THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

NO. ED 108598

ELIZABETH H. MOLK

Appellant

VS.

US BANK, N.A.

Respondent

Appeal from the Circuit Court of the City of St. Louis
The Honorable Rex Burlison, Judge

APPELLANT'S BRIEF

Steven M. Hamburg, P.C.
Steven M. Hamburg [27549]
231 South Bemiston Avenue
St. Louis, Missouri 63105
(314) 725-8000 (314) 726-5837

Michael Gross [23600]
Michael Gross Law Office
231 South Bemiston Avenue
St. Louis, Missouri 63105
(314) 863-5887 (314) 727-2430

Attorneys for Appellantm

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the Circuit Court for the City of St. Louis on December 15, 2019. D805. On June 28, 2019, the Court granted the motion of plaintiff U.S. Bank N.A. for summary judgment on its claim against defendant Elizabeth H. Molk and denied Mrs. Molk's motion for partial summary judgment against U.S. Bank. D796. Mrs. Molk voluntarily dismissed her remaining claim on September 9, 2019. D797. On December 15, 2019, the Court entered its final judgment, noting that the sole remaining issue between the parties was the request of U.S. Bank for an award of attorney fees and making that award in favor of U.S. Bank and against Mrs. Molk. D805.

A notice of appeal from the judgment of a probate court is timely if filed within 10 days after the judgment became final. Mo. R. Civ. P. 81.04(a); Mo. Rev. Stat. § 472.210. Mrs. Molk filed her notice of appeal on January 14, 2020. D806. She seeks review of the interlocutory judgment of June 28, 2019, and the final judgment of December 15, 2019.

This appeal raises no issues subject to the exclusive appellate jurisdiction of the Supreme Court of Missouri set for the Article V, section 3 of the Missouri Constitution. Mo. Const. Art. V, section 3. Having arisen from the Probate Court for the City of St. Louis, the case falls within the territorial appellate jurisdiction of the Missouri Court of Appeals, Eastern District. Mo. Rev. Stat. § 477.050.

STATEMENT OF FACTS

Lorenz K. Ayers had two daughters: Helen A. Davis and Barbara Herbst. D697 He wrote a will in 1967 that created a trust for each daughter, effective upon the death of their mother. D698, pp. 1, 11, 23. Mr. Ayers directed that when his daughters died their trusts were to be divided so that a separate trust was created for each of their children. *Id.*, pp. 14-15. Each grandchild trust provided for the grandchild beneficiary to receive only the income from his or her trust. *Id.*, pp. 15-16. No provision was made for the trustee to exercise discretion nor was the trustee authorized to encroach upon principal. *Id.* Each grandchild trust provided that if the grandchild beneficiary died without having children the trust assets were to be distributed outright to his or her sibling or to the children of predeceased siblings. *Id.*, p. 16. The trusts created by Mr. Ayers became irrevocable upon his death in 1987. D751, p. 2. US Bank N.A. (USB) is the sole trustee of the grandchild trusts. D751, p. 2.[1]

Appellant Elizabeth H. Molk and Respondent Anne Herbst are two daughters of Barbara Herbst. D697[2] Elizabeth has three children. D710. Anne has none. *Id.* Elizabeth and her children have a contingent beneficiary interest in Anne's Trust. D699,

[1] The trust instrument names Mercantile Trust Company as trustee. US Bank is the successor through merger to Mercantile Trust. *See* US Bank website, "US Bank Locations," https://www.usbanklocations.com/mercantile-trust-company-33854.shtml (last visited August 2, 2020).

[2] Elizabeth is sometimes referred to as "Wendy" or "Elizabeth A. Molk" in the summary judgment record. Her actual name is Elizabeth H. Molk.

p. 3 ¶17. Upon Anne's passing, Elizabeth or her children are to receive at least 75% of the assets of Anne's trust. D698, p. 3 ¶17.

Anne requested that the Trustee invade principal to increase her trust income D697, p. 4, ¶19. Elizabeth objected when the trustee notified her that it intended to start distributing principal to increase Anne's monthly income. *Id.* at ¶23. She contended that this action was contrary to her grandfather's intent and would erode the principal prior to Anne's death, eliminating or diminishing the benefit that the trust had provided for Elizabeth's children. D710, p. 7, ¶¶ 32,33. Elizabeth advised the trustee that (1) invading the corpus of the trust to provide income to beneficiaries was expressly prohibited by the grantor in the trust instrument and (2) there was no economic or other reason for this corpus invasion other than to exhaust Anne's trust so that Elizabeth and her children would be denied its benefits. *Id.*

USB filed this suit to seek directions on whether it had the authority to make a unitrust election under the provisions of Mo. Rev. Stat. §469.411. D697.[3] Elizabeth filed a counterclaim in which she contended that USB had no right to take this action under the

[3] Under the Revised Principal and Income Act, Mo. Rev. Stat. §§ 469-401*et seq.*, and pursuant to § 469.411 in particular, subject to statutory conditions including the grantor's expressed intentions, trustees may be allowed to change the interest of a beneficiary in an existing trust from an income interest to an interest in the entire trust. Section 469.411 specifies that this authority is not applicable to a trust that became irrevocable prior to 2001 if the trust "specifically prohibits an election under this subdivision." Mo. Rev. Stat. § 469.411.5(2). The trust at issue was created by an instrument written 34 years before the statute and became irrevocable upon the grantor's death 24 years prior to that enactment. D751, p. 2. In it, Mr. Ayers specified that under trusts created for his grandchildren the grandchild beneficiary was to receive only trust income and trust principal was to be preserved for successor beneficiaries. D698, pp. 15-16.

statute, was acting contrary to and interfering with the grantor's intent, and had failed to conduct the statutory analysis required as a condition of making such an adjustment. D700 She also claimed and that §469.411 was unconstitutional as applied by the trustee in this instance. *Id.*

The Trustee's Analysis of the Anne Herbst Trust

On several occasions during 2016 and 2017, USB sought a method to accommodate Anne's request for the invasion of principal to increase her distributions under the trust. D726, 728, 729. The bank never stated a reason why the trust could not be fairly and impartially administered without making the change Anne had requested. D724, p. 2; D725, p. 3-4; D727, p. 5. It produced a two-page analysis of the Anne Herbst Trust during June 2016, concluding that a change in allocation of principal and income was not required for impartial administration of the trust when all that was necessary to increase Anne's distribution was a change in the investments. D724. USB memorialized its decision not to exercise its statutory powers or make a unitrust conversion at that time.[4] A bank representative recorded a note stating: "Client is further inquiring with her CPA & may make a Unitrust election at a later date." D734 at p. 1-3.

USB purported to conduct another analysis of the eligibility of Anne's trust for conversion to a unitrust one month later. D735. In a "unitrust conversions checklist" completed at that time, the bank correctly noted that the trust prohibited principal encroachments, that Anne did not have children, and that upon her demise the trust assets

[4] The documents comprising this analysis are checklists generally following the factors outlined in § 469.405 which are required before an election can be made.

would go to her siblings or their descendants. *Id.*, p. 2. USB memorialized its conclusion that the trustee's duty of impartiality to the income or remainder beneficiaries was met by this analysis. *Id.*, p. 3-4. According to the checklist, USB did not consider Anne's financial circumstances to determine whether she had any need for additional income as required at *Id.*, p. 4. It acknowledged that the "nature, purpose and expected duration of trust indicated an adjustment power should NOT be exercised." *Id.* (emphasis in original). The checklist then posited the following question which, if answered in the affirmative, would terminate the Unitrust evaluation:

> [Having answered one or more of the preceding questions in the affirmative] … does this lead to a compelling conclusion that the trustee is meeting the duty of impartiality and that Unitrust should NOT be exercised?

Id. (emphasis in original). USB answered in the negative and proceeded with the inquiry. *Id.* Five bank officials signed the evaluation. *Id.*, p. 7.

