TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This action involves the applicability and interpretation of the Missouri Uniform Fiduciaries Law, §§ 456.240, *et seq*., R.S.Mo., to a fiduciary's conduct in drawing checks on her principal's account, payable to a bank, and securing the deposit of those checks into her personal account at the payee bank. Accordingly, this case does not fall within the categories of cases within which this Court has exclusive appellate jurisdiction pursuant to Article V, § 3 of the Missouri Constitution. Initial appellate jurisdiction was therefore appropriate in the Court of Appeals. Following opinion in the Western District Court of Appeals, a majority of the judges of that Court ordered it transferred

[1] All statutory references are to R.S.Mo. (1994) unless otherwise noted.

to this Court. Jurisdiction is appropriate herein pursuant to Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

This case involves two plaintiffs, Chouteau Auto Mart, Inc. (hereafter Chouteau) and Northland Acceptance Corporation (hereafter Northland), and one defendant, First Bank of Missouri, formerly known as First Bank of Gladstone (hereafter Bank). All other parties and claims were voluntarily dismissed or disposed of by a summary judgment ruling not at issue in this appeal. Legal File (hereafter L.F.) at 86, 88, 169 & 171.

The trial court decided the issues currently before this Court on cross Motions for Summary Judgment, pursuant to a Stipulation of Facts. L.F. at 172-76 and 206; Supplemental Legal File (hereafter S.L.F.) at 211-20. Pertinent facts from that Stipulation follow.

At all relevant times Janice Thompson (hereafter Thompson) was an employee, officer and fiduciary of both Chouteau and Northland. L.F. at 173. Chouteau maintained two corporate checking accounts with Bank, and Thompson was authorized to sign checks drawn on both of those accounts. L.F. at 172-73. Northland maintained a corporate checking account at Norbank, and Thompson was authorized to sign checks drawn on that account as well. L.F. at 173. During this time frame, Thompson also controlled, and co-owned with her daughter Tami, two separate accounts at Defendant Bank (hereafter collectively referred to as the Thompson Accounts). L.F. at 172.

Beginning in 1993, Thompson began stealing money from Chouteau and Northland. L.F. at 173-74; S.L.F. at 216-20. This scheme involved a series of 83 checks drawn on Chouteau's two accounts at Defendant Bank and 4 checks drawn on Northland's account at Norbank. L.F. at 173; S.L.F. at 216-20. Each of the checks was signed by Thompson, and each was made payable to Defendant Bank as payee. L.F. at 173. Thompson presented each of the checks to Defendant

Bank, along with a deposit slip for one of the Thompson Accounts. L.F. at 174. The proceeds of each of the checks were then credited to one of the Thompson Accounts. L.F. at 173. None of the checks were endorsed to Thompson. L.F. at 174.

There is no evidence that Chouteau, Northland, or any of their respective owners benefited from any of the checks at issue in this case. L.F. at 176. The parties have stipulated that Thompson was not authorized by Chouteau or Northland to deposit any of the checks into the Thompson Accounts, L.F. at 174, and that she in fact breached her fiduciary duty to Chouteau and Northland by so depositing the checks. L.F. at 174. The face amount of the 83 checks written on the Chouteau accounts and deposited to the Thompson Accounts totaled $843,624.98, with accrued interest of $374,381.84 through December 13, 1999. L.F. at 173; S.L.F. at 216-19. The face amount of the 4 checks written on the Northland account and deposited to the Thompson Accounts totaled $59,002.93, with accrued interest of $23,690.20 through December 13, 1999. L.F. at 173; S.L.F. at 219-20.

Thompson also drew and signed numerous checks on the Chouteau Accounts, payable to Defendant Bank, other than the ones at issue in this suit. L.F. at 175. Those other checks were applied to the benefit of Chouteau, and in a manner authorized by Chouteau, such as payment on loans, deposit to a Federal Tax Withholding Account, and the purchase of cashier's checks. L.F. at 175.

