SC97689

IN THE MISSOURI SUPREME COURT

MEADOWFRESH SOLUTIONS USA, LLC,

Plaintiff-Respondent,

vs.

MAPLE GROVE FARMS, LEON RINEHART, TED DAHLSTROM, CAROL DAHLSTROM, CURTIS HALL, LISA HALL and KYLE BOUNOUS,

Defendants-Appellants,

Appeal from the Circuit Court of Greene County, Missouri
Honorable Jason R. Brown
Case No. 1731-CC01311

APPELLANTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is taken from the document titled "Order" issued by the Circuit Court of Greene County, entered on November 29, 2017 by the Honorable Jason Brown following hearings conducted on November 6 and 22, 2017. The order is appealable pursuant to §515.665 and §512.020(2), RSMo., which grant a right to appeal an order which denies a motion to revoke, modify, or change an interlocutory order appointing a receiver. The order appointing receiver was entered by the trial court on November 6, 2017. On November 9, 2017, Appellants filed their Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing Receiver. The trial court denied Appellants' motion in its order of November 29, 2017.

Appellants timely filed their Notice of Appeal in the circuit court December 5, 2017. Appeal to the Missouri Court of Appeals was appropriate pursuant to Article 5, §3 of the Missouri Constitution in that this appeal is not from an order or judgment regarding the validity of a treaty, statute of the United States, a statute or provision of the Constitution of this state, the construction of the revenue laws of this state, the title to any state office or a case where the punishment imposed is death. This appeal was not originally within the exclusive jurisdiction of the Missouri Supreme Court. The Court of Appeals has general appellate jurisdiction of all other cases, including appeals from an order granted as a matter of right by statute.

The Southern District of the Missouri Court of Appeals was the proper district of the Missouri Court of Appeals for this appeal pursuant to §477.060 RSMo., which identifies the Circuit Court of Greene County, from which this appeal is taken, as being within the Southern District of the Missouri Court of Appeals.

On March 1, 2018, the Court of Appeals issued a show cause order inviting Appellants to file written suggestions showing cause why the appeal herein should not be dismissed as an appeal that is not taken from a document denominated as "judgment" as referenced in Rule 74.01. On March 8, 2018, the Court of Appeals issued its Order declaring it would take the issue of appealability of the trial court's November 29, 2017, order with the case when submitted to the court of appeals for determination.

Appellants and Respondents timely filed briefs. The Missouri Court of Appeals-Southern District heard oral argument on January 9, 2019. On February 4, 2019, the Southern District issued its opinion and order dismissing the appeal. That opinion and order included a dissent by the Hon. Nancy Steffen Rahmeyer certifying this matter for transfer to the Missouri Supreme Court. The Court of Appeals - Southern District entered its Order of Transfer on February 7, 2019. Pursuant to Missouri Supreme Court Rule 83.03, the Missouri Supreme Court has jurisdiction of this appeal. Pursuant to Missouri Supreme Court Rule 83.09, the Supreme Court may consider the substantive issues presented by Appellants on the merits and finally determine the case as if it were an original appeal. Appellants request consideration on that basis.

STATEMENT OF FACTS

Background and Context

This matter stems from a dispute over management and operation of a large dairy farm in Barry County, Missouri. There are two lawsuits discussed in this brief. The first filed suit is often referred to as "the first suit" or "prior suit". The "second suit" or "subsequent suit", in which a Receiver was appointed by court order, is the suit underlying this appeal. Appellants are Defendants in the action underlying this appeal and were all named Defendants in the prior suit. Respondents are Plaintiffs in this underlying action, and were all Plaintiffs in the prior lawsuit as well.

The parties were connected to the farm and to each other through two Missouri limited liability companies: Meadowfresh Solutions USA, LLC ("Meadowfresh") and Maple Grove Farms, LLC ("Maple Grove").

Prior to July of 2015, the ownership in the two companies was approximately:

Meadowfresh Solutions USA, LLC: Members:

John and Sue Fulton: 74.2%;
Ted and Carol Dahlstrom: 4.0%; and
Kyle Bounous: 21.8%.

Maple Grove Farms, LLC: Members:

Meadowfresh: 65.5%;
Ted and Carol Dahlstrom: 8.5%;
Curtis and Lisa Hall: 3.00%; and
Leon Rinehart: 23.0%.

The Fultons and Meadowfresh filed suit in August of 2015 in Greene County, Missouri and through the course of amendments to petition eventually proceeded against the following defendants: Maple Grove Farms, LLC, Curtis and Lisa Hall, Ted and Carol Dahlstrom, Leon Rinehart, Kyle Bounous, All American Cattle Leasing, LLC, and The Animal Clinic of Monett ("the first suit"). The number of the first lawsuit is Case No. 1531-CC01018 and it was assigned to Division 1, the Hon. Michael Coordonnier. Following two

years of litigation and a ten-day jury trial conducted in Greene County, Mo., in August of 2017, judgment was entered by the Hon. Michael Coordonnier for the plaintiffs (now referred to as "Respondents"). Following entry of judgment in the first suit, Respondents (Plaintiffs) filed a motion to sever a claim for receivership of Maple Grove Farms which Respondents had elected not to submit to the jury. That motion to sever was granted, splitting the cause of action after verdict and judgment were already rendered. Respondents then filed a new lawsuit seeking receivership of Maple Grove Farms and naming the same defendants (now referred to as "Appellants") as were named as defendants in the first case.

This second suit was filed in Greene County, Mo. and assigned case No. 1731-CC01311. The case was assigned to Division 3, the Hon. Jason Brown. This appeal derives from the order appointing receiver and subsequent order refusing to revoke receivership in the second suit.

Pertinent Facts

Respondents filed their first Motion for Appointment of Receiver over Maple Grove Farms, LLC on November 29, 2016 in Case No. 1531-CC01018 (the "prior case" or "first case") (Doc. 6 p2). That motion was denied by Hon. Michael Cordonnier on December 6, 2016 (Doc. 6 p3). A second motion was filed on June 9, 2017 in the same case, Case No. 1531-CC01018 (Doc. 6 p1). That motion was granted, with directions for submission of a written order, by order of the Court dated June 16, 2017 (Doc. 5 p1-2). Prior to jury trial in Case No. 1531-CC01018 in August 2017, Respondents did not, as directed by the court order of June 16, 2017, seek to proceed with obtaining a written order appointing a receiver or even submit any proposed order or endeavor to schedule further hearing on the matter (App. 130).

Jury trial was concluded in the first suit, Case No. 1531-CC01018, on August 28, 2017 (App. 173-175). Well after jury trial and verdict, on September 20, 2017 Respondents filed a motion to sever the claim for dissolution stated as Count II of the Fifth Amended Petition but the motion to sever did not mention the claims for accounting (Count XIV of the Fifth Amended Petition) or for receivership (App. 74). Neither the claim for dissolution, claim for accounting nor claim for receivership were submitted for

determination at jury trial, and none were the subject of any motion to sever prior to the conclusion of jury trial and verdicts rendered (App. 124, 130).

On September 21, 2017, the trial court presiding over the first case entered an order via docket entry purporting to sever the claims for dissolution *and* accounting although the motion requested severance of only the dissolution claim in Count II (App. 176, 74). Receivership was not mentioned in the motion or in the order (App. 74). On September 27, 2017, thirty days after conclusion of the ten-day jury trial, the trial court entered its amended judgment in which it purported to document the reservation of the claims for dissolution, accounting and receivership (Doc. 4, p6; App. 124).

One day after entry of amended judgment in the first suit, on September 28, 2017, Respondents instituted a separate lawsuit in Greene County, Mo., Case No. 1731-CC01311 (the "second suit," "subsequent suit," "receivership" or "underlying suit") from which this appeal arises, seeking to obtain relief on their reasserted claims for dissolution and accounting. At the time this second suit was filed, Count II of Respondents' Fifth Amended Petition in the first suit (seeking dissolution) and Count XIV (seeking an accounting) remained undetermined by judgment or order in the first suit, Case No. 1531-CC01018 (App. 16, 130). Respondents' new petition in the second suit asserts in paragraph 2 of the section denominated as "Facts Common To All Counts" that Respondent Meadowfresh Solutions USA, LLC and others had filed a previous lawsuit in the Circuit Court of Greene County, Missouri on August 20, 2015 against the named Defendants and others, assigned Case Number 1531-CC01018, referred to as "the prior lawsuit" (App. 17).

Within paragraph 3 on page 3 of the petition filed on September 28, 2017 in the second Case No. 1731-CC01311, Respondents asserted that the prior lawsuit proceeded to a trial by jury and that Respondents prevailed on claims asserted (App. 18). Paragraph 4 on page 3 of the petition asserts that the only claims remaining in the prior suit were claims for accounting and dissolution of defendant Maple Grove Farms, LLC (App. 18). Respondents asserted that the previous claims for accounting and dissolution were dismissed without prejudice so that a final and appealable judgment could be entered on the claims submitted to the jury in the prior lawsuit (App. 18). On September 28, 2017,

when the second suit was filed, contrary to the assertions in the petition, there had not been a dismissal with or without prejudice of the claims for accounting and dissolution in the first lawsuit. Respondents did not dismiss the previous claims for accounting and dissolution in the first lawsuit until November 6, 2017, thirty-nine (39) days after the filing of the second lawsuit (App. 178).

