

No. SC83933

IN THE

SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* FORD MOTOR COMPANY,
Relator,

v.

THE HONORABLE EDITH L. MESSINA
Circuit Court of Jackson County, Missouri, at Kansas City
Respondent

RESPONDENT'S BRIEF

THE HONORABLE EDITH L. MESSINA
Circuit Court of Jackson County,
Missouri, at Kansas City
415 E. 12th Street
Kansas City, Missouri 64106

RESPONDENT

4741 South Arrowhead Drive, Suite B
Independence, Missouri 64055
T: (816) 795-7500
F: (816) 795-7881

Randy W. James
Aaron N. Woods
Lisa C. Beckley
RISJORD & JAMES, P.C.
218 N.E. Tudor Rd.
Lee's Summit, Missouri 64086
T: (816) 554-1500
F: (816) 554-1616

ATTORNEYS FOR
PLAINTIFFS CHURCH

Douglas R. Horn
THE HORN LAW FIRM

TABLE OF CONTENTS

TABLE OF AUTHORITIES 6

 Cases 6

 Other Authorities 10

JURISDICTIONAL STATEMENT 11

STATEMENT OF FACTS AND PROCEDURAL HISTORY 12

POINTS RELIED ON 16

ARGUMENT 19

 I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION OF RELATOR’S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR’S MOTION FOR RECONSIDERATION, BECAUSE PROHIBITION IS AN EXTRAORDINARY REMEDY THAT IS INAPPROPRIATE IN THIS CASE UNDER THE STANDARDS ESTABLISHED BY THIS COURT. 19

 A. Relator Has Failed to Prove That Respondent’s Order Exceeded Her Jurisdiction or Constituted an Abuse of Discretion. 21

B. Relator Has Failed to Prove That it Will Suffer “Absolute Irreparable Harm” or “Considerable Hardship and Expense” as a Consequence of Respondent’s Decision. 24

C. The Missouri Cases Relied upon by Relator Are Distinguishable and Do Not Support a Writ of Prohibition in this Case. 28

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR’S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR’S MOTION FOR RECONSIDERATION, BECAUSE THE FACTS OF THIS CASE SHOW THAT THE WITNESSES POSSESS KNOWLEDGE SUFFICIENT TO JUSTIFY THE TAKING OF THEIR DEPOSITIONS SUCH THAT RESPONDENT PROPERLY EXERCISED HER DISCRETION. 31

A. The Adoption of an Inflexible Standard Is Not a Proper Substitute for the Exercise of Sound Judicial Discretion. 31

B. The Subject Matter of the Depositions of Messrs. Nasser, Rintamaki, Baughman and Grush Is Relevant and Discoverable. 34

C. Plaintiffs Made a Sufficient Showing That the Information Possessed by Jacques Nasser, Ford’s Chief Executive Officer, Justifies His Deposition. 35

D. Plaintiffs Made a Sufficient Showing That the Information Possessed by John Rintamaki, Chief of Staff and Head of Ford’s “Tire Team”, Justifies His Deposition. 43

E. Plaintiffs Made a Sufficient Showing That the Information Possessed by Tom Baughman, Ford’s Engineering Director for North America Truck, Justifies His Deposition. 44

F. Plaintiffs Made a Sufficient Showing That the Information Possessed by Ernest Grush, Corporate Technical Specialist, Justifies His Deposition. 46

G. The Affidavits of Messrs. Nasser, Rintamaki and Baughman Submitted by Relator Should Not Excuse Them from Testifying in this Case. 46

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING

RELATOR’S MOTION FOR PROTECTIVE ORDER AND/OR
MOTION TO QUASH THE DEPOSITION NOTICE OF
RELATOR’S CEO AND OTHER HIGH RANKING
OFFICIALS AND DENYING RELATOR’S MOTION FOR
RECONSIDERATION, BECAUSE SOUND PUBLIC POLICY
FAVORS DENIAL OF THE RULE ADVOCATED BY
RELATOR. 49

A. Relator’s Claims of Burden, Harassment and Annoyance
Are Unfounded. 49

B. Requiring Discovery Through “Less Intrusive Means” Will
Give Corporations an Unfair Advantage over Individual
Citizens. 52

C. Adoption of the Rule Advocated by Relator Would Usurp
the Exercise of Sound Judicial Discretion and Would
Likely Increase the Burden on Missouri’s Appellate
Courts. 54

CONCLUSION 59

CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(C) 61

TABLE OF AUTHORITIES

Cases

<i>A.I.A. Holdings, S.A. v. Lehman Brothers, Inc.</i> , 2000 WL 1538003 (S.D.N.Y. 2000)	56
<i>AMR Corp. v. Enlow</i> , 926 S.W.2d 640 (Tex. App.-Fort Worth 1996)	58
<i>Armstrong Cork Company v. Niagra Mohawk Power Corporation</i> , 16 F.R.D. 389 (S.D.N.Y. 1954)	55
<i>Arth v. Director of Revenue</i> , 722 S.W.2d 606 (Mo. banc 1987)	28
<i>Billingsley v. Ford Motor Company, et al.</i> , In the Circuit Court of Polk County, Missouri, Case No. CV795-42CC	25
<i>Binkley v. Palmer</i> , 10 S.W.3d 166 (Mo. Ct. App. 1999)	29, 30, 59
<i>Boales v. Brighton Builders, Inc.</i> , 29 S.W.3d 159 (Tex. App.-Hous. 2000)	33, 42
<i>Crown Central Petroleum Corp. v. Garcia</i> , 904 S.W.2d 125 (Tex. 1995)	31-34, 47, 52, 57, 58
<i>CSR Ltd. v. Link</i> , 925 S.W.2d 591 (Tex. 1996)	58
<i>Enercor, Inc. v. Pennzoil Gas Marketing Co.</i> , 2001 WL 754773 (Tex. App.-Hous. 2001)	58
<i>Ferrellgas, L.P. v. Williamson</i> , 24 S.W.3d 171 (Mo. Ct. App. 2000)	25
<i>Fogelbach v. Director of Revenue</i> , 731 S.W.2d 512 (Mo. Ct. App. 1987)	28-30, 59

<i>Frasier v. Twentieth Century Fox Film Corporation,</i>	
22 F.R.D. 194 (D.Neb. 1958)	50
<i>Frozen Food Exp. Industries, Inc. v. Goodwin,</i>	
921 S.W.2d 547 (Tex. App.-Beaumont 1996)	58
<i>Giddens v. Kansas City Southern Railway Co.,</i>	
29 S.W.3d 813 (Mo. banc 2000)	22, 23
<i>Goff v. Ford Motor Company, et al.,</i> In the Circuit Court of	
Jackson County, Missouri, at Kansas City, Case No. 00CV207340	25
<i>Hocker v. American Family Mutual Insurance Company, et al.,</i>	
In the Circuit Court of Jackson County, Missouri, at Kansas City,	
Case No. 98-CV-5290	56
<i>Ierardi v. Lorillard, Inc.,</i> 1991 WL 158911 (E.D.Pa. 1991)	48
<i>In Re Alcatel U.S.A., Inc.,</i> 11 S.W.3d 173 (Tex. 2000)	32, 58
<i>In re Bunch,</i> 1998 WL 851123 (Tex. App.-Dallas 1998)	58
<i>In re Columbia Rio Grande Healthcare, L.P.,</i>	
977 S.W.2d 433 (Tex. App.-Corpus Christi 1998)	58
<i>In re Daisy Mfg. Co., Inc.,</i> 17 S.W.3d 654 (Tex. 2000)	58
<i>In re Daisy Mfg. Co., Inc.,</i>	
976 S.W.2d 327 (Tex. App.-Corpus Christi 1998)	58
<i>In re El Paso Healthcare System,</i>	
969 S.W.2d 68 (Tex. App.-El Paso 1998)	58

<i>In re George</i> , 28 S.W.3d 511 (Tex. 2000)	58
<i>In re Pierce</i> , 2001 WL 246877 (Tex. App.-Dallas 2001)	58
<i>In re Sanchez</i> , 991 S.W.2d 507 (Tex. App.-Corpus Christi 1999)	58
<i>In re Smith Barney, Inc.</i> , 975 S.W.2d 593 (Tex. 1998)	58
<i>Letz, et al. v. Turbomeca Engine Corporation, et al.</i> ,	
In the Circuit Court of Jackson County, Missouri, at Kansas City,	
Case Nos. CV93-19156, CV93-19491, CV93-24644, and CV93-23578	
.....	56
<i>Naftchi v. New York University Medical Center</i> ,	
172 F.R.D. 130 (S.D.N.Y. 1997)	47, 56
<i>Neuls v. Peeples</i> , 914 S.W.2d 194 (Tex. App.-San Antonio 1995)	58
<i>Nueces County v. De Pena</i> ,	
953 S.W.2d 835 (Tex. App.-Corpus Christi 1997)	58
<i>Overseas Exchange Corporation v. Inwood Motors, Inc.</i> ,	
20 F.R.D. 228 (S.D.N.Y. 1956)	48
<i>Parkhurst v. Kling</i> , 266 F.Supp. 780 (E.D.Pa. 1967)	48
<i>Simon v. Bridewell</i> ,	
950 S.W.2d 439 (Tex. App.-Waco 1997, no writ)	33, 42, 58
<i>Six West Retail Acquisition, Inc. v. Sony Theater Management Corporation</i> ,	
____ F.R.D. ____, 2001 WL 1033571 (S.D.N.Y. 2001)	56
<i>Spadmark, Inc. v. Federated Department Stores, Inc.</i> ,	
176 F.R.D. 116 (S.D.N.Y. 1997)	56

