

No. SC 89795

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

MOORE AUTOMOTIVE GROUP, INC.

Plaintiff/Appellant,

v.

SANDY GOFFSTEIN and
GOFFSTEIN, RASKAS, POMERANZ, KRAUS & SHERMAN, L.L.C.

Defendants/Respondents.

On Appeal from the
Circuit Court of St. Louis County, Missouri
Twenty-First Judicial Circuit
Honorable Maura B. McShane

RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Plaintiff/Appellant Moore Automotive Group, Inc.'s ("Appellant's" or "Moore's") statement of facts contains many immaterial, extraneous and argumentative statements and fails to include undisputed facts essential to understanding and deciding the points and issues raised by this appeal. In particular, Moore's statement of facts insidiously implies that the funds at issue in this lawsuit were stolen from Moore. While it is undisputed that Julie Lewis embezzled from Moore, Moore has never alleged, and there is absolutely no evidence in the record, that the monies at issue in this lawsuit were stolen from Moore. Therefore, the following neutral statement of facts is provided:

A. Facts Relating to the Civil Case

This lawsuit arises out of the representation of Julie D. Lewis ("Lewis") by Defendants/Respondents Sandy Goffstein ("Goffstein") and Goffstein, Raskas, Pomerantz, Kraus & Sherman, L.L.C. (the "Law Firm")(collectively, "Respondents"). From 1997 until October, 2005, Lewis was employed by Moore as its chief financial officer. (Transcript of Proceedings P. 18 L. 13 through P. 19 L. 10 (LF 67)). On or about October 3, 2005, Lewis resigned from her position with Moore after admitting that she had stolen money from Moore. (Transcript of Proceedings P. 19 L. 11-18 (LF 67)). After resigning, Lewis retained the Law Firm to represent her in any legal matters arising from her alleged misappropriation of funds from Moore. (Goff. Aff. ¶ 2 (LF 103)). In connection with this representation, on or about October 7, 2005 Lewis transferred her personal funds in the amount of \$286,790.17 (the "Funds") to the Law Firm for payment of all of her attorneys' fees, costs, expenses, expert fees, and other fees and costs incurred

by her in all litigation matters. (Amended Pet. ¶ 7, 19-20 (LF 89; 92); Answers to Interrogatories (LF 133-34; Appendix A-4-A-5); Goff. Aff. ¶ 2 (LF 103); Goff. Depo P. 20 L. 23 through P. 22 L. 6, P. 25 L. 2 through L. 12 (LF 280-82, 285)). These Funds are the subject matter of this lawsuit.

On November 1, 2005, Moore filed a civil suit against Lewis and her husband styled Moore Automotive Group, Inc. v. Julie D. Lewis and Kevin M. Lewis, Cause Number 05CC-5600 (the “Civil Case”), in the Circuit Court of St. Louis County, Missouri, Division 19. (Amended Pet. ¶ 4 (LF 89)). The Civil Case contained allegations that, over the course of her employment, Lewis had embezzled approximately \$1,000,000 from Moore, and sought damages therefor. (Civil Case Petition ¶¶ 5-7 (LF 182)).

On the day the Civil Suit was filed, Moore filed a Motion for Writ of Attachment seeking to attach the assets of Lewis and her husband prior to judgment pursuant to §521.010 RSMo.¹ (LF 189-90). Lewis contested the motion via a Motion to Dissolve the Attachment and Quash Execution. (Summary Information (LF 105)). An evidentiary hearing was held on this motion before Judge Melvyn Wiesman on November 18, 2005, at which Goffstein represented Lewis. (Transcript of Proceedings (LF 61-78)). During the hearing, Respondent Goffstein cross-examined several witnesses called by Moore, including Moore’s president, Ronald Moore (“Mr. Moore”). As part of Goffstein’s cross-

¹ All references are to the Revised Statutes of Missouri (2000), as amended from time to time.

examination of Mr. Moore, an exchange was had between Goffstein and Mr. Moore regarding certain settlement discussions that had taken place previously, and that Lewis's proposed settlement offer to Moore, assuming a settlement could be reached, was to have been funded, in part, with the Funds at issue in this lawsuit. (Transcript of Proceedings P. 25 L. 7 through P. 32 L. 15 (LF 69-70)). However, Mr. Moore acknowledged during the evidentiary hearing on November 18, 2005, that by the time of that hearing, all settlement offers had been withdrawn, and no settlement had been reached. (Transcript of Proceedings P. 38 L. 2 through P. 39 L. 1 (LF 72)).

On November 23, 2005, and pursuant to its writ of prejudgment attachment, Moore filed a Request to Issue Garnishment directed against the Law Firm (LF 131; Appendix A-2), with associated garnishment interrogatories directed to the Law Firm inquiring as to whether it had in its possession or under its control any property, money, or other effects of Lewis. (LF 132). Moore acknowledges that its writ of attachment, and the garnishment interrogatories issued against the Law Firm pursuant thereto, were directed at the personal Funds of Julie Lewis at issue in this lawsuit. (First Amended Pet. ¶¶ 8-13; LF 90).

On March 1, 2006, the Law Firm timely filed with the court its Answers to Interrogatories. (LF 133-34; Appendix A-4-A-5). In its Answers to the Interrogatories, the Law Firm stated that it had no property, money, or other effects in its possession or under its control which belonged to Lewis or her husband, and that all Funds which had previously been paid to the Law Firm were to be used by the Law Firm for the purpose of representing Lewis and paying all of her attorneys' fees, costs, expenses, expert fees, and

other fees and costs incurred by her in all litigation matters. (LF 133-34; Appendix A-4-A-5). This full and complete disclosure of the status of the Funds was provided in addition to, the Law Firm's simple answer of "no," and demonstrated that the Funds belonged to the Law Firm, and not to anyone else. (LF 133-34; Appendix A-4-A-5). Moore never filed any exceptions to or denials of the Law Firm's Answers to Interrogatories. (Goff. Aff. ¶ 5 (LF 103); Resp. Facts ¶ 7 (LF 154)).

Subsequently, on March 29, 2006, Moore filed in the Civil Case a Motion to Compel Compliance with Execution (Appendix A-6),² seeking a determination that Moore was rightfully entitled to the Funds and to compel payment of the Funds to Moore. (Summary Information (LF 105)). Oral argument was presented on this motion on May 10, 2006, again before Judge Melvyn Wiesman, who denied the requested relief by finding that the Law Firm's answers to the garnishment interrogatories were "sufficient." (LF 235, Appendix A-9).

Meanwhile, on March 3, 2006, Lewis made her initial appearance on a federal indictment in the United States District Court for the Eastern District of Missouri, Eastern Division, in a criminal case styled United States of America v. Julie Diane Lewis, Cause Number 4:06CR00149ERW (the "Criminal Case"). (Initial Appearance (LF 202);

² This Court may take judicial notice of the contents of court filings in a related case, including the motion to compel compliance with execution. The trial court was similarly entitled to do so. See Smitty's Super Markets, Inc. v. Retail Store Employees Local 322, 637 S.W.2d 148, 151 (Mo. App. S.D. 1982).

Amended Pet. ¶ 5 (LF 89); Answer ¶ 17 (LF 146)). As part of the Criminal Case, Lewis pled guilty to wire fraud (Judgment in a Criminal Case (LF 193)), and, on November 27, 2006, an Order of Restitution was entered by the District Court ordering Lewis to pay restitution to Moore in an amount in excess of \$2,000,000. (Amended Pet. ¶ 6 (LF 89); Answer ¶ 17 (LF 146); Judgment in a Criminal Case (LF 197-99)). Lewis is currently incarcerated as a result of her plea in the Criminal Case. (Judgment in a Criminal Case (LF 194)).

B. Facts Relating to the Instant Case

On May 31, 2007, Moore initiated the instant action against Respondents in two counts: (i) conversion, and (ii) civil conspiracy. (Minutes (LF 1); Petition (LF 5-9)).