POINT RELIED ON

THE TRIAL COURT ERRED IN GRANTING DEFENDANT BANK'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE:

(1) THERE WAS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT, IN THAT ALL PERTINENT FACTS WERE STIPULATED TO BY THE PARTIES; AND

(2) PLAINTIFFS, RATHER THAN DEFENDANT BANK WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT (a) SECTION 456.310, R.S.MO. DOES NOT PROVIDE THE BANK WITH A DEFENSE BECAUSE IT DOES NOT ADDRESS THE SPECIFIC SITUATION WHERE THE BANK IS THE PAYEE OF A CHECK DRAWN AND DELIVERED IN A TRANSACTION KNOWN BY THE BANK, AS PAYEE, TO BE FOR THE PERSONAL BENEFIT OF THE FIDUCIARY, AND, IN ANY EVENT, THE CHECKS AT ISSUE ARE NOT PAYABLE TO, ENDORSED TO, OR OTHERWISE PROPER FOR DEPOSIT INTO THE FIDUCIARY'S ACCOUNT, AS REQUIRED BY SECTION 456.310, R.S.MO., AND (b) SECTION 456.270, R.S.MO. PROVIDES THAT THE PAYEE OF A CHECK IS LIABLE TO THE PRINCIPAL IF A CHECK IS DRAWN AND DELIVERED IN A TRANSACTION KNOWN BY THE BANK, AS PAYEE, TO BE FOR THE PERSONAL BENEFIT OF THE FIDUCIARY, AND THE FIDUCIARY IN FACT COMMITS A BREACH OF HER OBLIGATION AS FIDUCIARY.

§ 456.270, R.S.Mo. (1994)

Wright vs. The Mechanic's Bank of St. Joseph, 466 S.W.2d 174 (Mo. App. 1971)

Lucas v. Central Missouri Trust Co., 166 S.W.2d 1053 (Mo. 1942)

American Sash and Door Company v. Commerce Trust Company, 25 S.W.2d 545 (Mo. App. 1930), *affirmed,* 56 S.W.2d 1034 (Mo. Banc 1932)

Cassel vs. Mercantile Trust Company, 373 S.W.2d 433 (Mo. Banc 1965)

Central Bank of Kansas City v. Costanzo, 873 S.W.2d 672 (Mo.App. 1994)

Farmers Insurance Co. v. McFarland, 976 S.W.2d 559 (Mo.App. 1998)

General American Life Ins. Co. v. Barrett, 847 S.W.2d 125 (Mo.App. 1993)

General Insurance Company of America v. Commerce Bank of St. Charles, 505 S.W.2d 454 (Mo.App. 1974)

Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82 (Mo. Banc 1993)

ITT Commercial Financial Corp. v. Mid-American Marine Supply Corp, 854 S.W.2d 371 (Mo. Banc 1993)

J.R. Waymire Co. v. Antares Corp., 975 S.W.2d 243 (Mo.App. 1998)

James v. Union Electric Co., 978 S.W.2d 372 (Mo.App. 1998)

Larison v. Public Water Supply Dist. No. 1 of Andrew County, 998 S.W.2d 192 (Mo.App. 1999)

McCrary v. Truman Medical Center, Inc., 943 S.W.2d 695 (Mo.App. 1997)

Moore Equipment Co. v. H.H. Halferty, 980 S.W.2d 578 (Mo.App. 1998)

Sims, Ex'r v. United States Trust Co. of New York, N.Y., 103 N.Y. 472, 9 N.E. 605

Trenton Trust Company vs. Western Surety Company, 599 S.W.2d 481 (Mo. 1980)

21 West, Inc. v. Meadow Green Trail, Inc. 913 S.W.2d 858 (Mo.App. 1995)

Mo. Const., Art. V, § 3

Mo. Const., Art. V, § 10

§ 456.240, R.S.Mo. (1994)

§ 456.310, R.S.Mo. (1994)

Missouri Rule of Civil Procedure 84.14

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANT BANK'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE:

(1) THERE WAS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT, IN THAT ALL PERTINENT FACTS WERE STIPULATED TO BY THE PARTIES; AND

