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SC97689

IN THE MISSOURI SUPREME COURT

MEADOWFRESH SOLUTIONS USA, LLC,

Plaintiff-Respondent,

vs.

MAPLE GROVE FARMS, LLC, 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 REPLY BRIEF

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REPLY TO JURISDICTIONAL STATEMENT CHALLENGING THE COURT'S JURISDICTION

All parties to this appeal have agreed and stipulated that this Court has jurisdiction to hear this appeal, transferred to this Court by dissenting opinion from the Southern District Court of Appeals pursuant to Rule 83.03.

The Jurisdictional Statement in Respondent's Substitute Brief raises the issue of appealability of the order refusing to revoke an interlocutory order appointing receiver, from which this appeal lies. By way of reply to this discussion in Respondent's Jurisdictional Statement, and in order to avoid redundancy, Appellants refer the Court to the parties' relative argument sections, specifically Appellants' Point I, for more detailed discussion.

REPLY TO RESPONDENT'S SUBSTITUTE SUPPLEMENTAL STATEMENT OF FACTS

Respondent's Supplemental Statement of Facts does not include any facts relevant to the questions presented for determination which cannot be found in Appellants' Statement of Facts. It does contain a fair number of argumentative references and Respondent's own interpretations of and contextual spin on the history of litigation between these parties. This Court is capable of discerning where fact and argument intersect, and will no doubt grant those statements the appropriate weight and credibility in light of Rule 84.04(c).

However, there is one particular mis-statement of Respondent's that requires correction. On page 12 of Respondent's Substitute Supplemental Statement of Facts, Respondent references Appellants' alleged failure to "refinance" the Maple Grove debt as the basis for moving the prior court for Receivership. This is a false statement, and requires correcting. Respondent's references to the "Transcript of Dec. 6 Hearing, pp. 40:8-15 and 46:14-47:2" to support this statement make no sense and have nothing to do with "refinancing." Further, Respondent fails to represent to this Court that Appellants were

refused traditional re-financing because Jock Fulton renounced his guaranty, causing Arvest Bank, the bank that had been engaged in the financing of the business, to refuse to refinance. (Supp. L.F. 79.1-2) With traditional re-financing not an option because of Jock Fulton's actions, Appellants were fortunate to find a way to purchase the notes thereby preventing foreclosure by the bank and preserving all guaranties, including their own. They saved the farm and preserved the status quo by doing so. This is a common transaction in the banking industry and served the same purpose as traditional refinancing. This was confirmed by attorney Dan Nelson at the Nov. 6 hearing who has 30 years of experience in the industry. (See: November 6, 2017 T.R. 94: 1-8). Respondent fails to mention this in its Substitute Supplemental Statement of Facts, and it bears correcting.

Regardless of Respondent's colorful commentary, the following facts are undisputed between the parties. The parties indisputably agree that in the first lawsuit, Case No. 1531-CC01018. Respondent sought, on two occasions, to have a receiver appointed (Doc. 6 p. 2; Doc. 6 p. 1). In the first case, Respondent's first motion for appointment of a receiver was denied (Doc. 6 p. 3), and the second was granted (Doc. 5 p. 1-2). The first trial court's order granting Respondent's second motion for appointment of receiver ordered Respondent to submit a proposed written order identifying a Receiver (Doc. 5 p. 1-2). Respondent did not follow through with submission of a proposed order appointing a Receiver and one was never appointed by the first trial court (A130). The case ultimately went to trial by jury, verdicts were rendered, and a judgment entered (A175). Following entry of a first judgment (which was later amended) in the first case, Respondent filed, for the first time, a motion to sever a claim for dissolution that was not submitted to the jury, severed before trial, or reserved by the trial court (the motion did not request severance of claims for accounting or receivership) (A74). The first trial court entered an order granting that motion and severing claims for dissolution and accounting although the untimely motion for severance only requested severance of the dissolution claim (A176). The order did not mention receivership at all (A74). In the trial court's Amended Judgment identified Respondent's claims for accounting, dissolution, and receivership as being "severed" (Doc.

