

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC88392

STATE ex rel. FORD MOTOR COMPANY

Relator,

vs.

THE HONORABLE MICHAEL W. MANNERS, CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, AT INDEPENDENCE, CIRCUIT JUDGE, DIVISION 2,

Respondent.

RELATOR'S REPLY BRIEF

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I. Introduction

Contrary to Respondent's assertions, Relator is not seeking a writ to prohibit Respondent from enforcing protective order provisions. What Respondent did is to threaten to vacate protections afforded Relator during the pendency of a case to benefit and provide relief to those not before the court. Therein lies the abuse of discretion.

Respondent appointed the Discovery Commissioner to assist with complicated discovery issues. The Discovery Commissioner issued Order No. 1 that had broad protective order provisions. (See Order No. 1, App. at A184-A191.) Importantly, the documents at issue were not ordered produced pursuant to Order No. 1. Instead, production of the documents at issue was compelled pursuant to subsequent orders of the Discovery Commissioner, and non-sharing protection was afforded these documents pursuant to Order Nos. 7, 8, 9, 10, 11, 14, 18, and 19 of the Discovery Commissioner, as well as Respondent's November 3, 2006 Orders granting non-sharing protective orders for suspension orders and IVD/ESC/RSC. (See Order Nos. 7, 8, 9, 10, 11, 14, 18, 19, App. at A42, A126, A146, A286, A119, A162, A165, and A138.) (See November 3, 2006 Orders, App. at A44 and A118.)

These, and the other multiple discovery orders, were entered to protect Relator's legitimate interests and facilitate discovery in anticipation of an approaching trial date. Plaintiffs tried on several occasions to have Respondent vacate the non-sharing protections. Respondent denied their requests. Relator relied on the non-sharing protections, produced the documents, and, in the case of suspension orders, provided sealed deposition testimony on the issue. Likewise, with respect to CAE, Relator

permitted (over its objections) Plaintiffs' counsel to conduct direct, live searches of its CAE databases in Dearborn, Michigan. Relator relied on the non-sharing protections and entered into a settlement with Plaintiffs. Respondent approved the settlement. Releases were executed and monies were paid.

After the case settled, but before final judgment was entered in this wrongful death case, Plaintiffs' lawyers filed a motion requesting Respondent remove the non-sharing protections and permit **“Plaintiffs’ counsel to retain all documents and things produced by Ford in Hachinsky v. Ford Motor Company to be used in other litigation involving this counsel of record and counsel who qualify under Order No. 1.”** (Plaintiff’s January 3, 2007 Motion at 4, App. A181.) (emphasis added.) The stated purpose for Plaintiffs' lawyers' motion was that **“Plaintiffs’ counsel has ongoing need for the use of documents and things produced in Hachinsky v. Ford for use in other litigation...”**. (*Id.* at 2, App. at A179.) (emphasis added.)

Respondent’s grant of this request – to benefit and convenience Plaintiffs’ counsel and other plaintiffs not before the court – is what forms the basis for Relator’s request for extraordinary relief. This writ action has nothing to do with Respondent’s ability to enforce protective order provisions, before or after final judgment, as between the parties to the order. Of course the court can do that.

What Respondent has threatened to do in this case is to drastically modify a protective order (after a case has settled) to benefit lawyers and other individuals not before the court. Parties, such as Relator, properly rely on protections provided by protective orders when producing documents while a case is pending. One of the

fundamental purposes of the protective order is to facilitate a means to enable discovery so that a case can progress. Parties, such as Relator, often do not seek appellate relief for every discovery order entered. Many times non-sharing protective orders provide adequate protection to parties while allowing the other parties access to discovery. What Respondent has done is gut the very purpose of protective orders, which are entered **to facilitate discovery between the parties**. To aid counsel or plaintiffs in other cases is not the purpose or intent of the Missouri Rules of Civil Procedure, or the Discovery Commissioner's orders. Accordingly, a writ is necessary to prohibit Respondent from vacating the non-sharing protection to provide relief to others not before it.

Respondent ignores these issues and instead tries to convince this Court the issue is whether Respondent retains jurisdiction to enforce protective order provisions. This Court should not be misled.

II. Reply to Point No. 1

A. Introduction

Respondent contends “the appropriate standard is whether the trial court abused its discretion in entering whatever protective orders were entered.” (See Respondent's Brief at 8-9.) This is incorrect. Rather, the appropriate standard is whether Respondent abused his discretion in threatening to vacate – after the case had settled – the non-sharing protective orders that had been entered and repeatedly endorsed by Respondent and his Discovery Commissioner.