On October 30, 2017, Respondents filed in the second suit a new motion to have the trial court enter an order appointing a Receiver. (Doc. 2). The motion was premised upon the prior grant of the abandoned motion filed in the first suit on June 16, 2017 which the Respondents had filed before the trial court in the first case, No. 1531-CC01018, prior to the time of jury trial in the first case (Doc. 5). On November 6, 2017, Appellants filed a motion to dismiss the second suit No. 1731-CC01311. (Doc. 17; App. 178). That same day, Respondents voluntarily dismissed Count II, seeking dissolution, and Count XIV, seeking an accounting which had remained undetermined and unaddressed by order or judgment in the first case No. 1531-CC01018 (App. 178). On November 6, 2017, the trial court in the second suit entered its order appointing receiver (Doc. 14). Three days later, on November 9, 2017, Appellants filed their Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing a Receiver (Doc. 15). On November 29, 2017, the trial court entered its Order denying Appellants' Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing a Receiver, from which this appeal is taken (Doc. 20).

Following a timely Notice of Appeal, the Missouri Court of Appeals - Southern District issued a show cause order inviting Appellants to file written suggestions showing cause why the appeal should not have been dismissed as an appeal that is not taken from a Rule 74.01 "Judgment" (App. 193). On March 8, 2018, the court of appeals issued its Order declaring it would take the issue of appealability of the trial court's November 29, 2017, order with the case when submitted for determination. The Southern District's Opinion, entered after complete briefing and oral argument, dismisses the appeal (App. 194). The opinion does not address the merits of the appeal.

This appeal now before the Missouri Supreme Court transferred by reason of the question of whether certain orders are appealable contains four points of appeal. The first asserts that the order from which Appellants take appeal is an appealable order. The second, third and fourth points address the merits of the order appealed, i.e. the order denying Appellants' motion to revoke or modify the order appointing a receiver, and request that the trial court's order appointing a receiver to preside over Maple Grove Farms, LLC be revoked. Pursuant to Rule 83.09, Appellants request this Court review and issue opinion on all four points, as if this were an original appeal.

POINTS RELIED ON

POINT I

THE SOUTHERN DISTRICT COURT OF APPEALS ERRED IN DISMISSING THE UNDERLYING APPEAL FOR LACK OF APPEALABILITY BECAUSE THE ORDER FROM WHICH APPEAL LIES IS AN APPEALABLE ORDER IN THAT THE APPEAL OF AN ORDER REFUSING TO REVOKE, MODIFY OR CHANGE AN INTERLOCUTORY ORDER APPOINTING A RECEIVER IS SPECIFICALLY AUTHORIZED BY MISSOURI STATUTE.

- *Sanford v. Centurytel of Missouri*, LLC, 490 S.W.3d 717 (Mo.banc 2016)
- *Erslon v. Cusumano,* 691 S.W.2d 310, 312 (Mo.App.1985).
- RSMo. §515.665
- RSMo. §512.020(2)

POINT II

THE TRIAL COURT ERRED IN DETERMINING IT HAD AUTHORITY TO TAKE ANY ACTION OTHER THAN DISMISSAL BECAUSE ALL OF THE CLAIMS ASSERTED IN THIS SUIT WERE PREVIOUSLY ASSERTED AND ABANDONED IN A PRIOR SUIT THAT PROCEEDED TO JUDGMENT IN THAT CLAIMS ASSERTED IN THIS SECOND LAWSUIT CONSTITUTE AN IMPERMISSIBLE SPLITTING OF A CAUSE OF ACTION.

- *Collins v. Burg*, 996 S.W.2d 512 (Mo. App. E.D. 1999)
- *Davis v. Realty Exchange, Inc.*, 488 S.W.2d 913 (Mo. 1973)
- *King General Contractors v. Reorganized Church*, 821 S.W.2d 495 (Mo. banc 1991)
- *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188 (Mo. App. S.D. 2000)

POINT III

THE TRIAL COURT ERRED IN DETERMINING THAT THE "LAW OF THE CASE" DOCTRINE APPLIED TO RESPONDENTS' MOTION FOR APPOINTMENT OF RECIEVER BASED SOLELY ON A PRIOR TRIAL

COURT'S PREVIOUS GRANT OF A DIFFERENT MOTION FOR APPOINTMENT OF RECEIVER BECAUSE THAT DETERMINATION IS A MISAPPLICATION OF "THE LAW OF THE CASE" DOCTRINE IN THAT THE PRIOR TRIAL COURT'S GRANTING OF MOTION FOR APPOINTMENT OF RECEIVER IN THE PRIOR (OR FIRST) CASE WAS NEVER APPEALED AND THEREFORE NO "LAW OF THE CASE" WAS EVER ESTABLISHED.

- *Camden County v. Lake of the Ozarks Council*, 282 S.W.3d 850 (Mo. App. S.D. 2009)
- *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999)
- *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141 (Mo. 2005)
- *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc. 2007)

POINT IV

THE TRIAL COURT ABUSED ITS NARROW DISCRETION BY ENTERING AN ORDER APPOINTING A RECEIVER OVER THE ASSETS OF MAPLE GROVE FARMS, LLC BECAUSE NO EVIDENCE WAS OFFERED BY RESPONDENTS AND THE APPOINTMENT OF A RECEIVER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS NO EVIDENCE OF WASTE AND, IN FACT, NO EVIDENCE TAKEN AT ALL.

- *Camden County v. Lake of the Ozarks Council*, 282 S.W.3d 850 (Mo. App. S.D. 2009)
- *Houston v. Crider*, 317 S.W.3d 178, 186-87 (Mo. App. S.D. 2010)
- *Jewish Center for Aged v. BSPM Trustees*, 295 S.W.3d 513 (Mo. App. E.D. 2009)
- *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141 (Mo. 2005)

ARGUMENT

POINT I

THE SOUTHERN DISTRICT COURT OF APPEALS ERRED IN DISMISSING THE UNDERLYING APPEAL FOR LACK OF APPEALABILITY BECAUSE THE ORDER FROM WHICH APPEAL LIES IS AN APPEALABLE ORDER IN THAT THE APPEAL OF AN ORDER REFUSING TO REVOKE, MODIFY OR CHANGE AN INTERLOCUTORY ORDER APPOINTING A RECEIVER IS SPECIFICALLY AUTHORIZED BY MISSOURI STATUTE.

Standard of Review

After a case has been decided by a Court of Appeals and subsequently transferred to the Supreme Court, Missouri Supreme Court Rule 83.09 specifies that the Supreme Court may review the case on transfer as though it is on original appeal. Rule 83.09. The Court of Appeals' opinion is of no precedential effect. *Carroll v. Loy-Lange Box Co.*, 829 S.W.2d 86, Mo. Ct. App. E.D. (1992).

Appellants assert in this point of error that the Southern District Court of Appeals has erred by dismissing an appeal of an order which is designated by Missouri statute as an appealable interlocutory order. In so doing, the appellate court misapplied the law.[1] The standard of review in this case is established by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Where, as in the instant point, the particular *Murphy* ground for error asserted is that the lower court has misapplied the law, the reviewing court must review *de novo*. *Smith v. Great American Assur. Co.*, 436 S.W.3d 700, 704 (Mo. App. S.D. 2014). This point of error was preserved for appellate review by the certification for transfer to the Supreme Court found in the dissent to the Southern District's opinion, as written by the Hon. Nancy Steffan Rahmeyer (App. 194).

[1] A read of the Southern District's opinion makes it reasonable to infer that the misapplication of law was committed reluctantly.

Argument

Appellants pursued this appeal of an order entered by the trial court in Case No. 1731-CC01311, which refused to revoke an interlocutory order appointing a receiver. This appeal is authorized by the authority of RSMo. §512.020(2) and RSMo. §515.665. RSMo. §512.020 states, in relevant part, that any aggrieved party may appeal from any:

> (1) Order granting a new trial;
> (2) *Order refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers,* or dissolving an injunction.

RSMo. §512.020 (emphasis added).

RSMo. §515.665 states, in its entirety:

> Orders of the court pursuant to §515.500 and §515.665 are appealable to the extent allowed under existing law, including subdivision (2) of §515.020.

Following Appellants' Notice of Appeal, the Southern District's subsequent Show Cause Order raised the issue of appealability of the order, because the order was not titled or denominated a "judgment" (App. 193). A "judgment" as long been defined by statute, RSMo. 511.020. Appellants' Response to the Southern District's Show Cause Order relies again upon the authority of the statutory right to appeal found in RSMo. §512.020(2), RSMo. §515.665 and also on *Sanford v. CenturyTel of Missouri, LLC*, 490 S.W.3d 717 (Mo. banc 2016) (App. 208). That response correctly asserts that the law contemplates the immediate appealability of certain orders. It is of no use, and does not comport with common sense, to require trial court judges to improperly and inaccurately label documents which are clearly orders as "judgments," in order to make those orders appealable. And yet, that is exactly what the Southern District has determined the law requires. That determination is based largely on an opinion which does not address or follow statutory law and is contradictory to other more recent opinions of the Supreme Court. *See: Spiece v. Garland,* 197 S.W.3d 594 (Mo. banc 2006).

The law on what type of trial court determination is immediately appealable has devolved into a non-sensical, non-linear mess of contradictory rules and dicta which are,

in many cases, entirely form-over-substance. The law clearly provides that a judgment is appealable. The question before this Court is: Are there certain orders that are appealable? In order to facilitate the answering of that question, some basic definition practice of three particular terms is required.

The Definitions

What is an "order"?

