

Appeal No. SC-87866

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IN THE SUPREME COURT OF MISSOURI

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**PRECISION INVESTMENTS, L.L.C., CHILDREN'S INVESTMENT  
COMPANY, INC.; STEPHEN R. PLASTER, Trustee of the Robert W. Plaster  
Trust u/t/d December 13, 1998; Robert W. Plaster Trust u/t/d April 4, 1984;  
and Robert W. Plaster Trust (undated); EMPIRE RANCH;  
and STEPHEN R. PLASTER, Individually,  
Respondents,  
vs.  
CORNERSTONE PROPANE, L.P.  
Appellant.**

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**APPELLANT CORNERSTONE PROPANE, L.P.'S BRIEF IN RESPONSE TO  
BRIEF OF RESPONDENTS PRECISION INVESTMENTS, LLC, ET AL.**

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## **TABLE OF CONTENTS**

TABLE OF CONTENTS .....	2
TABLE OF AUTHORITIES.....	4
JURISDICTIONAL STATEMENT .....	6
STATEMENT OF FACTS.....	7
POINTS RELIED ON BY CORNERSTONE .....	11
ARGUMENT.....	13
I. THIS COURT IMPROVIDENTLY GRANTED PRECISION’S APPLICATION FOR TRANSFER BECAUSE THERE IS NO ISSUE OF GENERAL INTEREST OR IMPORTANCE IN THIS CASE IN THAT WHETHER OR NOT THERE IS SUFFICIENT SECURITY FOR PRECISION TO COLLECT A JUDGMENT AGAINST CORNERSTONE IN THE FUTURE IF THE TRIAL COURT’S DECISION IS REVERSED ON APPEAL DOES NOT REQUIRE THE COURT OF APPEALS TO HOLD CORNERSTONE’S APPEAL IN ABEYANCE WHILE PRECISION APPEALS A COLLATERAL MATTER THAT WAS NOT RAISED IN CORNERSTONE’S ORIGINAL APPEAL.....	13
II. THE COURT OF APPEALS CORRECTLY DISMISSED CORNERSTONE’S APPEAL AS MOOT BECAUSE THE ORIGINAL FINAL JUDGMENT AGAINST CORNERSTONE	

WAS EXTINGUISHED, OR WILL BE EXTINGUISHED, BY THE TRIAL COURT’S ORDER GRANTING CORNERSTONE’S MOTION TO ENFORCE SETTLEMENT IN THAT THE PARTIES AGREED TO SUBSTITUTE PERFORMANCE THROUGH THEIR SETTLEMENT AGREEMENT, AND AS A RESULT OF THE MAY 6, 2006, ORDER ENFORCING SETTLEMENT, THE ORIGINAL JUDGMENT AGAINST CORNERSTONE DOES NOT CONTROL. ....	15
CONCLUSION .....	24

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Cravens v. McKinnell</i> , 359 F.2d 24 (8 <sup>th</sup> Cir. 1966).....	18
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### **STATE CASES**

<i>Armstrong v. Elmore</i> , 990 S.W.2d 62 (Mo. App. W.D. 1999).....	16
<i>Baker v. Felker</i> , 952 S.W.2d 743 (Mo. App. S.D. 1997).....	16, 22
<i>Beckers v. Seck</i> 14 S.W.3d 139 (Mo. App. W.D. 2000).....	13,16
<i>Bishop v. Heartland Chevrolet, Inc.</i> , 152 S.W.3d 893 (Mo. App. W.D. 2005).....	21
<i>Brock v. Brock</i> , 142 S.W.3d 204 (Mo. App. E.D. 2004).....	16, 21, 23
<i>Brown v. Curtiss</i> , 137 S.W. 24 (Mo. App. 1911).....	18
<i>Carrothers v. Beal</i> , 565 S.W.2d 807 (Mo. App. 1978).....	20
<i>Central Maloney, Inc. v. City of St. Louis</i> , 527 S.W.2d 39 (Mo. App. 1975).....	21
<i>Curia v. St. Louis County</i> , 645 S.W.2d 137 (Mo. App. E.D. 1982).....	18
<i>Frederick v. Heim</i> , 943 S.W.2d 343 (Mo. App. S.D. 1997).....	19
<i>In the Interest of P.L.O.</i> , 168 S.W.3d 716, 718 (Mo. App. S.D. 2005) .....	16
<i>Johnston v. Sweany</i> , 68 S.W.3d 398 (Mo. banc 2002).....	11, 14
<i>Joplin Waterworks Co. v. Jasper County</i> , 38 S.W.2d 1068 (Mo. 1931).....	21, 24
<i>Kracman v. Ozark Electric Cooperative, Inc.</i> , 816 S.W.2d 688 (Mo. App. S.D. 1991).....	12, 16, 20, 24

