

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

REPLY BRIEF OF RELATOR

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REPLY TO RESPONDENT’S STATEMENT OF FACTS

Supreme Court Rule 84.04(c) provides in pertinent part that the statement of facts “shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.” Respondent “Statement of Facts” was divided into two sections captioned “Procedural Status” and “The Circumstances and The Actual Request”. (R. 11-12.) Rather than merely set forth a fair and concise statement of the relevant facts without argument, Respondent’s additional statement of facts includes several misplaced arguments, including: 1) an attempt to define the meaning of the term “medical services”; 2) suggestions as to the breadth of evidence that may be considered by a jury; 3) an attempt to distinguish the materials sought by Plaintiff’s subpoena duces tecum from other types of forbidden discovery, and 4) suggestions that if Plaintiffs were unable to obtain the materials sought, that they would be precluded from proper cross-examination without the information. (R. 12-15.)

Respondent’s arguments are misplaced and usurps the Court’s authority by stating as fact the very issues presently before the Court. Therefore, Relator once again submits the following portions of the Subpoena at issue, so the Court can properly determine the scope of these requests in their proper context:

DOCUMENTS TO BE PRODUCED

1. **All documents** related to fees received by Metropolitan Orthopedics, Ltd. And/or Dr. Marvin Mishkin as a result of medical services performed by Dr. Marvin Mishkin for the calendar years 2002 through 2006.

2. **All documents** memorializing communications between Metropolitan Orthopedics, Ltd. and Dr. Marvin Mishkin on the one hand and Brown & James, P.C. on the other hand for the calendar years 2002 through 2006.
3. **All documents** related to the number of persons who received medical services by Dr. Marvin Mishkin for the calendar years 2002 through 2006.
4. **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. (A. 29.) (emphasis added)

* * *

AREAS OF INQUIRY

1. **All medical** services performed by Dr. Marvin Mishkin for the calendar years 2002 to 2006.
2. **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 for the calendar years 2002 to 2006.
3. **All documents** related to the number of persons who received medical services by Dr. Marvin Mishkin for the calendar years 2002 to 2006.

4. **All documents** related to the names of lawyers and law firms requesting medical services by Dr. Marvin Mishkin for the calendar years 2002 through 2006. (A. 32.) (emphasis added)

* * *

“Medical services” **shall 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 legal claim for injuries or damages. (A. 32.) (emphasis added)

To the extent that Respondent’s Statement of Facts includes argument and unsupported statements, it should be disregarded.

REPLY ARGUMENT

I. Relator is entitled to an order prohibiting Respondent from taking any action other than granting its Motion to Quash, because Plaintiffs' subpoena and notice of deposition are so overly broad, burdensome and inclusive that it undermines the spirit of discovery, and a trial court has a duty to protect against unreasonable disclosure of burdensome, oppressive and overly broad discovery without first determining the relevance of the materials sought.

INTRODUCTION

In the Brief previously filed, Relator Rebecca Pooker argued that the Respondent had erroneously overruled her Motion to Quash. This argument emphasized that no precedent under Missouri case law authorized such intrusive discovery and that the only decisions permitting such discovery had involved exceptional circumstances, which are not present in this case. Relator further emphasized that Respondent's failure to make specific findings, based on factual evidence, rendered his decision illogical and arbitrary. Finally, Relator demonstrated that the broad scope and oppressive nature of Plaintiffs' subpoena and notice of deposition violates the physician-patient and work-product privileges, and significantly invades the privacy of non-parties.

Rather than repeat these arguments or the circumstances in which this Court may issue a writ to redress a trial court's abuse of discretion, Relator will limit its response to the more significant misconceptions of law and fact contained in the Respondent's Brief. This limitation should not be construed, however as an abandonment of any argument previously asserted.

In *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327 (Mo. App. E.D. 1985), the Eastern District observed that extensive and burdensome discovery as to financial matters was abusive because the pertinent information sought could have been obtained by deposition. *Id.* at 328. The Court went on to note that if the deposition testimony revealed the general information sought, then there would be no need for additional, overly intrusive, discovery. *Id.* If the deposition testimony proved otherwise, *then* additional discovery might be warranted, but in any event, requests for production should be directed toward specific documents rather than all encompassing “catch-all” demands. *Id.*

In an effort to minimize the impact of Plaintiffs’ burdensome request, Respondent tries to equivocate the hypothetical questions Plaintiffs would ask Dr. Mishkin at a deposition with the discovery sought by Plaintiffs’ subpoena and notice of deposition. (A. 29, 32.) In its Motion to Quash, Relator recognized Plaintiffs’ right, during a deposition, to inquire generally as to Dr. Mishkin’s finances or whether he testifies more for plaintiffs rather than defendants. However, Plaintiffs’ request goes beyond what is necessary to demonstrate what can readily be determined by a simple cross-examination.

