

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

Missouri Supreme Court No. SC89795

MOORE AUTOMOTIVE GROUP, INC.,

Appellant,

v.

**SANDY GOFFSTEIN, and GOFFSTEIN, RASKAS, POMERANTS, KRAUS &
SHERMAN, L.L.C.,**

Respondents.

**APPEAL FROM THE ST. LOUIS COUNTY CIRCUIT COURT
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION 2**

Cause No. 2107CC-02219

The Honorable Maura B. McShane, Judge

SUBSTITUTE APPELLANT'S BRIEF

Matthew J. Rossiter, #42685
Jamie L. Boock, #50912
ROSSITER & BOOCK, LLC
8000 Maryland Avenue, Suite 930
St. Louis, MO 63105
(314) 754-1500
(314) 863-5151 (facsimile)
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

This action involves an appeal from a judgment of Division 2 of the Circuit Court of St. Louis County, State of Missouri. The present lawsuit arises out of an underlying suit by Moore Automotive Group, LLC (hereinafter “Moore”) against Julie Lewis for embezzling over \$2,000,000 from Moore. (LF 181). Just prior to Moore filing suit, Ms. Lewis transferred \$286,790.17 to Sanford Goffstein and his law firm (hereafter collectively “Respondents”). (LF 168-69, LF 281). On November 18, 2005, Goffstein stated in open court and on the record that this money was to be used to repay Moore for the money embezzled by Julie Lewis. (LF 176-77, A 13-14). Goffstein later changed his position and claimed the money had at all times either been a legal fee that was earned upon receipt (as of October 7, 2005) (LF 134, A 19) or was an advance fee to be used for Ms. Lewis’ legal fees and expenses. (LF 281-82, A 26-27).

As a result, Plaintiff/Appellant Moore filed the present action asserting claims against Defendants/Respondents Goffstein and his law firm for conversion, constructive trust, fraud, money had and received, and civil conspiracy. (LF 88-96) On February 15, 2007, the Trial Court entered judgment granting Respondents’ Motion for Summary Judgment on all counts. (LF 307). Moore timely appealed, and on October 21, 2008, the Eastern District Court of Appeals affirmed the Trial Court’s judgment. Moore filed an Application for Transfer to the Supreme Court pursuant to Rule 83.04 on November 4, 2008. The Supreme Court granted Moore’s application on January 27, 2009, and thus this Court has jurisdiction over this appeal pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF THE FACTS

I. Introduction and Overview:

This claim arises out of the transfer of \$286,790.17 from Julie Lewis to Sandford Goffstein and his law firm, Goffstein, Raskas, Pomerantz, Kraus & Sherman, L.L.C. (hereinafter collectively referred to as “Respondents”). During the course of several years, Lewis embezzled over \$2,000,000.00 from the Plaintiff, Moore Automotive Group, Inc. This embezzlement was finally discovered in October, 2005. (Transcript of Proceedings, LF 168, 175-76, A 5, 12-13) (Judgment in a Criminal Case, LF 197).

On November 1, 2005, Moore filed suit against Lewis to recover the embezzled money. (Petition in *Moore v. Lewis*, LF 181). Less than one month before Moore filed suit, and mere days after her embezzlement was discovered, Lewis transferred the \$286,790.17 at issue in this case to Respondents. (Transcript of Proceedings, LF 168-69, A 5-6) (Affidavit of Sandford Goffstein, LF 281). At the same time Moore filed suit against Lewis, Moore also filed a Motion for Writ of Attachment against Lewis. (Writ of Attachment, LF 189-190). The Circuit Court of St. Louis County held a hearing on Moore’s Motion for Pre-Judgment Writ of Attachment on November 18, 2005. During this hearing, Goffstein told Division 19 of the Circuit Court of St. Louis County, on the record, that Lewis transferred the \$286,790.17 to Respondents to serve as a down payment to repay Moore for the funds that she had stolen. (LF 176-77, A13-14). Moore’s Motion for Pre-Judgment Writ of Attachment was granted by Division 19 of the Circuit Court of St. Louis County.

On November 22, 2005, Moore's attorney in the prior case sent interrogatories to Respondents regarding funds in their possession which had been transferred to them by Lewis. (LF 131, 132). On December 21, 2005, these form interrogatories were served on Respondents, requesting information about all assets of Julie Lewis in their possession as of the date of service. (LF 134). In response to the interrogatories, Respondents attached a lengthy narrative, claiming that as of December 21, 2005, Respondents had no assets under the control of Lewis, and that the previously disclosed funds were an advance on all attorneys' fees and other costs related to the representation of Lewis in both the civil and criminal litigation. (LF 134, A 19). Later still, during a deposition taken in the present case, Mr. Goffstein stated that the entire amount was a non-refundable flat fee for legal services that was earned upon receipt. (LF 281, A 26). Moore's attorney did not object to Respondents' interrogatory responses.

As a result of the questionable circumstances surrounding the transfer of \$286,790.17 from Lewis to Respondents, Moore filed a claim against Mr. Goffstein and his law firm for fraud, conversion, constructive trust, money had and received and civil conspiracy. (Petition in *Moore v. Goffstein*, LF 88-96).

II. The Underlying Lawsuit, *Moore Automotive Group, Inc. v. Julie Lewis, et al.*:

Moore filed the underlying suit against Julie Lewis and her husband Kevin Lewis in the Circuit Court of St. Louis County on November 1, 2005. This suit, captioned, *Moore Automotive Group, Inc. v. Julie D. Lewis and Kevin M. Lewis*, Cause Number 05CC-5600, alleged that Julie Lewis had embezzled over \$2,000,000 from Moore and stated causes of action against Lewis and her husband for conversion, civil conspiracy

and breach of fiduciary duty against Julie Lewis and Kevin Lewis. (Petition, LF 181-87). David Wasinger of Murphy Wasinger, LLC represents Moore in this lawsuit against Julie Lewis and Kevin Lewis. (LF 187). Respondents represent Julie Lewis in this lawsuit. (Entry of Appearance, LF 160).

Julie Lewis was criminally indicted for her actions in the United States District Court, Eastern District of Missouri. (Judgment in a Criminal Case, LF 193). On November 27, 2006, she pled guilty to charges of federal wire fraud and criminal forfeiture and the Court entered an Order of Restitution ordering Lewis to pay restitution to Moore in an amount of \$2,401,432.95. (LF 197).

III. The Transfer at Issue.

On or about October 7, 2005, just 23 days before Moore filed suit against Lewis, and a few days after the embezzlement was discovered, Lewis transferred \$286,790.17 to Respondents. (Transcript of Proceedings in *Moore v. Lewis*, LF 168-69, A 5-6) (Affidavit of Sandy Goffstein, LF 281, A 26). Respondent Goffstein has admitted that there was no written agreement memorializing why Lewis transferred this money to the Law Firm, or documenting how it was to be utilized. (LF 285, A 30).

