

No. SC86365

---

IN THE MISSOURI SUPREME COURT

---

STATE ex rel. FORD MOTOR COMPANY

Relator,

v.

THE HONORABLE W. STEPHEN NIXON,  
Circuit Judge, Jackson County, Missouri, Division 5

Respondent.

---

RELATOR'S REPLY BRIEF

---

**Jeremiah J. Morgan**  
**Ann K. Covington**  
**BRYAN CAVE LLP**  
**3500 One Kansas City Place**  
**1200 Main Street**  
**Kansas City, Missouri 64105**  
**Telephone: (816) 374-3200**  
**Facsimile: (816) 374-3300**

**Thomas E. Rice, Jr.**  
**Gregory John Pals**  
**BAKER STERCHI COWDEN**  
**& RICE, L.L.C.**  
**2400 Pershing Road, Suite 500**  
**Kansas City, Missouri 64108**  
**Telephone: (816) 471-2121**  
**Facsimile: (816) 472-0288**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 4

PRELIMINARY STATEMENT..... 6

ARGUMENT ..... 7

    Standards For Writ of Prohibition..... 7

        I. Relator is Entitled to an Order Prohibiting Respondent from  
            Compelling Discovery Responses Regarding Plaintiffs’ Work-  
            Related Claims, Because Respondent Does Not have Subject  
            Matter Jurisdiction Over the Work-Related Claims, in that the  
            Labor and Industrial Relations Commission has the Exclusive  
            Jurisdiction. .... 8

            A. Plaintiffs Do Not Deny Having Received Substantial  
                Work-Related Discovery from Prior Claims..... 9

            B. Plaintiffs’ Work-Related Discovery is Not to Identify or  
                Support “John Doe” Claims; it is an Attempt to  
                Circumvent the LIRC and Reinstate Claims that have  
                either been Dismissed or Stayed..... 15

        II. Relator is Entitled to an Order Prohibiting Respondent from  
            Compelling Discovery Responses that are Grossly Overbroad  
            and Unduly Burdensome, Because the Respondent Abused the  
            Discretion Granted for Discovery and Rejected Controlling Law,

in that the Ordered Discovery is Without Any Reasonable or Relevant Limitation and Would Result in the Expenditure of Thousands of Hours and Million of Dollars.....	18
A. Ford has Not Responded to Similarly Overbroad Discovery.....	18
1. Respondent’s own exhibits demonstrate Ford has not been required to engage in the undue burden of reviewing all workers’ compensation files.....	19
2. Ford has not been required to produce all documents relating to all asbestos products sold in the entire 102 year history of Ford. ....	21
B. Ford Did Not Need to Seek a Protective Order. ....	26
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE .....	29
CERTIFICATE OF SERVICE .....	30

## TABLE OF AUTHORITIES

### FEDERAL CASES

<u>Constance Stables v. General Motors Corp., et al.</u> , Case No. 90-506-CA17 (19th Judicial Circuit, St. Lucie County, Fla.) .....	20
<u>In Re IBM Peripheral EDP Devises Antitrust Litigation</u> , 77 F.R.D. 39 (N.D. Cal 1977) .....	6
<u>In re Sears, Roebuck &amp; Co. and In re Ford Motor Co.</u> , 146 S.W.3d 328 (Tex. Ct. App. 2004).....	21
<u>County Court of Washington County v. Murphy</u> , 658 S.W.2d 14 (Mo. banc 1983).....	7
<u>Goodrum v. Asplundh Tree Expert Co.</u> , 824 S.W.2d 6 (Mo. banc 1992).....	17
<u>Robert Johnson, et al. v. DaimlerChrysler Corp., et al.</u> , Case No. 04CV219314 (16th Judicial Circuit, Jackson County, Mo.) .....	26
<u>Shannon v. Hines</u> , 21 S.W.3d 839 (Mo. Ct. App. 1999).....	8
<u>State ex rel. Chassaing v. Mummert</u> , 887 S.W.2d 573 (Mo. banc 1994).....	7
<u>State ex rel County of Jackson v. Missouri Public Serv. Commission</u> , 985 S.W.2d 400 (Mo. Ct. App. 1999) .....	7
<u>State ex rel Ford Motor Co. v. Messina</u> , 71 S.W.3d 602 (Mo banc 2002) .....	6, 8, 15, 17,19, 21, 23
<u>State ex rel. Lester E. Cox Medical Centers v. Darnold</u> , 944 S.W.2d 213 (Mo. banc 1997) .....	26
<u>State ex rel. Lipic v. Flynn</u> , 215 S.W.2d 446 (Mo. 1948).....	8
<u>State ex rel. McDonnell Douglas Corp. v. Ryan</u> , 745 S.W.2d 152 (Mo. banc 1988 .....	6, 8