Plaintiffs’ intrusive requests includes repeated reference to “all documents” and “all information” covering a four year time span. They are a far cry from the hypothetical questions posed by Respondent. Courts generally assume that an expert witness will tell the truth if asked directly about his financial interests, unless there is some particular reason to believe the witness may not tell the truth. *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 643 (Mo. App. W.D. 1994). The courts would

prefer to reasonably limit the burdens with which litigants might choose to place on witnesses, rather than allow them unfettered authority in discovery. *Creighton*, 879 S.W.2d at 643. The courts will protect against discovery efforts which are unreasonable and abusive. *Id.* If Dr. Mishkin were to answer questions posed at his deposition in a manner which is evasive or dishonest, then, according to *Anheuser*, Plaintiff's could perform additional discovery and support its request for such discovery to the trial court with the deposition transcript of Dr. Mishkin. Then, if necessary, Plaintiffs would be free to depose Dr. Mishkin again, at their own expense.

Respondent contends that if Relator was legitimately concerned about the excessive scope and burdens of the discovery at issue, that Relator should have contacted the attorney for Plaintiff so as to arrive at some sort of compromise, or pursued a different method of restricting the documents produced altogether.

Plaintiffs' counsel is an extremely seasoned and experienced litigator with many years of service. There is no reason for Relator to believe that he was seeking anything other than what he specifically referred to in the subpoena. Furthermore, there is no requirement that Relator had to contact Plaintiffs in the face of an overly broad and intrusive subpoena directed at Dr. Mishkin. Nor is there any reason to believe that merely telephoning opposing counsel would sidetrack Plaintiffs' efforts to obtain the burdensome discovery at issue. The fact that Plaintiffs have persisted in fighting for the full breadth of the discovery at issue, all the way to the Missouri Supreme Court, establishes the futility of attempting to resolve these issues in such a manner. Therefore, Relator properly sought the proper redress available under Supreme Court Rule

57.09(b)(1), by filing a motion that the subpoena be quashed, as is Relator's right under the Rules.

Respondent also argues that Dr. Mishkin is not an independent medical examiner pursuant to Missouri Supreme Court Rule 60.01; therefore, he should be automatically subject to increased scrutiny. However, Rule 60.01(b)(3) states that 60.01(b) also applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Furthermore, in *State ex rel. Castillo v. Clark*, 881 S.W.2d 627, 630-631 (Mo. 1994), this Court found that Rule 60.01 does not require all communications between patient and physician or hospital and physician's office records in general, demonstrating that there are limits, to expert discovery in any event. *Id.* at 630.

While the trial court has the ultimate responsibility for selecting an independent medical examiner, the examining physician is usually suggested by the moving party. *State ex rel. Metropolitan Transportation Services, Inc., v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. W.D. 1990). However, the trial judge abuses his discretion if a party moves that a particular physician be used, and the judge denies that parties request without stating a legal reason. *Id.*

There is no practical difference between a doctor appointed by the trial court and a doctor agreed to by the parties, and the standard by which each is subject to overly burdensome and intrusive discovery should be no different. Plaintiffs waived any objection to his qualifications or bias by failing to do so at the earliest available opportunity. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 878 (Mo. App. W.D. 1986). If Plaintiffs in this case were genuinely concerned about the

qualifications and potential bias of Dr. Mishkin, they should have filed a motion pursuant to Rule 60.01 to either disqualify him or have Respondent name a different doctor.

A. The rule outlined in *Lichtor*, and subsequently followed by *Creighton* and *Soete*, firmly establish that pursuant to ordering the production of intrusive, overly broad, and burdensome discovery from an expert witness, it is incumbent upon the trial court to properly determine whether any privilege applies, and to apply the proper framework for balancing the needs of the interrogator against the privacy interest of the expert. In doing so, the trial court must clearly state the legal reason for doing so, based on specific findings of fact.