<i>Magruder v. Petre</i> , 690 S.W.2d 830 (Mo. App. W.D. 1985).....	12, 21
<i>McKean v. St. Louis County</i> , 964 S.W.2d 470 (Mo. App. E.D. 1998).....	12, 17
<i>Preisler v. Doherty</i> , 265 S.W.2d 404 (Mo. banc 1954).....	18, 19
<i>Promotional Consultants, Inc. v. Logsdon</i> , 25 S.W.3d 501 (Mo. App. E.D. 2000).....	21
<i>Reed v. Reardon</i> , 41 S.W.3d 470 (Mo. banc 2001) .....	13, 15, 16
<i>Snow v. Sunbelt Systems Transport</i> , 813 S.W.2d 868 (Mo. banc 1991).....	11, 14
<i>Sprake v. Testerman</i> , 470 S.W.2d 526 (Mo. 1971).....	24
<i>State ex rel. Berbiglia, Inc. v. Randall</i> , 423 S.W.2d 765 (Mo. banc 1968).....	12, 17, 18
<i>State ex rel. Ellsworth v. The State Tax Commission</i> , 651 S.W.2d 130 (Mo. banc. 1983).....	20
<i>State ex rel. Mo. Public Serv. Co. v. Fraas</i> , 627 S.W.2d 882 (Mo. banc 1980).....	22
<i>State v. Watson</i> , 603 S.W.2d 530 (Mo. banc 1980).....	14

## **JURISDICTIONAL STATEMENT**

On July 25, 2006, Respondents (hereinafter collectively referred to as “Precision”) sought to transfer this case from the Court of Appeals, Southern District, to this Court pursuant to Missouri Rule 83.04, after the court of appeals dismissed Cornerstone’s appeal. Precision sought transfer to this Court on the grounds that the case involved a question of general interest or importance arising from the court of appeals’ dismissal of Cornerstone’s appeal. *See* Precision’s Application for Transfer. The Court sustained Precision’s Application for Transfer on September 26, 2006.

If this Court does not rule that it improvidently granted transfer, then the Court has jurisdiction over this matter pursuant to Article V, Section 4 of the Constitution of the State of Missouri, as well as Missouri Rule 83.04 and Chapter 530 of the Missouri Revised Statutes.

## **STATEMENT OF FACTS**

Precision recovered a judgment against Cornerstone based on claims alleging that Cornerstone had trespassed on real estate owned by Precision in several states. These properties were originally owned by Cornerstone or its predecessors and were subsequently sold to Precision. Although the properties were sold, Precision contended that the propane tanks and other personal property that remained on the properties were still owned by Cornerstone. After Mr. Robert Plaster's employment with Cornerstone was terminated, Precision demanded that the tanks and other personal property be removed from Precision's real estate. Cornerstone subsequently complied in removing personal property from some of the lots, denied that it owned any personal property on others, and contended that it did not receive notice of trespass on other lots. After a trial to the Court, the Court entered a judgment in favor of Precision and against Cornerstone in the amount of \$613,716.59 in compensatory damages and an equal amount in punitive damages for Cornerstone's alleged trespasses.

Cornerstone appealed from that judgment to the Missouri Court of Appeals, Southern District. (*See* Joint Motion for Extension of Time and Request for Clarification Regarding Briefing Schedule and Issues on Transfer, ¶1). While the appeal was pending in the court of appeals, Cornerstone filed for bankruptcy. (Admitted by Precision, Application for Transfer, p. 2).

On February 8, 2006, Cornerstone filed in the court of appeals a Notice of Lifting Bankruptcy Stay. On that same day, Cornerstone filed its Motion to Enforce Settlement Agreement, asserting that the parties had settled the case. Cornerstone argued that

Precision agreed to accept, and Cornerstone agreed to pay, \$1.1 million, and that mutual releases would be executed releasing all claims asserted by the parties in the underlying case. The Motion to Enforce Settlement Agreement also argued that the parties agreed that the underlying case would be dismissed with prejudice, and that the appeal pending in the Missouri Court of Appeals, Southern District, would be dismissed. Finally, Cornerstone contended that Precision agreed to satisfy the judgment against Cornerstone and release any and all judgment liens attached to properties owned by Cornerstone or its successor in interest.

