

**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 OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

These two appeals, which were consolidated by the Missouri Court of Appeals, Eastern District, are brought by Gwen Marie Spicer from the judgment and amended judgment entered by the Circuit Court of St. Louis County on June 24, 2009, and August 3, 2009, respectively. (LF 9, 10, 345-60, 395).¹ This Court has jurisdiction over these appeals because (1) this Court has granted Respondents' application for transfer, see Mo. const. art. V, §10; Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 54 (Mo. 1999); (2) the notices of appeal – most importantly, that from the amended judgment – are timely, see Berger v. Cameron Mut. Ins. Co., 173 S.W.3d 639, 641 (Mo. 2005) (“Timely filing of a notice of appeal is jurisdictional.”); and (3) the judgments before this Court are final judgments.

Regarding the timeliness of the notices of appeal: The original judgment was entered on June 24, 2009. (LF 345-60). Ms. Spicer's motion for new trial or, in the alternative, to amend the judgment, which is an authorized post-trial motion, Taylor v. United Parcel Serv., Inc., 854 S.W.2d 390, 392 n.1 (Mo. 1993), was filed within 30 days after the judgment was entered, (LF 9-10, 372-94), making the notice timely, Rule 78.04. Hence, the original judgment didn't become final for purposes of appeal until the Circuit Court disposed of Ms. Spicer's motion, on August 3, 2009. Rule 81.05(a)(2)(B). Ms. Spicer had filed her (first) notice of appeal prematurely, on July 22, 2009, (LF 9, 361-64),

¹ “LF” and “TR” are references to the legal file and to the transcript (of the hearing held May 19, 2009), respectively.

so that notice is “considered as filed immediately after” August 3, 2009, Rule 81.05(b), and is timely. The amended judgment was entered on August 3, 2009, (LF 395), and is deemed a “new judgment for all purposes” (because the amended judgment doesn’t “otherwise specify”), Rule 78.07(d). The amended judgment became final on September 2, 2009. Rule 81.05(a)(1). The notice of appeal from the amended judgment was filed prematurely, on August 27, 2009; it is treated as if it had been filed immediately after September 2, 2009, Rule 81.05(b), so the (second) notice was timely.

The key judgment on appeal – that is, the amended judgment granting Respondents’ motion to enforce settlement agreement – is a final judgment. To be final, a judgment must, among other things, adjudicate all the claims of all the parties, leaving nothing for future determination by the court. Rule 74.01(b); In re. Marriage of Werths, 33 S.W.3d 541 (Mo. 2000) (per curiam). In the amended judgment, the Circuit Court granted Respondents’ motion to enforce the settlement agreement, and disposed of all claims by all the parties – in particular, by finding that Ms. Spicer and the Donald N. Spicer Revocable Living Trust were each 1/2 owners of the realty, reciting the terms of the parties agreement, and ordering the parties to sign a consent judgment. (LF 395). The amended judgment neither reserved any issues for future determination nor left unaddressed any pending matters. Cf. Matter of Bornfeld v. Kaemmerer, 36 S.W.3d 424 (Mo. Ct. App. E.D. 2001) (“[A] judgment that requires external proof or another hearing to dispose of disputed issues involved in the litigation is not final.”). The Circuit Court was finished with the case, the entire action having been decided. See Blechle v. Goodyear Tire & Rubber Co., 28 S.W.3d 484, 486 (Mo. Ct. App. E.D. 2000); Chase

Manhattan Mortg. Corp. v. Moore, 446 F.3d 725, 726 (7th Cir. 2006) (“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[.]”).²

Moreover, the present appeal doesn’t risk undermining the purpose of the final-judgment rule – namely, “to avoid disruption of the trial process, to prevent appellate courts from considering issues that may be addressed later in trial, and to promote judicial efficiency.” Blechle, 28 S.W.3d at 486. To the contrary, judicial efficiency counsels in favor of hearing this appeal, and resolving the five points raised by Appellant,

² To be sure, the parties have not signed the consent judgment that the Circuit Court ordered them to sign. (LF 347). But the time to do so has long since passed, and there is no motion pending in the Circuit Court seeking to compel execution of a consent judgment. Furthermore, the fact that the consent judgment hasn’t been signed in no way means there is something else for the *Circuit Court* to do. In essence, the order to execute a consent judgment is equivalent to a permanent injunction, which is, *ceteris paribus*, a final and appealable judgment (assuming no other matters, e.g., damages, remain to be decided). Most significant of all, it would be absurd to conclude that because no consent judgment has been entered, the judgment is not final, for if the parties were to execute a consent judgment, neither party would be aggrieved, eliminating any possibility of appeal. See Kenney v. Vansittert, 277 S.W.3d 713, 723 (Mo. Ct. App. W.D. 2008). Clearly, the policy against piecemeal appeals is *not* a policy *opposing* any appeal at all.

which address every major issue that arose in the Circuit Court – to wit, the order granting Appellant’s motion for summary judgment, the order setting aside summary judgment in favor of Appellant, and the motion granting Respondents’ motion to compel enforcement of the settlement agreement.

That the amended judgment is a final, appealable judgment is confirmed by Eaton v. Mallinckrodt, 224 S.W.3d 596 (Mo. 2007). In Eaton, the circuit court had granted a motion to enforce a settlement agreement and “entered judgment enforcing the settlement agreement.” Id. at 598. This Court, which has a duty to *sua sponte* determine whether it has appellate jurisdiction, Smith v. State, 63 S.W.3d 218 (Mo. 2001), noted that a motion to enforce a settlement agreement initiates a “collateral action,” and then proceeded to address the merits of the appeal, ultimately reversing the circuit court. Id. at 599, 601-02. Presumably, then, this Court concluded (or, at a minimum assumed) that a judgment granting a motion to enforce a settlement agreement is, assuming the other finality requirements have been satisfied, a final judgment.

Respondents have contended that no final judgment is before this Court because, in granting Ms. Spicer’s motion for summary judgment, the prior judgment, entered on January 22, 2008, didn’t adjudicate Appellant’s claim for attorney’s fees and failed to adjudicate the rights of all the parties of the quiet-title action. (Defendants/Respondents [*sic*] Motion for Rehearing or, in the alternative, for Transfer to the Supreme Court, at 2-7; Transfer Application, at 4-6). If Appellant were appealing the January 22nd judgment, Respondents’ argument might have some merit. But Appellant has lodged an appeal

from the amended judgment entered on August 3, 2009, and only the judgment on appeal must be final in order to establish appellate jurisdiction.

If Respondents believe that any prior, interlocutory decisions cannot be reviewed once there is a final judgment on appeal, they are mistaken. MO. REV. STAT. §512.020(5) (2010) (“[A] failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case.”); Ess v. Griffith, 30 S.W. 343 (Mo. 1895) (“[T]he last clause of the act, quoted above, gives to a party an election either to take an appeal directly from the adverse order, or to wait, and have it reviewed upon an appeal from the final order.”). An appeal brings up the entire case for review. Otherwise, lower-court errors preceding the final judgment, such as discovery orders that violate attorney-client privilege and orders disqualifying counsel in a civil case, could escape appellate review entirely. Cf. Mohawk Industries, Inc. v. Carpenter, No. 08-678, at 10 (U.S. Sup. Ct. Dec. 8, 2009) (noting that such interlocutory orders are appealable only after entry of a final judgment that is appealed).

STATEMENT OF FACTS

In 1990, Donald N. Spicer and Gwen Marie Spicer, who were husband and wife, bought a home (“marital home”), located at 5367 Southview Hills in St. Louis. (LF 12, 15, 20, 22; TR 47). On May 31, 2007, after Ms. Spicer had moved out of the marital home (see TR 47-49), Mr. Spicer purportedly conveyed to himself, *qua* trustee of the Donald N. Spicer Living Trust (“Trust”), a one-half interest in the marital home, using a general warranty deed in which he referred to himself as a “married man.” (LF 18). One provision of the Trust provided that after his death “my Spouse, at my Spouse’s election, shall have the right to possess and occupy during his or her life the real property in the Trust Estate that me and my Spouse were using” – without any specification of when – “for our principal residence without any obligation upon my Spouse to pay rent.” (Though the Trust was amended in May 2007, the provision authorizing Mr. Spicer’s spouse to live in the marital residence was not changed. (See LF 136-45).)

Two months later, on July 3, 2007, Mr. Spicer died. (LF 12, 15, 23). At his death, Mr. Spicer was still married to Ms. Spicer, from whom he had been informally, but not legally, separated. (LF 20, 23). During the separation, Mr. Spicer had not paid any child support for the Spicers’ son, Scott. (TR 49). About two weeks before Mr. Spicer’s death, the general warranty deed that he had purportedly executed was recorded. (LF 30).