Respondent advances four arguments in rebuttal to Relator's first Point Relied On, all of which should be considered in light of the proper standard enumerated

above: (1) notwithstanding the parties' settlement, Respondent maintained jurisdiction to enforce the non-sharing protective orders; (2) Respondent exercised "reasonable discretion" by threatening to vacate the non-sharing protective orders, and he did not abuse his discretion by relying on his Discovery Commissioner; (3) Relator did not demonstrate the documents deserved more protection than afforded by Order No. 1 (a sharing protective order that governed other documents); and (4) because the non-sharing protective orders were "interim" in nature, Relator did not demonstrate it relied on the non-sharing protective orders or, alternatively, should not have relied upon the non-sharing orders. (See Respondent's Brief at 6-7.) Each argument is incorrect and will be addressed in turn.

B. Enforcing a protective order is much different than vacating one

Relator agrees a trial court maintains jurisdiction to "enforce its protective orders[.]" (Id. at 8.) Relator also agrees most "protective orders would be worthless" if a trial court could not enforce its protective orders after a case has settled. (Id.) There is a big difference, however, between "enforcing" a protective order and vacating one. According to Black's Law Dictionary, Sixth Edition, "enforce" is defined as "To put into execution; to cause to take effect; to make effective; . . . to compel obedience to." On the other hand, "vacate" is defined as "To annul; to set aside; to cancel or rescind. To render an act void. . ." Obviously, the terms are antonyms.

The difference is important, especially considering Respondent's jurisdiction to enter his Post-Settlement Order. Contrary to Respondent's assertions, the issue is not whether Respondent possessed jurisdiction to enforce the non-sharing

protective orders. Obviously, Respondent could do that, as the parties submitted themselves to the jurisdiction of the court for enforcement of the protective orders. Rather, the issue is whether Respondent had jurisdiction to vacate the non-sharing protective orders after the case had settled for the purpose of granting relief to persons **not before the court**, specifically, lawyers and other parties involved in litigation against Relator. Respondent could not do that, as his jurisdiction extends only to parties before the court. Moreover, if a Missouri judge could vacate protective orders after a case has settled for the sole benefit of parties not before the court, any protection provided by such orders would be “worthless.” (Respondent’s Brief at 8.) It is for this reason that Respondent’s jurisdiction to take action on January 29, 2007 with respect to the non-sharing protective orders was limited to enforcement, and he lacked jurisdiction to grant the relief sought (for the third time) by Plaintiffs’ attorneys.

C. Respondent, not the Discovery Commissioner, is the Article III judge

Respondent asserts he did not abuse his discretion by entering the “protective orders in reliance on the review of the Discovery Commissioner.” (Id. at 6, 8.) (See also id. at 11, stating “The Order of January 29, 2007 is founded upon the detailed analysis of the Discovery Commissioner...”) (See also id. 11-12.) Elsewhere, Respondent argues that, when he entered his Post-Settlement Order, “he knew what was at issue, had issued its [sic] previous orders to protect a trial date, and concluded that Ford had not met its burden of showing why Order No. 1 would not adequately protect its

interests.”¹ (Id. at 9.) Either Respondent relied on the review of his Discovery Commissioner or he did not, and Respondent’s position with respect to the role of his Discovery Commissioner is inconsistent and unclear.

Regardless, Respondent is the Article III judge, and the Discovery Commissioner is not. As such, it was **Respondent’s duty** to review the pleadings filed by the parties, examine the documents subject to the protective orders, and arrive at an independent determination regarding the protection to be afforded the documents. If, in fact, Respondent deferred to his Discovery Commissioner, Respondent abused his discretion by delegating important Article III obligations to a Discovery Commissioner. Alternatively, if Respondent ultimately (and independently) concluded Order No. 1 “adequately protect[ed]” Relator’s interests, Respondent abused his discretion because he previously concluded on multiple occasions **that sharing protective orders did not adequately protect Relator’s interests**, and it was not until the case had settled that Respondent reversed his position on this important issue.

¹ As discussed in Section IV A, infra, Respondent’s repeated references to Order No. 1 demonstrate a misunderstanding of the rulings of his Discovery Commissioner. The Discovery Commissioner entered Order No. 1 before he (and Respondent) compelled production of suspension orders, IVD/ESC/RSC, CAE, VEHDYN, and records management documents. As such, Order No. 1 did not govern any document at issue.