On February 10, 2006, the court of appeals referred Cornerstone's Motion to Enforce Settlement to the Circuit Court of Laclede County. The court of appeals instructed the circuit court to decide Cornerstone's motion, while the appeal was held in abeyance. (*See* Precision's Application for Transfer, Exhibit 1).

On April 24, 2006, the circuit court conducted an evidentiary hearing on Cornerstone's Motion to Enforce Settlement. On May 6, 2006, the circuit court entered its Findings of Fact and Conclusions of Law holding that a valid and enforceable settlement agreement existed between the parties. (Admitted by Precision, Application for Transfer, p. 2).

After receiving the circuit court's Findings of Fact and Conclusions of Law, on June 28, 2006, the court of appeals dismissed Cornerstone's appeal as moot, and remanded the case back to the circuit court. In its remand order, the court of appeals instructed the circuit court to enter a final judgment consistent with the circuit court's Findings of Fact and Conclusions of Law. The court of appeals instructed that the parties



could then file a new appeal or seek to enforce the final judgment. (*See* Precision's Application for Transfer, Exhibit 2).

Before the circuit court could enter a final judgment consistent with its Findings of Fact and Conclusions of Law, Precision moved the court of appeals for a rehearing, or, in the alternative, for transfer of the case to the Supreme Court of Missouri. (*See* Precision's Application for Transfer, Exhibit 3). In its motion for rehearing, Precision requested that the court of appeals rescind its order dismissing the appeal, and requested that the court enter an order directing the circuit court to (1) enter a final judgment consistent with its Findings of Fact and Conclusions of Law, and (2) certify that the judgment was final for purposes of appeal. Precision further requested that the court of appeals hold in abeyance Cornerstone's appeal from the May 3, 2004, final judgment pending the exhaustion of Precision's appeal of the trial court's judgment granting the motion to enforce settlement. On July 11, 2006, the court of appeals denied Precision's request for rehearing or transfer. (*See* Precision's Application for Transfer, Exhibit 4).

On July 25, 2006, Precision filed with this Court its application to transfer. Precision argued that the Supreme Court should transfer the case because Cornerstone's appeal bond and any existing judgment liens would be dissolved if the appeal is dismissed as moot. Precision argued that it would have no security protecting its original judgment against Cornerstone in the event that an appellate court subsequently reversed the circuit court's decision to sustain Cornerstone's motion to enforce the settlement. (*See* Precision's Application for Transfer). On September 26, 2006, over Cornerstone's opposition, this Court granted Precision's application to transfer.

On October 23, 2006, the Court ordered the parties to brief only the issue of whether the court of appeals prematurely dismissed Cornerstone's appeal as moot.

**POINTS RELIED ON BY CORNERSTONE**

**I. THIS COURT IMPROVIDENTLY GRANTED PRECISION'S APPLICATION FOR TRANSFER BECAUSE THERE IS NO ISSUE OF GENERAL INTEREST OR IMPORTANCE IN THIS CASE IN THAT WHETHER OR NOT THERE IS SUFFICIENT SECURITY FOR PRECISION TO COLLECT A JUDGMENT AGAINST CORNERSTONE IN THE FUTURE IF THE TRIAL COURT'S DECISION IS REVERSED ON APPEAL DOES NOT REQUIRE THE COURT OF APPEALS TO HOLD CORNERSTONE'S APPEAL IN ABEYANCE WHILE PRECISION APPEALS A COLLATERAL MATTER THAT WAS NOT RAISED IN CORNERSTONE'S ORIGINAL APPEAL.**

*Snow v. Sunbelt Systems Transport*, 813 S.W.2d 868 (Mo. banc 1991).

*Johnston v. Sweany*, 68 S.W.3d 398, 405 (Mo. banc 2002).

Missouri Rule 84.22.

Missouri Rule 83.09.