An "order" is a written direction or command delivered by a court or judge. Black's Law Dictionary, 9th Ed. There are hundreds of types of orders. The word "order" is used to describe any decision of the court, from something so seemingly inconsequential as granting a party an extension of time to something so impactful as appointing an officer of the court to take over and run a business. A "judgment" itself is one type of order. *State ex rel. Henderson v. Asel*, --- S.W.3d---, 2019 WL 581179 (Mo. banc 2019).[2]

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[2] According to some authority, but not all. Presumably, the reader can predict where this definitions discussion is going, and so out of general interest, take note that the conflict regarding what is an "order" and what is a "judgment" dates all the way back to 1902 (and probably farther). See the two conflicting authorities, cited in Black's Law Dictionary (9th Edition) under the definition of "Order":

> "An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, *not disposing of the merits*, but adjudicating a preliminary point or directing some step in the proceedings." 1 Henry Campbell Black, *A Treatise on the Law of Judgments* § 1, at 5 (2d ed. 1902) (emphasis added).

> "While *an order may under some circumstances amount to a judgment*, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of enforcement and appeal but in other respects, as for instance, the time within which proceedings to annul them must be taken. Rulings on motions are ordinarily orders rather than judgments. The class of judgments and decrees formerly called interlocutory is included in the definition given in [modern codes] of the word 'order'". 1 A.C. Freeman, *A Treatise of the Law of Judgments* §19, at 28 (Edward W. Tuttle ed., 5th ed. 1925) (emphasis added).

As this Court is very well aware, the definitions confusion of these terms is not a new problem.

There are certain types of orders that do not conclusively dispose of all issues in a judicial unit, but which do immediately dispossess a party of its rights or property, and as such, are appropriate to appeal immediately. Regardless, so long as the decision in question does not dispose of every issue in a judicial unit, it is still an order.

What is a "judicial unit"?

A "judicial unit" is defined by this Court in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997), as "'differing', 'separate', 'distinct' transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim." *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997) (internal citations omitted). Per *Gibson*, a judicial unit may be all of the claims against one of several defendants, but not all defendants. *Id.* In that circumstance, where the lawsuit remains pending as to some defendants, a judgment must include an "express determination" by the trial court that "there is no just reason for delay". Rule 74.01(b). *Id.* (internal citations omitted).

What is a "judgment"?

Finally, it is important to know the definition of "judgment" currently used by our reviewing courts in Missouri. The definition is unclear, in no small part because Rule 74.01 and subsequent case authority requires that trial courts routinely be required to title decisions that are appealable orders as "judgments" in order for litigants to be able to successfully exercise appeal rights. This Court entered an opinion merely 9 days ago, on February 13, 2019, which provides a clear definition of "judgment", and therefore is appropriate for quoting at some length:[3]

> "There is persistent confusion surrounding the issues of what a judgment is, what form it takes, and when it is entered. The first, and most important, of

[3] The *Henderson* opinion has not been released for publication in the permanent law reports. Until released, Appellants understand that it is subject to revision or withdrawal. Even assuming *arguendo* that the *Henderson* is modified or withdrawn later, the definition it puts forth is sufficiently supported by other Supreme Court opinions (namely, by *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 401 (Mo. banc 2016), such that it is still appropriate for Appellants to quote here.

> these issues is definitional: a judgment is a legally enforceable judicial order that fully resolves at least one claim in a lawsuit and establishes all the rights and liabilities of the parties with respect to that claim. Rule 74.01. If a judgment resolves all claims by and against all parties, or it resolves the last such claim and some (but not all) claims have been resolved previously, it is commonly referred to as a "final judgment'. *State ex rel. Koster v. ConocoPhillips Co.,* 493 S.W.3d 397, 401 (Mo. banc 2016).
>
> Judgments are a subset of orders generally. Rule 74.02. As a result, a judgment must be in writing. Rule 74.01(a). In addition, because the foregoing definition of judgment depends upon the court's purpose and intent, a judgment must be denominated "judgment" and signed by the judge to avoid any confusion about whether the court intended to enter a judgment. *Id.* Finally, because numerous timetables are or may be triggered by the entry of a judgment, *see, e.g.,* Rules 71.05, 72.01(b), and 78.04, a judgment is "entered" when the writing denominated a judgment is signed by the judge and filed. Rule 74.01(a)."

State ex rel. Henderson v. Asel, --- S.W.3d---, 2019 WL 581179 (Mo. banc 2019).

Missouri's codification of the Uniform Enforcement of Foreign Judgments Act is also helpful to trial judges in identifying exactly what makes up (and how to write) a judgment. RSMo. §511.020 defines judgment as "the final determination of the right of the parties in the action." RSMo. §511.020.

RSMo. §511.130 states:

> "Where there are several defendants in a suit, and some of them appear and plead and others make default, an interlocutory judgment of default may be entered against such as make default, and the cause may proceed against the others; *but only one final judgment shall be given in the action."*RSMo. §511.130 (emphasis added).

The *Henderson* opinion provides some much-needed guidance as to the definition of a "judgment",[4] but does not reach or address the question before the Court in this case,

[4] This author is thankful for the clear and concise definition of "judgment" but respectfully submits to this Court that the *Henderson* opinion will not resolve all confusion regarding the question of what sort of "judgment" is appealable, because the opinion seems to differentiate between a "judgment" and a "final judgment;" a "judgment" being "a judicial order which fully resolves at least one claim in a lawsuit" and a "final judgment" being a judicial order which fully resolves the **last** remaining claim in the lawsuit. *State ex rel.*

which is: Are there certain orders that are appealable? Of course, the Legislature answered this question long ago with a resounding "yes." There are numerous statutes (in addition to the two relied on for this appeal) in the State of Missouri which very clearly grant an immediate right of appeal of an order. *See* RSMo. §512.020; RSMo. §435.440; RSMo. §472.160; Rules 29.15(k); Rule 24.035(k). The quagmire that exists here is that Rule 74.01 and several accompanying opinions of reviewing courts of this state seem to indicate that the **only** type of decision which can ever be appealable is a "judgment". That is not correct.

Henderson v. Asel, ---S.W.3d---, *2, 2019 WL 581179 (Mo. banc 2019). The persisting problem that will arise is that the term "final judgment" was already previously defined elsewhere: in Rule 81.05. Rule 81.05 makes very clear that the only appealable "judgment" is a "final judgment" and specifies the ways in which a "judgment" becomes a "final judgment" that is ripe for appeal. Rule 81.05's definition of "final judgment" is at odds with the definition of "final judgment" as put forth by this Court in the recent *Henderson* opinion and so this author suspects that Supreme Court has not seen the last of the definitional confusion regarding that issue.

See: "Generally, a final judgment is a prerequisite to appellate review." *Sanford v. CenturyTel of Missouri, LLC*, 490 S.W.3d 717, 719 (Mo. banc 2016). "If the trial court's judgments are not final, the Supreme Court lacks jurisdiction and the appeal must be dismissed." *Id.* at 719 *(internal citations omitted).*
See also Rule 81.04(a): "Filing the Notice of Appeal. If an appeal is permitted by law from a trial court, a party may appeal from a judgment, decree or order by filing with the clerk of the trial court a notice of appeal. No such appeal shall be effective unless the notice of appeal shall be filed not later than ten days *after the judgment*, decree or order appealed from *becomes final*." Rule 81.04(a) (emphasis added).
See also RSMo. §511.775, which is part of Missouri's codified version of the Uniform Enforcement of Foreign Judgments Act, and says in relevant part that the statues encompassing the Act "apply to any foreign country judgment that is *final and conclusive and enforceable* where rendered even though an appeal therefrom is pending or it is subject to appeal." RSMo. §511.775 (emphasis added).

Is there difference between a "final judgment" as defined in *Henderson* to mean "the last judgment" and a "final judgment" as defined by Rules 81.04 and 81.05 to mean "a judgment which has undergone the process of becoming final for appeal"? This conflict is touched on very briefly in Footnote 2 of the *Henderson* opinion. *Henderson* at *3. The old phrase 'Say what you mean. Mean what you say.' comes to mind. Luckily, while tangential, that particular problem is not the same as the one before the Court in this matter.

The more appropriate rule is: Judgments are appealable. Some (but not all) orders are appealable.

Armed with the correct definitions, reviewing courts must now determine what sort of trial court decision is appealable. The Legislature of this state has long since held that there are certain types of interlocutory orders that are appealable. However, case law seems to indicate to reviewing courts that the only type of decision that is ever appealable is a "judgment." In an apparent attempt to resolve the conflict between the Legislature's statutory law which tells us that certain orders are appealable and the Supreme Court's decisions which tell us that only judgments are appealable, various reviewing courts including the Missouri Supreme Court have implied that labelling an appealable order a "judgment" will solve the problem: now the order is a judgment! This rule is so non-sensical and form-over-substance that it is not a stretch to use the following analogy: if what you need is a chair, and all you have is a table, just call the table a chair and now you can sit upon it! It's a chair!

As a result of this approach, over many years and many decisions, we have lost our way. Particularly, we have lost sight of the truth in law that there are some types of orders which need to be, and may be, appealed immediately. They are orders, not judgments. They are interlocutory, and subject to the trial court's revision. They are immediately appealable anyway. We have a nomenclature problem of our own making. It needs to be fixed.

Keeping in mind the question before this Court which is, "Are there certain orders that are appealable?", a review of the conflicting authorities on this issue is appropriate.

The Existing Authority

From *Spiece v. Garland*, 197 S.W.3d 594, 595-596 (Mo. banc 2006):

The substantive right to appeal is governed by §512.020. It states in relevant part that aggrieved parties may appeal:

> 'from any order granting a new trial, or order refusing to revoke, modify or change an interlocutory order… or dissolving an injunction… or from any final judgment in the case or from any special order after final judgment in the cause…' *Id.*

> The statute, however, must be read in conjunction with Rule 74.01(a), which states:
>
> *'Judgment'* as used in these rules *includes* a decree and *any order from which an appeal lies.* A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated 'judgment' or 'decree' is filed.'
>
> *Id.* (emphasis added).
>
> The effect of the rule, as it applies to this case, is that there can be no order from which an appeal lies unless the decree or order is entered and denominated a 'judgment.' In other words, the order must be perfected in this way under Rule 74.01(a) before it can constitute an order from which an appeal lies under §512.020. There is no conflict between the statute and the rule. §512.020 merely lists the kinds of orders that, in addition to final judgments, are appealable; it does not purport to address the procedural requirements for appeal."

