction. The remaining issues raised by Richter's motions are rephrased as follows:[(1)]

(1) Whether the petition fails to state a claim upon which relief may be granted.

(2) Whether the claim asserted against Richter is barred by the statute of limitations.

(3) Whether mediation is a prerequisite to this action.

(4) Whether the present action is barred by equitable principles of res judicata, collateral estoppel, waiver, estoppel, or unjust enrichment.

(5) Whether this action deprives Richter of rights to due process of law and a jury trial.

(6) Whether the State Fund has standing to bring this action.

(7) Whether the claim asserted in this action amounts to a prohibited impairment of contract.

(8) Whether this action is precluded because of a lack of privity of contract between the parties.

(9) Whether the Court has jurisdiction over the defendant.

Many of the grounds asserted by Richter lack cogent legal analysis, are utterly unsupported by any citation to legal precedent, or are supported only by perfunctory assertions. The Court disapproves of this type of practice. The prospects of success are not improved by the sheer numbers of grounds asserted in a motion, and parties should not expect the Court to do their basic legal research for them.

The State Fund advances a singular ground for its motion. Simply stated, the State Fund asserts that uncontroverted facts entitle it to judgment for the full amount of the attorney fees paid Richter.

Summary Judgment Standard

The rules of this Court contain no specific provision for summary judgment motions. However, the Court has in previous decisions borrowed Rule 56, Mont.R.Civ.P., and will continue to do so. ***Murer v. State Compensation Mutual Insurance Fund,*** *257 Mont. 434, 436, 849 P.2d 1036 (1993);* ***Moen v. Peter Kiewit & Sons' Co.,*** *201 Mont. 425, 434 655 P.2d 482 (1982).*

Summary judgment must be based on sworn, admissible evidence, although it may be presented by way of affidavit, deposition and answers to written discovery. Rule 56, Mont.R.Civ.P. The Court cannot consider representations of the parties which are not rooted in the sworn evidence. ***B.M. by Berger v. State****, 215 Mont. 175, 179, 698 P.2d 399 (1985);* ***Prairie State Bank v. IRS of Treasury Dept.****, 745 P.2d 966 (Ariz. 1990).* It is also not bound by the parties' characterization of evidence.

Summary judgment will be granted only if the uncontroverted material facts entitle the moving party to judgment as a matter of law. ***First Security Bank v. Vander Pas****, 250 Mont. 148, 152, 818 P.2d 384 (1991).* Every factual link in the chain of elements necessary to entitle a party to judgment must be uncontroverted. ***Bickler v. Racquet Club H&S Assoc.****, 50 St. Rep. 409, 410 (Mont. 1993);* ***Tippens v. Celotex Corp.****, 805 F.2d 949, rehearing denied 815 F.2d 66 (Ga. Ct. App.)*

Factual Basis For Motions

The factual basis for the cross-motions are gleaned from the record of proceedings in the criminal prosecution against Sharon Young and affidavits submitted by Willem Visser and Frank Richter. No depositions or other evidence have been submitted. The following facts are deemed uncontroverted:

> 1. Effective March 1, 1983 Sharon Young and her husband, Robert Young, secured workers' compensation insurance coverage from the State Compensation Fund for a business known as Parrot Creek Properties. The Youngs were listed as owners of the business and they were listed as covered employees of the business.
>
> 2. On May 6, 1983, Sharon Young submitted a claim for compensation with respect to an injury she allegedly suffered on May 4, 1983. The claim was accepted and the State Fund thereafter paid benefits to Sharon.
>
> 3. On April 3, 1985, Sharon Young entered into an agreement retaining Richter to represent her with respect to her claim. The agreement established Richter's entitlement to a fee.[(2)]
>
> 4. Several days prior to April 7, 1986, Willem Visser, a claims manager for the State Fund, had a telephone conversation with Richter in which he expressed concern that Ms. Young's claim was fraudulent. That concern was based on a suspicious chronology of coverage and injuries which was disclosed to Richter. Richter did not

view the circumstances as sufficient for him to waiver in his representation of Sharon Young and he continued to vigorously press her claim.[3]

5. According to Richter's Affidavit, a petition was filed in the Workers' Compensation Court on behalf of Sharon Young, depositions were taken and the matter was heard by a hearing examiner without any further allegations or evidence of fraud. The State Fund does not deny or reply to this statement and it is accepted as true. Neither party has provided any further information regarding the previous proceeding.[4]

6. The State Fund then entered into a full and final settlement agreement with Sharon. The agreement was signed by Sharon on May 11, 1987 and by a representative of the State Fund on July 6, 1987.