<i>Spurgeon v. Ford</i> , In the Circuit Court of Jackson County, Missouri, at Independence, Case No. 00-CV-211611	56
<i>State ex rel. Crowden v. Dandurand</i> , 970 S.W.2d 340 (Mo. banc 1998)	21
<i>State ex rel. Cummings v. Witthaus</i> , 358 Mo. 1088, 219 S.W.2d 383 (Mo. banc 1949)	20
<i>State ex rel. Faith Hospital v. Enright</i> , 706 S.W.2d 852 (Mo. banc 1986)	25, 26
<i>State ex rel. Ford Motor Company v. Westbrooke</i> , 12 S.W.3d 386 (Mo. Ct. App. 2000)	20
<i>State ex rel. Health Midwest Development Group, Inc. v. Daugherty</i> , 965 S.W.2d 841 (Mo. banc 1998)	20
<i>State ex rel. Noranda Aluminum, Inc. v. Rains</i> , 706 S.W.2d 861 (Mo. banc 1986)	19, 21, 24, 26, 27, 30
<i>State ex rel. Norman v. Dalton</i> , 872 S.W.2d 888 (Mo. Ct. App. 1994)	27
<i>State ex rel. Peabody Coal Co. v. Clark</i> , 863 S.W.2d 604 (Mo. banc 1993)	25
<i>State ex rel. Plank v. Koehr</i> , 831 S.W.2d 926 (Mo. banc 1992)	25, 47, 53, 54

State ex rel. Riverside Joint Venture v. Missouri Gaming Commission,

969 S.W.2d 218 (Mo. banc 1998) 19, 24, 26

State ex rel. Webster v. Lehdorff Geneva, Inc.,

744 S.W.2d 801 (Mo. banc 1988) 22

Vinzant, et al. v. Waste Management of Kansas, Inc., et al.,

In the Circuit Court of Jackson County, Missouri, at Kansas City,

Case No. CV96-8863 56

Other Authorities

Deposition Dilemmas: Vexatious Scheduling and Errata Sheets,

12 Geo. J. Legal Ethics 1 (1998). 57

Effectively Defending High-Level Corporate Officials,

37-AUG Ariz. Att’y 12, 15, 16 (2001) 54

Rule 57.03(b)(4), Missouri Rules of Civil Procedure 52, 53

JURISDICTIONAL STATEMENT

Respondent agrees with Relator that this Court has jurisdiction in this proceeding but that the appropriate provision of the Missouri Constitution is Article 5, §4(1), not Article 5, §3 as cited by Relator.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about June 28, 1997, plaintiffs in the underlying action were traveling home to the Kansas City area northbound on Interstate 35 near Marietta, Oklahoma, when the right rear tire on their Ford Bronco II experienced a sudden and catastrophic tread separation that caused the vehicle to go out of control and ultimately roll over multiple times, resulting in the ejection of Shondel Church, Jesse Church and Shon Aaron Church from the vehicle. Plaintiffs filed suit against Relator Ford Motor Company (“Ford”) and Continental General Tire Company, the manufacturer of the tire, alleging that the Ford Bronco II in which plaintiffs were traveling was defective and unreasonably dangerous in design because it has the propensity to roll over catastrophically under intended, anticipated and foreseeable circumstances of operation including, but not limited to, a sudden and catastrophic tread separation of one of the rear tires. Appendix at 3 (A.3) Plaintiffs also allege that the subject tire, a General GT52S which was original equipment on the Bronco II, was defective in that it had the propensity to experience a sudden and catastrophic tread separation while in use. A.4. Plaintiffs allege that Ford was liable based on the defective design and sale of the Bronco II, its failure to warn and instruct regarding the hazards of the Bronco II, and its sale of the defective GT52S tire. A.3-4. Plaintiffs also allege that Ford’s conduct in these particulars makes it liable for punitive damages. A.6.

On July 5, 2001, plaintiffs noticed the depositions of several key Ford employees to commence on August 6, 2001: Jacques Nasser, Chief Executive Officer; Tom Baughman,

Ford's Engineering Director for North America Truck; Ernest Grush, Corporate Technical Specialist; and John Rintamaki, Chief of Staff and head of Ford's "Tire Team".¹ A.7-9.

On July 27, 2001, Ford filed a Motion for Protective Order And/Or Motion to Quash Plaintiffs' Notice to Take Videotaped Depositions relating to all of the individuals above. A.545-547. Despite ample notice, Ford waited until little more than a week before the scheduled depositions, twenty-two days after the notice was served, to file its Motion for Protective Order. While Ford requested a hearing on its motion, it apparently took no steps to secure a hearing date. Immediately upon receipt of the motion, plaintiffs' counsel contacted the Respondent trial court and was able to obtain a hearing date on August 3, 2001, just three days before the noticed depositions were scheduled to begin. Even with the delay, Ford failed to include with its motion affidavits from the designated individuals describing their professed lack of knowledge of relevant subject matters until August 1, 2001. A.526-527.

On August 3, 2001, Respondent conducted a lengthy hearing on Ford's motion, having received and considered the extensive submissions of the parties. A.15-328. Throughout the hearing, Respondent interjected numerous times to ask questions both for clarification and to test the parties' positions. A.242-298. At the conclusion of those arguments, Respondent denied Ford's Motion and ordered that the depositions of Jacques Nasser, Tom Baughman,

¹In March 2001, Plaintiffs asked Ford about the availability of Messrs. Nasser and Grush, among other witnesses. A.10-12. Ford did not respond. On July 16, 2001, plaintiffs offered to cooperate in the scheduling of the noticed depositions if Ford would agree to produce the deponents. A.13-14.

Ernest Grush, and John Rintamaki would go forward during the week of August 6, 2001, as originally noticed by plaintiffs. A.329. Even though the deposition notice called for the deponents to appear for deposition in the Kansas City area, plaintiffs agreed at Respondent's suggestion to rearrange the scheduling of the depositions to accommodate the deponents' schedules and to conduct the depositions near Ford's headquarters in Dearborn, Michigan. A.298-300. Respondent also considered and declined to grant Ford's request to establish a fixed time limit on the depositions because they were noticed in "fairly quick succession" and not for multiple days. A.286-289. Mr. Nasser was scheduled for only one day and two of the others were scheduled for the following day. A.7. Respondent also denied Ford's oral motion for a stay of the Court's Order based on the fact that Ford waited until the eve of the depositions to seek a protective order and because of the impending trial date in October, 2001. A.277-280.

Despite being ordered to go forward with the depositions, Ford's counsel notified plaintiffs' counsel late in the afternoon of August 3, 2001 that Ford would not produce the witnesses. A.330-331. At the same time, Ford filed a Motion for Reconsideration with Respondent which plaintiffs opposed. A.332-511. On August 17, 2001, Respondent denied Ford's Motion for Reconsideration. A.512. On the same day, Ford filed its Petition for Writ of Prohibition and/or Mandamus with the Missouri Court of Appeals for the Western District. Relator's Brief at 9.

On August 20, 2001, the Western District Court of Appeals issued an Order requiring Respondent to file suggestions in opposition to Ford's Petition on or before Monday, August

27, 2001. A.548-549. After considering the submissions of the parties, the Court of Appeals denied Ford's Petition for Writ of Prohibition on September 6, 2001. A.550.

On September 10, 2001, Ford filed a Petition for Writ of Prohibition and/or Mandamus with this Court. On the same day, counsel for Ford wrote to counsel for plaintiffs and offered to produce Messrs. Nasser, Rintamaki, Baughman and Grush for half day depositions to be taken by plaintiffs in Dearborn, Michigan. A.551. On September 25, 2001, this Court issued a Preliminary Writ in Prohibition and established a briefing and oral argument schedule that necessitated the postponement of the trial of this case which was specially set for October 15, 2001.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION OF RELATOR'S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR'S MOTION FOR RECONSIDERATION, BECAUSE PROHIBITION IS AN EXTRAORDINARY REMEDY THAT IS INAPPROPRIATE IN THIS CASE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

State ex rel. Riverside Joint Venture v. Missouri Gaming Commission,

969 S.W.2d 218 (Mo. banc 1998)

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986)

State ex rel. Health Midwest Development Group, Inc. v. Daugherty,

965 S.W.2d 841 (Mo. banc 1998)

Giddens v. Kansas City Southern Railway Co., 29 S.W.3d 813 (Mo. banc 2000).

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR’S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR’S MOTION FOR RECONSIDERATION, BECAUSE THE FACTS OF THIS CASE SHOW THAT THE WITNESSES POSSESS KNOWLEDGE SUFFICIENT TO JUSTIFY THE TAKING OF THEIR DEPOSITIONS SUCH THAT RESPONDENT PROPERLY EXERCISED HER DISCRETION.

In Re Alcatel U.S.A., Inc., 11 S.W.3d 173, (Tex. 2000)

Boales v. Brighton Builders, Inc., 29 S.W.3d 159 (Tex. App.-Hous. 2000)

Simon v. Bridewell, 950 S.W.2d 439 (Tex. App.-Waco 1997, no writ)

Naftchi v. New York University Medical Center, 172 F.R.D. 130 (S.D.N.Y. 1997)

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR'S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR'S MOTION FOR RECONSIDERATION, BECAUSE SOUND PUBLIC POLICY FAVORS DENIAL OF THE RULE ADVOCATED BY RELATOR.

