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

REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities ……. 3-4

POINT I ……. 5

POINT II …….. 10

POINT III …… 12

POINT IV ……. 16

POINT V …… 18

CONCLUSION …….. 20

CERTIFICATE OF COMPLIANCE …… 21

Table of Authorities

Cases:

Brown v. Brown-Thill, 543 S.W.3d 620, 636 (Mo. Ct. App. 2018), *reh'g and/or transfer denied* (Feb. 27, 2018), *transfer denied* (May 1, 2018) …….. 19

Brown v. Brown, 530 S.W.3d 35, 47–48 (Mo. Ct. App. 2017) ……... 19

C & W Asset Acquisition, LLC v. Somogyi, 136 S.W.3d 134, 140 (Mo. Ct. App. 2004)16

Gateway Metro Federal Credit Union v. Jones, 603 S.W.3d 315 (Mo.App.E.D. 2020) …….. 14

Hegger v. Valley Farm Diary Company, 596 S.W.3d 128 (2020)…… 5

Household Finance Corp. v. Robertson, 364 S.W.2d 595, 602 (Mo. 1963)…… 5

In re Nelson, 926 S.W.2d 707, 709 (Mo.App. S.D. 1996) …… 6

Jungmeyer v. City of Eldon, 472 S.W.3d 202 (Mo.App.W.D. 2015)…….. 15

J.S. v. Beaird, 28 S.W.3d 875, 876 (Mo. 2000)…… 6

May & May Trucking LLC v. Progressive Northwestern Insurance Co., 429 S.W.3d 511, (Mo.App.W.D. 2014) ……13

Rustco Products Co. v. Food Corn, Inc., 925 S.W.2d 917, 924 (Mo. App. W.D. 1996) 12

State v. Graham, 641 S.W.2d 102, 106–07 (Mo. 1982) ……..16

State v. Green, 575 S.W.2d 211, 212 (Mo.App.1978)…….. 17

State ex rel. Hobbs v. Tuckness, 949 S.W.2d 651, 655 (Mo. App. W.D.1997) ……... 16

United Petroleum Service, Inc. v. Piatchek, 218 S.W.3d 477 (Mo.App.E.D. 2007)…….13

Statutes:

§469.411.5(2) ……5, 7, 8, 9, 20

Rule 74.04 …… 10, 11, 12

§469.403 …….. 10, 11

§469.405…… 10

§469.409 …… 16
§490.680 …… 16
§490.692 …… 16
§456.10-1004……..…… 18

Other Authority:

4C MISSOURI TRUST CODE AND LAW MANUAL at 716 (2017-2018 ed.) ……11
BLACK's LAW DICTIONARY 1004 (10th ed. 2014) ……14

I.

USB insists that this Court afford §469.411.5(2) and the trust instrument readings that cannot have been intended by the legislature or Mr. Ayers. The outcome sought by the bank would violate the cardinal rule of statutory construction and undermine the most fundamental principle governing the interpretation and enforcement of trusts. Further, the authority relied upon by USB in support of its argument—*Hegger v. Valley Farm Diary Company,* 596 S.W.3d 128 (2020)—is inapposite. In fact, Mr. Ayer's trust instrument meets the statutory requirement that it "specifically prohibit" a unitrust election. The Court should reject USB's arguments.

The court's application of Missouri statutes 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). Section 469.411.5(2) prohibits a trustee from making a unitrust election if (1) the trust instrument became effective prior to August 28, 2001, as Mr. Ayer's instrument did, and (2) the instrument "specifically prohibits" such an election. Mr. Ayers expressly restricted Ms. Herbst and his other grandchild beneficiaries to distributions of income and made express provision for the distribution of the principal of their trusts to subsequent beneficiaries. He could not have been more specific than that in prohibiting trustees from doing what USB requested to do in this case. The statute provides just as clearly that the bank cannot make a unitrust election for those trusts.

USB suggests that § 469.411.5(2) is ambiguous: "[I]t is unclear whether the opt-out phrase 'unless the instrument creating the trust specifically prohibits an election under

this subdivision' is meant to apply to trusts that became irrevocable before the date of the statute." Resp. Br. 12. If the Court finds that statute susceptible to more than one interpretation, it will afford the law "a reasonable reading rather than an absurd or strained reading." *J.S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). Under the construction proposed by USB, the Court must impute to the legislature an intent to require that Mr. Ayers have foreseen the enactment of unitrust legislation early in the next century. That would be absurd. Or the Court can conclude that the legislature intended to shield any pre-enactment trust from conversion by a trustee when the maker clearly directed that (a) beneficiaries of certain trusts were to receive distributions of income only and (b) the principal of their trusts was to be conserved and distributed to certain future beneficiaries. That construction would be reasonable.