7. Pursuant to the settlement agreement Sharon Young was paid a lump sum of $21,000 on July 27, 1987. Payment was made by a state warrant to the joint order of Sharon Young and Frank Richter. The settlement agreement also provided for further biweekly temporary total disability benefits for up to 24 months while claimant attended a community college. Those payments were made to Sharon Young individually.

8. All told the State Fund ultimately paid Sharon $116,148.14 plus an additional $21,650 for medical benefits with respect to her claim.

9. Out of the amounts paid by the State Fund to claimant, Richter received $9,862.50 on account of his representation of Sharon Young.

10. According to the Affidavit of Willem Visser:

> . . . [I]n my opinion it was only after Jack Wilkerson, Edith Wilkerson and William R. Young filed what were later determined to be fraudulent claims in 1988 that it was appropriate to refer the Sharon Young claim for possible investigation and prosecution of unlawful or fraudulent conduct to appropriate authorities.

No other information is provided concerning the referral for investigation.

11. A criminal information was filed against the claimant on January 30, 1991 charging her with conspiracy to commit felony theft by deception for obtaining workers' compensation benefits for the May 4, 1983 alleged injury.

12. On August 20, 1991, a jury found Ms. Young guilty of the felony conspiracy charge.[5]

13. On December 12, 1991, the District Court for the Thirteenth Judicial District, Yellowstone County, entered judgment sentencing claimant to five years incarceration, suspended. The judgment also directed her to make restitution.

14. The Montana Supreme Court affirmed the conviction on July 20, 1993.

15. The present petition was filed in August 11, 1993.

Other "uncontroverted facts" urged upon the Court are in fact controverted or irrelevant, or not based upon admissible evidence.

I

The first matter to be addressed is what, if any, cause of action or claim is stated against Richter. In his Renewed Motion to Dismiss, Motion for Summary Judgment, Answer and Affirmative Defenses filed October 5, 1993, Richter alleges that no claim is stated in the petition. However, he has not briefed the matter. Nonetheless, Richter's statute of limitations defense requires identification of the claim as a threshold matter. Moreover, the State Fund's cross-motion for summary judgment also requires an analysis of legal underpinnings of the action.

This is *not* an action for fraud. The petition does not allege, and the State Fund does not argue, that Richter was a participant in Sharon Young's fraud. Rather, the State Fund relies on the following cases as supporting its claim for restitution of amounts received by Richter: ***Reil v. State Compensation Mutual Insurance Fund,*** *254 Mont. 274, 836 P.2d 1334 (1992);* ***Champion International Corp. v. McChesney,*** *239 Mont. 287, 779 P.2d 527 (1989);* ***Waggoner v. Glacier Colony of Hutterites,*** *131 Mont. 525, 312 P.2d 117 (1957);* ***Anderson v. Border,*** *87 Mont. 4, 285 P. 174 (1930); and* ***State Compensation Insurance Fund v. Chapman and Pyfer,*** *WCC No. 9207-6543 (September 1, 1993).*

Reil, Waggoner and ***Anderson*** all involved restitution of amounts received through execution or payment of judgments which were later reversed. "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." ***Anderson****, 87 Mont. at 11;* ***accord Reil,*** *254 Mont. at 278.* In ***McChesney*** an attorney was ordered to repay fees which were paid to him pursuant to section 39-71-611, MCA, under a conditional judgment of the Workers' Compensation Court. The judgment awarded claimant temporary total disability benefits on the condition that he submit to surgery. It was later learned that the claimant refused to submit to surgery, thus entitling the insurer to recoup the temporary total disability benefits paid after the date of refusal. Attorney fees paid with respect to the benefits were also ordered to be repaid since the fees were due the attorney only if claimant agreed to the surgery. The Court noted that the attorney was aware of the condition. In ***Chapman*** this Court ordered restitution of benefits and attorney fees awarded by the Workers' Compensation Court as a result of the claimant's fraud. The original judgment awarding benefits and fees was set aside.