On July 20, 2016, USB sent Elizabeth a statement of its intention to convert the Anne Herbst Trust to a unitrust. D736, pp. 1-2. The statement advised that henceforth Anne would receive four percent of the fair market value of trust principal and income each year, rather than merely a distribution of income. *Id.* On August 26, 2016, Elizabeth objected to this adjustment. *Id.*

On December 14, 2016, USB's employees, Al Jonagan and Donna Schwarz, met with Anne Herbst in San Francisco to discuss the possibility of exercising the Trustee's

power to statutorily adjust in lieu of a unitrust election.[5] D751, p. 10, ¶¶80-81. During January 2017, USB generated a checklist for employing the trustee's statutory power to adjust. D737. Conclusions were indicated by the checking of boxes on the checklist form. *Id.,* pp. 2-6. Many of these are indecipherable. No evidence reflects the facts of investigation or analysis that might have supported those conclusions. The checklist apparently led to USB's election to exercise the trustee's statutory power to adjust but not elect a unitrust conversion. *Id.,* p. 5. USB noted at the end of the checklist:

> SPA being requested by beneficiary. There is no encroachment clause. Notice will be sent out to all remaindermen. Unitrust was not elected as one possible remainderman declined … Since an objection was received, unitrust was not exercised.

Id.

On February 9, 2017, USB again notified Elizabeth of its intention to exercise its power to adjust for the Anne Trust to enable Anne to receive between three and five percent of the value of the trust assets, including principal, rather than merely income. D738. On February 17, 2017, Elizabeth notified the bank that she objected to this desired adjustment. *Id.*

On March 17, 2017, without apparent further analysis of the Anne Herbst Trust, USB advised it intended to convert Anne's trust to a unitrust and disburse 4% of the value of the trust assets and income to her each year rather than just the trust's income. A week later, on March 14, 2017, Elizabeth lodged her objection again. D739 at p. 1-2.

[5] Nothing in the record indicates that Justin F. Meyer participated, directly or indirectly, in issues relating to the Anne Trust or USB's analysis in regard to the Anne Trust.

Procedural History

On September 28, 2017, USB filed a petition for declaratory relief seeking a determination that it had the power to exercise a unitrust election over the Anne Trust when a remainder beneficiary of the trust objected to the election. D637. On November 13, 2017, Elizabeth filed a counterclaim requesting the Court to determine that the trustee had no power to adjust for principal distributions from the trust when the Grantor specifically prohibited principal invasions with income-only disbursements. D699, D700.[6]

Discovery Proceedings

On March 8, 2018, Elizabeth sent USB interrogatories and a document production request. D789. In response USB acknowledged that "at no time has the Trust not been administered fairly and impartially." *Id.*, p. 7. Asked to identify "all documents reflecting or memorializing the … analysis of the factors identified in [§ 409.405.2] prior to its decision to attempt a unitrust election," USB produced the two checklists. *Id.*, D735, D737. USB acknowledged that there was no document other than the trust from which the Grantor's intent could be ascertained and admitted that the Trustee had no discretionary power to invade principal of the trust for Anne's benefit. D 789, p.6. The

[6] Elizabeth's counterclaim included a Count II which challenged the constitutionality of §469.411 RSMo. D700. This Count was withdrawn prior to the submission of the summary judgment motions. D797. In addition, Elizabeth filed pleadings requesting that her alleged consent to a sibling's unitrust election be rescinded and that another election made by USB for another sibling be revoked. *Id.* These pleadings were also withdrawn prior to the submission of the summary judgment motions.

Bank produced no documents reflecting an analysis of Anne's assets outside the Trust or Anne's need for additional income from the Trust.

Summary Judgment Motions

Elizabeth filed her motion for partial summary judgment, statement of uncontroverted facts, and memorandum of law on December 18, 2018. D722-D723, D733. On February 25, 2019, the bank filed its response to Elizabeth's motion, together with its own motion for summary judgment and a statement of uncontroverted facts asserted in opposition to Elizabeth's motion and in support of its own, and memoranda of law. D747-D780.

USB's summary judgment submission included the Affidavit of Justin R. Meyer. D751. Mr. Meyer identified himself as a USB Trust Officer who had become a Trust Managing Director during August 2016. D751, ¶1. He attested that he had "reviewed the records the Trustee maintains with respect to the proposed or actual unitrust and SPA elections of the [the Herbst Trusts.]" *Id.*, ¶2. Mr. Meyer did not identify himself as a custodian of the records attached to his affidavit, but stated that he "ha[d] access to the Records." *Id.* at ¶4. He stated that he "ha[d] knowledge of how [the records] are maintained," but attributed the factual representations in his affidavit to "conversations with other [USB] representatives" apart from his own knowledge and review of the records. *Id.* The documents thus reviewed included "correspondence, reports, and completed forms" that Mr. Meyer attributed to "either people with first-hand knowledge of those events and conditions or from information provided by people with such first-

hand knowledge." *Id.* He stated: "Recording such information is a regular practice of Trustee's regularly conducted business activities." *Id.*

Elizabeth filed a motion to strike the Meyer Affidavit as well as the exhibits attached to it. D783-D784. Her motion to strike the exhibits contended that USB had failed to qualify the exhibits as business records and thus were inadmissible hearsay. D784, pp. 1-3. Her motion to strike Mr. Meyer's affidavit contended that virtually every fact asserted in the affidavit was obtained from other people or documents prepared by other people, and that the affidavit was inadmissible hearsay. D783, pp. 1-5. The Circuit Court denied both motions without explanation. D795, pp. 1-2.

The Circuit Court entered its order granting USB's motion for summary judgment and denying Elizabeth's motion for that relief. D796, pp. 1-2. The Court stated:

> Upon review and consideration of the written submissions and argument presented by the parties, the Court finds that Plaintiff is authorized to make the unitrust election over the separate trust for the benefit of Anne Herbst created under the Living Trust Agreement of Lorenz K. Ayers Dated May 3, 1967, as Amended and Restated.

Id., p. 1. No further explanation of the summary judgment rulings was provided.

On September 9, 2019, Elizabeth dismissed the remaining count of her counterclaim. D797. On December 15, 2020, noting that "[t]he question of attorney fees is the only issue still pending in this matter," the Circuit Court entered its order directing Elizabeth to pay attorney fees incurred by USB in the amount of $135,274.76. D805, pp. 2-3. The Court stated:

> Elizabeth Molk [and her children] were the only defendants to file an answer [to USB's petition for declaratory judgment]. In addition, they were also the only defendants to file a counterclaim. Elizabeth also added a

> divisive element to the cause of action when she withdrew her prior consent to the conversion of Donald's separate trust. The court believes that Elizabeth's actions were solely intended to protect her personal interest in her separate trust.

Id., p. 2. Its order concluded its award of attorney fees in favor of the trustee and against Elizabeth was required as a matter of equity and justice. *Id.* The Court denied the requests of Elizabeth, Anne, and Donald for reimbursement of attorney fees incurred individually in the litigation.

POINTS RELIED ON

I.

The Circuit Court erred in granting summary judgment in favor of USB because the unitrust election approved by that judgment is not permitted by and violates Mo. Rev. Stat. § 469.411, in that (1) the trust was created under an instrument that became irrevocable in 1987, (2) the instrument stated explicit and unconditional directions providing for the distribution of income only at the grandchild level and disallowing the invasion of principal at that level, and (3) § 469.411.5(2) precludes a trustee from making a unitrust election when the trust was "created under an instrument that became irrevocable [prior to] August 28, 2001, and "the instrument creating the trust specifically prohibits an election under this subdivision."

Household Finance Corp. v. Robertson, 364 S.W. 2d 595 (Mo. 1963)

J.S. v. Beaird, S.W.3d 875 (Mo 2000)

In re Nelson, 926 S.W. 2d 707 (Mo. S.D. 1996)

Arthaud v. Arthaud, 600 S.W. 3d 882 (Mo. App. E.D. 2020)

II.

The Circuit Court erred in granting summary judgment in favor of USB because USB failed to establish that there was no genuine issue of material fact and summary judgment thus was improper under Mo. R. Civ. P. 74.04(c)(6), in that there was substantial evidence that (1) USB failed to conclude that the trust was being administered unfairly and impartially, (2) the bank thus failed to comply with the requirements of Mo. Rev. Stat. §§ 469.403 and 469.405 prior to invoking the unitrust conversion provisions of Mo. Rev. Stat. § 469.411, and (3) USB thus was not entitled to judgment as a matter of law.

§469.403 R.S.Mo.

§469.405 R.S.Mo.