State ex rel. Upjohn Co. v. Dalton, 829 S.W.2d 83 (Mo. Ct. App. 1992) ..... 6

William R. Taylor, et al. v. ABEX Corp., et al., Case No. CV-404331 (Cuyahoga  
County, Ohio).....20, 25

**STATE STATUTES**

Mo. R. Civ. P. 56.01(b)..... 17

RSMo. § 287.560..... 17

## PRELIMINARY STATEMENT

Plaintiffs state in their conclusion that we have come a long way since the days of the “sporting theory of justice.” Respondent’s Brief, at 60. While this is certainly true, it does not justify the sporting theory of discovery that Plaintiffs are pursuing. As the court of appeals has stated, Plaintiffs’ requests go beyond even an improper fishing expedition and “seem designed to ‘drain the pond and collect the fish from the bottom.’” State ex rel. Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. Ct. App. 1992) (quoting In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 42 (N.D. Cal. 1977)). Proper discovery requires an appropriate balance, and the Respondent’s orders jettison all pretense of balance. Without the intervention of this Court, Ford will suffer an extreme burden and monumental expense to comply with Plaintiffs’ discovery that is either entirely outside of the jurisdiction of the trial court or far beyond the scope of proper discovery.

Under the controlling caselaw, State ex rel. McDonnell Douglas Corp. v. Ryan, 745 S.W.2d 152, 154 (Mo. banc 1988) (finding the Labor and Industrial Relations Commission has exclusive jurisdiction of workplace injury claims), and State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002) (finding discovery must be reasonably limited to the products and issues in the case), which was neither cited nor distinguished by Plaintiffs, the preliminary writ issued by this Court on November 23, 2004, should be made absolute; to wit, Respondent’s September 6 and 7, 2004 discovery orders (“Discovery Orders”) should be ordered vacated and Respondent should be

directed to enter a protective order “limiting discovery to those matters not already discovered and that are relevant to the issues in [the case].” Relator’s Exhibit A.

## **ARGUMENT**

Mr. Roy L. Dietiker was allegedly injured outside of work as a result of exposure to asbestos-containing brake pads on six Ford vehicles. Despite this limited claim against Ford, Plaintiffs requested, and Respondent ordered, substantial unrelated documents and information, including: work-related discovery; information from all workers’ compensation files; and, extensive documents and information for all asbestos-containing products ever sold by Ford in its entire history.

In their brief, Plaintiffs argue that the ordered discovery should be upheld because (1) the work-related discovery is intended to identify and support claims against “John Doe” defendants, and (2) the discovery is not overbroad or burdensome since Ford has answered it in other cases. Neither of these claims is supported in fact or law.

### ***Standards For Writ of Prohibition***

As set forth in Ford’s initial brief to this Court, State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994), establishes the circumstances under which prohibition relief should be granted in this case. To circumvent, Plaintiffs cite State ex rel. County of Jackson v. Missouri Public Serv. Comm’n, 985 S.W.2d 400 (Mo. Ct. App. 1999) and County Court of Washington County v. Murphy, 658 S.W.2d 14 (Mo. banc 1983), and claim that no justiciable issue has been presented. This misstates the law and the cases. Neither Missouri Public Service Comm’n nor Murphy deals with

discovery issues. The cases simply stand for the unremarkable proposition that if an issue becomes moot it is no longer justiciable.

In contrast, courts have repeatedly found discovery issues proper for prohibition relief and therefore justiciable. In Messina, 71 S.W.3d at 607, this Court found that “prohibition is the proper remedy for an abuse of discretion during discovery.” See also Shannon v. Hines, 21 S.W.3d 839, 841 (Mo. Ct. App. 1999) (“The party must be **sufficiently affected** so as to insure that a justiciable controversy is presented to the court.”) (emphasis added). Accordingly, this appeal presents a justiciable controversy for this Court.