This case does not involve the reversal or setting aside of a judgment, or payments made pursuant to a judgment which contained express conditions that were later found to have been violated. The amounts paid to Sharon Young were pursuant to a settlement

agreement rather than a judgment. The amounts received by Richter were out of the settlement proceeds paid to claimant pursuant to her attorney fee contract with him, and not the result of a judgment awarding attorney fees. The cases cited by the State Fund are therefore inapposite.

However, the petition nonetheless states a claim based on a constructive trust. A constructive trust arises out of operation of law and is "an equitable device used to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." ***In re Marriage of Allen,*** *724 P.2d 651, 656-7 (Colo. 1986)*. It is "imposed in favor of one entitled to property that is wrongfully withheld or where to allow the present holder to retain the property would result in unjust enrichment." ***Stone v. Williams,*** *970 F.2d 1043, 1052-3 (2d Cir. 1992), cert. denied, 113 S.Ct. 233*.

Current Montana law defines a constructive trust as follows:

> **72-33-219. Constructive trust.** A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to retain it.

Section 72-33-219, MCA (enacted in 1989 as a part of a general revision of the statutes governing trusts). The current statute is consistent with prior Montana law, as well as the law of other jurisdictions. The law in effect on the date of claimant's settlement was 72-20-111 and 72-20-301, MCA (1985, 1987). Those sections provided:

> **72-20-111. Involuntary trust -- fraud, mistake, wrongful act.** One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other or better right thereto, an involuntary trustee of the thing gained for the benefit of the persons who would otherwise have had it.
>
> **72-20-301. Third person transferee -- when involuntary trustee.** Everyone to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust unless he purchased it in good faith and for a valuable consideration.

The substance of the latter provision was carried forward in the 1989 general revision of laws governing trusts. Section 72-36-210, MCA (1989).

Thus, a constructive trust may be "imposed on a third party into whose possession the property or its proceeds can be traced" unless that third party "acquired the property in good faith, for value, and without notice of the circumstances under which the property originally was wrongfully acquired." ***In re marriage of Allen***, *724 P.2d at 657; and see* sections 39-20-111 and 310, MCA (1985, 1987); sections 72-33-219, 72-33-220, 72-34-

506, 72-36-210, MCA (1989); ***Ryan v. Stagg,*** *89 Mont. 390, 298 P. 353 (1931) (residuary legatees and devisees of an estate liable for debt of estate where the money owed was distributed to them and deemed held by them in constructive trust);* ***Meagher v. Harrington****, 78 Mont. 457, 254 P. 432 (1927) (where an officer of a corporation fraudulently diverts corporation funds, the corporation may follow and recover the funds unless the rights of innocent third parties intervene).*

Initially, a constructive trust was imposed on Sharon Young, who illegally obtained the benefits:

> (1) Where a person holding property in which another has a beneficial interest transfers title to the property in violation of his duty to the other, the transferee holds the property subject to the interest of the other, unless he is a bona fide purchaser.

Restatement of the Law of Restitution, § 168(1) (1937). Under the principles cited in the previous paragraph, Richter, as a transferee of claimant, similarly held amounts paid to him in constructive trust *unless* he gave value in return for the monies. The heart of this controversy is therefore whether Richter's legal services constituted value in return for the fees he received. At first blush, it would appear so. However, the evidence tendered to the Court, while not conclusive, suggests that Richter's services were rendered under a contingent fee agreement. Under a contingent fee agreement, the attorney is entitled to a fee only if his/her client recovers, otherwise s/he is entitled to nothing.[(6)] Assuming there was a contingency fee agreement in this case, Richter would have been entitled to nothing *but for* claimant's fraud.

Constructive trusts are rooted in the concept of *unjust enrichment. See section 72-33-219, MCA (1989).* "Unjust enrichment" is defined by *Black's Law Dictionary, 1377 (5th ed. 1979)* as:

> **Unjust enrichment, doctrine of.** General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. . . . (Citations omitted.)

If Richter was entitled to nothing in the first place, he parted with nothing of value in return for the fees and would be unjustly enriched if permitted to retain them.

