

**IN THE MISSOURI SUPREME COURT**

---

**GWEN MARIE SPICER,**

**Appellant,**

**v.**

**DONALD N. SPICER REVOCABLE LIVING TRUST, et al.,**

**Respondents.**

---

**No. SC91117**

---

**Appeal from the Circuit Court of St. Louis County**

**21st Judicial Circuit**

**The Honorable John A. Ross, Judge**

---

**SUBSTITUTE REPLY BRIEF OF APPELLANT**

---

**RON RIBAUDO**

Mo. Bar. No. 53833

**THE RIBAUDO LAW FIRM**

362 Autumn Creek Dr., Unit J

Valley Park, MO 63088

phone: (636) 485-8252

facsimile: (866) 499-3491

ron@ribaudolaw.com

www.ribaudolaw.com

*Counsel for Appellant*

## TABLE OF CONTENTS

Table of Authorities.....	ii
Argument	
I. This Court has appellate jurisdiction. ....	1
II. The Circuit Court misapplied or misconstrued the law by setting aside the 2008 judgment, by finding that the parties had entered into a settlement agreement, by finding that the statute of frauds did not bar enforcement of the (alleged) settlement agreement, and by ordering specific performance and execution of a consent judgment. ....	7
Conclusion.....	27
Certificate of Compliance & Service .....	28

## TABLE OF AUTHORITIES

### I. Cases

<u>American Sur. Co. v. Pauly</u> , 170 U.S. 133, 153 (1898) .....	11
<u>Barton v. Snellson</u> , 735 S.W.2d 160 (Mo. App. E.D. 1987). .....	15
<u>Berger v. Cameron Mut. Ins. Co.</u> , 173 S.W.3d 639 (Mo. 2005) .....	4, 9
<u>Besse v. Missouri Pacific R.</u> , 721 S.W.2d 740 (Mo. 1986).....	26
<u>Blechle v. Goodyear Tire &amp; Rubber Co.</u> , 28 S.W.3d 484 (Mo. App. E.D. 2000).....	3
<u>Bracey v. Monsanto</u> , 823 S.W.2d 946 (Mo. 1992).....	10
<u>Casper v. Lee</u> , 245 S.W.2d 132 (Mo. 1952) .....	10
<u>Chase Manhattan Mortg. Corp. v. Moore</u> , 446 F.3d 725 (7th Cir. 2006).....	4
<u>Cope v. Western Surety Co.</u> , 791 S.W.2d 844 (Mo. App. E.D. 1990).....	1
<u>DeWitt v. Lutes</u> , 581 S.W.2d 941 (Mo. App. S.D. 1979) .....	21
<u>Eaton v. Mallinckrodt</u> , 224 S.W.3d 596 (Mo. 2007).....	2-3, 27
<u>Edmunds v. Sigma Chapter of Alpha Kappa</u> , 87 S.W.3d 21 (Mo. App. W.D.App.2002).....	10
<u>Embry v. Hargadine, McKittrick Dry Goods</u> , 105 S.W. 777 (Mo. App. 1907) .....	18
<u>Farmer v. Arnold</u> , 371 S.W.2d 265 (Mo. 1963) .....	3
<u>Footwear Unlimited v. Katzenberg</u> , 683 S.W.2d 291 (Mo. App. E.D. 1984).....	22
<u>Gaunter v. Shelton</u> , 860 S.W.2d 843, 844 (Mo. App. E.D. 1993).....	2
<u>Gillenwaters Bldg. v. Lipscomb</u> , 482 S.W.2d 409 (Mo. 1972).....	21
<u>Grissum v. Reesman</u> , 505 S.W.2d 81 (Mo. 1974).....	23
<u>Hair Kraz v. Schuchardt</u> , 131 S.W.3d 854 (Mo. App. E.D. 2004).....	24

<u>Hill v. Boles</u> , 583 S.W.2d 141 (Mo. 1979).....	19
<u>Home Shopping Club v. Roberts Broadcasting</u> , 989 S.W.2d 174 (Mo. App. E.D. 1998) .....	26
<u>In re Estate of Shaw</u> , 256 S.W.3d 72 (Mo. 2008).....	14
<u>In re Coleman</u> , 295 S.W.3d 857 (Mo. 2009) .....	16
<u>In re Marriage of Crow &amp; Gilmore</u> , 103 S.W.3d 778 (Mo. 2003) .....	6
<u>In re Marriage of Miller</u> , 196 S.W.3d 683 (Mo. App. 2006).....	14
<u>In re Marriage of Smith</u> , 721 S.W.2d 782 (Mo. App. S.D. 1986) .....	6
<u>In re Voehl</u> , 783 S.W.2d 532 (Mo. App. S.D. 1990).....	8
<u>In Rep. Trustees Indian Springs v. Greeves</u> , 277 S.W.3d 793 (Mo. App. E.D. 2009).....	11
<u>Jackson v. Shain</u> , 619 S.W.2d 860 (Mo. App. W.D. 1981).....	20
<u>J.C.W. ex rel. Webb v. Wyciskalla</u> , 275 S.W.3d 249 (Mo. 2009).....	7, 14
<u>Jones v. Linder</u> , 247 S.W.2d 817 (Mo. 1952).....	22
<u>Justus v. Webb</u> , 634 S.W.2d 567 (Mo. App. 1982).....	22
<u>Kenney v. Vansittert</u> , 277 S.W.3d 713 (Mo. App. W.D. 2008) .....	4
<u>Komsky v. Union Pacific R.</u> , 293 S.W.3d 31 (Mo. App. E.D. 2009).....	14
<u>Landmark Bank v. First Nat. Bank</u> , 738 S.W.2d 922 (Mo. App. E.D. 1987) .....	3
<u>Leeson v. Etchison</u> , 650 S.W.2d 681 (Mo. App. W.D. 1983).....	22-23
<u>Meyers v. Johnson</u> , 182 S.W.3d 278, 280 (Mo. 2006).....	1
<u>Miller v. Harper</u> , 63 Mo. App. 293 (Mo. App. 1895).....	22
<u>Muse v. Woyner</u> , 698 S.W.2d 26 (Mo. App. S.D. 1985) .....	23
<u>N.L.R.B. v. P*I*E Nationwide</u> , 894 F.2d 887 (7th Cir. 1990).....	27