On November 1, 2005, at the same time Moore filed the Petition in *Moore v. Lewis*, Moore also filed a Motion for a Writ of Attachment against Julie and Kevin Lewis. (LF 189). On November 18, 2005, Judge Melvyn Wiesman held a hearing on Julie and Kevin Lewis's motions to quash the Writ of Attachment. (Transcript of Proceedings in *Moore v. Lewis*, LF 162-80, A 2-16). During this hearing, Judge Wiesman heard both live testimony from witnesses and oral arguments from the

attorneys. (LF 162-80, A 2-16). Throughout the hearing, Respondent Goffstein, both in his cross examination of Ronald Moore and in the final oral argument, consistently represented to opposing counsel and to the trial court that the \$286,790.17 Julie Lewis transferred to the law firm was to be used as a down payment to repay Moore the money that she had embezzled. (LF 170-71, 176-77, A 7-8, 13-14).

During the cross-examination of Ronald Moore, Respondent Goffstein asked Mr. Moore the following question: “Were you ever told that on behalf of my client, Julie Lewis, I offered to pay you immediately five hundred thousand dollars, which would come from the money she deposited in my office, plus refinancing her homes to raise five hundred thousand dollars cash to pay you a lump sum immediately...?” (LF 170, A 7).

Respondent Goffstein referenced the money again in the following exchange with Ronald Moore:

Q: (Goffstein) You didn’t know whether the two eighty was going to be used for that five hundred thousand?

A: (Moore) I never had that conversation with anybody. No, I don’t know.

Q: (Goffstein) And wouldn’t you expect that that’s where the five hundred thousand would come from, that the two eighty would be used to apply to that?

(LF 171, A 8).

Finally, in the oral argument portion of the hearing, Respondent Goffstein told Judge Wiesman: “The fact of the matter is that the only transfer that was made was the

money that was sent to my office, which everyone is aware of. That's not concealment. It's not an intent. *It was money to be used as part of the initial down payment.*" (LF 176-77, A 13-14) (emphasis added).

Following this hearing, on November 22, 2005, Wasinger sent Interrogatories to Respondents inquiring as to assets of Lewis. (LF 131, 132). On December 21, 2005, these form interrogatories were served on Respondents, requesting information about all assets of Julie Lewis in their possession as of the date of service. (LF 133, A 18).

Respondents filed their Answers to Interrogatories on February 22, 2006, and asserted that as of December 21, 2005, they did not have in their possession or control any property, money or other effects to which Moore was entitled. (LF 133, A 18). In their answer, Respondents attached a page long explanation of the transfer at issue, claiming that the entirety of the \$286,790.17 was transferred to Respondents by Julie Lewis to pay for attorneys' fees and all other expenses in representing Lewis in both the civil and criminal litigation. (LF 134, A 19). No objection was filed to Respondents' Answers.

IV. The Present Action:

Moore initiated the present action against Respondents on May 31, 2007 as Respondents were contending they no longer had any of Lewis' funds. (Minutes, LF 1). The First Amended Petition alleges claims for conversion, constructive trust, fraud, money had and received and civil conspiracy based on Respondents' receipt of \$286,790.17 from Julie Lewis on October 7, 2005. (LF 88-96).

On September 18, 2007, Respondents filed a Motion for Summary Judgment on all counts of Moore's First Amended Petition. (LF 098). Respondents contemporaneously filed a Statement of Uncontroverted Facts (LF 100) and attached thereto an affidavit of Respondent Goffstein. (LF 103, A 20). In this affidavit, Respondent Goffstein states that in connection with his representation of Julie Lewis, "on or about October 7, 2005 Lewis transferred the sum of \$286,790.17 to the Law Firm for payment of all her legal fees and costs." (LF 103, A 20).

On November 5, 2007, Moore filed a Memorandum in Opposition to Respondent's Motion for Summary Judgment. (LF 204). At the same time, Moore filed a Motion for Additional Time to Respond to Respondents' Motion for Summary Judgment and to Conduct Discovery. (LF 212).

On November 20, Respondents filed a Reply in Support of their Motion for Summary Judgment (LF 236) and a Motion to Stay All Discovery. (LF 219). On December 12, the trial court entered an Order limiting discovery to a single deposition of Respondent Goffstein, further limited to the issue of the garnishment in the underlying action of *Moore v. Lewis*. (Order, LF 245). The Order stayed all other discovery until after the trial court ruled on Respondent's Motion for Summary Judgment. (LF 245).

On December 20, 2007, Respondent Goffstein testified in his deposition that the \$286,790.17 paid to his law firm by Julie Lewis was a flat fee that was non-refundable as of the date it was paid, October 7, 2005. (Deposition of Sandy Goffstein, LF 281, A 26). Despite his interrogatory response to the contrary, he further testified that Julie Lewis lost all control over these funds as of that day. (LF 281, A 26). Respondent Goffstein

testified that he used these funds to pay all of Julie Lewis's court costs and attorney's fees, including separate representation for Julie Lewis in the pending criminal case. (LF 283-84, A 28-29). Finally, he testified that there is no written contract between his law firm and Ms. Lewis memorializing this agreement that \$286,790.17 was paid as a non-refundable flat fee. (LF 285, A 30).

On January 7, 2008, Moore filed a Supplemental Memorandum in Opposition to Respondents' Motion for Summary Judgment, arguing in part that Rule 90.07 does not preclude Moore's inquiry into events occurring before the service of the interrogatories on Respondents. (LF 258-259). On January 18, Respondents filed a Supplemental Reply in Support of Their Motion for Summary Judgment. (LF 294). On February 15, Circuit Judge Maura McShane entered judgment granting Respondents' Motion for Summary Judgment. (LF 309, A 1). The entirety of the Trial Court's Judgment, after the preamble identifying the motions and acknowledging oral argument and written memoranda, reads as follows:

The Court finds that there are no disputed material facts and that Defendants are entitled to a Summary Judgment as a matter of law.

It is therefore ORDERED, ADJUDGED and DECREED that Defendants' Motion for Summary Judgment be and is hereby granted, that the Plaintiff have and recover nothing by reason of this action, that Defendants be

discharged and go hence as to this cause of action and that the costs of this proceedings be paid by Plaintiff. (LF 0309, A 1).

Moore timely appealed, and the Appellate Court for the Eastern District of Missouri affirmed the Trial Court's Judgment on October 21, 2008. (A 31). This Court granted Moore's Application for Transfer on January 27, 2009.

POINTS RELIED ON¹

- I. The Trial Court erred in granting Respondents' Motion for Summary Judgment because Rule 90.07(c) of the Missouri Rules of Civil Procedure and Respondent's interrogatory answers should not preclude Moore from pursuing a separate, direct action against Respondents challenging the propriety of the transfer of funds between Lewis and Respondents in that Rule 90.07(c) should only preclude Moore from maintaining a garnishment action against Respondents and not preclude a separate, direct action against Respondents challenging the propriety of the transfer between Lewis and Respondents wherein Moore has alleged that Respondents and Lewis engaged in tortious conduct in transferring the funds at issue.**

Authority:

Supreme Court Rule 41.03

Supreme Court Rule 90.07

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

¹ Appellant has reorganized this substitute brief from that submitted below in that the Substitute Brief contains four Points Relied On instead of three. Appellant has done so for organizational purposes and clarity.