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4, p.6; A129). Following entry of the first trial court's Amended Judgment, Respondent filed a second lawsuit, the underlying action from which this appeal originates, Case No. 1731-CC01311. In the underlying action, Respondent filed a "Motion For Entry Of Order Based On Prior Grant Of Plaintiff's Motion For Appointment Of Receiver" (Doc. 2). The very title of the motion identifies, and Respondent cannot dispute, that Respondent's request of the underlying trial court to enter an order appointing a receiver was based on the first trial court's entry of an order appointing a receiver, which Respondent did not pursue or follow through to appoint. None of the above facts are disputed.

Respondent's Substitute Supplemental Statement of Facts includes many more details, many of which are not relevant for this Court to make a determination on the questions presented. Without an arduous process of identifying each of those, Appellants emphasize the above two paragraphs, which identify facts undisputed among the parties, and the following note: Respondent's list of "evidence" presented in support of its motion for receivership in the second suit, found on Respondent's Brief at page 15 and 16, is an attempt to distract from the fact that Respondent was admittedly relying upon an order of another trial court to achieve action in a separate lawsuit. Notably, Respondent lists three items which Respondent identifies as "the evidence". None of the three items listed by Respondent in its Substitute Supplemental Statement of Facts is evidence, and none were offered as evidence in the underlying suit. None of the items listed presents a factual basis upon which, without evidence, entry of an order of receiver might granted. Respondent's averments in that regard are just that: averments. They are not facts, and do not properly belong in an appellate Statement of Facts drafted pursuant to Rule 84.04(c).

REPLY TO RESPONDENT'S SUBSTITUTE 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.

In reply to Respondent's Argument in response to Appellants' Point I, Appellants initially point out two things. First, Respondent's Brief acknowledges, unequivocally, that RSMo. §512.020 "generally (and substantively) permits appeal from an order refusing to revoke, modify or change an interlocutory order appointing a receiver." See Respondent's Substitute Brief, p. 19. Second, Respondent acknowledges the precedent set in the *Sanford* case, which holds that there are certain orders which are appealable without the procedural requirement of mis-labeling the order a "judgment". *Sanford v. CenturyTel of Missouri,* 490 S.W.3d 717 (Mo. banc 2016). See Respondent's Substitute Brief, p. 21.

In spite of these two acknowledgements, Respondent continues to assert that an order which refuses to revoke, modify or change an interlocutory order appointing a receiver is not appealable. Respondent does not assert a position consistent with the older *Spiece* decision: that the order merely needs to be labelled a "judgment" to be appealable. *Spiece v. Garland,* 197, S.W.3d 594 (Mo. banc 2006). Surprisingly, Respondent apparently takes the position that an order refusing to revoke, modify or change an interlocutory order appointing a receiver is not appealable, regardless of its labelling, until the entire case is closed and the trial court releases its jurisdiction over the issue.

See the following quotes from Respondent's Substitute Brief:

> [T]his Court should find that the procedural requirements of Rule 74.01 apply to appeals taken pursuant to §512.020 (specifically §512.020.2) and dismiss Appellants' appeal for lack of appellate jurisdiction because the trial court's order at issue is not *(and should not be)* denominated a "judgment." (emphasis added).

Respondent's Substitute Brief p. 22.

> By contrast, in cases involving a receivership, the issues will not be 'resolved' or final *until the case is closed*. (emphasis added)

Respondent's Substitute Brief p. 23.

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> The protections of Rule 74.01(a) are intended, inter alia, to prevent this type of judicial waste of resources by requiring a trial court denominate its orders as a 'judgment' or 'decree' and thereby *signal its final release of jurisdiction over the issue*. (emphasis added)

Respondent's Substitute Brief, p. 24.

Respondent's assertions, on page 24 of Respondent's Substitute Brief, that an order refusing to revoke, modify or change an order appointing a receiver should not be appealable until the trial court has released jurisdiction over the issue misses the entire point of the many and various statutes which specify certain types of interlocutory orders which are immediately appealable. Our Missouri Legislature has recognized that there are certain types of interlocutory orders which may be appealed immediately, regardless of the lack of finality of the entire case. *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).