In response to the Petition, Respondents filed a Motion for Summary Judgment (LF 10-46), based on court filings in the underlying Civil Suit, asserting that all of the claims contained in Moore's Petition were barred by operation of Rule 90.07(c) and § 525.210 RSMo. After requesting additional time to respond to Respondents' Motion for Summary Judgment, and after a briefing of the motion by all parties (LF 47-87), Moore mooted the motion by obtaining leave to file a First Amended Petition. (Order (LF 97)). Moore's First Amended Petition purported to add claims for constructive trust, money had and received, and fraud. (Amended Pet. (LF 88-96)).

Moore's First Amended Petition alleges that the personal Funds of Lewis transferred by her to Respondents in October 2005 were transferred for the purpose of making payment on the debt allegedly owed by Lewis to Moore pursuant to the federal Order of Restitution. (Pet. ¶¶ 6- 8 (LF 89-90)). Respondents note that there was no

Order of Restitution until November 27, 2006, more than one year after the transfer of the Funds to Respondents. (Judgment in a Criminal Case (LF 197-199)).

In its First Amended Petition, Moore alleges (correctly) that the Law Firm's answers to the garnishment interrogatories constituted not only a denial that the Law Firm had any Funds belonging to Lewis, but also a denial that it had any Funds belonging to Moore. In this connection, Moore alleges in Paragraph 12 that "in Answers to Interrogatories to Garnishee, [Goffstein] and [the Law Firm] answered and asserted that they have not had in their possession or control any property, money or other effects to which [Moore] was entitled...." (Am.Pet. ¶ 12 (LF 90)).

Thereafter, Respondents filed a Motion for Summary Judgment (LF 98-134) directed against the First Amended Petition, again based on court filings in the underlying Civil Suit and asserting that all of Moore's claims were barred by operation of Rule 90.07(c) and § 525.210 RSMo. Respondents also filed an Answer to those counts of the First Amended Petition which it had not moved to dismiss. (LF 145-149).

Moore again filed a Motion for Additional Time to Respond in which it asserted that additional discovery was needed before a response to the Motion for Summary Judgment could be constructed. (LF 212-214). In the accompanying Affidavit of Jamie L. Boock (LF 216-218), Moore's counsel claimed that it required several depositions and certain banking records prior to responding to Respondents' motion. (Boock Aff. (LF 216-17)). Respondents opposed the request for extension of time and also filed a motion to stay all discovery pending a ruling on Respondents' Motion for Summary Judgment, in part on the ground that no amount of additional discovery could alter the court filings in

the Civil Suit upon which Respondents' Motion for Summary Judgment was premised. (LF 219-222).

Oral argument was heard on December 12, 2007 on Moore's motion for additional time, as well as on Respondents' motion to stay discovery. At the conclusion of the argument, Judge McShane entered an Order (LF 245) permitting the deposition of Respondent Goffstein and staying additional discovery pending a ruling on Respondents' Motion for Summary Judgment.

Subsequently, on December 20, 2007, Goffstein's deposition was taken. (LF 261-290). The testimony adduced there was incorporated into Moore's Supplemental Memorandum of Law in Opposition to [Respondents'] Motion for Summary Judgment. (LF 246-290). On January 25, 2008, oral argument was presented by the parties on Respondents' Motion for Summary Judgment, and the motion was taken under advisement. (LF 306). On February 15, 2008, Judge McShane granted Respondents' Motion for Summary Judgment and entered judgment in favor of Respondents and against Moore on all counts of the First Amended Petition. (LF 307).

After briefing and oral argument, Judge McShane's judgment in favor of Respondents was upheld by the Missouri Court of Appeals, Eastern District, on October 21, 2008 as set forth in its Order (Appendix A-10) and Memorandum Supplementing Order (Appendix A-11-A-18).

Subsequently, on November 4, 2008, Moore filed its Motion for Rehearing and its Application for Transfer to the Supreme Court. The Court of Appeals denied both requests on November 24, 2008. On December 8, 2008, Moore filed its Application for

Transfer in the Supreme Court. After receiving Respondents' Suggestions in Opposition to Transfer, this Court granted transfer on January 27, 2009.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE, UNDER MISSOURI RULE OF CIVIL PROCEDURE 90 AND CHAPTER 525 OF THE MISSOURI REVISED STATUTES, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE, IN THAT THOSE ANSWERS ESTABLISH FACTS WHICH NEGATE EACH OF MOORE'S CLAIMS HEREIN.

Mo. R. Civ. P. 90.07(c)

Wayland v. NationsBank, N.A., 46 S.W.3d 21 (Mo. App. E.D. 2001)

Allison v. Tyson, 123 S.W.3d 196, 200 (Mo. App. W.D. 2003)

Miller v. North American Ins. Co., 195 S.W.3d 529 (Mo. App. W.D. 2006)

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON MOORE'S CLAIMS FOR CONVERSION, FRAUD AND CONSPIRACY BECAUSE, UNDER RULE 90, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE, AND BECAUSE MOORE HAS NOT AND CANNOT STATE A CLAIM FOR CONVERSION OR FRAUD.

Mo. R. Civ. P. 90.07(c)

Wayland v. NationsBank, N.A., 46 S.W.3d 21 (Mo. App. E.D. 2001)

Miller v. North American Ins. Co., 195 S.W.3d 529 (Mo. App. W.D. 2006)

Allison v. Tyson, 123 S.W.3d 196 (Mo. App. W.D. 2003)

III. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON MOORE'S PURPORTED EQUITY CLAIMS FOR CONSTRUCTIVE TRUST AND MONEY HAD AND RECEIVED, BECAUSE, UNDER MISSOURI RULE OF CIVIL PROCEDURE 90 AND CHAPTER 525 OF THE MISSOURI REVISED STATUTES, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE. MOREOVER, BECAUSE EQUITY MUST FOLLOW THE LAW, MOORE CANNOT CIRCUMVENT THE PROCEDURES ESTABLISHED BY THE MISSOURI SUPREME COURT AND BY THE MISSOURI LEGISLATURE BY ATTEMPTING TO STATE EQUITABLE CLAIMS AFTER THE MATTER HAS BEEN FULLY DETERMINED IN RESPONDENTS' FAVOR IN A LAW PROCEEDING IN THE UNDERLYING CASE.

Wayland v. NationsBank, N.A., 46 S.W.3d 21 (Mo. App. E.D. 2001)

Lane v. Non-Teacher School Employee Retirement System of Missouri, 174 S.W.3d 626, 640 (Mo. App. W.D. 2005)

Walton v. City of Berkeley, 118 S.W.3d 617, 620 (Mo. App. E.D. 2003)

Legacy Homes Partnership v. General Elec. Capital Corp., 50 S.W.3d 346, 353 (Mo. App. E.D. 2001)

IV. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION
OVER DISCOVERY MATTERS BY PERMITTING THE DEPOSITION
OF RESPONDENT GOFFSTEIN AND STAYING ADDITIONAL
DISCOVERY PENDING A RULING ON RESPONDENTS' MOTION
FOR SUMMARY JUDGMENT BECAUSE NO ADDITIONAL
DISCOVERY WAS NEEDED.