**I. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses Regarding Plaintiffs’ Work-Related Claims, Because Respondent Does Not have Subject Matter Jurisdiction Over the Work-Related Claims, in that the Labor and Industrial Relations Commission has the Exclusive Jurisdiction.**

There is no dispute that the Labor and Industrial Relations Commission (“LIRC”) has exclusive jurisdiction over the work-related injury claims currently pending before the LIRC. Ryan, 745 S.W.2d at 154. Likewise, Plaintiffs do not attempt to respond to or even distinguish State ex rel. Lipic v. Flynn, 215 S.W.2d 446 (Mo. 1948), which prohibits “encroaching on jurisdiction” that is exclusive. Yet, the work-related discovery ordered in this case presents a conflict with these undisputed authorities. The discovery encroaches on the jurisdiction of the LIRC since it is substantially identical to

the discovery requested and answered before the LIRC and because it does not relate to any claim against Ford.

Plaintiffs seek to avert this conflict by suggesting in their brief that the work-related discovery is principally for another reason – the identification and support of claims against “John Doe” defendants. The prior discovery by Plaintiffs and their counsel does not support this theory. Thus, it is apparent that Plaintiffs are simply seeking to circumvent the exclusive jurisdiction of the LIRC. Their efforts should be denied.

**A. Plaintiffs Do Not Deny Having Received Substantial Work-Related Discovery from Prior Claims.**

This State Court Action is the third in a line of claims filed by Plaintiffs. For each separate claim, Plaintiffs have sought the same discovery from Ford. Plaintiffs’ brief fails to address the multiple sets of discovery or the responses provided by Ford. Instead, Plaintiffs misleadingly suggest in passing that the prior discovery resulted in only a “limited amount of documents.” Respondent’s Brief, at 33. This is not correct. Plaintiffs have received substantial work-related discovery.

For example, Ford seeks to prohibit Plaintiffs’ attempt to obtain another inspection of the Claycomo facility. Plaintiffs’ counsel and expert requested and were previously permitted to inspect the Claycomo facility as well as to take still photographs and asbestos samples of areas in which Mr. Dietiker worked. The Dietikers also served two subpoena duces tecums on Ford in the prior Federal Action. The first requested:

1. Any records concerning or relating to the employment of Roy Dietiker, Social Security Number 488-34-9985.
2. All documents concerning or relating to the content of paint used by Mr. Dietiker while employed at Ford and all documents concerning hazard or safety of such paint.
3. **All documents concerning or relating to the presence of asbestos at the Ford Motor Company plant in Claycomo, Missouri including building inspection reports, bulk sample analyses, air sample reports, asbestos abatement records, operations and maintenance reports.**
4. All documents concerning or relating to the original construction of the Ford plant in Claycomo, Missouri, records of remodeling of the plant prior to 1980, all records concerning the ovens used to dry paint on new cars.
5. Any NIOSH, OSHA or Missouri Department of health studies or other document concerning the Ford Motor Company plant in Claycomo, Missouri.
6. A schematic drawing or blueprint that indicates the area where Mr. Dietiker worked at the Ford Motor Company plant in Claycomo, Missouri.

7. A schematic drawing or blueprint(s) which indicate the areas in Claycomo plant in which asbestos products were located during the period when Mr. Dietiker was an employee of Ford Motor Company.

Relator's Exhibit G (emphasis added). Plaintiffs do not deny that Ford produced documents in response to this subpoena. See Relator's Exhibit H. Then, on October 16, 2001, the Dietikers issued their second subpoena to Ford in the Federal Action and requested:

1. [R]ecords concerning any construction in the paint booth, oven and the paint and oil mix room; any records concerning maintenance on pipes in those rooms; records concerning asbestos abatement in those rooms; any notices provided to Roy Dietiker concerning asbestos at Claycomo; any masks or hoods, or exemplars, provided to Mr. Dietiker for his work at Claycomo; [and] copies of any records concerning OSHA inspections or citations at Claycomo, which may concern or relate to the rooms in which Mr. Dietiker worked as described above, or in any way concerning asbestos.
2. Please produce Claycomo plant for inspection as requested in the attached letter dated September 10, 2001.
3. All records concerning construction or renovation projects at the Claycomo plant performed by or with A.D. Jacobson Co., Inc. between 1950 and 1995.

4. All records concerning purchase of pipe insulation and oven insulation for use at the Claycomo plant between the years 1957 and 1977.
5. Any general files concerning ACandS, Inc. and/or Armstrong World Industries, Inc.

Relator's Exhibit I. Ford again produced documents in response.

