IN THE MISSOURI SUPREME COURT

SC91117

GWEN MARIE SPICER,

Plaintiff / Appellant,

vs.

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

Defendants / Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri

Honorable John A. Ross, Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On appeal, plaintiff advances several contentions which, if accurate, would defeat this Court's jurisdiction. Plaintiff first contends that the Circuit Court entered an Order and Judgment on January 22, 2008 and that judgment became final thirty days thereafter. A timely notice of appeal would have been due within ten days of the expiration of the thirty day period. However, plaintiff's notice of appeal was filed 16 months later. If plaintiff's contention is correct, which defendantsdispute, then appellate jurisdiction is lacking.

Another jurisdictional issue concerns the entry of an Order and Judgment in the Circuit Court finding the case had been settled and enforcing the settlement. In ***St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.,*** 272 S.W.3d 504,505 (Mo.App. E.D.,2008) the Court held that "An order granting a motion to enforce settlement is not a final, appealable judgment. Instead, it is interlocutory and becomes final only after the trial court has entered a judgment on the settlement and dismissed the underlying petition." The underlying claims and counterclaims were never dismissed.

STATEMENT OF FACTS

Defendants are dissatisfied with Plaintiff's statement of facts.

Plaintiff Gwen Spicer married decedent Donald Spicer on September 5, 1984. (LF – 166) Plaintiff was Donald Spicer's second wife. (LF 180) Plaintiff and Donald had one child together, a son. (LF 180) Donald also had three children from his first marriage. (LF 181)

Plaintiff and Donald purchased the real property located at 5367 Southview Hills in St. Louis County, Missouri on July 31, 1990 by General Warranty Deed. (LF 91) Part of the original purchase price was financed, evidenced and secured by a note and deed of trust. (LF 181) Both Plaintiff and Donald executed the original note and deed of trust as borrowers. (LF 181)

In 1999, plaintiff and Donald refinanced the loan. (LF 181) Again, both plaintiff and Donald signed the note and deed of trust and committed to the payment of the loan. (LF 181,191)

Thereafter, Plaintiff and decedent began having marital difficulties. (LF 181) Plaintiff moved out of the marital home and started living and residing with her boyfriend in the City of St. Louis while Donald continued residing in and paying for the subject property in St. Louis County, Missouri. (LF 181) As a result of the marital situation, in February, 2002 Donald created a living trust naming his four children as beneficiaries. (LF 181)

In 2003, with plaintiff's consent, acquiescence and approval, Donald re-financed the property a third time. (LF 181) The 2003 re-financing differed than the two earlier transactions in that only Donald became obligated on the note to pay off the loan. (LF 181) Because plaintiff was living with her boyfriend and not contributing to the marital obligations, plaintiff signed the 2003 Deed of Trust as a non-borrower. (LF 209) As a result, Donald alone was responsible for the payment of the note, his interest in the property was secured, and plaintiff's interest was not. (LF 181) Donald made the payments on the third loan for five years and up to his death in 2007(LF 181)

Plaintiff and Donald were self- supporting. Both worked as police officers for the City of St. Louis. (LF 182) After plaintiff moved out of the marital home, the couple's son lived with Donald and attended school in the school district where the home was located. (LF 182) A divorce was not sought because of added pension benefits to the son. In addition, the Spicers did not want to sell the home while their son was completing his educationin the school district where the home was located. (LF 182)

In May of 2007 Donald deeded his interest in the property to the "Donald N. Spicer Living Trust". (LF 17) Donald died on July 3, 2007. (LF 167)

i. Commencement of the Case.

Within 7 weeks of decedent's death, Plaintiff filed her original petition styled as a "Petition to Quiet Title". (LF 11) The petition was in one count. Plaintiff named

in the caption as the sole defendant the Donald N. Spicer Revocable Living Trust. (LF 11) An attorney entered for the Trust and filed an answer. (LF 15) Thereafter, a motion for summary judgment was filed by plaintiff which lists the Trust as the defendant in the caption but does not otherwise identify the defendant. (LF 19) Plaintiff's motion for summary judgment was not timely opposed. (LF 2) On January 22, 2008 the Court entered an Order and Judgment relating to the plaintiff's motion for summary judgment. (LF 30) Sixteen days later on February 7, 2008, Steven Spicer, who was not a named party nor served with process, filed an entry of appearance as Trustee of the Trust and moved to set aside the summary judgment and to dismiss the cause for lack of jurisdiction in that the sole defendant, the Trust, was not an entity that could be sued. (LF 32) The Trustee's motion alerted the Court to the fact that original petition and judgment was against a non-suable Trust and the Trustee and beneficiaries were not parties. (LF 32) Trustee's motion further made the court aware that the necessary and indispensable parties were not before the Court. (LF 32) No objection was made to the intervention of Trustee. (LF 32-36)

The trial court heard argument and sustained the motion of Trustee Spicer in part. (LF 34) The Court granted the motion to set aside the summary judgment and order dated January 22, 2008. (LF 34) Referring to Trustee Steven Spicer as the "defendant" the February 25, 2008 order denied "Defendant's Motion to Dismiss for

Lack of Jurisdiction". (LF 34) The February 25 Order required plaintiff to amend her petition to include Trustee Spicer as a party. (LF 34)

On February 29, 2008 plaintiff amended her petition and added Steven Spicer, Debra Pauli and Robert Spicer as defendants. (LF 36) Following some legal maneuvering, answers and counterclaims were filed. (LF 78, 151). On June 19, 2008 plaintiff filed a second motion for Summary Judgment. (LF 59) Summary Judgment 2 was argued and denied on August 22, 2008. (LF 77)

On January 5, 2009, plaintiff filed a third motion for Summary Judgment. (LF 83). The third motion for summary judgment is word for word identical to the Second Motion. (LF 59, 83). Since new grounds were not alleged, defendants moved to strike the third motion for summary judgment. (LF 159) The motion to strike is somewhat confusing in that it refers to the second motion for summary judgment, but the third motion for summary judgment filed by plaintiff was the second motion for summary judgment asserted after the individual defendants were added as parties. (LF 159) While the defendants motion to strike and the plaintiff's last motion for summary judgment were pending, the parties began settlement discussions, many of which took place in the presence of the trial court. (LF 7)

ii. <u>Settlement Negotiations.</u>

From the filing of the original petition by plaintiff through the end of March, 2009, plaintiff was represented solely by Attorney Catlett. (T. 4) Catlett initiated

settlement negotiations on behalf of plaintiff. (T. 5) Many of these settlement negotiations took place in the presence of the trial court. (T. 9, 28,29)

