

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL.)
REBECCA E. POOKER, BY AND)
THROUGH HER NEXT FRIEND,)
NORMAN POOKER,)

RELATOR,)

APPEAL No.: SC87878

VS.)

HONORABLE GARY P. KRAMER,)
CIRCUIT JUDGE, DIVISION 2,)
MISSOURI CIRCUIT COURT,)
23RD JUDICIAL CIRCUIT,)
COUNTY OF JEFFERSON,)

RESPONDENT.)

ORIGINAL PROCEEDING IN PROHIBITION

ON PRELIMINARY RULE IN PROHIBITION FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE GARY P. KRAMER, CIRCUIT JUDGE OF THE CIRCUIT COURT OF THE
COUNTY OF JEFFERSON

BRIEF OF RELATOR

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JURISDICTIONAL STATEMENT

Relator brought this original proceeding in prohibition to challenge the June 9, 2006 order entered by Respondent which overruled Relator's Motion to Quash a Subpoena duces tecum directed to Relator's Medical Expert and his custodian of records. (A14.) This action is one involving questions of whether the production by Relator's medical expert of extensive, non-case related discovery documents can be compelled without a proper showing of "venality" on the part of Plaintiffs and without specific findings of fact by Respondent. Furthermore, this action involves whether producing such collateral discovery would violate the physician-patient privilege and the doctor's own privacy interest, and is unduly burdensome and oppressive. Relator contends that upholding Respondent's order would violate Missouri Supreme Court Rule 56.01, and hence involves construction of Missouri Supreme Court Rules and application of relevant Missouri law.

The pending case, *Russell and Janet Lee Macke v. Rebecca E. Pooker, by and through her Next Friend, Norman Pooker*, Cause No. CV305-2516-CC, arises out of a motor vehicle collision which occurred on March 21, 2004, in Jefferson County, Missouri. (A1.) Plaintiffs filed their Petition in Jefferson County, Missouri. (A1.) The deposition of defendant's expert, Dr. Marvin Mishkin, M.D., and his custodian of records were scheduled to take place in St. Louis County, Missouri. (A6.)

The Court has jurisdiction because it issued a Preliminary Writ of Prohibition on August 22, 2006. Under Article V, Section 4 of the Missouri Constitution, the Court has authority to determine and issue remedial writs.

STATEMENT OF FACTS

This original proceeding in prohibition arises from *Russell and Janet Lee Macke v. Rebecca E. Pooker, by and through her Next Friend, Norman Pooker*, Cause No. CV305-2516-CC (Mo. Cir. Ct., Jefferson County). (A1.) The *Macke* case is a personal injury action arising from a motor vehicle collision in which Plaintiff Russell Macke alleges permanent and progressive injury to his left knee. (A2.) Pursuant to Missouri Supreme Court Rule 60.01, Relator requested that Mr. Macke undergo an independent medical examination by orthopedic surgeon, Dr. Marvin Mishkin on May 1, 2006. (A5.) However, at Plaintiffs' request, the examination was rescheduled, and took place on April 24, 2006. (A15.) At no time did Plaintiffs object to the examination performed by Dr. Mishkin, call into question his qualifications or challenge his objectivity as a medical expert.

On May 10, 2006, Relator scheduled the video deposition of Dr. Marvin Mishkin on June 14, 2006, to commence at 11:00 a.m. (A17.) On May 31, 2006, Plaintiffs served a Notice of Deposition on Relator with an attached subpoena duces tecum directed to Dr. Mishkin and Metropolitan Orthopedics to commence two hours before Relator's deposition. (A6, A10, A17.) The notice required a representative of Metropolitan Orthopedics to testify as to the following matters for the calendar years 2002 through 2006:

- a) All medical services performed by Dr. Marvin Mishkin;

- b) All communications by and between Metropolitan Orthopedics, Ltd. and Dr. Marvin Mishkin on the one hand and Brown & James, P.C. on the other hand;
- c) All documents related to the number of persons who received medical services by Dr. Marvin Mishkin; and
- d) All documents related to the name of each lawyer or law firm requesting medical services by Dr. Marvin Mishkin. (A8.)

The attached subpoena commanded the production of the following documents:

- a) All documents related to fees received by Defendant's medical expert from 2002 through 2006;
- b) All documents memorializing communications between Metropolitan Orthopedics, Ltd. and Dr. Marvin Mishkin on the one hand and Brown & James, P.C. from 2002 through 2006;
- c) All documents related to the number of persons who received medical services by Defendant's medical expert from 2002 through 2006; and
- d) All documents related to the name of each lawyer or law firm requesting medical services from Defendant's medical expert from 2002 through 2006. (A12.)

On June 2, 2006, Relator filed a Motion to Quash Plaintiffs' Subpoena. (A20.) Plaintiffs did not file a response to Relator's Motion. On June 9, 2006, counsel for both parties appeared before Respondent and argued their positions relative to the Motion to Quash. (A34.) No transcription of the proceeding was made, and no evidence was submitted by Plaintiffs to support their request.

Respondent issued an order dated June 9, 2006, which states as follows:

“This matter came on for oral argument upon the Motion by the Defendant to Quash a Subpoena for Medical and Financial records of the Defendant's Independent Medical Examiner. The parties appeared and oral argument was heard, and the matter was taken under advisement.

Whereupon, having further considered same, the Court hereby overrules said Motion to Quash. See *State of Missouri ex rel. Donald Creighton, PhD. vs. Honorable Randall R. Jackson*, 879 S.W.2d 639 (W.D. Mo 1994). (A14.)

No specific findings of fact were stated in Respondents June 9, 2006 Order. (A14.) On June 13, Relator filed, and Respondent granted a Motion to Stay the Court's June 9, 2006 order and stay proceedings pending interlocutory appellate review. (A36, A37.) On June 24, 2006, the Court of Appeals for the Eastern District of Missouri granted Relator a preliminary writ of prohibition. (A47.) On July 13, 2006, Relator received notice that the Court of Appeals for the Eastern District of Missouri denied

Relator's writ of prohibition on July 11, 2006, without full briefing by the parties or oral argument. (A48.) This proceeding for a writ of prohibition follows.

POINT RELIED ON

- I. Relator is entitled to an order prohibiting Respondent from taking any action other than granting Relator's Motion to Quash, because Respondent exceeded the trial court's jurisdiction and abused his discretion in ordering Dr. Mishkin and his custodian of records to produce the materials identified in Plaintiffs' Subpoena *duces tecum* for the reasons that:
 - A. Respondent's order is contrary to Missouri law because there was no basis for compelling production of the requested material because Plaintiffs have wholly failed to support or make any allegations that Dr. Mishkin is a "venal" expert.
 - B. Respondent failed to make specific findings in his Order of June 9, 2006, and the order is not based on evidence or sound logic and is arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable;
 - C. The production of the collateral materials requested would improperly invade the physician-patient privilege as codified in Section 491.060(5), R.S.Mo. 2000, thereby compromising the privacy interests of Dr. Mishkin and non-party patients alike;
 - D. The production of the collateral materials requested is unduly burdensome, oppressive and serves to discourage reputable experts from participating in litigation; and
 - E. Respondent's order to produce the collateral materials requested would

improperly infringe on the work product privilege of counsel for Relator as well as other non-party attorneys under Supreme Court Rule 56.01(b)(3) and 56.01(b)(4).