State ex rel. Delmar Gardens North Operating, LLC v. Gaertner, 239 S.W.3d 608,

610 (Mo. banc 2007)

State ex rel. Ford Motor Co. v. Manners, 239 S.W.3d 583, 586-87

(Mo. banc 2007)

ARGUMENT

Throughout the course of this litigation, Moore's arguments have been continually in flux. In the trial court, Moore opposed Respondents' Motion for Summary Judgment by insisting that the interrogatories it served on the Law Firm in the Civil Case were not garnishment interrogatories, and thus Missouri Rule of Civil Procedure ("Rule") 90 did not apply to this case. After losing that argument, Moore abandoned it, conceded that the interrogatories issued to the Law Firm were garnishment interrogatories, and premised its appeal on the argument that, even if Rule 90.07(c) caused it to be bound by the Law Firm's answers to the garnishment interrogatories, those answers do not preclude its claims in this lawsuit. Now, having lost again, Moore appears to be abandoning its argument to the Court of Appeals in favor of the argument that the Law Firm's answers to Moore's garnishment interrogatories were outside the scope of the questions asked, and should have been disregarded to the extent they provide any explanation beyond a bare answer of "no." As discussed at length below, there is no basis for Moore's most recent position, and all of Moore's claims in this lawsuit would still be barred even if the Law Firm had merely answered "no" without providing any further explanation regarding the funds at issue in this case. However, as a threshold issue, Moore should be precluded from even making these arguments by virtue of Rule 83.08(b), which prohibits a party, in its substitute brief in this Court, from altering the basis of any claim, and by Missouri case law which holds that "issues raised for the first time on appeal are not preserved for review." Vinson v. Vinson, 243 S.W.3d 418, 423 (Mo. App. E.D. 2007).

I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE, UNDER MISSOURI RULE OF CIVIL PROCEDURE 90 AND CHAPTER 525 OF THE MISSOURI REVISED STATUTES, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE, IN THAT THOSE ANSWERS ESTABLISH FACTS WHICH NEGATE EACH OF MOORE'S CLAIMS HEREIN.

The Court's review of Point I is de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993). On appeal, the trial court's judgment will be affirmed if it is sustainable for any reason supported by the record. Reagan v. County of St. Louis, 211 S.W.3d 104, 107 (Mo. App. E.D. 2006). While the record is to be viewed in the light most favorable to Moore, "[f]acts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." ITT at 376. In resisting the summary judgment, the non-movant "may not rest upon the mere allegations or denials of his pleading," but rather "shall set forth specific facts showing that there is a genuine issue for trial." Cross v. Drury Inns, Inc, 32 S.W.3d 632, 635 (Mo. App. E.D. 2000)(original emphasis).

A. The Interrogatories At Issue Are Garnishment Interrogatories

Because the interrogatories served upon the Law Firm in the Civil Case are the keystone of this case, they must first be properly identified. While Moore now appears to concede that the interrogatories it served on the Law Firm were garnishment interrogatories, the crux of Moore's argument to the trial court in opposition to Respondents' Motion for Summary Judgment focused on Moore's contention that it had not pursued a garnishment proceeding. (Opp. Brief (LF 0209-0210)). Moore argued this point so strenuously below for a simple reason: if the disputed interrogatories are garnishment interrogatories (which they are), Moore is barred from asserting its claims.

On their face, the disputed interrogatories are unequivocally garnishment interrogatories (LF 132, Appendix A-3). They are titled "Interrogatories to Garnishee" and repeatedly refer to the Law Firm as the "garnishee." Although Moore repeatedly argued below that the disputed interrogatories were issued pursuant to the rules and statutes governing attachment of assets rather than the rules and statutes governing garnishment (LF 209; 252-53), it has never cited any specific rule or statute it believes authorized the issuance of the disputed interrogatories. The reason that Moore has failed to do so is simple—no Missouri statute or Rule authorizes the issuance of interrogatories to a non-party, other than the provisions of Rule 90 and Chapter 525 RSMo. relating to garnishment. The disputed interrogatories could therefore only have been garnishment interrogatories governed by Rule 90 and Chapter 525 RSMo.

Moreover, Moore has previously admitted that the interrogatories were garnishment interrogatories in connection with Respondents' first Motion for Summary

Judgment. There, in paragraphs 4, 5, and 6 of its response to Respondents' statement of uncontroverted material facts (LF 57-58), Moore "admits that a Request to Issue Garnishment with Interrogatories was filed by [Moore]." Later, in a disingenuous and futile attempt to avoid summary judgment on Respondents' second Motion for Summary Judgment, Moore argued the exact opposite, and has now apparently abandoned both arguments entirely. This conduct should not be tolerated by this Court. For the foregoing reasons, Moore is judicially estopped from denying that the interrogatories were garnishment interrogatories. See, e.g., Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C., 801 S.W.2d 382, 390-91 (Mo.App. W.D. 1990).

B. The Conclusive Effect of Garnishment Proceedings

Because the disputed interrogatories were garnishment interrogatories, Moore is precluded by the rules governing garnishment from asserting its claims herein.

In the Civil Case, Moore knew about the transfer of Lewis's personal Funds to the Law Firm at least as early as the hearing on its motion for writ of prejudgment attachment. Following the hearing, Moore filed its writ of garnishment against the Law Firm (Appendix A-2), and served its associated garnishment interrogatories thereon (Appendix A-3). Moore acknowledges in its First Amended Petition that the very purpose of this garnishment was to reach these personal Funds of Lewis now at issue in this case. (First Amended Pet. ¶¶ 9-13 (LF 90)).

In its response to these garnishment interrogatories, the Law Firm answered and asserted, in two different ways, that it did not possess or control any property belonging to Lewis. First, the Law Firm wrote "no" in response to the question "at the time of

service of garnishment or at any time thereafter until the return date stated in the summons of garnishment, have you had in your possession or under your control any property, money, or other effects of the judgment debtor?" (Appendix A-4).

Then, in an effort to provide full and complete disclosure with respect to the Funds, the Law Firm included an attachment to its answers which provides, in pertinent part, that:

The payment of certain monies by Julie Lewis to the Law Firm at the inception of the Law Firm's representation of Julie Lewis was well known to [Moore] and its counsel. Prior to the date of filing of the writ of attachment and prior to the date of service of the writ of attachment, Ms. Lewis had instructed the Law Firm that all funds which had previously been paid to the Law Firm by her prior to the date of filing of the writ of attachment, namely, November 22, 2005, were to be used by the Law Firm for the purpose of representing the interests of Ms. Lewis in all legal matters including the following: (a) for payment of attorneys' fees for the Law Firm; (b) for payment of attorneys' fees for outside or other legal counsel to represent Ms. Lewis; (c) for payment of fees for consultants which may be required with respect to the defense of Ms. Lewis; (d) for payment of fees for expert witnesses which may be required with respect to the defense of Ms. Lewis; (e) for payment of costs associated with such experts and consultants; (f) for payment of costs incurred in discovery; (g) for payment of court costs; and (h) for payment of all other necessary fees,

costs and expenses incurred or to be incurred in order to represent Ms. Lewis in both the [Civil Case] and all other litigation matters.

(LF 133-34)(Appendix A-5).

In Paragraph 12 of Moore's First Amended Petition (LF 90), Moore acknowledges that the Law Firm "answered and asserted that they have not had in their possession or control any property, money or other effects to which Moore Automotive Group, Inc. was entitled."

Specifically, the Law Firm's answers to the garnishment interrogatories established the following two points of fact:

- 1) The Law Firm had no money, property, or other effects in its possession or under its control which belonged to Lewis or Moore; and
- 2) In accordance with the instructions of Lewis, the Funds, which had previously been transferred to the Law Firm, were to be retained by the Law Firm as its property in consideration for its representation of Lewis and for the purpose of representing Lewis and paying all of her attorneys' fees, costs, expenses, expert fees, and other fees and costs incurred by her in all litigation matters.

Each of these facts independently and completely refutes the alleged factual basis for all of Moore's purported claims, all of which are based on the theory that Lewis directed that the Law Firm pay the Funds to Moore. Specifically, because the Law Firm had no funds of Lewis and because Lewis transferred the Funds to the Law Firm as payment of the Law Firm's fees for legal services, the Funds were not, and could not

have been, received by the Law Firm “in trust for the benefit of Appellant” (as alleged in ¶ 21 of the First Amended Petition (LF 92)), or for a “down payment” on the debt owed by Lewis to Moore (as alleged in ¶¶ 19, 26, 31 of the First Amended Petition (LF 92-94)).