An initial written settlement demand was proposed by Catlett. (T. 7, 8) At the plaintiff's urging, the initial demand was reduced to writing by Catlett and the parties used the writing as a working draft to reach an agreement. (T. 7,8). A copy of the initial written demand, marked exhibit A, was sent to defense counsel and a copy sent to plaintiff Spicer. (T. 38). Plaintiff admitted that she agreed that exhibit A accurately reflected her initial demand for settlement. (T. 39) Plaintiff further admitted that attorney Catlett did not do anything wrong when he negotiated the settlement and prepared the written demand. (T. 43)On at least three occasions the parties counsel met with the trial court in chambers to facilitate a settlement or move the case. (T. 9, 28-29). Consequently, this was a settlement process in which the Court was intimately informed. (T. 28-29) Plaintiff was also well informed as she attended those court settlement proceedings. (T. 35-45)

The case was set for trial on Monday March 9, 2009 at 1:00 p.m. (T. 10) A final settlement conference was held on Friday March 6, 2009. (T. 10). On March 6, the court entered the following Order (LF 266):

Order

Parties appear by counsel. Settlement positions discussed with the Court. The Court orders the matter continued to Monday March 9, 2009 at 1:00 p.m. The parties may advise the Court orally if they have settled

the matter, otherwise attorneys to appear at said time.

Attorney Catlett and defense counsel had a discussion on the telephone on the morning of March 9, 2009 wherein a final settlement was reached. (T. 11) Catlett telephoned the Court and advised the Court that the case was settled in accordance with the March 6 Order. (T. 11, 59) Catlett did not appear for trial at 1:00 p.m. Nor did plaintiff appear for trial on the 9th. (T. 43) This was the only court appearance where plaintiff did not appear.

Catlett prepared a final written settlement agreement and sent it to plaintiff for signature. (T. 12) This agreement was marked exhibit B. Regarding exhibit B Catlett testified: "In my opinion, I believed it was a settlement." (T. 34) Exhibit B was styled by Catlett "Order and Judgment" and is attached to and made part of the Court's Order and Judgment. (LF 345-360, Appendix A-1 – A-16). Both plaintiff's counsel and defendants' counsel testified that a settlement was reached and Exhibit B, attached to the Court's Order and Judgment, represented the settlement agreement. (T. 59) This was undisputed and never challenged by plaintiff. (T. 59) In addition, by way of affidavit, plaintiff Spicer admitted (LF 312):

> At one time, I was willing to come to some type of amicable settlement agreement in order to minimize my legal costs and to expedite recovery of my residence, so that, among other things, my son can continue his education in

the school district in which the house is located. *Mr. Catlett negotiated on my behalf . . . .* (LF 312)

Plaintiff Spicer's oral testimony was consistent with her affidavit when she admitted she was communicating her position through attorney Catlett. (T. 37,38,45)

Plaintiff did not dispute that she eagerly participated in the settlement discussions. She admitted that she was motivated to settle to because she was paying mortgage payments, she was continuing to incur legal fees and her son (defendant Scott Spicer) would be able to continue "his education in the school district in which the house was located." (LF 312)

When plaintiff refused to sign the final settlement agreement and retained new counsel, defendants filed a motion to enforce. (LF 234) An evidentiary hearing was set before Judge Ross on May 22, 2009. (LF 345) Defendants subpoenaed Catlett to testify at the hearing and requested he produce at the hearing documents concerning his agreement with plaintiff and documents concerning communications between Catlett and plaintiff regarding the settlement. (LF 328) Plaintiff moved to quash the subpoena, arguing that the communications and documents were privileged. (LF 325) The trial court sustained the motion as to the communications between plaintiff and her attorney. (LF 331)

At the evidentiary hearing, three witnesses testified, to-wit: (1) plaintiff's attorney Catlett; (1) defendants' attorney Greg Fenlon; and (3) Plaintiff Gwen Spicer.

(T. 35) On June 24, 2009 Judge Ross entered his written order and judgment granting the Defendants' motion to enforce settlement. (LF 347)

Attached to the judgment and made part thereof was the final settlement agreement prepared by Catlett. (LF 348) The final settlement agreement was styled "Order and Judgment" as it was the intent of the parties to have the trial court make the settlement a judgment as it pertained to the action to quiet title. (LF 348) The trial court ordered the parties "to sign and execute the consent Order and Judgment" within ten days. (LF 347) The original agreement was in plaintiff's possession as her attorney had sent it to her for execution. (T. 38) On July 1, 2009 plaintiff filed a motion to stay the Court Order and her requirement to sign and execute it. (LF 365) On July 2, the court stayed enforcement until July 22, 2009.

Also on July 2, 2009, plaintiff filed with the Missouri Court of Appeals a Petition for Writ of Prohibition / Mandamus. (LF 371) The appellate court denied the writ petition immediately on July 2 commenting: "If any proceedings are initiated against petitioner-relator to hold her in contempt before the time a notice of appeal and request for stay is due, petitioner – relator may relief her petition". (LF 371)

In addition to the petition for writ, Plaintiff filed a notice of appeal on July 22, 2009. (LF 361) Following the filing of the notice of appeal and on July 23, 2009, plaintiff filed a "motion for new trial & to amend judgment with the trial court". (LF 372) On August 3, 2009 and after the notice of appeal was filed, Judge Ross granted

the motion in part by changing a referenced date from 2009 to 2008. (LF 393) Plaintiff filed her second notice of appeal on August 27, 2009. (LF 394)

ARGUMENT

I.

THE VARIOUS INTERLOCUTORY MOTIONS FOR SUMMARY JUDGMENT WHICH WERE FILED AND RE-FILED BY APPELLANT ARE NOT FINAL AND APPEALABLE JUDGMENTS AND BECAME MOOT WHEN APPELLANT SETTLED THE CASE ON THE EVE OF TRIAL.

Point I of plaintiff's brief is difficult to follow. The point relied on is multifarious. The argument does not track the point. Plaintiff wildly argues numerous issues some related and others unrelated to her motion for summary judgment.

a. Plaintiff's contention concerning jurisdiction and Rule 75.01.

Plaintiff raises a jurisdictional issue that must be discussed at the outset. Plaintiff contends that the trial court lost jurisdiction on February 21, 2008 which is thirty days after it entered its Order and Judgment on plaintiff's original motion for summary judgment on January 22, 2008. To the contrary, Defendants maintain that the trial court retained jurisdiction throughout the proceedings and had jurisdiction to enter its Judgment in 2009 finding that the case had been settled.