State ex rel. Plank v. Koehr, 831 S.W.2d 926 (Mo. banc 1992)

Six West Retail Acquisition, Inc. v. Sony Theater Management Corporation,

___ F.R.D. ___, 2001 WL 1033571 (S.D.N.Y. 2001)

Spadmark, Inc. v. Federated Department Stores, Inc.,

176 F.R.D. 116 (S.D.N.Y. 1997)

Frasier v. Twentieth Century Fox Film Corporation, 22 F.R.D. 194 (D.Neb. 1958)

Rule 57.03(b)(4), Missouri Rules of Civil Procedure

ARGUMENT

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION OF RELATOR'S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR'S MOTION FOR RECONSIDERATION, BECAUSE PROHIBITION IS AN EXTRAORDINARY REMEDY THAT IS INAPPROPRIATE IN THIS CASE UNDER THE STANDARDS ESTABLISHED BY THIS COURT.

The standard of review cited by Ford as applicable to this case, while not inaccurate, grossly oversimplifies the issue and understates the burden Ford must carry in order to obtain extraordinary relief from this Court. Ford's citation of authority completely ignores the line of cases in which this Court established the very limited circumstances under which a writ of prohibition will be granted. In *State ex rel. Riverside Joint Venture v. Missouri Gaming Commission*, 969 S.W.2d 218 (Mo. banc 1998), this Court reaffirmed the rule first announced by the Court in *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-863 (Mo. banc 1986). The *State ex rel. Riverside* Court stated the rule as follows:

Prohibition is a powerful writ, divesting the body against whom it is directed to cease further activities. For this reason we have limited the use of prohibition to three, fairly rare, categories of cases. *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. banc 1986). First, prohibition lies where a judicial or quasi-judicial body lacks personal jurisdiction over a party or lacks jurisdiction over

the subject matter the body is asked to adjudicate. Second, prohibition is appropriate where a lower tribunal lacks the power to act as contemplated. Third, prohibition will issue in those very limited situations when an “absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court’s order,” *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983), or where there is an important question of law decided erroneously that would otherwise escape review on appeal *and* the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. *Noranda*, 706 S.W.2d at 862-3; *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994).

969 S.W.2d at 221. [Emphasis in original.]

It is Ford’s burden to prove its entitlement to prohibition under these narrow standards. *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998), *State ex rel. Cummings v. Witthaus*, 358 Mo. 1088, 219 S.W.2d 383, 386 (Mo. banc 1949). As Ford should be well aware, its burden includes overcoming the presumption of right action in favor of the Respondent trial court’s ruling. *State ex rel. Ford Motor Company v. Westbrooke*, 12 S.W.3d 386, 391 (Mo. Ct. App. 2000). As Respondent demonstrates below, Ford has not and cannot sustain the heavy burden of entitlement to extraordinary relief in this case.

A. Relator Has Failed to Prove That Respondent’s Order Exceeded Her Jurisdiction or Constituted an Abuse of Discretion.

Ford argues that Respondent exceeded her jurisdiction by abusing her judicial discretion in (1) not requiring plaintiffs to obtain discovery through other “less intrusive” means and (2) not requiring that the deponents have any superior or unique knowledge. This argument roughly parrots the second category of the *Noranda* rule, but does not articulate the reason why these conclusory allegations, even if true, justify prohibition. 706 S.W.2d at 862.² To the contrary, a detailed examination of the applicable legal requirements leads to the opposite result.

It is well settled that Missouri trial courts “have broad discretion in administering rules of discovery, which [the appellate courts] will not disturb absent an abuse of discretion.” *State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 353 (Mo. banc 1998). Moreover, this Court has stated that:

Judicial discretion is abused when a trial court’s ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

State ex rel. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 804 (Mo. banc 1988); *Giddens v. Kansas City Southern Railway Co.*, 29 S.W.3d 813, 819 (Mo. banc 2000). This standard defines the scope of the presumption of correctness afforded the trial court’s rulings

²Ford does not claim that Respondent lacked jurisdiction to entertain and rule upon its Motion for Protective Order. Hence, the first category of the *Noranda* rule is inapplicable here.

on discovery matters and is consistent with the very limited circumstances in which a writ of prohibition is appropriate. Ford's arguments simply do not rise to the heights required by Missouri law.

Even though Ford would have the Court believe that Respondent's Order has earthshattering implications, one must not lose sight of the fact that Respondent merely ordered the depositions of four individuals to go forward; an Order which was not entered into lightly. Before denying Ford's Motion for Protective Order, Respondent received extensive briefing from both sides, including a submission of substantial evidence from plaintiffs justifying their desire to take the depositions. Respondent conducted a detailed hearing and considered the arguments, authorities, and evidence presented by counsel. Respondent also received and considered additional extensive briefing from the parties on Ford's Motion for Reconsideration. All of these materials have been submitted as appendices to the submissions to the Missouri Court of Appeals for the Western District and to this Court in this proceeding. Therefore, even though it is clear that Ford does not like Respondent's ruling, dissatisfaction with the trial court's order does not demonstrate an abuse of discretion. There is nothing in the record that remotely approaches proof that Respondent's "ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration". *Giddens*, 29 S.W.3d at 819.

The circumstances of this case also prove that reasonable persons can and have differed with Ford's position in this case such that "it cannot be said that the trial court abused its discretion." *Id.* At this juncture, this issue has been carefully examined on its merits by no

less than three jurists, Respondent and Judges Newton and Lowenstein of the Western District Court of Appeals. It is important to note that prior to denying Ford's Writ of Prohibition, the Western District required Respondent to file suggestions in opposition. Those suggestions consisted of a statement of facts and arguments and authorities accompanied by an appendix of supporting materials consisting of 544 pages. Consequently, even though Respondent believes that this Court should agree with the propriety of her ruling, the fact that this issue has been carefully considered at the trial and appellate levels and reasonable persons have, in fact, differed from the position Ford is urging on this Court, precludes a finding that Respondent abused her discretion. As such, the only appropriate ruling under the circumstances of this case is to defer to Respondent's ruling to deny Ford's Petition for Prohibition.

B. Relator Has Failed to Prove That it Will Suffer “Absolute Irreparable Harm” or “Considerable Hardship and Expense” as a Consequence of Respondent’s Decision.

The third category of the *Noranda* rule allows prohibition to issue in the very limited situation where an “absolute irreparable harm may come to a litigant” if relief is not granted or “where there is an important question of law decided erroneously that would otherwise escape review on appeal and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.” *State ex rel. Riverside*, 969 S.W.2d at 221, *State ex rel. Noranda*, 706 S.W.2d at 862-63. While Ford does not make a specific claim of irreparable harm or hardship under the third category of *Noranda*, both it and *Amicus Curiae* Product Liability Advisory Council, Inc. (“PLAC”) devote much of their attention to gloom

predictions of burden and harassment should Respondent's Order be upheld. Examined in conjunction with the criteria of the *Noranda* rule, however, these claims do not justify prohibition.

Ford has not demonstrated that it would suffer any irreparable harm should the deponents be required to testify. In the short term, the worst possible result of Respondent's Order is that the witnesses testify in accordance with the notice served by plaintiffs which calls for depositions lasting at the longest, a single day. In the long term, production of the deponents for deposition in Bronco II litigation now will likely lessen the burden on Ford and the witnesses in the future because, contrary to Ford's argument, the existence of those depositions will factor into a subsequent trial court's discretion as to whether or not the witnesses should be required to testify in the same kind of litigation again, as is more fully discussed in Section III, A. *infra*.³

This situation contrasts sharply with cases in which the Missouri courts have issued writs of prohibition based on a claim of irreparable harm. By and large, the courts have found

³In an effort to further lessen the burden on Ford and its witnesses, the depositions were cross-noticed in two other Missouri Bronco II rollover cases, *Goff v. Ford Motor Company, et al.*, In the Circuit Court of Jackson County, Missouri, at Kansas City, Case No. 00CV207340, and *Billingsley v. Ford Motor Company, et al.*, In the Circuit Court of Polk County, Missouri, Case No. CV795-42CC. The parties in those cases agreed to allow Ford's Motion for Protective Order and/or to Quash to be decided in this case and have intervened as *Amicus Curiae* before this Court.

irreparable harm sufficient to justify prohibition in cases where the trial court denies discovery in contravention of Missouri's liberal discovery rules, which is inapplicable here, or where an order allowing discovery would improperly compel the production of privileged information resulting in damage which could not be repaired on appeal. See, *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171 (Mo. Ct. App. 2000); *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992); *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608 (Mo. banc 1993); and *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852, 855 (Mo. banc 1986).

Ford has not demonstrated any absolute irreparable harm from the exercise of Respondent's broad discretion to order discovery in this case. It has not made, and cannot make any legitimate claim on a global basis that the discovery sought by plaintiffs is privileged such that once the "bell has been rung, its sound can neither be recalled nor subsequently silenced." *State ex rel. Faith Hospital*, 706 S.W.2d at 855. While it is true that once the subject depositions are taken, no subsequent action of an appellate court can erase their existence, clearly this is not the kind of "irreparable harm" that justifies prohibition.

As an extension of the "irreparable harm" category, the *Noranda* Court also held that prohibition was proper where there was an important question of law decided erroneously that would otherwise escape review on appeal *and* the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. *State ex rel. Noranda*, 706 S.W.2d at 862, 863; *State ex rel. Riverside*, 969 S.W.2d at 221. The facts of this case do not justify prohibition under this standard. First, regardless of how important this Court concludes

this question of law to be, Respondent's ruling is not erroneous. Second, irrespective of these issues, neither Ford nor its witnesses would suffer the considerable hardship or expense contemplated by the rule should the depositions go forward. In fact, Ford's efforts in resisting Respondent's Order have required far more time and expense on its behalf, as well as that of Respondent, plaintiffs, the Western District Court of Appeals, and this Court, than the depositions of the witnesses themselves would ever have caused.