D. The record belies Respondent’s repeated assertions that Relator failed to demonstrate the need for non-sharing protection

Respondent repeatedly argues no “evidentiary basis” exists to conclude the documents deserve “more protection than is afforded by Discovery Order No. 1.” (Id. at 3.) (See also id. at 9-11, 18-20.) Respondent’s comments are belied by the record. Indeed, in his opposition to Relator’s request to prohibit direct, live access to Relator’s CAE databases, Respondent argued to this Court and the Missouri Court of Appeals that the non-sharing protective orders provided “reasonable safeguards” in the event privileged, confidential, and/or proprietary material was revealed during the searches. (See Respondent’s Suggestions in Opposition to Relator Ford Motor Company’s Petition for a Writ of Prohibition Pursuant to Rule 84.24(c), Missouri Supreme Court Brief, at 2, Supplemental App. at A2.) (See also Respondent’s Suggestions in Opposition to Relator Ford Motor Company’s Petition for a Writ of Prohibition and/or Mandamus Pursuant to 84.24(c), Missouri Court of Appeals Brief, at 2, Supplemental App. at A23.) Quite obviously, Respondent’s position is much different here. Respondent also disregards his November 3, 2006 Orders which granted – after substantial oral argument by the parties regarding the propriety of non-sharing orders² – non-sharing protection for suspension

² The entire November 3, 2006 transcript is included in the Appendix to this Reply Brief. As the November 3, 2006 record makes clear, substantial argument ensued regarding the propriety of non-sharing protective orders. For example, with respect to IVD/ESC/RSC, Relator explained non-sharing protection was necessary given the “proprietary and

orders and IVD/ESC/RSC. (See November 3, 2006 Orders, App. at A44 and A118.) Likewise, Respondent ignores his November 22, 2006 Order, which denied (for suspension orders) **the very same relief requested by Plaintiffs’ lawyers in the January 3, 2007 motion – specifically, to subject suspension orders to the provisions of Order No. 1.** (See November 22, 2006 Order, App. at A72.) Finally, although Respondent contends he relied heavily on the “detailed analysis” of his Discovery Commissioner, he disregards multiple discovery orders entered by the same Discovery Commissioner which reference the need for and propriety of non-sharing protective orders. (See Respondent’s Brief at 11.) (See Order Nos. 8, 9, 10, 11, 14, 18, 19, App. at A126, A146, A286, A119, A162, A165, and A138.)

Thus, Respondent’s contention that “[t]he record here is devoid of any evidentiary showing” regarding the propriety of non-sharing protective orders is incorrect and ignores substantial record evidence to the contrary. (See Respondent’s Brief at 9.)

commercially sensitive” nature of the documents. (See November 3, 2006 Transcript at 42, l. 25 - 43, l.1 Reply App. at A49.) (See also Id. at 42, l. 5 – 48, l. 5, Reply App. at A49-A50.) Likewise, with respect to suspension orders, Relator argued non-sharing protection was required due to the privilege and work product considerations, and that Respondent’s orders were being used in other jurisdictions as authority to compel production of suspension orders or to circumvent the rulings of other courts prohibiting discovery of suspension orders. (Id. at 66, ll. 21-22, Reply App. at A55) (See also Id. at 60, l. 1 – 62, l. 14; 65, l. 9 – 67, l. 10, Reply App. at A53-A54, A55.)

Indeed, Respondent and his Discovery Commissioner generated a substantial portion of the “the record” in support of non-sharing protective orders, and this record evidence underscores the impropriety and abusiveness of Respondent’s Post-Settlement Order.

E. Respondent has argued the reliance issue both ways

In his brief, Respondent contends “everybody but Ford” knew the propriety of the “non-sharing protective orders was an issue that could be revisited.” (Id. at 12.) In fact, this argument is repeated throughout Respondent’s brief. (Id. at 4, 5, 12-14.) Given the purported “interim” nature of the non-sharing protective orders, Respondent asserts it was unreasonable for Relator to rely on his non-sharing protective orders. (Id. at 12-14.)