§469.411 R.S.Mo.

III.

The Circuit Court erred in considering and relying upon Mr. Meyer's affidavit in granting summary judgment in favor of USB, because that consideration and reliance violated Mo. R. Civ. P. 74.04(e), in that (1) Rule 74.04(e) limits the consideration of affidavits in summary judgment proceedings to affidavits "made on personal knowledge" asserting "such facts as would be admissible in evidence," (2) Mr. Meyer based his affidavit on (a) a review of "correspondence, reports, and completed forms" purportedly maintained by USB, to which the affiant purported to "have access" and with respect to which he claimed to have "knowledge of how they are maintained," (b) "conversations with other [USB] representatives," and (c) unspecified "personal knowledge," and (3) the affidavit thus constituted hearsay rather than admissible evidence.

Gateway Metro Federal Credit Union v. Jones, 2020 WL 3053292 at *3 (Mo.App. E.D. June 9, 2020).

Fitzpatrick v. Hoehn, 746 S.W.2d 652 (Mo. Ct. App. 1988),

May & May Trucking, LLC v. Progressive Northwestern Ins. Co, 429 S.W.3d 511, 515-516 (W.D. 2014)

IV.

The Circuit Court erred in considering and relying upon purported bank records attached as exhibits to Mr. Meyer's affidavit in granting summary judgment in favor of USB, because that consideration and reliance violated Mo. R. Civ. P. 74.04(e) and Mo. Rev. Stat. § 490.680, in that (1) Rule 74.04(e) limits the consideration of evidence in summary judgment proceedings to proof that would be admissible in evidence, (2) Mr. Meyer acknowledged in his affidavit that the exhibits submitted with his affidavit had been prepared by other people and that his representations depended in part upon statements made to him by other bank employees rather than his own knowledge, (3) Mr. Meyer did not purport to be the custodian of the records or to state on the basis of his own knowledge the identity, mode, or timing of preparation of those records, (4) the exhibits thus were not shown to be business records pursuant to § 490.680, and (5) the documents thus constituted inadmissible hearsay.

Gateway Metro Federal Credit Union v. Jones, 2020 WL 3053292 at *3 (Mo.App. E.D. June 9, 2020).

Hadlock v. Dir. Of Revenue, 860 S.W.2d 335, 337 (Mo. banc 1993)
CACH LLC v. Askew, 358 S.W. 3d 58 (Mo. banc 2012)

§ 490.680 R.S. Mo.

V.

The Circuit Court abused its discretion in ordering Elizabeth to reimburse the Anne Trust for attorney fees because an award of fees in this case was neither just nor equitable and thus was not authorized by Mo. Rev. Stat. § 456.10-1004, in that (1) equity generally requires that a trust pay the costs of its own administration, (2) Elizabeth's challenge to the trustees request for judgment authorizing a unitrust conversion in the Anne Herbst Trust was reasonable rather than vexatious or improperly "divisive," and (3) the award in this case was arbitrary and unreasonable.

Klinkerfuss v. Cronin, 199 S.W.3d 831, 840 (Mo. Ct. App. 2006)

Coates v. Coates, 316 S.W.2d 875, 877–78 (Mo. App. 1958)

Klinkerfuss v. Cronin, 289 S.W.3d 607 (Mo.Ct.App. 2009)

§456.10-1004 R.S. Mo.

ARGUMENT

I.

The Circuit Court erred in granting summary judgment in favor of USB because the unitrust election approved by that judgment is not permitted by and violates Mo. Rev. Stat. § 469.411, in that (1) the trust was created under an instrument that became irrevocable in 1987, (2) the instrument stated explicit and unconditional directions providing for the distribution of income only at the grandchild level and disallowing the invasion of principal at that level, and (3) § 469.411.5(2) precludes a trustee from making a unitrust election when the trust was "created under an instrument that became irrevocable [prior to] August 28, 2001, and "the instrument creating the trust specifically prohibits an election under this subdivision."

Standard of Review

“Statutory interpretation is a question of law, which is subject to *de novo* review on appeal.” *Li Lin v. Ellis,* 594 S.W.3d 238, 241 (Mo. 2020).

Argument

Mr. Ayers’s will provided for the creation of separate trusts for his widow, children, grandchildren, and great-grandchildren. D 698. The trusts created for his grandchildren provided explicitly for the disbursement of income to the beneficiaries, and just as clearly for the preservation of principal in the interest of other beneficiaries. *Id.* at 14-16. Section 469.411 does not grant trustees unbridled discretion to convert any trust to a unitrust: rather the statute applies to trusts created after August 28, 2001, if “the terms of the trust clearly manifest an intent that this section apply,” Mo. Rev. Stat. § 469.411.5(1), and to trusts that became irrevocable prior to that date “unless the instrument creating the trust specifically prohibits an election under this subdivision.” Mo. Rev. Stat. § 469.411.5(2).

Mr. Ayers signed the instrument that would establish his grandchildren’s trusts in 1967, some 34 years prior to the enactment of § 469.411. The instrument became irrevocable upon his death in 1987, still 14 years before the statute came into existence. Unless the Legislature is presumed to have required prescience as a condition precedent to enforcement of a grantor’s intent that trust principal be preserved for a succeeding generation of beneficiaries, Mr. Ayers did exactly what he needed to do to prevent the disbursement of principal to his grandchild beneficiaries. Because such a presumption

would be anathema to canons that govern the construction of statutes and the overriding principle of trust interpretation, the judgment of the Circuit Court must be reversed.

The cardinal rule of statutory construction is to ascertain and give effect to the intention of the legislature. *Household Finance Corp. v. Robertson,* 364 S.W.2d 595, 602 (Mo. 1963). "Where the words of a statute are capable of more than one meaning, the court gives the words a reasonable reading rather than an absurd or strained reading." J.*S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). In § 469.411.5(2) the legislature excluded from a trustee's unitrust conversion authority any pre-enactment trust that "specifically prohibits an election under this subdivision." Of course it is conceivable that the legislature meant to require that Mr. Ayers—when he provided for his grandchildren's trusts in 1967 or at some time before he died in 1987—declare that his trustee was prohibited from making a unitrust conversion as would be provided when Missouri opted to recognize and allow such things early in the coming century. But that would be a pristine example of "an absurd or strained reading" of the statute. The reasonable interpretation of § 469.411.5(2) is that a pre-2001 grantor who clearly limited disbursements from a particular trust to income and just as clearly provided for disposition of the corpus remaining after the death of those beneficiaries to their successors—exactly as Mr. Ayers provided—was "specifically prohibit[ing] an election under this subdivision."

The Circuit Court's ruling in this case did not merely fail to apply the pertinent rules of statutory construction. It also ignored bedrock principles governing the

interpretation and enforcement of trusts: "The paramount rule of construction in determining the meaning of a trust provision is that the grantor's intent is controlling." *In re Nelson,* 926 S.W.2d 707, 709 (Mo.App. S.D. 1996). Further, "[u]nless the trust instrument is ambiguous, the grantor's intent is determined from the four corners of the trust document." *Arthaud v. Arthaud,* 600 S.W.3d 882, 888 (Mo.App. E.D. 2020). There is no ambiguity in Mr. Ayers's direction that his grandchildren receive trust income only and that principal be reserved for subsequent beneficiaries. And "a court will not attempt to rewrite an unambiguous trust under the guise of construction." *Betty G. Weldon Revocable Trust v. Weldon,* 231 S.W.3d 158, 174 (Mo.App. W.D. 2007).

Mr. Ayers did all that he could and all that was necessary to avoid the alteration of his intent under the rubric of a legal concept that had no currency and a statute that did not exist when his trusts were created. Absurdity is "[t]he quality, state, or condition of being grossly unreasonable." BLACK'S LAW DICTIONARY 11 (10th ed. 2014). The notion that Mr. Ayers was required to anticipate the advent of the unitrust in 2001 and explicitly prohibit a unitrust conversion before he died in 1987 is absurd. The judgment of the Circuit Court should be reversed because it authorizes an alteration of Anne's trust that contravenes the unitrust conversion statute and defies her grandfather's unambiguous intention.

II.