Following production in the Federal Action, Plaintiffs sought substantial discovery before the LIRC:

1. **Any records concerning or relating to the employment of Roy Dietiker, Social Security Number 488-34-9985 not previously produced to the Dietikers in this or any other asbestos action.**  
Mr. Dietiker was an employee at the Ford plant in Claycomo, Missouri.
2. All x-rays, x-ray reports or other record concerning physical examination or treatment of Roy L. Dietiker.
3. All records concerning construction and remodeling of the areas of the Claycomo plant where Roy Dietiker worked including all paint and paint mix areas.
4. All documents concerning the oven burners in the paint booth areas and also the paint ovens where the paint is baked onto the vehicles in both the passenger area, the commercial paint area which was in use up to around 1985 and the commercial/SUV paint area in use today. This includes records of purchase and/or construction of the oven burners

- and/or ovens, maintenance of same, asbestos surveys or tests concerning same and asbestos removal from same.
5. Any plant layouts which show the plant as it existed in 1960, 65, 70, 75, 80, 85, 90 and current.
  6. Any plant layouts or diagrams which show the areas in which asbestos-containing materials were sampled for the 1985 and 1989 Clayton Environmental Asbestos Surveys and any plant layouts or diagrams which show areas where asbestos is located today.
  7. All documents pertaining to or relating to the creation of the September 5, 1984 Inter Office memo from Mary Ann Livernois to S.J. Kuritz, D.S. Sugano, F.V. Viola, III, M.D. regarding “mesothelioma deaths.”
  8. All documents concerning or relating to the May 25, 1978 Inter Office memo from F.X. Scott to Mr. Paul E. Toth and Mr. R.W. Pascoe regarding “Dr. Block’s Letter Dated May 2, 1978 Re: Medical Monitoring-Asbestos Exposure.” See, Ex. 1B. The May 2, 1978 letter and any response to the May 25, 1978 Inter Office memo are specifically commanded as well as any other document pertaining thereto.
  9. All documents concerning or relating to the February 25, 1980 Inter Office memo from F.X. Scott to Mr. S. Mingela concerning “Asbestos Evaluation – Kansas City Assembly Plant.” See, Exh. 1-C. This

- includes the letter of Mr. S. Mingela of January 16, 1980 and any response to the February 25, 1980 Inter Office memo as well as any other document pertaining thereto.
10. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to medical monitoring of Ford employees including, but not limited to those at the Claycomo plant for asbestos exposure or asbestos disease.
  11. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to conducting an asbestos assessment or survey at the Ford Claycomo plant or any other Ford assembly plant.
  12. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to removal of asbestos at the Ford Claycomo plant.
  13. Copies of any records concerning the history of Ford's knowledge concerning asbestos which have been produced in other asbestos bodily injury actions.
  14. Copies of any records, booklets or other publications concerning the National Safety Council and/or Ford's membership in the National Safety Council.

15. Copies of any records, booklets or other publications concerning the Industrial Hygiene Foundation and/or Ford's membership in the Industrial Hygiene Foundation.

16. The Claycomo Plant for inspection and testing or sampling by outside experts and/or consultants.

Relator's Exhibit N (emphasis added). Plaintiffs admit that Ford responded to this discovery as well.

A review of these discovery requests and a comparison to the requests at issue here (Relator's Exhibit Q) reveal that the work-related discovery at issue is merely a duplicate of prior discovery served on Ford by Plaintiffs. Plaintiffs cannot and do not deny this. Therefore, the work-related discovery – even if it could be justified by Plaintiffs' hypothetical claims against "John Doe" defendants – should be denied. See Messina, 71 S.W.3d at 608 (recognizing discovery from prior cases as a means to avoid the burden of discovery). Moreover, the ordered discovery is not limited in any way to products, areas of the plant or time periods relevant to Plaintiffs' alleged exposure.

**B. Plaintiffs' Work-Related Discovery is Not to Identify or Support "John Doe" Claims; it is an Attempt to Circumvent the LIRC and Reinstate Claims that have either been Dismissed or Stayed.**

In fact, however, the work-related discovery has nothing to do with claims against "John Doe" defendants. Despite all of the work-related discovery Plaintiffs have received and the obvious duplication in this State Court Action, Plaintiffs have never substituted even one party for a "John Doe" defendant in the Federal Action or in this

State Court Action. In their brief, Plaintiffs fail to explain how after nearly four years and several rounds of work-related discovery they have never once substituted a party for a “John Doe” defendant. Their failure cannot be lack of information regarding third-parties.