(2) PLAINTIFFS, RATHER THAN DEFENDANT BANK WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW, IN THAT (a) SECTION 456.310, R.S.Mo., DOES NOT PROVIDE THE BANK WITH A DEFENSE BECAUSE IT DOES NOT ADDRESS THE SPECIFIC SITUATION WHERE THE BANK IS THE PAYEE OF A CHECK DRAWN AND DELIVERED IN A TRANSACTION KNOWN BY THE BANK, AS PAYEE, TO BE FOR THE PERSONAL BENEFIT OF THE FIDUCIARY, AND, IN ANY EVENT, THE CHECKS AT ISSUE ARE NOT PAYABLE TO, ENDORSED TO, OR OTHERWISE PROPER FOR DEPOSIT INTO THE FIDUCIARY'S ACCOUNT, AS REQUIRED BY SECTION 456.310, R.S.Mo., AND (b) SECTION 456.270, R.S.Mo., PROVIDES THAT THE PAYEE OF A CHECK IS LIABLE TO THE PRINCIPAL IF A CHECK IS DRAWN AND DELIVERED IN A TRANSACTION KNOWN BY THE BANK, AS PAYEE, TO BE FOR THE PERSONAL BENEFIT OF THE FIDUCIARY, AND THE FIDUCIARY IN FACT COMMITS A BREACH OF HER OBLIGATION AS FIDUCIARY.

I. STANDARD OF REVIEW

Review of cases on transfer to this Court from the Court of Appeals is the same as on original appeal. Missouri Constitution, Art. V, § 10. The standard for appellate review of a trial court's order granting summary judgment is *de novo*:

> The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment.

ITT Commercial Financial Corp. v. Mid-American Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. Banc 1993) (citations omitted); *Larison v. Public Water Supply Dist. No. 1 of Andrew County*, 998 S.W.2d 192, 195 (Mo.App. 1999). Where, as in the present case, the trial court's order does not state the grounds upon which it relied in granting summary judgment, the court is presumed to have based its decision on the grounds specified in Respondent's motion. *Moore Equipment Co. v. H.H. Halferty,* 980 S.W.2d 578, 581 (Mo.App. 1998); *McCrary v. Truman Medical Center, Inc.*, 943 S.W.2d 695, 697 (Mo.App. 1997).

Although rulings denying motions for summary judgment are generally not considered appeallable orders absent special circumstances, *Farmers Insurance Co. v. McFarland*, 976 S.W.2d 559, 566 (Mo.App. 1998), Missouri Rule of Civil Procedure 84.14 provides:

> The appellate court shall award a new trial or partial new trial, reverse or affirm the judgment or order of the trial court, or give such judgment as the court

ought to give. Unless justice otherwise requires, the court shall finally dispose of the case. No new trial shall be ordered as to issues in which no error appears.

Missouri Courts have frequently relied on Rule 84.14 to finally dispose of a case presented to the trial court on cross motions for summary judgment. *E.g.*, *Moore Equipment Co. v. H.H. Halferty*, 980 S.W.2d 578 (Mo.App. 1998) (reversing trial court's order granting summary judgment for defendant, entering summary judgment in favor of plaintiff, and remanding the cause to the trial court to determine damages); *General American Life Ins. Co. v. Barrett,* 847 S.W.2d 125 (Mo.App. 1993) (remanding cause with directions to vacate summary judgment in favor of one party and enter summary judgment in favor of opposing party); *see also James v. Union Electric Co*., 978 S.W.2d 372, 376 (Mo.App. 1998) (reversing trial court's grant of dismissal but, pursuant to Rule 84.14, reviewing trial court's denial of same party's motion for summary judgment, and granting summary judgment). Final disposition by an appellate court is appropriate under Rule 84.14 where "there is a record and evidence upon which it can render final judgment with some degree of confidence in the reasonableness, fairness and accuracy of the outcome and the appellate briefs are sufficient to allow it to decide the underlying legal issues presented. *Central Bank of Kansas City v. Costanzo*, 873 S.W.2d 672, 675 (Mo.App. 1994). Such disposition is particularly appropriate where "there is no real conflict of evidence upon any essential facts." *General American Life Ins. Co*., 847 S.W.2d at 132.