The Circuit Court erred in granting summary judgment in favor of USB because USB failed to establish that there was no genuine issue of material fact and summary judgment thus was improper under Mo. R. Civ. P. 74.04(c)(6), in that there was substantial evidence that (1) USB failed to conclude that the trust was being administered unfairly and impartially, (2) the bank thus failed to comply with the requirements of Mo. Rev. Stat. §§ 469.403 and 469.405 prior to invoking the unitrust conversion provisions of Mo. Rev. Stat. § 469.411, and (3) it thus was not entitled to judgment as a matter of law.

Standard of Review

The propriety of a grant of summary judgment is a matter of law to be reviewed *de novo.* *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. 2009). "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp,* 854 S.W.2d 371, 376 (Mo. 1993). Appellate

courts are to "review the record in the light most favorable to the party against whom judgment was entered" and "accord the non-movant the benefit of all reasonable inferences from the record." *Id.*

Argument

The Uniform Principal and Income Act was adopted in Missouri as Mo. Rev. Stat. §§469.401-469.467. This is a case of first impression, taking place at the intersection of the authority thus granted trustees to adjust the disbursement of interest and principal for trust beneficiaries and the general duties of a trustees in trust administration. Because there was a want of evidence capable of demonstrating the bank trustee's compliance with the statutory requirements for such a conversion. the grant of summary judgment in this case should be reversed.

Because the present trustee's exercise of the unitrust conversion authority established in § 469.411 will subvert the grantor's expressed intention with respect to the disbursement and conservation of trust assets—and because there was a want of evidence clearly demonstrating the satisfaction of statutory requirements for such a conversion even if this could be an appropriate exercise of that authority—the resolution of this appeal is a matter of exceptional importance.

The statutory duties and powers of trustees are outlined in §469.403. In some circumstances that section allows a trustee to disburse principal as well as income to the extent a trustee considers it necessary, provided a trustee considers certain factors enumerated in §469.405. Before making the factor evaluation for determining the

propriety of a statutory power of adjustment under that section, the trustee must make a determination pursuant to §469.403.2 that without such an adjustment the trust cannot be administered fairly and impartially to all beneficiaries. Mo. Rev. Stat. §469.405.1. If the trustee concludes the trust is not being administered in a fair and impartial manner, for certain trusts it may elect to treat the trust as a "unitrust" as provided in §469.411. When it is applicable to a trust, the latter section allows a trustee to distribute between three and five percent of the value of trust assets—principal and income—on an annual basis. Mo. Rev. Stat. § 469.411.1(1). This authority was apparently intended as an aid to determine a permissible yield from trust assets rather than being a separate power to adjust from that given in §469.405. The comments of a legislative committee suggest that § 469.411 was intended only to shield a fiduciary from liability for an income and principal allocation: "This Section was added because of concerns regarding fiduciary liability for the exercise of a power to allocate between income and principal, whether granted by section §469.405 or pursuant to a discretionary allocation provision in the governing instrument." *See* MISSOURI TRUST CODE AND LAW MANUAL, Mo. Prac, 4C, p. 716 (2017-2018 ed.)

USB argued correctly in the Circuit Court that the "trustee's analysis of the appropriateness of a unitrust election (or a SPA election) occurs in two stages." D779, at p. 10. But that process does not include a trustee acceding, without the requisite statutory analysis, to an income beneficiary's request for an increased pay-out from an invasion of principal to supplement income distribution. Even if it could be assumed that a unitrust

conversion is allowable at all when it would conflict with the grantor's distribution instructions, *See* Point I, *supra,* the need for such analysis would be even more acute in that circumstance. The summary judgment record in this case reflects genuine dispute with respect to whether that analysis was conducted and, to the extent that there was an analysis, what conclusion was reached.

The first phase of the process analyzes the partiality or impartiality of administration in light of the trust terms and applicable law with consideration given to a trust portfolio's risk/return profile. This analysis is required under § 469.403.2, which codifies the need for a fiduciary to administer a trust with fairness and impartiality. In fact, adjustments between principal and income are allowable only if, after applying §469.403.1, administration of the trust is found not fair and impartial as required by §469.403.2.

USB argued in the Circuit Court that a trustee's determination in the first phase that compliance with the trust's allocations and state law, without more, would allow for impartiality, then neither the statutory power to adjust nor the unitrust election is to be considered. D779, p. 10-11. The bank's use of a checklist bears out the need to perform this initial analysis to determine at the onset whether the trust is being administered fairly and impartially to all beneficiaries D779 at pp. 12-14

On the first checklist prepared for Anne's Trust, USB noted that the trust document contained provisions for income and principal allocation and determined that no statutory power of adjustment would be exercised or unitrust election made because

impartiality could be achieved merely with investment changes. D734, p. 2. A month later the bank concluded that nothing in its analysis led to a compelling conclusion that it was, in fact, meeting its duty of impartiality and that the unitrust should not be exercised. *See* D735, p. 4. These analyses are irreconcilable; only one can be factual. The first checklist is consistent with the bank's interrogatory response. D789 at p. 6-7.

The bank sought to extinguish the inconsistency between its two written analyses by declaring the conclusion in its first checklist as "scrivener error." D751, p. 7; D780, p. 8. The affidavit upon which it relied for this dismissal of inconsistent documents was signed by Mr. Meyer as Trust Managing Director of USB. D751, p. 1. Mr. Meyer declared that he had reviewed the bank's "correspondence, reports, and completed forms" pertaining to the "proposed or actual unitrust and SPA elections." *Id.,* p. 1. He attributed the information provided in his affidavit to "my review of those records, my personal knowledge, and my conversations with other representatives of Trustee." *Id.,* p. 2. Mr. Meyer offered no explanation of the inconsistency between the bank's two analyses other than that "[a]nswering 'Yes'" on the first "was a scrivener's error" and that the error was corrected "[s]everal months later" on the second. *Id.,* p. 7.

No other evidence supported USB's insistence that the determination memorialized by its initial evaluators was "scrivener's error" rather the product of considered review and analysis. No evidence could explain or justify the bank's change of position on that pivotal conclusion. The Circuit Court necessarily made a credibility determination in accepting Mr. Meyer's second-hand assurance that scrivener error was the case. Moreover, the Bank came up with a different conclusion on Form 905-A for

Anne's Trust than it did for the identical Catherine and Donald Trusts. Compare D753, p. 1 with D764 p. 1 and D775, p.1. The granting of summary judgment on that basis is untenable.

The Missouri Supreme Court and each of the three branches of the Missouri Court of Appeals have characterized summary judgment as "an extreme and drastic remedy," and routinely insist that trial courts exercise "great caution" when considering requests for summary judgment. *See, e.g., Cooper v. Finke*, 376 S.W.2d 225, 229 (Mo. 1964); *Walters Bender Strohbehn & Vaughan PC v. Mason*, 316 S.W.3d 475, 481 (Mo.App.W.D. 2010); *Bellon Wrecking & Salvage Co. v. Rohlfing*, 81 S.W.3d 703, 705 (Mo.App.E.D. 2002); *Merrick v. Southwest Electric Cooperative*, 815 S.W.2d 118, 123 (Mo.App.S.D. 1991). There is good reason for that admonition: summary judgment denies a litigant his day in court and, granted improvidently, deprives him of due process. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 377-78 (Mo. 1993). The vice of unfounded summary judgment—the preclusion of trial when there are factual issues to be tried—was realized in this case.

A trial court called upon to consider a motion for summary judgment must "scrutinize the record in the light most favorable to the [non-moving] party . . . and must accord that party the benefit of every doubt." *Kemp Construction Co. v. Landmark Bancshares Corp.*, 784 S.W.2d 306, 307 (Mo.App.E.D. 1990). Subject to that remarkably demanding standard, the summary judgment movant must prove that it is entitled to judgment as a matter of law on the basis of facts "about which there is no genuine dispute." *ITT*, 854 S.W.2d at 378. Further, the Supreme Court explained:

> Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to summary judgment, summary judgment is not proper.

Id. And: "The non-movant never needs to establish a right to judgment as a matter of law; the non-movant need only show that there is a genuine dispute as to the facts underlying the movant's right to judgment." *ITT* at 381-82. Appellate courts are to apply those same standards when they review an order granting summary judgment. *Lomax v. DaimlerChrysler Corp.,* 243 S.W.3d 474, 479 (Mo.App.E.D. 2007).