<u>Nolan v. Metropolitan St. Ry. Co.</u> , 157 S.W. 637 (Mo. 1913).....	11
<u>Norton v. Friedman</u> , 756 S.W.2d 158 (Mo. 1988) .....	22, 23
<u>Owens v. Hankins</u> , 289 S.W.3d 299 (Mo. App. 2009).....	22
<u>Peasel v. Dunakey</u> , 279 S.W.3d 543 (Mo. App. E.D. 2009) .....	14
<u>Reformed v. Matthews</u> , 234 S.W.2d 567 (Mo. 1950) .....	12
<u>Rosenfeld v. Thoele</u> , 28 S.W.3d 446 (Mo. App. E.D. 2000).....	25
<u>Sappington v. Miller</u> , 821 S.W.2d 901 (Mo. App. 1992).....	17
<u>Schindler v. Pepple</u> , 158 S.W.3d 784 (Mo. App. E.D. 2005).....	13-14
<u>Scott v. Ranch Roy-L</u> , 182 S.W.3d 627 (Mo. App. E.D. 2005).....	22
<u>Skelly Oil v. Ashmore</u> , 365 S.W.2d 582 (Mo. 1963) .....	26
<u>Smith v. State</u> , 63 S.W.3d 218 (Mo. 2001).....	3
<u>St. Louis Union Station Holdings v. Discovery Channel Store</u> ,	
272 S.W.3d 504 (Mo. App. E.D. 2008).....	2-3
<u>State ex rel. Highway Commission v. Morganstein</u> ,	
649 S.W.2d 485 (Mo. App. 1983) .....	1
<u>State ex rel. Myers v. Shinnick</u> , 19 S.W.2d 676 (Mo. 1929).....	25
<u>State ex rel. Pettis County v. Sloan</u> , 643 S.W.2d 618 (Mo. App. W.D. 1982).....	8
<u>State ex rel. Picerno v. Mauer</u> , 920 S.W.2d 904 (Mo. App. W.D. 1996).....	5
<u>State ex rel. Union Elec. v. Public Service Commission</u> , 687 S.W.2d 162	
(Mo. banc 1985).....	12
<u>State ex rel. Webster County v. Hutcherson</u> , 199 S.W.3d 866 (Mo. App. S.D. 2006)10	
<u>State ex rel. Wolfner v. Dalton</u> , 955 S.W.2d 928 (Mo. 1997).....	8

<u>Ste. Genevieve County Levee v. Luhr Bros.</u> , 288 S.W.3d 779 (Mo. App. 2009) .....	26
<u>Taylor v. Sturgell</u> , 553 U.S. 880 (2008) .....	12
<u>Taylor v. United Parcel Service, Inc.</u> , 854 S.W.2d 390 (Mo. 1993) .....	9
<u>Terminal Warehouses v. Reiners</u> , 371 S.W.2d 311 (Mo. 1963).....	16
<u>Three-O-Three Investments v. Moffitt</u> , 622 S.W.2d 736 (Mo. App. W.D. 1981) .....	17
<u>United States v. Burr</u> , 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807) .....	26
<u>Welborn v. Rigdon</u> , 231 S.W.2d 127 (Mo. 1950) .....	23, 24

**II. Rules, Statutes, Constitutional Provisions, and Other Authorities**

Mo. Rev. Stat. § 432.010 .....	20
Mo. Rev. Stat. § 442.360 .....	20
Mo. Rev. Stat. §512.020 .....	4
Restatement (Second) of Agency §283(a) .....	11
Rule 52.06 .....	8, 10
Rule 75.01 .....	7, 13
Rule 81.05 .....	7, 8, 13

## ARGUMENT

Appellant Gwen Spice and her husband, Donald N. Spicer, purchased their marital home as tenants by the entirety, with each spouse owning the “whole,” rather than a divisible part, of the realty. State ex rel. Highway Commission v. Morganstein, 649 S.W.2d 485, 488 (Mo. App. 1983). When Donald died, his property interest in the tenancy automatically terminated, leaving Appellant the fee simple owner of the realty, notwithstanding Donald’s (void) attempt to unilaterally sever the tenancy by conveying a 1/2 interest to the Donald N. Spicer Revocable Living Trust. Cope v. Western Surety, 791 S.W.2d 844, 848 (Mo. App. E.D. 1990). The Circuit Court properly made these findings, granting Appellant summary judgment in 2008. But in setting aside that judgment, finding an enforceable settlement agreement, and by ordering the parties to specifically perform the agreement by executing a consent judgment, the Circuit Court committed multiple forms of reversible error.

### **I. This Court Has Appellate Jurisdiction**

Respondents make two arguments why this Court lacks appellate jurisdiction.

(1) Respondents contend that since Appellant did not file her (first) notice of appeal until 16 months after the Circuit Court’s 2008 judgment entered in her favor, the appeal is untimely. The contention is frivolous: Appellant is obviously not appealing the 2008 judgment, which does not aggrieve her and which she thus could not appeal even if she wanted to. See Meyers v. Johnson, 182 S.W.3d 278, 280 (Mo. 2006). Appellant is appealing the 2009 judgments finding a settlement agreement, which do aggrieve her. The notices of appeal regarding those judgments are clearly timely. (AB 1-2).

(2) Quoting St. Louis Union Station Holdings v. Discovery Channel Store, 272 S.W.3d 504 (Mo. App. E.D. 2008), Respondents argue that because an “order granting a motion to enforce settlement is not a final, appealable judgment,” because such an order becomes final “only after the trial court has entered a judgment on the settlement and dismissed the underlying petition,” and because neither the parties nor the Circuit Court has dismissed the case with prejudice, there is no final judgment before this Court. (RB 8).

As characterized by Respondents, St. Louis Union was wrongly decided. First of all, St. Louis Union, which is only two years old, mischaracterized the case law upon which it relied. Gaunter v. Shelton, 860 S.W.2d 843, 844 (Mo. App. E.D. 1993), which St. Louis Union cited for the proposition that “[a]n order granting a motion to enforce settlement is not a final, appealable judgment,” says no such thing. In Gaunter, it was *conceded* by the parties to the case, and assumed by the appellate court, that the parties had executed a *voluntary* settlement agreement. The appellants, plaintiffs in the underlying personal injury suit, did not challenge the voluntariness or existence of the settlement agreement (they did not, e.g., raise fraud, mistake, or any other contract defense). Rather, they challenged the validity of the Circuit Court’s *enforcement order*. Unlike the appellants in Gaunter, Appellant *is* challenging the validity, existence, and enforceability of the (alleged) settlement agreement.