In support of its position that an order refusing to revoke, modify or change an order appointing a receiver is not appealable until the case is closed, Respondent relies upon a case out of the Missouri Court of Appeals Southern District which draws a distinction between types of orders appealable by statute. The case, *Nicholson v. Surrey Vacation Resorts, Inc.,* 463 S.W.3d 358 (Mo. Ct. App. S.D. 2015) is not good precedent for this Court's consideration for two reasons: first, it is an opinion of a lower court not binding upon this Court; and second, it is an opinion that pre-dates *Sanford*, which is a Supreme Court opinion that conflicts with the earlier *Nicholson* opinion. As a Supreme Court opinion, *Sanford* is binding and controlling upon all lower appellate courts.

Respondent's position that an order refusing to revoke, modify or change an interlocutory order appointing a receiver is not appealable until the case is closed is in direct conflict with Missouri law found in RSMo. §512.020 and with both the *Spiece* and

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Sanford opinions. It is also in direct conflict with the United States Constitution, which dictates that a citizen shall not be deprived of his property without due process. U.S. Constitution 14th Amendment. Respondent's proposed rule for this Court's consideration would require that parties subject to a receivership can not challenge the legality of the receivership until all of that party's assets have been dissolved, their property taken, and the case finally closed. This proposed rule does not comport with the law as established, and frankly, does not offer an answer to the question before this Court.

The law already tells us, in no uncertain terms, that the order is immediately appealable. See RSMo. §512.020.2. The question before this Court is whether the order has to be "perfected" by mis-labelling it as a judgment before that appeal can occur. Appellants urge this Court to follow the precedent set in *Sanford* and issue its opinion that an order which is appealable by statute is appealable without the requirement for mis-labeling it a judgment, over-turning any opinion to the contrary. As Appellants have proposed in their Substitute Brief: Judgments are appealable. Some orders are appealable.

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.

Respondent's argument in response to Appellants' Point II asserts three contentions for why the trial court had authority to enter an order appointing a receivership in spite of the improper splitting of a cause of action. Those three contentions are: (1) that there were new and independent undisputed bases for appointing a receiver that arose after the trial and the Amended Judgment in the prior lawsuit, (2) Respondent's claims for accounting and dissolution in the prior lawsuit were properly reserved for determination after jury trial and then severed, and (3) there was no final adjudication/result in the prior lawsuit

regarding Respondent's claims for accounting and dissolution of Maple Grove and the severance of those claims into the Underlying Action was not an improper splitting of a cause of action. Appellants hereafter address each of these points in turn.

Initially, it should be noted that Respondent's assertion that Appellant's Point II does not specify how Appellants believe the trial court erred is incorrect. Appellants have asserted that the trial court erred in entering its order refusing to revoke, modify or change an order appointing a receivership because the trial court had no authority to take any action in the underlying suit (other than dismissal), because the lawsuit and each action taken within it is without support under the law as the lawsuit originates from an impermissible splitting of a cause of action. Appellants are not appealing from the trial court's order denying Appellants' Motion To Dismiss. The Motion to Dismiss first identified the fact that the trial court was without jurisdiction and was later incorporated into Appellants' Motion for Order Revoking, or in the Alternative, Modifying and Changing Interlocutory Order Appointing Receiver (Docs. 17, 15). Lack of subject matter jurisdiction is never waived. The trial court's lack of jurisdiction in this suit was clearly pointed out to the trial court in Appellants' Motion for Order Revoking, or in the Alternative, Modifying and Changing Interlocutory Order Appointing a Receiver (Doc. 15). Appellants' Motion To Dismiss, while not the issue directly on appeal, is a valid part of the analysis. Further, while the point of error itself has been rephrased from Appellants' underlying brief before the Missouri Court of Appeals, the basis of the point of error is the same. Much of the argument is matching Appellants' argument from the same point in the Missouri Court of Appeals brief verbatim. Respondent does not assert otherwise, and therefore further discussion on this issue is un-necessary.

