

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.

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

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JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Court of Appeals improperly entered its order dismissing the underlying appeal on grounds of mootness, and hence involves this Court's general superintending control over inferior courts. Article V, Section 4, of the Missouri Constitution.

STATEMENT OF FACTS

Respondents obtained a judgment against Cornerstone Propane on May 3, 2004, in the amount of \$1,252,465.33. (Admitted by Appellant, pg. 2 of Suggestions in Opposition to Application for Transfer.) An appeal bond has been posted by Cornerstone Propane in the amount of \$1,400,000. (Admitted by Appellant, Exhibit A to Motion to Enforce Settlement.) Appellant filed its Motion to Enforce Settlement with the Court of Appeals on February 8, 2006. On February 10, 2006, the Court of Appeals referred the motion to the trial court for hearing. (Exhibit 1 to Application for Transfer) After a contested hearing, the trial court entered findings on May 6, 2006, sustaining Appellant's Motion to Enforce Settlement and finding that a binding settlement agreement existed. (Admitted by Appellant, pg. 2 of Suggestions in Opposition to Application for Transfer.) On June 28, 2006, the Court of Appeals entered its Order dismissing the appeal and directing the trial court to enter a judgment consistent with its May 6, 2006 findings. (Exhibit 2 to Application for Transfer) The Court of Appeals found the Trial Court's decision to sustain the Motion to Enforce Settlement "renders this appeal moot inasmuch as any ruling by this Court on Appellants' appeal would have no practical effect upon an existing controversy. *See Promotional Consultants, Inc.*, 25 S.W.3d at 504-06; *Brock*, 142 S.W.3d at 206-07. Accordingly, the Court hereby dismisses the appeal as moot and remands this case to the Circuit Court of Laclede County for entry of a judgment consistent with said

Court's May 6, 2006 'Findings of Fact and Conclusions of Law.'" (Exhibit 2 to Application for Transfer)

On July 10, 2006, Respondents filed their Motion for Rehearing and Alternative Motion for Transfer to this Court. (Exhibit 3 to Application for Transfer) Said motions were denied by the Court of Appeals on July 11, 2006. (Exhibit 4 to Application for Transfer)

During the course of the underlying appeal, Appellant filed for protection under the United States Bankruptcy Laws. During the bankruptcy, Appellant was acquired by a successor in interest. (Exhibit 5 to Application for Transfer)

On July 25, 2006, Respondents filed their Application for Transfer from the Missouri Court of Appeals, Southern District. On September 26, 2006, this Court, *en banc*, sustained Respondents' Application for Transfer. On October 23, 2006, the Court clerk directed the parties to submit briefs addressing the mootness issue contained in the Court of Appeals Order of June 28, 2006.

POINT RELIED ON

THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AS MOOT BECAUSE THE DISMISSAL HAS A PRACTICAL EFFECT UPON AN EXISTING CONTROVERSY IN THAT RESPONDENTS WILL LOSE THE PROTECTION OF THEIR JUDGMENT LIEN ON APPELLANTS' ASSETS; APPELLANT WILL BE FREE TO TRANSFER ANY OR ALL OF ITS ASSETS; THERE WILL NO LONGER BE ANY APPEAL BOND ON FILE TO INSURE RESPONDENTS' JUDGMENT IS PARTIALLY SATISFIED; AND IN THAT RESPONDENTS HAVE NO AVAILABLE REMEDY TO RETROACTIVELY REINSTATE THEIR JUDGMENT LIEN.

Brown v. Curtiss, 137 S.W. 24 (Mo. App. 1911)

Preisler v. Doherty, 265 S.W.2d 404 (Mo. Banc 1954)

ARGUMENT

THE COURT OF APPEALS ERRED IN DISMISSING THE APPEAL AS MOOT BECAUSE THE DISMISSAL HAS A PRACTICAL EFFECT UPON AN EXISTING CONTROVERSY IN THAT RESPONDENTS WILL LOSE THE PROTECTION OF THEIR JUDGMENT LIEN ON APPELLANTS' ASSETS; APPELLANT WILL BE FREE TO TRANSFER ANY OR ALL OF ITS ASSETS; THERE WILL NO LONGER BE ANY APPEAL BOND ON FILE TO INSURE RESPONDENTS' JUDGMENT IS PARTIALLY SATISFIED; AND IN THAT RESPONDENTS HAVE NO AVAILABLE REMEDY TO RETROACTIVELY REINSTATE THEIR JUDGMENT LIEN.

In its June 28, 2006, Order, the Court of Appeals found the Trial Court's decision to sustain Appellant's Motion to Enforce Settlement rendered the underlying appeal moot. The Court of Appeals went on to state in its Order that the appeal was moot in that any ruling it might enter would have no practical effect upon an existing controversy. In support of its Order, the Court of Appeals cited *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 relied on these cases in determining the underlying appeal was moot and that any ruling it might enter would have no practical effect upon an existing controversy.