In the present case, not only is there "no real conflict of evidence upon any essential facts," but all of the facts were presented to the trial court by stipulation in connection with cross motions for summary judgment. Moreover, the issues of law raised by the parties' respective motions for summary judgment are identical. Accordingly, this cause is ripe for final disposition through appeal.

II. DISCUSSION

A. Overview of § 456.270

Plaintiffs' claims against Defendant Bank are based upon § 456.270 of the Missouri Uniform Fiduciaries Law, which provides as follows:

> **Check drawn by fiduciary payable to third person.** -
>
> If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action is taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

Although this statute establishes several permutations of potential liability for the payee of a check, it is composed of only two rather lengthy sentences, with each addressing quite different factual scenarios and imposing quite different legal obligations. The characteristic which is common to both sentences, however, and which distinguishes them from most of the remaining portions of the

Uniform Fiduciaries Law, is that liability is premised upon a party's status as the **payee** of a check, as opposed to a mere depository or other entity in the chain of collection or handling of a check.

The legal obligation imposed by first sentence upon a Payee is a duty of inquiry into the propriety of the fiduciary's actions, arising from the Payee being chargeable with notice that the fiduciary may be breaching her obligation. Generally, the Payee is chargeable with such notice, and therefore has no duty of inquiry, unless he takes the instrument with actual knowledge of a breach of fiduciary duty, or with knowledge of such facts that this action in taking the instrument amounts to bad faith.

The legal obligation imposed upon a Payee by the second sentence of § 456.270 is much more stringent, rising virtually to the level of insurer, once the stringent factual predicates are met. Under it, the "payee is liable to the principal if the fiduciary in fact commits a breach of his obligation." This heightened obligation arises only in two distinct factual situations. The first is where the check is payable to a creditor of the fiduciary, and delivered to the creditor in payment of or as security for a personal debt of the fiduciary, to the actual knowledge of the creditor. The second is where the check is "drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary."

B. Applicability of § 456.270 to the Present Case

This is not a case arising from the duty of inquiry obligation of the first sentence of § 456.270. Nor is it a case arising from the first factual scenario of the second sentence, where the check is delivered to a creditor of the fiduciary in payment of, or as security for, a personal debt of the fiduciary. It is a case arising under the second portion of the second sentence of § 456.270,

regarding transactions known by the payee to be for the personal benefit of the fiduciary. The elements of a claim under that section, as applied to the facts of this case, are:

(1) Defendant was the payee of the checks;

(2) Thompson was a fiduciary of Chouteau and Northland;

(3) Thompson was empowered to draw checks on Chouteau's and Northland's accounts;

(4) The checks were drawn and delivered in transactions known by Bank to be for the personal benefit of Thompson; and

(5) Thompson in fact breached her obligation as fiduciary in drawing or delivering the checks.

Elements 2, 3 and 5 were admitted pursuant to the Stipulation of the parties, and remain admitted. Although Bank also Stipulated that each of the checks "was made payable to First Bank of Missouri (or its predecessor First Bank of Gladstone) **as payee**," L.F. at 173 (emphasis added), it argued on appeal that it was not the payee, and the majority opinion of the Western District interpreted "payee," as that term is used in § 456.270, to mean "a payee other than a payee/depository bank covered by § 456.310". Majority Op. at 13. Accordingly, the first element of the claim, regarding the Bank's status as payee, is discussed at length below.

Although not expressly stipulated, there is no dispute as to the fourth element. Thompson held an ownership interest in, and controlled, the personal accounts into which the checks were deposited at Bank. L.F. at 172. The parties stipulated that, following review of all the records of Thompson's accounts, there is no evidence that either of the Plaintiffs, or their respective owners, benefited in any way from said deposits. L.F. at 176.