II. The Trial Court erred in granting Respondents' Motion for Summary Judgment because Respondents are not entitled to judgment as a matter of law on Moore's claims for conversion, fraud and civil conspiracy, in that Moore has properly alleged these claims in the First Amended Petition and there are genuine issues of material fact as to why Lewis transferred \$286,790.17 to Respondents immediately after admitting to Moore that she had embezzled a similar amount, whether that money was to be held in trust or used for attorney's fees and costs, whether the entire sum was earned upon receipt by Respondents, and whether Respondent Goffstein misrepresented to Moore, on the record and in open court, the purpose for which his law firm was holding this money, and these factual issues, if resolved in Moore's favor, support Moore's legal claims.

Authority:

Supreme Court Rule 90.07

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993)

Mackey v. Goslee, 244 S.W.3d 261 (Mo. App. S.D. 2008)

Mackey v. Mackey, 914 S.W.2d 48 (Mo. App. W.D. 1996)

Shaw v. Raymond, 196 S.W.3d 655 (Mo. App. S.D. 2006)

III. The Trial Court erred in granting Respondents' Motion for Summary Judgment with regard to Moore's counts for constructive trust and monies had and received because Moore's failure to object under Rule 90.07 in the underlying attachment proceedings should not bar Appellant's equitable claims against Respondents, in that Respondents' interrogatory answers should not conclusively establish the facts relevant to Appellant's equitable claims, and the Transcript of Proceedings in the underlying action, *Moore v. Lewis*, and the deposition of Respondent Goffstein established a valid claim against Respondents for constructive trust and for money had and received because Plaintiff was the rightful owner of \$286,790.17, which was embezzled by Julie Lewis, wrongfully transferred to Respondents and wrongfully withheld by them and Respondents failed to establish they were entitled to judgment as a matter of law.

Authority:

Supreme Court Rule 90.07

Brown v. Brown, 152 S.W.2d 911, 916 (Mo. App. W.D. 2005)

Bueneman v. Zykan, 181 S.W.3d 105, 113 (Mo. App. E.D. 2005)

IV: The Trial Court abused its discretion in entering an Order, dated December 12, 2007, limiting discovery in this case to a single deposition of Respondent Goffstein on the issue of the prejudgment attachment in the underlying action and staying all other discovery until after ruling on Respondent's Motion for Summary Judgment because this discovery limit resulted in a manifest injustice to Plaintiff, in that Respondents never filed a complete Answer to Plaintiff's First Amended Petition, Respondents never responded to the interrogatories or requests for production issued by Plaintiff, Plaintiff was not allowed to depose a corporate representative of Goffstein, Raskas, Pomerantz, Kraus & Sherman, LLC, Plaintiff was also not allowed to depose Julie Lewis or Kevin Lewis, nor was Plaintiff allowed to subpoena the banking records of Respondents or Julie Lewis, and Plaintiff expects that this discovery, if allowed, will produce evidence that directly contradicts facts Respondents claim are not in dispute.

Authority:

Cody v. Missouri Bd. of Probation and Parole, 111 S.W.3d 547, 552 (Mo. App. W.D. 2003)

State ex rel. Delmar Gardens North Operating, LLC v. Gaertner, 239 S.W.3d 608, 610 (Mo. 2007)

State ex rel. Ford Motor Co. v. Manners, 239 S.W.3d 583, 586-87 (Mo. banc 2007)

ARGUMENT

I. The Trial Court erred in granting Respondents' Motion for Summary Judgment because Rule 90.07(c) of the Missouri Rules of Civil Procedure and Respondent's interrogatory answers should not preclude Moore from pursuing a separate, direct action against Respondents challenging the propriety of the transfer of funds between Lewis and Respondents in that Rule 90.07(c) should only preclude Moore from maintaining a garnishment action against Respondents and not preclude a separate, direct action against Respondents challenging the propriety of the transfer between Lewis and Respondents wherein Moore has alleged that Respondents and Lewis engaged in tortious conduct in transferring the funds at issue.

A. Introduction.

The issue presented on appeal in this case is a simple one. Does Rule 90.07(c) cut off all inquiry into what happened to the \$286,790.17 Julie Lewis transferred to Respondents on the eve of her being named a defendant in civil and criminal cases for embezzling funds? Respondents contend that they are entitled to summary judgment as a matter of law because Rule 90.07(c) and the interrogatory responses filed by Respondents in the earlier, underlying action preclude all inquiry into the propriety of the transfer of funds between Lewis and Respondents.

However, Respondents' interrogatory responses should not preclude Moore from pursuing the claims alleged in the present action because the applicability of the Respondent's interrogatory answers should be limited to a garnishment action and not a

direct action against the garnishee. As discussed below, Respondents interrogatory answers should only establish that Respondents were not in possession of any of Lewis' property as of December 21, 2005 and that a garnishment proceeding is therefore not an appropriate method of obtaining the disputed funds. All other matters addressed in Respondents' interrogatory responses should be considered collateral and beyond the scope of the question asked. Based on Missouri's strong public policy in favor of disposing of cases on the merits, this Court should not allow Respondents' self serving, collateral statements in their interrogatory responses to preclude an inquiry into the facts of the present litigation based upon an overly broad reading of Rule 90.07(c) of the Missouri Rules of Civil Procedure.

B. Standard of Review.

Appellate review of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is only appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* In making this determination, the Court must review the record in the light most favorable to the non-movant. *Id.*

"The moving party bears the burden of establishing a right to judgment as a matter of law." *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 580 (Mo. banc 2006). Any time the court is faced with a credibility determination on an issue material to the cause of action, summary judgment is not appropriate. *Id.* at 578. "Summary judgment should not be granted unless evidence could not support any reasonable

inference for the non-movant.” *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). “If the plaintiff can make out a submissible case on any plausible theory, summary judgment for the defendant is inappropriate.” *McLeese v. J.C. Nichols Co.*, 842 S.W.2d 115, 118 (Mo. App. 1992). Finally, “[a] party against whom summary judgment is rendered may advance for reversal any legal argument that is supported by the record.” *Johnson v. McDonnell Douglas Corporation*, 745 S.W.2d 661, 663 (Mo. banc 1988) (Blackmar, J., dissenting). “It is of no significance that the point was raised for the first time on appeal. *Id.*

Missouri courts have expressed a strong policy disfavoring summary judgment.

Summary judgment borders on a denial of due process in that it denies the non-movant his day in court. Hence, in affirming summary judgment we are cautious to insure that it was warranted under the safeguards provided in Rule 74.04. Thus, while we are to affirm summary judgment on any theory pled in the motion and supported by the summary judgment record, where it is unclear from the summary judgment record that a basis exists for the grant of summary judgment, we will reverse.

Cody v. Missouri Bd. of Probation and Parole, 111 S.W.3d 547, 552 (Mo. App. W.D. 2003) (internal citations omitted).