After Mr. Spicer’s funeral, Ms. Spicer went to the marital home to retrieve some of her personal property, including a charcoal drawing of her and china she had bought when she was a teenager. (TR 48, 51, 52). Ms. Spicer was unable to enter the home,

however, because her stepson, Steven Spicer, who had moved into the marital home before Mr. Spicer's death, had changed the locks and the security system code. (See TR 48). Consequently, Ms. Spicer hired an attorney, William Catlett, to expel Steven from the marital home. (TR 41, 48).

On August 21, 2007, Catlett filed, in the Circuit Court of St. Louis County, a petition to quiet title against the Donald N. Spicer Living Trust, alleging that Ms. Spicer was the fee simple owner of the marital home as a result of Mr. Spicer's death; the Trust's lawyer was served. (LF 1, 11-14). Catlett then moved for summary judgment, contending that the Spicers had purchased the marital home as tenants by the entirety and that upon Mr. Spicer's death Ms. Spicer became the fee simple owner of the marital home. (LF 19-27). The Circuit Court agreed, and entered summary judgment in favor of Ms. Spicer, ordering, among other things, that the general warranty deed recorded (allegedly) by Mr. Spicer be cancelled. (LF 30-31).

More than thirty days after the Circuit Court's granted Ms. Spicer summary judgment, counsel for Steven Spicer, the Trust's trustee, moved to set aside the summary judgment and to dismiss the case for lack of "jurisdiction." (LF 32-34). Steven never sought permission to intervene, and never was joined as a party. Steven's motion argued that the Trust was not a "legal entity" that could be sued and that, because the trustee had not been sued, the Circuit Court lacked "jurisdiction" over the suit. (LF 32-34). The Circuit Court granted the motion. (LF 35).

In response, Catlett filed an amended petition to quiet title, naming as defendants not just the Trust, but also the trustee, Steven. (LF 36-39). Catlett then filed a second

motion for summary judgment, repeating the same legal theory as before. (LF 59-69). Defendants never filed a response to Catlett's motion. (See LF 5). Counsel for defendants, Gregory and Joseph Fenlon, failed to attend the hearing on the summary judgment motion, scheduled for August 18, 2008, despite proper notice having been given. (LF 5). Nor did they request additional time to conduct discovery or to respond to the summary judgment motion. (See LF 5, 76). Over Catlett's objection, the Circuit Court reset the hearing on the summary-judgment motion for four days later. (LF 76). On that date, the Circuit Court denied the motion for summary judgment, without written explanation why the Court had changed its mind about the merits of Ms. Spicer's position. (LF 77).

Thereafter, the parties engaged in a series of negotiations, (TR 7-9), at the conclusion of which, sometime in March 2009, Catlett sent Ms. Spicer a "proposed" judgment for her review, (TR 12). Ms. Spicer said that the proposal had "shocked" her and made her "sick," and so rejected it, terminated Catlett, and retained new counsel, undersigned counsel. (TR 45, 52, 267-70). Catlett acknowledged his termination in a letter to Ms. Spicer, a letter that made no mention of any settlement agreement, but rather urged Ms. Spicer's new counsel to "immediately file" a reply to defendants' motion for summary judgment, lest a "default" be entered against Ms. Spicer. (LF 270).

After Catlett filed his motion to withdraw (LF 268-69), after undersigned counsel entered his appearance for Ms. Spicer, after undersigned counsel filed a timely response to defendants' motion for summary judgment (explaining in detail why defendants' legal theories were meritless (LF 271-86)), after undersigned counsel moved the Circuit Court

to reconsider its order setting aside the summary judgment (LF 287-93) and urged the Circuit Court to re-enter summary judgment for Ms. Spicer: after all this, the Fenlons filed a motion to enforce an alleged settlement agreement. (LF 295-96). The Fenlons issued Catlett a subpoena *duces tecum*, which, because the subpoena sought documents shielded by attorney-client privilege, the Circuit Court quashed, in part. (LF 325-31). An evidentiary hearing on the Fenlons' motion was held on May 22, 2009. (LF 9). Three witnesses testified: Ms. Spicer, Catlett, and Gregory Fenlon. (TR Index). One month later, the Circuit Court granted defendants' motion to enforce, ordering the parties to execute a "consent judgment," attached to the Circuit Court's judgment. (LF 345-60). After undersigned counsel moved for a new trial or, in the alternative, to amend the judgment, the Circuit Court granted the motion in part, but rejected the lion's share of Ms. Spicer's contentions why the original judgment was erroneous, and issued an amended judgment on August 8, 2009.

Ms. Spicer (hereafter "Appellant") appealed from both judgments issued by the Circuit Court to the Missouri Court of Appeals, Eastern District, which consolidated the appeals. In Appellant's first of five points on appeal, she argued that the Circuit Court had erred or, alternatively, lacked the power to set aside the summary judgment granted Appellant. (Appellant's Brief, Mo. Ct. of Appeals, at 12).

The Eastern District agreed with Appellant's first point on appeal. (Slip Opinion, at 5-7). The Eastern District held that Respondent Spicer was not a party to the case, neither having moved to intervene nor actually intervening, and hence, as a nonparty, lacked "standing" to move to set aside the January 22nd judgment granting Appellant's

motion for summary judgment. Accordingly, declared the Eastern District, citing Wolfner v. Dalton, 955 S.W.2d 928, 929-31 (Mo. banc 1997), once the thirty days following the January 22nd judgment expired, on February 22, 2010, the Circuit lost the “power” or “jurisdiction” to *sua sponte* set aside the judgment, which it purported to do on February 25, 2010; the order granting Respondent Spicer’s motion to set aside was thus “void.” (Slip Opinion, at 6-7).

In addition, the Eastern District held that the incapacity of the Spicer Revocable Living Trust to be sued was waived by trust counsel, who did not raise the incapacity argument in the answer to the quiet-title petition. (Slip Opinion, at 7-8). The Eastern District also opined (or held – it is unclear which) that the Trust’s counsel had virtually represented the trustee and trust beneficiaries. (Slip Opinion, at 8).

This Court granted Respondents’ application for transfer, which argued that there was no final judgment on appeal and which attacked the Eastern District’s invocation of the doctrine of virtual representation.

POINTS RELIED ON

- I. The Circuit Court erred in granting Respondent Spicer’s motion to set aside the summary judgment entered in Appellant’s favor, because in granting the motion the Circuit Court misapplied or misconstrued the law, in that (a) the Circuit Court had correctly granted Appellant summary judgment; (b) Rule 75.01 prohibited the Circuit Court from attempting to *sua sponte* set aside the summary judgment more than 30 days after entry thereof; (c) Respondent Spicer, when the motion to set aside was filed, was a nonparty who had neither sought to intervene nor ever been joined as a party; (d) the motion to set aside was neither an authorized post-trial motion nor a proper Rule 74.06 motion; and (e) the motion’s contentions that Respondent Spicer was a necessary or indispensable party, and that the Circuit Court lacked jurisdiction without his joinder, were clearly erroneous.**

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009)

State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. 1997)

Nelson v. Hotchkiss, 601 S.W.2d 14 (Mo. 1980)

Casper v. Lee, 245 S.W.2d 132 (Mo. 1952)

Reformed v. Matthews, 234 S.W.2d 567 (Mo. 1950)

- II. The Circuit Court erred in granting Respondents’ motion to enforce settlement agreement, because the finding of a settlement agreement is both against the weight of the evidence and unsupported by sufficient evidence, in that the record clearly establishes that (a) Appellant’s (former) counsel**

lacked the authority to settle the case without her prior approval; (b) Respondents' counsel had rejected the only authorized offer made by Appellant; and (c) Appellant never accepted the counter-offer made by Respondent's counsel.

Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596 (Mo. 2007)

Muilenburg, Inc. v. Cherokee Rose Design, 250 S.W.3d 848 (Mo. Ct. App. S.D. 2008)

III. The Circuit Court erred in granting Respondent's motion to enforce the (alleged) settlement agreement, because even if there was a settlement agreement, the statute of frauds bars enforcement of the agreement, in that the settlement agreement was never reduced to a writing, signed by the party to be charged (i.e., Appellant).

Schmidt v. White, 43 S.W.3d 871 (Mo. Ct. App. W.D. 2001)

Sappington v. Miller, 821 S.W.2d 901 (Mo. Ct. App. W.D. 1992)

McQueen v. Huelsing, 425 S.W.2d 506 (Mo. Ct. App. St.L.D. 1968)

Mo. Rev. Stat. § 432.010 (2010)

Mo. Rev. Stat. § 442.360 (2010)

IV. The Circuit Court erred by ordering the parties to execute a consent judgment, because such an order is an improper and unauthorized remedy to enforce a settlement agreement, in that it places Appellant in a Catch 22 – either forego the right to appeal or expose herself to contempt.