More significantly, like Respondents, St. Louis Union doesn’t mention, let alone attempt to distinguish, this Court’s decision in Eaton v. Mallinckrodt, 224 S.W.3d 596 (Mo. 2007), which trumps any contrary Eastern District precedent. In Eaton, this Court

reviewed a judgment granting a motion to enforce a settlement agreement, even though neither the parties nor the circuit court had dismissed the case with (or without) prejudice. If Respondents' argument were right, this Court – which has a duty to *sua sponte* ascertain its own jurisdiction before addressing the merits, Smith v. State, 63 S.W.3d 218 (Mo. 2001) – either ignored or botched the jurisdictional issue. Such an unfounded charge is belied by the Eaton opinion itself. The opinion (penned by Judge Lowenstein) expressly noted that a motion to enforce a settlement agreement initiates a “collateral” action in the underlying suit, citing Landmark Bank v. First Nat. Bank, 738 S.W.2d 922 (Mo. App. E.D. 1987) (reviewing the merits of an appeal from a judgment granting a motion to enforce a settlement agreement). Farmer v. Arnold, 371 S.W.2d 265 (Mo. 1963), in which this Court stated that “a compromise and settlement operates as a merger of, and bars all right to recover on, the claim or right of action included therein . . . The antecedent claim is extinguished,” is consistent with appellate jurisdiction Eaton, as it is here.

Respondents assume that the finality of a judgment turns on whether future action can be taken by the parties to a case. But finality is, or should be, gauged by whether the circuit court is finished with the case, not whether the parties could pursue additional matters in the case. See Blechle v. Goodyear Tire & Rubber Co., 28 S.W.3d 484, 486 (Mo. App. E.D. 2000). To be sure, if the parties' claims are pending and the parties dismiss their claims, the case will be final, but such a dismissal is not *necessary* for a case to be over. “The test is not the adequacy of the judgment but whether the district court

has finished with the case. If it has, ending the lawsuit, the judgment can be appealed[.]” Chase Manhattan Mortg. Corp. v. Moore, 446 F.3d 725, 726 (7th Cir. 2006).

If Respondents were right, an appeal would lie only if the would-be appellee or the circuit court were to decide, in effect, to allow an appeal. But the right to appeal created by Section 512.020 confers no such veto power, as it were, on the circuit court or the party opposed to an appeal. Moreover, in the present case, there is nothing that Appellant can do, under Respondents’ theory, to make her judgment final, which is flatly contrary to this Court holding that “[c]ases should be heard on the merits if possible, and court rules should be construed liberally to allow an appeal to proceed.” Berger v. Cameron Mut. Ins., 173 S.W.3d 639, 641 (Mo. 2005). In essence, Respondents’ theory boils down to the absurd claim that Appellant should never be able to challenge on appeal the Circuit Court’s (erroneous) judgment and its previous erroneous setting aside of the properly-entered judgment in her favor.

The following reasons explain why, under Respondents’ theory, Appellant will not be able to do anything to make her judgment final.

(1) If Respondent complies with the settlement agreement, by executing the consent judgment and then dismissing her claim, she will no longer be aggrieved and thus be unable to appeal. Kenney v. Vansittert, 277 S.W.3d 713, 723 (Mo. App. W.D. 2008).

(2) Even if Appellant could make the judgment final under Respondent’s view of finality, she would be unable to appeal the Circuit Court’s order to execute a consent judgment. That is because the “collateral bar rule” forbids a party from disobeying a

court order, and then challenging it on appeal. State ex rel. Picerno v. Mauer, 920 S.W.2d 904, 914 (Mo. App. W.D. 1996) (Stith, J., dissenting).

(3) Even if collateral bar rule were inapplicable, Appellant would probably never be held in contempt and subjected to *per diem* fines or imprisonment for her contempt, which would allow her to appeal the contempt ruling and the prior “interlocutory” judgments of 2009 and order setting aside the 2008 judgment. Respondent Spicer is unlikely to seek to have Appellant held in contempt. He is happy with the status quo and wouldn’t benefit from having Appellant held in contempt. He is living rent-free in a home whose mortgage is being paid in full by Appellant. If the house is sold, he loses his residence, and is unlikely to receive anything from the sale proceeds. That is because, under the consent judgment, Appellant is entitled to 1/2 of the (\$1,000 plus per month) mortgage payments she has made over the three years Respondent Spicer has been trespassing in Appellant’s house, as well as a set-off of \$100 per day since the Circuit Court entered its judgment granting the motion to enforce. (LF 351-53). (Currently, the penalties exceed \$52,000.) Respondent Spicer’s attorney, Gregory Fenlon, will then get 40 percent of the remaining 1/2 of the proceeds. (LF 352). Appellant is assuming that the house would sell, probably a false assumption given the atrocious housing market. Respondent Spicer must realize that his 1/3 interest (in the 1/2 interest in the proceeds) amounts to – nothing, or less than nothing. As a practical matter, the current judgment confers on Respondent Spicer a life interest in Appellant’s house, extinguishing Appellant’s property and possessory rights regarding the home.

Even if Respondent were inclined to move to have Appellant held in contempt, she still would not be able to appeal. To begin with, a finding of contempt will allow Appellant to pursue an appeal of the judgment granting the motion to compel only if the Circuit Court orders the contempt finding enforced by jailing Appellant or imposing per diem fines. In re Marriage of Crow & Gilmore, 103 S.W.3d 778, 781 (Mo. 2003). This is unlikely to happen. Appellant has a strong unclean hands argument, for Respondents have failed to sign the consent judgment or otherwise carry out any of its terms. (He has not delivered any of the personal property Appellant is entitled to under the consent judgment, and for almost a year, he has been violating the Circuit Court's order that he vacate Appellant's home.) Consequently, he has "engaged in inequitable activity regarding the very matter for which he seeks relief." In re Marriage of Smith, 721 S.W.2d 782, 785 (Mo. App. S.D. 1986).

(4) The Circuit Court will not dismiss this case with prejudice. As noted above, the Circuit Court has already disposed of the case, by granting the motion to enforce settlement agreement and ordering the parties to execute a consent judgment. In addition, the Circuit Court has already raised the idea of dismissing the case without prejudice, because of both parties' nonappearance on the trial date – and rejected it by issuing its current judgments. Also, the Circuit Court has no incentive to take any steps to give Appellant a chance to reverse its judgment. Neither party wishes to have the case dismissed with prejudice: It will place title to the property in limbo, essentially making the title unmarketable. In any event, the right to appeal should not turn on the happenstance of actions being taken by another party or the Circuit Court.

## II. The Circuit Court Misconstrued & Misapplied the Law in Multiple Ways

### A. The Circuit Court Erred in Vacating the 2008 Summary Judgment

Respondents contend that because Steven Spicer, then a non-party, filed his “motion to dismiss” within 30 days after the Circuit Court’s 2008 entry of summary judgment in favor of Appellant, the Circuit Court retained “jurisdiction” to set-aside that judgment. Respondent is mistaken.