If “John Does” were the target of Plaintiffs’ interest, Plaintiffs would have pursued them in the Federal Action and substituted named parties, regardless of whether other named parties declared bankruptcy. Plaintiffs’ suggestion that the Federal Action involved different claims and different defendants is wrong. The Federal Action included claims arising from Mr. Dietiker’s workplace and named 20 “John Doe” defendants. In addition, if “John Does” were truly the targets of Plaintiffs’ interest, Plaintiffs surely would have made some modification or alteration to the discovery at issue. This State Court Action originally included work-place injury claims against Ford even though counsel for Plaintiffs was fully aware of the exclusive jurisdiction of the LIRC. Prior to the trial court’s dismissal and stay of the work-place injury claims Plaintiffs served extensive written discovery, including work-related discovery. That discovery has not been changed one bit following the dismissal and stay of Plaintiffs’ work-place claims. Instead, Plaintiffs are simply attempting to justify the discovery by reference to “John Doe” defendants.

For these reasons, it is clear that Plaintiffs are not pursuing work-related discovery in an effort to identify and support claims against supposed “John Doe” defendants. Then why are Plaintiffs pursuing the work-related discovery? The answer is in Plaintiffs’ own brief. Plaintiffs assert that they are “pursuing discovery to prove that

decedent's death was not an accident, as defined under Missouri Workers Compensation laws." Respondent's Brief, at 47.

The LIRC "has exclusive jurisdiction to determine whether the claimant's injuries were the product of an accident or of an intentional act on the part of the employer." Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 8 (Mo. banc 1992). As set forth previously, Plaintiffs have obtained discovery for this purpose before the LIRC. And any attempts in this State Court Action to obtain work-related discovery to support a determination that is solely within the exclusive jurisdiction of the LIRC is improper. See Mo. R. Civ. P. 56.01(b); RSMo. § 287.560.

Plaintiffs' attempt to circumvent the exclusive jurisdictional bar so as to pursue discovery solely for the dismissed and stayed claims against Ford should not be countenanced. Permitting a party to disguise duplicative discovery of work-related claims as discovery to identify "John Doe" defendants is "clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." Messina, 71 S.W.2d at 607 (emphasis added).

Based on the lack of subject matter jurisdiction, the impermissible attempts to circumvent the exclusive jurisdiction of the workers' compensation laws, and the attendant unnecessary and irreparable harms, Ford requests an order prohibiting further discovery in this case regarding the dismissed and stayed work-place claims. Accordingly, this Court should make absolute its preliminary writ and order Respondent to vacate his September 6 and 7, 2004 Discovery Orders, thereby prohibiting discovery

on work-related issues, including a second inspection of the work site and corporate deposition.

**II. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses that are Grossly Overbroad and Unduly Burdensome, Because the Respondent Abused the Discretion Granted for Discovery and Rejected Controlling Law, in that the Ordered Discovery is Without Any Reasonable or Relevant Limitation and Would Result in the Expenditure of Thousands of Hours and Million of Dollars.**

Equally important in this appeal is the undue burden resulting from the dramatically overbroad discovery ordered by Respondent. In their brief, Plaintiffs claim that the requests are neither burdensome nor overbroad since they have been answered by Ford previously. Plaintiffs also assert that Ford should not prevail on this point because it did not seek a protective order. Neither the law nor the facts support these assertions.

**A. Ford has Not Responded to Similarly Overbroad Discovery.**

Although Plaintiffs' only claims against Ford – the Brake Claims – involve, at most, six vehicles and a limited number of products for those vehicles, Plaintiffs requested, and Respondent ordered, discovery that spans the entire 102-year history of Ford, as well as thousands of unrelated products. Plaintiffs contend in their brief that these supposedly “specific interrogatories” and “specific requests” are not in fact overbroad or unduly burdensome since Ford “has answered virtually the same discovery in many other jurisdictions in the United States as is at issue here.” Respondent’s Brief, at 1 & 40. Plaintiffs then cite exhibits DD and MM to support this proposition. These

exhibits, however, not only fail to support Plaintiffs' arguments, but they actually support Ford's request for prohibition relief.

**1. Respondent's own exhibits demonstrate Ford has not been required to engage in the undue burden of reviewing all workers' compensation files.**

In this case, Plaintiffs request that Ford produce "[a]ll workers' compensation files of employees of this defendant or its contracting divisions, subsidiaries or predecessor corporations, who have made a claim that he or she had contracted an asbestos-related disease or disability." Relator's Exhibit P(5), at 242. Ford responded to this request, in part, by stating that workers' compensation files are not centrally located, categorized or described to permit such retrieval.<sup>1/</sup> Thus, answering the request would require the manual review of every workers' compensation file company-wide for the entire history of Ford. Id.