Kenney v. Vansittert, 277 S.W.3d 713 (Mo. Ct. App. W.D. 2008)

V. The Circuit Court erred in effectively ordering specific performance of the (alleged) settlement agreement, because that remedy was unauthorized and improper, in that Respondents neither alleged nor proved that damages at law would be inadequate to compensate them for the harm flowing from Appellant's alleged breach.

Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. banc 1963)

Home Shopping Club, Inc. v. Roberts Broadcasting Co., 989 S.W.2d 174

(Mo. Ct. App. E.D. 1998)

ARGUMENT

I. The Circuit Court erred in granting Respondent Spicer’s motion to set aside the summary judgment entered in Appellant’s favor, because in granting the motion the Circuit Court misapplied or misconstrued the law, in that (a) the Circuit Court had correctly granted Appellant summary judgment; (b) Rule 75.01 prohibited the Circuit Court from attempting to *sua sponte* set aside the summary judgment more than 30 days after entry thereof; (c) Respondent Spicer, when the motion to set aside was filed, was a nonparty who had neither sought to intervene nor ever been joined as a party; (d) the motion to set aside was neither an authorized post-trial motion nor a proper Rule 74.06 motion; and (e) the motion’s contentions that Respondent Spicer was a necessary or indispensable party, and that the Circuit Court lacked jurisdiction without his joinder, were clearly erroneous.

A. Standard of Review

The standard of review in a civil, court-tried case is set forth by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The judgment must be reversed if it is not supported by substantial evidence, it is against the weight of the evidence, or it rests on a misinterpretation or misapplication of law. Id. See also Kenney v. Vansittert, 277 S.W.3d 713, 720 (Mo. Ct. App. W.D. 2008) (applying Murphy to an appeal of a judgment granting a motion to enforce settlement agreement).

B. Analysis

Over two years ago, the Circuit Court granted Appellant's (first) motion for summary judgment. (LF 30-31). In that motion, Appellant argued that when her husband (Mr. Spicer) died, his interest in the marital home – which with Appellant was held as a tenancy by the entirety – expired, leaving Appellant the sole and fee simple owner. (LF 19-27; 30-31). See Nelson v. Hotchkiss, 601 S.W.2d 14, 20 (Mo. 1980). In response, counsel for Respondent Steven Spicer, the Trust's trustee, claimed that the Trust and Appellant were tenants in common with respect to the realty, because Mr. Spicer had “unilaterally cancelled [the] joint tenancy and conveyed his 1/2 property interest to” the Trust. (LF 28). The Trust neither alleged nor provided any evidence purporting to establish that Appellant, who had been separated from Mr. Spicer,³ knew of

³ At the evidentiary hearing on the motion to enforce, the Circuit Court sought to elicit from Appellant an admission that she hadn't lived in the marital home for “many years.” (TR 48-49). Besides being irrelevant to the issues before the Circuit Court (i.e., whether the parties had settled the case and, if so, what the terms were and the proper remedy to enforce the settlement), whether Appellant had been living with her husband when he died and whether they had separated has no bearing on the issue of severance of the realty. Being lawfully seised of the entire estate, Appellant had every right to reside there, for the unity of possession necessary to maintain a tenancy by the entirety doesn't require *actual* physical possession, but merely the right to possession, 20 AM.JUR.2D Cotenancy & Joint Ownership, §32-33 (2005), which Appellant unquestionably had.

or consented to Mr. Spicer's conveyance. Of course, a key feature of entireties property is that the tenancy *cannot* be unilaterally terminated; any purported unilateral termination is a nullity. Cope v. Western Surety Co., 791 S.W.2d 844, 848 (Mo. Ct. App. E.D. 1990). Hence, the Circuit Court properly rejected the Trust's argument the first time around and entered summary judgment for Appellant, declaring her the fee simple owner of the marital home.⁴

“[U]nity of possession . . . is, of course, simply another way of saying that the tenancy in common is a form of concurrent ownership.” 4 THOMPSON ON REAL PROPERTY § 32.06(a), at 87 (David A. Thomas ed., 2d ed. 2004). And just as a decree of legal separation doesn't automatically sever a tenancy by the entirety (a separate court order is required to do that), Ronollo v. Jacobs, 775 S.W.2d 121, 123-24 (Mo. 1989), *a fortiori* an informal separation by a married couple doesn't sever the tenancy. A contrary conclusion would be absurd. In many marriages, the spouses acquired title to realty as entireties property, and if a spouse decides to dissolve the marriage, one spouse almost always moves out of the marital home. No court has ever thought, or could think, that such informal separations cause the severance of the entireties, causing each spouse on, as separate property, a fifty-fifty interest in the marital home as tenants in common. Missouri is not, after all, a community property State.

⁴ Though the fact wasn't before the Circuit Court when it was ruling on Appellant's (first) summary judgment motion, Appellant and Mr. Spicer had refinanced the marital home before he died and executed a deed of trust; but that deed neither

The Fenlons moved on behalf of Respondent Steven Spicer to set aside the judgment; their sole argument was that the Circuit Court lacked jurisdiction. (LF 32-33). In granting the motion (LF 34-35), the Circuit Court misapplied or misconstrued the law, for five distinct and dispositive reasons.

(1) The Circuit Court lost the right and authority to set aside the summary judgment *sua sponte*, because it failed to do so within thirty days of the date summary judgment was entered. See Rule 75.01; Bank of Brookfield-Purdin, N.A. v. Burns, 730 S.W.2d 605, 607 (Mo. Ct. App. W.D. 1987).

(2) Because Respondent Spicer was a nonparty and had not filed a proper motion to intervene, the Circuit Court erred by entertaining the motion to set aside. The trustee had never moved to intervene (and why would he have, given that the Trust's lawyer had been defending his interests), let alone granted permission to do so. So the trustee was a nonparty, Proctor v. Director of Revenue, 753 S.W.2d 69, 70 (Mo. Ct. App. S.D. 1988) ("For one to be a party to a civil lawsuit, as the term party is used in our statutes and rules, a person must not only have some actual and justiciable interest susceptible of protection, but also must either be named as a party in the original pleadings, or be later added as a party, by appropriate trial court orders, through utilization of court rules and

purported to (LF 245-65) nor could have affected title, legally or equitably, M & P Enterprises, Inc. v. Transamerica Financial Services, 944 S.W.2d 154, 164 (Mo. 1997); Belote v. McLaughlin, 673 S.W.2d 27, 30-31 (Mo. 1984); R.L. Sweet Lumber Co. v. E.L. Lane, Inc., 513 S.W.2d 365 (Mo. 1974).

statutes regarding joinder of parties, interpleader, intervention, and other procedures authorized by [statute or court rules].”), and nonparties cannot be heard by a circuit court unless and until they intervene or are joined as a party, by the court or another party in the case. State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. 1997) (holding that because nonparties did not effectively intervene in case, the circuit court erred in considering the nonparties’ motions filed after the judgment became final).

The Circuit Court did not (*pace* the Eastern District) lack the power or jurisdiction to entertain the motion to set aside. Rather, the Circuit Court *erred* by considering the merits of the motion to set aside. Though Wolfner characterizes its holding as a jurisdictional one, that characterization was inessential to its holding. Before this Court had decided J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009), errors committed by circuit courts were often labeled, incorrectly, jurisdictional errors. J.C.W. clarified that the circuit courts’ jurisdiction is created by the Missouri constitution, not state statutes, and covers all civil and criminal cases. Id. at 253-54. (Granted, the federal constitution can, and does in some circumstances, deprive a circuit court of jurisdiction to entertain certain classes of cases that only the federal courts can hear. State ex rel. Laughlin v. Bowersox, SC90542, Slip Opinion, at 2 (Mo. Aug. 23, 2010).) But an error need not be jurisdictional to warrant reversal – in fact, most reversible errors are *not* jurisdictional, but rather involve noncompliance with mandatory (and sometimes discretionary) rules and standards, such as that set forth in Rule 75.01. Minus the “jurisdictional” verbiage in Wolfner, this Court correctly held that it was error (albeit not jurisdictional) for a circuit court to entertain and grant a motion filed by a nonparty to a

case. Furthermore, in their transfer applications, Respondents never challenged the validity of Wolfner, let alone explained why this Court should deviate from stare decisis.