Spiece v. Garland, 197 S.W.3d 594, 595-596 (Mo. banc 2006).

Ten years later, in *Sanford v. CenturyTel of Missouri, LLC,* 490 S.W.3d 717 (Mo. banc, 2016), this Court employed a different analysis when discussing the appealability of an interlocutory[5] order and determined that where a Missouri statute specified that an

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[5] The word "interlocutory" is used in this brief from time to time for clarity's sake, as the author tiptoes through a definitional landmine. To be clear, if the solution proposed by Appellants is adopted, the word "interlocutory" becomes un-necessary. An "order" is subject to trial court revision (it is always interlocutory), unless the order is under the authority of another court (presumably for appeal purposes). A "judgment" is not subject to trial court revision, after 30 days or denial of a motion to amend, whichever comes sooner. Discussion about the superfluous-ness of the word "interlocutory" has been had before:

> "*Rulings on motions are ordinarily orders* rather than judgments. The class of judgments and of decrees formerly called interlocutory is included in the definition given in [modern codes] of the word "order". 1 A.C. Freeman, *A Treatise of the Law of Judgments*, §19, at 28. (Edward W. Tuttle ed., 5th Ed. 1925) (emphasis added).

And more recently:

> "[T]he interlocutory order does not become a judgment just because a statute makes it subject to interlocutory appeal." *Sanford v. CenturyTel of Missouri, LLC,* 490 S.W.3d 717, 721 (Mo. banc 2016).

interlocutory order was immediately appealable, the order could be appealed without being re-titled "judgment." *Id.* at 718. The *Sanford* opinion specifically acknowledges that interlocutory orders are not "final" and do not need to be, if a statute authorizes its immediate appeal. *Id.* at 719. The opinion further specifies that engaging in the process of transforming an appealable interlocutory order into a final judgment simply to authorize the appeal that is already authorized by statute would be "meaningless." *Id.* at 720. The opinion even resolves confusion over whether the trial court can continue to revise or amend an interlocutory order on appeal:

> "Of course, once a notice of appeal is filed on the order [which is interlocutory and appealable by statutory authorization], the trial court's jurisdiction to modify *that order*- for the time being- is relinquished to the appellate court." *Id.* at 721.

In other words: there are some orders that are appealable. They can be interlocutory in nature, and still be appealable. They do not need to be, and should not be, denominated as a "judgment" to be appealable. Once the order is entered, a notice of appeal should be filed within ten days. Once a notice of appeal is filed, the trial court's authority to modify that order is superseded by the appellate court's pending review of that order, unless or until the appellate court returns authority over the order in question to the trial court. As proposed in simple statement form on page 24 of this brief: Judgments are appealable. Some (but not all) orders are appealable.

The *Sanford* analysis makes sense. It does not require the arbitrary and confusing re-labeling of "orders" as "judgments" just to allow litigants to exercise their statutory right to appeal. Unfortunately, the *Sanford* case does not specifically over-rule *Spiece,* and so thirteen years after the *Spiece* opinion was issued and three years after issuance of *Sanford*, the Southern District Court of Appeals apparently felt obligated to follow the controlling precedent set forth in *Spiece* and dismiss an appeal that is authorized by statute. Once again, the key question before this Court is: Are there certain orders that are appealable? The answer is yes. Does a trial court have to write the word "judgment" on top of that kind of

appealable order before a party can appeal? The answer should be no. In devising a rule for future cases, a footnote found in the concurrence authored by Hon. Don E. Burrell in the Southern District opinion in this case may be of some value:

> "If I were master, all interlocutory orders appealable by statute would remain denominated as orders, and a notice of appeal filed within 10 days of their entry would subject them to an interlocutory appeal. Judgments disposing of all issues in the case would be denominated as judgments, and after remaining subject to modification by the trial court for 30 days, they would then be appealable by a notice of appeal filed not more than 10 days after the judgment becomes final. See Rule 81.05(a)."
> (App. 202)

Appellants agree with this proposed rule, with only one proposed modification. As discussed more fully in the "Definitions" section of this argument found on page 20 of this brief, a judgment does not necessarily have to dispose of all issues in a case, but should always dispose of all issues in at least one judicial unit. Therefore, Appellants would urge that the language found in Hon. Don E. Burrell's proposed rule which states "Judgments disposing of all issues in the case would be denominated as judgments" be modified to instead say "Judgments disposing of all issues in a judicial unit would be denominated as judgments".

With that modification, Appellants urge that this proposed rule be adopted by the Supreme Court, to the exclusion of and over-ruling any previous opinion to the contrary. In addition, Appellants urge that this Supreme Court remind reviewing courts that, confusion aside, in all scenarios: "It is the content, substance, and effect of the order that determines finality and appealabilty." *Erslon v. Cusumano*, 691 S.W.2d 310, 312 (Mo.App.1985). *See* also: *Ndegwa v. KSSO, LLC*, 371 S.W.3d 798 (Mo. 2012): "The Circuit Court's denomination is not dispositive; instead, 'it is the content, substance, and effect of the order that determines finality and appealability [sic]. The Circuit Court's designation is only effective 'when the order disposes of a distinct judicial unit.' *Id.; Shell v. Shell*, 605 S.W.2d 185 (App. W.D. 1980): "A trial court's designation of a partial judgment as final and appealable is not conclusive; whether a judgment is final and appealable is not determined by the name applied but by what is actually accomplished

according to the content, the substance and effect of the order entered. A judgment which resolves fewer than all legal issues as to any single claim for relief is not final notwithstanding the trial judge's designation as such."; *Blechle v. Goodyear Tire & Rubber Co.*, 28 S.W.3d 484 (App. S.D. 1996). In these cases, and countless others not cited herein, the court applies an analysis of substance and content over form. In other words, when a future case arises that does not seem to fit the rule exactly: engage in substance-over-form analysis.

The Question Before This Court: Are Certain Orders Appealable?

The November 29, 2017 order denying appellants' "Motion For Order Revoking, Modifying Or Changing Order Appointing Receiver" is interlocutory in nature and falls within the exception to the general rule disallowing interlocutory appeals. It is not a "judgment." It is subject to future modification by the trial court and provides no finality as to parties or issues. The appeal of such an order is specifically authorized by RSMo. §512.020(2) and RSMo. §515.665. Both statutes properly use the term "order" and not "judgment." The trial court chose to denominate the November 29, 2017 ruling as "Order," presumably because it is an order and not a judgment. To denominate an order as "judgment" is nonsensical. What is clear is that the trial court intended for this to be an appealable order as it took the time to draft a separate document, signed it and filed it.

Sanford v. Centurytel of Missouri, LLC, 490 S.W.3d 717 (Mo.banc 2016), cited by the Court of Appeals in its Show Cause Order, makes it clear that an "interlocutory order does not become a judgment just because a statute makes it subject to interlocutory appeal." *Id.* at 721. It simply is not a judgment, i.e. not a written recitation disposing of an entire judicial unit. *Id.* at 718. Interlocutory orders "are not a final determination of the rights of the parties and, therefore, are not judgments." *Id.* at 722. The same analysis of substance-over-form should be applied in this case with respect to statutory rights to appeal interlocutory orders under §512.020(2), RSMo.

The *Sanford* court has clearly authorized such a substance-over-form analysis. It has also specifically acknowledged that appealable interlocutory orders exist. *See* RSMo. §435.440 (arbitration orders), RSMo. §472.160 (probate orders), Rules 29.15(k) and

24.035(k) (post-conviction relief orders). *See* also other types of orders deemed appealable by statute: RSMo. §512.020(1) (orders granting a new trial), RSMo. §512.020(2) (orders refusing to revoke or modify a receivership), RSMo. §512.020(3) (class action certification orders), and RSMo. §512.020(4) (partition orders). The *Sanford* court held that such interlocutory orders are not judgments, but are appealable nonetheless. This case is analogous, as RSMo. §512.020(2) grants a right to appeal of an *order*.

Conversely, there are many examples of cases where a document has been properly denominated as a "judgment" but an appellate court determined there was no judgment, and therefore no right to appeal. The Missouri Supreme Court has held in excess of twenty years that a document, although denominated as a "judgment", does not necessarily afford any appeal rights. *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo. 1994); see also *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (holding at page 244 that an appealable judgment resolves all issues in a case, leaving nothing for future determination and that a trial court's designation of an order as a judgment is not conclusive.). Numerous appellate court decisions have followed this ruling and refused to review "judgments" signed by a circuit court, determining the rulings were non-appealable. See for example *Miller v. Sams*, 504 S.W.3d 885 (MoApp. W.D. 2016); *Boomerang Transportation, Inc. v. Miracle Recreation Equipment Co.* 360 S.W.3d 314 (MoApp. S.D. 2012); and *First Community Credit Union v. Levison* 395 S.W.3d 571 (MoApp. E.D. 2013). Clearly, labeling a document as a "judgment" is, under some circumstances, not controlling regarding its appealability. Therefore, insisting that a document be labeled as a "judgment" before appeal is undertaken is elevating form over substantive rights provided in statutes.

