

**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 REPLY BRIEF

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ARGUMENT

Appellant Gwen Spicer and her husband purchased a marital home as tenants by the entirety, with each spouse owning the “whole,” rather than a divisible part, of the realty. State ex rel. Highway Com'n v. Morganstein, 649 S.W.2d 485, 488 (Mo.Ct.App. 1983). When Mr. Spicer died, his interest in the tenancy terminated, leaving Appellant the sole owner, notwithstanding his (alleged) void attempt to unilaterally sever the tenancy by conveying his interest in the marital home to his trust, Cope v. Western Surety Co., 791 S.W.2d 844, 848 (Mo.Ct.App. E.D. 1990) – and so the Circuit Court properly found in granting summary judgment in favor of Appellant. In setting aside that judgment, finding a settlement agreement, and then ordering Appellant to execute a consent judgment, the Circuit Court committed reversible error.

I. The Circuit Court Erred in Setting Aside Summary Judgment

Respondents raise various arguments why this Court should not review Appellant’s first point, which challenges the propriety of the Circuit Court’s setting aside of summary judgment entered in favor of Appellant. The arguments are meritless.

Respondents are correct that each point must challenge a *single* error – and that is precisely what Appellant’s first point does. The single error is the Circuit Court’s setting aside of the summary judgment; the first point doesn’t ask this Court to correct any other errors by the Circuit Court. Granted, if this Court agrees with Appellant’s first point, her

other points relied on need not be addressed, but that in no way detracts from the fact that the first point alleges a single erroneous decision, a decision this Court can correct, MO.REV.STAT. §512.020.4. It is also true that Appellant lists, in the point relied, the multiple legal reasons why the Circuit Court's single decision (setting aside summary judgment) was erroneous, but that is what Rule 84.04(d)(1) required Appellant to do.

Respondents are correct that an appellant's opening brief must contain a "concise statement of the applicable standard of review for each claim of error." Rule 84.04(e). But Appellant's brief contains that very statement, in a so-denominated "Standard of Review" paragraph that appears immediately before Appellant's arguments in support of the points relied. To be sure, Appellant does not recite the applicable standard of review before each sub-argument; but since there is only one standard of review for this appeal – namely, Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976) – it would be pointless, pure clutter, to restate the same standard five times. Neither Appellant nor this Court is prejudiced (to the contrary) by the single recitation of the standard of review. Finally, Schaefer v. Altman, 250 S.W.3d 381 (Mo.Ct.App. 2008), upon which Respondents rely, is inapposite: The appellant in Altman set forth an *incorrect* standard of review, and the brief suffered from other Rule 84.04 violations.

Respondents are correct that the denial of a motion for summary judgment, being interlocutory, cannot be appealed – though this Court once held that it could be

challenged on appeal once a final judgment is entered, Sharpton v. Lofton, 721 S.W.2d 770 (Mo.Ct.App. 1986).¹ Appellant is not, however, challenging the *denial* of summary judgment, but rather challenging the setting aside of the *grant* of summary judgment, as authorized by Section 512.030.4.

In response to Appellant's arguments that there were no valid reasons for setting aside the summary judgment, Respondents reiterate that Respondent Donald N. Revocable Living Trust is not a "suable entity." But, as Appellant previously established, the argument that a group or entity is not suable is a lack of capacity argument, which, as an affirmative defense, can be – and in this case, was – waived by failing to raise it in a timely answer. In Rep. Trustees Indian Springs v. Greeves, 277 S.W.3d 793, 798 (Mo.Ct.App. E.D. 2009); (LF15-18).

Nor was the nonjoinder of the trust beneficiaries a proper reason to vacate the summary judgment. Contrary to Respondents' assertion, Komsky v. Union Pacific R., 293 S.W.3d 31 (Mo.Ct.App. 2009) doesn't state that the nonjoinder of a necessary party

¹ Judy v. Arkansas Log Homes, 923 S.W.2d 409, 414 (Mo.Ct.App. W.D. 1996) criticizes Sharpton, but fails to address Section 512.020.4; nor does it acknowledge that the federal appellate courts, which follow a final judgment rule, uniformly authorize review of denials of summary-judgment motions based (as here) solely on the interpretation or application of law. Chemetall GMBH v. ZR Energy, 320 F.3d 714, 718 (7th Cir. 2003) (collecting cases).

authorizes vacating a summary judgment. Rather, Komsky cites In re Estate of Shaw, 256 S.W.3d 72 (Mo. 2008), which in turn cites In re Marriage of Miller, 196 S.W.3d 683, 694 (Mo.Ct.App. 2006), both of which hold that “void” orders, entered by a court without “jurisdiction,” must be vacated. The nonjoinder of a necessary party doesn’t deprive a court of jurisdiction, Peasel v. Dunakey, 279 S.W.3d 543, 545 (Mo.Ct.App. E.D. 2009) – and (contrary to pre-2009 case law) neither does the nonjoinder of an *indispensable* party, see J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009). And even if the absence of an indispensable party were a jurisdictional defect, the trust beneficiaries here weren’t indispensable: They could have feasibly been joined (they were joined), and given their virtual representation by trust counsel, retained by trust beneficiary and trustee Steven Spicer, their joinder wasn’t “so critical that equity and good conscience” prohibited continuing the action without them as parties. Peasel, 279 S.W.3d at 545.