---

<sup>1/</sup> Contrary to Plaintiffs' arguments in their brief, Ford has always disclosed that a limited computer database of workers' compensation files was begun in 1988. See Affidavit of Jonathan Parker, ¶ 9, attached hereto as Relator's Exhibit Y (originally submitted to the Court of Appeals and in support of a Preliminary Writ of Prohibition to this Court). Ford affirmed the same to this Court. See Relator's Exhibit U, ¶ 9. However, the existence of the limited database does not change the burden of manually reviewing all workers' compensation files.

In Constance Stables v. General Motors Corp., et al., No. 90-506-CA17 (19<sup>th</sup> Judicial Circuit, St. Lucie County, Fla.), which Plaintiffs suggest supports their argument that Ford has previously produced this information, the plaintiff asked whether Ford has been a “party to any Workers Compensation Claim made by a worker alleging asbestosis, lung cancer or mesothelioma? And if your answer is yes, provide the following: a. Name of claimant; b. Claim number; c. State where claim is filed; d. Date claim filed; e. Injury complained by Claimant; f. Occupation of Claimant.” Respondent’s Exhibit DD, at 249. Consistent with its answer in this State Court Action, Ford responded by stating that workers’ compensation files are not centrally located, categorized or described to permit such retrieval. “Identification of responsive claims would therefore necessitate review of the entire workers’ compensation file for what is several hundred thousand claims.” Id. at 250

Similarly, in the case styled William R. Taylor, et al. v. ABEX Corp., et al., Case No. CV-404331 (Cuyahoga County, Ohio), which Plaintiffs also suggest supports their argument that Ford has previously produced this information, the plaintiffs asked for identification of employee “claim[s] for asbestosis, mesothelioma, bronchogenic carcinoma and/or cancer of the stomach, colon or rectum, under the Occupational Disease or Workers’ Compensation Statutes of any state.” Respondent’s Exhibit MM, at 406. Consistent with its answer in this State Court Action and its answer in Constance Stables, Ford responded that its “records do not permit retrieval of this information as injuries alleged are described in general terms.” Id. at 407.

Thus, in all three cases Ford has consistently answered that it cannot retrieve the requested information regarding all workers' compensation claims without an extensive and burdensome manual review of every single workers' compensation file. Furthermore, as set forth in Ford's initial brief, the issue of workers' compensation files was recently addressed in In re Sears, Roebuck & Co. and In re Ford Motor Co., 146 S.W.3d 328 (Tex. Ct. App. 2004). See Relator's Exhibit W. In that case, the plaintiffs made a similar request for workers' compensation files as Plaintiffs in this case. A response would have required an expensive and burdensome review of all workers' compensation files. Ford filed a petition for a writ, challenging the trial court's order permitting the discovery. After reviewing the discovery, the Texas Court of Appeals held that the similarly unlimited discovery request for workers' compensation files was "not narrowly tailored" and simply constituted a "fishing expedition." Id. The request was therefore denied and the Texas court issued a writ prohibiting the discovery.

**2. Ford has not been required to produce all documents relating to all asbestos products sold in the entire 102 year history of Ford.**

Despite the clear holding in Messina, 71 S.W.3d at 606, limiting discovery to the products and issues in the case, Plaintiffs request the following information and documents for all asbestos-containing products ever sold by Ford at any time since 1903:

- 5a. the brand name of each such product and a description of the use anticipated by you for each such product;
- b. the identity of each United States government patent, whether issued or pending, pertaining to such product;

- c. general description of the said product (e.g., size, shape, and color);
- d. describe the type of package(s) in which the product was and/or is contained, give the name of the product appearing on each package, and state the colors on which the package and any writings appeared;
- e. the date that such product first was placed on the market;
- f. the date that asbestos was removed from the product;
- g. the reason such product was removed from the market;
- h. the type of asbestos contained in each such product;
- i. the amount of each type of asbestos in each such product (stated as a percentage of the total solid constituent materials);
- j. the date the product was removed from the market, if it was;
- k. the identity of each and every document relating to the sale, distribution, or use of any such product in the states of Kansas and/or Missouri;
- l. the name(s) and address(es) of each and every person and/or entity to whom any such product was sold and/or delivered in the states of Kansas and/or Missouri together with the date(s) of each such sale and/or delivery;
- m. the precise location(s) in the states of Kansas and/or Missouri to where each or any such product was delivered.