The current position of the Southern District Court of Appeals requires that the order denying the motion to revoke the appointment of a receiver, from which an appeal is provided as a matter of right under §512.020(2) RSMo., must be saddled with a clearly erroneous and inapplicable label in order to be able to achieve the appeal rights guaranteed by statute. That is, it seems the Court of Appeals wants a false label on a document before an appeal will be considered, and then, only sometimes. Once again, Appellants urge a

much simpler common-sense approach: Judgments are appealable. Some orders are appealable.

In this case, it is clear that there is a specific statutory right to appeal an order refusing to revoke, modify, or change an interlocutory order appointing a receiver under §512.020(2), RSMo. The order appointing receiver was entered on November 6, 2017 (Doc. 14). On November 9, 2017, appellants filed their Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing Receiver (Doc. 15). The trial court denied appellants' motion in its order of November 29, 2017 (Doc. 20). Appellants timely filed their Notice of Appeal on December 5, 2017. (Doc. 21).

It is also clear that the trial court in this case anticipated and intended that an appeal from the order be taken in that it created a separate document, signed it and caused same to be filed rather than making a simple docket entry. Appellants should not now be foreclosed from seeking their statutory right to appellate review by the Appellate Courts by reason of technicalities of nomenclature. Parties with rights of appeal from orders provided by statute should not be precluded from appeal based on an appellate-court-created rule calling for a false labeling.

There are certain types of orders that are appealable. The authority to appeal those orders is created by statute. The orders are interlocutory in nature. The orders are not judgments. They do not need to be titled "judgment" in order to be perfected for an appeal. They are appealable by law, labelled simply as what they are: orders. It is respectfully submitted that this Court should, in its consideration of this matter, accept Appellants' appeal of an order refusing to revoke an order appointing a receiver as appropriate pursuant to RSMo. §512.020(2).

POINT II

THE TRIAL COURT ERRED IN DETERMINING IT HAD AUTHORITY TO TAKE ANY ACTION OTHER THAN DISMISSAL BECAUSE ALL OF THE CLAIMS ASSERTED IN THIS SUIT WERE PREVIOUSLY ASSERTED AND ABANDONED IN A PRIOR SUIT THAT PROCEEDED TO JUDGMENT IN THAT

CLAIMS ASSERTED IN THIS SECOND LAWSUIT CONSTITUTE AN IMPERMISSIBLE SPLITTING OF A CAUSE OF ACTION.

Standard of Review

Mo. Sup. Ct. Rule 84.13(d) states that where appellate review is sought in cases tried without a jury, the appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. Mo. Sup. Ct. Rule 84.13(d)(1). The standard of review in this case is established by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) and by *Smith v. Great American Assur. Co*., 436 S.W.3d 700 (Mo. App. S.D. 2014). The Court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, supra. Where, as in the instant point, the particular *Murphy* ground for error asserted is that the Court has misapplied the law, the appellate court must review de novo. *Smith v. Great American Assur. Co*., 436 S.W.3d 700, 704 (Mo. App. S.D. 2014). This error was preserved for appellate review by Appellants in their Motion To Dismiss filed November 6, 2017 and Appellants' Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing a Receiver, filed on November 9, 2017 (Doc. 17; Doc. 15).

Argument

Respondents in this case have brought claims for accounting, dissolution, and receivership (App. 16). Each of these three claims were previously asserted in the first lawsuit (App. 33, Count II and Count XIV; App. 146; and Doc. 2). The first lawsuit proceeded to a jury trial. The jury returned verdicts. The trial court entered judgment on those verdicts. It was only after all of those actions had already taken place that Respondents raised the issue of pursuing the claims for accounting, dissolution, and receivership. At that point, Respondents had already abandoned those claims, by not reserving them or submitting them to the jury. However, Respondents succeeded in convincing the trial court to address these three claims in an amended judgment. Respondents then brought these three claims a second time, in the instant case. This constitutes an impermissible splitting of a cause of action.

The First Case

The paragraph within the Amended Judgment of September 28, 2017 from the first case, No. 1531-CC01018, which purports to document the reservation of the claims for dissolution and accounting is incorrect and improper (*See* App. 129, first full paragraph). The docket sheet of the first case reflects that no motion for severance of any claim was filed until after the jury trial and no order was ever entered granting a motion for severance until after the case was concluded by trial before a jury. As such, any pending claim which was not submitted for final resolution at some point prior must be deemed abandoned. This includes any remedies sought by motion, such as a motion for appointment of Receiver. The Missouri Supreme Court has stated this before:

> "We note that defendants did not at any time move that the trial court order separate trials.
> . . . .
> Had defendant desired that the Court sever their claims and order separate trials of the three Counts they should so have moved the Court before the trial began."

Davis v. Realty Exchange, Inc., 488 S.W.2d 913, 914-915 (Mo. 1973).

See also *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188 (Mo. App. S.D. 2000) in which the Court stated:

> "Where separate trials are not ordered in cases with multiple claims and parties, there should be one final judgment that disposes of all parties and all issues. *M.F.A. Central v. Harrill*, 405 S.W.2d 525, 530 (Mo. App. 1966)."

The Second Case

Respondents filed a new petition, instituting a second lawsuit, bringing only claims that were previously asserted in the first lawsuit. In the petition in this case, No. 1731-CC01311, Respondents have alleged the first suit proceeded to a trial by jury on August 14, 2017 (App. 20, ¶16). Respondents also allege that the only claims remaining before the trial court in the first suit were claims for accounting and dissolution of Maple Grove Farms, LLC (App. 20, ¶18). Respondents assert that those claims were dismissed without prejudice in the first suit, and reference Exhibit 1 of the petition in this second suit as

evidence of that assertion (App. 23). Then, in Count I of the petition in the suit underlying this appeal, Respondents assert a renewed claim for dissolution, even though Respondents previously dismissed that claim in the first suit that went to trial before a jury (App. 20).

Respondents also assert a claim for accounting (see Count II of the petition in the underlying suit), which was previously brought in the first suit (App. 21). Finally, Respondents asserted a new claim for appointment of Receiver by motion in the second suit (Doc. 2). Nearly two years (and one two-week jury trial) have passed since the first trial court granted the motion for appointment of Receiver in the first case, but no receivership was ever pursued by Respondents pursuant to that order. That first case progressed on: a trial was had, verdicts rendered and a judgment entered. That motion and order should have been determined to be abandoned by the second trial court.

Respondents' petition and new Motion for Appointment of Receiver filed in the second lawsuit raise no issues which were not previously brought in the first lawsuit, making clear that the rule against splitting a cause of action should be applied here. Appellants raised this issue before the trial court in Appellants' Motion To Dismiss, filed November 6, 2017. (Doc. 17; App. 178). Pursuant to the rule against splitting a cause of action, the second lawsuit should be dismissed entirely.

Rule Against Splitting a Cause of Action

The Respondents to this appeal are Plaintiffs in this underlying action, and are Plaintiffs in the first lawsuit as well. Appellants are Defendants in the underlying action and were all Defendants in the first suit. The claims asserted in this case were previously asserted in the first suit. No order was ever entered prior to jury verdict in the first suit which severs or dismisses the claims for dissolution, accounting, or for receivership. Those same claims for dissolution, accounting and receivership were then asserted in this second subsequent suit. The second suit must be dismissed as it violates the rule against splitting a cause of action.

The Missouri Supreme Court in *King General Contractors v. Reorganized Church*, 821 S.W.2d 495 (Mo. banc 1991) discussed the rule against splitting a cause of action. The rule is closely related to the doctrine of res judicata. In *King*, this Court held that a party

may not litigate an issue and then, upon an adverse verdict, revive the claim on cumulative grounds which could have been brought before the court in the first proceeding. *King General Contractors v. Reorganized Church*, 821 S.W.2d 495 (Mo. banc 1991). The *King* court went on to hold that separate legal theories are not to be considered as separate claims, even if 'the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief. [citation omitted] Citing *Burke v. Doerflinger*, 663 S.W.2d 405 (Mo. App. E.D. 1983), the *King* court held that the doctrine takes on the character of the rule against splitting a cause of action and that res judicata and splitting a cause of action are closely related because both are designed to prevent a multiplicity of lawsuits. *King*, supra.

The impermissible splitting of a cause of action is a bar to a second suit. *Burke v. Doerflinger*, 663 S.W.2d 405 (Mo. App. E.D. 1983). The *Burke* court set out the test for determining whether a cause of action is single and cannot be split: First (1), whether separate actions brought arise out of the same act, contract or transaction; and second (2), whether the parties, subject matter, and evidence necessary to sustain the claim are the same in both actions. *Burke* at 407. The *Burke* court also held that the word "transaction" has a broad meaning and has been defined as the "aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose. [citations omitted]." *Burke* at 407.

The Restatement (Second) of Judgments § 24 (1982) articulates the principle in this manner:

> Sec. 24. Dimensions of "Claim" for Purposes of Merger or Bar – General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transactions, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'"

Missouri appellate courts have consistently followed the rule put forth in *King General Contractors*. For example, see *Collins v. Burg*, 996 S.W.2d 512 (Mo. App. E.D. 1999), in which the court stated, at page 515 of its opinion, the following:

> "A cause of action which is single may not be split by a plaintiff and filed or tried piecemeal. *Eugene Alper Construction Co., Inc. v. Joe Garavelli's of West Port, Inc.*, 655 S.W.2d 132, 135 (Mo. App. E.D. 1983). The penalty for violating this rule is that an adjudication on the first suit is a bar to the second suit. *Id.*; *Burke v. Doerflinger*, 663 S.W.2d 405, 407 (Mo. App. E.D. 1983). Though not one and the same, the rule against splitting a cause of action is closely related to the doctrine of res judicata; both are designed to prevent a multiplicity of lawsuits."