State ex rel. Soete v. Weinstock, 916 S.W.2d 861 (Mo. App. E.D. 1996)

State ex rel. Creighton v. Jackson, 879 S.W.2d 639 (Mo. App. W.D. 1994)

State ex rel. Lichtor v. Clark, 845 S.W.2d 55 (Mo. App. W.D. 1992)

State ex rel. Whitacre v. Ladd, 701 S.W.2d 796, 798 (Mo. App. E.D. 1985)

Missouri Supreme Court Rule 56.01

Missouri Supreme Court Rule 57.09

Missouri Supreme Court Rule 60.01

Missouri Supreme Court Rule 84.24

Missouri Supreme Court Rule 97

Section 491.060, R.S.Mo. 2000

42 U.S.C. § 1320d-5

42 U.S.C. § 1320d-6

STANDARD OF REVIEW

Prohibition exists to prevent a trial court from exceeding its jurisdiction. *State ex rel. Barnett v. Mullen*, 125 S.W.3d 896, 898 (Mo. App. E.D. 2004). Prohibition is the proper remedy for an abuse of discretion during discovery. *State ex rel. Ford Motor Co. v. Nixon*, 160, S.W.3d 379, 380 (Mo. banc 2005). Prohibition is available to prevent an abuse of judicial discretion, to avoid irreparable harm, or to prevent the exercise of extra-judisdictional power. *State ex rel. Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 504 (Mo. banc 2004).

Trial courts have broad discretion in the administration of discovery. *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 251 (Mo. App. E.D. 1989). They possess authority, under Rule 57.09 to quash or modify a subpoena if it is unreasonable or oppressive. *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796, 797 (Mo. App. E.D. 1985). However, a trial court's discretion is not without bounds. The rules governing discovery "are not talismans without limitation." *Id.* "A party's right to discovery is not completely unfettered." *J.L.M. v. R.L.C., Jr.*, 132 S.W.3d 279, 287 (Mo. App. W.D. 2004). Unlimited discovery is not a matter of right. *State ex rel. Hoffman v. Campbell*, 428 S.W.2d 904, 906 (Mo. App. E.D. 1968). Therefore, a trial court abuses its discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration. *State ex rel. Doe Run Resources Corp.*, 128 S.W.3d at 504.

Where a trial court abuses its discretion in entering a discovery order, prohibition is the appropriate remedy. *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238, 239 (Mo. banc 2006); *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327 (Mo. App. E.D. 1985). Prohibition is therefore warranted to prevent prejudice and harm during the discovery process that cannot be cured at the end of the case by direct appeal. *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. banc 1995). Prohibition will lie where “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. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994), quoting *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983).

Additionally, Prohibition is the proper remedy when a trial court exceeds its jurisdiction by ordering production of discovery directed at a party’s expert witness that is collateral and irrelevant to the case at bar. *State ex rel. Williams v. Lohmar*, 162 S.W.23d 131, 134 (Mo. App. E.D. 2005).

Furthermore, prohibition is the proper remedy when a trial court abuses its discretion in a discovery order to the extent its act exceeds its jurisdiction; thus, a preliminary writ in prohibition should be made absolute where discovery requests were so broad as to be defectively oppressive, burdensome and intrusive in requiring production of records and statistics spanning more than a two-year period, and possibly requiring violation of physician-patient privilege in interference with the deponent’s medical practice. *State ex rel. Whitacre*, 701 S.W.2d at 796. The scope of such discovery should be limited by Missouri Supreme Court Rule 56.01(b)(1). Prohibition

should also be available when said discovery requests seeks documents protected by the work product doctrine as codified in Missouri Supreme Court Rule 56.01(b)(3). Once the privilege is discarded and privileged material is produced, the damage to the party against whom discovery is sought is both severe and irreparable. *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608 (Mo. banc 1993).

ARGUMENT

I. Relator is entitled to an order prohibiting Respondent from taking any action other than granting Relator’s Motion to Quash, because Respondent exceeded the trial court’s jurisdiction and abused his discretion in ordering Dr. Mishkin and his custodian of records to produce the materials identified in Plaintiffs’ Subpoena *duces tecum* for the reasons that:

A. Respondent’ Order is contrary to Missouri law because was there was no basis for compelling production of the requested material because Plaintiffs have wholly failed to support or make any allegations that Dr. Mishkin is a “venal” expert;

B. Respondent failed to make specific findings in his Order of June 9, 2006, and the order is not based on evidence or sound logic and is arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable;

C. The production of the collateral materials requested would improperly invade the physician-patient privilege as codified in Section 491.060(5), R.S.Mo. 2000,thereby compromising the privacy interests of Dr. Mishkin and non-party patients alike;

D. The production of the collateral materials requested is unduly burdensome, oppressive and serves to discourage reputable experts from participating in litigation; and

E. Respondent’s order to produce the collateral materials requested would improperly infringe on the work product privilege of counsel for Relator as well as other non-party attorneys under Supreme Court Rule 56.01(b)(3) and 56.01(b)(4).

INTRODUCTION

Relator has presented this Court with an opportunity to clarify the circumstances in which one party may conduct collateral discovery directed at the credibility of another party’s medical expert. Discovery is collateral if the party seeking it is not entitled to prove it as part of his [or her] case. *State ex rel. Willaims*, 162 S.W.3d at 134. The Eastern District has held in similar circumstances that a careful balancing of the competing interests did not warrant such intrusive discovery, *See, State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796 (Mo. App. E.D. 1985), especially when the trial court has failed to make any specific factual findings to support its decision to allow the discovery of impeachment evidence related to a party’s medical expert. *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861, 863 (Mo. App. E.D. 1996). The Western District has reached a different conclusion, but only when presented with specific evidence of an expert’s “venality” or lack of objectivity. *See, State ex rel. Lichtor v. Clark*, 845 S.W.2d 55 (Mo. App. W.D. 1992); *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639 (Mo. App. W.D. 1994). Only then, and with the adoption of an articulable legal reason to do so, will a court allow such discovery. *Id.*

The petition for an extraordinary writ also raises significant issues concerning the sanctity of the physician-patient privilege as codified in R.S.Mo § 491.060, and Supreme

Court Rule 56.01 concerning the general scope and privileges involved in discovery. As demonstrated below, Respondent's Order permitting Plaintiffs' proposed discovery is both unsupported by, and contrary to, the pertinent precedent. Therefore, this Court should make permanent its preliminary writ in prohibition.

A. Respondent's Order is contrary to Missouri law because there was no basis for compelling production of the requested material since Plaintiffs have wholly failed to support their allegations that Dr. Mishkin was a "venal" expert.