Nowhere on the USB form or on any document was there an explanation of why impartial administration was not possible, or in what respects the administration was not currently impartial. Nowhere did USB provide any rationale for the its decision. If USB's answer to the March 8, 2018 interrogatories was correct, the trustee can go no farther and is unable to adjust. D789 ¶10. Not only did USB admit in answers to interrogatories in this case that "at no time has the Trust not been administered fairly and impartially," it also admitted that the future administration of the trust would be impartial without a unitrust election being made. *See* D789, ¶13. (responding, "None," to inquiry regarding "what respects, if any, the future administration of the Trust will not be impartial unless a unitrust election is made"). Consequently, a finding that the Bank concluded that trust was not being administered impartially and fairly is not warranted,

Assuming the trustee is not meeting his duty of impartiality, the next phase of the analysis entails the use of one of two USB checklist forms memorializing a required analysis and consideration of the factors relevant to the trust, including those listed at

§469.405.2. The bank uses Form 905-D when it is electing unitrust. D725, pp. 2-7. It uses form 905-E when exercising a statutory power to adjust. D727, pp. 2-6. The two forms are virtually identical. Each contains the same questions and boxes to be checked and each of the questions track the factors listed at §469.405.2.

USB produced numerous forms purportedly used in its analysis after it appeared to have concluded that the none of the trusts were being fairly and impartially administered and could not be fairly and impartially administered without an adjustment. D789, p. 7. These documents failed to show how the trusts were not being fairly and impartially administered. The bank produced no documents—including but not limited to financial documents of the income beneficiary or communications with the beneficiary or her representatives—which were to have been reviewed to comply with the requirements of 469.405.2.

Apart from Mr. Meyer's affidavit, there is no evidence in the summary judgment record showing the performance by USB of its duties under that section with an outcome that could justify the unitrust conversion sought by the beneficiary and the bank as trustee and approved by the Circuit Court. Apart from its insubstantiality—*i.e.*, its utter failure to explain the purported occurrence of "scrivener error"— the affidavit was incapable of supporting summary judgment because it consisted of inadmissible hearsay: "Only evidence that is admissible at trial can be used to sustain or avoid summary judgment." *BV Capital LLC v. Hughes,* 474 S.W.3d 592, 595 (Mo.App. E.D. 2015).[7]

[7] *See* Points III and IV, *infra.*

"[S]ummary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant." *Loth v. Union Pacific Railroad Co.*, 354 S.W.3d 635, 642 (Mo.App.E.D. 2011). Further, "[w]here the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment, summary judgment is not proper." *Id.* at 641 (quoting *ITT,* 854 S.W.2d at 378). Finally, a court considering a motion for summary judgment should make no attempt to resolve questions of credibility, which are to be left for the finder of fact at trial: "When a court is faced with a credibility determination on an issue material to the cause of action, summary judgment is not appropriate." *Id.* at 642. The summary judgment granted in this case violated each of those precepts:

• The evidence of USB's initial determination that a unitrust conversion was neither necessary nor appropriate was more than sufficient to support a ruling in favor of Elizabeth on the bank's motion for summary judgment.

• In order to grant summary judgment in favor of USB, the Circuit Court necessarily overlooked that analytical evidence showing the bank's own conclusion that it should not proceed with the conversion.

• The entry of summary judgment for USB necessitated a determination by the Circuit Court that Mr. Meyer's affidavit was credible with respect to the details and findings of the bank's analysis, despite evidence that would support factual determinations to the contrary at trial.

No prior Missouri decision has provided the guidance called for in this appeal. The Circuit Court's resolution of the parties' dispute by summary judgment was wrong procedurally. By every indication it also was wrong in substance. The case should be remanded for trial with directions for application of the statutory criteria governing unitrust conversions affecting pre-2001 trusts.

III.

The Circuit Court erred in considering and relying upon Mr. Meyer's affidavit in granting summary judgment in favor of USB, because that consideration and reliance violated Mo. R. Civ. P. 74.04(e), in that (1) Rule 74.04(e) limits the consideration of affidavits in summary judgment proceedings to affidavits "made on personal knowledge" asserting "such facts as would be admissible in evidence," (2) Mr. Meyer based his affidavit on (a) a review of "correspondence, reports, and completed forms" purportedly maintained by USB, to which the affiant purported to "have access" and with respect to which he claimed to have "knowledge of how they are maintained," (b) "conversations with other [USB] representatives," and (c) unspecified "personal knowledge," and (3) the affidavit thus constituted hearsay rather than admissible evidence.

Standard of Review

The propriety of a grant of summary judgment is a matter of law to be reviewed *de novo.* *Hill*, 277 S.W.3d at 664. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting

summary judgment." *ITT Commercial Finance Corp.,* 854 S.W.2d at 376. Appellate courts are to "review the record in the light most favorable to the party against whom judgment was entered" and "accord the non-movant the benefit of all reasonable inferences from the record." *Id.*

Argument

USB relied on Mr. Meyer's affidavit and its attachments alone to prove 138 of the 143 facts asserted in support of its own motion for summary judgment and in opposition to Elizabeth's motion for partial summary judgment. D751-777. The only foundation asserted for admissibility of the exhibits was Mr. Meyer's own reference to them, accompanied by his acknowledgment that he had relied upon the representations of other USB employees. *Id.*, pp. 1-2. He did not purport to be a custodian of the bank's business records. *Id.*

The bank's motion for summary judgment on its own claims as well as its opposition to Elizabeth's request for the same relief rises or falls on the court's consideration of Mr. Meyer's affidavit. D783. Mrs. Molk moved unsuccessfully to strike the affidavit and its attachments and exclude it from the summary judgment proceeding as hearsay. D783, D784, D795. The Circuit Court erred when it admitted the affidavit and relied on it as proof that USB had complied with the statutory preconditions for a unitrust conversion. The entry of summary judgment in favor of USB should be reversed on account of that error.

Mr. Meyer was a USB trust officer and became a managing director of USB's trust department after August 2016. D751, p. 1. He attested that at an unspecified time he had "reviewed the records Trustee maintains with respect to the proposed or actual unitrust and SPA elections of the [the Herbst Trusts.]" *Id.* Those "records" included "correspondence" from and two unspecified entities or people, undifferentiated "reports" prepared by unspecified individuals or generated by unspecified devices, and "completed forms" completed by who knows whom. *Id.*, p. 2. Mr. Meyer swore that these records were made by people having "first hand knowledge" of the memorialized events but did not purport to know or be able to identify anyone involved in preparation of the documents or to link any preparer to any particular record, did not begin to suggest the connection if any between the preparer or preparers and each document upon which he might have relied as affiant, and did not contend that he had reviewed or was submitting all records pertinent to the summary judgment issues. *Id.*

Mr. Meyer never participated with Anne Herbst or any member of USB's trust department in regard to her request for a unitrust election or in regard to the process in which USB engaged to elect to invade principal with a unitrust election provided in §469.411. According to USB, Mr. Meyer had no contact whatsoever with Anne Herbst or a bank employee during 2016 and 2017 when the Bank was deciding what to do with Anne's Trust. It was six months after the commencement of the litigation, in April, 2018, that Mr. Meyer first had a telephone conversation with Ms. Herbst. D789. P. 8. Presumably, this conversation occurred so that after the fact, he could provide the answers to and sign USB's interrogatory answers two weeks later. D789, pp. 1, 11. Mr.

Meyer's affidavit does not suggest that he had personal knowledge of anything having to do with USB's processing this matter, nor could it as he was not involved.[8] As a result, the trial court erred when it found, without any explanation or rationale, Meyer to be a "competent and qualified" witness. D795, p.1.

Mr. Meyer's affidavit may offer sufficient proof of his proficiency as a trust managing director. It is incapable of establishing his competency or qualifications to testify about the facts of any trust transaction relating to the Herbsts, as he had no personal and first-hand knowledge of the events. Meyer only looked at files containing reports of others.