Rule 90.07(c) provides the exclusive procedure for challenging a garnishee’s answers to interrogatories. It states:

The garnishor, within ten days after service of the garnishee’s answers to interrogatories, shall file any exceptions to the interrogatory answers asserting any objections to the answers and asserting all grounds upon which recovery is sought against the garnishee. The garnishee’s answers to interrogatories are conclusively binding against the garnishor if the garnishor does not timely file exceptions to the interrogatory answers.

Section 525.210 RSMo. echoes this Rule, providing that “if the answer of the garnishee be not excepted to nor denied in proper time, it shall be taken to be true and sufficient.”

As a result, if Moore disagreed with the Law Firm’s answers in any way, Moore was required by the garnishment rules to set forth “any objections to the answers” and to assert “all grounds upon which recovery is sought against the garnishee.” Doing so would have joined the issues between the Moore and the Law Firm and set-up Moore’s claims against Respondents. As explained by our Court of Appeals:

When the [garnishee] answers saying that he has no money or property of the defendant, the denial of the plaintiff is the foundational pleading on which his cause of action against the garnishee rests. The issues are made

up, not by the interrogatories and the answer, but by the denial and reply.

This denial stands in place of the petition and like any other pleading must contain the grounds upon which recovery is sought.

Landmark Bank of Ladue v. General Grocer Co., 680 S.W.2d 949, 953 (Mo. App. E.D. 1984)(internal quotations and citations omitted).

Moore, however, never filed exceptions to the Law Firm's answers to the garnishment interrogatories and never asserted any of its claims to the Funds in the garnishment proceeding. (Goff. Aff. ¶ 5 (LF 103); Resp. Facts ¶ 7 (LF 154)). Moore's failure to file exceptions and assert its claims within ten days of the Law Firm's answers to the garnishment interrogatories caused the answers to these interrogatories to become conclusively binding against Moore by operation of Rule 90.07(c) and § 525.210 RSMo. The garnishment rules and statutes provided Moore with its opportunity to assert, in the garnishment proceeding, any claims it thought it had against Respondents, including the claims for conversion, constructive trust, fraud, money had and received and conspiracy that it now asserts in this lawsuit. All of these claims could have been asserted, and fully litigated, within the garnishment proceeding. Landmark Bank, supra. By initiating the garnishment proceeding, then failing to follow through with it, Moore barred itself from asserting any of its claims in this action because a key element of each of these claims is factually precluded by the Law Firm's answers to the garnishment interrogatories in the Civil Case.

Although Moore failed to challenge the Law Firm's answers and assert its claims against the Law Firm in the garnishment proceeding, as it was required to do, Moore has

already had a second bite at the apple. In the Civil Case, Moore tried to compel payment of the Funds to it after it failed to object to the garnishment interrogatories by filing a “motion to compel compliance with execution”, seeking a determination that Moore was rightfully entitled to the Funds. (Appendix A-6; Summary Information (LF 105)).

Argument on this motion was heard by Judge Wiesman, the same judge to whom all of Goffstein’s allegedly “inconsistent” statements regarding use of the Funds to repay Moore had been made. Indeed, these alleged statements made by Goffstein to Judge Wiesman at the pre-judgment attachment hearing in the Civil Case are the very foundation of each and every one of Moore’s claims in this case. However, following oral argument on Moore’s motion to compel payment of the Law Firm’s Funds to it, Judge Wiesman denied Moore’s motion by holding that the Law Firm’s answers were “sufficient.” (LF 235; Appendix A-9). By filing the instant action against Respondents, Moore seeks to obtain yet a third bite at the apple to reach the Funds which have already been determined twice in the Civil Case to be the property of the Law Firm, and not of Lewis or Moore.

Moreover, in its pleadings, Moore claims that the money transferred by Lewis to Respondents was for the purpose of making payment on the debt owed by Lewis to Moore pursuant to the Order of Restitution in the federal criminal proceedings. (Pet. ¶ 8 Petition (LF 7); (¶ 8 Amended Pet. (LF 90)). Moore’s premise is fatally flawed in that the Order of Restitution was not even imposed by the federal court until November 27, 2006, more than one year after the transfer of the Funds had occurred. (Judgment in a Criminal Case (LF 193–200)(emphasis added)). Moore’s claims are therefore also fatally

flawed as a result of this factual impossibility upon which its First Amended Petition is founded.

Notwithstanding all of the foregoing, and for the first time, Moore now argues to this Court, on pages 22-24 of its Substitute Brief, that the Law Firm's answers to the garnishment interrogatories cannot be considered to the extent they exceed a bare statement of "no" in response to the question whether the Law Firm had in its possession, custody or control at the time of service any money of Lewis. Moore argues at page 24 of its substitute brief that the remaining portion of the answer is "simply not responsive to the question that was asked."

There is absolutely no basis for this position. Form 13, promulgated by this Court as the official form for interrogatories to a garnishee, permits the garnishee to give a full narrative explanation of its answers to the garnishment interrogatories in the blank space marked "ANSWER." (Appendix A-19). This is precisely what the Law Firm did. Its response set forth, in detail, exactly when and why the Funds were transferred to it. More importantly, the narrative attachment submitted by the Law Firm explains the basis for its answer of "no" by setting forth the reasons why the Funds no longer belonged to Lewis, but rather belonged to the Law Firm. Rather than requiring Moore to guess at the Law Firm's position with respect to the Funds by providing only an opaque answer of "no," the Law Firm chose to give a full explanation of its answer. This explanation is unquestionably responsive to the question asked. Such full and complete disclosure lies at the heart of the purpose of garnishment interrogatories.

Moreover, even assuming, arguendo, that the Law Firm had simply answered “no” to the garnishment interrogatories, with no corresponding explanation of that answer, that answer would have the same preclusive effect on Moore’s claims in this case as the full disclosure provided by the Law Firm. As discussed above, Moore concedes that its purpose in garnishing the Law Firm was to obtain the Funds. At the time the garnishment was issued, Moore knew that the Funds had been transferred by Lewis to the Law Firm. In Moore’s First Amended Petition, it alleges that, at the time the Funds were transferred from Lewis to the Law Firm, they were Lewis’s “personal property.” (First Amended Pet. ¶¶ 19-20 (LF 92)). Clearly, at that time, Moore did not take the position that the Funds belonged to it, because the purpose of garnishment is to reach funds of the debtor in the hands of a third party, not funds of the garnishor or garnishee.

Because Moore knew at the time it issued its garnishment that the Funds had been Lewis’s “personal property” (and not Moore’s property) when she transferred them to the Law Firm, when the Law Firm answered “no” to the question of whether it had in its possession or under its control any money that belonged to Lewis, the Law Firm was, in effect, claiming that the Funds which had previously been transferred to it were now its own property, and not that of Lewis or Moore. Thus, the response of “no,” with nothing more, was in itself sufficient to trigger Moore’s duty to object or be barred under Rule 90.07(c) if it thought that it had any claims against the Law Firm with respect to the Funds. If Moore thought it had any such claims, it was required to follow the procedure of the garnishment rules it had chosen to use by objecting to the Law Firm’s answer of “no” and asserting its claims (regarding the Funds allegedly being held in trust for Moore

or as a down payment), accordingly. This would include each and every claim Moore asserts in this lawsuit, all of which are premised on the assertion that, at the time the garnishment interrogatories were issued, the Funds belonged to Lewis (and that Moore has a claim to them through Lewis). Because garnishment is in derogation of the common law, “strict compliance with all of the requirements...is essential to confer jurisdiction in a garnishment proceeding.” Landmark Bank of Ladue v. General Grocer Co., 680 S.W.2d 949, 953 (Mo. App. E.D. 1984). Simply put, Moore failed to meet this standard.