To begin with, the issue here is not a jurisdictional issue. See generally J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009). Rather, the issue is whether the Circuit Court *erred* in applying or construing the court rules, in particular Rule 75.01, in setting aside the 2008 summary judgment more than 30 days after its entry. The answer is, “Yes.”

Respondents don’t deny that, more than 30 days having expired since the 2008 judgment’s entry, the Circuit Court lacked any authority to set aside the judgment *sua sponte*. Instead, Respondents contend that Respondent Spicer’s “motion to dismiss,” which was filed within 30 days of entry of the 2008 judgment, was a valid “authorized after-trial motion” and thus extended the Circuit Court’s authority, pursuant to Rule 81.05(a)(2), to set aside the 2008 judgment. This contention is meritless, for three reasons:

(1) Respondent Spicer was not a party when he filed his “motion to dismiss.” This is important because (a) no statute, rule, or other authority authorizes circuit courts to entertain motions from nonparties (except motions to intervene), and (b) nonparties generally lack standing, which cannot be waived, to contest a circuit court judgment. In

re Voehl, 783 S.W.2d 532 (Mo. App. S.D. 1990); State ex rel. Pettis County v. Sloan, 643 S.W.2d 618, 620 (Mo. App. W.D. 1982). In particular, non-parties cannot challenge a judgment by filing a Rule 74.06 motion, for “[t]he provisions of Rule 74.06(b) are limited to parties.” State ex rel. Wolfner v. Dalton, 955 S.W.2d 928, 930 (Mo. 1997). Likewise, though an “authorized after-trial motion” within 30 days after entry of judgment will prevent the judgment from becoming final and extend the authority of the Circuit Court to set-aside the judgment to as long as 90 days after entry of judgment, Rule 81.05(a)(2) limits this extension of authority to an after-trial motion filed by “a party.” So, however characterized, Respondent Spicer’s “motion to dismiss” wasn’t cognizable by the Circuit Court.

To remedy this problem, Respondents invoke Rule 52.06 and contend that the Circuit Court tacitly joined them as parties by operation of granting Respondent Spicer’s “motion to dismiss.” Rule 52.06 states: “Misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiate at any stage of the action and on such terms as are just[.]” But Respondent Spicer’s motion did not request permission to intervene. Ironically, and incorrectly, the “motion to dismiss” asked the Circuit Court to dismiss the case. In addition, not only did the motion state that “the only defendant before the [Circuit Court] is the trust named by Plaintiff,” (LF 32), the Circuit Court, in granting the motion, did not, ipso facto, add Respondent Spicer (or anyone else) as a party. Rather, the Circuit Court set aside the summary judgment (relief not sought by Respondent Spicer) and ordered Appellant to amend her pleadings to add Steven as party defendant,

refuting the claim that the Circuit Court's order granting the motion operated to add Respondent Spicer (or anyone else) as a party. (It is, of course, linguistic nonsense for a court to order the joinder of a party who is already a party to the case.)

(2) Respondent Spicer's "motion to dismiss" was not a properly filed post-trial motion. This Court has recognized 6 types of authorized post-trial motions: "[1] a motion to dismiss without prejudice after the introduction of evidence is commenced under Rule 67.01; [2] a motion for a directed verdict under Rule 72.01(a); [3] a motion for judgment notwithstanding the verdict under Rule 72.01(b); [4] a motion to amend the judgment, Rule 73.01(a)(3); [5] a motion for relief from judgment or order under Rule 74.06(a) and (b), but see Rule 74.06(c); and [6] and a motion for a new trial under Rule 78." Taylor v. United Parcel Service, Inc., 854 S.W.2d 390, 392 n.1 (Mo. 1993). Respondent Spicer's motion was none of these. Respondents try to characterize Respondent Spicer's motion to dismiss as a motion for new trial, but the attempt fails. "In determining whether a motion is an authorized after-trial motion," this Court has held, "Missouri courts have looked not to the nomenclature employed by the parties, but to the actual relief requested in the motion." Here, though, both the nomenclature of Respondent Spicer's motion (it is not called a "motion for new trial" or "motion for rehearing of summary judgment," but a "motion to dismiss") and actual relief requested (dismissal of the lawsuit) indicate that the Respondent Spicer was not seeking a do-over, but dismissal of the case. Moreover, the motion is not "directed toward [correcting] errors of law or fact," Berger, 173 S.W.3d at 641, committed by the Circuit Court in granting Appellant's motion for summary judgment.

(3) Even if Respondent’s “motion to dismiss” can be construed as a motion for new trial, Respondent Spicer “necessary party” argument was meritless, and the relief granted by the Circuit Court improper. The absence of a necessary party is not a jurisdictional defect. State ex rel. Webster County v. Hutcherson, 199 S.W.3d 866, 874 (Mo. App. S.D. 2006); Edmunds v. Sigma Chapter of Alpha Kappa, 87 S.W.3d 21, 27 (Mo. App. W.D.App.2002). Moreover, as this Court has held, with respect to a trustee who had not been joined as party, when “one not joined has no interest whatever in the subject matter of the suit,” which aptly describes Respondent Spicer, that party is not a necessary party. Casper v. Lee, 245 S.W.2d 132, 138 (Mo. 1952). In any event, the proper remedy for nonjoinder of a necessary party is to join the omitted party, not to vacate prior judgments entered against *other* parties. See Rule 52.06(a); Bracey v. Monsanto, 823 S.W.2d 946, 947 (Mo. 1992).

Respondents maintain that Appellants must be invoking virtual representation to bar Respondent Spicer from litigating his counter-claims and that virtual representation is unconstitutional *tout court*. Appellant’s brief, however, nowhere invokes virtual representation. (The first point only argues that the Circuit Court erred in setting aside its 2008 judgment; it does not argue that the 2008 judgment bars Respondent Spicer qua trustee or the other Trust beneficiaries from litigating their claims.) Hence, the applicability of, and constitutionality, of virtual representation is not a ripe issue for adjudication. These issues will become ripe if and only if this Court reinstates the 2008 judgment and then, on remand, Appellant invokes virtual representation, and the Circuit Court finds the doctrine applicable.