**II. THE COURT OF APPEALS CORRECTLY DISMISSED CORNERSTONE'S APPEAL AS MOOT BECAUSE THE ORIGINAL FINAL JUDGMENT AGAINST CORNERSTONE WAS EXTINGUISHED, OR WILL BE EXTINGUISHED BY THE TRIAL COURT'S ORDER GRANTING CORNERSTONE'S MOTION TO ENFORCE SETTLEMENT, IN THAT THE PARTIES AGREED TO SUBSTITUTE PERFORMANCE THROUGH THEIR SETTLEMENT AGREEMENT, AND AS A RESULT OF THE MAY 6, 2006, ORDER ENFORCING SETTLEMENT, THE ORIGINAL JUDGMENT AGAINST CORNERSTONE DOES NOT CONTROL.**

*McKean v. St. Louis County*, 964 S.W.2d 470 (Mo. App. E.D. 1998).

*Kracman v. Ozark Electric Coop., Inc.*, 816 S.W.2d 688 (Mo App. S.D. 1991).

*Magruder v. Petre*, 690 S.W.2d 830 (Mo. App. W.D. 1985).

*State ex rel. Berbiglia, Inc. v. Randall*, 423 S.W.2d 765 (Mo. banc. 1968)

## **ARGUMENT**

The standard of review for whether this Court improvidently granted transfer is de novo. *See* Missouri Rule 83.09.

The standard of review for whether the court of appeals correctly decided that Cornerstone's appeal was moot is also de novo because it involves a legal decision regarding the case's justiciability. *See Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001). But the standard of review for determining if the court of appeals' subsequent decision refusing to retain jurisdiction over the moot appeal is whether the court abused its discretion. *See Beckers v. Seck*, 14 S.W.3d 139, 141 (Mo. App. W.D. 2000).

**I. THIS COURT IMPROVIDENTLY GRANTED PRECISION'S APPLICATION FOR TRANSFER BECAUSE THERE IS NO ISSUE OF GENERAL INTEREST OR IMPORTANCE IN THIS CASE IN THAT WHETHER OR NOT THERE IS SUFFICIENT SECURITY FOR PRECISION TO COLLECT A JUDGMENT AGAINST CORNERSTONE IN THE FUTURE IF THE TRIAL COURT'S DECISION IS REVERSED ON APPEAL DOES NOT REQUIRE THE COURT OF APPEALS TO HOLD CORNERSTONE'S APPEAL IN ABEYANCE WHILE PRECISION APPEALS A COLLATERAL MATTER THAT WAS NOT RAISED IN CORNERSTONE'S ORIGINAL APPEAL.**

The Court erroneously granted transfer in this case, because transfer is not available to review an order dismissing an appeal prior to an opinion.

Missouri Supreme Court Rule 83.04 permits a case to be transferred to this Court from the court of appeals on application by a party only: (1) if the case involves a

question of general interest or importance; (2) for the purpose of reexamining existing law; or (3) for the reason that the opinion is contrary to a previous decision of the appellate court. None of these grounds are applicable here. The Court should conclude that transfer was improvidently granted. *See* Missouri Rule 83.09; *State v. Watson*, 603 S.W.2d 530, 531 (Mo. banc 1980).

Precision did not argue in their application for transfer that this Court should accept transfer for the purpose of reexamining existing law or for the reason that the opinion is contrary to a previous decision of an appellate court. Rather, Precision argued that this dispute involving a settlement agreement is a matter of general interest and importance that demands the intercession of Missouri's highest court. Precision, however, now appears to acknowledge that the reasons set forth in Rule 83.04 do not provide a legitimate basis for the transfer of this case. In its brief, Precision does not cite Missouri Rule 83.04, but instead now argues that the Court has jurisdiction to hear the case because it "involves this Court's general superintending control over inferior courts." (*See* Brief of Respondents, p. 4). A transfer is not an appropriate procedure for the Court to exercise its general supervisory authority over the court of appeals.

The Court improvidently granted transfer because, under Rule 83.09, the Court reviews a transferred appeal as if it were an original appeal. *See Snow v. Sunbelt Systems Transport*, 813 S.W.2d 868 (Mo. banc 1991). Once transfer is granted, the court of appeals' opinion is effectively withdrawn. *See Johnston v. Sweany*, 68 S.W.3d 398, 405 (Mo. banc 2002). In this case, however, this Court ordered the parties to brief only the issue of whether the court of appeals' decision to dismiss the appeal as moot was

premature. Transfer is not the appropriate procedure for review of the court of appeals' dismissal order. If Precision believed that the court of appeals was abusing its discretion in dismissing the appeal, it should have sought review of that decision through a writ of prohibition, not an application for transfer. *See* Missouri Rule 84.22. The case should be remanded to the court of appeals for proceedings consistent with that court's order of dismissal.