Regarding Respondent's first (of the three) argument for why the trial court's receivership order should not have been revoked is that "there are additional sufficient grounds for appointing a receiver for Maple Grove that arose after the trial and Amended Judgment in the Prior Lawsuit beyond any bases that existed in the Prior Lawsuit". This argument is without substance. In its discussion on this matter, Respondent never actually

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identifies even one single new or additional ground for appointment of a receiver that arose after the trial and Amended Judgment in the first lawsuit. In fact, the only new "ground" identified by Respondent at all is Respondent's claim to be a judgment creditor of Appellants. The judgment upon which Respondent claims to be a creditor is still hotly disputed, and currently on appeal. Respondent's status as a judgment creditor is not undisputed (very much the opposite, in fact), and therefore is not a valid basis for putting a business into a receivership. There were no other "additional sufficient grounds…that arose after trial" identified by Respondent in its brief.

The fact remains that Respondent sought a receiver in the underlying lawsuit solely on the basis of the first trial court's grant of a previous motion for appointment of receiver that was subsequently abandoned by Respondent. Respondent's motion for appointment of receiver was very tellingly titled "Motion For Entry Of Order Based On Prior Grant Of Plaintiff's Motion For Appointment Of Receiver" (Doc. 2). At the hearing for Respondent's Motion, Respondent admitted that it would not present any evidence and took the position that it was unnecessary to do so (See: November 22, 2017 T.R. 17:3-6). Respondent cannot now, in good faith, claim that Respondent sought a receiver on some new and additional grounds when Respondent (1) offered no evidence of any new or additional grounds for receivership (and in fact, offered no evidence at all)[1] and (2) Respondent's own motion title very clearly identifies the ground upon which Respondent sought a receiver to be the grant of a prior abandoned motion in a previous lawsuit that proceeded to trial and judgment without appointment of a receiver.

The second argument of Respondent as to why Appellants' Point II fails makes an attempt to explain how Respondent, in the first lawsuit, properly reserved the claims it raised in the second lawsuit. Respondent asserts that the claims were "reserved", the case proceeded to trial, and following trial, the court severed the claims for accounting and dissolution. This is not so. Notably, Respondent has failed to cite to any portion of the

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[1] Respondent's failure to offer any evidence for admission before the underlying trial court is discussed more fully in argument and briefing associated with Appellants' Point IV.

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record before this Court, whether in the transcript or in the form of a motion or trial court order, which documents the reservation of certain claims before jury trial. The reason Respondent has not cited to the record to support its assertion that claims were properly reserved prior to trial is because no claims were reserved prior to trial. It is always improper to cite to matters, true or not, which lie outside the record before the court on appeal. *Johnson v. Buffalo Lodging Associates,* 300 S.W.3d 580 (Mo. App. E.D. 2009); *Pattie v. French Quarter Resorts,* 213 S.W.3d 237 (Mo. App. S.D. 2007).

Even if, assuming *arguendo*, Respondent had properly obtained a severance or otherwise reserved claims not submitted to the jury, Respondent would still not be permitted in a second lawsuit to rely upon orders and factual findings made in the first lawsuit from which the claims were severed. In other words, even if this second trial court had authority to consider Respondent's request for a receiver, the trial court would still be required to take evidence, evaluate it, and form factual findings supporting its decision. (See *Bryan v. Peppers,* 175 S.W.3d 714 (Mo. App. S.D. 2005), which acknowledges that a severance of a claim always results in the risk of an inconsistent verdict, because the severed claim is adjudicated separately.) That did not happen.

Respondent merely chose not to submit its claims for accounting and dissolution to the jury or the court for determination prior to judgment in the first suit. It did not reserve the claims for the court's consideration after trial, either. It was well within Respondent's rights as a plaintiff in the first lawsuit to elect to abandon claims by not submitting them to the court or a jury for final determination. It is not within Respondent's rights to abandon claims and then file a second lawsuit for the same claims because Respondent later regretted its choice to abandon the claims.