Mr. Meyer's attestation to the facts and circumstances leading to "scrivener error" the unitrust analysis checklist is a profound instance of error affecting the judgment in this case. Mr. Meyer stated that USB's response to a checklist item required by § 469.403.2 was recorded incorrectly and purported to fix that error with an unexplained waive of the hand:

> 52. Trustee then completed Part 4 of Form 905-D, entitled "Unitrust Election Factors."
>
> 53. Trustee answered "Yes" to the question, "If income is being distributed to the beneficiaries that is less or more than the Unitrust statutory rate or range, and unitrust is not currently being exercised, is the trustee meeting its duty of impartiality to the income or remainder beneficiaries?"
>
> 54. Answering "Yes" to that question was a scrivener's error.

[8] As defined by Black's Law Dictionary, personal knowledge is "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said *Id.*" BLACKS LAW DICTIONARY, Second Pocket Edition, 2001. D789, p.8.

55. The proper answer to that question was "No."

56. Several months later, Trustee correctly answered "No" to the same question on Trustee's Form 905-E for the Anne Trust.

D751, p. 7. If patent and material inconsistencies in recorded documents can be explained away conclusively with that sort of unexplained, unattributed, self-serving, after-the-fact declarations by the institutional party that created the record in the first instance, what need is there for trials at all?[9]

The Circuit Court should have ignored Mr. Meyer's affidavit as requested by Elizabeth and denied USB's request for summary judgment. The affidavit was incapable of satisfying the personal knowledge condition imposed by Rule 74.04(e). Section 469.411 is the sole authority for a unitrust conversion in Missouri. Section 469.411.5 makes it clear that in order to justify the conversion it sought for Anne's trust, which Mr. Ayers created through an instrument that became irrevocable prior to enactment of the statute—if such a conversion ever could be proper when the grantor provided explicit instructions providing for the disbursement of income only to a particular generation of beneficiaries and for the preservation of trust principal for the succeeding generation, *See* Point I, *supra*—USB was required to show that it had performed the analyses and reached the conclusions enumerated in §§ 469.403, 469.405.2, and 469.405.3. The bank

[9] Other statements in Mr. Meyer's affidavit are unmistakable out-of-court declarations being offered for their truth. D751, pp. 5, 8-11. Still other averments are mixtures of opinions and legal conclusions from someone who asserts no competence, qualifications or expertise to make them. *Id.*, pp. 3-8.

relied on Mr. Meyer's affidavit alone as proof of virtually every fact asserted in its statement of uncontroverted facts. D747.

Those "facts" constituted USB's proof of its compliance with the governing statutes. *Id.* This Court recently recognized the inadequacy of an affidavit remarkably similar to Mr. Meyer's to support an award of summary judgment:

> While an affidavit need not contain a particular "magic phrase" in order to establish that it is made on personal knowledge, the averments should still demonstrate that the affiant has personal knowledge of the matters contained in the affidavit. On the other hand, an affidavit which relates information gained from other documents relates hearsay, not such facts as would be inadmissible in evidence, and is not sufficient to support a motion for summary judgment.

Gateway Metro Federal Credit Union v. Jones, 2020 WL 3053292 at *3 (Mo.App. E.D. June 9, 2020).

The affidavit in *Gateway Metro* identified the affiant as a senior executive of the entity seeking summary judgment, recited that the affiant's responsibilities included "supervising, maintaining and reviewing" the pertinent records, described the records reviewed in connection with his affidavit, and assured the summary judgment court:

> The information described herein and referenced below is found in the [company's] business records. The entries in those records are made at the time of the events and conditions they describe either by people with first-hand knowledge of those events and conditions or from information provided by people with such first-hand knowledge. Recording such information is a regular practice of [the company's] regularly conducted business activities.

Id. The affiant added: "Based on my review of those records, I have gained knowledge of the facts set forth herein, and if called upon to testify as a witness, I could competently do so under the penalty of perjury." *Id.*

Gateway Metro differs from the present case only because the affidavit there was not accompanied by any of the documents relied upon by the affiant. *Id.* at 2-3. The opinion in that case allows that those documents—properly authenticated by the custodian of those records in accordance with Mo. Rev. Stat. §§ 490.680 and 490.692—might have led to a different outcome. *Id.* at *3 n.3. An equally salient distinction between the two cases is that the affiant in *Gateway Metro* identified himself as having responsibility for "supervising" and "maintaining" the records upon which he had relied. *Id.* Mr. Meyer did not purport to be the custodian of the USB records submitted as exhibits to his affidavit, but only to "have access" to them. He did not claim to have supervised maintenance of the records, but only to have unexplained "knowledge of how they are maintained." D751, p. 2. No distinction between Gateway Metro and this case can make Mr. Meyer's affidavit probative and capable of supporting USB's position. The affidavit in Gateway Metro was inadequate because it was supported by no evidence—i.e., no business records were attached to it. The affidavit in this case was inadequate despite being accompanied by documents—because the documents were hearsay that did not begin to qualify as business records. Mr. Meyer also made it clear that his reliance on the exhibits to his affidavit was premised in unspecified measure upon "conversations with other representatives" of the bank. *Id.* That is the definition of hearsay. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 59 (Mo. 1999) (stating that "[a] hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and which depends upon the veracity of the statement for its value"). The hearsay rule exists to prevent the proof of facts with statements made outside of

court, avoiding cross-examination, allowing "testimony" to be given in the absence of any oath, and depriving the fact-finder of the opportunity to judge demeanor at the time the statement is made. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 121 (Mo.App. E.D. 1995).

In short:

• Mr. Meyer's affidavit was just as objectionable as the affidavit in *Gateway Metro.*

• The purported bank records referred to in his affidavit were not submitted to the Circuit Court or qualified as business records, and for that reason alone could not establish USB's case for summary judgment.

• The fact that Mr. Meyer found it necessary to bolster his supposed knowledge of compliance with the statutory prerequisites for making a unitrust conversion by talking with unnamed co-employees surely eradicated any doubt that might remain about incapacity of those records to pass muster under Rule 74.04(e).

The Circuit Court erred in accepting and relying upon Mr. Meyer's affidavit in granting USB's motion for summary judgment. This Court should reverse the judgment for that reason.

IV.

The Circuit Court erred in considering and relying upon purported bank records attached as exhibits to Mr. Meyer's affidavit in granting summary judgment in favor of USB, because that consideration and reliance violated Mo. R. Civ. P. 74.04(e) and Mo. Rev. Stat. § 490.680, in that (1) Rule 74.04(e) limits the consideration of evidence in summary judgment proceedings to proof that would be admissible in evidence, (2) Mr. Meyer acknowledged in his affidavit that the exhibits submitted with his affidavit had been prepared by other people and that his representations depended in part upon statements made to him by other bank employees rather than his own knowledge, (3) Mr. Meyer did not purport to be the custodian of the records or to state on the basis of his own knowledge the identity, mode, or timing of preparation of those records, (4) the exhibits thus were not shown to be business records pursuant to § 490.680, and (5) the documents thus constituted inadmissible hearsay.

Standard of Review

The propriety of a grant of summary judgment is a matter of law to be reviewed *de novo. Hill,* 277 S.W.3d at 664. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *ITT Commercial Finance Corp.,* 854 S.W.2d at 376. Appellate courts are to "review the record in the light most favorable to the party against whom judgment was entered" and "accord the non-movant the benefit of all reasonable inferences from the record." *Id.*

Argument

Again, USB relied on Mr. Meyer's affidavit and its attachments alone to prove 138 of the 143 facts asserted in support of its own motion for summary judgment and in opposition to Elizabeth's motion for summary judgment. D751-777. Again, the only foundation asserted for admissibility of the exhibits was Mr. Meyer's own reference to them, his representation that they were created "at the time of the events and conditions they describe" either by individuals "with first-hand knowledge" of the events described in the records *or by people who did not have that knowledge themselves but received their information from other unspecified people who supposedly did,* and that making records in this way *"is a regular practice"* of the USB trust management operation. D751, p. 2. Mr. Meyer attested that his own information about the creation, content, and maintenance of the records was acquired in some measure *through his extrajudicial conversations with other people. Id.* That is a singularly inadequate foundation for the admission of documents as business records under § 490.680.