A trial court has an affirmative duty to carefully balance the need of the interrogator to obtain the requested information against the burden imposed on the target of the discovery to ensure that the purposes of pre-trial discovery are not subverted into a "paper war". *See, Generally, State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325 (Mo. App. E.D. 1985); *VBM Corp., Inc. v. Marvel Enterprises Inc.*, 842 S.W.2d 176 (Mo. App. W.D. 1992) (Recognizing that the trial court has an affirmative duty to prevent subversion of the pre-trial discovery process). This is particularly true when such discovery can only lead to extrinsic proof concerning collateral matters. *See, Lineberry v. Shull*, 695 S.W.2d 132, 136 (Mo. App. W.D. 1985) (The trial court properly denied plaintiff's attempts to impeach defendant's expert by reference to collateral matters). *See also, Stojkovic v. Weller*, 802 S.W.2d 152, 156 (Mo. banc. 1991) (Personal injury victims were properly precluded from attempting to impeach insurer's medical expert by asking whether he testified only for defendants and whether he always concluded there was no injury).

Under Missouri Supreme Court Rule 56.01(b)(1), the seeking party shall bear the burden of establishing relevance for obtaining any form of discovery. It is the duty of trial counsel to exercise judgment in formulating discovery requests by realizing there is a limit to the paperwork burden that may be saddled upon the other party or his witnesses. *State ex rel. Whitacre*, 701 S.W.2d at 799. Otherwise, such overreaching in pretrial discovery will subvert the proceedings into a “war of paper”. *Id.* Precedent demonstrates that evidence disclosed by documents sought in discovery must only be such evidence that would be admissible at trial for its relevancy and materiality to the substantive issues of the case, and not merely for impeachment purposes. *State ex rel. Whitacre*, 701 S.W.2d at 798. Seeking discovery for the sole purpose of impeachment is an exceptional request. *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861 (Mo. App. E.D. 1996).

The Eastern District has previously held that limitations exist when the proposed discovery concerns evidence to be used to impeach an expert witness. *See, State ex rel Whitacre v. Ladd*, 701 S.W.2d at 799. There, the court made permanent a writ of prohibition quashing a deposition subpoena duces tecum directed to a defendant’s medical expert because it was defectively oppressive, burdensome and intrusive. *Id.* In recognizing its duty to prevent discovery from devolving into a paper war, the court further criticized the subpoena for requiring the production of office records spanning two and one-half years, for directing the defendant to compile statistics from those records, and for violating the physician-patient privilege because it required disclosure of documents concerning patients with no connection with the pending lawsuit. *Id.* In that

case, the Eastern District held that information only, and not documents sought for impeachment purposes, was within the general scope of discovery as defined in Rule 56.01(b)(1). *Id.* at 799. Missouri courts have since recognized a need, in **extremely limited circumstances**, to allow discovery of impeachment evidence. However, to require an independent medical examiner to produce a broad array of personal documents relating to his financial history, professional affiliations, and medical practice is a rare exception and not the rule. *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 64 (Mo. App. W.D. 1992).

In *State ex rel. Lichtor*, 845 S.W.2d at 58, the Western District considered whether a trial court could subject the defendant's named expert to a thorough interrogation concerning his objectivity as a precondition to serving as a witness. The plaintiff served Dr. Lichtor and his office records custodian a notice of deposition and corresponding subpoena *duces tecum* seeking production of various documents from the previous four and one half years related to Dr. Lichtor's income and finances, including: financial records; copies of federal and state tax returns; copies of all bills, receipts, and accounts receivable; records showing his professional association with defense counsel; and records showing income earned for any surgical services. *Id.* at 58.

While the Western District did allow the discovery in that case, it did so only because plaintiff provided the court with overwhelming factual evidence of prior conduct which suggested that Dr. Lichtor was a "venal expert" *Id.* at 64. That evidence included 1) an affidavit stating that forty-four percent of the expert's testimony was for one law firm; 2) evidence of the expert's attempts to avoid service of subpoena; 3) orders from

five Jackson County cases refusing permission for the expert to serve as an examining physician; 4) testimony of the expert that he wore his Kansas City Chiefs ring on the hand facing the jury; and 5) the transcript of a cross examination in which the expert claimed he would change his evaluation of a claimant. *Id.* at 63-64.

Furthermore, the Western District was keen to temper its ruling by stating that an order requiring a medical expert to “undergo the unpleasant procedure” of producing such a broad array of impeachment discovery **can only be justified where** “the trial court has reasonable grounds to believe that the proposed discovery will tend to show that the testimony of the expert presents a significant risk of confusing, misleading or distracting the jury.” *Id.* at 61 (emphasis added). Additionally, the Western District noted that the extraordinary discovery it had **approved was appropriate only in rare and exceptional cases involving a venal expert** and not a typical expert, because to hold otherwise would allow parties to enter into a new “over-reaching” form of pre-trial discovery in which overbearing and burdensome requests may “subvert the proceedings into a “war of paper,” and therefore necessarily lead to the burden of increased and excessive expense on the part of all parties involved. *Id.* at 64. (emphasis added). The Western District further cautioned that excessive use of this type of discovery would discourage capable and objective professionals from being willing to undertake service as an expert witness. *Id.* at 64.

In *State ex rel. Lichtor*, The Western District repeatedly stressed the requirement that a trial court must adopt special findings based on an articulable legal basis that demonstrates the justification for such an order. *Id.* at 62, 64, and 68. Specifically, the

court stated that **in any future case, justification for such discovery should be based on specific findings adopted by the trial court, and that the trial court must justify the order with an articulable legal basis.** *Id.* at 64 (emphasis added).

In *State ex rel. Creighton v. Jackson*, 879 S.W.2d at 641, the Western District also approved a subpoena *duces tecum* commanding production of portions of income tax records for the plaintiff's expert witness. However, it did so only upon a finding, based on evidence presented at a hearing, that the expert had been "less than forthcoming regarding information pertaining to his annual income as a consultant/witness." *Id.*

There, the Western District stated that the courts generally assume that an expert witness would tell the truth, and that the courts should reasonably limit the burdens, which litigants might choose to place on witnesses if allowed unfettered authority within the scope of discovery. *Id.* at 643. Nonetheless, the Western District in that case only granted limited production of the requested documents because plaintiffs produced substantial evidence that Mr. Creighton might be venal, including: 1) several excerpts from previous depositions that the expert had been earning his living solely as an expert witness for five years; and 2) prior testimony of the expert in which he evaded answers concerning his income as an expert witness. The trial court found, therefore, through presentation of such factual evidence, that the proposed witness was "less than forthcoming" as to his annual income as a consultant witness. *Id.* at 643. The Western District held that it was therefore reasonable for the trial court to anticipate that the expert would attempt to evade inquiries to that effect without the presence of any documentation. *Id.* However, the trial court did limit the production of the originally

requested discovery to reflect an appropriate balance between the expert's privacy interests and the interrogating party's interest in discovery the information at issue. *Id.* at 643.