Because the claims for accounting and dissolution were not reserved prior to jury deliberation, they could not be properly "severed" after verdicts were rendered, no matter what the trial court wrote in its Amended Judgment. A claim that has not been specifically reserved (and that reservation properly documented and communicated to all parties) can not be "severed" after jury verdicts are rendered. See *Davis v. Realty Exchange, Inc.,* 488

S.W.2d 913, 914-915 (Mo. 1973). ("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.")

Respondent did not reserve or request severance of any claims until Respondent's Motion To Sever was filed twenty-four days after jury verdicts were rendered, and that motion only requests severance of Respondent's claim for dissolution (A74). It did not mention a claim for accounting or receivership. However, the first trial court 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 (A176, 74). Receivership was not mentioned in the motion or in the order (A74). 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; A129).Amended Judgment apparently grants Respondent's untimely motion to sever, and documents that it "severed" claims for dissolution, accounting and receivership (A124). None of these claims was properly severable at that juncture in the first case. Certainly, the trial court was not entitled to sever claims for accounting and receivership *sua sponte*, after submission of the suit to a jury for deliberation. The trial court's purported "reservation" and "severing" of the claims for accounting and dissolution was addressed for the very first time over thirty days after verdicts were rendered. in the trial court's Amended Judgment (There is no mention of these claims in the trial court's first judgment. Although that judgment is of course rendered void by the trial court's entry of an Amended Judgment, it is of some note here just the same), entered thirty days after the jury rendered verdicts.

Respondent's assertion that the trial court's Amended Judgment somehow solves Respondent's error in failing to reserve claims is false. Even a trial court is not entitled to ignore well-established doctrine on splitting causes of action. The fact remains, and the record supports, that Respondent simply impermissibly split a cause of action in filing its

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second lawsuit and then sought receivership in the second suit on the asserted strength of the abandoned motion in the first lawsuit.[2]

Respondent's third and final argument for why Appellants' Point II should fail is that "there was no final adjudication/result in the Prior Lawsuit regarding Respondent's claims for accounting or dissolution". Respondent is correct that there was no final adjudication of Respondent's claims for accounting and dissolution. The reason for that outcome in the first lawsuit is because Respondent chose not to pursue those claims to final adjudication. That was Respondent's choice to make. It is not correct that there was no final result in the first lawsuit regarding these claims. Respondent's abandonment of the claims prior to jury verdict is the final result. Re-filing those claims later is an impermissible splitting of a cause of action. *King General Contractors v. Reorganized Church*, 821 S.W.2d 495 (Mo. banc 1991). See also: *Burke v. Doerflinger*, 663 S.W.2d 405 (Mo. App. E.D. 1983).

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.

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[2] It should be of some interest to this Court to note that Respondent's Brief, in Footnote 10 found on p. 37, clearly acknowledges its belief that claims for accounting and dissolution are claims that should be "court-tried". However, the over-arching theme of Respondent's position in this appeal is that Respondent would like this Court to affirm relief Respondent received without any kind of trial at all, court-tried or otherwise.

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The response offered to Appellants' Point III is contradictory in and of itself. In Subpart A, Respondent asserts that the second trial court's admitted reliance on the first trial court's rulings was not based upon "law of the case."[3] In Subpart B, Respondent takes a contradictory viewpoint, asserting that the trial court was entitled to rely upon the findings of another trial court in lieu of consideration of evidence before granting a motion for appointment of receiver. [4] Finally, in Subpart C, Respondent asserts there were "new and additional grounds to appoint a receiver for Maple Grove in the Underlying Action that did not exist in the Prior Lawsuit."