Section 490.680 provides an exception to the hearsay rule for business records that meet—and are offered in a manner that meets—the criteria determined by the legislature to warrant trust in their accuracy:

> A record of an act, condition or event, shall … be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event …

A "qualified witness" is one with sufficient personal knowledge of the record-keeping facts "to give the records probity." *CACH LLC v. Askew,* 358 S.W.3d 58, 64 (Mo. 2012). Mr. Meyer's affidavit made it clear that his personal knowledge regarding the exhibits submitted with his affidavit did not meet that standard. He obtained an undifferentiated measure of his knowledge from unidentified third parties described only as bank employees. Only some of the records were prepared by individuals with first-hand knowledge of their content. He gave no information about where or how the bank's records generally or these records in particular were created, maintained, did not claim to be the regular custodian of any of the records, and gave no indication that the custodian or custodians—whoever he or she or they might be—had provided the records to him.

The rationale of the business records exception to the hearsay rule is the presumptive verity of business records actually created and maintained as a function of routine business operations. *Mitchell v. St. Louis Argus Publishing Co.,* 459 S.W.2d 1, 6 (Mo.App. E.D. 1970); *See also Davolt v. Highland,* 119 S.W.3d 118, 134 (Mo.App. W.D. 2003) (explaining that properly qualified business records "are assumed to be accurate because they reflect entries systematically and routinely made by those with a self-

interest to ensure accuracy to allow reliance … in the regular course of business"). That rationale was not applicable to, and the criteria upon which the statutory exception to the hearsay rule is premised were not present in, the exhibits submitted by USB in this case.

The exhibits attached to the affidavit were rank hearsay. They were prepared by people other than Mr. Meyer, sometimes with actual knowledge of what they were recording and sometimes based on information obtained from unnamed other people, and consisted of documents and information that to some unspecified extent were known to Mr. Meyers only through information or assurances provided by unspecified other USB personnel. They were redolent of hearsay's vice: "[C]ourts exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made." *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. 1995).

The notion that Mr. Meyer's description and attribution of the present exhibits warranted a presumption of verity is untenable. One illustration of the probative gap in the exhibits was his personal assurance—established by no document and attributed to no other person—about the preparer's intent in recording a critical determination during the unitrust evaluation process:

> 36. Trustee indicated on Form 905-A for the Anne Trust that the combination of trust terms and applicable state law do not allow impartiality administration [sic] of the Anne Trust, but that portfolio changes, if made, might be sufficient to achieve impartiality.
>
> 37. This answer was intended to reflect the fact that no decision would be made until Anne and Trustee could confer with Anne's accountant.

D751, p. 5. In fact, Form 905-A alone, absent Mr. Meyer's explanation of an unnamed third-person's remarks, states an analytical finding clearly and unequivocally and never could support a finding of the "fact" relied upon by USB. Elsewhere Mr. Meyer attests:

> 52. Trustee then completed Part 4 of Form 905-D, entitled "Unitrust Election Factors".
>
> 53. Trustee answered "Yes" to the question, "If income is being distributed to the beneficiaries that is less or more than the Unitrust statutory rate or range, and unitrust is not currently being exercised, is the trustee meeting its duty of impartiality to the income or remainder beneficiaries?"
>
> 54. Answering "Yes" to that question was scrivener's error.
>
> 55. The proper answer to that question was "No."
>
> 56. Several months later, Trustee correctly answered "No" to the same question on Trustee's Form 905-E for the Anne Trust.

Id., p. 7. Really? Again, the bank's forms alone—first answering the question in the affirmative and the second reversing that conclusion without explanation—offered no evidentiary support whatsoever for the bank's handy resolution of an issue critical to evaluating the trustee's compliance with the statutes governing unitrust conversion.

The affidavit exhibits and Mr. Meyer's endorsement of them were incapable of supporting the Circuit Court's summary judgment ruling:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Mo. R. Civ. P. 74.04(e). As this Court recognized in *Gateway Metro,* "an affidavit which relates information gained from other documents relates hearsay, not such facts as would

be admissible in evidence, and is not sufficient to support a motion for summary judgment." *Id.*, 2020 WL 3053292 at *3.

USB offered no evidence in support of any fact necessary for the Circuit Court's summary judgment rulings other than the affidavit exhibits and Mr. Meyer's attestation to second- or third-hand information contained in those documents. This Court should reverse those rulings.

V.

The Circuit Court abused its discretion in ordering Elizabth to reimburse the Anne Trust for attorney fees because an award of fees in this case was neither just nor equitable and thus was not authorized by Mo. Rev. Stat. § 456.10-1004, in that (1) equity generally requires that a trust pay the costs of its own administration, (2) Ellizabeth's challenge to the trustees request for judgment authorizing a unitrust conversion in the Anne Herbst Trust was reasonable rather than vexatious or improperly "divisive," and (3) the award in this case was arbitrary and unreasonable.

Standard of Review

Where the legislature statutorily authorizes an award of attorney's fees in the discretion of the trial court such as provided by Section 456.10–1004, RSMo , the decision to grant or deny attorney's fees is reviewable for an abuse of discretion. The trial court abuses its discretion in awarding attorney's fees if the award is either arbitrarily

arrived at or so unreasonable as to indicate indifference and lack of proper judicial consideration. *O'Riley v. U.S. Bank, N.A.*, 412 S.W.3d 400, 418–19 (Mo. Ct. App. 2013)

Argument

The Court abused its discretion in awarding attorney fees to USB when (1) it had already been paid for fees; (2) no authority exists for the Court to order reimbursement to trusts when the Trustee pays itself out of trust assets and (3) there is no record evidence to support that the party against whom the order is entered litigated in a "divisive" manner.

USB Paid Itself Out of The Trust Accounts Involved in The Litigation And No Authority Exists for USB To Seek or Receive Reimbursement from Elizabeth

It is noteworthy that, unlike the usual fee motion by a bank, USB here does not seek payment for its attorneys' fees and admits that those fees have already been paid by the Anne's and her siblings' trusts. USB requests that those trusts be reimbursed by Elizabeth for their payments to USB. USB offers no support under Missouri law for one beneficiary being liable ***to reimburse*** another beneficiary for a trustee's attorneys' fees when the trustee pays itself out of the trust assets under its control. USB fails to support its claim that under Missouri law, Elizabeth is liable ***to reimburse*** either of her siblings' trusts. This is to be distinguished from *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 840 (Mo. Ct. App. 2006) in which the Court charged the complaining beneficiary's share of a trust with the Bank's attorneys' fees as a result of that beneficiary engaging in vexatious litigation against the Bank. In this case, USB paid itself from its customers' trust funds under an agreement to which Elizabeth never agreed.

"It is a well-settled doctrine of equity that a trust fund should bear the expense of its own administration. In conformity with this doctrine it is the general rule that where doubt arises as to the true or proper construction of an instrument by which a trust is created and there are different claimants, the Bank may bring a proper action, such as for a declaratory judgment, setting forth the facts, calling for the claimants to settle their rights before the court, and praying the order of the court in regard to the correct construction of the trust instrument and its proper execution. In such cases the expenses of the litigation, as respects all the parties, and as between attorney and client are properly charged upon the fund. The litigation is regarded as indispensable to the proper administration of the fund, it being necessary that all persons having interests therein or making claims thereto should be made parties, and be afforded an opportunity of being fully heard to the end that their several rights and claims be judicially determined and set at rest." *Coates v. Coates*, 316 S.W.2d 875, 877–78 (Mo. App. 1958).

"It is also the general rule where the trust instrument is so ambiguous or difficult to apply and administer that two or more persons may fairly make an adverse claim to the fund or its proper allocation, either may resort to a court of equity for a correct interpretation, and the court is justified in not only assessing the costs of the litigation against the trust estate, but also *in allowing reasonable attorneys' fees and expenses payable out of the trust estate both to the defeated and to the successful parties.* (citations omitted)." *Id.* (emphasis added).

In this case, there is no reason that USB should not pay its own attorneys' fees or that Anne's trust share should not pay USB's attorneys' fees because Anne sought the benefit from an enhanced distribution. In addition, Elizabeth was forced to litigate the matter because USB chose to sue her to implement Anne's wishes. Likewise, Elizabeth's fees should be paid by Anne's Trust or USB. No other allocation needs to be made. As a result, Elizabeth submitted a cross-motion for the attorney fees she incurred. This litigation was instituted by USB to obtain an interpretation of the unitrust statute under the circumstances presented by the Ayers Trust, namely an intention expressed by the grantor that no principal be invaded to support his granddaughters.