**C. Rule 90.07(c) Should Not Preclude Moore’s Separate, Direct Action
Against Respondents.**

**1. The Court’s Interpretation of Rule 90.07(c) is Governed by Rule
41.03 and a Policy of Resolving Cases on Their Merits.**

The Missouri Supreme Court has never interpreted the scope of the preclusive effect of a failure to object pursuant to Rule 90.07(c). However, Rule 41.03 of the Missouri Rules of Civil Procedure provides the framework for how the Court should interpret Rule 90.07. Rule 41.03 states, “Rules 41 to 101, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every action.” Rule 41.03.

Missouri courts have recognized that Rule 41.03 represents a policy of favoring the resolution of cases on their merits rather than through procedural pitfalls. “[T]he rules of civil procedure are to be liberally construed to promote justice and minimize the number of cases disposed of on technical grounds.” *Gray v. White*, 26 S.W.3d 806, 815 (Mo. App. E.D. 1999), *citing Brancato v. Wholesale Tool Co., Inc.*, 950 S.W.2d 551, 555 (Mo.App. E.D.1997); *Commerce Bank of Kansas City, N.A. v. Conrad*, 560 S.W.2d 388, 391 (Mo. App. 1977). “The aim of the Rules of Civil Procedure is to secure a just determination in every civil proceeding.” *Stacy v. Department of Public Health and Welfare*, 468 S.W.2d 651, 654 (Mo. App. 1971).

In the present case, Moore has asserted claims against Respondents for civil conspiracy, fraud, conversion, money had and received and constructive trust. Significantly, the focus of Appellant’s claims is on *how* Respondents received the \$286,790.17 at issue and the *propriety of the transfer*. Moore is not disputing that Ms.

Lewis no longer has this money, or that the money is simply being held by Respondents. Moore concedes that Respondents are the nominal owners of the funds at issue and that they therefore cannot garnish these funds from Respondents. However, Moore contends that the preclusive effect of Rule 90.07 should be limited to this issue, i.e. that garnishment is no longer an appropriate mechanism to obtain this money as Respondents are the nominal owners of these funds. Respondents should not be allowed to utilize Rule 90.07(c) as a complete shield to any and all causes of action Moore may have against Respondents regarding the transfer of these funds.

The Court of Appeal's opinion seems to support Appellant's position in that it states "[w]hen a judgment creditor fails to file timely exceptions, the 'conclusively binding' truth of a garnishee's answers prevents that judgment creditor from proceeding any further against that garnishee *in a garnishment action*." (Opinion, p. 5 (emphasis added)). However, the Court of Appeals has ruled that Rule 90.07 operates as a complete bar in a separate action to any inquiry into the propriety of the transfer where the Respondents have clearly profited from the receipt of these funds and Moore has plead claims for both civil conspiracy and unjust enrichment.

The conclusive nature of the garnishee's responses should be limited to the scope of the interrogatories actually authorized by Rule 90.07(a) and should not preclude a separate cause of action inquiring into the propriety of the transfer. Taken to its logical extreme, the Court of Appeals' opinion would allow a garnishee to put any statement he or she wished into his or her response to a garnishment interrogatory (regardless of its connection to the actual garnishment proceeding) and a garnishor's failure to object to

that statement would conclusively establish the truth of that statement. For example, a garnishee could include a statement that not only does he or she not have any property or money of the debtor, but that the garnishor actually owes the garnishee funds. Under the ruling of the Court of Appeals, any failure by the garnishor to object to this completely collateral, self-serving statement of the garnishee, would prevent the garnishor from ever contesting this statement in the future and would in fact conclusively establish that the garnishor actually owed the garnishee money. Surely this is not the intent of Rule 90.07(c).

2. Respondents' Interrogatory Answers Contain Facts and Allegations Beyond the Scope of the Questions Asked.

Respondents claim that Moore may not maintain his claims as the interrogatory answers submitted by Respondents are conclusively binding and somehow extinguish Moore's claims against Respondents. Respondents' position requires an overly broad reading and application of Rule 90.07 of the Missouri Rules of Civil Procedure.

Rule 90.07(a) states:

“Prior to the issuance of the summons and writ of garnishment, the garnishor shall file written interrogatories asking the garnishee to:

(1) list and describe the property subject to garnishment in the possession, charge or control of the garnishee, and

(2) state the name and last known address of any person, other than debtor, whom the garnishee knows claims or may claim an interest in or to the property subject to garnishment.”

(Supreme Court Rule 90.07(a)).

A garnishor is limited in a garnishment action to issuing interrogatories consistent with Rule 90.07(a), and cannot inquire into other matters. *See State ex. rel Bagnell Investment Co., Inc. v. Luten* 647 S.W.2d 539, 541 (Mo. banc 1983) (holding interrogatories about “the incorporation, internal affairs and assets” of the garnishee to be beyond the scope of Rule 90.07(a) and therefore unauthorized).

Consistent with Rule 90.07(a), Moore issued the following interrogatory to Respondents:

At the time of service of garnishment or at any time thereafter, until the return date stated in the summons of the garnishment, have you had in your possession or under your control any property, money (excluding wages, salary, and commissions), or other effects of the judgment debtor? If so state what property, how much, of what value, and what money or effects.” (LF 132, A 18).

Respondents responded in part as follows:

No. See attached. (LF 133, A 18).

As of the date of service of the writ of attachment on [Respondents], on or about December 21, 2005, and up and including the return date of the writ of attachment, namely, February 22, 2006, the Law Firm had no money, property or

other effects in its possession or under its control which belonged to Julie Lewis or Kevin Lewis. (LF 134, A 19).

This portion of Respondents' response simply establishes that as of December 21, 2005, Respondents did not have any money, property or other effects in its possession which belonged to Julie Lewis. This is the only part of Respondents' answer that is relevant and responsive to the question asked. Furthermore, it is entirely consistent with Moore's allegations against Respondent in that Moore concedes that Lewis had in fact transferred the funds at issue to Respondents. What Moore disputes is the propriety of that transfer.

However, Respondents did not stop with this response, but also included a lengthy, self-serving narrative outlining the alleged facts of Lewis's transfer of the funds to Respondents and decision that such funds should be used for legal fees rather than held in trust to repay Moore the money Lewis had stolen. (LF 134, A 19). This narrative is simply not responsive to the question that was asked. As such, Rule 90.07(c) should not operate to conclusively establish these facts.

3. Existing Appellate Court Opinions do not Compel the Result Reached by the Court of Appeals in this Case

Appellant was unable to locate any decision of this Court addressing the scope of Rule 90.07(c). Several appellate court decisions have discussed Rule 90.07(c), but are not dispositive of the present case. For example, Respondents and the Court of Appeals relied upon *Wayland v. Nationsbank, N.A.*, 46 S.W.3d 21 (Mo. App. E.D. 2001) in reaching their conclusions. However, Appellant contends that both the Respondents and

the Court of Appeals erred in holding *Wayland* to be dispositive in this case as *Wayland* is factually dissimilar to the case under review.