It is undisputed that Moore knew about, and sought to obtain, the Funds held by the Law Firm via its garnishment in the Civil Case. By choosing to proceed by way of a garnishment in the Civil Case, rather than a direct action against the Law Firm, Moore put the ownership of the Funds in issue. When the Law Firm answered that it, not Lewis, owned the Funds sought to be garnished, it became incumbent upon Moore, if it disputed that answer, to object to it and assert its claims to the Funds. This result is dictated by the very garnishment rules Moore had chosen to use to try to reach the Funds. When Moore failed to timely object, the fact of the Law Firm’s ownership of the Funds, to the exclusion of Lewis or Moore, became conclusively binding upon Moore. If the result were otherwise, it would render Rule 90.07(c) completely meaningless, as any garnishor could simply challenge answers to garnishment interrogatories later by way of a direct action. Moreover, when Judge Wiesman ruled on Moore’s untimely and irregular attempt to challenge the Law Firm’s answers to the garnishment interrogatories, finding

in favor of Respondents, any and all outstanding issues regarding ownership of the Funds were resolved yet again.

C. Moore's Attempts to Manufacture an Issue of Material Fact to Survive Summary Judgment

Although Moore attempts to manufacture issues of material fact to survive summary judgment, the simple fact of the matter is there are no genuine issues of material fact in this case. Throughout its brief Moore takes great pains to argue that various statements made by Goffstein create a genuine issue of material fact that should have precluded a grant of summary judgment. This issue is a red herring. Nevertheless, Respondents feel compelled to respond to Moore's argument. In this connection, Respondents first note that Goffstein's statements cannot alter the facts set forth in the Law Firm's answers to Moore's garnishment interrogatories or create a genuine issue of material fact regarding ownership of the Funds. Moreover, as discussed above, Moore is conclusively bound by the substance of the answers to the garnishment interrogatories.

Moore makes much of the fact that, during oral argument on the Motion for Writ of Attachment in the Civil Case, Goffstein stated, in reference to the Funds at issue in this case, that "it was money to be used as part of the initial down payment." Throughout this litigation, Moore has seized on this statement as "proof" that the Funds rightfully belong to it, and have been wrongfully withheld from it. However, as is clear from the context of this statement vis-a-vis the entire Transcript of Proceedings (LF 61-78), as well as from Respondent Goffstein's Affidavit filed in this case (LF 103) and his deposition

testimony (LF 261-290), the Funds were to be part of a potential settlement of the Civil Case, if, and only if, the matter could be completely settled at the outset of the case. Mr. Moore admitted at the hearing that he knew of a settlement offer made by Goffstein on Lewis's behalf, and further admitted that Mr. Moore's assertion in his own affidavit that he knew of no settlement offer, was in fact incorrect. (Transcript of Proceedings P. 27 L. 14 through P. 30 L. 18 (LF 69-70)). However, as Mr. Moore further testified, and as is now apparent, no settlement was ever reached. Lewis's Motion to Dissolve the Attachment and Quash Execution was denied, and a writ of prejudgment attachment was entered in favor of Moore. (Transcript of Proceedings P. 57 L. 12-20 (LF 77)).

Moreover, Respondents' Motion for Summary Judgment is not impacted by whether the Law Firm's answers to the garnishment interrogatories are consistent with any statements made by Goffstein. Respondents nonetheless submit that the statements of Goffstein cited by Moore as "misrepresentations and inconsistencies" (App.Brief P. 25) are in no way inconsistent with the Law Firm's interrogatory answers. Respondents maintain, and have always maintained, that the Funds at issue were paid to the Law Firm as a non-refundable flat fee for legal services, expenses and costs. (Stat. Facts ¶ 3 (LF 12); Stat. Facts ¶¶ 3, 6 (LF 100-101); Answer ¶¶ 17, 30 (LF 145, 147); Goff. Aff. ¶ 2 (LF 15, 103); Goff. Depo. P. 20 L. 23 through P. 22 L. 6, P. 25 L. 2 through L. 12 (LF 280-82, 285)). Goffstein has stated that, early in the underlying case, the Funds would have been paid to Moore in partial settlement of the Civil Case, but only if a settlement could have been reached. This is the "down payment," to which Moore repeatedly referred. However, the matter was obviously not resolved and settled. The civil and criminal cases

proceeded against Lewis, and Moore's civil case is still pending. Goffstein and the Law Firm were involved in the defenses of both the civil and criminal matters, and continue to represent Lewis in Moore's on-going civil case. (Goff. Aff. ¶ 2 (LF 15); Goff. Depo. P. 6 L. 18 through P. 8 L. 2 (LF 266-68)).

Furthermore, Goffstein's statement at the hearing on the Motion for Writ of Attachment in the Civil Case regarding use of the funds as a "down payment" or for a "quick settlement" is entirely consistent with the Law Firm's interrogatory answers, as Mr. Moore acknowledged that all settlement offers had been withdrawn. (Transcript of Proceedings. P. 38 L. 2 through P. 39 L. 1 (LF 72)). Nevertheless, Moore contends that the interrogatory answers are inconsistent with Goffstein's statements at the hearing because the interrogatory answers say nothing about settlement. This claim by Moore of an inconsistency, however, is inaccurate. The interrogatory answers say nothing about settlement because that issue is not the subject matter of the interrogatories, and further, by that time, settlement was no longer a viable option as all settlement offers had been rescinded. (*Id.*). Therefore, it is entirely consistent that "settlement" would not have been listed in the Law Firm's interrogatory answers as one of the purposes for which the Funds would be used. Certainly Judge Wiesman, the very judge to whom these allegedly "inconsistent" statements were made, was not impressed by this argument of Moore's when he ruled that the Law Firm's answers to the garnishment interrogatories were "sufficient."

Even assuming that such statements were somehow inconsistent with the Law Firm's interrogatory answers, a proposition which Respondents vigorously dispute, any

such inconsistency still does not create a genuine issue of material fact with respect to Respondents' Motion for Summary Judgment. Once the Law Firm set forth that the Funds were its property and not Lewis's in its answers to the garnishment interrogatories, and Moore failed to file exceptions to those answers and assert its claims to the Funds within ten days, the answers became conclusively binding on Moore. Rule 90.07(c); Wayland, Miller, and Allison, infra. Any statements made by Goffstein could not change the fact that as of December 21, 2005, the money belonged to the Law Firm. In sum, none of the cited statements made by Goffstein, however construed, create a genuine issue of material fact sufficient to resist Respondents' Motion for Summary Judgment.

D. The Case Law

Wayland v. NationsBank, N.A., 46 S.W.3d 21 (Mo. App. E.D. 2001) is directly on point and dictates that Respondents were entitled to summary judgment on all of Moore's claims in this lawsuit. In Wayland, the garnishor had obtained a money judgment against the debtor in federal court. The garnishor filed garnishment interrogatories on NationsBank's predecessor-in-interest inquiring as to whether the debtor maintained any account there. NationsBank's answer to the garnishment interrogatories falsely stated that the debtor did not maintain any account there. Later, the garnishor filed suit in state court against NationsBank for fraud and negligent misrepresentation. The trial court awarded summary judgment to NationsBank in the subsequent state court proceeding because the garnishor had failed to file exceptions to NationsBank's answers to the garnishment interrogatories as required by Rule 90.07(c). In upholding the grant of summary judgment, the Court of Appeals stated that "by failing to file a denial to the

interrogatories or to question the veracity of the interrogatory responses, Wayland is precluded from bringing this action [for fraud and negligent misrepresentation].” Id. at 24. It is noted that the court reached this result despite the fact that the interrogatory answers in Wayland were false. In stark contrast, the Law Firm’s interrogatory answers in the case here provided full and complete disclosure regarding the Funds

Here, as in Wayland, Moore cannot stand idly by, fail to object to the Law Firm’s garnishment answers, and later sue the Law Firm to recover the Funds. The appropriate time to dispute the substance of the Law Firm’s garnishment answers was to file a denial thereto and assert its claims within ten days. Moore is not entitled to another bite at the apple now. Indeed, the facts of this case are at least as compelling than those in Wayland. In Wayland, the garnishor had information that the garnishee held some funds of the debtor, yet still failed to object to the the garnishee’s answer that it held no funds of the debtor. Wayland at 22. The situation is the same in this case. At the time it sent its garnishment interrogatories to the Law Firm, Moore knew that the Law Firm was in possession of the Funds and claimed ownership of them to the exclusion of all others. Moore therefore had an immediate basis to object to the Law Firm’s answers to its garnishment interrogatories, yet it still failed to do so. Moreover, whereas in Wayland summary judgment was granted despite NationsBank’s lack of candor in its garnishment answers, the Law Firm’s answers made full and complete disclosure of the existence and intended use of the Funds.

