

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

JOAN ILENE GOULD, ET AL., RESPONDENTS,

v.

MARY ELIZABETH GOULD, APPELLANT.

DOCKET NUMBER WD69563

DATE: February 27, 2009

Appeal From:
CLAY COUNTY CIRCUIT COURT
THE HONORABLE ANTHONY REX GABBERT, JUDGE

Appellate Judges:
Division Two: Lisa Hardwick, P.J., Victor Howard and Joseph P. Dandurand, JJ.

Attorneys:
Daniel Lee Fowler, Esq., Kansas City, MO, **for appellant.**

Michael W. Blanton, Esq., Kansas City, MO, **for respondent.**

MISSOURI APPELLATE COURT OPINION SUMMARY COURT OF APPEALS – WESTERN DISTRICT

JOAN ILENE GOULD, ET AL.,

RESPONDENTS,

V.

MARY ELIZABETH GOULD,

APPELLANT.

WD69563

Clay County

Before Division Two Judges: Lisa Hardwick, P.J., Victor Howard and Joseph Dandurand, JJ.

Mary, Joan, and Patricia Gould were the daughters and beneficiaries of their mother's testamentary trust, with Mary Gould serving as the trustee. Mary Gould filed an estate tax return and took a "charitable remainder" deduction, effectively reducing the tax owed to zero. However, the IRS disallowed the deduction, assessing \$463,662.36 in taxes and \$139,159.00 in interest and penalties. Mary Gould did not pay the taxes, interest, or penalties, resulting in a tax lien asserted by the IRS. Upon petition filed by Joan Gould, Mary Gould was removed as trustee, and Joan Gould was appointed as successor trustee. The trust paid the IRS a total of \$1,562,653.55: \$666,227.00 in taxes and \$896,426.55 in interest and penalties.

Joan and Patricia Gould filed a Petition for Breach of Trust against Mary Gould, asserting that Mary Gould breached her fiduciary duty as trustee by failing to timely file tax returns and pay taxes on behalf of the trust. Thereafter, Joan and Patricia Gould filed a Second Motion for Summary Judgment. Mary Gould filed her response and suggestions in opposition to the motion, but the trial court found that it did not comply with the requirements of Rule 74.04 and granted summary judgment to Joan and Patricia Gould. The trial court found that Mary Gould's failure to comply with Rule 74.04 resulted in all of Joan and Patricia Gould's uncontroverted facts being deemed admitted and entered judgment for Joan and Patricia Gould in the amount of \$896,426.55. Mary Gould appeals.

On appeal, Mary Gould claims that the trial court erred in: (1) granting Joan and Patricia Gould's motion for summary judgment because their claim was barred by the applicable statute of limitations; (2) denying her motion to dismiss Joan and Patricia Gould's petition because the petition showed their claim was barred by the applicable statute of limitations; (3) granting Joan and Patricia Gould's motion for summary judgment because they failed to address her affirmative defense of statute of limitations in their summary judgment motion; (4) granting summary judgment to Joan and Patricia Gould as individuals because they were not proper parties to the lawsuit; and (5) awarding damages of \$896,426.56 because the award failed to consider mitigation of damages and

failed to distinguish between penalties and interest that accrued when Mary Gould was trustee and after she was removed as trustee.

AFFIRMED.

Division Two Holds:

Where the action for breach of trust accrued before adoption of the current trust code, **section 456.10-1005, RSMo**, the applicable statute was **section 456.220** and that statute's 22-year time limitation had not run; thus, the trial court did not err in granting summary judgment in favor of the trust beneficiaries.

Under **section 456.10-1002, RSMo**, which provides in part that "a trustee who commits a breach of trust is liable to the beneficiaries affected," beneficiaries of the trust were proper parties to bring the suit.

Where the response to a summary judgment motion did not comply with **Rule 74.04(c)(2)**, the trial court properly found that the statements, including the amount of damages, were deemed admitted. The trial court did not err in awarding damages accordingly.

Opinion by: Joseph P. Dandurand, Judge

February 27, 2009

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