It is unlikely that such findings will be made, because Appellant probably does not need virtual representation. When Appellant's former counsel sued the Trust, this was a shorthand way, albeit a sloppy and incorrect way, of suing the trustee. (The suit should have been brought against the trustee, who has legal title to trust property, and the trust beneficiaries, who retain equitable title to trust property.) True, a trust lacks the capacity to be sued, but a lack-of-capacity argument is waived if not raised in a timely responsive pleading, In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793, 798 (Mo. App. E.D. 2009). It was waived here. The Trust, which was represented by Trust counsel, Charles Amen & Purcell & Amen, L.L.C., retained by Respondent Spicer, who is both trustee of the trust and a beneficiary thereof, failed to raise the lack-of-capacity defense in its answer to Appellant's petition. (LF 15-18). Respondent Spicer thus had the same knowledge of the proceedings as the trust and the attorney agents he had retained. See American Sur. Co. v. Pauly, 170 U.S. 133, 153 (1898); RESTATEMENT (SECOND) OF AGENCY §283(a) (1958) (knowledge of agent is imputed to principal). What Respondents ask this Court to do is precisely what this Court has condemned: "Justice will not allow a party to lie in wait for his adversary, take his chances on a verdict [or summary judgment, as here], and then, if it be against him, profit by the strict technicality of the science of pleading, if a liberal construction will obviate the objection." Nolan v. Metropolitan St. Ry. Co., 157 S.W. 637, 640 (Mo. 1913). Respondent Spicer already had one chance to make his (meritless) arguments; the Circuit Court erred by giving him a second bite at the apple.

Because this Court should “avoid the decision of a constitutional question if the case can be fully determined without reaching it,” State ex rel. Union Elec. v. Public Service Commission, 687 S.W.2d 162, 165 (Mo. 1985), this Court should decline Respondents’ invitation to abrogate virtual representation in Missouri, especially when the Respondents’ invitation is based on nothing more than a bare-bones citation, and misinterpretation of, Taylor v. Sturgell, 553 U.S. 880 (2008), which only decided federal common law.

Alternatively, this Court should hold that virtual representation validly precludes Respondent Spicer and the trust beneficiaries from (re)litigating the quiet-title suit adjudicated by the 2008 judgment. Respondent Spicer and the other trust beneficiaries were virtually represented by the Trust and counsel for the Trust. “The doctrine [of virtual representation] is applicable if . . . the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them.” Reformed v. Matthews, 234 S.W.2d 567, 574 (Mo. 1950). Unquestionably, the Trust and Mr. Amen and Purcell & Amen, L.L.C., had a fiduciary duty, as counsel for the Trust and counsel retained by Respondent Spicer, to protect and promote trust assets as his own, and had the identical interests in doing so. (As noted before, the Trust was essentially Respondent Spicer and the other trust beneficiaries.) In fact, Mr. Amen and Purcell & Amen had a *stronger* incentive than Fenlon to defend Donald Spicer’s (purported) transfer of a 1/2 interest in the marital home to the Trust, since they are the ones who prepared the trust documentation and, apparently, advised

Donald that the transfer would be effective. If they lost the quiet-title suit, they would be exposed to a malpractice suit.

Next, Respondents contend that this Court cannot grant the relief requested by Appellant in her first point, reinstatement of the 2008 summary judgment, because that judgment is not a final judgment. This is a red herring. Though a judgment must be final to be appealed (except in the case of certification of an interlocutory ruling for immediate appellate review), no appellate rule prohibits the relief sought by Appellant. To the contrary, the norm is for the appellate court to restore the *status quo ante* before the circuit court error, and let the case resume. Reinstating the 2008 judgment undoes the Circuit Court's error, without conferring a windfall on any party.

Respondents apparently believe that, because the 2008 judgment was not a final judgment, Rule 75.01's 30-day limitation on the circuit court's authority to *sua sponte* reconsider judgments does not apply. Respondents have got things backwards: Rules 75.01 and 81.05 specify *when* a judgment becomes final – namely, 30 days after entry or at most 90 days after the filing of an authorized post-trial motion, respectively. By definition, these rules apply only to non-final judgments.

In any event, Respondents are mistaken: The 2008 judgment did not fail to adjudicate the issue of attorney's fees. Paragraph 4 of the judgment, prepared by Appellant's former counsel, initially ordered the Trust to pay Appellant \$3,000 in attorney's fees. (LF 31). By crossing out this paragraph before signing the judgment, Judge Ross rejected Appellant's request for attorney's fees. Moreover, under the American rule, recovery of attorney's fees is generally disallowed. Schindler v. Pepple,

158 S.W.3d 784, 786-87 (Mo. App. E.D. 2005). Presumably that is why Judge Ross crossed-out Paragraph 4.

Nor was the nonjoinder of the trust beneficiaries a proper reason to vacate the summary judgment. Komsky v. Union Pacific Railroad, 293 S.W.3d 31 (Mo. App. E.D. 2009) does state (*pace* Respondents) that the nonjoinder of a necessary party authorizes or requires vacatur of any previously entered orders or judgments. Instead, Komsky cites In re Estate of Shaw, 256 S.W.3d 72 (Mo. 2008), which in turn cites In re Marriage of Miller, 196 S.W.3d 683, 694 (Mo. App. 2006), both of which hold that “void” orders, entered by a court without “jurisdiction,” must be vacated. The nonjoinder of a necessary party does not, however, deprive a court of jurisdiction, Peasel v. Dunakey, 279 S.W.3d 543, 545 (Mo. App. E.D. 2009), and (contrary to pre-2009 case law) neither does the nonjoinder of an *indispensable* party, *see* Webb, 275 S.W.3d at 254. Even if the absence of an indispensable party were a jurisdictional defect, the trust beneficiaries here weren’t indispensable: They could have feasibly been joined (they were joined later) and, given the representation of their interests by Trust counsel, retained by beneficiary and trustee Respondent Spicer, their joinder wasn’t “so critical that equity and good conscience” prohibited continuing the action without their joinder. Peasel, 279 S.W.3d at 545.

Finally, that Appellant filed an amended petition after the Circuit Court vacated the summary judgment, adding the trust beneficiaries, is irrelevant. The abandonment of the original petition by filing an amended petition doesn’t prevent Appellant from attacking the Circuit Court’s decision to vacate its properly-entered summary judgment. But for that erroneous decision, no amended petition would have been filed. Nor did

Appellant waive her right to challenge the Circuit Court's decision, given her inability to challenge that decision by lodging an interlocutory appeal. Her only option was to file an amended petition and re-file the same (meritorious) summary judgment motion, which is what she did, (LF 59-69).

**B. There Was No Actual or Enforceable Settlement Agreement**

The Circuit Court erred in finding that Appellant's former counsel, William Catlett, had the authority to settle the case and that a settlement agreement had been reached. Respondents' arguments to the contrary are meritless.

