IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

GWEN MARIE SPICER,

Appellant,

v.

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

Respondents.

No. ED93371 (consolidated with No. ED93529)

Appeal from the Circuit Court of St. Louis County
21st Judicial Circuit
The Honorable John A. Ross, Judge

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

These two appeals 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) they do not raise any issue falling within the exclusive jurisdiction of the Missouri Supreme Court, see Mo. Const. art. V; (2) the Circuit Court of St. Louis County is within the territorial jurisdiction of this Court, MO. REV. STAT. § 477.050 (2005); and (3) the notices of appeal filed by Ms. Spicer are timely, Breeden v. Hogan Transports, Inc., 176 S.W.3d 178, 181 (Mo. Ct. App. E.D. 2005) (holding that timely notice of appeal is a jurisdictional prerequisite).

Regarding (3), 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, an authorized post-trial motion, Taylor v. United Parcel Serv., Inc., 854 S.W.2d 390, 392 n.1 (Mo. 1993), was filed within thirty days later, (LF 9-10, 372-94), and thus was timely, Mo. Sup. Ct. R. 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. Mo. Sup. Ct. R. 81.05(a)(2)(B). Ms. Spicer had filed her (first) notice of appeal prematurely, on July 22, 2009, (LF 9, 361-64), so that notice is "considered as filed immediately after"

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

August 3, 2009, Mo. Sup. Ct. R. 81.05(b), and thus the (first) notice of appeal was 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 does not "otherwise specify"), Mo. Sup. Ct. R. 78.07(d). The amended judgment became final on September 2, 2009. Mo. Sup. Ct. R. 81.05(a)(1). The notice of appeal from the amended judgment having been filed prematurely, on August 27, 2009, that notice is treated as having been filed immediately after September 2, 2009, Mo. Sup. Ct. R. 81.05(b), and thus is timely. Accordingly, both notices of appeal were timely.

STATEMENT OF FACTS

In 1990, Donald N. Spicer and Gwen Marie Spicer, as 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 purported to convey to himself *qua* trustee of the Donald N. Spicer Living Trust ("Trust") a one-half interest in the marital home, by 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 unchanged by the amendments. (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 not been legally (as opposed to informally) separated. (LF 20, 23). Nor had Mr. Spicer paid any child support (one child, Scott, had been born of the marriage) after Ms. Spicer moved out of the marital home. (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 (Ms. Spicer had a key to the house) and the security system code. (See TR 48). Consequently, Ms. Spicer hired an attorney, William Catlett, to expel Steven from the marital home and to restore her possession. (TR 41, 48).

On August 21, 2007, in the Circuit Court of St. Louis County, Catlett filed 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 trustee'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 for Ms. Spicer, ordering, among other things, that the general warranty deed recorded (allegedly) by Mr. Spicer be cancelled. (LF 30-31).

Within thirty days of the Circuit Court's entry of the 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.) The 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 Spicer. (LF 36-39). He then filed a second motion for summary judgment, alleging the same legal theory. (LF 59-69). Defendants filed no response to Catlett's motion – ever. (See LF 5). Nor did counsel for defendants, Gregory and Joseph Fenlon, attend the hearing on the summary judgment motion scheduled for August 18, 2008, despite proper notice having been given. 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). She said that the proposal "shocked" her and made her "sick," and so she rejected it, fired Catlett, and hired new 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 urging the court to reenter 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 some 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," which was 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") timely appealed from both judgments issued by the Circuit Court. (See Jurisdictional Statement supra). Upon Appellant's motion, this Court consolidated the two appeals, Case Nos. ED93371 and 93529, designating ED93371 the lead appeal.

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, more than thirty days after the summary judgment's entry, 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) the motion to set aside is just a motion to reconsider, which is not cognizable; (c) the motion is not an authorized post-trial motion; (d) the sole argument advanced in the motion (i.e., lack of jurisdiction) is meritless; and (e) if the motion's sole argument were

correct, that would mean that the movant, Respondent Spicer, lacked the standing to raise, and the hence the Circuit Court to grant, the motion.

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

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 (2005)

Mo. Rev. Stat. § 442.360 (2005)

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)

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).

ARGUMENT

I. The Circuit Court erred in granting Respondent Spicer's motion to set aside the summary judgment entered in Appellant's favor, more than thirty days after the summary judgment's entry, 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) the motion to set aside is just a motion to reconsider, which is not cognizable; (c) the motion is not an authorized post-trial motion; (d) the sole argument advanced in the motion (i.e., lack of jurisdiction) is meritless; and (e) if the motion's sole argument were correct, that would mean that that the movant, Respondent Spicer, lacked the standing to raise, and the hence the Circuit Court to grant, the motion.

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, Donald Spicer, died, his interest in the marital home – which with Appellant was held as a tenancy by the entirety – expired, leaving Appellant the 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 before he died, counsel argued, 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 Ms. Spicer, who had been separated from Mr. Spicer,[2] knew of or consented to Mr. Spicer's conveyance.) Of course, a key feature of

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[2] 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 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 is immaterial to the issue of severance. 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. "[U]nity of possession . . . is, of course, simply another way of saying that the tenancy in common is

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.[3]

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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 acquire title to realty as entireties property, and if the spouses later divorce, 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 own, as separate property, a fifty-fifty interest in the marital home as tenants in common. Missouri is not, after all, a community property State.