Relator's Exhibit Q, at 286-87. Plaintiffs discovery further requires "[a]ll catalogs, brochures, sales literature, pamphlets, loose-leaf binders, or inventory data sheets" and

“[a]ll records, correspondence, invoices, contracts, memoranda, billings and other documents” regarding every product ever sold containing asbestos. Id., at 291.

In response to these requests Ford provided significant information and documents regarding friction components such as brake linings, brake pads (the only Ford product at issue), and clutch facings. Relator’s Exhibit P(2), at 193. In addition to thousands of pages of documents and other discovery material and information, Ford affirmed the following points in response to these requests:

- “Ford believes asbestos-containing friction components were incorporated into its vehicles since it began selling mass production vehicles in the early 1900s;”
- “Ford began its phase-out of asbestos-containing friction products beginning with the 1982 model year Ranger vehicle. By 1993, the only vehicles in which asbestos-containing friction products were still used were low-volume limousine applications . . . .”

Id. at 193-96.

Unsatisfied with Ford’s response limited to friction components, Plaintiffs now claim that “[t]his is the same discovery that Relator has answered in numerous asbestos cases across the United States.” Respondent’s Brief, at 55. Thus, Plaintiffs argue that “the burden to give a full answer here is minimal.” Id. In support of their arguments Plaintiffs cite documents containing lists of asbestos-containing products as well as Respondent’s exhibits MM and QQ.

The lists identified by Plaintiffs provide no support for the proposition that the requests at issue involve only a minimal burden. The discovery requests require not just lists of products but instead seek the production of a multitude of documents and information concerning every product on the lists. Similarly, exhibit QQ, a new affidavit submitted by Plaintiffs in this Court, does not support the argument that the requested information involves only a minimal burden. The affidavit merely states that part numbers of asbestos-containing components from 1991 to the present are purportedly available in a database concerning warranty claims stored on a supercomputer. Respondent's Exhibit QQ.

Even assuming the warranty database contains all of the information Plaintiffs contend, which Ford disputes, searching the database would not minimize Ford's burden. This is because the database only contains information from 1991 to the present, and all the vehicles at issue predate the information contained in the database. As Plaintiffs admit in their brief, only one of the eight Ford vehicles that the Dietikers owned was after model year 1991 (a 1993 Ford F-150), and the vehicle is not at issue because Mr. Dietiker did not change the brakes on it. See Respondent's Brief, at 13. The remaining seven vehicles (a 1959 English Ford Perfect, 1963 Ford Fairlane wagon, 1968 Ford Cortina, 1973 Ford Torino wagon, 1979 Ford Fairmont wagon, 1982 Ford F-150 truck, and 1988 Mustang convertible), all predate the creation of the database. As such, the information alleged to exist in the database would not be relevant in any way to the vehicles at issue, and searching the database would not minimize the burden on Ford.

Furthermore, the affidavit entirely misses the point of the discovery requests. Plaintiffs are not simply asking for the part number, or for that matter a list, of asbestos-containing products or even brake products. Instead, Plaintiffs are asking for all information and documents regarding every asbestos-containing product ever sold by Ford, including “[a]ll catalogs, brochures, sales literature, pamphlets, loose-leaf binders, or inventory data sheets” and “[a]ll records, correspondence, invoices, contracts, memoranda, billings and other documents” regarding every product ever sold containing asbestos. Id. p. 213. Thus, neither the lists of products nor the affidavit at exhibit QQ provides support for the proposition that Plaintiffs’ requests involve only minimal burden.

Nor does exhibit MM support Plaintiffs’ contentions. In that case, William R. Taylor, et al. v. ABEX Corp., et al., Case No. CV-404331 (Court of Cuyahoga County, Ohio), the plaintiffs requested similar documents and information for every “asbestos-containing product manufactured, sold, purchased or distributed by you since 1928.” Respondent’s Exhibit MM, at 394. Consistent with its response in this State Court Action, Ford limited its response to friction components. In fact, Ford made nearly identical points in its response:

- “Ford believes asbestos-containing friction products were incorporated into its vehicles since it began selling mass production vehicles in the early 1900s;”
- “Ford states that the use of asbestos-containing friction products were phased out of the majority of Ford’s vehicles [and by] 1993, the only

vehicles in which asbestos-containing friction products were still used were low-volume limousine applications.”