The fact that the funds were deposited into an account owned and controlled by Thompson is significant to the personal benefit issue. If, for example, Thompson had obtained cash back from a check payable to the Bank, the Bank might have legitimately claimed that it did not know whether said cash was for the personal benefit of Thompson, or whether Thompson was, as a mere bailee, taking the cash for the benefit of her principal. By depositing the proceeds into her accounts, however, the Bank indisputably and by stipulation knew that it was making Thompson the **owner,** and not simply a possessor, of the funds. *See*, *Trenton Trust Company v. Western Surety Company,* 599 S.W.2d 481, 489, n. 2 (Mo. 1980) (deposit of guardianship funds to personal account is "transaction known by the transferee to be for the personal benefit of the fiduciary" under § 456.260). Indeed, the Bank did not dispute, either in its response to Plaintiff's Second Motion for Summary Judgment, its Third Motion for Summary Judgment, or in Respondent's Brief filed in the Court of Appeals, that the checks were drawn and delivered in transactions known by it to be for the personal benefit of Thompson. L.F. at 202-05 and 188-94. Since the trial court did not specify the basis for its ruling, and the Bank's lack of knowledge of personal benefit was not raised in its motion, such lack of knowledge should not be considered as a basis for affirmance of the trial court's order. *Moore Equipment Co. v. H.H. Halferty,* 980 S.W.2d 578, 581 (Mo.App. 1998); *McCrary v. Truman Medical Center, Inc.,* 943 S.W.2d 695, 697 (Mo.App. 1997).

1. Bank's Status as "Payee" Under § 456.270

Defendant Bank was indisputably the payee of the checks at issue. It stipulated in the trial court that each of the checks in question was made payable to it "**as payee**," L.F. at 173 (emphasis added). In its brief on appeal, however, it argues that the term "payee," as used in the statute, did not include a bank. Respondent's Brief at 13-14.

The majority and the dissent in the Court of Appeals agree that the scope of the term payee "is in no way limited by § 456.270," and that therefore this "section would appear, on its face, to be applicable where a bank is the payee, even if it was made a payee for the sole purpose of effectuating a deposit from the principal's account to the fiduciary's personal account." Majority Op. at 12; Dissent at 1. The majority nonetheless concluded:

> However, in our view, such an interpretation of § 456.270 would leave it in conflict with § 456.310 in that it would essentially negate the 'defense' provided banks by § 456.310, when its role in the transaction was, as a practical matter, limited to a depository bank.

Majority Op. at 12. Plaintiffs most respectfully disagree with the Majority's analysis. First, the transactions at issue are not properly classified as ones in which the bank was made payee for the "sole purpose of effectuating a deposit from the principal's account to the fiduciary's personal account," or where the bank's role was "limited to a depository bank." The purpose of effectuating a deposit from the principal's account to the fiduciary's personal account cannot, consistent with a bank's fundamental contractual obligation to pay checks as they are written, be accomplished by making the bank the payee. The only reason the bank's role may have in fact been limited to a depository bank was because of its misfeasance in failing to honor and pay the checks as they were written. (I.e., if the bank had followed the written instructions on the checks, its role would not have been limited to a depository bank). Second, § 456.310, when interpreted according to its terms, consistent with a bank's fundamental contractual obligation to pay checks as they are written, and in light of the history and purposes of the Uniform Fiduciaries Law, does not

provide a defense, and is simply inapplicable, under the facts of this case. There is therefore no conflict between the statutes which would require a judicial amendment to harmonize.

2. Bank's Status as a Depository of the Fiduciary

A bank's obligation to pay checks as they are written is fundamental to the relationship between a bank and its customer, and has long been recognized by Missouri courts. *American Sash and Door Company v. Commerce Trust Company*, 25 S.W.2d 545, 548 (Mo. App. 1930) ("There is an implied contract existing between a bank and a depositor to the effect that the bank will pay out the depositor's money only to persons to whom he orders payment to be made"), affirmed, 56 S.W.2d 1034 (Mo. Banc 1932); *Cassel vs. Mercantile Trust Company,* 373 S. W. 2d 433, 438 (Mo. Banc 1965) ("the implied contractual obligation assumed by the bank is to honor and pay on presentation the depositor's checks to the person or persons to whom he orders payment"). Plaintiff has discovered no Missouri cases which even purport to abrogate this obligation, with or without reference to the Uniform Fiduciaries Law.