However, the State Fund is not entitled to summary judgment for several reasons. First, it has not adequately established that the fee agreement between Richter and the claimant was in fact a contingency agreement. Second, even if the fee agreement was a contingent

one, Richter may be entitled to recover his out-of-pocket costs if claimant's liability for those costs was non-contingent. Third, Richter's statute of limitations defense raises factual issues which must be resolved at trial.

II

The first step in any analysis of the statute of limitations defense is to determine which statute applies. In an action brought to impose a constructive trust, the applicable statute of limitations is the statute "applicable to the ***underlying*** cause of action." ***Howell Petroleum Corp. v. Samson Resources Co.,*** *903 F.2d 778, 780 (10th Cir. 1990) (emphasis added);* ***accord Stove v. Williams,*** *970 F.2d 1043, 1052-3 (2d Cir. 1992), cert. denied 113 S.Ct. 233;* ***Kaken Pharmaceutical Co. v. Eli Lilly & Co.***, *737 F.Supp. 510, 518 (S.D. Ind. 1987)*. Where, as in this case, fraud is the basis for imposing the trust, then the statute of limitations for fraud applies. ***Kaken,*** *737 F.Supp. at 518*.

The statute of limitations applicable in cases of fraud is section 27-2-203, MCA, which provides:

> **27-2-203. Actions for relief on ground of fraud or mistake.** The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

By its express terms, the statute does not begin to run "until the discovery by the aggrieved party of the facts constituting the fraud." Actual discovery is not required. A party who is aware of facts that would have led to discovery of the fraud had the party exercised ordinary diligence, is sufficient to start the clock. ***D'Agostino v. Swanson,*** *240 Mont. 435, 443, 784 P.2d 919 (1990), citing* ***Gregory v. City of Forsyth,*** *187 Mont. 132, 609 P.2d 248 (1980)*. Where a party "has notice or information of circumstances which would put him on inquiry which if followed would lead to knowledge, he will be deemed to have had actual knowledge of the facts." ***Ray v. Divers,*** *81 Mont. 552, 559, 264 P.2d 673 (1928)*.

In the present case Richter claims that Visser was aware of Sharon Young's fraud as early as 1986. Richter states:

> A few days prior to April 7, 1986, Mr. Bill Visser called my offices and stated that it was his opinion that Sharon Young committed fraud. . . .

Affidavit of Frank C. Richter, ¶ 3 (October 4, 1993). Visser in his own affidavit does not deny there was such a conversation, and Richter vigorously argues that the conversation is enough to start the clock. Richter's argument, however, crumbles in the face of the additional information he provides in his own affidavit. Referring to his 1986 conversation with Visser and the information Visser thereafter provided, Richter goes on to say:

> . . . I asked Mr. Visser if he would provide the facts and evidence upon which he based his claim for fraud. Mr. Visser sent a letter to me dated April 7, 1986, with the attachments that are marked hereto as Exhibit "C". The affiant examined the documents which were an application by Sharon Young which shows that she had insurance. There is [sic] no facts and or [sic] substance that led counsel to believe that his client had participated and or was committing fraud. Under these circumstances, counsel felt that he had a duty and obligation to continue his representation of Sharon Young and that the State Fund had a duty to present to the Workmans' [sic] Compensation Court and or hearing examiners [sic] all facts and evidence of fraud.

Affidavit of Frank C. Richter, ¶ 3 (October 4, 1993). Visser's letter set out the chronology regarding insurance coverage, cancellations and claims for the Youngs.[7] While the chronology is suspicious, Richter felt in 1986 that it fell far short of any substantial evidence of fraud, and the Court agrees. Richter pressed on with Sharon Young's case, took the case to hearing, and then prior to any Court decision negotiated a full and final compromise settlement on behalf of the claimant, who executed the settlement on July 23, 1987. Richter's own conduct belies his present contention that Bill Visser knew enough in 1986 to commence the running of the statute of limitations.