Respondents (tacitly) contend that, because Appellant's first attorney, William Catlett, testified that Appellant authorized him to settle the case and that he had, in fact, settled the case, there is a strong presumption that the case was settled. There are multiple problems with this contention. First, Catlett never testified that he had the authority to settle the case on Appellant's behalf. To the contrary, Catlett conceded that the representation letter he had sent to Appellant – a letter that the Circuit Court said established the scope of Catlett's authority – did *not* authorize him to settle the case on Appellant's behalf. (TR 22-23, 50). Moreover, the rule invoked by Respondents is, as Barton v. Snellson, 735 S.W.2d 160, 163 (Mo. App. E.D. 1987) noted,

inconsistent with basic agency principles. The rule permits an attorney to create a presumption he has express authority to dispose of his client's substantive rights, when he may have no authority to do so. Express authority focuses on the relationship between the principal and agent. We look to see if the principal has given the agent specific instructions. An

agent's representations to a third party are irrelevant to the existence of express authority, and such representations cannot establish the fact or scope of an agent's authority. . . . The attorney must have express authority from the client to settle a case and no implied authority to settle arises from the mere fact of his employment. . . . These limits on attorney authority are meaningless if they can be circumvented merely by an attorney's representations he has such authority.

In addition, the presumption is contrary to Rule 1.2, which does not “allow an attorney to expand the scope of representation by a client's agreement so that the attorney may determine whether to accept or reject a settlement offer instead of the decision being made by the client,” and thus any such (nonexistent) conferral of express authority on Catlett to settle the case is void as in violation of public policy. In re Coleman, 295 S.W.3d 857, 864, 871 n.5 (Mo. 2009). Further, this Court should clarify, as it has before, that the evidentiary presumption invoked by Respondents is a “bursting bubble” presumption. That is, the presumption does not shift the burden of proof, which always remains on the party seeking to prove a settlement agreement by clear and convincing evidence; it only shifts the burden of production, so that once “substantial evidence [of no settlement agreement or express authority] is adduced, the presumption disappears.” Terminal Warehouses v. Reiners, 371 S.W.2d 311 (Mo. 1963).

In any event, even if an attorney could have express (or implied) authority to settle a case, there is no clear and convincing evidence of such authority or of an actual settlement by Catlett. Rather, the evidence establishes that Respondents rejected

Appellant's original offer by proposing a written counter-offer, which Mr. Catlett "hope[d]" she would accept, (TR 12-13), but which she rejected. (Respondents do not challenge Appellant's mirror-image analysis.) Among other things, the written counter-offer, which included signature lines for the parties, was signed by no one; Mr. Catlett testified that the representation letter he sent Appellant, which established the scope of Mr. Catlett's agency according to the Circuit Court, didn't confer a settlement power on him, (TR 22-23, 50); no term of the lengthy, complex proposal – including delivery of those items of personal property that under both offers were to be Appellant's – was ever executed (unlike in *Sappington v. Miller*, 821 S.W.2d 901 (Mo. App. 1992), in which the cases were dismissed with prejudice); and after undersigned counsel entered, Mr. Catlett sent him a letter informing him of the upcoming deadline to respond to Respondents' motion for summary judgment, (LF 269-70), a nonsensical warning if the case had already been settled. That the Circuit Court awarded Appellant numerous items of personal property that was listed on the offer presented to Fenlon, but that Fenlon had crossed out – that is, rejected – indicates that the Circuit Court was less interested in trying to ascertain whether there was an agreement and more interested in trying to cobble together an agreement that the parties never reached, but that would be a reasonable compromise. (LF 346-47; TR 14-15). At most, the parties made an agreement to agree, which is not a valid contract. *Three-O-Three Investments v. Moffitt*, 622 S.W.2d 736, 738 (Mo. App. W.D. 1981).

Respondents next contend that there was an undisputed "open court settlement agreement." (RB 36). There was no such thing. The parties never admitted in open

court (or otherwise) that the case had been settled, let alone spread the terms of the agreement on the record. Catlett testified that he was “uncertain” whether he had called the court, (TR 11), but even if he did, any such informal notification to court staff is not a settlement upon the record. All Respondents have shown is that there were a series of settlement negotiations, and that counsel had hoped and believed the case had settled – subjective states of mind that have no bearing on whether a contract was actually executed. See Embry v. Hargadine, McKittrick Dry Goods, 105 S.W. 777 (Mo. App. 1907) (rejecting subjective theory of contract). That the Circuit Court had entered an order stating that the “parties may advise the Court orally if they have settled the matter, otherwise attorneys to appear at said time,” (LF 266), only means that the parties might settle the case, not that they had done so. Nor is the affidavit from Appellant an admission of a settlement agreement. The affidavit, which Appellant prepared to explain *why* she had rejected the Respondents’ counter-offer, states that Appellant was at one time “willing to come to some type of amicable settlement agreement,” in particular one that would allow her to move back into her home, so that her son could attend public school in the district where the house was located. But a willingness to settle is not a willingness to settle on any terms, let alone an admission of an actual settlement, let alone of the terms thereof. In settlement negotiations, as in life, the devil is in the details.

Respondents fault Appellant for not producing documentary or testimonial evidence about the nature of Catlett’s authority, concluding that her “proof falls short of her heavy burden.” The burden, though, was Respondents’ to prove the existence of settlement by clear and convincing evidence, not Appellant’s to disprove a settlement.

Moreover, Appellant *did* testify – namely, that she never authorized Catlett to settle the case for her – and Catlett testified that his engagement letter to Appellant, which the Circuit Court found established the scope of his authority, didn’t authorize him to settle the case on her behalf. (TR 22-23, 50). Insofar as Respondents imply that written correspondence between Catlett and Appellant undermine her position that Catlett lacked authority to settle, (1) Respondents admit that their non-admission was “[t]o her detriment,” (RB 20-21), meaning the correspondence would have *supported* her position, and (2) “the raising of a negative inference in argument from a party's failure to produce a witness [or evidence] is improper if the witness [or evidence] is equally available to both parties,” Hill v. Boles, 583 S.W.2d 141, 145 (Mo. 1979). Plus, Respondents could have supplemented the legal file with the (nonexistent) negative documentary evidence, Rule 81.12(c), and argued that the attorney-client privilege, contrary to the Circuit Court’s finding, didn’t shield the documents.

In sum, even if this Court disregards, as it must, the testimony provided by Appellant, the Circuit Court’s finding of a settlement agreement was against the weight of the evidence and unsupported by sufficient evidence.