(3) The motion to set aside was neither an authorized post-trial motion nor a proper Rule 74.06(b) motion. Regarding the former, Respondent Spicer's motion failed to allege any substantive errors of law or fact in granting summary judgment, *cf.* Taylor, 854 S.W.2d at 393 (“The Taylors’ motion claims that the trial court committed an error of law in sustaining the UPS motion for summary judgment.”), such as a reasonable dispute about a material fact or a principle of law that scotched Appellant’s legal theory. Instead, Respondent Spicer attacked the court’s lack of jurisdiction, which goes to the power of the court to act, not the legal or factual propriety of the court’s action, *see* Webb, 275 S.W.3d at 252-54 (distinguishing legal errors from jurisdictional errors), and the Circuit Court clearly had the power to grant a motion for summary judgment in a civil case.

Though Rule 74.06(b) authorizes the filing and granting of a motion to set aside a judgment on the grounds that the judgment is “void,” and though a judgment entered without jurisdiction is void, the Circuit Court clearly had jurisdiction. As this Court has held, there are two forms of jurisdiction: subject-matter and personal jurisdiction. Webb, 275 S.W.3d at 252-54. (Standing is also jurisdictional requirement, probably tacit in the Missouri constitution’s requirement of a “case” or “matter.” *See* Mo. const. art. V, §14(a); Healthcare Services v. Copeland, 198 S.W.3d 604 (Mo. 2006).) The motion to set aside contested neither subject-matter jurisdiction nor personal jurisdiction, (LF 32-3), both of which were clearly present (and any objection to personal jurisdiction was waived

because not challenged in the answer to the petition (LF 15-18)). See id. Rather, the motion alleged that because the Trust had been sued, not the trustee, that a necessary party was omitted from the case, and hence the court lacked “jurisdiction.” But the absence of a necessary party is *not* a jurisdictional defect. Id.; State ex rel. Webster County v. Hutcherson, 199 S.W.3d 866, 874 (Mo. Ct. App. S.D. 2006); Edmunds v. Sigma Chapter of Alpha Kappa, 87 S.W.3d 21, 27 (Mo. Ct. W.D. App. 2002). In any event, the proper remedy for nonjoinder of a necessary party is to join that party to the lawsuit, not to vacate any prior order or judgments. See Rule 52.06(a); Bracey v. Monsanto Co., Inc., 823 S.W.2d 946, 947 (Mo. 1992).

(4) Respondent Spicer’s argument that he was a necessary party (or even an indispensable party, though the trustee never claimed as much) is incorrect. True, in *suits brought by creditors or beneficiaries of a trust seeking property or damages from a trust*, the trustee is a necessary party. How else could the ordinary plaintiff execute on a money judgment or judgment in specie, when only the trustee holds legal title to trust property (with equitable title held by the trust beneficiaries)? But when the controversy can be resolved without formal joinder of the trustee, the trustee is not a necessary (let alone indispensable) party. Casper v. Lee, 245 S.W.2d 132, 138 (Mo. 1952).

There are two reasons why the controversy initiated by Appellant’s quiet-title case could be adjudicated (and actually was, before the court set aside the summary judgment it had entered for Appellant) without the formal joinder of the trustee. One, the trustee (and the trust beneficiaries) were virtually represented by counsel for the Trust, who (unsuccessfully) opposed the initial summary judgment motion. “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’s counsel, whose fiduciary duty required him to protect and promote trust assets as his own, had the same interest as the trustee and the beneficiaries in protecting what they (wrongly) believed to be a 1/2 interest in the marital home. In this case, the Trust’s counsel entered his appearance and answered the petition. (LF 1, 15-18). If his representation was shoddy, the remedy was to sue him for malpractice or to have him surcharged. (Such a suit would have failed, but that is beside the point.)

Even disregarding the existence of virtual representation, failure to join the trustee as a party could not have harmed (“prejudiced,” to put it in the legalese) the trustee or the trust beneficiaries. Declaring Appellant the fee simple owner did not require, and could not have required, the trust to pay damages or convey property out of trust assets to Appellant, or do anything else to its detriment; whereas declaring the Trust the winner outright would have resulted in a judgment that Appellant would be barred from collaterally attacking in a subsequent suit. See Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 715 (Mo. 2008) (discussing the prohibition on claim splitting). In effect, the Circuit Court, by granting the motion to set aside, condoned 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).

One last observation about the merits of the “necessary party” argument: The trustee’s contention that the trust is not a “legal entity” (LF 32) is a claim of lack of capacity to be sued. See In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793, 798 (Mo. Ct. App. E.D. 2009) (“Capacity to sue refers to the status of a person or group as an entity that can sue or be sued.”). A “lack of capacity” argument is waived if not raised in a responsive pleading. Id. Here, the Trust failed to argue lack of capacity in its answer to Appellant’s petition, (LF 15-18), and thus waived the argument.

If the movant were correct that the Trust was not a “legal entity” (more on which below), that would mean that summary judgment had been entered against nobody or nothing, aggrieving nobody or nothing. If so, then since the trustee suffered no concrete harm (or even abstract harm), the trustee lacked standing to attack the judgment, which is a jurisdictional prerequisite (remember the “case” or “matter” requirement of the Missouri constitution) for a court to act. Healthcare Services v. Copeland, 198 S.W.3d 604 (Mo. 2006); Clifford Hindman R.E. v. City of Jennings, 283 S.W.3d 804, 808 (Mo. Ct. App. E.D. 2009). That the Circuit Court believed that the trustee or trust beneficiaries were aggrieved by the summary judgment belies both the trustee’s contention that the Trust was not a legal entity and his tacit assumption that the trustee had not been virtually represented by the Trust’s counsel.

The foregoing reasons establish that the Circuit Court misapplied or misconstrued the law in setting aside its (correctly entered) summary judgment for Appellant. But for

the Circuit Court's erroneous interlocutory order – an order this Court could not have previously reviewed on appeal, but which it can review now, MO. REV. STAT. §512.020.4 (2010) – the issue of whether the parties had subsequently executed a valid, enforceable settlement agreement never would have arisen. It is thus unnecessary for this Court to address that issue. This Court should vacate the amended judgment (which superseded the original judgment enforcing the alleged settlement agreement), and order the Circuit Court to reenter its (correctly entered and incorrectly vacated) summary judgment in favor of Appellant.

II. The Circuit Court erred in granting Respondents' motion to enforce settlement agreement, because the finding of a settlement agreement is both against the weight of the evidence and unsupported by sufficient evidence, in that the record clearly establishes that (a) Appellant's (former) counsel lacked the authority to settle the case without her prior approval; (b) Respondents' counsel had rejected the only authorized offer made by Appellant; and (c) Appellant never accepted the counter-offer made by Respondent's counsel.

A. Standard of Review

The standard of review in a civil, court-tried case is set forth by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The judgment must be reversed if it is not supported by substantial evidence, it is against the weight of the evidence, or it rests on a misinterpretation or misapplication of law. Id.

B. Analysis

The formation of a settlement agreement must be proven by clear, convincing, and satisfactory evidence. Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. 2007). Respondents failed to satisfy that strong burden. The Circuit Court erred in concluding otherwise.

Respondents' theory was that Appellant's (first) attorney, William Catlett, had the authority to settle the case on behalf of Appellant and that Catlett and Respondents' counsel, Gregory and Joseph Fenlon, had, in fact, settled the case. (See LF 294-98). But the evidence, far from supporting Respondents' theory, clearly establishes that Appellant never conferred on Catlett authority to settle the case, with or without her approval of any offer from the Fenlons. Instead, the evidence establishes that Appellant instructed Catlett to negotiate with the Fenlons, which he did, and to deliver a single offer to them, which he also did; and the Fenlons rejected that offer, proposing a counter-offer that included additional and different terms from Appellant's offer – a counter-offer that Appellant rejected.

The scope of Catlett's authority is paramount. Though the Circuit Court found that Catlett had testified that he had authority to accept a settlement offer on Appellant's behalf (LF 346), the evidence establishes the opposite – namely, that Catlett had the authority only to negotiate with, and then relay any offers from the Fenlons to Appellant, for her to choose whether to accept or reject. Catlett testified that he was authorized to negotiate with the Fenlons, which he did, separately, (TR 7-9), but never did he opine that he had the power to settle the case on Appellant's behalf. To the contrary, he

testified that he didn't believe that the representation letter sent to Appellant – which the Circuit Court said established the scope of Catlett's agency (TR 50) – gave him the power to settle the case on her behalf. (TR 22-23). Moreover, the conduct of Catlett and Appellant belies any notion that he had such independent settlement authority. As Catlett and Appellant testified, the two were exchanging information as the multiple negotiations took place, and, at the end of the last one, Catlett sent Appellant a “proposed order and judgment for review of [sic] the Appellant,” (TR 12), indicating that he believed only Appellant had the final authority to settle.