One of the issues examined by the courts under the third category of the *Noranda* rule is whether deciding an issue on an extraordinary writ served "judicial economy". *State ex rel. Noranda*, 706 S.W.2d at 863; *State ex rel. Norman v. Dalton*, 872 S.W.2d 888, 892 (Mo. Ct. App. 1994). It can hardly be said that judicial economy has been served in this case. By the time this issue is decided by this Court, countless hours of legal and judicial time will have been spent purely on the issue of whether plaintiffs can take the subject depositions to begin with. Apparently, however, Ford believes that one day of Mr. Nasser's time is far more valuable than all of the combined judicial and legal time expended over the past four months and certain to be expended for many months to come.⁴ By contrast, if the depositions had been allowed to go forward, they would have long since been taken in the expeditious fashion advocated by plaintiffs and recognized by Respondent and Ford's relief would have taken the form of Respondent's evidentiary rulings at trial, a process in which she will ultimately engage

⁴During the preparation of this brief, Ford announced the termination of Jacques Nasser as Chief Executive Officer. A.553-555. This development would certainly seem to moot Ford's arguments about burden, annoyance and harassment as to Mr. Nasser.

in any event, and the assertion of any errors in those rulings in the course of the appeal that is also certain to come.

Nowhere is the transparency of Ford's claims of burden and hardship better revealed than in Ford's own offer to produce the subject witnesses for deposition. On the very same day that Ford petitioned this Court for extraordinary relief, it also offered to produce Messrs. Nasser, Rintamaki, Baughman and Grush for half day depositions each. A.551. So the only real issue between the parties prior to this Court granting a preliminary writ was whether Messrs. Nasser and Rintamaki would depose for one-half day or a full day. Yet, Ford persists in burdening the time and resources of the courts and plaintiffs with claims for relief that its own actions belie.

C. The Missouri Cases Relied upon by Relator Are Distinguishable and Do Not Support a Writ of Prohibition in this Case.

Ford's reliance on two decisions of the Missouri Court of Appeals for the Eastern District is misplaced. Both decisions are distinguishable and do not support Ford's request for extraordinary relief in this case.

In *Fogelbach v. Director of Revenue*, 731 S.W.2d 512 (Mo. Ct. App. 1987), Mr. Fogelbach was arrested for driving while intoxicated after which he received a suspended license. *Id.* at 513. After an administrative hearing upholding the suspension, Mr. Fogelbach applied for a trial *de novo* during which he sought the deposition of the Director of Revenue. *Id.* The Director of Revenue was not shown to have any knowledge about any issue relevant to Mr. Fogelbach's case. Relying on the decision of this Court in *Arth v. Director of Revenue*, 722 S.W.2d 606 (Mo. banc 1987), the Court of Appeals found that the Department of Revenue

“is not required to go to herculean lengths to respond to discovery, and that licensees cannot avoid the consequences of driving while intoxicated by overwhelming the department during discovery.” *Id.* The situation in *Fogelbach* differs substantially from the situation in this case where the deponents have been called upon to give testimony about issues of which they have personal knowledge and which are relevant to the Ford Motor Company’s standard of care and policies on product safety. Moreover, unlike *Fogelbach* where the Director of Revenue may be called upon to comment on a number of specific cases, there is every reason to believe that once Ford’s witnesses testify in this case, the burden on them to testify further in subsequent Bronco II rollover cases is lessened rather than increased. *See*, Section III A., *infra*.

The Court’s decision in *Binkley v. Palmer*, 10 S.W.3d 166 (Mo. Ct. App. 1999), is similarly inapplicable. There, plaintiffs were investors in a failed resort and golf course development at the Lake of the Ozarks. *Id.* at 167, 168. Arnold Palmer and his companies had contracted with the developers to design and manage the golf course. *Id.* at 168. After the development failed, plaintiffs sued Palmer and his companies alleging that they were partners or joint venturers with the now bankrupt developers. *Id.* at 168, 169. This was a key issue in the case. Palmer and his companies moved for summary judgment claiming that the uncontroverted evidence proved that they were not partners or joint venturers but merely contractors of the developers. *Id.* Plaintiffs sought a continuance of the trial court’s ruling on the motion for summary judgment and requested additional time to take the deposition of Mr. Palmer. *Id.* at 172. The trial court declined plaintiffs’ request based solely on plaintiffs’ failure to show “what additional relevant and material information supporting the existence of

a factual dispute they expected to obtain . . . as required by Rule 74.04(c)(2) [Missouri Rules of Civil Procedure].” *Id.* Because the affidavit submitted by plaintiffs in support of their motion “did not set out what evidence supporting the existence of a factual dispute would be adduced by such deposition,” the Court of Appeals held that the trial court did not abuse its discretion. *Id.* at 173. Therefore, the issue was whether the trial court abused its discretion in refusing to continue a summary judgment hearing in order to allow an additional deposition when plaintiffs failed to make the showing required under the rules. The decision neither addresses whether Mr. Palmer’s deposition would have been appropriate at an earlier stage of the litigation, nor holds that the trial court would have abused its discretion if it had decided to allow the requested discovery.

For these reasons, the *Fogelbach* and *Binkley* decisions are of no value in deciding the issue before the Court. More appropriately, this issue should be decided in conjunction with the criteria established by this Court in *State ex rel. Noranda*, and reaffirmed in subsequent decisions. Under those criteria, Ford has failed to carry the heavy burden of overcoming the presumption in favor of upholding Respondent’s ruling. Ford has proven neither that it will suffer any “absolute irreparable harm” nor that it would suffer “considerable hardship and expense” as a consequence of an erroneous decision. *State ex rel. Noranda*, 706 S.W.2d at 862, 863. For these reasons alone, therefore, Ford’s petition for extraordinary relief should be denied.

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR’S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR’S MOTION FOR RECONSIDERATION, BECAUSE THE FACTS OF THIS CASE SHOW THAT THE WITNESSES POSSESS KNOWLEDGE SUFFICIENT TO JUSTIFY THE TAKING OF THEIR DEPOSITIONS SUCH THAT RESPONDENT PROPERLY EXERCISED HER DISCRETION.

A. The Adoption of an Inflexible Standard Is Not a Proper Substitute for the Exercise of Sound Judicial Discretion.

Perhaps realizing the uphill battle it confronts in overturning the well-reasoned exercise of a trial court’s discretion, Ford advocates that this Court impose its will on that discretion by adopting relatively inflexible rules that define when upper level management employees can be deposed. Ford relies heavily on the decision of the Texas Supreme Court in *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995), to argue that this Court should require a party seeking to take the deposition of an upper level management employee “to attempt to obtain the discovery through less intrusive means and demonstrate that the ‘apex’ employee has unique or superior knowledge of discoverable information.” Relator’s Brief at 15. In making this argument, however, Ford seriously misstates the substance and effect of the *Crown Central* decision. Ford’s argument that parties seeking the deposition must both attempt to obtain the discovery through less intrusive means *and* demonstrate that the upper

level employee has unique or superior knowledge of discoverable information has been held by the Texas Supreme Court to be an improper application of the *Crown Central* rule. In *In Re Alcatel U.S.A., Inc.*, 11 S.W.3d 173, 176 (Tex. 2000), the court reviewed the decision of the Dallas Court of Appeals which interpreted and applied *Crown Central* much as Ford advocates here. Even though the court upheld the Court of Appeals' decision based on the facts of that case, it disagreed with the appellate court's phrasing of the *Crown Central* guidelines. The *Alcatel* court held,

The court of appeals stated: "A party requesting an apex deposition must show that the corporate official to be deposed has an [sic] unique or superior personal knowledge that is unavailable through less intrusive means." [Citation omitted] That phrasing of the guidelines improperly collapses the two discrete inquiries into a single test. Under *Crown Central*, if the party seeking the deposition has "arguably shown that the official has *any* unique *or* superior personal knowledge of discoverable information," the trial court should deny the motion for protection and the party seeking discovery should be entitled to take the apex depositions. *Crown Cent.*, 904 S.W.2d at 128. The party seeking the apex deposition is required to pursue less intrusive means of discovering the information *only* when that party cannot make the requisite showing concerning unique or superior knowledge.

Id. [Emphasis supplied]

This holding is consistent with other post *Crown Central* Texas appellate decisions holding that the "apex" doctrine does not apply where the deposition of a high ranking

corporate officer is sought because he has “first-hand knowledge of relevant facts.” *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.-Hous. 2000), *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex. App.-Waco 1997, no writ). Properly interpreted and applied, therefore, *Crown Central* does not impose upon the trial court a level of inquiry higher than that in which it would ordinarily engage when confronted with the issue at hand. Even though Missouri has not adopted a specific standard on this issue, Respondent engaged in extensive inquiry over whether Ford’s witnesses possessed any superior or unique knowledge of discoverable information, in large measure because Ford contested the depositions on these grounds in its Motion for Protective Order. Plaintiffs responded to Ford’s motion by demonstrating substantial evidence from outside sources indicating that the deponents possessed a quantity and quality of information that justified their depositions. Only after careful consideration of this information did Respondent exercise her discretion in denying Ford’s Motion for Protective Order and ordering the depositions to go forward.

To the extent that this Court desires to reexamine the facts considered by Respondent, the Court will find, at the very least, that Respondent acted well within her sound judicial discretion. Further, even though Ford has not provided this Court with a compelling reason to wade into this issue by adopting a specific standard, if the Court were inclined to do so using

the *Crown Central* decision as a guide, the outcome of this case would be the same.