In defining the scope of discovery in civil actions, Missouri Supreme Court Rule 56.01(b)(1) clearly and unambiguously states, “The party seeking discovery shall bear the burden of establishing relevance.” The determination of whether proffered evidence is relevant is within the discretion of the trial court. *Weatherly v. Miskle*, 655 S.W.2d 842, 844 (Mo. App. E.D. 1983). If information sought is not within the scope of discovery, the trial court’s discretion plays no role. *State ex rel. Creighton v. Jackson*, 879 S.W.2d 639, 641 (Mo. App. W.D. 1994). A trial court’s discretion is involved where an inquiry, which is within scope of discovery, runs against an interest in privacy or against an assertion that the proposed discovery is burdensome. *Id.* The courts are given broad authority to intervene to protect against discovery abuses. *State ex rel. Creighton*, 879 S.W.2d at 642. Trial courts are to restrict discovery regarding professional objectivity of examining witness so that it is no more intrusive than necessary because counsel should

not be permitted to harass, badger and humiliate the witness with inquiries not strictly necessary to discovery of matters relevant to professional objectivity. *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 65 (Mo. App. W.D. 1992). The privacy of the expert witness should be respected and should be invaded only as necessary to insure the honesty and accountability of the expert in responding to legitimate inquiries. *Id.* The trial court must limit the scope of discovery to protect against unreasonably cumulative or duplicative discovery, and to protect against unnecessary burden or expense. *In re Francis W. Weir, Lincoln Electric company, Hobart Brothers Company, and the Boc Group, Inc.*, 166 S.W.3d 861 (Tex. App. Beaumont 2005).

Respondent spends a great deal of time trying to establish the scope of discovery, but only with respect to *financial information* related to an opposing party's medical expert. Unfortunately, Respondent fails to address the practical effects of what happens when the scope of such financial discovery is exceeded. Furthermore, Respondent fails address those situations where privileged materials are sought and the trial court has no discretion to compel the sought after discovery. Therefore, it is important to address the process by which a trial court should determine whether discovery sought should be deemed admissible.

Respondent fails to comprehend the importance of the decisions in *Lichtor*, *Creighton*, and *Soete* in several respects. Respondent suggests that because the courts in its cited cases allowed for limited production of financial documentation, that all of the intrusive discovery sought by Respondent in the present case should be produced. Respondent sidesteps the process by which the Western and Eastern District determined

whether the discovery sought was permissible and whether the trial court abused its discretion in the instant case.

In *Lichtor, Creighton and Soete*, the Eastern and Western Districts have outlined a general framework within which trial courts may engage in the balancing function necessary to determine whether intrusive or broad discovery, regardless of its collateral nature, may be obtained from an expert witness: First, the trial court should determine whether the items sought are within the scope of discovery. If the items sought are not within the scope of discovery, then the trial court has no discretion to order its production. *State ex rel. Creighton*, 879 S.W.2d at 641-642. Second, if the items sought are within the scope of discovery, then the trial court must conduct a delicate balancing analysis of the privacy interests of the expert witness against the need for accountability to determine the objectivity of the expert. *Id.* at 643. Third, the order compelling the discovery must have (a) a sufficient legal reason, (b) **based on specific findings**, for believing that the testimony of the expert would be such as would, because of venality or otherwise, tend to confuse, mislead or distract the jury. *State ex rel. Lichtor*, 845 S.W.2d at 68. See also, *State ex rel. Soete v. Weinstock*, 916, S.W.2d 861, 863. If the trial court fails to make specific findings to support a sufficient legal reason for allowing the discovery, then a higher court cannot determine whether the trial court acted either arbitrarily or justly. *Id.* Therefore, any order to produce extraordinary discovery (as is the case here) without such a finding, by default, appears arbitrary and capricious, indicates a lack of careful consideration and is unreasonable. *Id.*

B. Missouri law does not support absolute discretion on the part of a trial court when ordering the production of documents related to a medical expert. Such discretion must be tempered when the parties abuse the discovery process.

Respondent argues that Relator fails to meet the burden of showing that the trial court exceeded its jurisdiction. However, the documents sought in this case are burdensome and oppressive on their face and should not be produced. The refusal to forbid the discovery of matters which are privileged or work-product is an act outside the court's jurisdiction. *State ex rel. Hackler v Dierker*, 987 S.W.2d 337, 338 (Mo. App. E.D. 1998).