Because ownership of the Funds has been conclusively established to be in the Law Firm, there is no genuine issue of material fact as to any of Moore’s claims, and

Respondents are entitled to summary judgment on those counts as a matter of law. See also Miller v. North American Ins. Co., 195 S.W.3d 529 (Mo. App. W.D. 2006) and Allison v. Tyson, 123 S.W.3d 196 (Mo. App. W.D. 2003), both holding that the garnishor's failure to file exceptions conclusively binds it to the substance of the answers under both Rule 90.07(c) and § 525.210 RSMo.

Moore criticizes Respondents' reliance on Wayland, claiming that it is distinguishable from the instant case. This argument is specious, as the issues decided in Wayland are identical to those at bar. That the judgment being pursued in Wayland was issued by the United States Bankruptcy Court is of no moment. It is a distinction without a difference. Both in Wayland and here, garnishment interrogatories were issued pursuant to Rule 90, they were answered, and the garnishor failed to object to the answers. Both in Wayland and here, the garnishor sought to sidestep the garnishment rules by filing an independent action against the garnishee. While the court in Wayland did address the Appellant's potential federal remedies in the opinion, the precise holding of Wayland is that "by failing to file a denial to the interrogatories or to question the veracity of the interrogatory responses, Wayland is precluded from bringing this action." Wayland at 24. The opinion reveals no evidence that it was "primarily concerned with avoiding a potential conflict with the federal bankruptcy court," as Moore baldly asserts.

As in Wayland, Miller and Allison, Moore's failure to file exceptions to the Law Firm's answers to garnishment interrogatories conclusively established the truth of the Law Firm's answers. Those answers establish that the Funds paid to the Law Firm on October 7, 2005, which are the subject of this lawsuit, were not Lewis's property, but

rather were lawfully the property of the Law Firm. If Moore was dissatisfied with such answers, it had a defined statutory remedy to challenge them. Moore failed to avail itself of that remedy, and now seeks to circumvent the strictures of the garnishment rules and statutes by challenging the answers in this case. The law does not permit such a result. Accordingly, summary judgment was properly entered in favor of Respondents.

E. There Is No Risk of Setting Precedent for Using Garnishment Interrogatories as a Sword Rather than as a Shield

In its substitute brief at page 21 Moore suggests that, when taken to its logical extreme, the a decision of this Court in favor of Respondents would set a dangerous precedent whereby an unscrupulous garnishee could use Rule 90.07(c) as a sword by slipping affirmative claims against a garnishor into its answers to garnishment interrogatories, then claiming that the garnishor is estopped to deny the validity of those claims if it does not timely object. This argument lacks merit for several reasons.

First, the garnishment rules and statutes authorize relief only against the garnishee; there is no provision for relief against the garnishor. As a result, the procedural structure of garnishment belies any suggestion that it could be used as a sword against a garnishor.

Second, Moore does not (and cannot) allege that the Law Firm raised any affirmative claims for relief against it by way of its answers to Moore's garnishment interrogatories in the Civil Case. Rather, in its Application for Transfer, Moore states that "taken to its logical extreme," the opinion would allow Rule 90 to be used as a

sword. By asking this Court to take the Court of Appeals opinion in this case “to its logical extreme,” Moore invites the analysis by this Court of an issue not framed by the facts of this case or addressed by the Court of Appeals in its unpublished opinion. In this case, the Law Firm’s answers to Moore’s garnishment interrogatories related only to the issues raised by the questions asked, which were the subject of the pending garnishment.

II.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON MOORE'S CLAIMS FOR CONVERSION, FRAUD AND CONSPIRACY BECAUSE, UNDER RULE 90, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE, AND BECAUSE MOORE HAS NOT AND CANNOT STATE A CLAIM FOR CONVERSION OR FRAUD.

Moore's second point of error concerns its legal claims alleged in Counts I, III, and V of the First Amended Petition (conversion, fraud, and civil conspiracy, respectively). The Court's review of Point II is also de novo. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993). On appeal, the trial court's judgment will be affirmed if it is sustainable for any reason supported by the record. Reagan v. County of St. Louis, 211 S.W.3d 104, 107 (Mo. App. E.D. 2006). While the record is to be viewed in the light most favorable to Moore, "[f]acts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." ITT at 376. In resisting the summary judgment, the non-movant "may not rest upon the mere allegations or denials of his pleading," but rather "shall set forth specific facts showing that there is a genuine issue for trial." Cross v. Drury Inns, Inc, 32 S.W.3d 632, 635 (Mo. App. E.D. 2000)(original emphasis). "Failure to state a claim upon which

relief can be granted is a jurisdictional defect and can be raised at any time.” Envirotech, Inc. v. Thomas, 259 S.W.3d 577, 590 (Mo. App. E.D. 2008).

A. Moore’s Claims at Law Are Barred By Operation of Rule 90 and § 525.210 RSMo.

Moore’s claims for conversion and fraud are bottomed on the allegation that the Funds were transferred to the Law Firm as a down payment on a debt owed by Lewis to Moore pursuant to an Order of Restitution that would not be entered for over a year after Lewis transferred the Funds to Respondents. (Amended Pet. ¶ 26 (LF 93)). These allegations are at the heart of all of the claims contained in Moore's First Amended Petition. Moreover, the allegation that the Funds were transferred to the Law Firm as a down payment on a debt owed by Lewis to Moore is irrebuttably refuted by the Law Firm’s answers to the garnishment interrogatories in the Civil Case, namely, that the Law Firm had no funds belonging to Lewis, and that the Funds paid to the Law Firm on October 7, 2005 were lawfully the property of the Law Firm. Moore’s claims for conversion and fraud were appropriate for disposal on summary judgment because, as discussed above, Moore was obligated to follow the procedure of Rule 90.07(c) in order to challenge the Law Firm’s answers to garnishment interrogatories and assert any claims to the Funds which it thought it had. When Moore failed to do so, the substance of those answers, (that the Funds did not belong to Lewis, but rather belonged to the Law Firm, and not to Lewis or Moore) became conclusively binding on Moore. Wayland, supra, at

24. Indeed, even if the Law Firm’s answers had been inaccurate (which they were not, as explained in detail in Section I above), Moore would still be bound by them. Id.

In a final attempt to avoid the binding effect of the garnishment interrogatory answers, Moore claims that, even if the Law Firm’s interrogatory answers are conclusively binding on Moore, Moore “may still claim that the funds were converted by Respondents or obtained by improper means between the date of receipt by Respondents, October 7, 2005 and December 21, 2005.” (Moore Supp. Brief, P. 13-14 (LF 258-59)). Moore’s argument on this issue is wholly without merit. The Law Firm’s answers to the garnishment interrogatories establish that, as of December 21, 2005: (1) the Funds no longer belonged to Lewis, and (2) that they belonged to the Law Firm to the exclusion of anyone else. These facts have been conclusively established and negate a finding that the funds had been “converted” or “improperly obtained” by Law Firm at an earlier date because the answers preclude the critical element of each of Moore’s claims—that Moore had a right to the Funds. The Law Firm’s answer that the Funds were its property as of December 21, 2005, and not the property of Lewis or Moore, cuts off all inquiry with respect to any earlier time period. Under the facts presented, since the Funds were the lawful property of the Law Firm as of December 21, 2005, and not those of Lewis or Moore, Moore cannot proceed with its claims based on any conduct which allegedly occurred prior to December 21, 2005.