Respondents respectfully disagree with the Court of Appeals' reading of *Promotional Consultants* and *Brock*. *Promotional Consultants* involved a signed,

executed settlement agreement disposing of the underlying dispute. *Promotional Consultants*, 25 S.W.3d at 504. Neither party contested the existence of a signed settlement agreement. The Court in *Promotional Consultants* found the settlement agreement called for the parties to dismiss their respective cases with prejudice and, as a result, there was no existing controversy. *Id.* at 506. The Court in *Promotional Consultants* correctly determined that when there is no existing controversy, the Court should not retain jurisdiction. *Id.* As a result, the appeals were dismissed as moot.

Similarly, the parties in *Brock* had also entered into a written settlement agreement. *Brock*, 142 S.W.3d at 206. The validity of the settlement agreement was not contested in *Brock*. Since the father in *Brock* had acquiesced in a judgment being entered against him, he had waived any right to have the judgment reviewed on appeal. *Id.* at 207. As in *Promotional Consultants*, the *Brock* court dismissed the appeal because there was no existing controversy. *Id.*

Clearly, neither *Promotional Consultants* nor *Brock* have application here. Appellant and Respondents do not agree that a settlement agreement was entered into. Indeed, that issue is disputed, and was the subject of the Trial Court's May 6, 2006 Findings of Fact and Conclusions of Law. The Trial Court's determination has not yet been tested on appeal. *Promotional Consultants* and *Brock* were both premised on the existence of a valid, binding, unchallenged executed settlement agreement. No such agreement is present here. As such, Respondents submit the Court of Appeal's reliance on these cases was misplaced.

This Court's decision in *Preisler v. Doherty*, 265 S.W.2d 404 (Mo. Banc 1954), serves as the basis for the *Promotional Consultants* and *Brock* decisions. In *Preisler*, this Court found Plaintiff's claim for alleged violation of his right to run for the state senate was moot after the election was held and new senators seated. *Id.* at 407. The test for mootness is whether "the question presented for decision seeks a judgment upon some matter which if judgment were rendered could not have any practical effect upon any then existing controversy." *Id.*

Respondents refer this Court to the Court of Appeals' declaration that any disposition of the underlying appeal "would have no practical effect upon an existing controversy." Respondents submit there is a very real, prejudicial effect resulting from the Court of Appeals' Order. If the appeal is dismissed, and if the Trial Court erroneously sustained Appellants' Motion to Enforce Settlement, Respondents will be irreparably prejudiced. While Respondents may be able to overturn the Trial Court's May 6, 2006, ruling on the Motion to Enforce Settlement, Respondents have no remedy available to them to "reinstate" their judgment lien retroactive to the original date of the judgment. This issue was addressed by the Court in *Brown v. Curtiss*, 137 S.W. 24 (Mo. App. 1911). In *Brown*, appellant's judgment was set aside by the Trial Court and later reinstated on appeal. *Id.* at 25. The appellant in *Brown* sought retroactive reinstatement of his judgment lien, going back to the date of the original judgment. *Id.* at 26. It was held that in Missouri, a judgment lien is lost until the judgment is reinstated.

Id. at 26. Once a judgment is set aside, even if erroneous, the judgment lien is lost. *Id.*

Respondents likewise have no ability to set aside any transfer of assets by Appellant which may occur while no judgment lien is in effect. The Court of Appeals' June 26, 2006, Order has two prejudicial, practical effects upon the Respondents. First, Respondents lose the protection of the judgment lien on Appellant's assets, leaving Appellant free to transfer any or all of its assets. Secondly, if the Trial Court erroneously sustained the Motion to Enforce Settlement, Respondents have no remedy available to them to retroactively reinstate their judgment lien.

Respondents respectfully suggest that the June 26, 2006, Order was erroneous, as it has very real, practical and prejudicial effects on them. These effects render the Court of Appeals' Order improper. Dismissal of the appeal will nullify Respondents' judgment, extinguish the judgment lien and release the appeal bond. Further, Appellant, or its successor, will be free to transfer any or all of its assets. If the Trial Court erroneously determined a binding settlement existed, there exists no remedy to return Respondents to their current position vis-a-vis their judgment lien. If Respondents are forced to prosecute a subsequent appeal challenging the May 6, 2006, Trial Court decision to enforce settlement, Respondents may regain their judgment, but have no hope of regaining their judgment lien.

Respondents respectfully suggest that the Court of Appeals should have ordered that the underlying appeal be held in abeyance or stayed, pending appellate review of the Trial Court's judgment to be entered in the case. Such review could easily take place within the context of the current appeal. In this way, Respondents' rights are protected, insulating them from the practical, prejudicial effects of the June 26, 2006, Order. If the Court of Appeals determines the Trial Court erroneously granted the Motion to Enforce Settlement, the parties will be free to continue prosecution of the underlying appeal. This approach also has the added benefit of maintaining the status quo, namely Respondents' judgment lien and the appeal bond.

CONCLUSION

For the foregoing reasons, Respondents submit the Court of Appeals Order of June 26, 2006, was improper. Respondents have demonstrated real, practical and prejudicial results directly flowing from a dismissal of the appeal. 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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