The role of the reviewing court is limited to insuring that the trial court is not acting arbitrarily or unjustly. *State ex rel. Metropolitan Transportation Services, Inc. v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. W.D. 1990). The reviewing court is limited to the record made in the court below. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997). The record under review must be sufficiently developed so that a reviewing court may make a proper determination as to the correctness of the ruling of the trial court. *State ex rel. St. Anthony's Medical Center v. Provaznik*, 863 S.W.2d 21, 23 (Mo. App. E.D. 1993). Where the propriety of granting a motion depends on evidence, but no evidence appears in the transcript, a reviewing court cannot presume that the proper evidence was adduced. *Fine v. Waldman Mercantile Co.*, 412 S.W.2d 549, 552 (Mo. App. 1967). To the contrary, if the record fails to show that evidence was adduced, the reviewing court must presume evidence was not properly adduced by the

trial court. *Id.* An appellate court may not assume as a fact something which does not appear from the record and base a ruling thereon. *Foster v. Laba*, 402 S.W.2d 619, 623 (Mo. App. 1966). Therefore, a trial courts failure to make findings based on properly adduced evidence is a clear abuse of discretion because the appellate court cannot presume otherwise. *State ex rel. Soete*, 916 S.W.2d at 863.

Respondent's order allows for unduly burdensome and oppressive production of materials, which will serve to discourage reputable experts from participating in litigation. None of the requested documents or areas of inquiry included in Plaintiffs' notice of deposition and attached subpoena are narrowly tailored to request specific documents, but are instead overly broad and overtly inclusive requests which will require a great deal of effort on the part of Dr. Mishkin and his staff to collect and produce.

Requests for production should be directed toward specific documents rather than all encompassing "catch-all" demands. *State ex rel. Anheuser*, 692 S.W.2d at 327. In determining whether the items requested are beyond the scope of discovery, it is important to look to the language of the requesting documents. Here, the documents requested in under "Documents to be Produced", numbered 1 - 4, as well as "Areas of inquiry", numbered 1 - 4, are, **on their face**, are well beyond the scope of discovery because each paragraph specifically requests "**all** documents related to" and "**all** medical services" related to each request.

Paragraph number 1, under the caption "Documents to be Produced", specifically seeks all documents related to fees for medical services. (A. 12.) This request effectively seeks the **all** fees earned by Dr. Mishkin for the performance of medical

services. While counsel for Plaintiffs have never previously indicated otherwise, Respondent now contends that “medical services” is narrowly defined to only include services performed pursuant to legal proceedings. To the contrary, the definition itself indicates that “medical services” shall include **treatment**. (A. 8.) The fact that the definition later includes reference to a legal claim merely means that services performed pursuant to legal services are a sub-category of the broader definition of medical services, which necessarily includes **treatment** of any person.

Additionally, under the heading “Areas of Inquiry”, Plaintiffs contend that a topic of discussion will be, “All medical services performed by Dr. Marvin Mishkin for the calendar years 2002 to 2006.” (A. 8.) This “area of inquiry” is even broader than that referring to the documents produced because the topic is not limited to fees alone, but for medical services in general.

Upon objection, the trial court has a duty to consider whether the discovery sought runs against an interest in privacy or against an assertion that it is burdensome. *Edwards v Missouri State Board of Chiropractic Examiners*, 85 S.W.3d 10, 22 (Mo. App. W.D. 2002). Respondent argues that Plaintiffs have “observed boundaries” and “narrowly tailored” their discovery request so that it is not burdensome or unduly intrusive. (R. 42.) Furthermore, Respondent argues that the documents and testimony sought in the present case are not as broad and extensive as those requested in *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796, 797 (Mo. App. E.D. 1985). Respondent’s representation is inaccurate at best.

First, the request for documents made in *Whitacre* is for a significantly shorter period of time than Plaintiffs' request in the present case. In *Whitacre*, the document time span requested was two and one half years. *Id.* at 796. In the present case, the time span over which Plaintiffs' are seeking discovery covers nearly four years, spanning calendar years 2002 through 2006. (A. 8.)

Second, the very scope of the requests made in *Whitacre* are narrower than those made in the present request. In *Whitacre*, the plaintiff's subpoena necessarily limited the scope of the entire request by limiting the request to, "services concerning patients **not seen for purposes of treatment but only for the rendition of medical opinions.**" *Id.* at 796. The scope of this request stands in stark contrast to the request made by Plaintiffs in the present case, which, by self-imposed definition, requests information for **all** medical services, **including** those related to a legal claim or potential legal claim for injuries or damages. (A. 8.)