[3] 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 purported to (LF 245-65) nor could have affected title, legally or equitably, M & P Enterprises, Inc. v.

The Fenlons moved on behalf of the Respondent 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. One, the Circuit Court lost the power and right 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 Mo. Sup. Ct. R. 75.01; Bank of Brookfield-Purdin, N.A. v. Burns, 730 S.W.2d 605, 607 (Mo. Ct. App. W.D. 1987).

Two, the motion to set aside was not an authorized after trial motion, because it 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. A court's lack of jurisdiction (what the trustee's motion alleged) goes to the power of the court to act, not the legal or factual propriety of the court's action. See J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 252-54 (Mo. 2009) (distinguishing legal errors from jurisdictional errors).

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).

Three, the Circuit Court could not have granted the trustee's motion pursuant to Missouri Supreme Court Rule 74.06(b). Though Rule 74.06(b) authorizes the filing and granting (at any time) 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 the Missouri Supreme Court has held, there are two forms of jurisdiction: subject-matter and personal jurisdiction. Webb, 275 S.W.3d at 252-54. (Standing is a third form because it is tacit in the Missouri's constitutions requirement of a "case.") The motion to set aside contested neither subject-matter nor personal jurisdiction, (LF 32-3), both of which were clearly present (and with respect to personal jurisdiction, 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 missing and hence the court lacked jurisdiction. But the absence of a necessary (as opposed to essential) 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 joinder of the party, not vacating any prior order or judgments. See Mo. Sup. Ct. R. 52.06(a); Bracey v. Monsanto Co., Inc., 823 S.W.2d 946, 947 (Mo. 1992).

Four, the trustee's argument that he was a necessary party (or even an essential 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, given that 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 essential) 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 have been adjudicated (and actually was adjdicated, 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 add the trustee as a formal party could not have harmed ("prejudiced," to put it in legalese) the trustee or the trust beneficiaries. Declaring Appellant the fee simple owner would not have required (and did not require) 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 the Missouri Supreme Court has condemned, when it declared: "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."). But a "lack of capacity" argument is waived if not raised in a responsive pleading, id., and here the Trust failed to argue lack of capacity in its answer to Appellant's petition, (LF 15-18), thereby waiving the argument.

The fifth and final reason the Circuit Court erred was that the trustee, Respondent Spicer, lacked standing to move to vacate the motion (or in any other way attack the summary judgment). 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 been granted permission to do so. So he was a nonparty, and nonparties have no standing to complain about a judgment. Cf. Marino v. Ortiz, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."). 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 for a court to act. 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 definitely review now, MO. REV. STAT. § 512.020.4 (2005) ("[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.") – 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 original judgment and amended judgment, and order the Circuit Court to reenter its (correctly entered and incorrectly vacated) summary judgment for 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.

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 (former) 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 settled the case. (See LF 294-98). But the evidence, far from supporting Respondent's theory, clearly establishes that Appellant never conferred on Catlett the authority to settle the case, with or without her approval of any offer from the Fenlons. The evidence establishes, rather, 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 then the Fenlons rejected that offer by proposing a counter-offer that included additional and different terms from Appellant's offer.

The scope of Catlett's authority is addressed first. 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 only had the authority 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 Catlett believed only Appellant had the final authority to settle.

In addition, it is not normal 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 of 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, for the client to accept or reject. 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 hearing was Gregory Fenlon, counsel for Respondents, 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 also the Circuit Court 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 (the trustee), 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 contracts might be somewhat common, but where an agreement includes multiple complicated provisions, especially those dealing with the sale of real estate and the disposition of 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 executed 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 had 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 squatting (read: trespassing) without paying rent since her husband's death, 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. Rather, 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 Appellant would accept, she never did. (As the adage goes, if wishes were horses, we'd all ride.)

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 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 (2005) (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). And 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 an "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 here 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.

Even assuming, *arguendo*, that the Circuit Court had properly found that the parties had executed a settlement agreement, the Circuit Court still erred in ordering the parties to execute a consent judgment. Like a voluntary dismissal, the execution of a consent judgment would have deprived Appellant of her 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. App. W.D. 2002). The right of appeal is statutory. *See Gaunter v. Shelton*, 860 S.W.2d 843, 844 (Mo. 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 such 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.

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 nonbreaching 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. The only witnesses at the evidentiary hearing (William Catlett, Ms. Spicer, and Gregory Fenlon) made no mention of "damages" (or any synonymous word or phrase), let alone testify about the inability of proving the concrete harm from Appellant's (alleged) breach. Respondents merely assumed that they were entitled to specific performance, which is clearly wrong.

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.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. Pursuant to Mo. Sup. Ct. R. 84.06, the attached brief contains 7,571 words, as determined by Microsoft Word 2007 software;

2. Pursuant to Special Rule 363, in lieu of filing a floppy disk of the brief, an email message was sent to this Court (moapped@courts.mo.gov) on February 5, 2010, which included as attachments copies (in .pdf and Word 2007 versions) of the brief, which were scanned and virus-free.

3. True and correct copies of the attached brief and a CD disk containing a copy of this brief were mailed on February 5, 2010, to counsel for Respondents:

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APPENDIX

Judgment A-1

Amended Judgment A-16