**II. THE COURT OF APPEALS CORRECTLY DISMISSED CORNERSTONE'S APPEAL AS MOOT BECAUSE THE ORIGINAL FINAL JUDGMENT AGAINST CORNERSTONE WAS EXTINGUISHED, OR WILL BE EXTINGUISHED, BY THE TRIAL COURT'S ORDER GRANTING CORNERSTONE'S MOTION TO ENFORCE SETTLEMENT IN THAT THE PARTIES AGREED TO SUBSTITUTE PERFORMANCE THROUGH THEIR SETTLEMENT AGREEMENT, AND AS A RESULT OF THE MAY 6, 2006, ORDER ENFORCING SETTLEMENT, THE ORIGINAL JUDGMENT AGAINST CORNERSTONE DOES NOT CONTROL.**

**A. Standard Of Review For Dismissal of Moot Appeal.**

In the current posture of this case, the Court must address two decisions by the court of appeals: (1) whether the court of appeals erred in concluding that the settlement made Cornerstone's appeal moot, and (2) whether the court of appeals erred in dismissing Cornerstone's appeal based on its conclusion that the appeal was moot.

A threshold question for any appellate review is whether an actual controversy exists or whether the case is moot. *Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc

2001). If a question is presented for a decision that will have no practical affect on an existing controversy, the case is moot. *In the Interest of P.L.O.*, 168 S.W.3d 716, 718 (Mo. App. S.D. 2005). If no controversy exists, a court of appeals generally should decline to retain jurisdiction and dismiss the appeal. *Id.* (citing *Brock v. Brock*, 142 S.W.3d 204, 207 (Mo. App. E.D. 2004)). A moot case implicates a case's justiciability; therefore, an appellate court may dismiss a moot appeal *sua sponte*. *Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo. App. W.D. 1999). When determining whether a controversy is moot, an appellate court may look outside the record. *Kracman v. Ozark Electric Coop., Inc.*, 816 S.W.2d 688, 690 (Mo App. S.D. 1991).

Whether a lower court correctly determined whether a case is moot in the first instance appears to be subject to de novo review because it involves legal issues concerning justiciability of the case. *See, e.g., Reed*, 41 S.W.3d at 473 (“When an event occurs that makes a court’s decision unnecessary *or makes granting effectual relief by the court impossible*, the case is moot and generally should be dismissed”) (emphasis added).

An appellate court, however, has the discretion to dismiss an appeal that it finds moot, and that decision is reviewed for abuse of discretion. *See Beckers v. Seck*, 14 S.W.3d 139, 141 (Mo. App. W.D. 2000) (holding that “dismissal is discretionary in a moot case” while on appeal). A discretionary ruling by a court is presumed to be correct, and judicial discretion is abused only when a court’s ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it “shock[s] the sense of justice and indicate[s] a lack of careful consideration.” *See Baker v. Felker*, 952 S.W.2d 743, 746 (Mo. App. S.D. 1997).



The record supports the court of appeals' legal conclusion that the appeal was moot, and that court's decision to dismiss the appeal is neither arbitrary nor unreasonable and does not reflect a lack of consideration in light of the ample precedent permitting the dismissal of moot appeals.

B. The Circuit Court's Finding That The Parties Had Settled Made Cornerstone's Appeal Moot.

In the case at bar, the circuit court ruled that the parties settled their dispute while on appeal by agreeing to discharge the judgment for a substituted and agreed-upon performance. Once the circuit court ruled that a valid and enforceable settlement agreement existed, there was no judgment for the appeal bond or judgment lien to secure, and any issues raised in Cornerstone's appeal from the underlying judgment became moot. Cornerstone's legal obligation to Precision on the underlying May 2004 judgment, which was the jurisdictional basis for Cornerstone's appeal, was extinguished and replaced with the parties' substitute performance in the form of a settlement agreement, in which Cornerstone agreed to pay Precision \$1.1 million. *See, e.g., McKean v. St. Louis County*, 964 S.W.2d 470, 471 (Mo. App. E.D. 1998) (holding that a settlement agreement is an agreement to discharge an existing claim by substituted performance).