### **C. The Statute of Frauds Bars Enforcement of Any Settlement Agreement**

The settlement agreement allegedly reached by the parties included a provision requiring Appellant and Respondents’ counsel, Gregory Fenlon, to sell the marital home. (LF 350). As Appellant’s opening brief establishes, this provision is subject to the statute of frauds – namely, Sections 432.010 and 442.360. The provision is an agreement “made for the sale of lands . . . or an interest in or concerning them,” and thus must be reduced

to a writing “signed by the party to be charged therewith, or some other person by him thereto lawfully authorized.” MO. REV. STAT. §432.010. The alleged settlement agreement also contains an authorization “to execute, as agent or attorney for another, any instrument in writing . . . whereby real estate may be affected in law or equity” – namely, Appellant’s authorization of counsel for Respondents’ counsel to negotiate the sale of the property – and hence the authorization must be ““acknowledged or proved” as “other instruments conveying or affecting real estate are required to be acknowledged or proved.” MO. REV. STAT. §442.360. Because the settlement agreement, under which the parties agree to sell the marital home and to authorize Respondents’ counsel to handle the sale, has not been reduced to a writing *signed by Appellant*, the statute of frauds bars enforcement of it.

Respondents’ arguments to the contrary are unavailing. One, that the settlement agreement is not itself a contract between the (alleged) co-owners of the realty and a third-party purchaser does not (*pace* Respondents) make the statute of frauds inapplicable. The statute of frauds applies not just to such contracts, but also more generally to contracts “made for the sale of lands” or contracts “concerning them,” MO. REV. STAT. §432.010, of which the alleged settlement agreement is clearly one. True, the settlement agreement is not itself a sales agreement, but Section 432.010 isn’t limited to such sales; it also includes contracts “made for the sale of lands” or “concerning” such sales. Jackson v. Shain, 619 S.W.2d 860 (Mo. App. W.D. 1981), which held that the parties’ “oral agreement to convey real estate,” made in settlement of a quiet-title action,

was governed by the statute of frauds, confirms the conclusion that the statute of frauds applies here.

DeWitt v. Lutes, 581 S.W.2d 941 (Mo. App. S.D. 1979), doesn't help Respondents. Lutes concerned, and solely addressed, an oral agreement "fix[ing] a disputed or uncertain boundary line" between two adjacent properties. But the reason the compromise of a boundary dispute doesn't involve the statute of frauds is not because such a dispute is litigated in a quiet-title suit, but rather because the agreement "does not pass title" – or agree to pass title – "but merely fixes what each party owns." Gillenwaters Bldg. v. Lipscomb, 482 S.W.2d 409, 412 (Mo. 1972) (cited by DeWitt, 581 S.W.2d at 945). The alleged settlement agreement here does not merely fix what each party owns (1/2 each, as tenants in common). It goes beyond that, by including two provisions to which the statute of frauds *does* apply: an agreement (1) to convey title to a third-party purchaser and (2) to authorize Respondents' counsel to be agent for sale of the realty.

Respondents' second argument – that the statute of frauds is inapplicable because there was an unsigned writing memorializing the settlement agreement – is frivolous. Sections 432.010 and 442.360 require not only that a (covered) agreement be reduced to a writing, but also that the writing be signed by the party to be charged. Here, that party is Appellant, who has never signed any writing evidencing the parties' (alleged) settlement agreement.

Respondents' third argument, which relies on Owens v. Hankins, 289 S.W.3d 299 (Mo. App. 2009), is that by failing to raise the statute of frauds defense at the evidentiary

hearing, Appellant waived the defense. Unquestionably, a footnote in Owens states that failure to object to evidence of the oral agreement was *one* reason the statute of frauds was waived, but the other, more significant reason was that the defense wasn't raised in any point relied on. Id. at 30 n.7. But, with due respect to Owens – a proximate source of which is Justus v. Webb, 634 S.W.2d 567 (Mo. App. S.D. 1982), which in turn relies on Miller v. Harper, 63 Mo. App. 293, 296-97 (Mo. App. 1895) – this Court has held that “even where an oral contract is admitted, a party to it may nevertheless assert the statute of frauds as a complete bar to enforcement, and may effectively repudiate any obligation under it,” Jones v. Linder, 247 S.W.2d 817, 820 (Mo. 1952). The Eastern District made the same holding in Footwear Unlimited v. Katzenberg, 683 S.W.2d 291, 295 (Mo. App. 1984), which Owens failed to address. Moreover, the (nonexistent) waiver rule misunderstands the nature of a statute of frauds defense: “The Statute of Frauds relates to the remedy only” – namely, whether it can be enforced, by damages or specific performance – “and not to validity of a contract.” Scott v. Ranch Roy-L, 182 S.W.3d 627, 634 (Mo. App. E.D. 2005). Accordingly, a party does not have to object to evidence of the *existence* of a contract in order to argue the *unenforceability* of any (alleged) contract; these are two separate issues.

Respondent's reliance on Norton v. Friedman, 756 S.W.2d 158, 162 (Mo. 1988) is misplaced. The only applicable case cited by Norton was Leeson v. Etchison, 650 S.W.2d 681 (Mo. App. W.D. 1983), which states: “If the statute [of limitations] is not pleaded, a party may yet invoke the defense by objection to the introduction of oral evidence to prove the contract. Here, Etchisons did not plead the defense and they raised

no objection when Leeson testified as to the terms of their agreement. The defense that the agreement was not in writing was therefore waived.” That a defendant waives the affirmative defense of the statute of limitations when the defendant fails both to raise it in a timely answer and to raise it at trial is unsurprising. But that principle has no application in the case, such as the present one, where no responsive pleading is required (or allowed) to be filed in response to a motion to enforce a settlement agreement. Moreover, though Norton is in tension with Linder, in Norton this Court did not mention Linder, let alone question or overrule it. Given the clear correctness of the analytical distinction recognized by Linder, which is hornbook contract law, this Court should clarify the continued vitality of Linder.

Also misplaced is Respondents’ reliance on Welborn v. Rigdon, 231 S.W.2d 127 (Mo. 1950), for two reasons. One, unlike present case, in which no party has performed any terms of the (alleged) settlement agreement, in Rigdon the party fighting the statute of frauds “had fully performed.” Muse v. Woyner, 698 S.W.2d 26 (Mo. App. S.D. 1985) (citing Welborn, 231 S.W.2d at 133). It has long been established that “full performance by one party completely eliminates the operation of the statute,” Grissum v. Reesman, 505 S.W.2d 81, 88 (Mo. 1974), and the Welborn court noted that full performance had taken the case out of the statute of frauds.