In addition, it is abnormal for attorneys to have independent authority to settle. Rule 1.2 of the Rules of Professional Conduct is clear: “A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.” That rule assumes that it is wrongful for an attorney to represent that he has the power to settle a case for his client, to whom he is obligated to communicate settlement offers, which the client, and only the client, accepts or rejects. It is also notable that Appellant testified that, though she had authorized Catlett to negotiate with the Fenlons, she had only “agreed for [Catlett] to express [her] opinion to” the Fenlons. (TR 38). Finally, the only other witness besides Appellant and Catlett to testify at the evidentiary, Gregory Fenlon, and he had zero personal knowledge about the scope of authority conferred on Catlett by Appellant.

Not only did the Circuit Court err in finding that Catlett had the power to settle the case on Appellant's behalf, but the Circuit Court also erred in finding that the parties, through counsel or otherwise, had executed a settlement agreement. “To establish a valid contract,” of which a settlement agreement is a subspecies, “there must be both an offer

and an unequivocal acceptance of that offer. The acceptance must be a ‘mirror image’ of the offer; any purported acceptance that contains additional or different terms is a rejection of the original offer and is simply a non-binding counter-offer.” Muilenburg, Inc. v. Cherokee Rose Design, 250 S.W.3d 848, 852 (Mo. Ct. App. S.D. 2008). “[I]f a purported acceptance adds or alters the terms of the proposition made, neither party is bound.” Londoff v. Conrad, 749 S.W.2d 463, 465 (Mo. Ct. App. E.D. 1988).

It is undisputed here that Appellant instructed Catlett to present a settlement offer (detailed in a letter dated February 6, 2009) to the Fenlons. (TR 6-7, 39-40). No testimony was presented that either the Fenlons or their clients had accepted, absolutely and without qualification, the offer from Appellant. Rather, the undisputed testimony was that the Fenlons and Catlett had multiple negotiations about Appellant’s offer, during which Catlett would receive contrary responses from Joseph and Gregory Fenlon, and that eventually they had agreed on a “proposed” settlement, which Catlett later reproduced in a twelve-paged writing that he forwarded to Appellant, with the “hope” that she and the Fenlons’ clients would execute the proposal. (TR 12-13).

That the proposal from the Fenlons was just that – a proposal – is confirmed by the facts that (a) the Fenlons have never withdrawn their motion for summary judgment; (b) the proposal includes signature lines for Appellant, Respondent Spicer, and one of the beneficiaries, none of which have been signed; and (c) the proposal is quite lengthy and detailed. (LF 342-44). On simple matters, oral contract might be relatively common, but where an agreement includes multiple complicated provisions, especially those dealing with the sale of real estate and the disposition of highly valuable property, personal and

real, it is highly unlikely that the contracting parties would believe they had entered into a contract until the parties had a chance to review and sign the contract. Moreover, nothing in the record shows that even a single provision of the settlement agreement – including, e.g., the provision requiring delivery, before execution of the agreement, to Appellant of personal property that both Appellant’s offer and the Fenlons’ counter offer agree she is entitled to – has been performed, by any party.

Never did Catlett testify that he had accepted the Fenlons’ counter-offer on Appellant’s behalf (not that he had the authority to do so) or that Appellant had accepted the Fenlons’ counter-offer. To the contrary, Appellant testified that the counter-offer had “shocked” her and made her “sick.” (TR 45, 52). Under the counter-offer, forty percent of her son’s share in the trust would go to the Fenlons’ as attorney’s fees; \$10,000 of personal property, some of sentimental value, that she had specified be awarded to her in her offer, had been crossed-out on the counter-offer; Respondent Spicer, who had locked Appellant out of the marital home in which he had been trespassing since his father’s death, without paying rent, would continue to be allowed to live in her home for months longer; and Appellant, instead of taking sole responsibility to sell the house, would have to work with Gregory Fenlon, whom she despises. (TR 41, 44-48, 54, 56). Notably, nowhere in Catlett’s letter to Appellant acknowledging termination did Catlett imply that the case had been settled. To the contrary, the letter urged that new counsel “immediately file” a reply to Respondents’ motion for summary judgment, in order to avoid a “default” judgment being granted in Respondents’ favor. (LF 270).

In sum, the testimony from the evidentiary hearing, the proposed settlement agreement itself, and the parties' conduct, before and after the alleged settlement, all make it clear that the Fenlons (even assuming they were authorized to accept or reject Appellant's offer and to make a counter-offer; no evidence on the issue was presented) had *rejected* Appellant's offer by making a counter-offer, which, though the Fenlons and Catlett expected and hoped Appellant would accept, she never did.

III. The Circuit Court erred in granting Respondent's motion to enforce the (alleged) settlement agreement, because even if there was a settlement agreement, the statute of frauds bars enforcement of the agreement, in that the settlement agreement was never reduced to a writing, signed by the party to be charged (i.e., Appellant).

A. Standard of Review

The standard of review in a civil, court-tried case is set forth by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The judgment must be reversed if it is not supported by substantial evidence, it is against the weight of the evidence, or it rests on a misinterpretation or misapplication of law. Id.

B. Analysis

"A compromise settlement is a contract, and must be in writing if the subject matter of the compromise is within the [s]tatute of [f]rauds." Sappington v. Miller, 821 S.W.2d 901, 903 (Mo. Ct. App. W.D. 1992). Whether the statute of frauds dictates the enforceability of a settlement agreement turns on the intended effect of the settlement

agreement, not the claims raised in the underlying action. *Id.* The statute of frauds states:

No action shall be brought . . . to charge any person . . . upon any contract made for the sale of lands, tenements, hereditaments, or an interest in or concerning them . . . unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be *in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized*, and no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract.

MO. REV. STAT. §432.010 (2010) (emphasis added).

“The statute of frauds was designed to avoid dangers [that] developed in permitting title to real estate . . . to rest in parol.” Tuckwiller v. Tuckwiller, 413 S.W.2d 274, 278 (Mo. 1967). Because the statute “applies with equal force to both the purchasers and sellers of real estate,” any purported authorization by one co-owner of realty of another co-owner to sell the realty to a third party is governed by the statute. McQueen v. Huelsing, 425 S.W.2d 506, 508 (Mo. Ct. App. St.L.D. 1968). Accord Evans-Rich Mfg. Co. v. David G. Evans Coffee Co., 2 S.W.2d 176, 177 (Mo. Ct. App. 1928) (“[i]t has never been supposed that the statute of frauds could be so easily set at naught” by re-characterizing a selling agreement as merely an agency agreement outside the scope of the statute).

The statute of frauds governs the (alleged) settlement agreement found by the Circuit Court. To begin with, the intended effect of the agreement was, among other things, to have the real estate listed and sold “for the highest price acceptable to the parties at the earliest possible time to a bona fide purchaser for value.” (LF 350). This is a “contract made for” – that is, with the object or purpose of – “the sale of lands.” See Jackson v. Shain, 619 S.W.2d 860, 862 (Mo Ct. App. W.D. 1981). It is a (purported) agreement between the (supposed) co-owners, as tenants in common of the property – namely, Appellant and Respondent Spicer, the trustee of the Donald N. Spicer Revocable Living Trust – to sell a parcel of realty to a third party. This conferral of authority to sell the marital home had to satisfy the statute of frauds. McQueen, 425 S.W.2d at 508.

Moreover, even if, contrary to fact, Catlett had the authority to settle the case on his own, any settlement agreement executed by him with the Fenlons still had to comply with the statute of frauds – and not just because of Section 432.010. Section 442.360 declares: “Every instrument . . . to execute, as agent or attorney for another, any instrument in writing . . . whereby real estate may be affected in law or equity, shall be acknowledged or proved, and certified and recorded, as other instruments in writing conveying or affecting real estate are required to be acknowledged or proved and certified and recorded.” Hence, any (alleged) settlement agreement to authorize Appellant and Gregory Fenlon to hire a real estate agent, as the (alleged) settlement agreement required (LF 350), had to be “acknowledged or proved” in the same way as “instruments in writing conveying or affecting real estate” – that is, by complying with Section 432.010, which governs the conveyance of interests in real estate.

It is undisputed that no signed writing reciting the terms of the settlement exists. Because the statute of frauds required any (alleged) settlement agreement, whether between the Fenlons and Catlett or between Appellant and the Fenlons or between Appellant and Respondent Spicer, to be in writing and signed by the party to be charged (here, the Appellant), the statute of frauds bars enforcement of any such settlement agreement.