Respondent’s position was much different in December 2006. Specifically, Respondent did not inform this Court, or the Missouri Court of Appeals, that the non-sharing protective order for CAE was “interim,” “subject to amendment,” or could be “revisited.” (Id. at 4, 5, 12.) Likewise, Respondent did not advise this Court, or the Missouri Court of Appeals, of the “obvious environment of uncertainty as to the permanent character of the extant non-sharing orders.” (Id. at 5.) To the contrary, Respondent told these honorable Courts the non-sharing protective order provided a “reasonable safeguard” that weighed in favor of permitting Plaintiffs’ counsel to fish for CAE data in Dearborn, Michigan. (See Respondent’s Suggestions in Opposition to Relator Ford Motor Company’s Petition for a Writ of Prohibition Pursuant to Rule 84.24(c), Missouri Supreme Court Brief, at 2, Reply App. at A2.) (See also Respondent’s Suggestions in Opposition to Relator Ford Motor Company’s Petition for a Writ of Prohibition and/or Mandamus Pursuant to Rule 84.24(c), Missouri Court of Appeals

Brief, at 2, 12, Reply App. at A23, A33.) Presumably, Respondent's position would have been the same had Relator sought appellate relief from the orders compelling production of suspension orders, IVD/ESC/RSC, VEHDYN, and records management documents.³

Thus, just eight months ago, Respondent took a dramatically different position with respect to the permanence and reliability of the non-sharing protective order for CAE. At no time did Respondent state or suggest the non-sharing protective order was "subject to amendment"; indeed, such an argument would have undercut Respondent's arguments in support of his ruling to permit direct, live access to Relator's computer systems. Simply put, Respondent cannot tell this Court one thing in December 2006 and say something completely different in July 2007. In doing so, and putting aside the obvious fact that Relator should be able to rely on orders entered by a Missouri judge, Respondent has demonstrated the inconsistency and fallacy of his contention Relator that improperly relied on the non-sharing protective orders.

III. Reply to Point No. 2

Respondent missed the point with respect to suspension orders. Although Relator strongly disagrees with Order No. 6 of the Discovery Commissioner and Respondent's decision to uphold Order No. 6 over Relator's attorney-client privilege and work product objections, Relator acknowledges judges may arrive at different decisions on the same issue. Indeed, Relator acknowledged this point at the November 3, 2006

³ Relator opted against seeking appellate relief from these orders due, in part, to the non-sharing orders.

hearing regarding the non-sharing protective order for suspension orders. (See November 3, 2006 hearing at 59, ll. 17-20, Reply App. at A53.)

For these reasons, Relator's comity arguments were not meant to suggest Respondent could only rule in Relator's favor with respect to production of suspension orders. Rather, the important point (and the point missed by Respondent) is (1) if numerous other courts have found suspension orders to be privileged, and (2) Plaintiffs' counsel have expressed their intent to circumvent these rulings by using the suspension orders in other cases (including in cases where the courts have held suspension orders to be privileged), then the rule of comity dictates a non-sharing protective order be entered to prevent abuse of the judicial process.⁴ In other words, Respondent should not permit his orders to be used as an extraterritorial means of circumventing rulings by other judges presiding over Ford cases pending in other jurisdictions. By permitting his Post-Settlement Order with respect to suspension orders to be used in such a fashion, Respondent abused his discretion. That is especially true where, as here, Respondent's record comments demonstrate the impropriety of using his orders in such a fashion, and

⁴ Indeed, the non-sharing protective order promotes comity because it permitted Respondent to rule as he saw fit with regard to production of suspension orders and, at the same time, respect the rulings of other judges finding that suspension orders are attorney-client communications and opinion work product. If Respondent is permitted to enforce his Post-Settlement Order, however, the comity provided by the non-sharing protective order will be destroyed.

he repeatedly endorsed non-sharing protection for suspension orders. (See November 3, 2006 Hearing Transcript at 74, ll. 19-25, Reply App. at A57.) (See also November 3 and 22 Orders, App. at A118, A72.)

IV. Reply to Point No. 3

A. Order No. 1 did not govern any document at issue

Respondent's repeated references to Order No. 1 demonstrate a misunderstanding of the orders entered by his Discovery Commissioner. As its title suggests, Order No. 1 was the first order entered by the Discovery Commissioner. Order No. 1 did not govern any document at issue, as it was entered on September 21, 2006 – before Respondent compelled production of suspension orders, IVD/ESC/RSC, CAE, VEHDYN, and records management documents. (See Order No. 1, App. at A184-A191.) Rather, in response to the various arguments advanced by Relator, both the Discovery Commissioner and Respondent granted non-sharing protective orders to govern the documents that are the subject of this writ.

For these reasons, Order No. 1 has no bearing on Respondent's jurisdiction, his ability to modify or vacate the non-sharing protective orders, or the timing by which Plaintiffs could challenge the non-sharing protective orders.