The outcome sought by USB also calls upon the Court to flout the most basic principle governing trust interpretation. Mr. Ayers expressly limited distributions for his grandchild beneficiaries to income. "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). The bank proposes three arguments about why Mr. Ayer's intent does not matter. None of those arguments hold water.

First, USB insists that consideration of Mr. Ayer's intent as suggested by Ms. Molk is "unnecessary" and "inapposite"—*i.e.,* irrelevant to this issue. Resp. Br. 13. *Second* the bank contends that even if the maker's intent could matter the Court should deduce that Mr. Ayers—who expressly limited distributions for this generation of

beneficiaries to income and thus made clear his intent that principal not be distributed to them—"would have allowed" a unitrust election if he had known of the concept. *Id.* *Third,* USB reasons that (1) § 469.411.5(2) has no effect on trusts that allow encroachment on principal, (2) "by [its] very nature" the statute applies only to trusts that limit distributions to income, and thus (3) "[t]he Missouri legislature intended the statute to reach income-only trusts such as the Anne Trust." Resp. Br. 14.

Of course, Mr. Ayers' intent is relevant to the § 469.411.5(2) question of whether he "specifically prohibited" a unitrust election. As USB acknowledges, "there is *no* ambiguity" in the trust for Ms. Herbst. Resp. Br. 13 (emphasis added). Mr. Ayers made his intent clear by providing that Ms. Herbst and Mr. Ayers' other grandchildren would receive only trust income, principal being reserved for future beneficiaries. The bank's assurance that Mr. Ayers would have allowed a unitrust election if only he "had … known of the possibility" cannot be reconciled with the fact that, again, he specifically allowed for the distribution of principal in other trusts but directed his trustee to distribute only income to Ms. Herbst's generation of beneficiaries. Mr. Ayers knew how to provide for or allow the distribution of principal to beneficiaries.[1] Finally, although the bank

[1] Mr. Ayers authorized his trustee to decide whether new receipts were to be "considered part of the principal of the trust estate or part of the income thereof." D698, p. 2. USB cites this provision as proof that he would have agreed to allow a trustee to subvert the design of his income-only grandchild trusts and decide to distribute principal to those beneficiaries. Resp. Br. 13-14. The preceding paragraph of Mr. Ayers' instrument leaves no room to doubt that the maker meant to define principal and control its conservation and distribution. D698, p. 2. Again, USB has recognized that "there is no ambiguity" in the trust for Ms. Herbst. Resp. Br. 13.

correctly observes that the unitrust legislation is directed to income-only trusts, its argument ignores the statutory exception for trusts in which the maker has provided for the distribution of income only and made other explicit provision for principal. USB's syllogism is incapable of proving that § 469.411.5(2) authorizes a unitrust election for Ms. Herbst's trust.

Hegger, which USB relies on as authority for the notion that Mr. Ayers' trust instrument does not "specifically prohibit" a unitrust election, arose from a claim for enhanced mesothelioma benefits under Mo. Rev. Stat. § 287.200.4(3). The statute had been amended in 2014 to provide those benefits but required that the claimant's employer have made an election to accept liability for this optional award. 596 S.W.3d at 130-31. The Supreme Court noted that an employee's entitlement to the new statutory benefits required an affirmative election to accept liability for loss caused by the disease, effected by the provision of insurance for that liability. *Id.* (citing § 287.200.4(3)(a)). The benefit for employers making that election is immunity to civil liability for mesothelioma loss. *Id.* (citing § 287.200.4(3)(b)).

The employer in *Hegger* had ceased doing business in 1998. Although the company maintained insurance for worker compensation claims while it was operating, the Supreme Court held that "now-defunct employers" would not be deemed to have elected to accept the enhanced liability created by the 2014 amendment "solely by virtue of having workers' compensation coverage at the time of an employee's last exposure to asbestos." Id. at 133 (emphasis added). The Court explained:

> [T]he plain language of section 287.200.4(3)(a) operates such that employers that do not make the requisite affirmative election to accept liability for the enhanced benefit are deemed to reject such liability under 287.200.4(3)(b) and thereby are exposed to civil liability outside the context of the workers' compensation statutes.

Id.