By disregarding the statute of fraud's prohibition on enforcing the (alleged) settlement agreement (a defense raised by Appellant in opposition to the motion to enforce (LF 308-09)), the Circuit Court misapplied or misconstrued the law. See Schmidt v. White, 43 S.W.3d 871 (Mo. Ct. App. W.D. 2001).

IV. The Circuit Court erred by ordering the parties to execute a consent judgment, because such an order is an improper and unauthorized remedy to enforce a settlement agreement, in that it places Appellant in a Catch 22 – either forego the right to appeal or expose herself to contempt.

A. Standard of Review

The standard of review in a civil, court-tried case is set forth by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The judgment must be reversed if it is not supported by substantial evidence, it is against the weight of the evidence, or it rests on a misinterpretation or misapplication of law. Id.

B. Analysis

Even assuming, *arguendo*, that the Circuit Court had properly found that the parties had executed a settlement agreement, the Circuit Court erred in ordering the

parties to execute a consent judgment. Like a voluntary dismissal, the execution of a consent judgment would have deprived Appellant (and Respondents) of the statutory right to appeal. Nations v. Hoff, 78 S.W.3d 222, 223 (Mo. Ct. App. E.D. 2002). It is error for a Circuit Court to order, as a remedy for failure to comply with a settlement agreement, that the breaching party take an action, such as voluntarily dismissing a case, that would place the party in the “double bind” of either losing the right to appeal or being exposed to contempt. Kenney, 277 S.W.3d at 723. As the Western District explained:

The proper course for the Circuit Court to follow after finding the parties had mutually agreed to release their claims [pursuant to a settlement agreement] was to dismiss those claims. A court order to a party to ‘voluntarily’ dismiss claims miscasts an involuntary dismissal as voluntary. It also places the party in a double bind, having to choose between losing a right to appeal or acting in contempt of court. It is well settled that no appeal lies from a voluntary dismissal. *See, e.g. Richman v. Coughlin*, 75 S.W.3d 334, 337 (Mo. Ct. App. W.D. 2002). The right of appeal is statutory. *See Gaunter v. Shelton*, 860 S.W.2d 843, 844 (Mo. Ct. App. E.D. 1993). Section 512.020 requires parties to be ‘aggrieved’ by a judgment in order to appeal. If a party stipulates to a voluntary dismissal of their claims, they would not be ‘aggrieved’ because the dismissal was with their consent. *Gaunter*, 860 S.W.2d at 844. Thus, if the party complies with the court’s order, the party loses a right to appeal to test the underlying

ruling. However, if the party does not comply, the party may be in contempt of the court's order.

Id. By placing Appellant in a forbidden Catch 22, the Circuit Court misconstrued or misapplied the law.

V. The Circuit Court erred in effectively ordering specific performance of the (alleged) settlement agreement, because that remedy was unauthorized and improper, in that Respondents neither alleged nor proved that damages at law would be inadequate to compensate them for the harm flowing from Appellant's alleged breach.

A. Standard of Review

The standard of review in a civil, court-tried case is set forth by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The judgment must be reversed if it is not supported by substantial evidence, it is against the weight of the evidence, or it rests on a misinterpretation or misapplication of law. Id.

B. Analysis

The Circuit Court ordered Appellant to sign and execute what the Circuit Court found was a modified version of the settlement agreement. By issuing, in effect, an order of specific performance, the Circuit Court misapplied or misconstrued the law.

Specific performance – an equitable command to perform a contract – is not a remedy to which a non-breaching party is entitled as a matter of right, but rather is a matter of judicial grace. Skelly Oil Co. v. Ashmore, 365 S.W.2d 582 (Mo. banc 1963); Lemp Hunting & Fishing Club v. Hackmann, 156 S.W. 791, 798 (Mo. Ct. App. St.L.D.

1913); Minor v. Rush, 216 S.W.3d 210, 215 (Mo. Ct. App. W.D. 2007) (Lowenstein, J., dissenting). One prerequisite for specific performance is affirmative proof that the remedy at law, damages, is inadequate to compensate the non-breaching party. Becker v. Tower Nat. Life Inv. Co., 406 S.W.2d 553 (Mo. 1966); Home Shopping Club, Inc. v. Roberts Broadcasting Co., 989 S.W.2d 174, 180 (Mo. Ct. App. E.D. 1998). Accord RESTATEMENT (2ND) OF CONTRACTS §359 (1981) (“[S]pecific performance or an injunction will not be entered if damages would be adequate to protect the injured party”).

The Circuit Court disregarded these established principles of law. To begin with, Respondents never alleged that legal damages would be inadequate to compensate them. Moreover, at the evidentiary hearing on the motion to enforce, Respondents produced no evidence about damages or the inability to prove or collect such damages. The only witnesses at the evidentiary hearing (William Catlett, Ms. Spicer, and Gregory Fenlon) made no mention of “damages” or any other synonymous word or phrase. Respondents merely assumed that they had a right to specific performance; that assumption is incorrect.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's judgment and remand the case with instructions to (re)enter judgment in Appellant's favor, declaring her the *fee simple* owner of the marital home.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. Pursuant to Rule 84.06, the attached brief contains 8,972 words, as determined by Microsoft Word 2007 software;
2. A CD copy of this brief (in Word 2007 and pdf formats) is attached and properly labeled; it was scanned and found virus-free;
3. True and correct copies of the attached brief and a CD disk, also scanned and found virus-free, containing a copy of this brief were mailed on Oct. 16, 2010, to counsel for Respondent:

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Respectfully submitted,



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APPENDIX

Judgment A-1

Amended Judgment A-17

FILED

JUN 24 2009

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

**JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY**

GWEN MARIE SPICER,)
)
Plaintiff,)
)
vs.)
)
DONALD N. SPICER REVOCABLE)
LIVING TRUST, et al.,)
)
Defendants.)

Cause No. 07CC-003416

Division 15

ORDER/JUDGMENT

This matter is before the Court on Defendants' Motion to Enforce Settlement Agreement.

The Motion was called and heard on May 22, 2009, evidence was adduced and the matter was concluded. Being now fully advised, the Court enters the following Order and Judgment.

The party seeking to enforce a settlement agreement must prove its existence by clear, convincing and satisfactory evidence. Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. 2007). Settlement agreements are governed by principles of contract law. Neiswonger v. Margulis, 203 S.W.3d 754, 760 (Mo.App. E.D.2006). So long as the essential terms are present in a contract and are sufficiently definite to enable a court to give them exact meaning, the contract will be found to be valid and enforceable even if some terms are missing or left to be agreed upon at a later time. Raskas Foods, Inc. v. Southwest Whey, Inc., 978 S.W.2d 46, 50 (Mo.App. E.D. 1998).

The Court finds it is clear by their actions that counsel for the parties believed the case was settled. On March 6, 2009, the parties appeared by counsel to discuss settlement positions with the Court and at that time, with the assistance of the Court, reached a tentative agreement. The Court ordered the matter continued to March 9, 2009. Plaintiff's attorney then called and

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notified the Court that the matter had been settled, and no one appeared in Court on that day. Counsel for Plaintiff drafted a consent Order and Judgment incorporating the agreed upon terms. A copy of this consent Order and Judgment is attached hereto and referenced as Exhibit 1. The Court finds Exhibit 1 to be the settlement agreed to by the parties. The Court further finds the material terms of the parties' agreement as set forth in Exhibit 1 are clear and sufficiently definite to enable the Court to give them exact meaning.

Plaintiff contends her counsel had no authority to settle the case on her behalf. While there is no implied authority for attorneys to settle cases on behalf of their clients, "in cases where an attorney represents that he or she has authority from the client to accept a settlement offer, and did reach an agreement with the other party's counsel to settle, Missouri courts have placed a heavy burden on the client to disprove his own attorney's authority if the client wishes to avoid the settlement." Bolander v. City of Green City, 35 S.W.3d 432, 440 (Mo.App. W.D. 2000), citing Southwestern Bell Yellow Pages, Inc. v. Dye, 875 S.W.2d 557, 561 (Mo.App. E.D.1994). In fact, "[o]nly where the trier of fact has been convinced that authority to settle was truly lacking, or where the evidence has been deemed insufficient to raise the presumption of attorney authority, have our courts allowed clients to avoid or attempt to avoid settlements concluded by their attorneys." Dye, supra, at 562. The Court finds and concludes based on the testimony and evidence adduced that Plaintiff's counsel did in fact have authority to settle this matter on her behalf.