Under Rule 75.01 a trial court retains control over a final judgment for thirty days after entry of a judgment disposing of all issues and parties and during that

time period may vacate, correct, amend, or modify its judgment. However, upon filing of a timely, authorized after-trial motion, the time period within which the court may exercise jurisdiction over the judgment extends to ninety days. Rule 81.05(a)(2). In the case sub judice, Trustee filed his motion to dismiss on February 7, 2008, 16 days after the January 22 judgment. (LF 2,32) Plaintiff is mistaken where she alleges in her factual statement that Trustees motion was made "more than thirty days after the Circuit Court" entered the judgment. (Appellant's Substitute Brief, p. 7)

Plaintiff argues two points. First, plaintiff argues that the Order and Judgment dated January 22, 2008 was final judgment disposing of all parties and all issues. Second, plaintiff argues that the motion filed by trustee Steven Spicer was not an "authorized" post- trial motion. Thus, plaintiff contends that the extended period under Rule 81.05 was not triggered.

As a starting point and assuming plaintiff is correct, which is disputed, the thirty days would have expired on February 21, 2008 and plaintiff's notice of appeal would have been required to be filed ten days thereafter or before March 4, 2008. Plaintiff filed her first notice of appeal 16 months later on July 22, 2009. (LF 9) Thus, according to plaintiff's position, plaintiff's notices of appeal are untimely and the appellate court never had jurisdiction. It would necessarily follow that this Court also lacks jurisdiction. Nevertheless, defendants believe plaintiff's claim is erroneous for the reasons stated below.

It must be considered that plaintiff wants more than a judgment against a non-suable entity. Plaintiff wants the defendants to be bound by the judgment under the doctrine of virtual representation. Missouri courts have not fully examined the doctrine of "virtual representation" since the United States Supreme Court decision in ***Taylor v. Sturgell,*** 553 U.S. 880 (2008). In Taylor the Court stated emphatically that "[w]e disapprove the doctrine of preclusion by `virtual representation.' " Id. The Court specifically rejected the argument that preclusion exists where "the relationship between a party and a non-party is `close enough' to bring the second litigant within the judgment." Id. Recounting the "`deep-rooted historic tradition that everyone should have his own day in court,'" the Court stated the "general rule that `one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'

When a person was not a party to a suit, that person generally "has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." ***Taylor,*** supra. The Supreme Court has established that a "party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned and (2) either the party understood [itself] to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." ***Taylor***, 128 S.Ct. 2161, 171 L.Ed.2d 155 (internal citations omitted). Although the Taylor case decided federal

common law, it invoked the general principles of due process. The Supreme Court instructed the lower courts to discontinue use of the term "virtual representation". It is respectfully contended that this Court should follow the lead of the United States Supreme Court and adopt the holding in Taylor.

b. January 22 Summary Judgment Order was not a final Order.

A close look at the pleadings and the issues raised in the petition show that the summary judgment Order issued by the trial court on January 22, 2008was not a final, appealable judgment. The January 22 Order did not dispose of all issues.

i. The issue of attorneys fees remained in the case following the January 22, 2008 Judgment.

In paragraph 9 of plaintiff's original petition plaintiff sought damages for attorneys fees. (LF 13) Plaintiff's petition also prayed for an award of attorneys fees. (LF 13) At the summary judgment stage, Plaintiff sought, but was not awarded, attorney fees. (LF 31) The January 22 judgment unmistakably shows that the trial court crossed out that portion of the proposed judgment. [LF 31]

Remembering that a summary judgment motion is not a substitute for a full trial on the merits, it must be concluded that the summary judgment request was only partially granted. Following the denial of the attorney fees portion of the motions for summary judgment caused the issue of attorney fees to remain open and subject to further litigation. (LF 31) Regardless of whether the issue of attorney fees was meritorious or not, it remained in alive in the case.

Missouri Supreme Court Rule 74.01(b) provides that -

> any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of the parties. "

The issue of attorney fees was never withdrawn. In fact, in plaintiff's amended petition filed five weeks later on February 29, 2008, which added Steven Spicer, Debra Pauli and Robert Spicer as defendants, plaintiff maintained and again alleged in paragraph 9 a claim for attorney fees. Because the January 22, 2008 did not dispose of all issues it was not a final judgment and the trial court did not lose jurisdiction thirty days thereafter.

In ***Jones v. Housing Authority of Kansas City, Missouri***, 118 S.W.3d 669 (Mo.App. W.D.,2003) the court stated in footnote 4: "[C]learly, in summary judgment cases where the issue of damages and attorney fees remain, the claim is not subject to early appeal under Rule 74.01(b)". In ***Artisan Construction, Inc. v. Gruetner***, 975 S.W.2d 958 (Mo.App. 1998) the court held that a cross claim where "attorneys fees are still an issue" was not a final judgment for purposes of appeal. Similarly, in ***L.R. Oth v. Albritton,*** 90 S.W.3d 242 (Mo.App. 2002) the Court held that the "judgment left Plaintiff's claim pending for attorney fees and costs in Count II.

As a result, the judgment is not final and appealable." See also ***Lumbermens Mut. Cas. v. Thornton***, 36 S.W.3d 398 (Mo.App. 2000) and ***Hoffman v. Cowardin***, 11 S.W.3d 895 (Mo.App. S.D.,2000).

ii. The January 22 Judgment was not final because it did not determine or declare the interests of the parties to the real estate.

"[I]t is well established that a judgment or decree in a quiet title action must affirmatively adjudge the title of the several parties." ***Harrington v. Muzzy***, 258 S.W.2d 637,638 (Mo. 1953). Just last year in ***Maune v. Beste***, 292 S.W.3d 528,529 (Mo.App. E.D.,2009) the Court of Appeals held:.

> In a judgment affecting real estate, the parties are entitled to have their respective titles and privileges affirmatively determined and declared. If the judgment fails to adjudicate title to all the real estate in dispute, or fails to declare the rights of the parties with respect to the areas in dispute, it is not a final judgment.

In the case sub judice, the Order and Judgment dated January 22, 2008 did not determine title nor declare the rights of the parties. The Judgment provided, absent the recitals, as follows: (LF 31):

> Accordingly, the Court enters its Order and Judgment pursuant to the Motion for Summary Judgment and for all requests prayed for in Plaintiff's Petition as follows:
>
> 1. 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:
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

2. That any other transfers of the above stated real property from 1990 to date that were not jointly transferred by Plaintiff, Gwen Marie Spicer, and Plaintiff's spounse, Donald N. Spicer, are hereby CANCELLED.

3. That Plaintiff is ordered to file for record a certified copy of this Order and Judgment with the Recorder of Deeds in the County of St. Louis, State of Missouri where the real property is situated.