In *State ex rel. Soete v. Weinstock*, 916 S.W.2d at 863, the Eastern District flushed out this line of reasoning by holding that when seeking extraordinary impeachment evidence relating to a party's expert, specific evidence must be presented, accepted, and considered by the trial court before it can allow such intrusive collateral impeachment discovery. *Id.* There, plaintiffs sought materials spanning a two and one-half period of time, including: 1) all corporate and personal tax records; 2) all appointment calendars and office logs; 3) all records of any work for fourteen law firms; 4) any requests for payment from defendant's law firm; and 5) any copies of payments made by defendant's law firm to the expert in the pending case. *Id.* at 862. There, the Eastern District found that, absent any specific evidence, the intrusive and excessive discovery mentioned above should not be allowed. *Id.* at 863.

Examination of the holdings in *Lichter*, *Creighton* and *Soete* demonstrate that burdensome and extensive discovery for purposes of engaging on a fishing expedition as to the credibility of a party's expert witness is the exception, rather than the rule. In *Creighton*, the Western District noted in dicta that it would generally assume that a witness would tell the truth, unless there is some particular reason to believe the witness might not do so. *State ex rel. Creighton*, 879 S.W.2d at 643. It further noted that courts will therefore protect against unreasonable and abusive discovery directed at an expert witness. *Id.* In *State ex rel. Lichter*, 845 S.W.2d at 64, the Western District concluded

that the case was not decided as though it involved the usual expert witness. Rather, that case was decided involving a singular set of facts involving an out of the ordinary, venal witness. “The procedure here approved will be the *very rare exception* and not the rule.” *Id.* (Emphasis added). Finally, In *State ex rel. Soete*, 916 S.W.2d at 863, the Eastern District held that it would not even entertain production of such intrusive impeachment evidence without specific findings of fact that supported a stated legal reason. *Id.*

Such exceptional circumstances are entirely absent in the case at bar. Unlike *State ex rel. Creighton*, 879 S.W.2d at 639 (where the defendant prevailed because she had extensive factual evidence to support her position as to the venality of defendant’s expert), and more specifically *State ex rel. Lichtor*, 845 S.W.2d at 63 (where plaintiff presented to the trial court a number of documents, including an affidavit of the custodian for the Greater Kansas City Jury Verdict Service establishing that the doctor had testified for a single law firm forty-four percent of the time), Plaintiffs have not provided a single piece of evidence to demonstrate any venality, impropriety or bias on the part of Dr. Mishkin. Furthermore, Plaintiffs have failed produce any evidence at all of an inappropriate relationship between Dr. Mishkin and counsel for Relator, or, defense counsel in general.

In fact, there is no evidence in the record at all that Plaintiffs have alleged **any** reason whatsoever to suggest that they are entitled to each and every document relating to Dr. Mishkin’s treatment of non-party patients, fees, professional associations, or communications with attorneys in general or counsel for Relator covering a span of four and one half years. Nor is there any evidence that Plaintiffs have alleged any venality,

bias, or suspect behavior on the part of Dr. Mishkin. It seems that Plaintiffs merely feel they are entitled to the discovery at issue, and are under no compulsion to present a single reason for the Respondent to grant it.

This case is more similarly aligned with the facts of *State ex rel. Soete*, than with *State ex rel. Creighton* or *State ex rel. Lichtor*. As in *State ex rel. Soete*, Plaintiffs have requested extraordinary impeachment evidence without any evidence in the record that Dr. Mishkin is a “venal expert”. In fact, Plaintiffs did not, and will not be able to demonstrate that **any** factual evidence was presented, orally, by affidavit, or otherwise, sufficient to support their requests. In the usual course, a court does even not allow cross-examination as to such a broad array of issues, unless they bear materially on the interest of the witness in the case at bar. *Elam, v. ALCOLAC, INC.*, 765 S.W.2d 42, 199 (Mo. App. W.D. 1988). The party that seeks such additional information must define to the trial court the facts proposed to be shown in the inquiry as well as the witness, exhibit or other evidential source for the proof. *Id.* Therefore, since there is no evidence in the record that Plaintiffs presented any evidence to justify the proposed discovery, they failed to meet their burden to establish relevance under Rule 56.01. ***The mere statements and conclusions of the interrogator are not enough.*** *Elam.*, 765 S.W.2d at 199. (emphasis added).

B. Respondent failed to make specific findings in his Order of June 9, 2006, which is not based on evidence or sound logic and is arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable.

Respondent's Order fails to set forth any articulable legal reason, based on the adoption of specific factual evidence to support its order overruling Relator's Motion to Quash. While Respondent did cite *State ex rel. Creighton*, he failed to meet the very standards set forth by the court in *Creighton* and its predecessor, *Lichtor*, which held that imposing such broad discovery on a party's expert witness "can be justified only where the trial court has reasonable grounds to believe that the proposed discovery will tend to show that the testimony of the expert presents a significant risk of confusing, misleading or distracting the jury." *State ex rel. Lichtor*, 845 S.W.2d at 58. Both cases held that there was something suspect or venal about the expert at issue which warranted more intrusive discovery, a factor which is wholly absent from the case at bar. Furthermore, both cases particularly charged the trial court with the duty to employ reasonable measures to protect against unduly burdensome and unduly intrusive discovery inquiries. *State ex rel. Creighton*, 879, S.W.2d at 642.

Conspicuously absent from Respondent's order is any specific finding of "venality" or lack of objectivity required by the above cases. Without such a finding, Respondent's Order exceeds its jurisdiction and constitutes an abuse of discretion. *See State ex rel. Metropolitan Transportation Services, Inc. v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. W.D. 1990) (Trial court's denial of request of an examination of expert witness was reversed as an abuse of discretion ***where the reason for such disqualification was not articulated.***) (Emphasis added.)

In fact, this Court need not even address whether Plaintiff has demonstrated "venality", "bias" or "lack of objectivity" in order to find that Relator's order of June 9,

2006 is arbitrary and capricious. In *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861 (Mo. App. E.D. 1996), the defendant petitioned for a writ of prohibition to prevent the trial judge from allowing a subpoena duces tecum for impeachment evidence related to his expert, which is remarkably similar to the case at bar. *Id.* at 861. In that case, the subpoena sought the following documents spanning a four-year period: 1) all tax documentation reflecting income as an expert consultant; 2) all appointment logs and office logs; 3) all records of any work for fourteen law firms; 4) any payments from the defendant's law firm for medical exams; and 5) all payments made by the defendant's law firm to the expert. *Id.* at 862. The trial court denied the subsequently filed motion to quash and motion for protective order without making any specific findings upon the record. *Id.* at 863.