The matters remaining in dispute concern items of personal property, which do not concern the subject matter of the instant action for quiet title, to-wit:

A framed brown charcoal drawing of Gwen drawn in Paris, France;

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The remaining items of china (located in the china hutch);

A stained glass window (not installed) mounted like a picture on the wall near the kitchen sink;

The pool table;

The dining room set and upstairs living room set;

A gold signet ring depicting a St. Louis Police Lieutenant's badge;

A metal St. Louis Police Lieutenant's Badge; and

A collection of silver dollars and miscellaneous coins.

The Court finds these items were agreed to by the Plaintiff and will, therefore, include said items in the terms of the settlement agreement and award same to Plaintiff.

Accordingly, Defendants' Motion to Enforce Settlement is GRANTED. The parties are hereby ORDERED to sign and execute the consent Order and Judgment attached hereto as Exhibit 1 within ten (10) days of this Court's Order and Judgment.

SO ORDERED:

6/24/09
Date

John A. Ross, Div. 15
John A. Ross, Judge

cc: Ron Ribaldo ✓
Attorney for Plaintiff

Joseph A. Fenlon ✓
Gregory G. Fenlon
Attorneys for Defendant

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

GWEN MARIE SPICER,)
)
Plaintiff,)

vs.)

DONALD N. SPICER REVOCABLE)
LIVING TRUST U/T/A DATED)
FEBRUARY 7, 2002,)

Cause No. 07CC-003416

and)

Div. No. 15

STEVEN GREGORY SPICER,)

and)

DEBRA S. PAULI,)

and)

ROBERT SPICER,)

Defendants.)

ORDER AND JUDGMENT

Come now the parties, by and through their attorneys, and hereby consent to the following Order and Judgment:

1. That Steven Gregory Spicer is the Successor Trustee of the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 (hereinafter "Trust").

2. That the General Warranty Deed purportedly executed on or about May 31, 2007, and subsequently recorded on or about June 20, 2007, is hereby CANCELLED with regard to the following real property to wit:

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Lot 28 31j410101 12 1887 of Southview Hills Subdivision as recorded in Book and Page 01 0022 A of the St. Louis County Recorder of Deeds Office.

Locator No.: 31J410077

Known and numbered as: 5367 Southview Hills Court,
St. Louis, Missouri 63129

3. That the Lis Pendens purportedly executed, and subsequently recorded on or about August 21, 2007 (Doc. #1,183, Book 17652, Pages 5309-5311), as well as any other Lis Pendens filed by, or on behalf of, Gwen Marie Spicer, is hereby RELEASED with regard to the following real property to wit:

Lot 28 31j410101 12 1887 of Southview Hills Subdivision as recorded in Book and Page 01 0022 A of the St. Louis County Recorder of Deeds Office.

Locator No.: 31J410077

Known and numbered as: 5367 Southview Hills Court,
St. Louis, Missouri 63129

4. That the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 and Gwen Marie Spicer are the owners, as tenants in common, of the residence known and numbered as 5367 Southview Hills Court, St. Louis, Missouri 63129, and more fully described as follows:

Lot 28 31j410101 12 1887 of Southview Hills Subdivision as recorded in Book and Page 01 0022 A of the St. Louis County Recorder of Deeds Office.

Locator No.: 31J410077

Known and numbered as: 5367 Southview Hills Court,
St. Louis, Missouri 63129

5. Said Order and Judgment shall be filed with the Office of the Records of Deeds of St. Louis County.

6. Said property is presently subject to a note secured by a deed of trust in favor of Citimortgage. The parties shall

execute the necessary deeds, documents and releases so that the aforementioned property can be disposed of by sale beginning June 1, 2009. The parties shall continue their joint ownership of the property, as tenants in common, until it is sold. In this regard, the parties shall act as follows:

(a) The property shall be listed for sale and shall continue to be listed for sale by a licensed real estate company or broker on a multiple listing basis until it is sold (beginning June 1, 2009). The parties shall follow the recommendation of the realty company or broker in adjusting the list price for the property from time to time until it is sold unless the parties agree otherwise.

(b) The property shall be sold for the highest price acceptable to the parties at the earliest possible time to a bona fide third party purchaser for value.

(c) That both parties shall make the property available at reasonable times for inspection by brokers and prospective purchasers. Both parties agree that said selected broker shall place a "supra" electronic lockbox on said real property. Neither party shall unreasonably refuse to accept a bona fide offer of purchase for value or refuse to execute the necessary deeds, documents, etc. to accomplish and conclude the sale.

(d) Neither party shall have the exclusive right to reside in and occupy the residence and premises until the property is sold. That said property shall remain vacant beginning June 1, 2009.

(e) In the event any party advances the cost of the monthly mortgage after December 2, 2009, any such payment shall be reimbursed from the net sale proceeds in accordance with sub-paragraph (i) below before division between the parties.

(f) That the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 shall be responsible for the cost of the monthly gas, electric, water and sewer utility bills after December 2, 2009. In the event Gwen Marie Spicer advances the cost of the monthly gas, electric, water and sewer utility bills after December 2, 2009, said advancement shall be reimbursed to Gwen Marie Spicer from the net sale proceeds in accordance with sub-paragraph (i) (2) below prior to payment and/or distribution in sub-paragraph (i) (2) below.

(g) That the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 shall be responsible for the normal maintenance and upkeep of the premises. In the event Gwen Marie Spicer advances the cost of any such normal maintenance and upkeep of the premises, said advancement shall be reimbursed to Gwen Marie Spicer from the net sale proceeds in accordance with sub-paragraph (i) (2) below prior to payment and/or distribution in sub-paragraph (i) (2) below.

(h) The Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 shall be responsible for any major repairs necessary to place or maintain the residence in a habitable or saleable condition. In the event Gwen Marie Spicer advances the cost of any such major repair, said advancement shall be reimbursed to Gwen Marie Spicer from the net sale proceeds in accordance with sub-paragraph (i) (2) below prior to payment and/or distribution in sub-paragraph (i) (2) below.

(i) "Net sale proceeds" shall be defined as the gross sales price less the balance of the mortgage, liens and encumbrances of record, real estate commissions, customary closing adjustments, any credits due to either party in

accordance with sub-paragraph (e) above, and reasonable and customary expenses of sale. The then initial \$8,132.23 of the net sale proceeds shall be distributed to Gwen Marie Spicer representing one-half (1/2) of mortgage payments made by Gwen Marie Spicer through December 2, 2009. The then initial \$360.95 of the net sale proceeds shall be distributed to Gwen Marie Spicer representing Metropolitan St. Louis Sewer District payments made by Gwen Marie Spicer through December 2, 2009.

(1) The then remaining net sale proceeds shall be divided 50% to Gwen Marie Spicer.

(2) The then remaining net sale proceeds (less any credits due to Gwen Marie Spicer in accordance with sub-paragraphs (f) and (g) and (h) above), shall be divided 50% as follows:

[a] The initial forty percent (40%) of said amount shall be distributed to Joseph & Gregory Fenlon representing attorney's fees on behalf of the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002.

[b] The remaining sixty percent (60%) of said amount shall be distributed as follows:

[i] One-third (1/3) to Steven Gregory Spicer. However, Gwen Marie Spicer shall first receive one-hundred dollars (\$100.00) per day, beginning at 12:00 a.m. on May 31, 2009, that any individual, including, but not limited to, Steven Gregory Spicer and Steven Gregory Spicer's girlfriend's son, is residing and/or occupying said real property. Said amount, if any, shall

be paid to Gwen Marie Spicer from Steven Gregory Spicer's share of sale proceeds.

[ii] One-third (1/3) to Debra S. Pauli.

[iii] One-third (1/3) to Scott Gregory Spicer. That the parties, as well as the Successor Trustee hereby agree that said amount shall be placed in an account in the name of Scott Gregory Spicer (and not the name of the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002). That said account shall be placed into a Bank of America restricted renewal Certificate of Deposit account that shall be relinquished to Scott Gregory Spicer only upon attaining the age of thirty (30). In order to withdraw said sums prior to attaining the age of thirty (30), two signatures (Gwen Marie Spicer and Debra S. Pauli) would be required.

7. That said Order further creates an irrevocable Power of Attorney on behalf of the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 in which attorney Gregory Fenlon shall act as the attorney-in-fact with regard to executing documents on behalf of said Trust, including, but not limited to, the execution of listing agreements, contracts for sale, closing documents, deeds of transfer, initial deposit of Scott Gregory Spicer's sale proceeds in said referenced restricted account, etc..