In *Wayland*, the United States Bankruptcy Court for the Eastern District of Missouri entered a money judgment in favor of Wayland (garnishor and plaintiff in the subsequent action) against Croft. 46 S.W.3d at 22. In an effort to collect that judgment, Wayland issued interrogatories to Boatmen's National Bank of St. Louis (garnishee and defendant in the subsequent action) to ascertain whether Boatmen's held any assets of Croft. *Id.* Boatmen's responded that it had no assets of Croft, even though it did. *Id.* Wayland failed to file any exceptions or denials to Boatmen's answers to the garnishment interrogatories.

Over two years later, Wayland filed an action in the Circuit Court of the City of St. Louis against NationsBank (as successor to Boatmen's) for fraud and negligent misrepresentation based on its untruthful answers to the interrogatories. *Wayland*, 46 S.W.3d at 23. These were the only two claims presented by Wayland. *Id.* The Court of Appeals for the Eastern District affirmed the circuit court's judgment granting summary judgment, holding that it "was unable to locate any authority to recognize the fraud and negligent misrepresentation cause of action in the state court based upon an allegation of perjury committed during a federal court case." *Id.* "Without further authority, there is no reason to assume that Wayland has the ability to step outside of the federal system and seek redress within the state system when Wayland had adequate opportunities to remedy any injustice in the federal system." *Id.* at 23-24.

The Court of Appeal's decision in *Wayland* is dissimilar from the present case for several reasons. First, in *Wayland*, the bank, i.e. the defendant, *never took title to the funds at issue* and therefore *never profited* off of their false interrogatory answer. *Id.* at 22. The funds in *Wayland* always remained the property of the debtor. *Id.* In the present case, Respondents are claiming the funds at issue are theirs and have clearly profited as a result.

Second, in the present case Moore has alleged claims directly against Respondents that go beyond the scope of a Rule 90 garnishment proceeding, i.e. whether Respondents simply have funds belonging to the debtor. (LF 88-96). Moore is alleging that Respondents and Lewis engaged in conversion, fraud and/or conspiracy regarding the money Lewis transferred to Respondents and that this conduct occurred prior to the service of the Pre-Judgment Writ of Attachment on Respondent. Moore is claiming that Respondents conspired with Lewis to convert these funds and wrongfully withhold them from Moore. The facts and propriety regarding what happened to the \$286,790.17 during the seventy-five days between October 7 and December 21, 2005 should not be considered to be conclusively established by Respondents' interrogatory answers as those answers are outside the scope of the interrogatory. As such, summary judgment was improper at this time. This is especially true in light of the fact that the trial court did not allow the parties to conduct any meaningful discovery regarding this time period.

Fourth, Moore, unlike the plaintiff in *Wayland*, has alleged claims for punitive damages against Respondents that are unavailable in a Rule 90 garnishment proceeding. (LF 88-96). "As an incidental remedy, garnishment was never intended to enable a

plaintiff to enforce claims held by him directly against the garnishee.” *Landmark Bank of Ladue v. General Grocer Co.*, 680 S.W.2d 949, 953 (Mo. App. E.D. 1984). While a garnishment may be utilized when fraud enters into the transaction, in *Landmark Bank* the court held that a garnishment action is not proper where the garnishor alleges a claim for breach of fiduciary duty directly against the garnishee. *Id.* at 954. The court also noted that there is no procedure under either Chapter 525 or Rule 90 for an action for punitive damages. *Id.* Thus, any action alleging a claim for punitive damages directly against a third party is necessarily beyond the scope of a garnishment proceeding. *Id.*

Finally, the plaintiff in *Wayland* did not allege equitable claims, claims for either conversion or civil conspiracy and made no claim for punitive damages. 46 S.W.3d at 22. Conversely, Moore has alleged equitable claims of constructive trust, money had and received and legal claims of conversion, fraud and significantly, a claim for civil conspiracy against the Respondents. (LF 88-96). As there is no procedure for pursuing claims of punitive damages in a garnishment proceeding, Moore would have been precluded from requesting punitive relief in a garnishment action, and thus would have been forced to bring his claims in a separate action directly against Respondents.

At the trial court, Respondents also relied on *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). However, both of these cases address whether the court that entertained the original garnishment action retains jurisdiction where the creditor fails to object to a garnishee’s answers to interrogatories. Neither of these cases are dispositive to the issues

before the Court, because the present case is a second, direct action against the garnishee, i.e., the Respondents.

D. Conclusion.

The Trial Court erred in granting Respondents' Motion for Summary Judgment and the Court of Appeals erred in affirming that decision because both courts interpreted Rule 90.07 in an overly broad manner. Moore respectfully requests that this Court reverse and remand case to the trial court for further proceedings.

II. The Trial Court erred in granting Respondents' Motion for Summary Judgment because Respondents are not entitled to judgment as a matter of law on Moore's claims for conversion, fraud and civil conspiracy, in that Moore has properly alleged these claims in the First Amended Petition and there are genuine issues of material fact as to why Lewis transferred \$286,790.17 to Respondents immediately after admitting to Moore that she had embezzled a similar amount, whether that money was to be held in trust or used for attorney's fees and costs, whether the entire sum was earned upon receipt by Respondents, and whether Respondent Goffstein misrepresented to Moore, on the record and in open court, the purpose for which his law firm was holding this money, and these factual issues, if resolved in Moore's favor, support Moore's legal claims.

A. Introduction.

Moore has alleged claims for conversion, fraud and civil conspiracy based on the fact that Lewis transferred \$286,790.17 to Respondents immediately after a fellow employee caught her embezzling funds from Moore. Respondents have since offered shifting and contradictory explanations as to the purpose of this transfer, and there is a genuine issue of fact as to the propriety of this transfer. Moore has properly pled claims for conversion, fraud and civil conspiracy against Respondents and, construing all reasonable inferences in Moore's favor, the limited factual record supports Moore's claims of conversion, fraud and civil conspiracy. For these reasons, the trial court erred in granting summary judgment on Moore's legal claims.

B. Standard of Review.

The applicable standard of review for Point II is the same as that stated in Point I in that when a party appeals a trial court's grant of summary judgment, the appellate court reviews the decision *de novo*. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. Summary judgment is only appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* "Summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant." *Daugherty*, 231 S.W.3d at 818. "If the plaintiff can make out a submissible case on any plausible theory, summary judgment for the defendant is inappropriate." *McLeese*, 842 S.W.2d at 118. In the interests of brevity, Appellant has not restated the entire standard of review under Point I and refers the Court to Section IB of Appellants' Brief for the entire standard of review.

C. Moore Can Maintain a Claim for Conversion Against Respondents.

Moore has properly pled a claim for conversion and the limited factual record supports this claim. Conversion can be shown by one of three methods: "(1) a tortious taking; (2) any use or appropriation to the use of the person in possession, indicating a claim of right in opposition to the true owner's rights; or (3) by a refusal to give up possession to the owner on demand, even though the defendant's original possession of the property was proper." *Mackey v. Goslee*, 244 S.W.3d 261, 263-264 (Mo. App. S.D. 2008).

In this case, Moore has alleged that Respondents have intentionally failed or refused to transfer or give possession and control of money that is rightfully Moore's.