B. Moore Has Not and Cannot State a Claim for Conversion

With respect to Moore’s Count I for conversion, such a claim is also baseless for the additional reason that the Law Firm owed no duty to Moore. As discussed above,

throughout its brief Moore tries to create an inference that the Funds had previously belonged to it. However, there is no evidence in the record to support this inference. Moreover, Paragraph 19 of Moore's First Amended Petition (LF 92) belies any argument that the Funds previously belonged to Moore, as it specifically acknowledges that the Funds belonged to Lewis when they were transferred to the Law Firm. Because the Funds belonged to Lewis immediately before she transferred them to the Law Firm, Moore was a stranger to that transaction and has no standing to challenge the "propriety" of the transfer. It is clear that the transfer was a two-party transaction in which Lewis transferred the Funds she owned to the Law Firm. The Law Firm therefore owed no duty to Moore with respect to that transfer.

The elements of a cause of an action for conversion are: (1) the plaintiff held a legal interest in the property, (2) the defendant took possession of the property with the intent to exercise some control over it, and (3) the defendant thereby deprived the plaintiff of the right to the immediate possession of the property. IOS Capital, LLC v. Allied Home Mortgage Capital Corp., 150 S.W.3d 148, 153 (Mo.App. E.D. 2004); Osborn v. Chandeysson Electric Co., 248 S.W.2d 657, 663 (Mo. 1952). Moore cannot establish the first and third of these elements, and Count I of Moore's First Amended Petition fails to do so.

In Osborn, the plaintiff alleged that the defendant had converted certain stock certificates by failing to convey them to him in accordance with a contract. In denying recovery on that theory, the Supreme Court stated that, for trover and conversion, "plaintiff must have title to, or a right of property in and a right to the immediate

possession of, the [property] at the time of conversion.” Osborn at 663. The court went on to state that the cause of action requires an invasion of a legal, as opposed to an equitable right to specific personal property, and in particular requires that the plaintiff have had legal title to the property at the time it was allegedly converted. Id.

The First Amended Petition fails to allege, and cannot allege, that Moore was the owner of the funds that were allegedly converted (“Funds”). According to Moore, the property that was allegedly converted belonged, not to Moore, but to Ms. Lewis. (Amende Petition ¶ 19). Moore has never had any interest in the Funds, let alone legal title thereto. In addition, Moore fails to allege, and cannot establish, that at the time of the alleged conversion, Goffstein or the Law Firm deprived it of the right to immediate possession of the Funds, because the Funds did not then, nor did they ever, belong to it. This is an essential element of the tort of conversion. IOS Capital at 153. Because Moore has failed to allege that it held a legal interest in the Funds or that it was entitled to their immediate possession, the first and third elements of the tort of conversion, it has failed to state a claim for conversion.

Furthermore, while specific checks, drafts or notes can be the subject of an action for conversion where they can be described or identified as a specific chattel, as a general rule, money may not be the subject of a claim for conversion. Knight v. M.H. Siegfried Real Estate, Inc., 647 S.W.2d 811, 816-17 (Mo.App. W.D. 1983); Capitol Indem. Corp. v. Citizens Nat. Bank of Fort Scott, N.A., 8 S.W.3d 893, 900 (Mo. App. W.D. 2000).

Moore has failed to plead, and cannot plead, that it deposited specific checks, drafts, or notes with either Goffstein or the Law Firm. Rather, Moore alleges that Ms.

Lewis deposited “monies” with the Defendants. (First Amended Petition, ¶ 7). Absent an allegation that Moore delivered specific checks, drafts, or notes to Goffstein or the Law Firm, Moore has not plead the exception to the general rule and has thus failed to state a claim for conversion. Id.

C. Moore Has Not and Cannot State a Claim for Fraud

With respect to Moore’s Count III for fraud, that claim is also defective for the additional reason that Moore has failed to identify any representation made to it by the Law Firm that could form the basis of a fraud claim. For purposes of this discussion, Respondents assume, arguendo, that the representation upon which Moore’s fraud claim is based is either (1) Goffstein’s statements at the hearing on the writ of pre-judgment attachment in the Civil Case, or (2) Law Firm’s answers to Moore’s garnishment interrogatories. Even assuming Moore had identified one of these as the allegedly actionable representation, it still has failed to allege, and cannot allege, all of the required elements of a fraud claim.

In order to plead fraud with the particularity required by Rule 55.15, a petitioner must first plead every essential element of fraud. Hanrahan v. Nashua Corp., 752 S.W.2d 878, 883 (Mo. App. E.D. 1988). The essential elements of a fraud claim are: (1) a misrepresentation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity; (5) the speaker’s intent that the representation be acted upon by the other party; (6) the other party’s ignorance of its falsity and right to rely on its truth; (7) which proximately caused injury. Id.

Here, it is clear that Moore has not, and cannot, set forth each of the essential

elements of fraud, much less with the specificity required by Rule 55.15. Specifically, as demonstrated above in Section I.C., Goffstein's statements at the pre-judgment attachment hearing in the Civil Case are entirely consistent both with his later statements and with the Law Firm's answers to the garnishment interrogatories. As a result, Moore cannot allege that any of these statements were false (because they were in fact true).

Moreover, with respect to the Law Firm's answers to Moore's garnishment interrogatories, Moore cannot allege that it had any right to rely on any representation made therein. Indeed, because the garnishment rules provide a mechanism by which Moore could have challenged the veracity of the Law Firm's answers if it thought them to be untrue, Rule 90 itself establishes that Moore had no right to rely on them. Because Moore cannot allege these essential elements, it cannot state a claim for fraud. Id.

D. Moore's Claim For Conspiracy Must Also Fail

In Count V of its First Amended Petition, Moore also purports to assert a claim against Respondents for a civil conspiracy. (Amended Pet. ¶¶ 38-39 (LF 96)). Missouri follows the general rule that there is no tort of civil conspiracy. Xavier v. Bumbarner & Hubbell Anesthesiologists, 923 S.W.2d 428, 432 (Mo. App. W.D. 1996). Conspiracy is not actionable absent an underlying tort or wrongful act. Id. It has already been demonstrated here that Respondents were entitled to summary judgment on all of the underlying counts against them. Accordingly, because there is no underlying tort, there exists no genuine issue of material fact as to Moore's civil conspiracy claim in Count V, and Respondents were entitled to summary judgment on said count as a matter of law.

III.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON MOORE'S PURPORTED EQUITY CLAIMS FOR CONSTRUCTIVE TRUST AND MONEY HAD AND RECEIVED, BECAUSE, UNDER MISSOURI RULE OF CIVIL PROCEDURE 90 AND CHAPTER 525 OF THE MISSOURI REVISED STATUTES, MOORE IS CONCLUSIVELY BARRED FROM BRINGING THOSE CLAIMS AS A RESULT OF ITS FAILURE TO OBJECT TO THE LAW FIRM'S ANSWERS TO GARNISHMENT INTERROGATORIES IN THE UNDERLYING CASE. MOREOVER, BECAUSE EQUITY MUST FOLLOW THE LAW, MOORE CANNOT CIRCUMVENT THE PROCEDURES ESTABLISHED BY THE MISSOURI SUPREME COURT AND BY THE MISSOURI LEGISLATURE BY ATTEMPTING TO STATE EQUITABLE CLAIMS AFTER THE MATTER HAS BEEN FULLY DETERMINED IN RESPONDENTS' FAVOR IN A LAW PROCEEDING IN THE UNDERLYING CASE.