B. The Subject Matter of the Depositions of Messrs. Nasser, Rintamaki, Baughman and Grush Is Relevant and Discoverable.

For the first time in these proceedings, Ford argues in its brief that the subject matter of the proposed depositions is irrelevant. Again, Ford's actions belie its words. One must seriously question why, if the subject matters of the depositions are irrelevant, Ford offered to produce the witnesses for deposition and why it continues to offer Mr. Grush and another employee on the "comparison between Ford's conduct in the Firestone tire recall situation and an alleged 'Bronco II/GT52S problem.'" A.551. Relator's Brief at 19. The answer, simply, is that the subject matter is relevant as Ford's counsel acknowledged in the August 3, 2001, hearing before Respondent when he said, "Your honor, the point is not do they know something, do they have relevant information. Clearly, they do." A.293. Counsel made this concession while arguing that even though the deponents possessed relevant knowledge, that knowledge was not unique. Of course, even under the standard advocated by Ford, uniqueness of knowledge in and of itself is not the point either. Rather, the question is whether the quality of the knowledge possessed by the deponent is sufficient to justify taking the deposition. The record considered by Respondent and the Western District Court of Appeals was more than sufficient to require Messrs. Nasser, Rintamaki, Baughman and Grush to testify.

C. Plaintiffs Made a Sufficient Showing That the Information Possessed by Jacques Nasser, Ford’s Chief Executive Officer, Justifies His Deposition.

Mr. Nasser has placed himself in the position of corporate spokesperson on safety issues in his public appearances before Congress and the media. In his press conference on May 22, 2001, Mr. Nasser detailed the research which has been undertaken by Ford to evaluate the hazard present in Firestone tires. A.43.⁵ In that press conference, Mr. Nasser made the following statements:

- “. . . our customers . . . look to us to ensure the safety of every element of their vehicles.” A.43
- “. . . we’ve kept our pledge to do everything possible to identify and to prevent tire problems.” A.47.
- “. . . every decision is going to be driven by the concern for our customers’ safety. And I’ll tell you what, we’ll make that call every second, every minute, every day, that it is presented to us.” A.47.
- “But when we think there’s an issue, we want to be able to talk about it and make sure that our customers’ safety is paramount.” A.50.
- “. . . if we’ve got problems that are of a historical nature like these issues, we admit them.” A.50.

⁵Plaintiffs have prepared a transcript of the webcast of Ford’s Press Conference available on the internet at www.media.ford.com. The transcript is attached hereto as A.42-52 along with a printout of the web page from which the webcast was accessed.

- When asked if Ford could deny culpability for the Firestone situation, Mr. Nasser replied: “I can’t say that. That would be a foolish statement for us to make because we feel responsibility for our customers. . . we feel responsible for every car and truck that we produce” A.51.

Mr. Nasser has made additional comments to the press and others concerning Ford’s position on safety matters, including the following:

- “We have teams that are working around the clock. Once we know exactly what the issues are, we will act because we feel a responsibility to our customers, for their safety, and for the safety of their families.” A.53.
- “I want all of our owners to know that there are two things that we never take lightly. Your safety and your trust.” A.54.
- “My purpose is not to finger point, but simply to tell you that, at each step, Ford took the initiative to uncover this problem and find a solution.” A.56.
- “Regardless, we all must prevent this from ever happening again.” A.57.
- “Our unequivocal commitment to our customers is the core value of Ford Motor Company.” A.60.
- “There are early warning signs about these tires, and we will not ignore them.”
A.60

In addition to speaking to the press about Ford’s position on safety issues, Mr. Nasser has testified before Congress, under oath, regarding the Firestone problem on multiple occasions.

Mr. Nasser has also given prepared statements to Congress. In doing so, Mr. Nasser has made the following representations to Congress:

- “Our customers count on Ford to place their safety and interests above all else – and we do.” A.67.⁶
- “We have also moved from seeking remedies for bad tires to identifying and eliminating faulty tires before the safety of customers is compromised.” A.66.
- “You know I go back to the initial discussion and we can peel this data piece by piece, we can look at temperature, we can look at peel strength, we can look at all different types of things, in the end we’ve got to look at field data. One particular element, an attribute of a tire doesn’t tell the complete story. . . . you must look at the overall performance and that’s what we did.” A.70
- “We don’t want to be sitting here talking about further tragic deaths and accidents and having esoteric discussions about the behavior of a vehicle when a tread separation occurs.” A.71
- “. . . in the final analysis all of the testing and all of the hypotheses doesn’t really mean anything unless you can correlate it to real world data, field data.” A.72

⁶Plaintiffs have prepared a transcript of the testimony available on the internet at <http://energycommerce.house.gov/107/hearings/06192001Hearing286/hearing.htm> by clicking on the audio link. The transcript is attached hereto as A.65-107 along with a printout of the web page from which the audio archive was accessed.

- When asked about what Ford should do if it found that other tires used on its vehicles have a safety concern or have a worse safety record than the Firestone tires, Nasser replied: “Mr. Chairman, we shouldn’t be waiting 30 days. If that data is accurate we should be acting in 30 minutes. . . . If you have it and it’s accurate, we’ll act on it.” A.78.
- “. . . we in the end said, look, we can continue to study this for many, many more months and face the situation of increasing tragedy on the road or we can act now in the interest and safety of our customers. And we decided to act. It was an easy, it wasn’t an easy decision, yet it was easy once we really got down to the priority of protecting our customers.” A.94.
- When asked “How can you justify replacing a tire that fails 15 out of a million with a tire that has a claims rate failure of 124 out of a million and are we going to be in another cycle of recall later on?” Nasser replied: “We can’t justify it if the facts are right.” A.109.
- “From now on, when we know of a safety action, so will the world, even if some customers are totally unaffected.” A.111.
- “I am driven to make sure that everything we do serves all customers, and clearly their safety is uppermost on our minds. For that reason, I am deeply troubled by the fact that there are defective tires on some of our vehicles.” A.124
- “Ford Motor Company is absolutely committed to doing the right thing to protect our customers and to maintain their trust.” A.124

- “Throughout this period, we have been guided by three principles. First, we will do whatever we can to guarantee our customers’ safety. We are committed not only to their physical safety, but also their feelings of security when driving our vehicles. Second, we are working hard to find and replace bad tires with good tires. That includes making sure that we understand the scope of the problem and finding the cause of the problem. Third, we will continue to be open about any data, statistics or information that we have, and will share anything new as soon as we know it.” A.124-125.
- “As I said, our top priority is to replace faulty tires as fast as possible.” A.126.
- “The safety, trust and peace of mind of our consumers are paramount to Ford Motor Company.” A.128.
- “For nearly 100 years, our Company has thrived because we have been responsive to our customer and our communities around the world. In all the actions we have taken, we have been guided first and foremost by our commitment to safety. We have also been driven by facts – real world performance data, as well as laboratory analyses.” A.132.
- “As indicated in Exhibits 10 and 11 other tire manufacturers such as Continental and Goodyear do not accept that tread separation is a normal or common occurrence that should be part of the vehicle design requirements.” A.136.
- “NHTSA’s data show [sic] that other tire manufacturers have demonstrated that it is possible with current technology to design tires that do not separate. We

know the best way to prevent accidents caused by tread separations is to prevent tread separations.” A.136.

- “In summary, we have been guided throughout by our number one priority, the safety of our customers.” A.136.
- “We feel this expenditure is necessary to protect the safety of those who have put their trust in us. And, we will make that decision any time that the safety of our customers is at risk.” A.137.

While Mr. Nasser’s remarks have been focused primarily on the recent Firestone tire situation, the similarities between the current safety issue and the Bronco II rollover/GT52S tread separation problem is uncanny. The fact that Ford denies responsibility for the Bronco II/GT52S problem stands in stark contrast to the public statements made by Mr. Nasser on behalf of Ford. Plaintiffs intend to fully explore the reasons for the contrasts between Ford’s behavior in the Explorer and Firestone situation and Ford’s conduct relative to the Bronco II and GT52S concerns.

Through his many public statements, Mr. Nasser has defined the corporate standard of care to which Ford claims to adhere in protecting its customers. These broad statements of policy are overarching and apply to the situation with the Bronco II and GT52S tires no less than they apply to the Explorer and Firestone tires. Plaintiffs intend to question Mr. Nasser about the standard of care publicized by Ford, as well as the company’s current attitude about safety and its vehicles. In addition, Mr. Nasser established and announced an “early warning system” in response to the Firestone tire situation wherein Ford would require its original equipment tire

suppliers to provide Ford with their internal tire defect adjustment data so that any defect trends could be identified sooner rather than later. A.111. Not only do plaintiffs anticipate proving that this “early warning system” could have been developed years ago so that the GT52S problem could have been identified and resolved, but that the establishment of such a program would have also identified and resolved the current safety issue before it became the debacle that it has become.

In addition to Mr. Nasser’s public statements regarding safety and Ford’s policies, plaintiffs intend to question him specifically about the Bronco II situation. Mr. Nasser has submitted affidavits in a number of Bronco II cases in recent years claiming to have no relevant knowledge, yet, in its 1999 10K submission to the SEC, Ford listed at least \$4.1 billion in unresolved Bronco II claims which represented the largest category of products liability litigation for Ford Motor Company in that year. A.142. Importantly, Mr. Nasser was CEO of Ford at that time and signed off on the 10K submission. A.143. Plaintiffs intend to question Mr. Nasser about his professed lack of knowledge of the situation despite the fact that the Bronco II continues to be one of the largest product liability concerns for his company. One must question strongly how many times the CEO can claim that he has no relevant knowledge about a significant product safety issue before he has a duty to educate himself. He has certainly undertaken that duty in the current Firestone situation and it is evidentiary that he claims he has failed to do so with the Bronco II/GT52S problem.