B. Enforcement is not synonymous with “vacate,” “revise,” “amend,” etc.

Respondent cites the provisions of Order No. 1 providing that the trial court “retains jurisdiction over the parties and recipients of Protected Documents for enforcement of the provisions of this Order.” (Respondent's Brief at 18.) Again, enforcing a protective order is different than vacating, modifying, or revising one,

especially when it is done for the purpose of granting relief to parties not before the court. By way of further reply, Relator incorporates its arguments in Section II B, supra.

C. Respondent concedes the documents are “deserving of protection”

While Respondent repeatedly argues Relator did not demonstrate the documents met “the criteria for [Mo. R. Civ. P. 56.01(c)] protection,” he also admits “[n]o argument is made here that the Engineering Documents are not deserving of protection.” (Id. at 18-19, 20.) Respondent’s concession that the documents deserve protection calls into question his repeated argument that Relator did not establish cause for entry of protective orders pursuant to Mo. R. Civ. P. 56.01(c). Indeed, it leads one to wonder why he even makes that argument.

Moreover, contrary to Respondent’s suggestion, a higher showing of “cause” is not required for the entry of non-sharing protective orders as compared to sharing protective orders. In other words, if a litigant meets the requirements of Mo. R. Civ. P. 56.01(c), a trial court may make “any order” – including a non-sharing order – to protect confidential documents. (See Mo. R. Civ. P. 56.01(c).) In fact, pursuant to Mo. R. Civ. P. 56.01(c)(7), Respondent could have ordered the confidential documents “not be disclosed[.]” Thus, since Respondent concedes the documents are “deserving of protection” under Mo. R. Civ. P. 56.01(c), sufficient cause existed for entry of the non-sharing protective orders.⁵

⁵ Relator concedes non-sharing protection is not necessary each time a Missouri court enters a protective order pursuant to Mo. R. Civ. P. 56.01(c). The point, however, is that,

Finally, Respondent again ignores the substantial record evidence in support of the non-sharing protective orders, which has been addressed elsewhere in this Reply Brief.

V. Conclusion

There can be no question that, if Respondent's Post-Settlement Order is permitted to stand, Relator will be "absolutely and irreparably" harmed. State ex rel. Abdullah v. Roldan, 207 S.W.2d 642, 645 (Mo. Ct. App. 2006) (Respondent's Brief at 7.) Relator cannot turn back the hands of time and seek appellate review of the rulings compelling production of documents Relator (and other courts) contends are privileged and/or highly confidential. Even though Respondent's position has materially changed with respect to the permanence and reliability of the non-sharing protective order for CAE, Relator cannot ask this Court to reconsider its order denying Relator's request to prohibit direct, live access to its CAE databases. Relator cannot rescind or re-negotiate the settlement agreement between the parties. Finally, Relator cannot prevent Plaintiffs' attorneys from using the protected documents in jurisdictions where courts have ruled plaintiffs are not entitled to the documents.

Additionally, when considered against the important procedural history leading to his Post-Settlement Order (none of which is discussed in Respondent's Reply Brief), Respondent's Post-Settlement Order is "clearly against the logic of the

since Respondent admits the documents are deserving of protection under Mo. R. Civ. P. 56.01(c), then sufficient cause existed for entry of the non-sharing protective orders.

circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice[.]” Anglin v. Mo. Pac. R.R., 832 S.W.2d 298, 303 (Mo. 1992) (Respondent’s Brief at 7.) Respondent makes no attempt to explain his November 3, 2006 Orders granting non-sharing protection for suspension orders and IVD/ESC/RSC. Even though Respondent’s November 22, 2006 Order denied the very same relief (for suspension orders) requested by Plaintiffs’ lawyers in their January 3, 2007 motion, Respondent makes no effort to reconcile the November 22, 2006 Order with his Post-Settlement Order. Even though Respondent relied on his Discovery Commissioner, he ignores the multiple discovery orders issued by his Discovery Commissioner in favor of non-sharing protection. When viewed against this history, Respondent’s Post-Settlement Order “is clearly against the logic of the circumstances.” (Id.) Indeed, Respondent’s Post-Settlement Order is flatly contradictory to the rulings and orders that came before it.

Accordingly, for the reasons set forth in Relator’s Brief and Reply Brief, it respectfully requests this Court make permanent its writ of prohibition.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word and contains approximately 3,902 words and approximately 408 lines, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3-1/2 inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk. Further, the brief includes the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

Michael J. Kleffner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served via U.S. Mail this 2nd day of August, 2007, to:

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