In Counts II and IV of its First Amended Petition, Moore purports to assert claims against Respondents for constructive trust and money had and received, respectively. These purported equity claims are based on the allegation that Goffstein and the Law Firm misappropriated the Funds at issue in this lawsuit, which allegedly belong to Moore, when they failed to transfer the Funds to Moore. (Amended Pet. ¶¶ 13-15 (LF 90-91)). As discussed above, there is absolutely no evidence of this in the record or elsewhere.

Respondents note that Moore's original Petition contained no counts for equitable relief. (LF 5-9). Moore's equitable claims were asserted for the first time in its First

Amended Petition, after Moore received Respondents' first Motion for Summary Judgment directed at Moore's original Petition.

Respondents' initial response to Moore's equitable claims is identical to its response to Moore's legal claims. First, despite Moore's attempt to string together its claimed discrepancies between various statements made by Goffstein in an attempt to manufacture genuine issues of material fact, Goffstein's statements are not inconsistent. Moreover, none of these purported discrepancies Moore attempts to create are material to Respondents' Motion for Summary Judgment, in that Moore's claims are barred because ownership of the Funds has already been conclusively established to be in the Law Firm, and not in Lewis or Moore. This occurred when the Law Firm filed answers to garnishment interrogatories in the Civil Case stating that the funds were no longer the property of Lewis, but rather were its own property. Moore failed to file exceptions to those answers and file whatever claims to the Funds it thought it had. As a result, the Law Firm's answers became binding upon Moore by operation of Rule 90 and § 525.210 RSMo. Wayland, supra.

As held first by the court in the Civil Case, and subsequently by the trial court below, under the applicable law Moore is conclusively barred from bringing its claims for the Funds as a result of its failure to object to the Law Firm's answers to the garnishment interrogatories and assert its claims therein. Moore cannot circumvent the procedures established by the Missouri Supreme Court and the Missouri Legislature pertaining to garnishment by attempting to state equitable claims after the matter has been fully determined in Respondents' favor in a law proceeding in the Civil Case.

It has been long established that “equity follows the law...and where the rights of a party are clearly defined by statute, legal principles, and precedents, those determinations may not be unsettled or ignored in equity.” Lane v. Non-Teacher School Employee Retirement System of Missouri, 174 S.W.3d 626, 640 (Mo. App. W.D. 2005). As has been demonstrated above, the laws governing garnishment conclusively bar Moore from bringing the claims contained in its First Amended Petition. Moore cannot now resort to a court of equity to overturn the operation of the garnishment rules and related precedent. The equitable claims contained in Counts II and IV of Moore’s First Amended Petition must therefore fail.

Moreover, in both its initial Petition and First Amended Petition, Moore failed to plead, and cannot plead, that it has no adequate remedy at law, as it was required to do to invoke the trial court’s equity jurisdiction. “To invoke equity jurisdiction, the party seeking equitable relief must plead and prove there is no adequate remedy at law.” Walton v. City of Berkeley, 118 S.W.3d 617, 620 (Mo. App. E.D. 2003). However, Moore cannot now plead that it did not have an adequate remedy at law. Prior to filing the garnishment interrogatories in the Civil Case, Moore could have either pursued a direct action against the Law Firm, or proceeded, as it did, via a garnishment against the Law Firm. Moore chose the latter. That Moore subsequently failed to file exceptions to the Law Firm’s answers and assert its claims to the Funds pursuant to Rule 90 does not now supply the trial court with equity jurisdiction. Moore cannot use the guise of equity to create an equitable cause of action when one does not exist.

Furthermore, even if Moore's First Amended Petition had invoked the equity jurisdiction of the trial court (which it did not), equitable relief is both discretionary and extraordinary. Umphres v. J.R. Mayer Enterprises, Inc., 889 S.W.2d 86, 90 (Mo. App. E.D. 1994). In addition, "the trial court has discretion to determine whether the facts establish equitable jurisdiction, and its exercise of jurisdiction will be overturned only for an abuse thereof." Legacy Homes Partnership v. General Elec. Capital Corp., 50 S.W.3d 346, 353 (Mo. App. E.D. 2001). Moore has made no showing whatsoever of any such abuse in this case.

IV.

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION OVER DISCOVERY MATTERS BY PERMITTING THE DEPOSITION OF RESPONDENT GOFFSTEIN AND STAYING ADDITIONAL DISCOVERY PENDING A RULING ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BECAUSE NO ADDITIONAL DISCOVERY WAS NEEDED.

The Court's review of Point IV of this appeal is for abuse of discretion. State ex rel. Delmar Gardens North Operating, LLC v. Gaertner, 239 S.W.3d 608, 610 (Mo. banc 2007). A circuit court abuses its discretion only if "its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." State ex rel. Ford Motor Co. v. Manners, 239 S.W.3d 583, 586-87 (Mo. banc 2007). Moore has the burden to prove abuse of discretion. Id at 587. Here, Moore cannot do so. The trial court's permitting the deposition of Goffstein and staying additional discovery pending a ruling on Respondents' Motion for Summary Judgment was entirely reasonable because no amount of additional discovery could have aided Moore's response to the motion.

As has been discussed at length above, Respondents' Motion for Summary Judgment was based upon court filings in the Civil Case and the operation of law with respect to those filings. The filings are the basis of all of the uncontroverted facts that were relevant to Respondents' Motion for Summary Judgment. No amount of discovery could alter those filings. Permitting Moore to depose parties and sift through the Law Firm's records would have accomplished nothing but to add undue delay and expense to

this action. As the trial court recognized, such an exercise was unnecessary. Additional discovery was simply not relevant to Respondents' Motion for Summary Judgment, and could not have advanced Moore's position with respect thereto. The trial court's decision to permit Moore's request to take the deposition of Goffstein, and stay all other discovery pending a ruling on Respondents' second Motion for Summary Judgment was therefore neither arbitrary, unreasonable, nor clearly against the logic of the circumstances. Rather, the trial court's decision illustrates a careful consideration of the procedural posture of the case at the time it was entered, as well as the parties' needs. The trial court therefore did not abuse its discretion with respect to discovery.

CONCLUSION

As has been well established above, the disputed interrogatories were plainly garnishment interrogatories. The Law Firm's answers to those interrogatories clearly established that the Funds belonged to the Law Firm, and not to Lewis or Moore, even if the only response considered is the statement "no." Moore failed to file exceptions to those answers even though, at that time, it knew all of the same facts about the Funds upon which it now bases its claims. As a result, by operation of Rule 90.07(c) and § 525.210 RSMo., the Law Firm's answers to the garnishment interrogatories became conclusively binding on Moore, and all of Moore's claims in this lawsuit seeking ownership of the Funds are barred because a key element of each of these claims—that the Funds belonged to Moore or Lewis—is factually precluded by the Law Firm's answers to the garnishment interrogatories in the Civil Case.

Accordingly, based upon the record before the Court and for the foregoing reasons and authorities, it is respectfully submitted that this Court should affirm the trial court's grant of summary judgment in favor of Respondents and against Moore on all counts of Moore's First Amended Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned certifies that the foregoing Respondents' Brief and a computer disk containing Respondents' Brief was served this 20th day of April, 2009 by U.S. Mail, expenses prepaid, upon the offices of Matthew J. Rossiter and Jamie L. Boock, Rossiter & Boock, L.L.C., 8000 Maryland Avenue, Suite 930, Clayton, Missouri 63105, Attorneys for Appellant.

Furthermore, the undersigned certifies that: (1) Respondents' Brief complies with the limitations contained in Rule 84.06 (excluding the cover, Table of Contents, Table of Authorities, Certificate of Service and Compliance, signature block and Appendix, there are 11,290 words in Respondents' Brief); (2) the name and version of the word processing software used to prepare Respondents' Brief is Microsoft Word; and (3) the diskette provided to this Court has been scanned for viruses and is virus-free.

APPENDIX

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