In its Subpart A, Respondent attempts to parse out and lead this Court to misconstrue the trial court's very clear assertion on the record during the receivership hearing that the trial court believed it was relying on "the law of the case" in ordering a Receivership. Rather than spend time arguing about what the record actually reflects, Appellants simply refer this Court to the record. The relevant portion of the transcript cited by both parties can be found on pages 40 and 41. (See: November 6, 2017 T.R. 40-41). The "law of the case" doctrine is only properly applied when the law has been established by appeal. *Walton v. City of Berkeley*, 223 S.W.3d 126 (Mo. banc. 2007). In this case, the trial court's reliance on findings of another trial court that are subject to a pending appeal is mis-placed, and a mis-application of the law of the case doctrine.

Respondent's Subpart B takes a contradictory viewpoint from its Subpart A, now asserting that the second trial court did rely on rulings of the first trial court, and was

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[3] Even though the transcript very clearly substantiates that the trial court was relying on "the law of the case" doctrine, misapplication or not. (See: November 6, 2017 T.R. 40-41, line 16)

[4] This assertion, too, is contradictory from Respondent's previously taken position, in its Response to Point II, that the appointment of receiver in this case was appropriate because there were "new bases" for appointment of Receiver which arose after Amended Judgment was entered in the first case and as such the underlying trial court did not need to rely on the findings of the first trial court in making a decision to appoint Receiver. Respondent's Substitute Brief p. 25. In this section, Respondent flip-flops entirely, now acknowledging that appointment of receiver in this case *was* based on reliance on the trial court's previous rulings. Respondent's Substitute Brief, p. 41.

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entitled to do so, as this underlying lawsuit is merely a "continuance/severance of Respondent's dissolution and accounting claims from the Prior Lawsuit." See Respondent's Brief p. 42. First and foremost, a continuance and a severance are not ever interchangeable terms. Those two terms of art are entirely different procedures. Respondent seems to be taking the position that a properly severed claim, even if there was one, is merely a continuance of happenings in a prior lawsuit. That is not the case. See *Seabaugh v. Milde Farms, Inc.,* 816 S.W.2d 202 (Mo. banc 1991). See also: *State v. Lewis,* 243 S.W.3d 523 (Mo. App. W.D. 2008). Second, even if the claim for receivership was properly severed, the trial court in the newly filed case would never be allowed to simply rely upon the factual findings and previous orders of another trial judge in a separate lawsuit. Case law makes this clear when it warns against severance when not necessary, because of the risk of inconsistent verdicts on related claims. *Id.* This argument is non-sensical, and flies in the face of long-held and firmly grounded precedent designed to ensure a fair administration of justice.

Finally, in Subpart C, Respondent's argument that there were "new and additional grounds" upon which the trial court might find the propriety of a receivership is disposed of quickly and easily. Respondent may be honestly averring that there were new or additional grounds upon which the trial court might enter an order appointing a receiver, but without properly presenting those "grounds" to the trial court in the form of evidence substantiating those averments, the "new and additional grounds" make no difference whatsoever. The assertions of a party in its pleadings and the argument of counsel do not evidence make. *Thompson v. Bi-State Transit System, Inc.*, 458 S.W.2d 903 (1970). The fact remains: Respondent offered not one single item of evidence in support of its "Motion for Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" (See: November 22, 2017 T.R. 17:3-6). Respondent may not now in good faith enumerate all the items of evidence Respondent claims it *could have* presented to support this receivership because Respondent did not actually present *any* of that evidence, even if it existed. So whether Respondent avers that there was one reason or one hundred reasons for entry of

receivership does not make any difference under the law whatsoever, because averments alone ultimately never do. For further discussion tangential to this argument, see below in Point IV.

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.

Respondent's argument in response to Appellants' Point IV re-tracks ground Respondent has asserted under each point in this brief: "there were multiple bases upon which a trial court could properly find the necessity of the appointment of a receiver". See Respondent's Brief p. 44. This argument falls flat, as it has in each section of this brief, because of the controlling fact that Respondent never submitted any evidence to establish any sort of grounds or bases for appointment of a receiver, whether new or not. As it did in previous portions of its Argument, Respondent is merely urging this Court to affirm a trial court decision on the basis that Respondent *could have* proven reasons a receivership was necessary but did not actually do it.