There, the Eastern District acknowledged that it would ordinarily go through the analysis outlined in *Lichtor* and *Creighton* to “determine whether the trial court acted arbitrarily or unjustly in allowing such discovery of impeachment evidence.” *Id.* However, it was never able to apply such an analysis because the Court of Appeals was unable to discern what specific evidence was presented, accepted, and considered by the trial court. *Id.* The Eastern District specifically found that the trial court's failure to state the reasons for its discovery ruling was a clear abuse of discretion. *Id.* The court went on to admonish the trial court for failing to make any specific findings of fact to support its decision to allow the discovery of impeachment evidence. *Id.* at 863. In arriving at its decision, the court found that the trial court's decision “may be based in bias or sound logic” (emphasis added). However, the Eastern District had no way of knowing which,

and therefore could not merely assume that it was not an abuse of discretion. *Id.* Absent a stated legal reason, based on factual evidence presented to the trial court, the Eastern District quashed the subpoena because it found that the trial court's decision was "arbitrary and capricious, indicated a lack of careful consideration and was unreasonable." *Id.*

The facts and procedural history in *Soete* are remarkably similar to the case at bar. Here, Respondent simply failed to make any specific finding, let alone adopt any finding of "venality" or lack of objectivity as required the holding in *State ex re. Soete*. The fact that Respondent merely cites *State ex rel. Creighton*, in no way suggests that that he made any effort to base his decision on any findings of fact, but rather, only indicates that he is aware that the case exists. To the contrary, Respondent's order wholly ignores the approach advanced in *State ex rel. Creighton*, and its predecessor, *State ex rel. Lichtor*. Furthermore, any reference to either, without adhering to the rule that factual findings must be made, fails to satisfy both the holdings of the Western District and the subsequent holding in *State ex rel. Soete*.

Respondent's Order is directly contrary to the Western District's decisions in *State ex rel. Lichtor* and *State ex rel. Creighton*, and completely ignores the Eastern District's holding in *State ex rel. Soete*, 916 S.W.2d at 863, in which the Eastern District criticized the trial court for failing to make any findings of fact, and even went so far as to illustrate what types of findings are necessary to support the extraordinary discovery sought. *Id.* A trial court's failure to make such findings and further failure to state the reasons for its discovery ruling constitutes a clear abuse of discretion. *State ex rel. Metropolitan*

Transportation Services, Inc., 800 S.W.2d at 476. Absent a stated legal reason based on findings of fact, Relator's Order is arbitrary and capricious, and indicates a lack of careful consideration and is unreasonable. *State ex rel. Soete*, 916 S.W.2d at 863. Therefore, there is no way for this Court to determine whether Respondent's order was based on sound logic **or** bias, and this Court's preliminary writ should be made permanent, and Relator's Motion to Quash should be sustained.

C. The production of the collateral materials requested would improperly invade the physician-patient privilege as codified in R.S.Mo 491.060(5), thereby compromising the privacy interests of Dr. Mishkin and non-parties alike.

Although a party may obtain discovery regarding matters which are relevant to the subject matter involved in the pending action, a party may not discover matters which are privileged. Rule 56.01(b)(1). *See, generally, Black and White Cabs of St. Louis, Inc. v. Smith*, 370 S.W.2d 669 (Mo. App. E.D. 1963) (The purpose of the Rule authorizing discovery is to make relevant, non-privileged documents, papers and records in the possession of one party available to the other, but the right of discovery is limited to matters not privileged and relevant to the subject matter of the litigation); *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W.2d 810, 812 (Mo. App. E.D. 1993) (If a relevant matter is privileged, it has complete immunity from discovery.)

It can hardly be disputed that the statutory physician-patient privilege afforded by Section 491.060, R.S.Mo. 2000 encompasses medical records and prevents a physician from disclosing by **testimony in court or in formal discovery**, confidential medical

information acquired while attending a patient in a professional manner. *Cline v. William H. Friedman & Associates*, 882 S.W.2d 754, 761 (Mo. App. W.D. 1990) (emphasis added); *Leritz v. Koehr*, 844, S.W.2d 583, 584 (Mo. App. E.D. 1993). It is equally as well established that a writ of prohibition is appropriate to protect against disclosure of records subject to the privilege accorded by this statute. *State ex rel. Hayter v. Griffin*, 785 S.W.2d 590, 592-593 (Mo. App. W.D. 1990); *State ex rel. McBride v. Dalton*, 834 S.W.2d 890, 891 (Mo. App. E.D. 1992).

Furthermore, ordering the production of collateral material from a party's medical expert for purpose of impeachment is an abuse of discretion. *State ex rel. Willaims*, 162 S.W.3d at 134. In that case, defendant sought non-party medical records from plaintiff's medical expert concerning patients, with similar medical conditions to the decedent, that the medical expert had previously treated. *Id.* at 131. The Eastern District found that Plaintiff's expert was not a defendant in the case at bar. *Id.* at 134. Therefore, non-party patient operative notes of plaintiff's expert would not uncover any relevant material with respect to the physician defendant's defense at trial and were held to be collateral, and did not have to be produced. *Id.* at 134

In *Hammack v. White*, 464 S.W.2d 520, 524 (Mo. App. 1971), the Court of Appeals held that while the physician-patient privilege relating to a plaintiff's physical condition under the pleadings would be waived under Section 491.060(5), such privilege would not be waived with respect to other patients who had been represented by plaintiff's attorney. In that case, defendant sought discovery relating to the relationship between plaintiff's attorney and his medical expert. *Id.* at 523. The plaintiff's attorney

sought to quash a portion of a subpoena which requested: 1) written records relating to treatment of all patients who have been represented by the plaintiff's attorney over the course of three years; 2) records of all fees or monies received from or on behalf of the plaintiff's attorney for three years, including fees received for testifying on behalf of a client of the firm; and 3) all financial books showing payments received for testifying in court for or in behalf of any person for three years. *Id.*

The trial court sustained the motion to quash as to the above-mentioned documents and the Eastern District affirmed. *Id.* In arriving at its decision, the Court of Appeals specifically addressed the issue of requesting discovery with regards to non-party patients or persons referred to the expert by plaintiff's attorney. It held that non-parties did not have their physical condition at issue under the pleadings in the case at bar. *Id.* at 524. It further held that the doctor would have to unreasonably place these other patients in the position of having their personal medical records opened for inspection without being in a position to claim or waive their privilege against such an incursion into their privacy rights. *Id.* Additionally, the court noted that the request was burdensome and time-consuming and would take several days to complete, if it could be completed at all. *Id.*

The Eastern District has also applied the same rationale to non-parties who have been evaluated by defense counsel's medical expert. In *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796, 799 (Mo. App. E.D. 1985), the Eastern District found that production of documents and testimony relating to patients of defendant's medical expert could potentially violate the physician-patient privilege if they in any way relate to patients who have no connection with the lawsuit. *Id.* In making its finding, the Eastern District

noted that this was another example of a party's overreaching in pretrial discovery proceedings and subverting the proceedings into a "war of paper". *Id.* at 798. The Eastern District went further and instructed counsel regarding its duty to prevent such subversion and to exercise judgment in formulating discovery requests so as to limit the burdens placed on parties or their witnesses. *Id.* at 799.