As instructed by the court of appeals, the case should have been remanded to the circuit court for entry of a final judgment consistent with the court's Findings of Fact and Conclusions of Law from May 6, 2006. The final judgment reflecting that settlement controls, because there cannot exist two final judgments entered by the trial court which are contradictory in their rulings. *See State ex rel. Berbiglia, Inc. v. Randall*, 423 S.W.2d

765, 769 (Mo. banc 1968) (“There cannot be two final judgments in the same action . . . entry of the second judgment in the same action is not a vacation of the first judgment, if there is nothing further to show that such former judgment was regularly canceled or set aside”); *Curia v. St. Louis County*, 645 S.W.2d 137, 138 (Mo. App. E.D. 1982); *see also, Cravens v. McKinnell*, 359 F.2d 24, 26 (8<sup>th</sup> Cir. 1966) (“Even though there may be two judgments, there can only be one satisfaction”). In this case, the final judgment from which Cornerstone appealed was negated by the circuit court’s order finding that the parties had settled the case.

C. The Supersedeas Bond And Judgment Liens Relating To The May 2004 Judgment Do Not Warrant Holding The Appeal In Abeyance.

Precision offers no legal basis for arguing that Cornerstone’s appeal on the first judgment should be held in abeyance while Precision appeals the circuit court’s judgment enforcing the settlement. Cornerstone’s appeal bond and the judgment liens were no longer enforceable once the circuit court determined that Cornerstone and Precision had settled their dispute. Even during an appeal by Precision from the judgment enforcing settlement, the order enforcing settlement is binding on the parties, unless and until reversed, and the appeal based on the original judgment is moot. *See, e.g., Brown v. Curtiss*, 137 S.W. 24, 26 (Mo. App. 1911) (“And whereas the action of the court was erroneous, still it was binding upon the parties until reversed by the appellate court. . .”).

Precision relies heavily on *Preisler v. Doherty*, 265 S.W.2d 404 (Mo. banc 1954) for the proposition that the Court of appeals should not have dismissed Cornerstone’s appeal as moot because its decision “could have [a] practical effect upon the existing

controversy between the parties.” *Preisler*, 265 S.W.2d at 407. But *Preisler* further holds, “where there is no actual controversy existing *as to a question presented on appeal, the appellate court need not determine it.*” *Id.* at 407-08 (emphasis added). That holding is applicable here.

Precision argues that if they successfully challenge the trial court’s decision in the future, there may not be adequate security to collect on the judgment against Cornerstone because the appeal bond and judgment liens will be dissolved.<sup>1</sup> This argument requires the following future events to happen: (1) the circuit court will enter a final judgment consistent with its Findings of Fact and Conclusions of Law; (2) Precision appeals that final judgment; (3) Precision’s appeal successfully overturns the trial court’s discretionary ruling on an equitable matter; and (4) Cornerstone’s successor in interest, Titan Propane, will not have adequate assets for Precision to collect on the final judgment against Cornerstone. These assumptions of future events are based on speculation that have no bearing on the actual issues raised in Cornerstone’s appeal, and do not warrant

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<sup>1</sup> Moreover, whether Precision will have sufficient security to collect the underlying judgment if the trial court’s decision sustaining Cornerstone’s motion to enforce the settlement is reversed was never presented and is not an issue in Cornerstone’s original appeal. It is a matter collateral to Cornerstone’s appeal. *See Frederick v. Heim*, 943 S.W.2d 343, 347 (Mo. App. S.D. 1997) (holding that a motion to compel a settlement agreement is a collateral action for specific performance of a settlement agreement). It would have been improper for the court of appeals to consider matters extraneous to Cornerstone’s appeal. *See Preisler*, 265 S.W.2d at 407-408.

holding the appeal in abeyance and maintaining a judgment lien and bond after the court has entered an order enforcing settlement. *See Preisler*, 265 S.W.2d at 407.

As a collateral matter concerning equitable specific performance of a settlement agreement, there is no legal basis for Precision's argument that the court of appeals was required to hold Cornerstone's appeal in abeyance while Precision appealed a collateral matter. To the contrary, Precision's proposed course of action will effectively hold hostage Cornerstone's successor in interest, Titan Propane, by requiring that the judgment liens and the \$1.4 million appeal bond remain in place, despite the court's decision that the parties had settled their dispute by agreement.