Id. at 394-97. Thus, while it is true that Ford has responded to similar overly broad and unduly burdensome discovery in other cases, Ford has consistently limited its responses to asbestos friction components; Ford has not answered discovery with respect to all asbestos-containing components that were ever used in any vehicle or sold as replacement parts because to do so is unduly burdensome.

Finally, even Plaintiffs’ counsel has implicitly recognized the burden of this discovery. In the case styled Robert Johnson, et al. v. DaimlerChrysler Corp., et al., Case No. 04CV219314 (16<sup>th</sup> Judicial Circuit, Jackson Co.), the plaintiffs, represented by the same counsel as counsel representing Plaintiffs in this case (Steven Crick), requested documents and information regarding asbestos-containing products. Only in Johnson, the requests were limited to brake components, including brake linings and assemblies for an eleven year period. Respondent’s Exhibit PP, at 440-42. Thus, even Plaintiffs’ counsel recognizes that requesting all documents regarding unrelated products for the entire history of Ford is overly broad and burdensome.

**B. Ford Did Not Need to Seek a Protective Order.**

Plaintiffs’ final argument in opposition to prohibition relief is that Ford should have sought a protective order. Plaintiffs cite no authority for this proposition. Indeed, caselaw is to the contrary. In State ex rel. Lester E. Cox Medical Centers v. Darnold, 944 S.W.2d 213 (Mo. banc 1997), this court granted prohibition relief prohibiting discovery without requiring the party to file a motion for protective order.

The Court simply noted that the aggrieved party “objected to the interrogatories,” the Respondent overruled the objections and the aggrieved party sought prohibition relief from this Court. Id. at 214.

Furthermore, Plaintiffs freely admit that the issues raised in this proceeding were fully briefed before the trial court. Plaintiffs state that “Relator objected to the discovery and its objections were fully briefed and argued.” Respondent’s Brief, at 4. Accordingly, Ford did not need to seek a protective order to pursue its justiciable claims arising from Respondent’s Discovery Orders.

The law, as established by this Court in Messina and further explained in Dalton and Kawasaki, is simple and clear. Respondent did not follow the law. Therefore, this Court should make absolute its preliminary writ of prohibition prohibiting Respondent from compelling discovery that is grossly overbroad and burdensome.

### **CONCLUSION**

For the foregoing reasons, as well as those set forth in Relator’s initial brief, this Court should make its Preliminary Writ of Prohibition absolute, vacate Respondent’s September 6 and 7, 2004, discovery orders and limit discovery to those matters not already discovered and that are relevant to the issues in the case.

Respectfully submitted,

**BRYAN CAVE LLP**

By: \_\_\_\_\_

Jeremiah J. Morgan      Mo. Bar #50387

Ann K. Covington      Mo. Bar #26619

3500 One Kansas City Place

1200 Main Street

Kansas City, Missouri 64105

Telephone: (816) 374-3200

Facsimile: (816) 374-3300

and

Thomas E. Rice, Jr.      Mo. Bar #29946

Gregory John Pals      Mo. Bar #48820

**BAKER STERCHI COWDEN & RICE,  
L.L.C.**

Crown Center

2400 Pershing Road, Suite 500

Kansas City, MO 64108

Telephone:      (816) 471-2121

Facsimile:      (816) 472-0288

ATTORNEYS FOR RELATOR  
FORD MOTOR COMPANY

## **CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Missouri Rule of Civil Procedure 84.06(c), that the Reply Brief for Relator Ford Motor Company in the above-captioned appeal complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Times New Roman font and contains 5,022 words, from the Table of Contents through the Conclusion, as determined by the Microsoft Word counting system. I also certify that the diskettes of the brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

\_\_\_\_\_  
Attorney for Relator

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was mailed via U.S. Mail, on this 23rd day of February, 2005, to the following:

The Honorable W. Stephen Nixon  
16th Judicial Circuit  
415 E. 12th Street  
Kansas City, Missouri 64106  
(816) 435-4711

**RESPONDENT**

Kenneth B. McClain  
Steven E. Crick  
Scott A. Britton-Mehlich  
221 West Lexington  
Suite 400, P.O. Box 900  
Independence, MO 64051  
(816) 836-8966

John M. Klamann  
KLAMANN & HUBBARD, P.A.  
7101 College Boulevard  
Suite 120  
Overland Park, KS 66210  
(913) 327-7800

**ATTORNEYS FOR PLAINTIFFS**

---

Attorney for Relator