On its part, the State Fund argues that the running of the statute of limitations did not begin until July 20, 1993, when the Supreme Court affirmed Sharon Young's conviction. State Fund's Brief at 9. It cites ***Castillo v. Franks,*** *213 Mont. 232, 690 P.2d 425 (1984) (****Castillo II****),* as holding that the clock does not start until litigation in the underlying action is finally concluded. Although the peculiar facts in that case supported that conclusion, ***Castillo*** was factually unique and does not support the State Fund's contention in this case. ***Castillo*** involved a claim that the seller of ranch land had misrepresented appurtenant water rights. The action was commenced after an earlier case had adjudicated the water rights in question. ***Castillo v. Kunneman,*** *197 Mont. 190, 642 P.2d 1019 (1982)(****Castillo I****)*. In ***Castillo II*** the seller raised a statute of limitations defense. However, the district court specifically found that the plaintiffs did not discover the true facts, and therefore could not be certain of the truth or falsity of the representations at issue, until March 3, 1982, when the Supreme Court issued its decision in ***Castillo I***. The Court in ***Castillo II*** upheld the district court's finding, stating: "Findings of fact made by a District Court come to us with a high quality of rectitude. Such findings are not to be overturned by us unless they are clearly erroneous." ***Id.*** at 239. In ***Castillo I,*** however, the seller and buyer were aligned against third parties, both taking the position that the water rights were in fact appurtenant to the land. The matter involved highly technical issues which were resolved only after extensive litigation and a Supreme Court decision. It could hardly be said that the buyers, who were plaintiffs in ***Castillo II***, should have known or predicted the ultimate outcome of ***Castillo I***.

Sharon Young's fraud did not involve technical legal issues. She was charged with and convicted of simple fraud. At least by the time the State Fund became aware of the evidence against Ms. Young, it was on notice of her fraud and the clock began. The critical question that must be answered in this case is, ***when*** did the State Fund become aware of sufficient facts to start the running of the statute of limitations? In ***Mobley v. Hall,*** *202 Mont. 227, 657 P.2d 604 (1983)*, a fraud case, the plaintiff purchased land which contained less acreage than had been represented to him. An initial survey indicated there was less cropland than the parties had agreed on. The Court held that at that time the plaintiff had adequate information to put him on inquiry notice and that therefore the situation had been discovered. It rejected plaintiff's argument that the fraud was not discovered until an aerial survey, which confirmed the earlier survey, was done.

The evidence presented to the Court in connection with the motions for summary judgment is insufficient for it to determine when the State Fund knew or should have known of Sharon Young's fraud. Bill Visser's affidavit states:

> That in my opinion it was only after Jack Wilkerson, Edith Wilkerson and William R. Young filed what were later determined to be fraudulent claims in 1988 that it was appropriate to refer the Sharon Young claim for possible investigation and prosecution of unlawful or fraudulent conduct to appropriate authorities.

Affidavit of Willem Visser, ¶ 7. It is not clear from this statement when he reached this opinion. Did he reach it in 1988 or was 1988 merely the year in which the fraudulent claims were made? Moreover, it not clear whether the referral was based on mere suspicion arising from the chronology Bill Visser outlined in his 1986 letter to Richter and the involvement of the claimant's husband in a different fraud, or whether he had additional information which specifically implicated Sharon Young. He did initiate an inquiry and that in itself is suggestive of an awareness which could trigger the clock. The filing of the criminal information against Sharon Young on January 30, 1991, could also have triggered the running of the statute if Bill Visser or others at the State Fund were aware of the filing or with reasonable diligence should have been aware of the filing of the charges. However, without more evidence of the specific circumstances and the specific information available to Bill Visser and the State Fund, the Court cannot reach any definite conclusion concerning the statute of limitations.[(8)] The issue will therefore have to be resolved at trial. At trial "[t]he plaintiff must show when the fraud or concealment was discovered, and the circumstances of the discovery must be shown, so the court may see whether by ordinary diligence it might not have been made before." ***Frisbee v. Coburn,*** *101 Mont. 58, 52 P.2d 882 (1935)*.

III

Richter has asserted a number of other affirmative defenses. None merits more than passing mention.

Mediation: The dispute resolution requirements were enacted in 1987. They do not apply to claims arising prior to the effective date of the provisions. ***Carmichael v. Workers' Compensation Court, 234 Mont. 410, 763 P.2d 1122 (1988).*** Since the issues presented in this case stem from a 1983 claim, the mediation requirements do not apply.

