

Appeal No. SC-87866

IN THE SUPREME COURT OF MISSOURI

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.

REPLY BRIEF OF
RESPONDENTS PRECISION INVESTMENTS, L.L.C., ET AL.

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ARGUMENT

Point I

In Point I of its Brief, Appellant argues this Court improvidently granted Respondent's application for transfer. Appellant also notes Respondents' reference to Article V, Section 4, of the Missouri Constitution, delineating this Court's general superintending control over inferior courts. Finally, in Point I, Appellant intimates Respondents should have filed an application for writ of prohibition rather than an application for transfer. Respondents make the following reply to these arguments.

First and foremost, it is well established that on an application for a writ, the Court may grant the appropriate remedy irrespective of the relator's prayer. *State ex. rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo. Banc 1998). *See also*, *State ex. rel. Stewart v. Civil Service Commission of the City of St. Louis*, 120 S.W.3d 279, 285 (Mo. App. 2003). This Court has discretion to look beyond the designation of a petition seeking particular relief and treat it as a writ for different relief. Simply stated, if this Court concludes prohibition is a more appropriate vehicle to deal with the issues currently before the Court, it has the discretion to issue that relief. Any suggestion by Appellant that Respondents' application for transfer should be dismissed because it was not denominated as a matter in prohibition is without merit.

Respondents additionally want to address Appellant's argument in Point I that Respondents have somehow abandoned their stated basis for transfer to this

Court. In support of these strained arguments, Appellant notes Respondents' citation to Article V, Section 4, of the Missouri Constitution dealing with this Court's superintending control over inferior courts. What Appellant fails to tell the Court is that this citation occurred in Respondents' jurisdictional statement. Respondents certainly do not concede, as Appellant suggests, that the reasons set forth in Rule 83.04 provide no legitimate basis for transfer of this case. To the contrary, Respondents devote several pages of their initial brief explaining why the Court of Appeals' order was contrary to previous Appellate Court decisions. Respondents specifically examined *Promotional Consultants, Inc. v. Logsdon*, 25 S.W.3d 501 (Mo. App. 2000) and *Brock v. Brock*, 142 S.W.3d 204 (Mo. App. 2004). The Court of Appeals' June 28, 2006, order was contrary to these decisions, Respondents made that argument in their opening brief and have not abandoned that argument. It is also interesting to note that nowhere in Appellant's brief do they refute the inapplicability of *Promotional Consultants* and *Brock* to the instant proceeding. Those cases involved undisputed settlements, this case does not, and Appellant has not refuted this distinction.

ARGUMENT

Point II

Appellant attempts to justify the Court of Appeals' June 26, 2006, order by arguing the appeal was moot based on the trial court's finding that a settlement occurred. Specifically, Appellant states "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." (Appellant's brief, page 17). It is important for this Court to observe that the Trial Court simply made factual findings in response to an order from the Court of Appeals. No final orders, judgments, decrees or dismissals have been entered by the Trial Court. Rather, the Trial Court simply made a factual finding on May 6, 2006, sustaining Appellant's Motion to Enforce Settlement. The original judgment of \$1,252,465.33 entered against Appellant on May 3, 2004, has not been extinguished or set aside, nor has any other judgment been entered. Respondents respectfully submit that any arguments that the Trial Court's *Factual Findings* somehow extinguished or set aside the May 3, 2004, judgment are circuitous and without merit.

Appellant goes on to argue in Point II of its brief that it will be severely harmed if the judgment liens and appeal bond remain in place. Respondents simply suggest that there is no evidence of any real or potential harm accruing to Appellant present in the meager record before this Court. As such, Appellant

should not be allowed to use such allegations of harm in support of its position before this Court.

Appellant also makes the argument that there cannot be two final judgments entered by the same court with contradictory rulings. Again, no orders or judgments have been entered by the Trial Court other than its May 3, 2004, judgment against Appellant in favor of Respondents. The Findings of Fact entered by the Court on May 6, 2006, do not supplant or replace the original judgment. Accordingly, Appellant's reliance upon authorities addressing this issue is misplaced.

CONCLUSION

For the foregoing reasons, Respondents submit the Court of Appeals' order of June 26, 2006, was improper. Respondents have demonstrated that the Court of Appeals order is contrary to existing appellate decisions and, as such, the appeal is not moot and should not be dismissed. Rather, the appeal should be held in abeyance or stayed pending appellate review of the Trial Court's May 6, 2006, Findings of Fact and Conclusions of Law.

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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 1344. The number of lines of monospaced type in this Brief are 256.

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 3½ inch size. Said disk has been scanned for viruses and is virus free.

Michael K. Cully

Subscribed and sworn to before me this _____ day of January, 2007.

Notary Public
My commission expires: _____

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CERTIFICATE OF SERVICE

I, Michael K. Cully, certify the original and nine (9) copies of Brief of Respondents and one (1) floppy disk containing Brief were sent by Federal Express on this 3rd day of January, 2007, 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 Brief were sent, via Federal Express, on the 3rd day of January, 2007, to Mr. Darren K. Sharp, 2345 Grand Blvd., Suite 2000, Kansas City, MO 64108.

Michael K. Cully