Respondent asserts that the Missouri Commercial Receivership Act states that a hearing on the request for appointment of a receiver is only required when requested. RSMo. §515.505. Of course, as Respondent and this Court are aware, it is common to have an undisputed receivership action. This receivership action is not undisputed, and so Respondent's suggestion that the hearing was not even necessary is misplaced. Furthermore, given that all parties acknowledge that the new Missouri Commercial Receivership Act is designed to create a "mini-bankruptcy" proceeding when a receivership is requested, some analysis of bankruptcy cases is appropriate here. When

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there is a disputed claim in an involuntary bankruptcy, it necessarily follows that there will be a trial with evidence presented. (11 U.S.C.S. §303(h)).

The bankruptcy case law overwhelmingly discusses the "evidence" adduced at trial or hearing. For example, in *In re Stroop,* 47 BR 986 (DC Colo, 1985), the court found that where the only evidence presented was pleadings of parties and oral arguments, the court did not have sufficient information to determine whether pending state court proceedings between petitioning creditors and involuntary debtors was a bona fide dispute warranting dismissal of the involuntary petition under 11 USCS §303. In *Boston Beverage Corp. v. Turner,* 81 BR 738 (DC Mass, 1987) the court found that pleadings from four state cases were not admissible to show the existence of claims against an involuntary debtor. The consideration of the claims for purposes of determining the alleged debtor's financial status under 11 USCS §303(h)(1) was improper. The court held that the docket sheets were adequate evidence to show that claims existed, but the pleadings did not show how the claims were treated. Therefore, if introduced to demonstrate the truth of the allegations contained in the pleadings, the docket sheets and pleadings from four other cases was hearsay. *Id.* There are numerous other cases not cited herein on involuntary bankruptcy discussing the adequacy of evidence presented at trial on a disputed claim.

There is no opinion where an appellate court affirms a bankruptcy court's imposition of involuntary bankruptcy on a debtor with disputed claims without an evidentiary hearing, unless there was a default or stipulation of the parties.

The Missouri Commercial Receivership Act sets forth circumstances under which a receiver may be appointed. Respondent cites several of those circumstances in its brief. See Respondent's Brief, p. 46. Notably, nearly all of those "circumstances" outlined in the MCRA rely upon factual findings. A trial court can not make a factual finding on a disputed topic without hearing evidence. For example, Respondent cites to RSMo. §515.510.1.2(a), which states in relevant part:

> "In an action in which the person seeking appointment of a receiver has a lien on or an interest in property or its revenue-producing potential and… the

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> appointment of a receiver… is necessary to keep and preserve the property or its revenue-producing potential or to protect any business or business interest concerning the property or its revenue-producing potential…"

Using this particular basis for appointment of a receiver contemplated by the statute and referenced by Respondent as an example, the trial court would need to make the following findings before appointment of a receiver is appropriate: (1) the person seeking appointment has a lien or interest in the property or its revenue-producing potential, and (2) the debtor is committing some action or inaction likely to cause waste and (3) appointment of a receiver is necessary to keep and preserve the property or its revenue-producing potential. In order to make those findings, the trial court should be required to hear evidence sufficient to allow the trial court to form that opinion. Another example of a circumstance where receivership might be appropriate relied upon by Respondent out of the Missouri Commercial Receivership Act:

> "to prevent irreparable injury to the person or persons requesting the appointment of a receiver with respect to the debtor's property…"

RSMo. §515.510.1.14.

If a trial court were to rely on the authority found in that section of the statute, a trial court would need to find that (1) the person requesting appointment of receiver has a valid and undisputed interest in the debtor's property, and (2) the debtor is committing some action or inaction which will injure the creditor's interest, and (3) the receivership is necessary to prevent that injury. Those facts must be established before a trial court has discretion to enter a receivership on that basis. The only way to establish those facts when disputed is by introduction of evidence which substantiates them. Respondent fails to cite a single case that would grant the trial court authority to rely on a judgment from a court of concurrent jurisdiction for purposes of imposing a receivership on a limited liability company when the claims are in dispute, without evidence being received.