Because plaintiffs’ inquiry of Mr. Nasser surrounds statements he has personally made in the public domain, the origin of those statements and the reasons for and motivation behind

those statements, no one else but Mr. Nasser can answer plaintiffs' questions. Certainly, to the extent that plaintiffs seek to ask Mr. Nasser and the other witnesses about their personal statements, what they were thinking at the time the statements were made and the motivation for those statements, those witnesses have the "unique or superior" personal knowledge that Ford argues must be established in order to take their depositions. *See, Boales*, 29 S.W.3d at 168; *Simon*, 950 S.W.2d at 442.

D. Plaintiffs Made a Sufficient Showing That the Information Possessed by John Rintamaki, Chief of Staff and Head of Ford's "Tire Team", Justifies His Deposition.

John Rintamaki was appointed by Ford as the "person who since last summer has had company wide responsibility for leading the tire team at Ford." A.44. Ford's tire team, including Mr. Rintamaki as its head, launched its own evaluation of tires used on Ford's vehicles following Firestone's recall of certain defective tires. Acting under Mr. Rintamaki's supervision, the tire team "spent more than 100,000 person-hours analyzing real-world data, investigating accidents, testing tires and vehicles, running computer simulations and studying tire designs". A.132. Mr. Rintamaki's tire team analyzed three basic areas: field data, information shared with Ford by NHTSA, and technical analysis. A.44. They inspected failed tires from the field and performed tire laboratory testing, vehicle testing, computer modeling, and tire dynamometer or drum testing, among others. A.45. Mr. Rintamaki's tire team also compared the tires' performance with performance data for competitors, supplied by NHTSA, and determined that the Firestone tires performed more poorly than tires manufactured by

other companies. A.44. Based on this information, Ford ultimately decided to conduct its own recall of 13.1 million Firestone tires, including some of the tires which had been supplied as the original replacement tires in the Firestone recall. A.45. Importantly, Ford's analysis failed to identify a single specific defect in the Firestone tires, but concluded that they were defective based on their comparative performance, which led to the recall. A.47, 66. The same kind of failure analysis could and should have been performed by Ford on the GT52S and plaintiffs anticipate proving that the tests and analyses done to evaluate the defectiveness of the Firestone tires were feasible during the time when the GT52S was being manufactured and sold.

Mr. Rintamaki's corporate job history also demonstrates the likelihood that he has relevant knowledge. During time periods relevant to the production of the Bronco II, Mr. Rintamaki was acting as Associate Counsel for Ford in their corporate finance department and later as Assistant Secretary and Associate Counsel. In those positions, Mr. Rintamaki may well have been privy to information relating to the impact that Bronco II litigation had on Ford and the cost of certain programs relating to the Bronco II. In addition, in 1991, Mr. Rintamaki was appointed as Assistant Secretary and Assistant General Counsel - SEC and Corporate Matters. In this position, it would have been crucial for Mr. Rintamaki to learn of Ford's potential liabilities from current and future lawsuits.

E. Plaintiffs Made a Sufficient Showing That the Information Possessed by Tom Baughman, Ford's Engineering Director for North America Truck, Justifies His Deposition.

Tom Baughman, Ford's Engineering Director for North America Truck, possesses knowledge relating to the manner in which Ford analyzes and defines defective tires. Mr. Baughman analyzed the "real world data" which Ford relied on in conducting its own recall of 13.1 million Firestone Wilderness AT tires in June 2001. He explained that Ford relied on groups of claims and lawsuits in evaluating the safety of Firestone tires, the same type of information that has been available to Ford relating to GT52S tires for many years. A.534. Mr. Baughman also indicated that Ford considered the failure rates of tires and available adjustment data. A.534, 538. When Ford was provided with this adjustment data, Ford was able to complete an analysis of the data and identify the problem within only five days. A.538. From this data, Ford determined a rate of tread separation occurrences that it considered unacceptable and which justified a recall. Based on the same analysis, plaintiffs' evidence will be that the GT52S had a tread separation rate well over what Ford deems acceptable, but did nothing to rectify the situation.

Mr. Baughman was also deposed in the Explorer litigation and answered a number of questions relevant to issues in this case. In his deposition, Mr. Baughman discussed the impact of track width and wheel base on vehicle stability and handling. A.162-163. Mr. Baughman went on to describe the interaction between those features and the vehicle's yaw rate, explaining that the yaw rate is how quickly the vehicle tends to change direction from its

original path. A.164. Mr. Baughman also commented on Ford's decision to suspend J turn testing after one of its drivers was injured in the testing because the vehicle he was driving rolled over during the testing. A.165. Mr. Baughman later described Ford's J turn procedure and the requirements its vehicles must meet relative to the J turn procedure in detail. A.166-170. Mr. Baughman also commented on the impact of oversteer and understeer on vehicle handling and efforts Ford has made to ensure the vehicle stays under control. A.171-173. In addition, Mr. Baughman discussed the impact that passengers and cargo can have on the center of gravity in a sports utility vehicle such as the Bronco II and how that might impact the vehicle's handling characteristics. A.174-178. All of this information is relevant to the Bronco II and plaintiffs' claims in this case.

F. Plaintiffs Made a Sufficient Showing That the Information Possessed by Ernest Grush, Corporate Technical Specialist, Justifies His Deposition.

Ford originally moved to quash the deposition of Mr. Grush making the same unsupported conclusory allegations of harassment, burden, annoyance, etc. that it made with respect to the depositions of Messrs. Nasser, Rintamaki, and Baughman. However, since Respondent denied Ford's Motion for Protective Order and/or Motion to Quash, Ford apparently reconsidered its position as to Mr. Grush and offered him for a deposition. Relator's Brief at 19.

G. The Affidavits of Messrs. Nasser, Rintamaki and Baughman Submitted by Relator Should Not Excuse Them from Testifying in this Case.

In support of its Motion for Protective Order, Ford submitted affidavits from Messrs. Nasser, Rintamaki and Baughman, none of which were sufficient to excuse those witnesses

from testifying. A.528-531. Each of the affidavits, which contain the same language with only the names and personal information changed, state essentially three things: the witness does not have any particular knowledge about this case, the witness was not personally involved in the design or the development of the Bronco II and the witness did not personally participate in the selection of tires for use on the Bronco II. *Id.* These appear to merely be “form” affidavits apparently routinely signed by Ford corporate officers to avoid testifying which is evidenced by the fact that the affidavit of Jacques Nasser was executed in another case pending in Hays County, Texas over a year ago. A.531. Importantly, the affidavits do not deny “any knowledge of relevant facts.” *Crown Central*, 904 S.W.2d at 128. This issue was addressed by Respondent at the hearing wherein plaintiffs’ counsel pointed out that the affidavits did not constitute a denial of knowledge of relevant information. More accurately, the affidavits are carefully crafted to create the impression that the witnesses have no relevant knowledge without actually saying so. That way, if Ford loses its Motion for Protective Order, its witnesses will not have to explain the stark contrast between their deposition testimony and their affidavits. Ford’s strategy in crafting the affidavits is further illustrated by the fact that even though these witnesses are “out front” on issues relating to the current Ford Explorer/Firestone Wilderness AT problem, they could complete the same affidavit in that scenario as they did here. A.258-260.

A number of courts have held that the kind of denials contained in the affidavits of Messrs. Nasser, Rintamaki and Baughman does not excuse them from deposition and, in fact, provides a source of relevant inquiry. In a similar case, defendant New York University Medical Center

resisted the deposition of the Dean and Chairman of the Department of Medicine, submitting an affidavit from the witness in support of its position. *Naftchi v. New York University Medical Center*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997). After reviewing the broad scope of discovery in federal civil litigation which is comparable to the scope outlined by this Court in *State ex rel. Plank*, the Court noted that, “it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition.” *Id.* The court reviewed the affidavit submitted by defendant and found, like the affidavits submitted by Ford in this case, that the affidavit was “obviously . . . prepared with considerable care” in that it was drafted to deny knowledge of specific issues but did not deny knowledge of any relevant information in the case. *Id.* The court concluded, therefore, that it does not “matter that the proposed witness is a busy person or professes lack of knowledge of the matters at issue, as the party seeking the discovery is entitled to test the asserted lack of knowledge.” *Id.* See also, *Overseas Exchange Corporation v. Inwood Motors, Inc.*, 20 F.R.D. 228, 229 (S.D.N.Y. 1956); *Ierardi v. Lorillard, Inc.*, 1991 WL 158911 (E.D.Pa. 1991); *Parkhurst v. Kling*, 266 F.Supp. 780, 781 (E.D.Pa. 1967).

Plaintiffs have submitted more than adequate information to justify Respondent’s Order under the circumstances of this case. Regardless of the standard under which this Court reviews Respondent’s Order, any reasonable deference to Respondent’s discretion requires denial of Ford’s request for extraordinary relief. Not only do the witnesses possess relevant knowledge, as Ford has admitted in other proceedings in this matter, but the nature of plaintiffs’ proposed inquiry will necessarily delve into matters in which the witnesses have

superior or unique knowledge. Furthermore, plaintiffs should be allowed to test the witnesses' professed lack of knowledge against the substantial body of information to the contrary.

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH THE DEPOSITION NOTICE OF RELATOR'S CEO AND OTHER HIGH RANKING OFFICIALS AND DENYING RELATOR'S MOTION FOR RECONSIDERATION, BECAUSE SOUND PUBLIC POLICY FAVORS DENIAL OF THE RULE ADVOCATED BY RELATOR.