The judgment did not declare the rights of plaintiff to the property. Nor did the judgment declare the rights of the Trust to the property. A title examiner, reviewing the January 22 judgment, would not know or have an understanding regarding who has title to the property as of January 22. The judgment clouds the title. At most, the judgment cancels a deed in the chain of title.

c. <u>The January 22 Judgment lacked a necessary and indispensible party.</u>

A trust is not a legal entity. ***Farris v. Boyke***, 936 S.W.2d 197,200 (Mo.App.S.D. 1996). A trust is not a legal entity that is capable of suing or being sued***.Sunbelt Envtl. Servs., Inc. v. Rieder's Jiffy Market, Inc., 138 S.W.3d 130, 134 (Mo.App.2004).*** A judgment against a non-legal entity is a nullity. ***ADP Dealer Services Group v. Carroll Motor Co,***195 S.W.3d 1,7 (Mo.App. E.D.,2005).

> Rule 52.04 provides that "A person shall be joined in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest.... If he has not been joined, the court shall order that he be made a party ...." As a general rule in suits involving trust property both the trustees and the beneficiaries are necessary parties. The former are the legal owners of the trust and the latter have the beneficial or equitable interest.

Roth v. Lehmann, 741 S.W.2d 860,861 (Mo.App. E.D. 1987).

In ***Weldon v. Fisher***, 194 Mo.App. 573, 186 S.W. 1153,1155 (Mo.App. 1916) the Court held:

> In ***Metropolitan St. Ry. Co. v. Express Co***., 145 Mo. App. 371, 130 S. W. 101, the suit was brought and prosecuted to judgment against a foreign joint stock company named as defendant therein. Following its prior

ruling in ***Adams Express Co. v. Railway Co***., 126 Mo. App. 471, 103 S. W. 583, the Kansas City Court of Appeals held that the defendant company had no legal existence and could not sue or be sued; that "suits by or against the company must be brought by or against the individual members in their individual names." Respecting the point here made as to waiver of the so-called defect, the court said:

> "A civil action can be maintained only against a legal person; i. e., a natural person or an artificial or quasi artificial person. If the fault of the petition consisted of the misnomer of a legally existing defendant, we would hold that plaintiff had a true action subject only to defendant's right to object at the threshold for misnomer. But since we have no legal entity before us, there is no one against whom lawful judgment can be rendered."

It was accordingly held that the whole proceeding was void ab initio.

A judgment which fails to include a necessary party should be vacated. ***Komsky v. Union Pacific R. Co.,***293 S.W.3d 31,33 (Mo.App. E.D.,2009). "[T]he issue of whether there has been a failure to join a necessary or indispensable party under Rule 52.04 is fundamental and jurisdictional and can be raised at any time, even on appeal. " ***Wheeler v. McDonnell Douglas Corp***., 999 S.W.2d 279,284 (Mo.App. E.D.,1999). See also ***Wineteer v. Vietnam Helicopter Pilots Ass'n***, 121 S.W.3d

277,285 (Mo.App. W.D.,2003) stating "the issue of whether a necessary or indispensable party under Rule 52.04 has not been joined is a fundamental and jurisdictional issue that can be raised for the first time on appeal. Rule 55.27(g)(2)."

"When title to real estate is in question all possible claimants of title are indispensible parties." ***Spellerberg v. Huhn***, 672 S.W.2d 728,729 (Mo.App. E.D. 1984) "The issue of whether there has been a failure to join a necessary or indispensable party under Rule 52.04 is fundamental and jurisdictional and can be raised at any time, even on appeal."***Wheeler v. McDonnell Douglas Corp.,*** 999 S.W.2d 279,283-84 (Mo.App. E.D.,1999). "[W]hen an indispensable party to a declaratory judgment action is not joined in the case, any judgment rendered in that party's absence is a nullity." ***Jones v. Jones***, 285 S.W.3d 356,361 (Mo.App. S.D.,2009) citing ***Automobile Club Inter-Insurance Exchange v. Nygren***, 975 S.W.2d 235, 239 (Mo.App.1998).

d. Plaintiff did not object to the intervention or form of intervention.

When Trustee Steven Spicer appeared in the case and moved to set aside the summary judgment, plaintiff did not object to his appearance. Plaintiff not only failed to raise the issue of the participation of the Trustee but plaintiff also did not complain about the form of the intervention. Rather, the motion was heard on the merits, as is preferable.

Plaintiff argues here that Trustee "Spicer was a nonparty and had not filed a proper motion to intervene". (App. Brief, p. 17). However, plaintiff made the complete opposite argument in the trial court contending that "the trustee was a defendant under the original petition". (LF 300) "Parties are bound by the position they took in the trial court and will not be heard on a different theory on appeal." ***Country Mut. Ins. Co. v. Matney***, 25 S.W.3d 651,654 (Mo.App. W.D.,2000). A party must "stand or fall" on the theory it presented to the trial court. ***Kleim v. Sansone***, 248 S.W.3d 599(Mo.,2008). Plaintiff is not free to play fast and loose with the courts.

Issues raised for the first time on appeal are waived and not reviewable. ***Artman v. State Bd. of Registration for Healing Arts,*** 918 S.W.2d 247, 252 (Mo. 1996). If plaintiff wanted to object to the form of the motion and the procedures outlined by Rule 52.12(c) the matter should have been raised and argued before the trial court. Certainly, if an objection to the motion of Steven Spicer was timely raised, an amended motion could have been filed which would relate back to the initial filing. "If objections to an intervention be not made at the proper time, they are waived." ***Zeitinger v. Hargadine-McKittrick Dry Goods Co***., 298 Mo. 461, 250 S.W. 913,916 (Mo. 1923).

The Trustee is the proper party defendant in suits involving a trust. ***Farris v. Boyke***, 936 S.W.2d 197 (Mo.App. 1996). In that regard, it may be more accurate to refer to the motion as a "substitution" as opposed to an intervention.

The case of ***City Investing Company v. Davis***, 334 S.W.2d 63 (Mo. 1960) holds that even after a decree, equity requires the intervention of a party whose interest in real property is affected by the decree. In ***City Investing***, a motion to intervene was filed after the decree adjudicating real property interests was entered, and this Court held:

> It is an once apparent that the rights of [intervenor] . . could not be adjudicated, or taken from him by the decree, when he was not a party to the suit. He should have been brought in in as soon as his interest appeared . . . and the court had no authority to enter the decree it did, disposing of his rights, without having made him a party. If it never became apparent that his rights would be affected until the decree was entered, he had the right to intervene.