Other jurisdictions have also recognized the physician-patient privilege as it relates to a physician's independent medical examination files of patients not a party to the pending litigation. In *LeJuene v. Aikin*, 624 So.2d 788, 789 (Fla. App 3 Dist., 1993), the trial court ordered defendant's medical expert to create records in his office to determine the source of his fees for professional services and the amounts of the same for acting as an independent medical expert or expert witness. *Id.* The trial court also ordered the doctor to allow an audit of his files to determine how many independent medical examinations he had performed. *Id.* There, the Florida Court of Appeals held that allowing opposing counsel access to information related to non-party patients for the purposes of determining whether they were seen at the behest of an attorney or insurance company, **without the consent of the patients involved**, clearly violates Florida's statutorily enacted physician-patient privilege. *Id.* (emphasis added).

The above cases are similar to the case at bar because Plaintiffs in this case have requested information relating to non-party patients seen by Dr. Mishkin pursuant to providing medical services. (A8, A12.) Plaintiffs defined medical services to include **"treatment**, examination, diagnosis, testing, reporting, evaluation, rating, consultation, record review, and testimony **of any nature** including deposition testimony and trial

testimony related to any person having a legal claim or potential claim for injuries or damages.” (A8.) (emphasis added) Plaintiffs’ definition specifically refers to treatment of any nature provided by Dr. Mishkin. To allow Plaintiffs to inquire as to the treatment of any such person would not only necessarily violate the physician-patient privilege of any patients whose medical condition is not involved in the pending suit, but also venture into collateral matters that have no relevance to the case at bar. Even if this request were limited to any person having any actual or potential claim for injuries, it still fails to discern between patients being treated by Dr. Mishkin that happen to have a legal claim and those examined by Dr. Mishkin pursuant to litigation in general, and this action in particular. Non-party patient’s records are not relevant to the matter at bar and should not be produced. To allow otherwise would force open the medical records non-parties, whose physical condition is not at issue, without being afforded the opportunity to claim or waive their privilege against such an incursion into their privacy rights, and is inconsistent with previous holdings in this state. See, *Hammack v. White*, 464 S.W.2d at 524. Furthermore, it would constitute an abuse of discretion for allowing production of collateral impeachment materials, which is inconsistent with the Eastern District’s holding in *State ex rel. Williams*, 162. S.W3d at 134.

Even if Plaintiff’s request is limited to information relating to medical services provided to patients having a legal claim or potential legal claim. Such a request necessarily broadens the scope of Plaintiff’s proposed discovery to include the records of patients who have been treated by Dr. Mishkin since the beginning of 2002, but happen to have sustained their treated injury in such a way as to have a potential legal claim

against another person or entity. Therefore, any patient of Dr. who, during the past four and one-half years may have sustained any accidental injury would be subject to the scope of the deposition notice prepared by Plaintiffs. In order for Dr. Mishkin and his staff to properly respond to Plaintiffs' discovery request, they would have to perform an audit of every single file over the course of four and one-half years to determine whether any of his patients' injuries were the result accidental injury due to the negligence of another, or were suffered due to illness, infirmity or other condition. Furthermore, it would require a legal determination on Dr. Mishkin's part to ascertain whether each patient had a potential legal claim.

Finally, Plaintiffs' notice of deposition specifically includes in its first area of inquiry, "All medical services performed by Dr. Marvin Mishkin for the calendar years 2002 to 2006." (A8.) The notice does not limit the extent to which Plaintiffs' attorney will inquire as to medical services, nor does it relate only to fees received by Relator's expert, and therefore leaves open the possibility that Plaintiffs' counsel may venture into areas that are specifically protected by the physician-patient privilege. Such questions are simply unacceptable. In Missouri, it has been universally accepted since the enactment of the first predecessor statute to Section 491.060(5) in 1835, that the physician-patient privilege belongs to the patient and can only be waived by the patient or the legislature. *Randolph v. Supreme Liberty Life Ins. Co*, 359 Mo. 251, 252 (Mo. 1949). Furthermore, the Health Insurance Portability and Accountability Act (HIPPA), protects privacy of health information, and regulates how health care providers certain entities use and disclose certain individually identifiable, protected health information. HIPPA

provides for civil and criminal penalties against individuals that improperly handle or disclose private health information pursuant to 42 U.S.C. §§ 1320d-5 to d-6. *Bradford v. Semar*, WL 1806344, 2 (E.D. Mo. 2005). Compelling Dr. Mishkin, or any employee of Orthopedics, to testify as to any such medical service provided would necessitate contact with, **and** a signed authorization from **each patient** in order to obtain permission to discuss their treatment with Plaintiffs attorneys, or risk incurring such civil or criminal penalties.

Responding to these requests, as ordered by Respondent, will necessarily lead to the production of documents that will disclose the identities and physical condition of patients **who are not involved in the present litigation** and leaves open the opportunity for Plaintiffs' attorney to inquire as to the names, physical condition, and medical diagnoses of any number of people seen by Dr. Mishkin at the request of defense counsel or otherwise. Furthermore, these requests, specifically Plaintiffs' first and second areas of inquiry as contained in its notice of deposition, do not attempt to limit in any way the discovery requested relating to medical services provided by Dr. Mishkin for the treatment or evaluation of non-parties, and would therefore violate their physician-patient privilege without affording them the opportunity to claim or waive such privilege.

The decisions above uniformly recognize that an application of the physician-patient privilege involves a matter of law, rather than a trial court's discretion; that a trial court which threatens to order discovery of privileged medical records acts without jurisdiction or in excess of jurisdiction; and, that the threatened injury cannot be adequately remedied by appeal in as much as a confidential record once disclosed can

never again regain its confidentiality. *See also, State ex rel. Boswel v. Curtis*, 334 S.W.2d 757, 763 (Mo. App. S.D. 1960) (Court should include in the calculation of the burden upon the responding party any invasion of privacy, particularly the privacy of a non-party, which will result from compliance with the requested discovery.)

In weighing the privacy interests of those non-parties whose information is at risk against the exceptional remedy of providing otherwise burdensome collateral discovery by an expert witness, it is apparent that Respondent's order lacks the careful consideration necessary to limit discovery so as to protect the privacy interests of parties not subject to the case at bar as well as that of Dr. Mishkin. Therefore, Relator requests that this Court make permanent its preliminary writ in prohibition and properly overturn Respondents order.

D. The production of the materials requested is unduly burdensome, oppressive and serves to discourage reputable experts from participating in litigation.