Finally, that Appellant filed an amended petition after the Circuit Court vacated the summary judgment, adding the trust beneficiaries, is irrelevant. The abandonment of the original petition by filing an amended petition doesn’t prevent Appellant from attacking the Circuit Court’s decision to vacate its properly-entered summary judgment. But for that erroneous decision, no amended petition would have been filed. Nor did Appellant waive her right to challenge the Circuit Court’s decision, given her inability to challenge that decision by lodging an interlocutory appeal. Her only option was to file an

amended petition and re-file the same (meritorious) summary judgment motion, which is what she did, (LF 59-69).

II. No Valid Settlement Agreement Was Executed

The Circuit Court erred in finding both that Appellant's former counsel, William Catlett, had the authority to settle her case and that Catlett had settled the case. Respondents' counter-arguments are meritless.

Respondents contend that when a party's attorney of record testifies that she has express authority to settle, and has settled, a case, the burden of disproving such authority shifts to the client. The contention is immaterial. To begin with, Catlett testified that his engagement letter, which the Circuit Court found delineated the scope of his authority, did not authorize him to settle the case. (TR 22-23, 50). Two, "the rules of professional conduct do not allow an attorney to expand the scope of representation by a client's agreement so that the attorney may determine whether to accept or reject a settlement offer instead of the decision being made by the client," In re Coleman, 295 S.W.3d 857, 864 (Mo. 2009), and any such unethical agreement is contrary to public policy and thus void, see id. at 871 n.5 (noting "majority" position). The case law cited by Respondents fails to address this illegality problem, and does not deal with situations, such as the present one, in which the attorney allegedly having express authority to settle testified after being fired by the client and new counsel entered, contesting the existence of any

settlement. Moreover, as this Court has noted, the notion that an attorney's express or apparent authority can arise from attorney (agent) representations to third parties (e.g., courts) violates basic agency law. Barton v. Snellson, 735 S.W.2d 160, 163 (Mo.Ct.App. 1987). Finally, if the Circuit Court took the position that the pre-Coleman evidentiary presumptions shifted not only the burden of production but also the burden of proof, placing a thumb on the scale in favor of Catlett's testimony, the Circuit Court erred, for "a presumption is a rule of law (unless it is a conclusive presumption, i.e., a rule of substantive law) which puts the burden of producing some substantial evidence on the party presumed against; but . . . when substantial evidence is adduced, the presumption disappears." Terminal Warehouses v. Reiners, 371 S.W.2d 311 (Mo. 1963).

In any event, even if an attorney could have express authority to settle a case, there is no clear and convincing evidence of such authority here or of an actual settlement by Catlett. Rather, the evidence establishes that Respondents rejected Appellant's original offer by proposing a written counter-offer, which Mr. Catlett "hope[d]" she would accept, (TR 12-13), but which she rejected. (Respondents do not challenge Appellant's mirror-image analysis.) Among other things, the written counter-offer, which included signature lines for the parties, was signed by no one; Mr. Catlett testified that the representation letter he sent Appellant, which established the scope of Mr. Catlett's agency according to the Circuit Court, didn't confer a settlement power on him, (TR 22-23, 50); no term of the

lengthy, complex proposal – including delivery of those items of personal property that under both offers were to be Appellant’s – was ever executed (unlike in Sappington v. Miller, 821 S.W.2d 901 (Mo.Ct.App. 1992), in which the cases were dismissed with prejudice); and after undersigned counsel entered, Mr. Catlett sent him a letter informing him of the upcoming deadline to respond to Respondents’ motion for summary judgment, (LF 269-70), a nonsensical warning if the case had already been settled.

Respondents respond by noting that Appellant admitted that “Mr. Catlett negotiated on my behalf.” That is true – and truistic (negotiation is what *all* litigation attorneys do) – but immaterial to whether Mr. Catlett had the authority to settle the case. Respondents further misrepresent Appellant’s testimony by transforming her reasons why she *rejected* Respondents’ written counter-offer, which Mr. Catlett submitted for her review (a pointless exercise if he had already settled the case) – including, e.g., that the counter-offer would require selling the marital home, preventing her teenage son from staying in the same school district, that a portion of her son’s share in the settlement would be used to pay Respondents’ attorney fees, and that she would not receive \$10,000 of personal property, some sentimental – into reasons why she decided to *renege* on the agreement executed by Catlett.