This Court did not overrule City Investing in ***State ex rel. Wolfner v. Dalton***, 955 S.W.2d 928 (Mo. 1997)

e. Application of Rule 52.06

Apparently Plaintiff contends that the trial court erred by "sua sponte" requiring the addition of Trustee Steven Spicer as a party. Plaintiff fails to consider Supreme Court Rule 52.06. Rule 52.06 provides in relevant part:

> Misjoinder of parties is not 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***

initiative at any stage of the action of the action and on such terms as are just. . . . [emphasis supplied]

Applying the directives of Rule 52.06 the trial court did not dismiss the action. (LF 34) Rather, the trial court ordered plaintiff to amend the pleadings and add Trustee Steven Spicer as a party. (LF 34) Rule 52.06 unambiguously empowers the trial court to do exactly what it did "at any stage of the action".

f. <u>The post summary judgment motion of Trustee extended the finality of the judgment under Rule 81.05.</u>

Upon filing of a timely, authorized after-trial motion, the time period within which the court may exercise jurisdiction over the judgment extends to ninety days. Rule 81.05(a)(2). A summary judgment is considered a trial for purposes of after trial motion procedures. ***Taylor v. United Parcel Service, Inc***., 854 S.W.2d 390,392 (Mo. 1993). Courts generally construe improperly titled or crudely fashioned after-trial motions liberally as motions for new trial. ***Massman Const. v. Highway & Transp. Com'n***, 914 S.W.2d 801, 803 (Mo.banc 1996). Substance prevails over form and the focus is on the content. ***Taylor v. United Parcel Service, Inc***., 854 S.W.2d 390,392 (Mo. 1993). The goal is to achieve the correct result and therefore after trial motions are construed broadly. ***Coffer v. Wasson-Hunt,***281 S.W.3d 308,311 (Mo.,2009). The motion of Trustee was timely filed on February 7, 2008.

g. <u>Application of Rule 55.13 was not raised in trial court.</u>

On appeal and for the first time, plaintiff alleges application of Rule 55.13 arguing that the attorney representing the trust did not, in the original answer filed, include a specific negative averment concerning the trust as a non-suable entity. This issue was waived by plaintiff when it was not raised by plaintiff in the trial court and became moot when plaintiff filed her amended petition. The fact that plaintiff was suing a non-suable trust was self-evident in the caption of the pleading. The "failure of the pleadings to show that a named party is a legal entity that can sue or be sued results in it not being recognized as a party."***ADP Dealer Services Group v. Carroll Motor Co***., 195 S.W.3d 1,7 (Mo.App. E.D.,2005). The trial court does not abuse its discretion in directing that the proper parties be brought into the case.

h. The interlocutory summary judgment orders are not appealable.

In her argument, plaintiff asserts that "the Circuit Court had correctly granted [Plaintiff] summary judgment". On its face, this argument does not complain of court error. Because the summary judgment was ultimately denied, plaintiff raises an issue that is not subject to appellate review. When the proper parties were brought before the trial court and the issues properly raised, the trial court correctly denied the motion for summary judgment. "The law is abundantly clear that the 'denial of a motion for summary judgment is not subject to appellate review, even when an appeal is taken from a final judgment and not from the denial of a motion for summary judgment.' "***Hihn v. Hihn***, 235 S.W.3d 64,67 (Mo.App. E.D.,2007). It should go without saying that where a trial court initially grants a motion for

summary judgment but eventually denies same the matter is not reviewable on appeal.

> [A]n order denying a motion for summary judgment is interlocutory in nature. See ***Wilson v. Hungate***, 434 S.W.2d 580, 583 (Mo.1968). Trial courts have discretion to reconsider such an order at any point before final judgment is entered.
>
> ***Midwest Crane and Rigging, Inc. v. Custom Relocation's Inc***., 250 S.W.3d 757,761 (Mo.App. W.D.,2008).

Because the first motion for summary judgment was ultimately denied and was based on an initial pleading that was subsequently amended adding additional and proper parties, plaintiff's point should not be considered. Moreover, following the denial of the first motion for summary judgment, Plaintiff filed two additional and supplemental motions for summary judgment thereby abandoning the original motion.

On appeal, plaintiff wants to start over and revert back to the original petition and original motion for summary judgment which have long been abandoned.

> [A]n amendment to a pleading abandons any prior pleadings not referred to or incorporated into the new pleading." ***Beckmann v. Miceli Homes, Inc.,*** 45 S.W.3d 533, 543 (Mo.App. E.D.2001). Since an amended pleading supersedes the pleading which preceded it, "an abandoned pleading is not considered for

any purpose in the case; it becomes a mere 'scrap of paper' insofar as the case is concerned."

Hawk Isolutions Group, Inc. v. Morris,288 S.W.3d 758,762 (Mo.App. E.D.,2009).

i. Plaintiff's Motion for summary judgment failed to comply with Rule 74.04

Plaintiff contends her original motion for summary judgment was meritorious and should have been sustained. A careful review of the motion reveals the motion was fatally defective for failure to comply with Rule 74.04. "Rule 74 sets out a specific and mandatory procedure to determine whether a dispute exists as to any material facts." ***Grattan v. Union Elec. Co***., 151 S.W.3d 59,61 (Mo.banc 2004).

Supreme Court Rule 74.04(c)(1) provides in relevant part:

A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts.

The Rule 74.04 procedure for summary judgment is not discretionary; it is mandatory and must be followed. V.A.M.R. 74.04. ***Margiotta v. Christian Hosp. Northeast Northwest,*** 315 S.W.3d 342 (Mo. 2010).

Here, in the initial motion for summary judgment, plaintiff failed to properly reference a single fact. The motion is not properly supported in that it lacks citation to the "pleadings, discovery, exhibits or affidavits". ***Adams v. USAA Cas. Ins. Co.,*** 317 S.W.3d 66,74 (Mo.App. E.D.,2010). There are simply no facts for the Court to consider.

> Where the party who filed the motion for summary judgment is the claimant in the underlying case, to make a prima facie case for summary judgment, he must state with particularity all the undisputed material facts necessary to establish each element of his claim, referencing pleadings, discovery or affidavits to demonstrate the lack of a genuine issue of material fact.

K-O Enterprises, Inc. v. O'Brien, 166 S.W.3d 122,126 (Mo.App.E.D. 2005).

j. The merits of the original summary judgment.

The merits of the title to the real estate following the conveyance by decedent to his Trust was never fully adjudicated. There are disputed facts which should have been presented to the court and were not. There are title issues and legal theories available to defendants which were not briefed. For example, in 2003, when decedent and plaintiff executed the note and deed of trust, their title and obligations differed from that day forward. Defendants also had equitable claims to the real estate.

II.