Particularly appropriate to the present case is *Wright v. The Mechanic's Bank of St. Joseph*, 466 S.W.2d 174 (Mo. App. 1971), in which a Mrs. Peery drew a check payable to Defendant Mechanic's Bank of St. Joseph. An individual named Stewart delivered the check on Mrs. Peery's behalf to the bank and requested that it be deposited to his personal account. The bank did so. The heirs of Ms. Peery instituted suit against the bank to recover the proceeds. The Court of Appeals found the trial court's judgment in favor of the bank clearly erroneous, and directed that judgment be entered in favor of Plaintiff. In so doing, it expressly adopted the following analysis from *Sims, Ex'r v. United States Trust Co. of New York, N.Y.,* 103 N.Y. 472, 9 N.E. 605, 606:

> The check, upon its face, imported the ownership of the moneys represented in it by Dr. Sims, *and his desire that its custody be transferred from the People's Bank to the defendant* [United States Trust Co.].* * * If he had so intended (to pay the money to Crowell), the check *would have been made payable to Crowell's order*. * * * The defendant could have refused to receive the deposit * * * but, having accepted * * * it was bound to keep Dr. Sims' moneys until it received his directions to pay them out.

466 S.W.2d at 176-77 (Emphasis and omissions supplied by *Wright* court). The *Wright* court's adoption of *Sims* holding, and its rationale for doing so, is succinct and irrefutable:

> We adopt this language in the present case. It clearly declares what the law should be in cases similar to the one at bar. No other rule can or will provide safety for the deposits of members of the public, who deal with banks and must of necessity, depend upon the rule that banks will receive, hold and disburse the moneys of their depositors as such depositors direct.

Id.

Thus, the Majority's conclusion that a perceived conflict between §§ 456.270 and 456.310 necessitated additional language to "harmonize" them was based on the false premise that, in the transactions at issue, the Bank "was made a payee for the sole purpose of effectuating a deposit from the principal's account to the fiduciary's personal account." Majority Op. at 12. Pursuant to the foregoing authorities, an intent to transfer funds to an individual is not evidenced by making a check payable to a bank. An intent or purpose of effectuating a transfer to an individual is evidenced by making a check payable to that individual, or his order. Indeed, this conclusion is no

more than common sense. Where a check is payable to an individual the bank can deposit the check to individual's account, because the person to whom payment was ordered (i.e. the payee) is receiving the proceeds. Where the bank itself is the payee, however, it could in no way honor the written instructions of the check by depositing it to the individual's account because the person to whom payment is ordered is not receiving the funds.

The Majority acknowledges that, even under its interpretation of the statute, "a bank could still be liable under § 456.270 if, as payee, it was not also a depository bank." Majority Op. at 13. The Defendant Bank's role in the present case was in fact limited to a "mere depository" only because it chose to ignore and abrogate its role and responsibilities as a payee and, in contravention of the express written instructions of the maker, become a depository of the fiduciary, Thompson. There is no harshness or inequity in denying the Bank a "defense" available to depository banks, when the only reason it became a depository, or that its role was so limited, was because of its misfeasance in depositing the check to an account of someone other than the payee, and failing to give the maker anything of value for its money. That is, if Bank had honored its fundamental obligation to pay checks as written, its role would never have been a depository of the fiduciary **at all** (much less a "mere depository") with respect to the checks at issue.

C. Applicability of § 456.310

For reasons set forth above, Plaintiffs suggest that § 456.270 does not conflict with § 456.310, and that an analysis of § 456.310 is therefore unnecessary. When such an analysis is undertaken, however, it in fact confirms the lack of conflict by demonstrating that § 456.310 is not, by its terms, applicable to the transactions at issue, and that it therefore cannot provide a defense to Defendant Bank.

Section 456.310 provides:

> If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him, if he is empowered to endorse such checks, *or if he otherwise makes a deposit of funds held by him as fiduciary*, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith.

(Emphasis added.)