(LF 91). Moore also alleged that the Respondents have maintained and continue to maintain possession and control over said monies to the exclusion of Moore's rights and interests in said monies. (LF 91).

The facts in the record show that on November 18, 2005, Respondents were holding \$286,790.17 in funds which were transferred from Lewis to Respondents to repay Moore, in part, for the money Lewis had embezzled. (LF 168-69). Respondent Goffstein told Moore and Division 19 of the Circuit Court of St. Louis County that these funds were to be used to repay Moore. (LF 197). Respondents cannot identify any written memorandum explaining the purpose for this transfer between Lewis and Moore. (LF 285, A 30). Given the suspect circumstances surrounding this transaction, it is reasonable to infer at this stage in the litigation that Moore is the true owner of this money, which Respondents wrongfully refuse to distribute. As such, the facts support Moore's claim for conversion.

D. Moore Can Maintain a Claim for Fraud Against Respondents.

Moore has properly pled a claim for fraud and the limited factual record supports this claim. Count III of Moore's First Amended Petition alleges a claim for fraud. The elements of fraud are: "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) the hearer's right to rely thereon; and (9) the hearer's

consequent and proximately caused injury.” *Shaw v. Raymond*, 196 S.W.3d 655, 659 (Mo. App. S.D. 2006).

Moore has alleged that Respondent Goffstein represented to Moore and the trial court that Respondents were holding Lewis’s funds for the purpose of making payment on the debt to Moore. (LF 90, ¶ 8). This representation was false, and Moore relied on it without knowledge of its falsity to Moore’s injury. (LF 90- 91). Finally, since this representation was made in open court by an attorney, Moore had a right to rely on Respondent Goffstein’s representations.

In the underlying case, Respondents represented to opposing counsel and Judge Wiesman that Lewis’s money was being held to repay the money she had stolen. (LF 176-77). Respondents later changed their story and, depending on when you talked to them, the funds were either a flat fee that was earned upon receipt (as per Respondent Goffstein’s deposition) or was to be used as an advance for legal fees and expenses (as per Respondents’ interrogatory answer). Based on the facts within the record, it is reasonable to infer that: one of these representations was knowingly false; it was clearly material; that Moore and his counsel reasonably relied on this representation; and that Moore was damaged in the amount of \$286,790.17. Construing all reasonable inferences in favor of the non-movant, Moore has a valid claim for fraud.

E. Moore Can Maintain a Claim for Civil Conspiracy Against Respondents.

Moore has properly pled a claim for civil conspiracy and the limited factual record supports this claim. The elements of civil conspiracy are: (1) two or more persons; (2) an

object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts, and (5) resulting damages. *Mackey v. Mackey*, 914 S.W.2d 48, 50 (Mo. App. W.D. 1996). The essence of a civil conspiracy is an unlawful act agreed upon by two or more persons. *Id.* Unlawful, as the word is used in reference to civil conspiracy, is not limited to conduct that is criminally liable. *Id.*

In Count V, Moore alleges that Respondents and Lewis “agreed and conspired to deny [Moore] its rights and interests in the said monies through the actions set forth above.” (LF 96, ¶ 38). Respondents and Lewis “had a meeting of the minds to engage in such acts and have committed said wrongful acts in furtherance of said conspiracy, resulting in damages to [Moore] in the amount of \$280,000.00.” (LF 96, ¶ 39). The allegations in Count V

Again it is reasonable to infer from the facts and multiple inconsistent representations by Respondents that Respondents and Lewis conspired to transfer the money at issue to Respondents, to Moore’s considerable financial damage. Based on the facts in the case thus far, Moore has a valid claim for civil conspiracy.

F. Conclusion

Moore has properly pled claims for conversion, fraud and civil conspiracy, and there are still genuine issues of material fact regarding these claims. Respondents have failed to establish they are entitled to judgment as a matter of law on Counts I (conversion), III (fraud) and V (civil conspiracy), and the Trial Court erred when it granted Respondents’ Motion for Summary Judgment on these counts. Moore hereby

requests this Court reverse the judgment of the Trial Court and remand this case for further proceedings.

III. The Trial Court erred in granting Respondents' Motion for Summary Judgment with regard to Moore's counts for constructive trust and monies had and received because Moore's failure to object under Rule 90.07 in the underlying attachment proceedings should not bar Appellant's equitable claims against Respondents, in that Respondents' interrogatory answers should not conclusively establish the facts relevant to Appellant's equitable claims, and the Transcript of Proceedings in the underlying action, *Moore v. Lewis*, and the deposition of Respondent Goffstein established a valid claim against Respondents for constructive trust and for money had and received because Plaintiff was the rightful owner of \$286,790.17, which was embezzled by Julie Lewis, wrongfully transferred to Respondents and wrongfully withheld by them and Respondents failed to establish they were entitled to judgment as a matter of law.

A. Introduction.

The Trial Court erred in granting Respondents' Motion for Summary Judgment on Moore's claims for constructive trust and money had and received because Respondents failed to establish that they were entitled to judgment as a matter of law. Moreover, as discussed previously, Respondent's interrogatory responses should not conclusively establish any fact other than a garnishment action is no longer an appropriate mechanism to obtain the funds at issue and should not preclude a subsequent direct action against Respondents for constructive trust and money had a received. Finally, Appellant should

still be able to maintain his claims for equitable relief because Moore need not show wrongful conduct on the part of Respondents in order to recover.

B. Standard of Review.

The applicable standard of review for Point III is the same as that stated in Point I in that when a party appeals a trial court's grant of summary judgment, the appellate court reviews the decision *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is only appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* In making this determination, the Appellate Court must review the record in the light most favorable to the non-movant. *Id.* In the interests of brevity, Appellant has not restated the entire standard of review under Point I and refers the Court to Section IB of Appellants' Brief for the entire standard of review.

In the present case, Respondents have not established that they are entitled to judgment as a matter of law and have failed to cite a single case showing that Rule 90.07 precludes Moore's claims for constructive trust and/or money had and received.

C. Moore May Maintain His Claims for Constructive Trust and Money Had and Received.

1. Equity in General.

Moore's claims for Constructive Trust and Money Had and Received are based on equitable principles. "Equity is justice administered with fairness, as contrasted with strictly formulated rules of common law. The principles of equity are elastic so as to preserve their

flexibility to meet requirements of given case.” *In re Estate of Mapes*, 817 S.W.2d 545, 548 (Mo. App. W.D. 1991) (internal citations omitted). “Equitable doctrines are invoked to prevent injustices, not to permit parties to retain undeserved windfalls.” *Sutton v. Schwartz*, 808 S.W.2d 14, 23 (Mo. App. E.D. 1991). Questions of material fact still exist as to whether Respondents were unjustly enriched, making summary judgment improper.

2. Moore Can Maintain a Claim for Constructive Trust.

Constructive trusts are not trusts at all, but equitable devices employed by courts of equity and they arise by construction of the court, regardless and independently of any actual or presumed intention of the parties to create a trust. *Brown v. Brown*, 152 S.W.2d 911, 916 (Mo. App. W.D. 2005) (internal citations omitted). “The constructive trust arises from the situation in which [the plaintiff] is entitled to the remedy of restitution, and it arises as soon as that situation is created.” *Id. quoting Page v. Joplin Nat’l Bank & Trust Co.*, 255 S.W.2d 821, 824 (Mo. 1953).