The distinction between the amendment to the worker compensation law at issue in *Hegger* and the enactment of unitrust legislation at issue here is stark. Section 287.200.4(3) offered employers a *present choice* between enhanced but predictable statutory liability to employees sickened by workplace asbestos or continued exposure to the risk of unconstrained civil liability. The Supreme Court held that accepting this new option required an affirmative act that defunct employers were incapable of making. Section 469.411.5(2) created an *exception* to the new phenomenon of trustee-initiated conversion for pre-statutory income-only trusts in which the maker had prohibited the very object of such a conversion—*i.e.*, allowing the distribution of principal at the election of the trustee. The statute makes clear, and this Court should recognize, that the exception can *only* be triggered by the *historic* act of the trust's maker. *Hegger* does not control the analysis of this issue.

II.

USB contends that Ms. Molk has admitted all of the facts because a motion to strike is not an appropriate Rule 74.04 response. The bank's argument on this Point depends on the adequacy of Mr. Meyer's affidavit and its exhibits, which mirrored its statement of uncontroverted facts. As argued in Point III, *infra,* the affidavit did not comply with Rule 74.04(e) and should have been disregarded by the Circuit Court. That would have obviated any need to controvert the statement of facts submitted by USB: without that affidavit, no evidence supported the USB's purported facts. The appeal can be decided on that basis alone.

Granting summary judgment to USB was erroneous even if the affidavit and exhibits were viable. The legislature enacted §469.403 and §469.405 of the Uniform Principal and Income Act to constrain trustees seeking to change the dispositive provisions of trusts that became irrevocable prior to 2001. USB recognizes that §469.411 is "part of the UPAIA" but also claims without authority that these sections do not apply to §469.411. Resp. Br. 7, 19-24. They clearly do. Summary judgment should have been denied because the bank failed to establish its compliance with the requirements of §§ 469.403 and 469.405.

Reading § 469.411 in isolation from §§ 469.403 and 469.405 makes no sense. Section 469.411 alone provides no guidance regarding when or whether a trustee may make adjustments or allocations. It merely specifies the measure of principal and income that can be distributed after a unitrust election has been made. That election must be

governed by the factors enumerated in §§ 469.403 and 469.405. For example, §469.403 states: *"[i]n exercising the power to adjust pursuant to section 469.405 or a discretionary power of administration regarding a matter within the scope of sections 469.401 to 469.467, whether granted by the terms of a trust, a will, or sections 469.401 to 469.467, a fiduciary shall* ...". See §469.403.2. Likewise, §469.405 R.S. Mo states: *"[t]he net amount allocated to income pursuant to sections 469.401 to 469.467…."*. § See 469.405.2(6). §469.411 is clearly within the sections to which those two sections apply. Section 469.409 bars beneficiary claims against a trustee for making adjustments between principal and income pursuant to §469.403 and §469.405. In §469.411, the legislature gave a safe haven to trustees by specifying 3% to 5% as the appropriate *amount* to distribute from principal and income as income.

Section 469.411 follows §469.405 and was added to control trustee liability in making allocations—those that §469.409 did not already bar—by providing a safe haven of permissible percentage distributions. "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." 4C MISSOURI TRUST CODE AND LAW MANUAL at 716 (2017-2018 ed.).[2] Section 469.411 anticipates a decision has already made to adjust under the powers given in §469.403 and §469.405 and only deals with the amount.

[2] Note the similarity of the language of the committee note and §469.403: "*exercising the power to adjust pursuant to section 469.405 or a discretionary power of administration regarding a*

III.

USB contends that (1) Ms. Molk admitted all of its facts because her motion to strike the affidavit on which it relied to support its factual premises was not a response allowed by Rule 74.04, and (2) the affidavit was sufficient to establish those premises because it recited facts and purported to have been made on personal knowledge. The affidavit was incapable of satisfying Rule 74.04(e) and should have been disregarded by the Circuit Court.

Mr. Meyer identified himself as a USB "Trust Managing Director" who formerly was employed as a Trust Officer. D751, p. 1. His affidavit provided no description of his job duties in either capacity. In *Rustco Products Co. v. Food Corn, Inc*., 925 S.W.2d 917, 924 (Mo. App. W.D. 1996) cited by USB in its brief, the court found a proffered affidavit satisfied the requirements of Rule 74.04(e) because "[t]he affidavit opens by stating that Bessler is the Director of Food Oils for Rustco and ***that he has personal knowledge of the facts set forth within the affidavit*** (emphasis added)." Mr. Meyer stated only:

> Based on my review of those records, my personal knowledge, and my conversations with other representatives of the trustee, I have gained knowledge of the facts set forth herein, and if called to testify as a witness, I could competently do so under the penalty of perjury.