1. Lack of "Payee" Element in § 456.310

The most obvious reason that this section does not apply to the transactions at issue in the present case is that it does not address does not address the "payee" element, which is required by § 456.270, and was the linchpin of liability in *Wright*, and cases cited therein. Plaintiffs have never argued that personal benefit to the fiduciary, alone, is sufficient to impose liability on a bank. Indeed, there are numerous situations, such as when a fiduciary, with authority to sign payroll

checks, signs her own payroll check, where the bank would have no liability or duty of inquiry, at least absent bad faith or actual knowledge of a breach of fiduciary duty. Thus, while § 456.310 admittedly affords a bank with some protection in such situations involving a known personal benefit to the fiduciary, it is in no way inconsistent or at odds with § 456.270 because § 456.310 does not address the specific circumstances covered by § 456.270, where the known personal benefit to the fiduciary element is **coupled with** the element of the bank being the payee of a check.

2. Nature of Deposits Encompassed by § 456.310

Perhaps more fundamentally, but less apparently, § 456.310, properly construed, does not address the type of "deposit" into a fiduciary's account at issue in this case. Although the Majority interprets "'otherwise' in the statute, as defined in the dictionary as 'in another manner; differently," to include any means of deposit, including the deposits made by Thompson. Webster's New World College Dictionary 959 (3rd ed. 1997)," Majority Op. at 10, such a broad definition cannot withstand careful scrutiny, as illustrated by the two following examples.

First, the statute specifically includes "checks payable to his principal and endorsed by him, if he is empowered to endorse such checks." If the Majority's interpretation that "otherwise makes a deposit" really means "**any** means of deposit," (emphasis added), then checks payable to his principal and endorsed by the fiduciary, even if the fiduciary lacked endorsement authority, would be protected as well.

Perhaps an even more repugnant scenario would be a fiduciary presenting a principal's check payable to a third party, such as a utility company. Again, under an interpretation that "otherwise makes a deposit" really means "any means of deposit", a bank depositing a principal's check payable to Union Electric to the fiduciary's account would be protected.

Such interpretations are clearly untenable and would render the bulk of the statutory language is superfluous. If such results were intended, the legislature could have simply said "If a fiduciary makes a deposit to his personal credit of funds held by him as fiduciary, the bank receiving such deposit" is not bound to inquire as to a breach of fiduciary duty, absent bad faith or actual knowledge. The real issue is therefore not whether "otherwise makes a deposit" was intended to be limited, but how "otherwise makes a deposit" was intended to be limited. *See, Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. Banc 1993) (rule of statutory construction that "it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute").

The only principled interpretation of § 456.310, which is supported by both the statutory language and the history and purposes of the Uniform Fiduciaries Law, is one that relieves the bank of the heightened responsibilities historically placed upon it by the common law when dealing with fiduciaries, while preserving the bank's contractual obligations to its customer which exist wholly apart from, and regardless of, any fiduciary relationship. In the context of the present case, the bank's conduct in failing to pay the checks according to their terms, which is a violation of a fundamental obligation that in no way arises from a fiduciary relationship, is not protected.

The statutory language provides a basis for this conclusion in that § 456.310 references checks drawn upon the account of the principal "payable to him as fiduciary," "checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon," and "checks payable to his principal and endorsed by him, if he is empowered to endorse such checks." Each of these scenarios addresses checks that are facially appropriate for deposit to the fiduciary's personal account because they are either payable to the fiduciary or properly endorsed

to the fiduciary. They also present situations that provide the fiduciary, because of the authority granted him by the principal, with excellent opportunities to abuse that authority and misappropriate the principal's money.

Prior to the adoption of the Uniform Fiduciaries Law, a bank was not only bound by its basic contractual obligations to customers, but was additionally burdened with a "common law duty to inquire into the propriety of fiduciary transactions," *General Insurance Co. of America v. Commerce Bank of St. Charles*, 505 S.W.2d 454, 457 (Mo. App. 1974). As this Court held in *Lucas v. Central Missouri Trust Co*., 166 S.W.2d 1053 (Mo. 1942):

> There are three ways in which a bank may incur liability and be compelled to make good deposits that have been misappropriated by a fiduciary: (1) by a violation on its part of the contract, express or implied, between it and the owner of the fund; * * * (2) by appropriating the fund, either with or without the fiduciary's consent, to the payment of the latter's debt to the bank; * * * and (3) by assisting the fiduciary to accomplish the misappropriation, the bank having knowledge, actual or constructive, that the fraud is being or about to be perpetrated by the fiduciary.