Res Judicata etc: Richter argues that the claim against him is barred by equitable principles of res judicata, collateral estoppel, waiver, estoppel, or unjust enrichment. Res judicata and collateral estoppel must be premised on a prior adjudication of an identical issue. ***Davis v. LDS Church,*** *50 St. Rep. 535, 541 (Mont. 1993);* ***Martinelli v. Anaconda Deerlodge Co.,*** *50 St. Rep. 479, 480 (Mont. 1993); see also* ***Boyd v. First Interstate Bank of Kalispel, N.A.,*** *253 Mont. 214, 218, 833 P.2d 149 (1992) for discussion of res judicata and collateral estoppel.* Richter's liability under a constructive trust theory has never been adjudicated.

His arguments concerning waiver and estoppel are premised on the State Fund's failure to pursue its claim at an earlier time and the 1987 settlement agreement with Sharon Young. He has failed to show, however, that at those times the State Fund knew of Sharon Young's fraud.

Finally, his unjust enrichment argument smacks of putting a shoe on the wrong foot.

Due Process and Jury Trial: A constructive trust is an equitable remedy. The right to a jury trial has not been extended to suits in equity. ***Mont. Coalition For Stream Access v. Hildreth,*** *211 Mont. 29, 38, 684 P.2d 1088 (1984).* As to Richter's invocation of due process, that is what this proceeding is all about.

Standing: This defense is frivolous. The State Fund is attempting to recover money it lost on account of Sharon Young's fraud. It is clearly the real party in interest.

Impairment of Contract: This case does not involve any newly adopted statute which impairs a pre-existing contract.

Privity: This action is not based on contract. It arises as the result of Sharon Young's fraud and equitable principles.

In Personam Jurisdiction: This defense is frivolous. Richter is an attorney practicing in Montana and is subject to the jurisdiction of Montana courts.

IV

For the reasons set forth above, the motions are **denied** and this matter is set for trial.

DATED in Helena, Montana, this 4th day of March, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Charles G. Adams
Mr. Loren H. Torkelson

1. These issues are taken from Richter's Renewed and Amended Motion to Dismiss, Renewed and Amended Motion for Summary Judgment, Response to Petition and Amended Affirmative Defenses (November 9, 1993) and Richter's Renewed and Amended Motion to Dismiss, Renewed and Amended Motion for Summary Judgment (November 9, 1993).

2. The fee agreement has not been provided to the Court. While the Court can infer from the amounts paid Richter that the fee agreement was a contingent one, that fact is not conclusively established.

3. The exchange between Visser and Richter is discussed in more detail infra at 10.

4. According to the Petition For Full And Final Compromise Settlement which is attached as Exhibit 1 of the Affidavit of Willem Visser, the hearing was held November 20, 1986, and the parties thereafter agreed to settle.

5. The Supreme Court decision states that she was tried on "August 19 and 20, **1992."** *259 Mont. at 375.* A review of the district court record indicates, however, that the trial and the 1992 date was a typographical error and should be 1991.

6. Contingency fee agreements typically require the client to pay out of pocket expenses irrespective of the result. To this extent, Richter may have been entitled to reimbursement from the claimant even if a contingency fee agreement was used.

7. The letter provided the following history:

> Enclosed are copies of applications and cancellation notices and I would like to go through them in chronological order.
>
> The first application for coverage was made effective March 1, 1983 and the first claim we received was from William R. young for a date of injury of March 30, 1983.
>
> Shortly thereafter, his wife, your client, filed a claim with an accident date of May 4, 1983. Request for cancellation was thereafter submitted on May 6, 1983.
>
> When Mr. Young received a fourteen (14) day notice on his case which was set on December 14, 1983 and was informed that benefits would cease on December 28, 1983, a request for coverage was submitted to this office with an effective date of December 21, 1983. A claim was received for a date of accident of December 31,

1983. Benefits were reinstated as of May 21, 1984 retroactively to April 18, 1984 and request for cancellation was then received June 1984.

Subsequent to that, a third request for coverage was received and apparently this company has been covered from May 11, 1985 through December 6, 1985. As listed on the application form, all 3 owners were disabled.

Exhibit C to Affidavit of Frank Richter (dated October 4, 1993 and filed October 5, 1993).

8. Claimant was ultimately convicted on August 20, 1991. Certainly by this time the State Fund should have been aware of sufficient facts to file a petition with this Court.