A. Relator's Claims of Burden, Harassment and Annoyance Are Unfounded.

A recurrent theme that reverberates through the briefs of Ford and *Amicus* PLAC is that notices to take the depositions of corporate executives should be viewed by the courts presumptively as abusive and served for the purpose of harassment. For example, Ford states, "the deposition of these individuals would also be improper on a variety of other grounds, including annoyance, harassment and burdensomeness." Relator's Brief at 24. *Amicus* PLAC broadens the scope of the accusation by stating without support that, "plaintiffs' attempt to depose these 'apex' officials at Ford marks yet another attempt in a disturbing trend by plaintiffs' attorneys in Missouri to abuse the discovery process and harass and intimidate defendants' employees in an attempt to force defendants to capitulate and settle cases." *Amicus* Brief at 10. Inexplicably, PLAC cites a Texas case in support of its statement that, "the use of apex depositions as a tool to coerce settlement is a recurring problem that needs to be

addressed' in Missouri." *Id.* [Emphasis supplied]⁷ Judging from these statements, if Ford and PLAC are to be believed, the precedent established by upholding Respondent's ruling would unleash an onslaught of depositions that would virtually shut down corporate America. This position is grossly exaggerated at best and is akin to Chicken Little's unfounded claim that the sky is falling. While Chicken Little could be forgiven on grounds of ignorance, Ford and PLAC have no such excuse. Rather, it is more likely that these unsupported dire claims of gloom are motivated by self-interest. Is it any surprise that an organization such as PLAC representing no less than 124 multi-national product manufacturing corporations, including defendants Ford and Continental General Tire, Inc., would make such claims? Certainly, with the considerable wherewithal possessed by an organization representing some of the largest corporations in the world, one would think that those claims could be supported with empirical data, if true. Yet, neither Ford nor PLAC cite to this Court any evidence that corporate America has been or will be unduly burdened, oppressed or abused in any respect, much less on the broad scale they predict, unless this Court adopts the rigid inflexible rule they advocate. More likely, Ford and PLAC see this case as an opportunity to unfairly deprive individual

⁷In a more reasoned approach, the United States District Court for the District of Nebraska held that the "Court will not impute to counsel any improper motives on the showings made. As long as the witnesses know facts material to the issues in suit or which could lead to discovery of material facts, their interrogation is doubtless proper." *Frasier v. Twentieth Century Fox Film Corporation*, 22 F.R.D. 194, 196 (D.Neb. 1958).

citizens of the State of Missouri and elsewhere of an opportunity to secure discovery from corporate executives even when factually appropriate.

Contrary to the unsupported assertions of Ford and PLAC, the more probable result of upholding Respondent's Order is that once the depositions are taken in Bronco II rollover litigation, the burden on the witnesses will lessen dramatically. The depositions will perpetuate the testimony of the witnesses in Bronco II litigation for all time, a fact which Ford could use in subsequent cases to argue that they should not have to testify about the same issues again. Certainly, the question of whether a witness has testified on the same issues before should factor into the trial court's sound discretion in determining whether to allow a subsequent deposition to go forward or, at least, to control or limit the scope of the deposition.

Ford is not oblivious to this concept and has used it as a strategy in this case. On July 19, 2001, counsel for Ford wrote to counsel for plaintiffs and indicated that in lieu of reproducing certain witnesses on Bronco II issues, Ford would be amenable to designating prior deposition testimony. A.552. Subsequent to counsel's letter, plaintiffs designated portions of seventeen prior depositions taken of Ford employees in other Bronco II rollover cases for use in this case.

Ford also used this strategy in an attempt to avoid producing Mr. Nasser when it offered to produce the deposition that he gave in the consolidated litigation involving the Ford Explorer/Firestone Wilderness AT problem. Relator's Brief at 18 and A.251. This offer is unacceptable because the perspective from which the questioners would inquire of Mr. Nasser

in the Explorer/Wilderness AT litigation would be different from plaintiffs' perspective in this case. A.257. Nonetheless, these offers by Ford to use prior depositions in the current litigation demonstrate Ford's acknowledgment that the existence of the deposition can lessen the burden on those witnesses in subsequent cases. These actions further belie Ford's dire predictions of burden and oppression should Respondent's Order be upheld and lend credence to the conclusion that these predictions are little more than "cover" for Ford's true motivation.

B. Requiring Discovery Through "Less Intrusive Means" Will Give Corporations an Unfair Advantage over Individual Citizens.

In furtherance of their position, Ford and PLAC ask this Court to make it mandatory to seek discovery through so-called "less intrusive means" as a prerequisite to seeking the depositions of corporate executives, regardless of the showing of relevant knowledge possessed by these people. As discussed in Section II, *supra*, this position was rejected by the Texas Supreme Court in the *Crown Central* case and its progeny.

One of the "less intrusive" means of discovery advocated by Ford would allow a corporate defendant to respond to a notice to take a specific named corporate executive by designating a surrogate witness under Rule 57.03(b)(4), Missouri Rules of Civil Procedure. As set forth in its Brief, Ford has already employed that strategy in this case. Relator's Brief at 19. Rule 57.03(b)(4) is a rule designed to facilitate discovery of information from a corporation by requiring the corporation to respond to specific areas of inquiry by designating representatives whose testimony "on the identified topics will be admissible against and binding on the corporate party." *State ex rel. Plank*, 831 S.W.2d at 929. Rule 57.03(b)(4) was not designed

as a substitute for depositions of specifically named individuals in the corporate hierarchy when their identity and, to some degree, the scope of their knowledge is known. Adoption of the rule urged by Ford, however, would change Rule 57.03(b)(4) from a device designed to facilitate discovery of information from a corporation to a device used by the corporation to shield its executives from deposition, regardless of their knowledge of discoverable information.

While Ford and PLAC are careful not to promote a complete prohibition of corporate executive depositions, that is the practical effect of the rule they advocate. While they use claims of burden and oppression to support their position, Ford and PLAC quietly ignore the fact that such a rule would merely transfer the burden to individual citizens and the judicial system. If, in every case, individual parties must “jump through the hoops” advocated by Ford and PLAC, those parties would be forced to endure a great deal of extra time and expense before they could even approach the trial court to request the deposition of corporate executives. Even then, it is likely that the corporate defendant would argue that the executive has no better information than the surrogate witness or witnesses hand picked by the corporation and that the executive’s deposition could be “duplicative or cumulative.” *See, Effectively Defending High-Level Corporate Officials*, 37-AUG Ariz. Att’y 12, 15, 16 (2001).⁸ In either event, the corporation would at least be able to delay and make more difficult the discovery of a corporate executive’s relevant knowledge. Such a rule would give “a

⁸The author of the article is Heidi M. Standenmaier, a partner in the law firm of Snell & Wilmer, Ford’s counsel in this case.

corporate entity a tactical advantage over natural persons” that is contrary to the previous holdings of this Court. *See, State ex rel. Plank*, 831 S.W.2d at 929.

C. Adoption of the Rule Advocated by Relator Would Usurp the Exercise of Sound Judicial Discretion and Would Likely Increase the Burden on Missouri’s Appellate Courts.

Adoption of a rule that requires discovery through “less intrusive means” in all cases where a party seeks the deposition of a high ranking corporate executive would usurp the well-recognized discretion of a trial court to judge each case on its own merits. In effect, Ford urges this Court to create a presumption that any trial court order compelling the deposition of a corporate executive without substantial prior discovery constitutes an abuse of discretion. Consistent with this theme, Ford cites a number of cases from other federal and state jurisdictions where courts, for one reason or another, have declined to allow deposition of a high level corporate executive. Ford’s objective seems to be to convince this Court that just because other courts have declined to allow high level corporate depositions, Respondent abused her discretion.

This argument ignores the virtually infinite number of variables in the factual circumstances of each of these cases, which limits their precedential value in this case. These variables include differences in the facts, the subject matter of the litigation, and the manner and proficiency with which the issue was presented to the court. For example, in *Armstrong Cork Company v. Niagra Mohawk Power Corporation*, 16 F.R.D. 389 (S.D.N.Y. 1954), relied upon by Ford, the court declined to allow the depositions of the high ranking corporate

officials because the noticing party failed to make a showing that the deponents “have some knowledge of the facts concerning which their testimony is to be taken.” *Id.* at 390.

Moreover, in examining the facts, the court noted that,

Defendant [noticing party] apparently served a ‘shotgun’ notice naming nine officers and six directors of the plaintiff as persons whose depositions it desired to take. It is pointed out by the plaintiff that one of the persons so named is dead, and another has been retired for some time, and none of those noticed has any knowledge of the facts relating to the matters in controversy in the suit. Defendant does not appear to dispute this assertion.

Id. The quality and quantity of the showing made by plaintiffs herein contrasts sharply with the minimal conclusory showing made by the noticing party in *Armstrong*. Furthermore, any implication by Ford that decisions like *Armstrong* indicate that the trial courts in a particular jurisdiction are loathe to allow the depositions of high level corporate executives is untrue. Contrary to *Armstrong*, a number of decisions from the courts in the Southern District of New York have compelled the deposition testimony of high level corporate executives, denying efforts on the part of their employer to shield them from testifying. *Naftchi*, 172 F.R.D. at 132, 133; *Six West Retail Acquisition, Inc. v. Sony Theater Management Corporation*, ___ F.R.D. ___, 2001 WL 1033571 (S.D.N.Y. 2001); *A.I.A. Holdings, S.A. v. Lehman Brothers, Inc.*, 2000 WL 1538003 (S.D.N.Y. 2000); *Speadmark, Inc. v. Federated Department Stores, Inc.*, 176 F.R.D. 116, 118 (S.D.N.Y. 1997).