166 S.W.2d at 1058 (quoting Am.Jur. § 517, pp. 371-72). A bank's common law obligation upon "actual or constructive" notice of fraud sometimes became so onerous that the Uniform Fiduciaries Law was adopted "to facilitate commercial transactions in negotiable instruments held in trust, by relaxing some of the harsher rules which require of a bank and of individuals the highest degree of vigilance in the detection of fiduciary wrongdoing." *Trenton Trust Co. v. Western Surety Co*., 599 S.W.2d 481, 490 (Mo. banc 1980).

In summary, the purpose of § 456.310 is to relax and then codify a bank's obligation to inquire into fiduciary transactions for the purpose of detecting fiduciary fraud. It does not purport to relieve a bank of its contractual obligations to its customers, such as when it ignores the written instruction of the customer by crediting the check to an account other than that of the named payee. Section 456.310 is therefore not in conflict with § 456.270 where a bank, as payee of check, processes it in contravention of the written instructions and in a transaction known by it to be for the personal benefit of the fiduciary.

Prejudgment Interest

As indicated by the foregoing, Plaintiffs are, as a matter of law, entitled to judgment. The amount of damages is readily ascertainable and has indeed been stipulated. Since each of the checks was for a fixed and determined amount, rendering the claims liquidated, they are subject to pre-judgment interest at the statutory rate of 9 percent per annum. *21 West, Inc. v. Meadow Green Trail, Inc.* 913 S.W.2d 858, 871-72 (Mo.App. 1995). Interest accrues from the date of breach, *J.R. Waymire Co. vs. Antares Corp.*, 975 S.W.2d 243, 248-49 (Mo.App. 1998) ("Pre-judgment interest on unpaid real estate commission due from the date property is sold and commission payable"). The calculations as to the amount of Pre-judgment interest are stipulated.

CONCLUSION

For the foregoing reasons, Plaintiffs pray for the Court's Order reversing the judgment of the trial court, and, pursuant to Missouri Rule of Civil Procedure 84.14, directing that judgment be entered in favor of Plaintiff Chouteau Auto Mart, Inc. against Defendant First Bank of Missouri in the principal sum of $843,624.98, plus accrued interest of $374,381.84 through December 13, 1999 and per diem interest of $208.02 for each day thereafter until the date of judgment, along with the cost of this action, and directing that judgment be entered in favor of Plaintiff Northland Acceptance Corporation, Inc. against Defendant First Bank of Missouri in the principal sum of $59,002.93, plus accrued interest in the sum of $23,690.20 through December 13, 1999 and per diem interest of $14.55 for each day thereafter until the date of judgment, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

WITHERS, BRANT, IGOE & MULLENNIX, P.C.

By: _____

Michael S. Shipley #33249
Vincent F. Igoe, Jr. #22478
Two South Main
Liberty, Missouri 64068
(816) 781-4788 - Telephone
(816) 792-2807 - Fax
ATTORNEYS FOR PLAINTIFFS / APPELLANTS

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that one photocopy of the foregoing Brief and one floppy disk were mailed, postage prepaid, to John Shank, Attorney for Defendant Appellee, First Bank of Missouri on this 14th day of March, 2001.

_____
Michael S. Shipley

CERTIFICATE OF COMPLIANCE

Comes now the undersigned counsel for Plaintiffs and, pursuant to Special Rule No. 1(c & f), certifies that this brief complies with the limitations contained in Special Rule No. 1(b), that the brief, exclusive of the signature block and this certificate, contains 6,622 words, and that the floppy disk containing this brief which is being filed and served has been scanned for viruses and that it is virus-free.

Respectfully Submitted,

WITHERS, BRANT, IGOE & MULLENNIX, P.C.

By:_____

Michael S. Shipley #33249
Vincent F. Igoe # 22478
Two South Main Street
Liberty, MO 64068
(816) 781-4788 Telephone
(816) 792-2807 Facsimile

ATTORNEYS FOR APPELLANTS / PLAINTIFFS