Respondents fault Appellant for not producing documentary or testimonial evidence about the nature of Catlett’s authority, concluding that her “proof falls short of

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

III. The Statute of Frauds Bars Enforcement of the Alleged Settlement Agreement

The settlement agreement allegedly reached by the parties included a provision requiring Appellant and Respondents' counsel, Gregory Fenlon, to sell the marital home.

(LF 350). As Appellant's opening brief establishes, this provision is subject to the statute of frauds – namely, Sections 432.010 and 442.360. The provision is an agreement “made for the sale of lands . . . or an interest in or concerning them,” and thus must be reduced to a writing “signed by the party to be charged therewith, or some other person by him thereto lawfully authorized.” MO.REV.STAT. §432.010. The alleged settlement agreement also contains an authorization “to execute, as agent or attorney for another, any instrument in writing . . . whereby real estate may be affected in law or equity” – namely, Appellant's authorization of counsel for Respondents' counsel to negotiate the sale of the property – and hence the authorization must be ““acknowledged or proved” as “other instruments conveying or affecting real estate are required to be acknowledged or proved.” MO.REV.STAT. §442.360. Because the settlement agreement, under which the parties agree to sell the marital home and to authorize Respondents' counsel to handle the sale, has not been reduced to a writing *signed by Appellant*, the statute of frauds bars enforcement of it.

Respondents' arguments to the contrary are unavailing. One, that the settlement agreement is not itself a contract between the (alleged) co-owners of the realty and a third-party purchaser does not (*pace* Respondents) make the statute of frauds inapplicable. The statute of frauds applies not just to such contracts, but also more generally to contracts “made for the sale of lands” or contracts “concerning them,”

MO.REV.STAT. §432.010, of which the alleged settlement agreement is clearly one. True, the settlement agreement is not itself a sales agreement, but Section 432.010 isn't limited to such sales; it also includes contracts "made for the sale of lands" or "concerning" such sales. Jackson v. Shain, 619 S.W.2d 860 (Mo.Ct.App. W.D. 1981), which held that the parties' "oral agreement to convey real estate," made in settlement of a quiet-title action, was governed by the statute of frauds, confirms the conclusion that the statute of frauds applies here.

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

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

Respondents' third argument, which relies on Owens v. Hankins, 289 S.W.3d 299 (Mo.Ct.App. 2009), is that by failing to raise the statute of frauds defense at the evidentiary hearing, Appellant waived the defense. Unquestionably, a footnote in Owens states that failure to object to evidence of the oral agreement was *one* reason the statute of frauds was waived, but the other, more significant reason was that the defense wasn't raised in any point relied on. Id. at 30 n.7. But, with due respect to Owens – a proximate source of which is Justus v. Webb, 634 S.W.2d 567 (Mo.Ct.App. S.D. 1982), which in turn relies on Miller v. Harper, 63 Mo.Ct.App. 293, 296-97 (Mo.Ct.App. 1895) – the Missouri Supreme Court has held that “even where an oral contract is admitted, a party to it may nevertheless assert the statute of frauds as a complete bar to enforcement, and may effectively repudiate any obligation under it,” Jones v. Linder, 247 S.W.2d 817, 820 (Mo. 1952). This Court made the same holding in Footwear Unlimited v. Katzenberg, 683 S.W.2d 291, 295 (Mo. App. 1984), which Owens failed to address. Moreover, the (nonexistent) waiver rule misunderstands the nature of a statute of frauds defense: “The

Statute of Frauds relates to the remedy only” – namely, whether it can be enforced, by damages or specific performance – “and not to validity of a contract.” Scott v. Ranch Roy-
L, 182 S.W.3d 627, 634 (Mo.Ct.App. E.D. 2005).

Respondents’ last argument – that the statute of frauds is inapposite because Appellant’s counsel included in the (unsigned) written agreement provisions “foreign” to the litigation and favorable to Appellant – is a *non sequitur*. Whether there is a writing signed by the party to be charged does not turn on the nature of the terms of any agreement.

IV. The Circuit Court Erred in Ordering the Execution of a Consent Judgment

In response to Appellant’s argument that the Circuit Court erred in ordering Appellant to execute a consent judgment, Respondents contend that Appellant’s argument is moot. It is moot, they say, because the Circuit Court never held Appellant in contempt for violating the order and because Appellant never lost the right to appeal. Respondents’ mootness argument is meritless.