THE TRIAL COURT CORRECTLY HELD THAT THERE WAS SUFFICIENT EVIDENCE PRESENTED TO ESTABLISH THAT THE CASE WAS SETTLED AND THAT PLAINTIFF'S ATTORNEY CATLETT WAS AUTHORIZED TO SETTLE PLAINTIFF'S LAWSUIT.

From the filing of the original petition by plaintiff through the end of March, 2009, plaintiff was represented solely by Attorney Catlett. (T. 4) It is undisputed that during the course of proceedings, Attorney Catlett initiated settlement negotiations on behalf of plaintiff. (T. 5) Many of these settlement negotiations took place in the presence of the trial court. (T. 9, 28,29) "[A] presumption of express authority to settle arises when the attorney of record asserts such authority." ***Eaton v. Mallinckrodt, Inc***., 224 S.W.3d 596,599 (Mo.,2007).

> [W]here a party's attorney of record represents he has authority to settle and reaches an agreement with opposing counsel, it is then incumbent on the dissent client to prove his attorney lacked authority to settle; this since counsel's act of settling is presumed prima facie to be authorized.

McDowell v. Kearns, 758 S.W.2d 481,483 (Mo.App. W.D. 1988).

The initial settlement demand was drafted and authored by Catlett. At the plaintiff's urging, the initial written demand was reduced to writing by Catlett and the parties used the writing as a working draft to reach an agreement. (T. 7,8). A

copy of the initial written demand, marked exhibit A, was sent to defense counsel and a copy sent to plaintiff Spicer. (T. 38). Plaintiff admitted that she agreed that exhibit A accurately reflected her initial demand for settlement. (T. 39) Plaintiff further admitted that attorney Catlett did not do anything wrong when he negotiated the settlement and prepared the written demand. (T. 43)

On at least three occasions the parties counsel met with the trial court in chambers to facilitate a settlement. (T. 9, 28-29). Consequently, this was a settlement process in which the Court was intimately informed. (T. 28-29) Plaintiff was also well informed as she attended those court settlement settings.

The case was set for trial on Monday March 9, 2009 at 1:00 p.m. (T. 10) A final settlement conference was held on Friday March 6, 2009. (T. 10). On March 6, the court entered the following Order (LF 266):

Order

Parties appear by counsel. Settlement positions discussed with the Court. The Court orders the matter continued to Monday March 9, 2009 at 1:00 p.m. The parties may advise the Court orally if they have settled the matter, otherwise attorneys to appear at said time.

Attorney Catlett and defense counsel had a discussion on the telephone on the morning of March 9, 2009 wherein a final settlement was reached. (T. 11)

Attorney Catlett telephoned the Court and advised the Court that the case was settled in accordance with the March 6 Order. (T. 11, 59) Attorney Catlett did not appear for trial at 1:00 p.m. Nor did plaintiff appear for trial on the 9th. (T. 43) This was the only court appearance where plaintiff did not appear and the reasonable conclusion and circumstantial evidence demonstrates that plaintiff knew the case had settled.

An open court agreement to settle a pending lawsuit, accompanied by a stipulation that the cause be passed for settlement, terminates the cause of action and creates a new obligation warranting a judgment in accordance with the terms of the settlement. In ***Farmer v. Arnold, Mo***., 371 S.W.2d 265(3) (Mo. 1963) the court said '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, and subsequent ligation based upon it is barred by the compromise and settlement.'

From the working copy and his written notes, attorney Catlett prepared a final written settlement agreement and sent it to plaintiff for signature. (T. 12) This agreement was marked exhibit B. Regarding exhibit B Catlett testified: "In my opinion, I believed it was a settlement." (T. 34) Exhibit B, the written agreement, was styled by Catlett "Order and Judgment" and is attached to and made part of the Court's Order and Judgment. (LF 345-360, Appendix A-1 – A-16). Thus, both plaintiff's counsel and defendants' counsel testified that a settlement was reached

and Exhibit B, attached to the Court's Order and Judgment, represented the settlement agreement. (T. 59) This was undisputed and never challenged by plaintiff.

In addition, by way of affidavit, plaintiff Spicer admitted (LF 312):

> At one time, I was willing to come to some type of amicable settlement agreement in order to minimize my legal costs and to expedite recovery of my residence, so that, among other things, my son can continue his education in the school district in which the house is located. Mr. Catlett negotiated on my behalf . . . . (LF 312)

Plaintiff is not free to change her mind after the case is settled. This should be especially true where the court is notified of the settlement by the plaintiff and the court excuses the parties from appearing for trial.

Plaintiff Spicer's oral testimony was consistent when she admitted she was communicating her position through attorney Catlett. (T. 37,38,45) Remembering that Plaintiff Spicer was present in court when all settlement discussion were had before the Court, although they occurred out of her presence in chambers, the circumstantial evidence and inferences are overwhelming that plaintiff not only participated in the settlement discussions through her attorney Catlett but plaintiff also acquisced to the attorney negotiating process. (T. 37)

The credible evidence showed that plaintiff eagerly participated in the settlement discussions. She admitted that she was motivated to settle to because she was paying mortgage payments, she was continuing to incur legal fees and her son (defendant Scott Spicer) would be able to continue "his education in the school district in which the house was located." (LF 312) Two things caused plaintiff to change her mind, albeit after the case was settled. First, she learned for the first time that her son and defendant Scott Spicer would be responsible for his pro-rata share of defendants attorneys fees which would be paid to defendants attorney in settlement. That was the only part of the settlement agreement that she specifically mentioned "shocked" her. (LF 393). Unfortunately for plaintiff, she has no standing to complain what a defendant pays in attorneys fees.

The second thing that changed after the settlement was the fact that plaintiff's counsel on appeal, Ronald Ribaudo, who is a family friend, was willing to handle her case for free. (LF 393) That would eliminate plaintiff's concern about mounting attorneys fees. But both things occurred after settlement and are not legally relevant.

From the one document plaintiff did produce, there is overwhelming evidence that plaintiff was on board with the final settlement. In her e-mail response regarding the final written agreement, plaintiff's only objection was the attorneys fee mentioned above, which of course has nothing to do with her. (LF 393) The e-mail is not only significant for what it contains but also for what it

doesn't contain. Nowhere in the e-mail is there a mention of surprise regarding the content of the settlement concerning those items which would directly affect plaintiff. (LF 393) Nowhere is there mention that there were added terms or missing items or changes. Nowhere does plaintiff indicate "this is not what I agreed to" or words to that affect. There is no surprise with the negotiated content of the settlement agreement. There is no statement such as, "what is this", or "how did you come up with this", or "who authorized this". In fact, the e-mail expresses that plaintiff was willing to settle and "receive one-half of the house". (LF 393) Notably, the status of the real estate was the only subject matter related to plaintiff's petition to quiet title.