This is very basic statutory interpretation and evidence practice. To avoid a lengthy and tedious reply, Appellants will not parse out the required findings of each and every basis for receivership found in the MCRA, but each and every one requires some sort of

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finding on behalf of the trial court, and in a disputed case a trial court must have some evidence upon which to base its findings. No evidence was offered by Respondent in support of its request for a receiver in this case.

The trial court should have held an evidentiary hearing and made its own independent determinations, balancing the harms as required by the *Sangamon* case, especially in light of the amount of time that had elapsed since the prior court supposedly granted receivership (nearly ten months) which Respondent abandoned prior to trial. *Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd.,* 280 SW.3d 737 (Mo. App. W.D. 2009).

The new Missouri Commercial Receivership Act was designed to follow the lead of bankruptcy law but lacks many of the checks on trial court discretion that bankruptcy law contains. As such, it would be appropriate for this Court to issue some direction to trial court judges that the discretion to put a business into a receivership which will certainly cause it harm should be exercised narrowly. In a disputed case, trial courts should first conduct an evidentiary hearing; second, make findings which comport with a circumstance in which receivership is appropriate as defined by the MCRA; and third, conduct the balance of harms test described in *Sangamon* to determine whether the harm that will certainly occur to the business by virtue of its receivership is worth the potential harm to a petitioner if a receiver is not appointed. *Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd.,* 280 SW.3d 737 (Mo. App. W.D. 2009). Anything less than an analysis like the one described above should be determined an abuse of discretion by the trial court.

No such analysis occurred in the case underlying this appeal. No evidence was offered by Respondent to support its motion for appointment of a receiver. The trial court's findings, without any evidence to substantiate them, are an abuse of discretion. Further, even if the trial court had properly taken evidence and formed findings sufficient to appoint a receiver, there is no indication that the trial court in this case ever engaged in a balance of harms test like the one described in *Sangamon* or even considered the significant harm

a receivership always does to a business as part of its analysis in determining whether appointment of a receiver was appropriate. Without any of these steps being followed, the most basic of which is the offering of evidence, the trial court's order appointing a receiver was made in error.

CONCLUSION

This matter has arrived before this Court by virtue of a transfer from the Missouri Court of Appeals to determine the question of whether a statutorily appealable order must be "perfected" by mis-labelling it a judgment before it can be appealed. Appellants urge this Court to follow its own example set in the *Sanford* case, and rule that an order which has a statutorily-granted right to appeal does not need to be mis-labelled as a "judgment" in order to appeal. Appellants request this Court consider and dispose of the appeal on its merits as well, pursuant to Rule 84.14.

The trial court in this case erred in entering its order refusing to revoke a receivership order which was previously entered in error. The face of Respondent's Petition in this suit and its "Motion for Order Based on Prior Grant of Plaintiff's Motion for Appointment of Receiver" establishes 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 by virtue of the rule against splitting a cause of action in that the Respondent has proceeded to judgment in the first suit without obtaining resolution of those claims previously asserted.

Furthermore, the trial court's reliance 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, especially in light of the fact that no other evidence was taken in support of the trial court's decision. As such, it was impossible for this trial court to engage in any meaningful analysis with respect to the balancing of harm of granting the receivership against the harm of maintaining the status quo, as required by law.

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Appellants respectfully request that the Missouri Supreme Court remand this case to the Greene County Circuit Court with instructions to set aside, revoke and terminate the receivership order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th day of March, 2019, the foregoing was electronically filed with the Missouri Court of Appeals, Southern District, 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*
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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' Reply Brief* complies with the requirements of Civil Rule 55.03.

(b) **RULE 84.06(b)**: This *Appellants' Reply 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' Reply Brief* (excluding the cover, certificate of service, this certificate required by Rule 84.06(c), and signature block) the brief contains **7,375** words, and the font used is Times New Roman, 13, prepared in Microsoft Word. The undersigned further certifies that this *Appellants' Reply Brief* is in further compliance with Rule 84.06

/s/ *Kate Millington*
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