First of all, whether a judicial remedy is proper turns, in part, on whether the law authorizes the remedy and, if so, under what conditions. As the Western District held in Kenney v. Vansittert, 277 S.W.3d 713, 723 (Mo.Ct.App. 2008), a circuit court lacks the legal authority to order an appellant to execute a consent judgment, forcing the appellant

to choose either contempt or loss of the right to appeal. Respondents have no response to Kenney.

Second, and more significantly, Appellant's criticism of the Circuit Court's remedial order is clearly a live issue. "A case" – or in this case, a particular issue – "is moot where an event has occurred which makes the court's decision unnecessary or makes it impossible for the court to grant the effectual relief." Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo.Ct.App. E.D. 2000). It blinks reality to claim it is unnecessary for this Court to review the Circuit Court's remedial order. To the contrary, if this Court were to affirm the judgment without addressing the propriety of the Circuit Court's order, Appellant would continue face being held in contempt of court. Nor is there any doubt that this Court can grant effectual relief with respect to the Circuit Court's order; it can do so by holding that the order was legal error and either reverse or vacate the judgment for entry of a judgment free of the improper order. Finally, under Respondents' theory, the only way Appellant can challenge the remedial order is to violate the order, forcing the Circuit Court to find her in contempt and then impose compensatory *per diem* fines or imprisonment. See In re Marriage of Crow & Gilmore, 103 S.W.3d 778, 781 (Mo. 2003). That is incorrect, for when a permanent injunction is entered against a party pursuant to a final judgment, as here, that party can immediately challenge the permanent injunction on appeal, without first acting in contempt of court. Hair Kraz v. Schuchardt, 131 S.W.3d

854, 854-55 (Mo.Ct.App. E.D. 2004). Cf. Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974) (“Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect”).

Finally, State ex rel. Myers v. Shinnick, 19 S.W.2d 676 (Mo. 1929), to which Respondents analogize the present case, is inapposite. In Shinnick, the relief sought by the appellant, a building permit, was rendered moot by the receipt of the permit during the appeal. No such post-appeal event has transpired here. Only if Respondents were willing to confess error by the Circuit Court in entering the judgment or, with respect to the particular issue here, by ordering Appellant to execute a consent judgment, and this Court accepted the confession, would Shinnick be applicable.

V. Specific Performance Was Improper

In her final point, Appellant argued that Respondents’ failure to claim, or prove to prove with affirmative evidence, that damages at law (i.e., for breach of contract), was an inadequate remedy for Appellant’s breach of the (alleged) settlement agreement precluded the Circuit Court from ordering specific performance. Appellant cited Missouri case law establishing not only the lack of entitlement to specific performance of a settlement agreement, e.g., Skelly Oil v. Ashmore, 365 S.W.2d 582 (Mo. 1963), but also that specific performance is improper in the absence of proof that damages at law are

inadequate, e.g., Home Shopping Club v. Roberts Broadcasting, 989 S.W.2d 174, 180 (Mo.Ct.App. E.D. 1998). Respondents cite no countervailing authority (there is none), nor do they cite evidence that legal damages for breach of contract would have been inadequate (there is none). They merely note that specific performance is an equitable remedy, this Court reviews with deference, citing and quoting Ste. Genevieve County Levee v. Luhr Bros., 288 S.W.3d 779, 783 (Mo.Ct.App. 2009).

This response is inadequate. Appellant doesn't deny that review of the grant of a motion to enforce a settlement agreement is deferential or that specific performance is an equitable remedy. But "a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." U.S. v. Burr, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C.J.). ("Discretion . . . is not synonymous with whim. The discretion is a controlled discretion." Besse v. Missouri Pacific R., 721 S.W.2d 740, 742 (Mo. 1986). That is why it is an abuse of discretion for a discretionary decision to be based, in part or whole, on an error of law.) Two sound legal principles apply here: (1) "[m]odern equity has rules and standards, just like law," N.L.R.B. v. P*I*E Nationwide, 894 F.2d 887, 893 (7th Cir. 1990) (Posner, J.), and (2) one such rule is that specific performance is impermissible absent proof of the inadequacy of legal damages. By ignoring this rule or not knowing about it, the Circuit Court misapplied or misconstrued the law.

CONCLUSION

The Circuit Court's original and amended judgments should be reversed, and the summary judgment entered in favor of Appellant reinstated.

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 3,717 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 May 3, 2010, which included as attachments copies (in .pdf and Word 2007 versions) of the brief, which were scanned and virus-free; **(3)** On May 3, 2010, true and correct copies of the attached brief and a CD disk containing a copy of this brief, which were scanned and virus-free, were mailed by first-class mail to counsel for

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