“Thus a court of equity may impose or declare a constructive trust to provide a remedy in cases where one who ‘has acquired property under such circumstances as make it inequitable for him to retain it’ by making him or her a trustee for the person or persons thereby injured.” *Id. quoting Schultz v. Schultz*, 637 S.W.2d 2, 4 (Mo. 1982). “A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” *Id. quoting Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (1919).

Moore has pled that that Respondents were unjustly enriched as a result of their receipt of the funds at issue and their conduct with regard to these funds. (First Am. Petition, LF 91-93). “Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.” *Id. quoting Straube v. Bowling Green Gas Co.*, 227 SW.2d 666, 671 (Mo. 1950) (internal citations omitted). Missouri courts have often recognized the doctrine of unjust enrichment as a valid basis for the imposition of constructive trusts and have long held that a “constructive trust is an equitable device to prevent injustice, particularly unjust enrichment.” *Id. quoting Cohn v. Jefferson Sav. & Loan, Ass’n*, 349 S.W.2d 854, 858 (Mo. 1961). “[I]n most cases, the object and purpose of a court of equity in imposing constructive trusts is ‘to restore to plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant...’” *Id.* (internal citations omitted).

The facts of this case clearly present a situation where imposition of a constructive trust would be appropriate. Respondent Goffstein has testified under oath that the funds at issue, \$286,790.17, became his property upon receipt on October 7, 2005. (LF 281, A 26). Despite this current position, Respondent Goffstein represented to Judge Wiesman on November 18, 2005 and to Moore that these funds were to be used as a down payment to repay Moore for the funds Lewis embezzled from him. (LF 170-71, 176-77, A 7-8, 13-14). At that time, Respondent Goffstein told the Court that “The fact of the matter is that the only transfer that was made was the money that was sent to my office, which

everyone is aware of....It was money to be used a part of the initial down payment.” (LF 176-77, A 13-14).

Moreover, Respondents’ interrogatory answer states that Respondents were holding these funds to pay for attorneys’ fees and all other expenses incurred in the representation of Lewis, including the retention of additional attorneys to represent Lewis in the criminal proceeding. This is an admission that the money was being held in trust for Lewis’ benefit. To allow Respondents to retain the \$286,790.17 in this case would allow Respondents to be unjustly enriched at Moore’s considerable expense. Accordingly, this is an appropriate case for the imposition of a constructive trust over the funds at issue.

3. Moore Can Maintain a Claim for Money Had and Received.

“‘[A]n action for money had and received’ is a very broad and flexible action, which seeks to reach monies which in equity and good conscience ought not to be retained by the defendant but ought to be paid to plaintiff. It is a legal action, but based upon equitable principles. The tendency of the court is to widen rather than restrict its scope.” *Bueneman v. Zykan*, 181 S.W.3d 105, 113 (Mo. App. E.D. 2005) *citing Alacon v. Dickerson*, 719 S.W.2d 458, 461 (Mo. App. W.D. 1986).

The cause of action for money had and received is considered “a sort of connecting link between law and equity.” *Brandkamp v. Chapin*, 473 S.W.2d 786, 788 (Mo. App. 1971) *quoting Montgomery v. Wise*, 120 S.W. 100, 103 (Mo. App. 1909). “The action lies where the defendant has received or obtained money or its equivalent either from *or for the plaintiff* under such circumstances that in equity and good conscience, *ex aequo et bono*, he ought to pay it over to plaintiff.” *Id.* (internal citations

omitted) (emphasis added). “It is not necessary that an express promise to pay or privity of contract be pleaded or shown for the law implies both.” *Id.* (internal citations omitted). Therefore, the “action may be maintained even though the money to which plaintiff is entitled *may have been paid by a third party to defendant* or his agent.” *Id.* (internal citations omitted) (emphasis added).

In the present case, the parties still dispute why Julie Lewis transferred the \$286,790.17 to Respondents immediately following the discovery of her embezzlement. Reviewing the record in the light most favorable to Moore, and given Respondent Goffstein’s representations to Judge Wiesman, it is proper for this court to infer that Lewis transferred this money to Respondents in order to repay Moore the money she had embezzled. *See Daugherty*, 231 S.W.3d at 818 (summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant). Because Respondents have money which in equity and good conscience ought to be paid over to Moore, and not wrongfully retained, Moore has a valid claim for money had and received.

4. Respondents’ Interrogatory Answers do not Preclude Moore from Pursuing Equitable Claims Against Respondents.

Respondent’s interrogatory answer establish that as of December 21, 2005, Respondents were the nominal owners of the \$286,790.17 transferred from Julie Lewis to Respondents. As is discussed in detail in Point I, Respondents’ Answers should not preclude all inquiry into what transpired between Julie Lewis and Respondents prior to December 21. However, even if these Answers did preclude Moore’s claims against

Respondents for wrongful conduct, Moore would still be able to assert claims for constructive trust and money had and received because Moore need not show wrongful conduct on the part of Respondents in order to recover.

Respondents' Answers to the Interrogatories should not bar Moore's claim for constructive trust because a constructive trust may be assessed even when the acquisition of the property by the defendant was not wrongful. *Brown*, 152 S.W.3d at 917. In *Brown*, the defendant accidentally received a fee simple interest in a piece of property do to an error in the order in which a series of quitclaim deeds were recorded. *Id.* at 919. The Appellate Court still held that an imposition of a constructive trust was appropriate even though the defendant had done nothing wrong to obtain the property and was the legal owner of the property. *Id.*

In *Bueneman*, the plaintiffs brought a claim alleging that a judgment debtor transferred lake property to his wife's parents (the Frankenbergs) in order to defraud his creditors. 181 S.W.3d 105 (Mo. App. E.D. 2006). There was no issue that the transfer had been successfully accomplished and that the wife's parents were the titular owners of the property at issue. The trial court granted the Frankenbergs' Motion for Summary Judgment on plaintiff's claims for constructive trust and money had and received. With regard to the plaintiff's claim for constructive trust, the Court of Appeals reversed noting "the object of the constructive trust is to restore to the rightful owner the property wrongfully withheld by the defendant." *Id.* at 112.

The Court of Appeals also reversed the trial court's decision with regard to the plaintiff's claim for money had and received. In doing so, the Court noted that that there

is no requirement that the defendant receive any money directly from the plaintiff, but that the claim was a “very broad and flexible action, which seeks to reach monies which in equity and good conscience ought not to be retained by the defendant but ought to be paid to the plaintiff.” *Id.* at 113.