Regrettably, after the case was settled and after plaintiff changed her mind and to attempt to avoid the settlement agreement, plaintiff tried to challenge whether attorney Catlett had authority to enter into the settlement. That is a separate and distinct issue wherein plaintiff carries the heavy burden of proof and persuasion.

> In Missouri, a party contending that his attorney lacked authority to bind him carries a heavy burden. [citations omitted]. An attorney has no implied authority to settle claims on a client's behalf. However, authority is presumed to be present in the client's attorney of record and where the attorney undertakes negotiations with the opposing party. Here, Mr. Schmitt was Mr. Vansittert's only attorney of record in the case, Mr. Schmitt filed Mr.

> Vansittert's counterclaims, and Mr. Schmitt negotiated with Respondents' counsel to resolve Mr. Vansittert's counterclaims. Thus, Mr. Schmitt had prima facie authority to settle the claims; Mr. Vansittert consequently bore a heavy burden to rebut this presumption.

Kenney v. Vansittert, 277 S.W.3d 713, 720-721 (Mo.App. W.D.,2008).

"The trial court is free to believe or disbelieve a client's testimony about an attorney's authority.", Id. at 721. Plaintiff only offered her own testimony which the court apparently did not believe. On appeal the appellate court defers to the trial court on matters of witness credibility. ***Owen v. Hankins***, 289 S.W.3d 299,305 (Mo.App. S.D.,2009). Not only did plaintiff not offer any documentary evidence to support her allegation but she also refused to allow defendant the right to obtain and discover the written documentation and agreement between her and her attorney claiming attorney-client privilege. To her detriment, plaintiff failed to produce written communications between her and her attorney wherein settlement proposals were communicated. The authority of attorney Catlett was not protected by attorney client privilege and plaintiff's objections were at her own peril. See ***Sappington v. Miller***, 821 S.W.2d 90, 94 (Mo.App.,1992) – [" (Attorney) Smith could testify about the nature and extent of his authority to enter into the settlement agreement in the case at bar without implicating the doctrine of attorney-client privilege. An attorney can testify as to his authority to settle, since such communication is not within the pale of protection of the privilege."]

Plaintiff never testified what precise authority attorney Catlett was given. Plaintiff did not offer any evidence regarding conversations she had with Catlett about authority nor did she offer any evidence regarding what written authority attorney Catlett was given. Nowhere in the record is there foundation for the conclusion that Catlett lacked authority. It would be absurd to suggest, without specific evidence, that Catlett was authorized to negotiate but not authorized to communicate offers or demands. Plaintiff's proof falls short of her heavy burden.

Plaintiff should not be allowed to play cat and mouse with the court or the defendant. The Court in ***Sappington v. Miller***, 821 S.W.2d 901,905 (Mo.App.,1992), citing a Florida appeallate opinion with approval, stated:

> As the Florida Court of Appeals has noted, "[n]o court should countenance an announced settlement between counsel followed by escape therefrom, if one side arbitrarily reneges and then seals his counsel's lips by invoking the attorney-client privilege." ***Hamilton v. Hamilton Steel Corp.,*** 409 So.2d 1111, 1114 (Fla.App.1982). The client cannot have it both ways . . . .

III

THE STATUTE OF FRAUDS DID NOT PREVENT THE COURT FROM ENFORCING THE SETTLEMENT AGREEMENT.

The statute of frauds did not prevent the court from enforcing the settlement agreement because (1) the agreement did not provide for a sale or conveyance of

property; (2) there was a writing setting out the terms of the settlement; (3) plaintiff waived the defense of the statute of frauds by not raising it at the hearing to enforce; and (4) the writing had been prepared by plaintiff's attorney who inserted numerous provisions in the agreement which were foreign to the issues in litigation and favorable to plaintiff.

The litigation was commenced by plaintiff to quiet title after Donald Spicer's death. Plaintiff hired Catlett to represent her in the quiet title action. He remained her sole attorney through the end of March 2009. (Tr 4). At the hearing to enforce, Catlett testified that he thought he had authority to settle according to the terms of the settlement agreement.

Plaintiff claims in Point 3 that the statute of frauds bars enforcement of the settlement agreement. Section 432.010 R.S.Mo. requires a writing signed by the person to be charged if there is a sale of parcels or interests in lands or a conveyance. The settlement agreement here before the Court is not a contract for sale, does not involve a conveyance, nor does it require one party to transfer interests in property to another. The settlement is an agreement between the parties as to the title to the property that each of the parties presently has. The agreement is not between a purchaser and seller, but is between two owners. The settlement agreement does not lie within the statute of frauds.

In ***DeWitt v. Lutes,*** 581 S.W.2d 941 (Mo.App. 1979), a compromise agreement made to clarify and give effect to the title was held not to be within the Statute of

Frauds nor within the statutes regarding conveyance of real estate. In so holding, the Court stated at 581 S.W.2d 945:

> In determining whether the Statute of Frauds is applicable to a compromise settlement, the courts are concerned with the intended effect of the compromise, and not with the question whether the parties' antecedent claims are based on matters governed by the Statute of Frauds. If the compromise itself does not fall within the scope of the statute, then the statute is inapplicable to the compromise. Since a compromise which fixes a disputed or uncertain boundary line is not considered to involve a conveyance of land or passage of title, but is considered as an effort merely to clarify and give effect to the title which the parties already have, such an agreement is neither within the scope of the Statute of Frauds nor within the scope of the statutes regarding conveyance of real estate.

The settlement agreement herein is akin to the agreement in ***Owen v. Hankins,*** 289 S.W.3d 299 (Mo.App. 2009). Owen involved an oral settlement between two sisters involving two parcels of property that each sister maintained she owned. In the settlement agreement, titles were to be transferred and money was to be paid. After the agreement had been reduced to writing, one of the sisters refused to sign it. A motion to enforce was filed . The sister who refused to sign the

settlement filed an answer raising the statute of frauds as an affirmative defense. When the oral agreement was brought into evidence at the hearing, the party who refused failed to object on the grounds of the statute of frauds. The Court of Appeals held that even though the statute of frauds was pled as an affirmative defense, the failure to object to the offered evidence constituted a waiver of the protection of the statute, citing ***Crawford v. Dieering,*** 965 S.W.2d188, 192 (Mo.App. 1998).