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matter within the scope of sections 469.401 to 469.467, whether granted by the terms of a trust, a will, or sections 469.401 to 469.467".

D751, p. 2. He did not purport to be the custodian of records, identify any fact of which he had personal knowledge, or claim to have personal knowledge of the particular facts relied upon by USB.

"Only evidence that is admissible at trial can be used to sustain or avoid summary judgment." *United Petroleum Service, Inc. v. Piatchek,* 218 S.W.3d 477, 481 (Mo.App.E.D. 2007). More particularly, "[h]earsay statements cannot be considered in ruling on the propriety of summary judgment." *Id.* An affidavit asserting facts based on information gleaned from others is hearsay with respect to those facts. *See May & May Trucking LLC v. Progressive Northwestern Insurance Co.,* 429 S.W.3d 511, 515-16 (Mo.App.W.D. 2014) (recognizing that the recitation of facts obtained in "reli[ance] on other sources" does not set forth personal knowledge, and that the affiant's position as "senior casualty claims specialist and custodian of [company] records … alone do not show her personal knowledge of the facts stated"). It is clear from the first four paragraphs of Mr. Meyer's affidavit that undifferentiated portions of his knowledge came from "conversations with other [USB] representative" and the review of notes and documents made by others. D751, pp. 1-2.

Ms. Molk's initial brief recited facts demonstrating that Mr. Meyer had no involvement in the matter until six months after the commencement of litigation. Appellant Br. 36 (citing D789, p. 8). USB does not contest that fact. It would be impossible for Mr. Meyer to have "personal knowledge" of the facts asserted in his affidavit absent "firsthand observations or experience, as distinguished from a belief

based on what someone else has said." BLACK'S LAW DICTIONARY 1004 (10th ed. 2014) (defining "personal knowledge").

Like Mr. Meyer, the affiant in the recent case *Gateway Metro Federal Credit Union v. Jones,* 603 S.W.3d 315 (Mo.App.E.D. 2020), claimed she had gained knowledge of the facts she asserted. *Id.* at 320-21. Like Mr. Meyer, she relied on an executive title and supervisory responsibilities. Id. But her affidavit, like Mr. Meyer's, made it clear that she had relied on information gained from other sources. *Id.* at 321. This Court concluded that the affidavit failed to "demonstrate her personal knowledge of the matters stated therein" and "should not have been considered by the trial court." *Id.* at 322.

USB seeks to distinguish this case from *Gateway Metro* because Mr. Meyer claimed to have relied upon personal knowledge as well as second-hand information, and because his affidavit was accompanied by exhibits that might someday be deemed admissible as business records. Resp. Br. 31. Again, the affidavit leaves one to guess at where Mr. Meyer's personal knowledge ends and reliance on information *actually known* only to others begins. "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." *Gateway Metro,* 603 S.W.3d at 319.

Mr. Meyer's affidavit did not explain how as Trust Managing Director he would have obtained personal knowledge of all the facts necessary to the bank's motion. For

example, how did he personally know the content of a conference call in which he did not participate, or what was "intended" to be reflected in an answer on a bank form that he declared to be "scrivener's error," or exactly why the answer was wrong at all, or what the substance and conclusions of others' telephone conversations with Ms. Herbst's accountant had been? D751, p. 5, 7-8.

Mr. Meyer's affidavit was the only evidentiary support proffered by USB for its statement of uncontroverted facts. Ms. Molk brought the inadequacy of the affidavit to the Court's attention through her motion to strike it and its exhibits. She had no burden beyond that. *See Jungmeyer v. City of Eldon*, 472 S.W.3d 202 (Mo.App.W.D. 2015) (holding that a movant seeking summary judgment "must strictly adhere to the mandatory requirements of Rule 74.04" that a motion to strike a non-conforming affidavit is an appropriate way to bring the issue before the court, and that summary judgment should be denied when the movant's affidavit is inadequate to support its factual premises).

IV

Mr. Meyer's affidavit fails to lay the foundation required by §490.680 for the exhibits to become admissible under 490.692. He is not a custodian of records. He is not a "qualified witness" because of his representation that the records he reviewed (as well as the knowledge he gained) came "from people with such first-hand knowledge" or "from information provided by people with such first-hand knowledge." His affidavit fails to provide any facts upon which a conclusion can be reached that had any knowledge to lay a foundation for admissibility of the singular and unique trust paperwork pertaining to the Herbst transaction.