This example from a single jurisdiction proves why reliance on the mere results of a particular case without detailed inquiry into the facts and circumstances underlying the decision, is meaningless. It is certain that courts in jurisdictions throughout the country have ordered parties to produce their corporate executives for deposition, including at least four other cases in the Jackson County Circuit Court of which plaintiffs' counsel is currently aware. *Letz, et al. v. Turbomeca Engine Corporation, et al.*, In the Circuit Court of Jackson County, Missouri, at Kansas City, Case Nos. CV93-19156, CV93-19491, CV93-24644, and CV93-23578 [A.225-238]; *Hocker v. American Family Mutual Insurance Company, et al.*, In the Circuit Court of Jackson County, Missouri, at Kansas City, Case No. 98-CV-5290 [A.475-476]; *Vinzant, et al. v. Waste Management of Kansas, Inc., et al.*, In the Circuit Court of Jackson County, Missouri, at Kansas City, Case No. CV96-8863 [A.477-485]; and *Spurgeon v. Ford*, In the Circuit Court of Jackson County, Missouri, at Independence, Case No. 00-CV-211611 [A.486-511]. In the *Turbomeca* cases, this Court properly denied defendant's Petition for a Writ of Prohibition on this issue. A.525.

Accordingly, the only real value that can be gleaned from examination of these cases is that the exercise of the trial court's sound discretion is paramount in making decisions on discovery issues because the facts and circumstances of each case are unique. That is also why the well-settled law of Missouri requires the appellate courts to give great deference to that discretion. A source relied upon by Ford recognized that adoption of a single rule that would limit the trial court's ability to evaluate each case on its own merits would be unworkable.

A new rule or rule amendment is not needed to effectively handle the apex deposition dilemma. Indeed, given the varying nature of CEOs and their knowledge, a single rule would be impractical. Instead, when a top official's deposition is noticed and subsequently challenged, courts should review the proposed deposition on a case-by-case basis.

Deposition Dilemmas: Vexatious Scheduling and Errata Sheets, 12 Geo. J. Legal Ethics 1, 50, (1998).

Another effect of adopting a rule that would constrict the trial court's discretion in these matters is the likelihood that the burden on Missouri's appellate courts will be correspondingly increased. In addition to urging an inflexible rule on this Court, Ford also seeks what amounts to *de novo* review of these issues by the appellate courts.

The Texas experience is instructive. Even though the rule advocated by Ford is substantially more onerous than the rule announced by the Texas Supreme Court in *Crown Central*, the Texas court took upon itself and imposed upon the lower appellate courts the continuing burden of insuring that the *Crown Central* standard was being applied appropriately. More often than not the courts conducted a *de novo* review of the facts, paying lip service at best to the trial court's discretion. In six short years since *Crown Central* was decided, no less than seventeen appellate and Supreme Court decisions have been rendered on the subject.⁹ By

⁹*In re Daisy Mfg. Co., Inc.*, 976 S.W.2d 327 (Tex. App.-Corpus Christi 1998); *In re Daisy Mfg. Co., Inc.*, 17 S.W.3d 654 (Tex. 2000); *Alcatel*, 11 S.W.3d at 173; *Enercor, Inc. v. Pennzoil Gas Marketing Co.*, 2001 WL 754773 (Tex. App.-Hous. 2001); *In re El*

contrast, Ford was able to find only two cases decided by the Missouri courts in the entire history of our jurisprudence remotely related to this issue, both of which are easily distinguishable from this case: *Fogelbach* and *Binkley*. Even though the Texas appellate courts generate more decisions overall than the Missouri appellate courts, the contrast is stark and either means that this issue has never before arisen in the courts of this state, or that it has never created the kind of problems predicted by Ford and PLAC. Respondent and plaintiffs submit that the latter is the case.

The truth is that Missouri's judicial history on this issue contradicts the claims of Ford and PLAC of a legal system dominated by abusive plaintiffs and unreasonable trial courts. Rather, it seems clear that, as is the case with Respondent's careful consideration of this issue in this case, the current system of relying upon the trial court's sound discretion with limited

Paso Healthcare System, 969 S.W.2d 68 (Tex. App.-El Paso 1998); *Frozen Food Exp. Industries, Inc. v. Goodwin*, 921 S.W.2d 547 (Tex. App.-Beaumont 1996); *In re Smith Barney, Inc.*, 975 S.W.2d 593 (Tex. 1998); *In re Sanchez*, 991 S.W.2d 507 (Tex. App.-Corpus Christi 1999); *Simon v. Bridewell*, 950 S.W.2d at 439; *AMR Corp. v. Enlow*, 926 S.W.2d 640 (Tex. App.-Fort Worth 1996); *Neuls v. Peeples*, 914 S.W.2d 194 (Tex. App.-San Antonio 1995); *In re George*, 28 S.W.3d 511 (Tex. 2000); *In re Bunch*, 1998 WL 851123 (Tex. App.-Dallas 1998); *In re Columbia Rio Grande Healthcare, L.P.*, 977 S.W.2d 433 (Tex. App.-Corpus Christi 1998); *Nueces County v. De Pena*, 953 S.W.2d 835 (Tex. App.-Corpus Christi 1997); *CSR Ltd. v. Link*, 925 S.W.2d 591 (Tex. 1996); *In re Pierce*, 2001 WL 246877 (Tex. App.-Dallas 2001).

appellate review for serious abuse of that discretion has worked well in Missouri. The Texas experience certainly would suggest that, “if it ain’t broke don’t fix it.”

CONCLUSION

Relator Ford Motor Company has failed to sustain its heavy burden of proving that Respondent’s Order denying its Motion for Protective Order and for Motion to Quash and compelling the depositions of Messrs. Nasser, Rintamaki, Baughman and Grush constituted an abuse of discretion. Moreover, despite their protestations to the contrary, neither Ford nor *Amicus Curiae* Product Liability Advisory Council, Inc. has brought forward any credible evidence that Respondent’s Order would create the kind of “absolute irreparable harm” or “considerable hardship and expense” necessary to justify the extraordinary remedy of prohibition. In addition, this Court should seriously question the motivation underlying Ford’s efforts on this issue. While it claims to this Court that the depositions would be burdensome, harassing and annoying, Ford failed to disclose to this Court that it had offered the subject witnesses for deposition. While it claims to this Court that upholding Respondent’s Order will open veritable floodgates of future depositions, Ford failed to disclose to this Court that it had previously recognized that the opposite result was likely. While it claims to this Court that the testimony of the subject witnesses is irrelevant, Ford failed to disclose its earlier admissions to the contrary. All of these factors should lead this Court to critically examine whether Ford has a legitimate grievance or whether it and *Amicus* see this case as an opportunity to establish a rule that will unfairly benefit their interests in litigation now and in the future. Both

Respondent and the Missouri Court of Appeals for the Western District refused to be instruments of Ford's artifice. This Court should refuse to do so as well.

WHEREFORE, Respondent and plaintiffs pray an Order of this Court quashing the Preliminary Writ in Prohibition issued on September 25, 2001 and remanding this cause to Respondent for further proceedings in accordance with her Orders of August 3, 2001 and August 17, 2001.

CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(C)

The undersigned does hereby certify that this brief complies with Special Rule No. 1(b), and contains 13,380 words. The undersigned further certifies that a floppy disk containing Respondent's Brief was filed with this brief in compliance with Special Rule No. 1(f) and that the disk is virus free.

Respectfully submitted,

THE HONORABLE EDITH L. MESSINA
Circuit Court of Jackson County, Missouri
415 East 12th Street
Kansas City, Missouri 64106

RESPONDENT

RISJORD & JAMES, P.C.
218 N.E. Tudor Rd.
Lee's Summit, MO 64086
T: (816) 554-1500
F: (816) 554-1616

By _____
Randy W. James, Missouri Bar No. 30624
Aaron N. Woods, Missouri Bar No. 36832
Lisa C. Beckley, Missouri Bar No. 49470

Douglas R. Horn
THE HORN LAW FIRM
4741 South Arrowhead Drive, Suite B
Independence, Missouri 64055
T: (816) 795-7500
F: (816) 795-7881

ATTORNEYS FOR PLAINTIFFS CHURCH

CERTIFICATE OF SERVICE

The undersigned does hereby certify, pursuant to Special Rule No. 1, that (1) a hard copy of the foregoing document in the form specified by Special Rule No. 1(a) and (2) a copy of the disk required by Special Rule No. 1(f), was sent via U.S. Mail, postage prepaid, on this 31st day of October, 2001, to the individuals below. The undersigned does also hereby certify that the disks required by Special Rule No. 1(f) are virus free.

The Honorable Edith L. Messina
Division 12
Jackson County Circuit Court
415 E. 12th Street
Kansas City, MO 64106
Respondent

Robert T. Adams
Paul A. Williams
Douglas W. Robinson
Shook, Hardy & Bacon, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Andrew S. Ashworth
Vaughn A. Crawford
Snell & Wilmer, L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202

Attorneys for Relator Ford Motor Company

Randall E. Hendricks
William D. Beil
Matthew T. Geiger
Rouse Hendricks German May PC
1010 Walnut, Suite 400
Kansas City, MO 64106

Kenneth J. Moran
Moran & Kiker, P.C.
4112 E. Parham Road
Suite A
Richmond, VA 23228

Attorneys for Defendant Continental Tire