Third, while the plaintiffs in *Whitacre*, sought burdensome statistical information related to seven categories of inquiry (B. 41, BR. 40.), the request in the present case equally oppressive because it requires production of **all documents covering a four year span of time.** (A. 12.) Furthermore, the notice of deposition specifically states that inquiry will be made into the medical services provided by Dr. Mishkin for the same period of time. (A. 8.) Regardless of whether an expert has to compile statistical information, or identify and produce all documents related to the four areas of inquiry, such a request so broad as to be defectively oppressive, burdensome and intrusive. *State*

ex rel. Whitacre, 701 S.W.2d at 799. Many hours, more likely days, would have to be spent to manually search patient files in order to prepare for Plaintiffs' deposition. *Id.*

Dr. Mishkin maintains all of his patient files according to the patient name, not by the names of attorneys. For Dr. Mishkin to obtain the information requested, he, or a member of his staff would literally have to physically go through each and every file in his office from 2002 to the present in order to: 1) determine whether the patient was seen at the behest of an attorney; 2) determine whether any correspondence was generated; 3) locate the relevant documents; and 4) make copies of the documents for production. Under Respondent's order, Dr. Mishkin would have to produce all such correspondence, regardless of the privilege implications and regardless to the relevance to the present case. As held in *Whitacre*, without question, the onerous task required to meet the demand of the subpoena would constitute an intrusive interference with the expert's medical practice. *State ex rel. Whitacre*, 701 S.W.2d at 799. If Respondent *had* carefully reviewed Plaintiffs' notice and subpoena, it stands to reason that he would have at least addressed those concerns in his order.

Respondent relies heavily on *Edwards v Missouri State Board of Chiropractic Examiners*, for the proposition that discovery was allowable to show the inconsistent statements and proof of bias of a witness. 85 S.W.3d 10, 25 (Mo. App. W.D. 2002). However, this does not address Respondent's assertion that the discovery sought below was not overly burdensome, intrusive or oppressive. In that case, a chiropractor appealed a decision by an administrative board which found that he claimed to have successfully treated and cured a patient suffering from HIV. He sought "all logs, diaries, or

documents of any kind that refers to Dr. Edwards or that refers to any treatment by or representations of Dr. Edwards.” *Id.* at 23.

There Dr. Edwards’ request only focused on entries that were relevant only to him or his treatment of the decedent and not to non-parties or his treatment of those parties. *Id.* at 24. It is interesting to note, however, that the Western District also found that several of Dr. Edward’s discovery requests were in fact overly broad, and found that the Chiropractic Board had not abused its discretion in protecting documents that did not relate to the matter before the court. *Id.* at 24.

Here, Plaintiffs’ request necessarily seeks documents that are not relevant to the present matter and directly concern the privacy interest of others. The privileged types and oppressive amounts of the discovery sought are beyond the relevant scope of discovery in this matter and are overly broad, intrusive, and affect the privacy interests of non-parties. Therefore, the judge’s order is an abuse of discretion in that it allows for significant overreaching by a party for materials not relevant to the present matter, even for impeachment purposes.

C. Relevant Missouri precedent requires that in cases where one party seeks discovery of an exceptional nature for impeachment purposes of another party's expert witness, it is incumbent upon the trial court to make specific findings necessary to support such extraordinary discovery which is based on an articulable legal basis.

Respondent argues that Judge Kramer adequately explained his order of June 9, 2006 by merely citing *State ex rel. Creighton v. Jackson*. However, merely citing case law without making specific findings necessary to support a stated legal reason is a clear abuse of discretion. *State ex rel. Soete*, 916 S.W.2d at 863. Furthermore, the fact that Judge Kramer cites *Creighton* is a clear indication that he did not consider the facts and circumstances surrounding Plaintiffs' request, or the relief sought by Relator's Motion to Quash.