Under the Facts of This Case, Klinkerfuss III Did Not Apply and The Court Used Mo. Rev. Stat. §456.10-1004 as Authority for Its Order

In its Motion for an Order of Reimbursement below, USB relied on "two important concepts" from *Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo.Ct.App. 2009) *("Klinkerfuss III")* to require this Court to make Elizabeth liable to her siblings for reimbursement of the fees USB paid itself out of trust assets. The concepts which the Bank asserts were invoked by *Klinkerfuss* are not present in this case. When the Court ordered reimbursement, the Court did not rely on *Klinkerfuss*, and failed to mention any argument that Elizabeth engaged in "vexatious" litigation. Consequently, this brief need not go into that argument. Rather, the Court awarded fees based on a conclusion that "equity and justice require that Elizabeth Molk be responsible for a portion of the legal fees incurred by the Trustee. D805, pp. 1-3.

The Circumstances of this case do not Justify the Order that Elizabeth Reimburse the Trusts for USB's Attorneys' Fees pursuant to the authority of §456.10-1004

Section 456.10-1004 R.S. Mo. affords wide discretion to the trial court in a judicial proceeding involving the administration of a trust. A finding of liability of one party to another under the statute does not require that a party acted egregiously or vexatiously in litigation. It suggests that fees should be awarded as "justice and equity may require." As noted, in this matter, USB chose to seek guidance from the court and named Elizabeth Molk as well as the other siblings in this lawsuit. No one other than Anne would have requested this lawsuit be filed and she was the only one to benefit from the change she was seeking. By defending against the Bank's claim, asserting a compulsory counterclaim, serving focused interrogatories and seeking relevant documents, Elizabeth did nothing that was improper to justify a decision to make Elizabeth re-pay Anne' trust (and those of her other sister and brother) for USB's attorneys' fees.

The Court found that Elizabeth and her children were the only defendants to file an answer and a counterclaim in the litigation. The Court found that "Elizabeth also added a divisive element to the cause of action when she withdrew her prior consent to the conversion of Donald's separate trust. The Court believes that Elizabeth's actions were solely intended to protect her personal interest in her separate trust." There is nothing in the record to support the Court's conclusion in this regard and the order awarding fees was an abuse of discretion, even considering the wide latitude granted by

the statute. Elizabeth's separate trust (also created by her grandfather's trust) was never at issue in this case and her interest in her trust was never the subject of this litigation.

As noted, § 456.10–1004 is a discretionary statute. The statute provides that a court "*may* award costs and expenses, including reasonable attorney's fees." Thus, this statute is permissive and not mandatory. Because § 456.10–1004 grants the trial court authority to award attorneys' fees, but does not mandate an award, the probate court has discretion to either award or deny the request for attorneys' fees. A denial of fees by the Court in this case would not be against the logic of the circumstances and a denial would not be "so arbitrary and unreasonable as to shock one's sense of justice." Based on the record before this Court, there would be no abuse of discretion in denying the Bank's request for attorneys' fees. *Lehmann v. Bank of Am., N.A.*, 427 S.W.3d 315, 324 (Mo. Ct. App. 2010).

At page 4 of its Motion for an Order of Reimbursement, USB asserted that it "was ***forced*** to file its petition in the first place solely because Elizabeth had objected to the proposed unitrust election over the Anne Trust." (emphasis added). D798, ¶ 4 In fact, USB was not forced to do anything by anyone and certainly not by Elizabeth. All that Elizabeth did *prior* to the suit was respond to a request that she object or agree to USB's letter advising her of its intention to employ the formula in the "unitrust statute," including invading and distributing principal, rather than distributing income only. After Elizabeth objected, USB had several choices: to file a lawsuit against all of the Ayer's descendants to seek instructions from the Court; to leave matters status quo, not attempt a unitrust election or not attempt to make any principal distributions; USB could have gone

forward with a unitrust conversion (given that it says it always had the right to do so) or simply re-adjust the investments without a unitrust election pursuant to the remaining provisions of the Uniform Principal and Income Act.

While it is true that Elizabeth filed an answer to the petition and a two-count counterclaim and thereafter filed an amended counterclaim and then a motion attempting to revoke an alleged consent to a unitrust election for a sibling's trust, this participation in litigation was hardly "divisive." Appellant can find no authority in Missouri to justify making Elizabeth liable to USB for fees because of her participation in the litigation instituted by USB to protect her interests. If such was the case, any opposition to any claim in any litigation could be considered "divisive" to warrant an assessment of fees against an opposing party.

This Court in *Lorenzini v. Short*, 312 S.W.3d 467, 473 (Mo. Ct. App. 2010) re-stated the well-recognized rule:

> Missouri courts follow the "American rule" with respect to awards of attorney's fees. The "American rule" generally provides that each party is required to bear the expense of its attorney's fees. However, there are four common exceptions to the rule which allow a court to award attorney's fees if: (1) a statute authorizes an award of fees; (2) a contract authorizes an award of fees; (3) a party expends fees to defend collateral litigation; or (4) a court of equity deems fees are warranted in order to "balance benefits" where very unusual circumstances have been shown.

Courts also may award attorney's fees as sanctions in two limited situations. First, Rule 55.03(d) can serve as a basis to award attorney's fees for frivolous or bad faith litigation. *See* Rule 55.03(d); *Consolidated Public Water Supply,* 929 S.W.2d at 317 n. 1. Second, attorney's fees may be awarded by the trial court as sanctions pursuant to its

inherent powers. *Mitalovich v. Toomey,* 217 S.W.3d 338, 340 (Mo.App. E.D.2007). A finding that a party is "divisive" by opposing claims in the litigation is not an exception to the American Rule. Here the only possible exception could be § 456.10–1004 or a finding of unusual circumstances requiring a balancing of benefits. The Court did not award fees as a sanction.

This Is A Case of First Impression in Missouri

USB's lawsuit and the counterclaim filed by Elizabeth Molk dealing with the issue of how and under what circumstances a trustee may elect to distribute on the formula set out in the unitrust statute has never been ruled on by an appellate court in Missouri and is a case of first impression. However, that does not mean that litigation seeking to review the proper application of the statute and, in particular USB's conduct in implementing it, is divisive. Here, USB attempted to modify, by a unitrust election, the terms of a trust at the urging of an income beneficiary to authorize USB to invade and distribute trust principal contrary to the grantor's clear and unambiguous intentions. Certainly, it should not be surprising that another beneficiary economically adversely affected by such a decision would challenge it. Finding this conduct to be divisive is an abuse of discretion.

USB argued below that "it was only Elizabeth's resentment of her sister which set this entire matter in motion;" that Elizabeth's vexatious litigation should not be allowed to deplete the trust share of Anne, "the innocent beneficiary;" indeed, USB claims that Elizabeth only litigated because of "personal animosity toward Anne" and therefore should have to reimburse Anne. However, Anne and USB set this entire matter in motion when they took up Anne's quest for a unitrust election and filed suit. USB has no

support for its argument that Anne and Elizabeth's relationship or their feelings for each other can be the basis for the order being sought.

CONCLUSION

The entry of summary judgment in favor of US Bank and the award of attorney fees against Elizabeth Molk should be reversed for the reasons set forth in this brief. The case should be remanded to that Court for further proceedings and trial.

STEVEN M. HAMBURG, P.C.

By: */s/ Steven M. Hamburg*
Steven M. Hamburg, #27549
231 S. Bemiston Ave., Suite 1111
Clayton, MO 63105
Telephone: 314-725-8000
Facsimile: 314-726-5837
shamburg@smhpc-law.com

Michael Gross [23600]
Michael Gross Law Office
231 South Bemiston Avenue
St. Louis, Missouri 63105
(314) 863-5887 (314) 727-2430

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief contains all of the information required by Mo. R. Civ. P. 55.03 and complies with the limitations provided by Mo. R. Civ. P. 84.06(b), in that the brief contains 13,075 words including its cover, the required certificates, and the signature block. Counsel has relied upon the word-counting utility of Microsoft Word 2016 in making this certification.

/s/ Steven M. Hamburg