In addition, the Court of Appeals' opinion in *Collins* went on to construe the terms "transaction" or "occurrence" broadly, consistent with prior interpretations.

The Missouri appellate courts have continued to give the word "transaction" or "cause of action" a broad and expansive meaning when applying the rule against splitting causes of action. See for example *HFC Investments v. Valley View State Bank*, 361 S.W.3d 450 (Mo. App. W.D. 2012) in which the court restated the general rule that the word "transaction" has a broad meaning and includes all the facts and circumstances out of which an injury arose. Further, when a party is seeking to improperly split a cause of action, or not, depends on the ultimate facts, and not the evidentiary details. *Id.*

In the case of *Chesterfield Village v. City of Chesterfield*, 64 S.W.3d 315 (Mo. banc 2002), the Missouri Supreme Court determined that the concept of res judicata and its related principles, including the rule against splitting a cause of action, apply not only to losers in prior litigation, but also to parties that prevail in a prior suit. See *Chesterfield Village* at page 318. The terms "transaction", "occurrence" or "cause for action" were

continued to be given broad interpretation, relying upon Restatement (Second) of Judgments, § 24, and include all remedies against a defendant with respect to all or any part of a transaction, or series of connected transactions, out of which the action arose. See *Chesterfield Village* at page 319.

More recently, in *Adamson v. Innovative Real Estate, Inc.*, 284 S.W.3d 721 (Mo. App. S.D. 2009), the Court of Appeals held that the rule against splitting a cause of action also applied to what amounted to a counterclaim in the prior suit, barring the counterclaim's assertion in a subsequent proceeding. *Old Republic National Title Insurance Company v. Cox* reiterated the above authority, including re-affirming the *Chesterfield* standard: "[t]o determine whether [a party] asserts the same claims in both cases, a court looks to the factual bases for the claims, not the legal theories." *Old Republic National Title Insurance Company v. Cox*, 453 S.W.3d 780 (Mo. App. W.D. 2014).

The face of Respondents' Petition and Respondents' new "Motion for Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" establish the undisputed facts that there was a prior action instituted, which included claims for the dissolution of Maple Grove Farms, LLC, for an accounting and for receivership. Those claims were not prosecuted to judgment. They are now barred from being brought in a second suit by the rule against splitting a cause of action, in that Respondents have proceeded to judgment in the prior suit without obtaining resolution of those claims previously asserted. The claims are barred and should have been dismissed by the underlying trial court.

It is respectfully submitted that the foregoing authorities, in view of the face of Respondents' Petition and subsequent "Motion for Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" establish that Respondents have impermissibly split a cause of action. As such, the only authority that this underlying trial court had to exercise was the authority to dismiss the case. The claims asserted within the second pending suit must be dismissed for failure to state a claim upon which relief can be granted.

POINT III

THE TRIAL COURT ERRED IN DETERMINING THAT THE "LAW OF THE CASE" DOCTRINE APPLIED TO RESPONDENTS' MOTION FOR APPOINTMENT OF RECIEVER BASED SOLELY ON A PRIOR TRIAL COURT'S PREVIOUS GRANT OF A DIFFERENT MOTION FOR APPOINTMENT OF RECEIVER BECAUSE THAT DETERMINATION IS A MISAPPLICATION OF "THE LAW OF THE CASE" DOCTRINE IN THAT THE PRIOR TRIAL COURT'S GRANTING OF MOTION FOR APPOINTMENT OF RECEIVER IN THE PRIOR (OR FIRST) CASE WAS NEVER APPEALED AND THEREFORE NO "LAW OF THE CASE" WAS EVER ESTABLISHED.

Standard of Review

Mo. Sup. Ct. Rule 84.13(d) states that where appellate review is sought in cases tried without a jury, the appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. Mo. Sup. Ct. Rule 84.13(d)(1). The standard of review in this case is established by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) and by *Smith v. Great American Assur. Co.*, 436 S.W.3d 700 (Mo. App. S.D. 2014). The Court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, supra. Where, as in the instant point, the particular *Murphy* ground for error asserted is that the Court has misapplied the law, the appellate court must review de novo. *Smith v. Great American Assur. Co.*, 436 S.W.3d 700, 704 (Mo. App. S.D. 2014). This error was preserved for appellate review by Appellants in their Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing a Receiver, filed on November 9, 2017 (Doc. 15).

Argument

Following Respondents' motion for appointment of receiver filed in this suit, the trial court conducted a hearing on the motion on November 6, 2017. During that hearing, the trial court refers to the findings and judgment from the prior case No. 1531-CC01018 as "the law of the case" (See: November 6, 2017 T.R. 40-41, line 16) when justifying the

court's decision to grant Respondents' motion for appointment of receiver. The trial court in this action apparently felt obligated to appoint a Receiver solely on the basis that the trial court in the prior case entered an order granting Respondents' motion for a receiver (though, due to Respondents' lack of pursuit of the matter in that first case, no Receiver was ever actually appointed). Even by Respondents' own admission during hearing before the trial court in the second case, the application of the law of the case doctrine to justify entering an order appointing a receiver in this suit was improper (November 22, 2017 T.R. at p. 17, lines 17-20).

Missouri courts have held:

> The power to appoint a receiver is a delicate one which is reluctantly exercised by the courts; absent threatened destruction or dissipation of the property, or where there is no good cause to believe that benefit would result from the appointment of a receiver, then the court should decline to make such an appointment.

Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd., 280 SW.3d 737 (Mo. App. W.D. 2009). In spite of precedent which indicates that a trial court should only reluctantly order a receivership after (1) a finding of threatened destruction or dissipation of property and (2) a finding that good cause exists to believe that benefit would result from the appointment of a receiver, and in spite of the failure of Respondents to satisfy the elements required under RSMo. §515.510, this trial court entered an order appointing a receiver. That order appointing a receiver was made with an inappropriate reliance on the mere averments of Respondents' counsel about the supposed findings of another trial court judge. Even if the averments of counsel about the supposed findings of the trial court judge in the first case were entirely correct, it was still inappropriate to find that the first trial court's decisions were sufficient basis for reliance while the first case remains hotly disputed and pending appeal. The trial court's application of the "law of the case" doctrine was inappropriate and incorrect.

"Law of the Case" Doctrine

In *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc. 2007), this Court discussed *res judicata* and the doctrine of "law of the case." The two doctrines are similar, but the latter involves re-litigation of an issue within the same pending case.

> The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes re-litigation of the issue on remand and subsequent appeal. *State v. Graham*, 13 S.W.3d 290, 293 (Mo. banc 2000); *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999). The doctrine governs successive adjudications involving the same issues and facts. *Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999).

In other words, there must necessarily be a decision or opinion from an appellate court that becomes the "law of the case". There has been no decision from an appeal in either the first or second lawsuits at issue here. Judgment or commentary from the trial court in the prior case (No. 1531-CC01018) do not constitute the law of the case.

The "law of the case" doctrine is not applicable to this case. The statements of Respondents' counsel, none of which constitute evidence or impart any confidence that the trial court balanced the harm as required by *Sangamon*, do not justify imposition of the law of the case doctrine, particularly where the doctrine is inapplicable anyway, because there has not been any appellate ruling on either the first or second case. Further, in this case, where no evidence was presented, it should have been clear that an expensive receivership was not likely to affect any benefit, because no right to receivership or even a claim of injury was ever substantiated in evidence presented in this suit.

The trial court has engaged in no independent evidence review or balancing test to determine whether a receivership may do more harm than good. Instead, the trial court's statements during hearing indicate that the trial court relied solely on another trial court's ruling in the prior case, and in so doing, misapplied the doctrine of "law of the case".

It is respectfully submitted that the receivership order should be immediately set aside, rescinded, and revoked. At the time this appeal was submitted to the Southern District, Appellants' request was that the receivership order be set aside in order to prevent the eventuality that more waste and harm would occur to Maple Grove Farms, LLC by

virtue of the continuation of the receivership. As of now, with this appeal being submitted to the Missouri Supreme Court that harm and waste has occurred.

POINT IV

THE TRIAL COURT ABUSED ITS NARROW DISCRETION BY ENTERING AN ORDER APPOINTING A RECEIVER OVER THE ASSETS OF MAPLE GROVE FARMS, LLC BECAUSE NO EVIDENCE WAS OFFERED BY RESPONDENTS AND THE APPOINTMENT OF A RECEIVER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THAT THERE WAS NO EVIDENCE OF WASTE AND, IN FACT, NO EVIDENCE TAKEN AT ALL.

Standard of Review

Mo. Sup. Ct. Rule 84.13(d) states that where appellate review is sought in cases tried without a jury, the appellate court shall review the case upon both the law and the evidence as in suits of an equitable nature. Mo. Sup. Ct. Rule 84.13(d)(1). The standard of review in this case is established by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) and by *Smith v. Great American Assur. Co*., 436 S.W.3d 700 (Mo. App. S.D. 2014). The Court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, supra. Where, as in the instant point, the particular *Murphy* ground for error asserted is a not-supported-by-substantial-evidence challenge, there is a three-part analytical process required by *Houston v. Crider*, 317 S.W.3d 178, 186-87 (Mo. App. S.D. 2010) as follows:

(1) Identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;

(2) Identify all of the favorable evidence in the record supporting the existence of that proposition; and,

(3) Demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon that proposition such that the trier of fact could not reasonably decide the existence of the proposition.

