

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 04-21-2010  
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BY: GH

DENNIS D. HIGGINS and SANDRA K. ) 1 CA-SA 10-0060  
HIGGINS, 13248 North 80th Place, )  
Scottsdale, Arizona 85260, ) DEPARTMENT B  
)  
Petitioners, ) Maricopa County  
v. ) Superior Court  
) No. CV 2004-014521  
THE HONORABLE EDWARD O. BURKE, )  
Judge of the SUPERIOR COURT OF ) **DECISION ORDER**  
THE STATE OF ARIZONA, in and for )  
the County of MARICOPA, )  
)  
Respondent Judge, )  
)  
WARNE INVESTMENTS, LTD., an )  
Arizona corporation, )  
)  
Real Party in Interest. )

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**JURISDICTION ACCEPTED; RELIEF DENIED**

In this special action, petitioners Dennis D. and Sandra K. Higgins ask us to reverse an order entered by the superior court denying their motion to dismiss for failure to prosecute and misrepresentation. Because the Higginses have no adequate remedy by appeal from such an order, *Cf. Francini v. Phoenix Newspapers, Inc.*, 188 Ariz. 576, 584, 937 P.2d 1382, 1390 (App. 1996),

The Court, Presiding Judge Patricia K. Norris and Judges Daniel A. Barker and Peter B. Swann participating, accepts special action jurisdiction but denies the specific relief requested; petitioners, however, may submit a judgment on the mandate as discussed below.

This special action arises out of this court's opinion in this case, *Warne Investments, Ltd. v. Higgins*, 219 Ariz. 186, 195 P.3d 645 (App. 2008), and our issuance of the mandate in accordance with that opinion. As we explained in our opinion, the real party in interest, Warne Investments, Ltd. ("Warne") sued the Higginses and Bridge Info Tech, Inc., a business entity associated with the Higginses, asserting claims for successor corporate liability, breach of the Uniform Fraudulent Transfer Act ("UFTA"), and liability under the corporate trust fund doctrine. For the reasons set forth in our opinion, we affirmed the judgment entered by the superior court against Bridge Info Tech, Inc. on the successor corporate liability and UFTA claims, *id.* at 191, ¶ 15, 194, ¶ 29, 195 P.3d at 650, 653, and the judgment entered by the superior court against the Higginses personally under the trust fund doctrine. *Id.* at 196, ¶ 42, 195 P.3d at 655. Although we did not specify the date of the superior court judgment we affirmed on appeal, the record before us reflects this judgment was entered by the superior court on March 9, 2006. We reversed, however, the superior court judgment against the Higginses for personal liability under the successor liability doctrine and the UFTA. *Id.* at 196, ¶ 43, 199, ¶ 59, 195 P.3d at 655, 658. The record before us reflects

the judgment we reversed had been entered separately by the superior court on May 9, 2006. In due course, the clerk of this court issued the mandate which "COMMANDED" that "such proceedings be had in said cause as shall be required to comply with the decision of this court . . . ."

After issuance of our mandate, Warne evidently began to enforce the judgment, and unfortunately, in doing so referred to the May 9, 2006 judgment. Of course, the only judgment Warne was entitled to enforce was the March 9, 2006 judgment as this court had reversed the May 9, 2006 judgment. Subsequently, the Higginses filed a motion to dismiss for failure to prosecute and misrepresentation asserting Warne had failed to "prosecute and comply" with Local Rules of Practice of the Superior Court for Maricopa County 2.3(b) and 3.6(a)(1). The superior court denied the Higginses' motion to dismiss stating "there's nothing left to prosecute."

We agree with the superior court's interpretation of the local rules. Rule 2.3(b) only applies if a case is remanded by the appellate court for a new trial. Consistent with that rule, Rule 3.6(a)(1) states a case shall be dismissed for failure to prosecute if there is a noncompliance with Rule 2.3 within two months after the date of the filing of the mandate of the appellate court. Here, we did not remand for a new trial on any issue. Instead, we affirmed the March 9, 2006 judgment and reversed the May 9, 2006 judgment. The superior court was, therefore, correct in determining further proceedings were unnecessary to comply with our opinion.

Although the superior court was and is not required to initiate any proceedings to comply with our opinion, the Higginses may request the superior court enter a judgment on the mandate reflecting (1) they prosecuted a timely appeal from the judgment entered by that court on May 9, 2006, and (2) on April 15, 2008, this court filed *Warne Investments, Ltd. v. Higgins*, No. 1 CA-CV 06-0410 (App. 2008), and reversed the superior court's May 9, 2006 judgment.

For the foregoing reasons, we deny the relief requested by the Higginses.

/s/

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PATRICIA K. NORRIS, Presiding Judge