The reason for the business records exception to the hearsay rule is the presumptive verity of routine recording of business activities performed on a regular basis at times close to the transaction recorded. *State v. Graham*, 641 S.W.2d 102, 106–07 (Mo. 1982). There must be a showing of where these records came from and an indication as to who authored them. Mr. Meyer only served as a conduit to the flow of records and could not testify to the mode of preparation. *See C & W Asset Acquisition LLC v. Somogyi,* 136 S.W.3d 134, 140 (Mo.App.S.D. 2004) (finding documents inadmissible for want of evidence establishing their source and authorship).

USB sought to buttress its position with self-serving facts, opinions and conclusions in an affidavit premised on certain documents purportedly found in its offices. An out-of-court statement offered to prove the truth of the matter asserted is the classic definition of hearsay, and the hearsay rule excludes hearsay testimony absent a

recognized exception. *State v. Green,* 575 S.W.2d 211, 212 (Mo.App.E.D. 1978). Mr. Meyer's hearsay affidavit relied on hearsay documents.

V.

Mo. Rev. Stat. § 456.10-1004 authorizes an award of attorney fees in trust litigation "as justice and equity may require." Ms. Molk contends that the Circuit Court abused its statutory discretion in making an award of fees against her for being "divisive" in this case. The case evolved from USB's confusion over how to apply the Missouri Trust Code. The choice of filing suit belonged USB. USB had other alternatives to filing suit. Ms. Molk responded by asserting her interests reasonably and in good faith. Neither justice nor equity required or can account for the present award.

No Missouri case has discussed the propriety of an attorney fee award of under § 456.10-1004 based on a finding that a litigant was "divisive." Rather than address this argument, USB suggests that Ms. Molk "does not have a clear idea of what 'equity and justice' require" and invokes the acknowledged expertise of trial courts with respect to attorney fees and the inclination of appellate courts to defer to that expertise when an award has been made. *Id.* at 40-41 (citing *O'Riley v. US Bank NA,* 412 S.W.3d 400, 418 (Mo.App.W.D. 2013)). At best, the bank's argument misses the point.

Hopefully Ms. Molk's notion of justice and equity in the context of this case is clear enough. Her opening brief cited the salutary principle of equity "'that a trust fund should bear the expense of its own administration.'" Appellant Br. 48-49 (quoting *Coates v. Coates,* 316 S.W.2d 875, 877-78 (Mo.App.W.D. 1958)). This litigation was commenced by USB to resolve an issue of its own and Ms. Herbst's creation. The bank's brief does not begin to establish that Ms. Molk's position was "divisive" rather than an

assertion of her contrary position made reasonably and in good faith. Rather than demonstrate how justice and equity might require that she pay the trustee's attorney fees in those premises, USB contends that this Court need look no further than the general rule of deference to attorney fee awards to resolve Ms. Molk's appeal.

USB claims that "the court did not award fees to Trustee. The Court awarded the fees to the Anne Trust." Resp. Br. 40. It does not support its claim of standing to seek reimbursement on behalf of a trust from which it has taken its fees during the course of litigation. Neither of the two cases cited by USB relate to a trustee's attempts to have a litigant reimburse a trust from which trustee took its attorneys' fees to prosecute its litigation. The trust in *Brown v. Brown-Thill*, 543 S.W.3d 620, 636 (Mo. Ct. App. 2018), specifically provided for reimbursement and indemnification of the trustees for fees and costs. No claim was asserted that the terms of Ms. Herbst's trust would authorize the reimbursement sought by USB.

Brown v. Brown, 530 S.W.3d 35 (Mo.App.E.D. 2017), notes that the statute authorizes only attorney fee awards in favor of "any party." *Id.* at 47-48. The present award of fees was made to trusts that were not parties to the litigation. This alone warrants reversal of the award.

Neither justice nor equity required the award of attorney fees against Ms. Molk in this case. If the Circuit Court considered her opposition to the unitrust election sought by USB divisive, it is nonetheless clear that she was asserting a reasonable position in good

faith and in the interests of the remaindermen under Ms. Herbst's trust. The award of attorney fees should be reversed.

CONCLUSION

The judgment and award of attorney fees should be reversed and the case remanded to the Circuit Court for further proceedings for the reasons set forth in the appellant's brief and this reply brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for the appellant certifies that this brief contains all of the information required by Mo. R. Civ. P. 55.03 and complies with the limitations specified by Mo. R. Civ. P. 84.06(b). The brief contains 3,691 words. Counsel has relied on the word-counting utility of the Microsoft WORD word processing program in making this certification.

/s/ Steven M. Hamburg