In this case, as to point (1) above, the court is required to engage in an analysis of evidence taken, whereby the conceded harm resulting from the appointment of a receiver is balanced against the potential harm of not appointing a receiver as discussed in *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141 (Mo. 2005). Here, there was no evidence taken at all, only argument. The trial court was not entitled to rely upon argument of counsel. Argument of counsel is not evidence. *Thompson v. Bi-State Transit System, Inc.*, 458 S.W.2d 903 (1970). The trial court could not engage in the required balancing of harm test with no evidence before it.

As to part (2) of the required *Houston* analytical process identified above, there was no evidence taken at all, and so none available to identify for this Court's review. Only the transcript consisting of argument of counsel and commentary by the court from the November 6, 2017 and November 22, 2017 hearings exist. *See transcripts*. There was no evidence taken by the trial court during those hearings. As such, there is no favorable evidence supporting the court's decision to grant receivership over Maple Grove Farms, LLC.

It obviously follows then, as to part (3) of the required *Houston* analytical framework, that absent any evidence whatsoever, there can be no favorable evidence considered along with reasonable inferences drawn therefrom to even engage in an analysis. As such, the trial court could not possibly reasonably decide the existence of the proposition. That is, without any evidence, the trial court could not determine that waste was occurring at all, much less to what degree; or that a receivership would do more good than harm.

This error was preserved for appellate review by Defendants in their Motion for Order Revoking or in the Alternative Modifying and Changing Interlocutory Order Appointing a Receiver, filed on November 9, 2017 (Doc. 15).

Argument

The order appointing receiver entered by the trial court refers to facts stated in the Respondents' motion seeking an order appointing receiver and identifies those "facts" as being credible (Doc. 14 on page 1, paragraph (a)). Part of those "facts" referenced in the

order include evidence presented at trial of the first lawsuit, related to the first trial court's orders, the verdicts and judgment (Doc. 14).

The first trial court, by its partial summary judgment of July 17, 2017, found that Jock Fulton is (and has been all along) the manager of Maple Grove Farms, LLC. In facts before the court considering the appointment of a receiver, it was shown that Fulton had refused to take up the responsibilities of management even after the partial summary judgment of July 17, 2017 was entered (App. 163-164). In the second case, attached to Appellants' Objection to "Plaintiff's Motion for Entry of Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" as Exhibit 1 is a copy of a letter from defendants' counsel dated September 1, 2017 wherein it was requested that Mr. Fulton arrange for assumption of his management responsibilities (Doc. 12).

Also in the second case, attached to Appellants' Objection to "Plaintiff's Motion for Entry of Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" as Exhibit 2 is a letter from Appellants' counsel dated September 22, 2017 advising that Mr. Fulton and Meadowfresh should begin making immediate arrangements for the undertaking and discharge of their obligations to manage Maple Grove Farms due to the anticipated departure of the current acting Manager, Curtis Hall (Doc. 13). A little over a year and a half has passed since the trial court in the first case determined that Mr. Fulton was entitled to act as Manager and that Meadowfresh remained a majority Member of Maple Grove Farms. No responsibility was ever undertaken by Fulton or Meadowfresh to act as Manager.

In the second suit currently before this Court, there has never been any evidence presented by Respondents to indicate that Appellants' management of Maple Grove Farms caused waste. In fact, the only evidence presented at all during the course of the trial court's hearing on the motion seeking appointment of receiver was presented by Appellants. That evidence was the affidavit of Curtis Hall, which enumerates that no waste had occurred. The affidavit was referenced within page 4 of Appellants' Objection to Respondents' motion seeking appointment of receiver (Doc. 15). It was attached as Exhibit 1 to that filed objection (Doc. 16).

Appellants' offered Affidavit of Curtis Hall (Doc. 16) is an item of evidence proper for a trial court's consideration of a motion, pursuant to Rule 55.28. Rule 55.28 states:

> When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Appellants' offered affidavit was the only item of evidence presented for the trial court's consideration when ruling on Respondents' motion for appointment of receiver. Respondents relied solely upon the argument of counsel. There was no oral testimony nor any depositions taken in the second lawsuit, and so none upon which the trial court could rely, even if offered. During the course of hearing on the motion seeking appointment of a receiver, the trial court heard only arguments of counsel. This is substantiated by a transcript of the proceedings. *See transcript*. The only support for the motion seeking an order appointing a receiver was Respondents' argument included in the motion, which was filed on October 30, 2017 (Doc. 2). Statements of counsel set forth within the pleading seeking appointment of receiver do not constitute evidence. *Thompson v. Bi-State Transit System, Inc.*, 458 S.W.2d 903 (1970). There has been no trial in this case. The trial court in this case relied solely upon Respondents' counsel's interpretation of the events of the first case, 1531-CC01018.

References to proceedings and interpretation of proceedings had before another trial court in the first lawsuit do not constitute evidence. The first suit is, as of the date of the filing of this brief, still on appeal before the Southern District (SD35231). The only basis of Respondents' request for a receiver to be appointed in this case was Respondents' assertion that waste was being committed at Maple Grove Farms. That argument was extraordinary, given that Respondents were legally entitled at that point (by virtue of the first trial court's ruling that Respondent Jock Fulton was and remained the Manager of Maple Grove Farms) to undertake management of the farm themselves and yet they refused to do so. Exhibits 1 and 2 to Appellants' Objection to the motion for reciever substantiated that Respondent Jock Fulton refused to undertake management responsibilities of the assets

of Maple Grove Farms, even though the first trial court had ruled months prior that he was entitled to do so. At the time this receivership was sought, Fulton was the named manager of Maple Grove Farms, LLC (Doc. 15, 16, 17). Meadowfresh is asserted to be the majority member of Maple Grove. Fulton claims to be the majority member of Meadowfresh. Respondents Meadowfresh and Jock Fulton have abandoned Maple Grove Farms, despite the trial court ruling in the first case that Jock Fulton was the manager of Maple Grove Farms. And yet, Respondents Meadowfresh and Jock Fulton later represented to this second trial court that waste was being committed in operation of a business that they were entitled to, and could have, been operating themselves.

Trial Court Discretion To Appoint A Receiver

Under the circumstances of this suit, without any evidence presented or heard by the trial court, it was an abuse of discretion for the trial court to conclude that a very expensive receivership was likely to effect a reduction of any claim of injury asserted by Respondents, particularly in light of the well-settled notion that a Receiver will certainly cause injury to the business. Since the appointment of a receiver in this case, that injury has certainly been caused.

A review of the recently revised Missouri Commercial Receivership Act (MCRA) outlines the problems Appellants now face, having been subjected to a receivership that Appellants assert was ordered in error. The 2016 MCRA provides for a receivership to be administered in a manner that is strikingly similar to a bankruptcy, which is dictated by Title 11 of the United States Code. Unlike the bankruptcy code, however, the new receivership statutes do not contain sufficiently defined controls on the discretion of a trial court to appoint a receiver, nor any enumerated consequences for a party who inappropriately seeks receivership of an entity.

Missouri Commercial Receivership Act

The Missouri Commercial Receivership Act (MCRA), codified by RSMo. §515.500 to RSMo. §515.665, defines a receivership as "the estate created pursuant to the court's order or orders appointing a receiver, including all estate property and the interests, rights, powers, and duties of the receiver and all parties in interest relating to estate property."

RSMo. §515.505. A trial court is authorized to appoint a receiver to oversee an estate or business pursuant to RSMo. §515.510, which specifies circumstances under which a receiver may be appointed. The Missouri Commercial Receivership statutes adopted in 2016 and the U.S. bankruptcy code are approached in a very similar fashion.

Receivership under the new MCRA establishes a bankruptcy type of proceeding, where the court-appointed receiver can function and operate the business at issue much like a bankruptcy trustee. Unlike a bankruptcy trustee appointed under USCS Chapter 7 or 11, the new receivership statutes do not contain the same checks on trial court discretion and petitioners that the bankruptcy code has long provided. Three examples are appropriate.

(1)

In bankruptcy proceedings which are involuntary (in other words, the party being put into bankruptcy does not consent to the bankruptcy), a petitioner(s) seeking the bankruptcy of another is required to establish strictly construed circumstances which entitle the petitioner to put another into an involuntary bankruptcy. 11 USCS §303(b). For example, one of four ways petitioning creditors of an asserted bankrupt person or entity may establish right to involuntary bankruptcy proceedings is by showing that the petition is filed by: (1)three or more entities, (2) each with undisputed claims, (3) which are liquidated and defined, and (4) are unsecured. See 11 USCS Sec.303(b)(1). A U.S. bankruptcy court does not have discretionary authority to grant an order for relief in involuntary bankruptcy without specifically finding the requirements of 11 USCS §303(b) have been met.

By contrast, the newly adopted Missouri Receivership statutes do not contain any requirement that a petitioner establish a right to put an entity into an involuntary and disputed receivership, other than the trial court's general determination that a receiver is "necessary". See RSMo. §515.510. RSMo. §515.510 does outline circumstances under which a receivership may be appropriate, but the language of the statutes indicate that the list of situations where a receiver may be appointed is not exhaustive. *Id.* Still, it is note-worthy that the list of situations where a receiver may be appointed does not contain a

scenario which applies to the facts of this case, wherein the entity's alleged debts are (1) still hotly disputed and (2) the alleged creditor has not exhausted other remedies available to collect on an alleged debt. See RSMo. 515.510(1)-(14). Under the new receivership statutes, anyone could seek a receivership of any business. The trial court's discretion is not appropriately narrowed to specified circumstances in order to prevent entry of receivership in error.