There is a second distinction: In Welborn, the defendant was not seeking to challenge the enforceability of the agreement to sell the realty – *she had already sold the realty*. Thus the only issue before the Welborn court was whether the proceeds from the already completed sale would be split between the plaintiff (who had made improvements

to the realty before the sale) and the defendant. The enforceability of the contract to sell the realty to a third party was not, and could not have been, at issue. Only the enforceability of the contract to split the proceeds (and the existence of such a contract) was at issue. In short, the Welborn Court had no opportunity to pass on the issue presented by the present appeal.

#### **D. The Circuit Court Erred in Ordering the Filing of a Consent Judgment**

In response to Appellant's argument that the Circuit Court erred in ordering Appellant to execute a consent judgment, Respondents erroneously assert that Appellant's argument is moot, because the Circuit Court never held Appellant in contempt for violating the order and because Appellant did not lose the right to appeal.

Regarding the latter claim, which appears to be a tacit claim that Appellant is not aggrieved by the Circuit Court's 2009 judgments, Respondents are being inconsistent: The opening salvo of their brief argues that there is no final judgment before this Court, so the appeal must be dismissed. Moreover, Respondents also misunderstand what it takes to be aggrieved by a court order or judgment. A money judgment against the defendant does not in itself cause any harm to the defendant – it is just a piece of paper until plaintiff's counsel garnishes the defendant's wages or starts selling off defendant's property to satisfy the judgment. But no one doubts the judgment, *ceteris paribus*, can be appealed. Nor can it be denied that a permanent injunction, issued as part of a final judgment, can be immediately appealed; there is no requirement that the would-be appellant first violate the injunction. Hair Kraz v. Schuchardt, 131 S.W.3d 854, 854-55 (Mo. App. E.D. 2004). Likewise, Appellant is aggrieved by the Circuit Court's

command that she, in effect, abandon her right to appeal. Absurdly, Respondents are either counseling Appellant to flagrantly disobey the Circuit Court's judgment or to take an appeal after the consent judgment is executed.

Besides misunderstanding what makes a party aggrieved by a judgment and taking inconsistent positions, Respondents misunderstand what makes an appeal moot. "A case [or issue] is moot where an event has occurred which makes the court's decision unnecessary or makes it impossible for the court to grant the effectual relief." Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo. App. E.D. 2000). No event has transpired since the Circuit Court issued its 2009 judgment that makes it impossible for this Court to grant effectual relief. This Court can reverse the 2009 judgments – or at least the orders therein compelling Appellant to execute a consent judgment – and by doing so eliminate any risk of Appellant being held in contempt. Granted, Appellant's argument will become moot in the event this Court accepts any of her other points – but, not to belabor the obvious, this Court has not decided this appeal yet.

Finally, State ex rel. Myers v. Shinnick, 19 S.W.2d 676 (Mo. 1929), to which Respondents analogize the present case, is inapposite. In Shinnick, the decision challenged on appeal, the denial of an application for a building permit, was mooted by the issuing of the permit during the appeal. No such post-appeal event has transpired here. True, Appellant did file an application for an extraordinary writ of prohibition with the Eastern District, but that was an original writ proceeding, not an appeal, and the arguments cognizable, and the relief available, in original writ actions is much less extensive than in an appeal. In addition, the writ application was denied in part because

the Eastern District found the Circuit Court’s judgment was an “appealable judgment,” indicating the Eastern District thought the issues raised in the application were more properly addressed in an appeal. See Rule 84.22(a).

### **E. The Circuit Court Erred by Ordering Specific Performance**

Appellant has established that there is no right to specific performance – the remedy sought by Respondents to enforce the (alleged) settlement agreement – but rather that specific performance is available to enforce a contract (e.g., a settlement agreement) only if damages at law (for breach of contract) are inadequate. Skelly Oil v. Ashmore, 365 S.W.2d 582 (Mo. 1963); Home Shopping Club v. Roberts Broadcasting, 989 S.W.2d 174, 180 (Mo. App. E.D. 1998). Consequently, because Respondents never alleged, let alone proved, that damages for breach of contract would be inadequate, the Circuit Court erred in granting Respondents specific performance.

Respondents do not contend that Skelly Oil or Home Shopping Club are incorrect or have been overruled. Instead, quoting Ste. Genevieve County Levee v. Luhr Bros., 288 S.W.3d 779, 783 (Mo. App. E.D. 2009), Respondents note that appellate courts defer to circuit courts’ decision to grant specific performance, because the remedy is equitable. But “a motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” U.S. v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). “Discretion . . . is not synonymous with whim. The discretion is a controlled discretion.” Besse v. Missouri Pacific R., 721 S.W.2d 740, 742 (Mo. 1986). (That is why a discretionary decision predicated on an error of law is an abuse of discretion, requiring reversal.) Two sound

legal principles apply here: (1) “[m]odern equity has rules and standards, just like law,” N.L.R.B. v. P\*I\*E Nationwide, 894 F.2d 887, 893 (7th Cir. 1990), and (2) one such rule is that specific performance is impermissible absent proof of the inadequacy of legal damages. (Eaton is not to the contrary: The issue was neither raised by the parties nor addressed by this Court, and would have been dictum in any event, given this Court’s decision reversing the Circuit Court.) Accordingly, Respondents’ bare appeal to the Chancellor’s foot – that is, unconstrained discretion – should be rejected.

### **CONCLUSION**

This Court should reverse the Circuit Court’s 2009 judgments and order the 2008 judgment reinstated.

Respectfully submitted,

*Ron Ribaud*

**RON RIBAUDO**

Mo. Bar. No. 53833

**THE RIBAUDO LAW FIRM**

362 Autumn Creek Dr., Unit J

Valley Park, MO 63088

phone: (636) 485-8252

facsimile: (866) 499-3491

ron@ribaudolaw.com

www.ribaudolaw.com

*Counsel for Appellant*

## CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

(1) Pursuant to Mo. Sup. Ct. R. 84.06, the attached brief contains 7,591 words, as determined by Microsoft Word 2010 software; (2) a CD copy of this brief (in Microsoft Word 2010 and pdf formats), which was scanned and virus-free, is attached to this Brief; (3) On December 6, 2010, I mailed true and correct copies of the attached brief and a CD disk containing a copy of this brief, which were scanned and virus-free, were mailed by first-class mail to counsel for Respondents:

Gregory G. Fenlon, Esq.  
7711 Bonhomme  
Suite 300  
St. Louis, MO 63105

Respectfully submitted,



**RON RIBAUDO**

Mo. Bar. No. 53833

**THE RIBAUDO LAW FIRM**

362 Autumn Creek Dr., Unit J

Valley Park, MO 63088

phone: (636) 485-8252

facsimile: (866) 499-3491

ron@ribaudolaw.com

www.ribaudolaw.com

*Counsel for Appellant*