8. Gwen Marie Spicer shall be entitled, and shall receive, the following items of personal property (after execution of the settlement agreement by the parties but prior to execution by the Judge):

- a. An oil painting (portrait of Scott), depicting Scott at age two.
- b. A brown charcoal drawing, which is framed of Gwen; drawn in Paris, France.
- c. One St. Louis Police Memorial Statute. Note that there are two statues, one is Gwen's and one is Donald's (as a result of both contributing \$300.00 to the Police Memorial Foundation).
- d. The remaining items of China (located in the China Hutch). Said items consist of various pieces, including place settings to fill the china hutch in the dining room.
- e. A stain glass window (not installed) mounted like a picture on the wall near the kitchen sink. Note that this was a gift to Gwen from her former partner, Gary Maher, when Gwen was promoted to Sergeant.
- f. Scott's bedroom set (twin bed, chest, changing table and night stand) purchased by Gwen's parents.
- g. A child's wooden potty chair (with Scott's name cut out in the wood). This was a gift from Scott's grandparents.
- h. All framed photos of Scott and/or Gwen in the house.
- i. A picture frame depicting two photographs (one of Gwen and one of Donald Spicer) as children.
- j. Gwen's Federal Bureau of Investigation National Academy Graduation Photo (framed) and diploma (framed). Location: hanging in the finished basement.
- k. The pool table.
- l. The dining room set and upstairs living room set. Please note that Gwen has receipts for these items should you wish to view same.
- m. Scott Gregory Spicer shall be entitled, and shall receive, the following items of personal property (after execution of the settlement agreement by the parties but prior to execution by the Judge):
 - i. A gold signet ring, depicting a St. Louis Police Lieutenant's badge; given to Donald by Gwen Spicer upon his retirement from the St. Louis Police Department.

- ii. A metal St Louis Police Lieutenant's Badge, previously worn by Donald when he was an active St. Louis Police Lieutenant.
- iii. A collection of silver dollars housed in the safe in the garage and old miscellaneous coins to include silver dollars collected by Donald Spicer.

9. That Plaintiff, pursuant to Missouri Supreme Court Rule 67.01, hereby dismisses Petitioner's Cause of Action against Robert Spicer with prejudice.

10. That Defendants, pursuant to Missouri Supreme Court Rule 67.01, hereby dismiss Defendants' Cause of Action against Plaintiff with prejudice.

11. That all other pending matters between the parties are hereby dismissed with prejudice.

12. Plaintiff shall be solely responsible for the balance of Plaintiff's own attorney's fees and litigation expenses (including, but not limited to, witness fees, service fees, deposition costs, subpoenas, etc.).

13. Defendants' shall be solely responsible for the balance of Defendants' own attorney's fees and litigation expenses (including, but not limited to, witness fees, service fees, deposition costs, subpoenas, etc.).

14. Defendants' attorney's fees are exclusively those as stated in paragraph 6(i)(2)[a] above.

15. Court costs to be paid from the court cost deposit previously posted, except that each party shall pay their own litigation expenses (including, but not limited to, witness fees, service fees, deposition costs, subpoenas, etc.). The parties shall each pay one-half of the court costs in excess of the court cost deposit previously posted, if any.

16. The respective parties hereto fully and forever release the other from all claims, demands, causes of action at law or in equity, of every kind, manner and form, accruing prior

to the date hereof, except as to matters the performance of which is expressly provided for herein. As for the property rights of the parties, this instrument shall be a complete and effective bar on the part of each party hereto to the assertion by him or her of any right, title or interest other than those specifically contemplated by this Order.

17. This document constitutes the entire agreement between the parties. The parties acknowledge that no promises, agreements or inducements have been made which are not expressly contained herein. This Agreement may not be altered, modified or amended except by written agreement of the parties. Should any provisions of this Agreement be deemed to be invalid or ineffective in accordance with law, the remaining provisions shall survive and operate as the complete agreement between the parties.

18. In the event any of the provisions of this Agreement become the subject of enforcement proceedings between the parties, then the prevailing party shall be entitled to the reasonable costs incurred in prosecuting or defending such an action, including reasonable attorney's fees.

19. The parties shall execute the necessary deeds, waivers, releases and other documents, and to do all other things reasonably necessary, to accomplish and give effect to the provisions of this Agreement.

20. Each of the parties hereby warrants and affirms that they are entering into this Agreement freely and voluntarily; that they have ascertained and weighed all of the facts and circumstances likely to influence his/her judgment herein; that they have given due consideration to such provisions; that they have sought independent advice of counsel and have been afforded such advice in regard to all details and particulars of the Agreement and the underlying facts thereof.

21. Each party acknowledges that they have had the opportunity to complete discovery, such as Interrogatories, Requests for Production of Documents, Appraisals of Real Estate and other assets, and Depositions, but has chosen not to do all or some of such discovery. Each party understands the risks of proceeding without full and complete discovery. Each party acknowledges that without full and complete discovery their counsel is not in a position to make a determination of the full extent and exact value of the parties' property, debts, income and expenses.

22. Each party acknowledges that they have had the opportunity to pursue a trial of this cause, including any post-trial actions or appeals that might follow thereafter, but have chosen not to pursue a trial. Each party understands that they might have achieved a more favorable or less favorable outcome as a result of trial than what has been achieved as a result of this Agreement. Each party shall forego the right to a trial of this cause, in part, due to the cost and uncertain outcome of any trial (including, post-trial matters and appeals).

23. The provisions of this Agreement shall inure to, and be binding on, the heirs, assigns and representatives of each party.

24. The validity and construction of this Agreement shall be determined and interpreted in accordance with the laws of the State of Missouri.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

GWEN MARIE SPICER

STEVEN GREGORY SPICER, SUCCESSOR
TRUSTEE OF THE DONALD N. SPICER
REVOCABLE LIVING TRUST U/T/A DATED
FEBRUARY 7, 2002

STEVEN GREGORY SPICER

DEBRA S. PAULI

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

On this _____ day of _____, 20__, before me personally appeared Gwen Marie Spicer, to me known to be the person described in and who executed the foregoing instrument and acknowledged that Plaintiff executed the same as Plaintiff's free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public

My Commission Expires:

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

On this _____ day of _____, 20__, before me personally appeared Steven Gregory Spicer, Successor Trustee of the Donald N. Spicer Revocable Living Trust U/T/A dated February 7, 2002 to me known to be the person described in and who executed the foregoing instrument and acknowledged that Defendant executed the same as Defendant's free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public

My Commission Expires:

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

On this _____ day of _____, 20__, before me personally appeared Steven Gregory Spicer to me known to be the person described in and who executed the foregoing instrument and acknowledged that Defendant executed the same as Defendant's free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public

My Commission Expires:

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

On this _____ day of _____, 20__, before me personally appeared Debra S. Pauli to me known to be the person described in and who executed the foregoing instrument and acknowledged that Defendant executed the same as Defendant's free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal the day and year above written.

Notary Public

My Commission Expires:

WILLIAM A. CATLETT, L.L.C.
Dill Bamvakais Building
9939 Gravois Road
St. Louis, MO 63123
(314) 631-7200
(314) 631-1685 (facsimile)

JOSEPH AND GREGORY FENLON
7711 Bonhomme Avenue
Suite 300
St. Louis, MO 63105
(314) 862-7999
(314) 862-8999 (facsimile)

WILLIAM A. CATLETT #44821
Attorney for Plaintiff

JOSEPH OR GREGORY FENLON #
Attorney for Defendants

SO ORDERED:

HONORABLE JOHN A. ROSS

DATED: _____

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

2009 AUG 27 AM 10:46

GWEN MARIE SPICER,

Plaintiff,

vs.

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

Defendants.

JOAN M. GILMER
CIRCUIT CLERK

Cause No. 07CC-003416

Division 15

ORDER/JUDGMENT

This matter is before the Court on Plaintiff's Motion for New Trial and to Amend the Judgment. The Motion is GRANTED to the extent that the reference in paragraphs 6(e)-(f) and 6(i) of the parties' consent judgment to the date of "December 2, 2009," be changed to "December 2, 2008," to reflect the parties' intent that Plaintiff is to be reimbursed for one-half of the mortgage payments made by Plaintiff up to December 2, 2008 in the amount of \$8,132.23, and one-half of the sewage payments made by Plaintiff up to December 2, 2008 in the amount of \$360.95; and further that Plaintiff is to be reimbursed for *one-half* of all future mortgage and sewage payments made by Plaintiff after December 2, 2008. In all other respects Plaintiff's Motion is DENIED.

Date

8/3/09

SO ORDERED:

John A. Ross, Div. 15
John A. Ross, Judge

cc: Ron Ribando
Attorney for Plaintiff

Joseph A. Fenlon
Gregory G. Fenlon
Attorneys for Defendant

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