(2)

Another check that is missing from the newly revised MCRA which exists in the federal bankruptcy code is the potential for penalties to petitioning creditors who seek, but do not establish, a right to put another into an involuntary receivership. Under 11 USCS 303 (i):

> If a court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-
>
> (1) against the petitioners and in favor of the debtor for-
>
> (A)*costs*; or
>
> (B) *a reasonable attorney's fee*; or
>
> (C) any *damages* proximately caused by the taking of possession of the debtor's property by a trustee appointed…; or
>
> (2) against any petitioner that filed the petition in bad faith, for-
>
> (A) any damages proximately caused by such filing, or
>
> (B) *punitive damages*.

11 USCS 303 (i) (emphasis added).

Put more generally, the U.S. Bankruptcy Code identifies very serious penalties to a petitioner who seeks to put another into bankruptcy without sufficient authority to do so. Presumably, these remedies are available to the debtor because it is very well recognized that whether an involuntary bankruptcy petition has merit or not, it is likely to damage the entity subjected to it. More penalties to which a petitioner who negligently or fraudulently seeks bankruptcy of another entity can be found in 11 USCS §110.

A state court receivership is no different- the law in Missouri and elsewhere acknowledges that a receivership will most certainly cause damage to a business.

Sangamon Assoc. v. Carpenter 1985 Family, 165 S.W.3d 141 (Mo. 2005). And yet, the Missouri Receivership statutes contain no such check on the power of any petitioner to seek the receivership of any business. There is no defined potential risk in liability to a petitioner requesting a receivership, if it is later determined that the receivership was ordered in error or without merit. A business put into a receivership that is later found to be erroneous does not have a statutorily defined remedy to recoup the losses it most certainly sustained during the receivership. As such, there is nothing to deter a would-be petitioner from inappropriately seeking the appointment of a receiver.

(3)

A third and final illustrative example: U.S. Bankruptcy statutes are widely interpreted to recognize a bankruptcy trustee as a fiduciary. *See* 11 USCS §704(a). *See* also: Pottow, John A. E., "Fiduciary Duties in Bankruptcy and Insolvency" (2018). *Law & Economics Working Papers*. 135. It is not presumed that a receiver appointed under the new MCRA bears any such responsibility. In fact, the new MCRA takes the exact opposite approach and grants judicial immunity to a receiver for any "acts and omissions arising out of and performed in connection with his or her official duties" regardless of the prudence of the decisions or any damage they cause. RSMo. §515.600.

The above three examples illustrate that although the 2016 MCRA outlines a process for receivership that is very similar to the process of bankruptcy, the MCRA fails to include the checks on a court's discretion which are found in bankruptcy statutes that protect from reckless harm. The bankruptcy statutes narrowly define the court's authority and offer penalties to a petitioner or trustee who damage a business without cause. The new MCRA, lacking comparable checks, make receivership a very attractive option to alleged creditors who suffer no harm or consequences if they seek a receivership under inappropriate circumstances. This Court should follow example set by the federal bankruptcy statutes and specify more clearly what circumstances give rise to a trial court's discretion to put a business into an injurious and costly receivership. The discretion to appoint a receiver should be narrow in view of the lack of legislated protections and the near certainty that harm will result if a court-appointed official is directed to take control

of and manage private property and business.

Entry of a Receivership Requires Evidence

Regardless of the unclear parameters of a trial court's discretion to appoint a receiver, one thing that is clear is that a trial court must make findings prior to entry which are necessarily predicated by evidence. As previously quoted, the case authority sets forth the reluctance with which trial courts should appoint receivers:

> The power to appoint a receiver is a delicate one which is reluctantly exercised by the courts; absent threatened destruction or dissipation of the property, or where there is no good cause to believe that benefit would result from the appointment of a receiver, then the court should decline to make such an appointment.
> *Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd.*, 280 SW.3d 737 (Mo. App. W.D. 2009)

In spite of this admonishment, the trial court in the second lawsuit which underlies this appeal has ordered a receivership without any evidence being submitted by Respondents sufficient to allow the trial court to conclude the conditions for receivership found in RSMo. §515.510 or *Sangamon* have been met. Pursuant to *Sangamon*, a trial court should not appoint a receiver unless the trial court finds that there is threatened "destruction or dissipation of property." *Sangamon*, supra. It is improper to conclude that there is a threat of "destruction or dissipation of property" without any evidence of either. It is improper to conclude that a receiver is necessary for the preservation of assets, when no evidence was ever presented that assets were being wasted. The pleadings and the statements of counsel do not constitute evidence. The trial court's conclusion within sub-paragraph (a) on page 1 of its Order Appointing Receiver is not based upon any record or evidence to support the conclusion (Doc. 14). The only evidence actually ever presented in this suit was the Affidavit of Curtis Hall, presented by Appellants. That affidavit remains uncontroverted and clearly indicates no waste occurring at all (Doc. 16).

In *Sangamon Assoc. v. Carpenter 1985 Family*, 165 S.W.3d 141 (Mo. 2005), the Missouri Supreme Court addressed the longstanding general rule that a receiver should be appointed only when a court is satisfied that the appointment will (1) promote the interest

of one or both parties, (2) prevent manifest wrong which is imminently impending and (3) that the resulting injury caused by the Receiver's management will not be greater than the injury sought to be averted. The same rule was restated in *Jewish Center for Aged v. BSPM Trustees*, 295 S.W.3d 513 (Mo. App. E.D. 2009).

See also *Camden County v. Lake of the Ozarks Council*, 282 S.W.3d 850 (Mo. App. S.D. 2009) in which the Court of Appeals noted that the request for appointment of receiver should be declined whenever there is no good cause to believe that benefit would result from the appointment. The Court also recognized the issue in request for receivership addressed by the Missouri Supreme Court in the *Sangamon* case recognizing that there is injury which will certainly result from a receivership and that an appointment of receiver should be balanced against the injury which will result from the appointment.

The appointing of a receiver is not unlike the entry of an injunction. Evidence is certainly required to support an injunction. In *Cook v. McElwain*, 432 S.W.3d 286 (Mo. App. W.D. 2014), the trial court relied upon facts presented at the preliminary hearing in granting a permanent injunction without a trial on the merits or any presentation of evidence. The Court of Appeals held that "the trial court must weigh the harms which may be caused by the entry of an order *which permanently* prohibits or requires particular action." *Id* at 292. The *Cook* court went on to say that "the fact that the trial court may have made findings of fact favorable to [the plaintiffs] following the preliminary injunction hearing does not somehow make it unnecessary to hold a trial on the merits of their request for permanent injunctive relief." *Id* at 293. If evidence and a trial on the merits are required in cases involving injunctive relief, it only stands to reason that such an extreme remedy as receivership, requiring the balancing of harms as required by *Sangamon* and the new factors within §515.510 of the MCRA, would also require a trial on the merits and the presentation of evidence.

This trial court abused its discretion by entering an order appointing a receiver without taking any evidence from which the requisite findings for appointment of receiver could have been supported. It is respectfully requested that the receivership be set aside on this basis.

CONCLUSION

This appeal is now before the Missouri Supreme Court on the question of whether certain orders are appealable. The appeal contains four points of error. The first point asserts that the order from which Appellants take appeal is an appealable order. The second, third and fourth points of error address the merits of the appeal, and request that the trial court's order appointing a receiver to preside over Maple Grove Farms, LLC was inappropriate and should be revoked. Pursuant to Rule 83.09, Appellants request this Court review and issue opinion on all four points, as if this were an original appeal.

The face of Respondents' Petition in this lawsuit and Respondents' "Motion for Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" make clear that claims for the dissolution of Maple Grove Farms, LLC, for an accounting, and for a receivership were already asserted in a prior lawsuit. Those claims were not prosecuted to judgment in the prior lawsuit. They are now barred by virtue of the rule against splitting a cause of action, because Respondents have proceeded to judgment in the prior suit and elected not to obtain any resolution of those three claims. The entire underlying lawsuit should be dismissed for failure to state a claim upon which relief can be granted.

Furthermore, the trial court's reliance in this underlying suit on the "law of the case" doctrine as support for its decision to impose a receivership on Maple Grove Farms, LLC is entirely misplaced and inappropriate, for two reasons: first, because the law of the case doctrine does not apply when the case relied on is still on appeal, and the only "law" to rely on has been created by a trial court. Second, no evidence was taken by the second trial court to support its decision in relying on the "law" of the first lawsuit- an entirely separate case. Without hearing any evidence, it was impossible for the trial court to engage the required meaningful analysis with respect to the balancing of harm of granting the receivership against the harm of maintaining the status quo.

Appellants respectfully request that the Missouri Supreme Court set aside, revoke and terminate the receivership order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of February, 2019, the foregoing was electronically filed with the Missouri Supreme Court, using the Missouri eFiling System. Pursuant to Rule 103.08, service was made to the attorneys of record who are registered users as maintained by the Clerk's office through the Court's electronic filing system.

/s/ *Kate Millington*
Kate Millington

CERTIFICATE OF COMPLIANCE

Kate Millington, attorney for Appellants, pursuant to Rule 55.03 and Rule 84.06, certifies as follows:

(a) **RULE 55.03**: In compliance with Rule 55.03(c), the undersigned hereby certifies to the following that to the best of his knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

(1) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. An attorney providing drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney knows that such representations are false;

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief; and

(5) In all other regards, *Appellants' Brief* complies with the requirements of Civil Rule 55.03.

(b) **RULE 84.06(b)**: This *Appellants' Substitute Brief* complies with the word and page limitations set forth in that according to the word counter on the computer software which generated this *Appellants' Substitute Brief* (excluding the cover, certificate of service, and this certificate required by Rule 84.06(c), signature block, and Appendix) the brief contains 16,295 words, and the font used is Times New Roman, 13, prepared in Microsoft Word. The undersigned further certifies that this *Appellants' Substitute Brief* is in further compliance with Rule 84.06.

/s/ *Kate Millington*
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