Similarly, in ***Welborn v. Rigdon***, 231 S.W.2d 127, 133 (Mo.1950), the Supreme Court ruled that an oral agreement in which one party agreed to furnish funds to improve the other party's property, which was to be sold and the proceeds divided among the parties, was not a contract for the sale of land or any interest in or concerning land within the statute of frauds.

In addition, by failing to object and raise the statute of frauds at the evidentiary hearing on respondent's motion to enforce the settlement agreement, appellant has waived the defense of the statute of frauds. ***Norton v. Friedman,*** 756 S.W.2d 158, 162 (Mo. banc 1988). Even if the statute of frauds had not been waived, the settlement agreement in writing and not involving a conveyance, would satisfy the statute.

An oral agreement can be "valid and enforceable even if some terms may be missing or left to be agreed upon as long as the essential terms are sufficiently

definite to enable the court to give them exact meaning." ***Vulgamott v. Perry***, 154 S.W.3d 382, 390. (Mo.App. 2004)

Equity is also at play in enforcing this settlement agreement. Defendants and the Circuit Court relied upon the statements of plaintiff's counsel that the case was settled. When the case was passed for settlement, plaintiff's representations caused defendants to miss their trial date.

IV

THE TRIAL COURT ORDER REQUIRING APPELLANT TO SIGN THE SETTLEMENT AGREEMENT IS A MOOT ISSUE ON APPEAL BECAUSE APPELLANT WAS NOT AGGRIEVED BY THAT ORDER IN THAT APPELLANT DID NOT COMPLY WITH THE ORDER, DID NOT SIGN THE AGREEMENT, WAS NOT HELD IN CONTEMPT, AND APPEALED.

As defendants understand plaintiff's Point IV, plaintiff is criticizing the trial court for ordering appellant to sign the settlement agreement on the grounds that if plaintiff had done so, plaintiff would not be able to appeal. But factually, plaintiff did not sign and plaintiff has appealed. The trial court cannot be accused of reversible error under these circumstances because it did not force plaintiff to sign the agreement and plaintiff did not lose her right to appeal. Plaintiff has filed three proceedings in the Court of Appeals, the first being an application for a writ which the Court denied, and the other two being appeals of the trial court's judgment.

More specifically and in Response to the Writ application filed by plaintiff this Court ruled on July 2, 2009 as follows (LF 371):

> ORDER
>
> Petitioner – Relator has filed a Petition for Writ of Prohibition / Mandamus along with Suggestions in Support and Exhibits.
>
> The trial court's judgment dated June 24, 2009 granting the motion to enforce settlement is an appealable order. Being duly advised in the premises, The Court hereby DENIES the Petitioner – Relator's Writ of Prohibition / Mandamus without prejudice. If any proceedings are initiated against petitioner-relator to hold her in contempt before the time a not of appeal and request for stay is due, petitioner-relator may refile her petition.

The trial court in fact entered an Order staying the execution of the settlement agreement to allow for appeal. (LF 370) "The mootness of a controversy is a threshold question in any appellate review of that controversy." ***State ex rel. Chastain v. City of Kansas City***, 968 S.W.2d 232, 237 (Mo.App.1998). A point must be dismissed as moot whenever an event occurs that renders a decision unnecessary. ***State ex rel. Garden View Care Ctr. v. Missouri Health Facilities Review Comm.***, 926 S.W.2d 90, 91 (Mo.App.1996). Points which do not state what ruling of the trial court is challenged but instead set out abstract statements of law,

preserve nothing for appeal. ***Jones v. Wolff***, 887 S.W.2d 806, 808(Mo.App.1994). Points raised on appeal which are moot are denied. ***Lakin v. General American Mutual Holding Co.,*** 55 S.W.3d 499 (Mo. Ct. App., 2001).

It is not one of the functions of a court to determine mere abstract questions of law where no relief can be granted any of the parties, or to supply mere vindication for the action of a party in the bringing of a lawsuit. It is for the purpose of relief in actual controversies that prosecution of lawsuits is justified. In ***State ex rel. Myers v. Shinnick****,* Mo.Sup., 19 S.W.2d 676 (Mo. 1929), where mandamus was sought to obtain the issuance of a building permit from the Superintendent of Buildings of Kansas City, who declined to issue the same on the ground that it was prohibited by the Zoning Ordinance of the City, and pending the appeal of the case it was brought to the attention of the appellate court that the Board of Zoning Appeals had in the meantime granted the relief sought, the court refused to entertain the appeal further for the mere purpose of testing the constitutionality of a 'vicious' ordinance as urged by the appellant. The court found the controversy had become moot and dismissed.

In ***State ex rel. Donnell v. Searcy***, 347 Mo. 1052, 1059, 152 S.W.2d 8, 10 (Mo. 1941) the Supreme Court said: "Furthermore, we have held that we have the power to notice facts outside the record for the purpose of considering the moot character of a question before us". The Court proceeded to state: "Where there is no actual controversy existing at the time of the argument on appeal the appellate court as a

general rule will not undertake to determine the case." ***Joplin Water Works Co. v. Jasper County***, 327 Mo. 964, 38 S.W.2d 1068 (Mo. 1965).

V.

THE CIRCUIT COURT CORRECTLY ORDERED SPECIFIC PERFORMANCE OF SETTLEMENT AGREEMENT.

Plaintiff contends in Point V that the trial court lacked authority to order execution of the settlement agreement drafted by plaintiff's counsel. Plaintiff's point is frivolous under well-established case law. "A motion to enforce a settlement adds to the underlying case a collateral action seeking specific performance of the agreement." ***Eaton v. Mallinckrodt, Inc***., 224 S.W.3d 596, 599 (Mo. banc 2007). "Because specific performance is an equitable remedy, we will afford the trial court great deference in ruling on the motion." ***Ste. Genevieve County Levee Dist. #??2 v. Luhr Bros., Inc.,***288 S.W.3d 779,783 (Mo.App. E.D.,2009).

CONCLUSION

Defendants believe the record and case on appeal support the following conclusions. First, the trial court retain the power to act following the entry of its January 22, 2008 judgment beyond thirty days. Second, while the case was pending, the parties settled the case. Third, the order and judgment finding the case was settled is not a final and appealable judgment and the case should be remanded for entry of an order dismissing the underlying petition and counterclaim.

Respectfully Submitted,

_____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, that it complies with the limitations in Rule 84.06(b), and it contains 9,792 words, excluding the parts of the brief exempted; that is has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 13 point Cambria font; that an electronic copy was e-mailed to the Court and to counsel for appellant; and that an electronic copy of the Respondents' substitute brief was copied onto a CD Rom that had been scanned and found to be virus free using McAfee viruse software.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and an electronic copy were mailed and e-mailed this 22nd day of November, 2010 to:

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_____