Requiring an independent medical examiner to produce documents is a rare exception and not the rule. *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 64 (Mo. App. W.D. 1992). While trial courts have discretion in ordering discovery, that discretion is not unlimited. Instead, the trial court must balance the need of the interrogator to obtain the requested information against the burden imposed upon the target of the discovery in furnishing it to ensure that the purposes of pre-trial discovery are not subverted into a "paper war" *See, generally State ex rel. Anhuesser v. Nolan*, 692 S.W.2d 325 (Mo. App. E.D. 1985). It is the affirmative duty and obligation of trial judges to prevent such

subversion. *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796, 799 (Mo. App. E.D. 1985). It is also the duty of trial counsel to exercise judgment in formulating discovery requests by realizing there is a limit to the paperwork burden that may be saddled upon the other party or his witnesses. *Id* at 799. This is particularly true when the proposed discovery concerns evidence to be used solely for impeachment because seeking such discovery is an *exceptional request*. *State ex rel. Soete*, 916 S.W.2d at 861 (emphasis added).

The Eastern District has repeatedly recognized that limitations exist when the proposed discovery concerns evidence to be used solely for impeachment purposes. In *Willis v. Brot*, 652 S.W.2d 738, 739 (Mo. App. E.D. 1983), defendant asked five interrogatory questions regarding plaintiff's treating chiropractor who had been listed as an expert witness. Those questions included inquiries covering a four-year span as to the following: 1) the number of patients of the expert who were also clients of plaintiff's attorney; 2) the number of people referred to the expert by plaintiff's counsel; 3) the number of times plaintiff's counsel had deposed the expert; and 4) the number of times the expert had testified in court for plaintiff's counsel. *Id.* at 738. There, the Eastern District held that opinions held by the expert, and such information sought to impeach the expert's testimony regarding his facts known and opinions held were not discoverable through interrogatories. *Id.* at 739-740.

Significantly, in *State ex rel. Whitacre*, 701 S.W.2d at 799, the Eastern District made permanent a writ of prohibition quashing a deposition subpoena duces tecum directed to a defendant's medical expert because it was oppressive, burdensome and intrusive. In that case, the plaintiff issued a subpoena to take the deposition of the

custodian of records for defendant's medical expert. *Id.* at 796. The subpoena commanded the custodian to produce "all calendars, appointment books, ledgers, notebooks, or the like" which recorded the expert's court testimony, deposition schedules, office examinations and charges for his services concerning patients not seen for treatment, but rather for the rendition of medical opinions about the nature and extent of their injuries for a two and one half year period. *Id.* The subpoena also commanded the compilation of statistical information for the same period, including: 1) the number of patients seen by the expert as opposed to the number he had examined for other purposes; 2) the total number of patients for whom a medical report was generated; 3) the number of patients seen at the request of an insurance company; 4) the total number of depositions and live court testimony given and fees received; and 5) the total number of exams that were followed by a medical report and the fees received. *Id.* at 796-797. In reaching its decision, the Eastern District held that the "onerous task required to meet the demands of the subpoena would constitute an intrusive interference with the expert's medical practice." *Id.* at 799.

Missouri courts have cautioned that excessive use of this type of discovery would discourage capable and objective professionals from being willing to undertake service as an expert witness. *State ex rel. Lichtor*, 845 S.W.2d at 64. The fact that Dr. Mishkin does perform independent medical examinations should not be held as the only reason to order intrusive and burdensome discovery. Whether he performs such services alone is insufficient to demonstrate any bias, venality, or evasiveness on his part, nor is it sufficient to demonstrate that his testimony will tend confuse or misinform a jury. In

Missouri, as well as in other jurisdictions, the courts have recognized the necessity of expert testimony in civil litigation. *State ex rel. Lichtor*, 845 S.W.2d at 61, *citing In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233-34 (5th Cir. 1986) (That a person spends substantially all of this time consulting with attorneys and testifying is not grounds for disqualification because professional experts are now commonplace.) Such experts serve to aid the trier of fact in assessing the increasingly complicated issues involved in today's litigation. Reputable expert witnesses may be discouraged from accepting employment in any case if to do so would subject them to harassment through unnecessary and burdensome discovery of personal finances. *In re Francis W. Weir, Lincoln Elec. Co., Hobart Brothers Co., and the Boc Group, Inc.* 166 S.W.3d 861, 865 (Tex. Ct. App. 2005). In that case, the trial court ordered defendants to produce their expert to testify on the percentage of his income that was received from litigation related work for three years, and his total income from such work. *Id.* The expert had already admitted that ninety percent of his work was for defendants. He also testified as to the amount of time he spent on the case and his hourly fee for his services. *Id.* at 865. The Texas Court of Appeals held that three factors: 1) the intrusion on the expert's privacy; 2) the burden in obtaining the expert's financial records not related to the case at bar solely to obtain possible impeachment evidence; and 3) the **impact on the willingness of reputable experts to provide testimony when needed in litigation**, outweighed any possible benefit from the additional discovery ordered by the trial court. *Id.* (emphasis added).

Likewise, in the case at bar, Plaintiffs' have requested, "All documents related to fees received by Relator's Expert from 2002 through 2006." (A12.) However, Plaintiffs' have in no way limited that request to fees received for services provided as a medical expert. Instead, their request specifically seeks *all fees received by for medical services*. (A12.) Such a request is basically asking how much Dr. Mishkin has earned in any capacity since the beginning of 2002, and is wholly irrelevant, private, and not reasonably limited so as to balance the needs of the Plaintiffs to cross examine against the privacy interest of Dr. Mishkin.

Even if Plaintiffs' request were limited to fees received for purposes of expert testimony, the request is still burdensome and oppressive absent some indicia as to the venality of Dr. Mishkin. Relator has no doubt, and Missouri courts presume, that when asked at deposition, Dr. Mishkin will testify freely and honestly about his hourly fees for such testimony as well as the amount of time he spent on the case at bar. *State ex rel. Creighton v. Jackson*, 879 S.W.2d at 643. He will also freely as to the percentage breakdown of his consultant practice. However, to force Dr. Mishkin to provide all fees received since 2002, let alone significant information relating to each and every other patient he has seen for the purposes of providing medical services pursuant to any litigation for the last four years would only serve to needlessly emphasize what could be readily apparent to the jury following a simple cross examination. *LeJuene*, 624 So.2d at 790. Any such intrusive, oppressive and burdensome inquiry as to the finances and personal business practices of Dr. Mishkin go well beyond what is necessary to demonstrate what is easily discoverable orally during the deposition of Dr. Mishkin.

The above cases demonstrate that there are indeed limits to discovery as related to expert witnesses. They also demonstrate that it is the trial court's responsibility to prevent a party's overreaching in pretrial discovery proceedings and to save the proceedings from devolving into a "war of paper." *Id.* The facts and holding in *Whitacre* are particularly relevant to this case. Here, retrieving the documents requested by the subpoena could require days of investigation and organization by Dr. Mishkin and members of the staff of Metropolitan Orthopedics. It would also violate Dr. Mishkin's privacy rights and the rights of his other patients, including the protections afforded under the physician-patient privilege. Providing such information could also expose Dr. Mishkin to civil and criminal liability. Finally, the requests at issue are invasive, and burdensome and require a great amount of detail.