A controversy is no less moot simply because an issue may come into play in the future. *Kracman*, 816 S.W.2d at 690. An appellate court will not entertain speculative issues for the benefit of another case at some other time in the future. *See Carrothers v. Beal*, 565 S.W.2d 807, 808 (Mo. App. 1978). An appellate opinion must be limited to those questions that are essential to a proper disposition of the appeal. *State ex rel. Ellsworth v. The State Tax Commission*, 651 S.W.2d 130, 133 (Mo. banc. 1983). Precision's argument concerning equitable collateral issues that can be raised in a future appeal are not a basis for the court of appeals to retain jurisdiction over this moot case pending the conclusion of Precision's future appeal concerning a collateral matter.

This scenario is analogous to when a plaintiff obtains a favorable jury verdict and the verdict is set aside by the trial court pursuant to post-trial motions filed by a defendant. *See Missouri Rule 75.01*. In such a case, the plaintiff is not entitled to any security to insure that the plaintiff can collect any judgment if a court of appeals later

reinstates the verdict and reverses the trial court's decision to take away the jury verdict. In that situation, although the plaintiff would obviously prefer to have financial security in place to collect in the future if a judgment is subsequently entered consistent with the original jury verdict, there is no legal basis for a trial court or court of appeals to require any security once a court sets aside the jury verdict.

D. Once It Concluded That The Appeal Was Moot, The Court of Appeals Properly Exercised Its Discretion In Dismissing Cornerstone's Appeal.

In the absence of an actual controversy, an appellate court must either dismiss the appeal or remand it to the trial court with directions to vacate the judgment and dismiss the cause. *See Joplin Waterworks Co. v. Jasper County*, 38 S.W.2d 1068, 1075 (Mo. 1931). Ample precedent supports the dismissal of appeals when there is a legal decision that the dispute is moot, such as when the parties settle their dispute. *See Bishop v. Heartland Chevrolet, Inc.*, 152 S.W.3d 893, 897 fn. 6 (Mo. App. W.D. 2005); *Promotional Consultants, Inc. v. Logsdon*, 25 S.W.3d 501, 506 (Mo. App. E.D. 2000); *Brock v. Brock*, 142 S.W.3d 204, 206 (Mo. App. E.D. 2004); *Central Maloney, Inc. v. City of St. Louis*, 527 S.W.2d 39, 41 (Mo. App. 1975). In this case, the appeal is moot based on the circuit court's order enforcing the settlement agreement that existed between Cornerstone and Precision, and dismissal was appropriate.

An appellate court only has discretion to decide a moot issue when a case presents an "unsettled legal issue of public interest and importance." *Magruder v. Petre*, 690 S.W.2d 830, 831 (Mo. App. W.D. 1985). This narrow exception "is made where an issue is presented of a recurring nature, is of general public interest and importance, and will

evade appellate review unless a court exercises its discretionary jurisdiction.” *See State ex rel. Mo. Public Serv. Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App. W.D. 1981). Whether an appellate court should exercise this discretion depends on if there is a “legal principle not previously ruled on to which a judicial declaration should be made for future guidance.” *Id.* No such case exists here. This is not an appeal where the fact pattern is a “recurring nature” or involves a public interest or public importance. This is a dispute between private parties who agreed to settle their dispute on appeal.

Even if this case involved issues of a recurring nature and an important public interest that might evade appellate review (which it does not), then the court of appeals still properly exercised its discretion not to retain jurisdiction over the appeal. A discretionary ruling by a court is presumed to be correct, and judicial discretion is abused only when a court’s ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable that it “shock[s] the sense of justice and indicate[s] a lack of careful consideration.” *See Baker v. Felker*, 952 S.W.2d 743, 746 (Mo. App. S.D. 1997). If reasonable people could differ about the propriety of a court’s ruling, the court did not abuse its discretion. *Id.*

The appellate court’s decision to dismiss the appeal as moot neither shocks the sense of justice nor reflects a lack of careful consideration. To the contrary, it would shock the sense of justice to require Cornerstone’s successor, Titan Propane, to continue to be bound by a \$1.4 million appeal bond and to continue to be subjected to judgment liens after the trial court has held that the dispute was settled.

The status quo will not be preserved if Precision is permitted to appeal this collateral matter while the judgment liens and appeal bond remain, because the “status quo” was altered materially when the trial court ruled that the parties settled their dispute while on appeal. *See Brock*, 142 S.W.3d at 206 (“The doctrine of mootness is triggered when an event occurs that alters the position of the parties and any judgment would be a hypothetical opinion”). Precision improperly seeks the security of an appeal bond and judgment liens despite the circuit court’s ruling that the parties agreed to settle their dispute by having Cornerstone pay \$1.1 million to Precision, and for which its successor, Titan Propane, was ready, willing and poised to pay as agreed upon. Whether sufficient security exists for a judgment superseded by the order enforcing settlement has no bearing on the court’s decision to dismiss Cornerstone’s pending appeal as moot.