Similarly, in the present case, Respondents possess money which in equity and good conscience should be paid to Moore. The funds at issue are clearly the property of Moore which should be returned to its rightful owner. There is no dispute that Respondents’ client, Julie Lewis, embezzled in excess of two million dollars from Moore and then transferred \$286,790.17 to Respondents mere days after the embezzlement was discovered. Moreover, Respondent Goffstein represented to Moore and to the Court that this money was rightfully Moore’s during open court when he stated that it was to be used a down payment to repay Moore. (LF 176-77, A 13-14). Even if Moore is precluded from showing wrongful conduct on the part of Respondents in receiving this money, Moore still has a right to a determination of whether this money, in “equity and good conscience...ought to be paid to the plaintiff.” *See e.g. Brandkamp* 473 S.W.2d at 788.

D. Conclusion.

To affirm summary judgment in this case, this Court must completely disregard the statements made in open court by Respondent to a Circuit Judge and an opposing party. To do so would violate the interests of equity and good conscience. For these reasons, the Trial Court erred when it granted Respondents’ Motion for Summary

Judgment on Plaintiffs' equitable claims and this cause should be remanded to the Trial Court for further proceedings.

IV: The Trial Court abused its discretion in entering an Order, dated December 12, 2007, limiting discovery in this case to a single deposition of Respondent Goffstein on the issue of the prejudgment attachment in the underlying action and staying all other discovery until after ruling on Respondent's Motion for Summary Judgment because this discovery limit resulted in a manifest injustice to Plaintiff, in that Respondents never filed a complete Answer to Plaintiff's First Amended Petition, Respondents never responded to the interrogatories or requests for production issued by Plaintiff, Plaintiff was not allowed to depose a corporate representative of Goffstein, Raskas, Pomerantz, Kraus & Sherman, LLC, Plaintiff was also not allowed to depose Julie Lewis or Kevin Lewis, nor was Plaintiff allowed to subpoena the banking records of Respondents or Julie Lewis, and Plaintiff expects that this discovery, if allowed, will produce evidence that directly contradicts facts Respondents claim are not in dispute.

A. Introduction.

In the present case, Moore requested additional time to conduct discovery into the issues raised by Respondents in their Motion for Summary Judgment and in Moore's First Amended Petition. Respondents requested the Trial Court stay all discovery in the case pending the Trial Court's ruling on Respondents' Motion for Summary Judgment. This request was granted in part and the Trial Court limited discovery to a single deposition of Respondent Goffstein. For the reasons discussed below, this was an abuse of the Trial Court's Discretion.

B. Standard of Review.

“Trial courts have broad discretion in administering the rules of discovery, which [the appellate courts] will not disturb absent an abuse of discretion.” *State ex rel. Delmar Gardens North Operating, LLC v. Gaertner*, 239 S.W.3d 608, 610 (Mo. 2007) (citing *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992). A circuit court abuses its discretion if “its order is clearly against the logic of the circumstance, 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).

C. The Trial Court Abused its Discretion When it Limited Discovery in this Case to a Single Deposition.

As mentioned, a trial court has broad discretion in administering the rules of discovery. However, this deference to the discretion of the trial court is tempered by the requirements of due process. “Summary judgment borders on a denial of due process in that it denies the non-movant his day in court.” *Cody*, 111 S.W.3d at 552. Here, where the trial court has simultaneously prohibited Moore from pursuing discovery while at the same time granting summary judgment based on an issue of disputed fact, the due process concerns expressed in *Cody* are all the more pressing.

Moore filed his Petition on May 31, 2007. (Minutes, LF 001). Respondents never filed an Answer. Instead, Respondents filed a Motion to Dismiss and a Motion for Summary Judgment. (LF 001-002). Moore filed his First Amended Petition, effective September 13, 2007. (Minutes, LF 002, Order, LF 097). Again, Respondents filed Motions for Summary Judgment and to Dismiss. (LF 002-003). Finally, on September

21, 2007, Respondents filed an Answer to Counts II and IV of the First Amended Petition. (Answer, LF 145-49). To date, Respondents have not answered Counts I (conversion), III (fraud) and V (civil conspiracy) of the First Amended Petition.

On November 5, 2007, Moore filed a Motion for Additional Time to Respond to Respondent's Motion for Summary Judgment to Conduct Discovery. (LF 212-15). At the time this Motion was filed, Moore had sent written discovery to Respondents, including requests for production of documents and interrogatories. (Aff. of Jamie Boock, LF 216). Respondents had not responded to this discovery, and Moore had not had the opportunity to conduct any other discovery at this point. (LF 216). On December 11, 2007, the trial judge entered an Order staying all discovery, other than a single deposition of Respondent Goffstein, until after the court's ruling on the Motion for Summary Judgment. (Order, LF 245).

The ability to conduct discovery in this case is critically important since, in their Motion for Summary Judgment, Respondents rely in part on an Affidavit of Sanford Goffstein, which states that the money at issue was transferred to Respondents for the payment of all legal fees and costs. (Attachment to Respondent's Statement of Uncontroverted Facts, LF 103). This statement is directly contradicted by Respondent Goffstein's on the record comments to Judge Wiesman and further contradicted by his own sworn deposition testimony in this case. (LF 176-77, LF 281). The reason why Julia Lewis transferred \$276,790.17 dollars to Respondents is the critical factual issue to be resolved by this case. At a minimum, Moore should be allowed to subpoena and review Respondents' bank records and billing statements related to this matter.

By denying Moore any discovery into the circumstances surrounding this transfer, the trial court has abused its discretion and prevented Moore from fully inquiring into the facts regarding this transfer and having his day in court.

D. Conclusion.

The trial court abused its discretion in limiting Moore's discovery in this case to a single deposition. As such, Moore respectfully requests this Court reverse the trial court's grant of summary judgment, remand this case to the trial court and order that Moore be allowed to conduct complete discovery into these issues.

CONCLUSION

For the foregoing reasons Appellant Moore respectfully requests this Court reverse in its entirety the Trial Court's grant of Summary Judgment to Respondents, remand this cause of action to the Trial Court for further proceedings and allow Moore to conduct discovery into the transfer at issue.

ROSSITER & BOOCK, LLC

By: _____
Matthew J. Rossiter, #42685
Jamie L. Boock, #50912
Andrew W. Callahan, #60714
Attorneys for Appellants
8000 Maryland Ave., Ste.930
St. Louis, Missouri 63105
Tele: (314) 754-1500
Fax: (314) 863-5151

CERTIFICATION

Comes now Jamie L. Boock, pursuant to Rule 84.06(c), and certifies that the brief complies with Rule 84.06(b) in that it contains 10,799 words.

Further, pursuant to Rule 84.06(g), counsel certifies that the CD-ROM has been scanned for viruses and is virus-free.

Finally, pursuant to Rule 84.08, counsel does hereby certify that one (1) copy of Appellant's brief was served via United States Mail, postage prepaid this 9th day of March, 2009, upon Charles Alan Seigel, Michael Fisher and Matthew J. Aplington, 911 Washington Ave., 7th Floor, St. Louis, MO 63101.

ROSSITER & BOOCK, LLC

By: _____
Matthew J. Rossiter, #42685
Jamie L. Boock, #50912
Andrew W. Callahan, #60714
Attorneys for Appellants
8000 Maryland Ave., Ste.930
St. Louis, Missouri 63105
Tele: (314) 754-1500
Fax: (314) 863-5151