In balancing Plaintiffs' need to obtain the information about the type of consulting Dr. Mishkin performs, which they may freely ask Dr. Mishkin at his oral deposition, against the burden of furnishing the documents requested, it seems clear that Dr. Mishkin's burden outweighs Plaintiffs' need. Therefore, Respondent's unreasonable, oppressive, and intrusive order that Relator's expert comply with Plaintiff's subpoena and testify as to matters requested in its notice of deposition should be quashed as a matter of public policy. To open the door to allow such a broad range of discovery from a medical expert, would basically force any experienced and reputable expert in any given field, to lay bare the facts of his life for the scrutiny of an opposing counsel whose only goal is to undermine his credibility and make him appear to a jury as less than what he is, a respected and long standing member of the St. Louis medical community. Subjecting

such an expert to unscrupulous, and unchecked scrutiny thereby serves as a disincentive to prospective experts to offer their services, and ultimately undermine the purpose of civil litigation in the process.

E. Respondent’s order to produce of the materials requested would improperly invade the work product of counsel for Relator as well as other non-party attorneys under Supreme Court Rule 56.01(b)(3) and 56.01(b)(4).

Plaintiffs’ request also seeks “All documents memorializing communications” between Brown & James P.C. and Dr. Mishkin and his office, as well as all documents related to the names of lawyers and law firms requesting medical services by Dr. Marvin Mishkin for the calendar years 2002 to 20006. (A8, A12.) Such communications would necessarily include any and all independent medical examination reports generated by Dr. Mishkin, and would also include the names, physical conditions, medical history and potentially even social security numbers of the patients examined. Furthermore, the requested documents would necessarily include any communications between Dr. Mishkin and attorneys from any number of law firms for which Dr. Mishkin may be acting merely as a non-testifying consultant. Such correspondence is precluded by Missouri Supreme Court Rule 56.01(b)(3), absent a showing that the seeking party has substantial need of the materials, and is unable, without due hardship to obtain the substantial equivalent by other means. Rule 56.01(b)(3) specifically mandates that even if such discovery is allowed, “the court shall protect against disclosure of the mental impression, conclusions, opinions or legal theories of an attorney... concerning the

litigation.”

Although a party may obtain discovery regarding matters that are relevant to the subject matter involved in the pending action, a party may not discover matters which are privileged. Rule 56.01(b)(1). *See generally, Black and White Cabs of St. Louis, Inc. v. Smith*, 370 S.W.2d 669 (Mo. App. E.D. 1963) (The purpose of the Rule authorizing discovery is to make relevant, non-privileged documents, papers and records in the possession of one party available to the other, but the right of discovery is limited to matters not privileged and relevant to the subject matter of the litigation.); *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W.2d 810, 812 (Mo. App. E.D. 1993) (If a relevant matter is privileged, it has complete immunity from discovery.)

The work product privilege precludes an opposing party from discovery materials created **or commissioned** by counsel in preparation for possible litigation. *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984). In addition, it “protects the ‘thoughts’ and ‘mental processes’ of the attorney preparing a case.” *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. banc 1995). (emphasis added). The doctrine generally protects “both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney’s mental impressions, conclusions, opinions, and legal theories-sometimes called opinion work product)” from disclosure. *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O’Malley*, 898 S.W.2d 550, 552 (Mo. banc 1995).

Furthermore, a discovery order requiring a party to provide information about any medical experts whose testimony they did not intend to present at trial exceeds the trial court's jurisdiction. *Welty by Welty v. Gallagher*, 812 S.W.2d 546 (Mo. App. E.D. 1991). In that case, the plaintiff sought a writ of prohibition to prevent having to provide 1) the name of *any* medical professional who has formed an opinion that the plaintiff incurred an injury, and 2) for each medical professional identified, provide his or her address and medical specialty. The plaintiff argued that, with regards to those experts not expected to testify, the trial court's order compelling said discovery was in excess of the trial court's jurisdiction. *Id.* at 546. There, the Eastern District held that ordering production of information related to "non-testifying" experts was in excess of the trial court's jurisdiction and that the plaintiffs' only had to reveal the requested information for those experts who were previously identified as expected to testify at trial. *Id.*

Relator has no knowledge as to what other law firms Dr. Mishkin has dealt with over the past four years. However, to compel Dr. Mishkin to produce all documents related to the name of each lawyer or law firm requesting medical services by Dr. Mishkin for the previous four years would necessarily include correspondence with those attorneys, including attorneys with Brown & James, which might include consultant's reports generated by Dr. Mishkin based upon medical records reviews, and not in anticipation of giving deposition or courtroom testimony. It is also reasonable to assume that the scope of such an order would include correspondence related to pending litigation, whether in the case at bar or not. To force Dr. Mishkin to produce any such correspondence or report would not only violate the tangible work product privilege

asserted by Defendant's in the present action, but would also waive the same privilege for any other law firm that might rely on Dr. Mishkin to provide consulting services which do not lead to expert testimony.

Respondent's order compelling Relator to provide all documents memorializing communications between Metropolitan Orthopedic, Ltd. and Dr. Marvin Mishkin on the one hand, and Brown & James, P.C., on the other hand, and all documents related to the name of each lawyer or law firm requesting medical services by Dr. Marvin Mishkin, for the calendar years 2002 through 2006 is overly broad and intrusive and violates the statutory protections afforded communications with an expert consultant under Missouri Supreme Court Rules 56.01(b)(3) and (b)(4). Therefore Relator respectfully requests this Court make permanent the preliminary writ of prohibition.

CONCLUSION

WHEREFORE Relator Rebecca Pooker respectfully requests the Court to make permanent its preliminary writ of prohibition and to direct Respondent to sustain Defendant's Motion to Quash, in *Russell and Janet Lee Macke v. Rebecca E. Pooker*, by and through her Next Friend, Norman Pooker, Cause No. CV305-2516-CC (Mo. Cir. Ct., Jefferson County), and for other such further relief as this Court deems just and proper.

Respectfully submitted,

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AFFIDAVIT SERVICE

The undersigned hereby certifies that Relator’s Brief and a disk containing same were hand delivered 20th day of October, 2006, to: Gary R. Sarachan, Esq., Capes, Sokol, Goodman & Sarachan, 7701 Forsyth Blvd., 4th Floor, St. Louis, Missouri 63105, attorneys for plaintiffs; Honorable Gary P. Kramer, Circuit Judge Division 2, Circuit Court of Jefferson County, 300 Main Street, Hillsboro, MO 63050, Respondent.

Troy A. Brinson #56156

Subscribed and sworn to before me this 12th day of July, 2006.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil procedure that:

1. The Realtor's Brief includes the information required by Rule 55.03.
2. The Realtor's Brief complies with the limitations contained in Rule 84.06.
3. The Realtor's Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, table of contents, and table of authorities contains 10,210 words, as determined by the word-count tool contained in the Microsoft Word 2000 Software with which this Realtor's Brief was prepared; and
4. the computer disk accompanying the Realtor's Brief has been scanned for viruses and, to the undersigned's best knowledge, information, and belief, is virus free.

Troy A. Brinson

#56156