Moreover, Precision’s argument that it risks losing its security to collect on the judgment against Cornerstone if the trial court’s decision is reversed is simply a red-herring. There is no evidence in the record to support Precision’s assertion that Titan Propane, Cornerstone’s successor, does not have assets to collect, or that it is underfunded such that it cannot pay a \$1.4 million judgment. On the contrary, the underlying assets were transferred to Cornerstone’s successor, Titan Propane, pursuant to the bankruptcy order and continue to be owned by Titan. As such, it is pure speculation that there will be any practical effect on Precision if the judgment liens and appeal bond are dissolved.

The basis of Precision’s endeavor here is simply to frustrate Titan Propane and prevent it from completing sales of its under-performing properties. The existing

judgment liens are preventing the sale of these properties and are seriously undermining Titan's business by creating a substantial inconvenience and burden, despite the existence of a valid judicial determination that the parties have settled their dispute. Precision's arguments otherwise have no basis in fact, much less in the record on appeal.

This case is factually and legally different from *Sprake v. Testerman*, 470 S.W.2d 526, 527 (Mo. 1971). In *Sprake*, the court declined to dismiss the appeal because there was an unresolved dispute over settlement. *Id.* In the case at bar, however, the circuit court made a judicial determination that a valid and enforceable settlement agreement existed. The court of appeals may rely on that judicial decision to determine that the case is moot. *See Kracman*, 816 S.W.2d at 690. Unlike *Sprake*, this is not a case involving two parties presenting an unresolved "he said/she said" dispute.

The appeal is moot based on the circuit court's conclusion that a valid and enforceable settlement agreement existed between Cornerstone and Precision. Based on that decision, the court of appeals properly dismissed the moot appeal. *See Joplin Waterworks Co.*, 38 S.W.2d at 1075.

### **CONCLUSION**

The court of appeals did not err when it dismissed Cornerstone's appeal as moot. After an evidentiary hearing, the trial court held that a valid and enforceable settlement agreement existed between the parties as determined. As a result of that holding, the appeal from the original judgment became moot. Precision's argument about a judgment lien and appeal bond have no relevance to the question of whether the appeal was moot or whether the court of appeals abused its discretion in dismissing the appeal.



Respectfully Submitted,

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IN THE SUPREME COURT OF MISSOURI

PRECISION INVESTMENTS, L.L.C., et al.	)	
	)	
Respondents,	)	
	)	
	)	
vs.	)	
	)	
CORNERSTONE PROPANE, L.P.,	)	<b>Appeal No. SC-87866</b>
	)	
Appellant.	)	
	)	

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)**

This Brief complies with the limitations contained in Supreme Court Rule 84.06(c). The number of words contained in this Brief are 4,494. The number of lines of monospaced type in this Brief are 373.

Attached and served with this Brief is a floppy disk containing the Brief. The attached disk is double-sided, high density, IBM-PC compatible 1.44 MB 3 ½ inch size. Said disk has been scanned for viruses and is virus free.

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Attorney for Cornerstone

Subscribed and sworn to before me this \_\_\_\_ day of December, 2006.

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Notary

My commission expires: \_\_\_\_\_

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	)	

**CERTIFICATE OF SERVICE**

I, Darren K. Sharp, certify the original and nine (9) copies of Appellant Cornerstone Propane, L.P.'s Brief in Response to Brief of Respondents Precision Investments, et al. and one (1) floppy disk containing Appellant Cornerstone Propane, L.P.'s Brief in Response to Brief of Respondents Precision Investments, et al. were sent by Federal Express on this 15<sup>th</sup> day of December, 2006, to Thomas F. Simon, Clerk, Supreme Court of Missouri, Supreme Court Building, 207 W. High Street, Jefferson City, MO 65101-1516 and one (1) copy and (1) floppy disk containing Appellant Cornerstone Propane, L.P.'s Brief in Response to Brief of Respondents Precision Investments, et al. were sent by Federal Express, on the 18<sup>th</sup> day of December, 2006, to:

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