The type of discovery sought in the present case is extraordinary. *State ex rel. Soete*, 916 S.W.2d at 863. Plaintiffs have required Dr. Mishkin to produce a broad array of documents beyond those requested in *Lichter*, *Creighton*, and *Soete*. (See Relator's discussion on page 23 through 28 above.) In *State ex rel. Lichtor*, the Western District specifically found that arguably less burdensome discovery directed at a party's proposed expert, including financial records, income tax returns, records of billings for consultation and testimony, were clearly exceptional in nature. *State ex rel. Lichtor*, 845 S.W.2d at 58, 64. The Western District extended this rationale in *State ex rel. Creighton* in the face of a subpoena for a party's expert to appear for deposition and produce Schedule C's and 1099 Forms reflecting income from consulting and testifying for five years. 879 S.W.2d

at 640. There the Western District expressed its desire to limit the burdens with which litigants might choose to place on witnesses if allowed unfettered authority within the scope of discovery. *Id.* at 643. Therefore the courts will protect against discovery efforts which are unreasonable and abusive. *Id.*

In *Soete*, the Eastern District further extended this rationale to extend to a Defendant's expert that had already examined the plaintiff, much as in this case. The Eastern District specifically held 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 impeachment discovery. *State ex rel. Soete*, 916 S.W.2d at 863.

There, plaintiffs sought remarkably similar materials to the case at bar, spanning a two and one-half period of time. *Id.* at 862. The Eastern District found that, absent any specific evidence, the intrusive and excessive discovery mentioned above should not be allowed. *Id.* at 863. The Court also approved of the process seeking a timely Motion to Quash a subpoena that is unreasonable or oppressive. *Id.* In *Soete*, the Eastern District stood ready to apply the analysis in *Lichter* and *Creighton*, to determine whether the trial court acted arbitrarily or unjustly, but could not do so because of a lack of specific findings by the trial court. *Id.*

The most important part of the holdings of the above three cases seems to be what Respondent, in his argument, is trying so desperately to avoid. **Findings of fact were necessary in each case for the court to determine whether or not the trial court abused its discretion in allowing the exceptional discovery.** *Lichter, Creighton*, and

Soete are not the only cases to find an abuse of discretion in similar circumstances. In *State ex rel. Metropolitan Transportation Services v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. W.D. 1990), the Western District found that failure to state a reason for denying defendant's request that Dr. Lichtor examine plaintiff pursuant to his personal injury claim was an abuse of discretion. *Id.* at 476. Absent a stated reason, the court's decision appears arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable. *Id.*

Respondent argues that a correct result is more important than the process used in obtaining that result. Yet Respondent fails to demonstrate any fact to suggest that Judge Kramer's decision is correct. If Judge Kramer's decision is *incorrect*, then the privacy interests of non-parties, as well as work-product, and physician-patient privileges will be violated and the door will be opened to unfettered discovery from a party's expert witness that flies in the face of Missouri precedent.

Respondent claims that neither Defendant nor Plaintiffs requested findings of fact at the hearing for Defendant's Motion to Quash. (R. 48.) To the contrary, Relator specifically requested that findings of fact be made and additionally went so far as to include that language in its Motion to Quash. (A. 26.)

Furthermore, the mere fact that Respondent cited *Creighton* in his order is actually indicative that he did not apply careful consideration to the facts before him. In that case, only issue argued by the parties was whether the financial records sought were within the scope of discovery. *Id.* at 641. Even if Respondent did reflect on the financial documents at issue in *Creighton*, there is no evidence in the record, and no indication in

Respondent's order, that he considered any of the other relevant issues in this case. (BR. 13-14.)

Respondent repeatedly states that Plaintiffs have not asked for unreasonable, oppressive, and intrusive discovery as if restating the notion repeatedly will somehow make it true. However, as Relator's Brief and the arguments herein show, Plaintiffs' subpoena is not narrowly tailored to be no more intrusive than necessary to discover evidence to demonstrate any bias on the part of Dr. Mishkin. To the contrary, the discovery at issue is vague and appears highly invasive of the physician's privacy, and could lead to the production of information and documents completely unrelated to Dr. Mishkin's professional income and relationships. *State ex rel. Lichtor*, 845 S.W.2d at 67.

By merely citing *Creighton* in his order, Respondent failed to make any findings related to the physician-patient privilege. Respondent's abuse of judicial discretion ruling is clearly against the logic of the circumstances then before the court, and was so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Edwards v. Missouri State Board of Chiropractic Examiners*, 85 S.W.3d 10, 23 (Mo. App. E.D. 2002).

D. The discovery sought by Plaintiffs' subpoena, as well as the areas of inquiry identified in Plaintiffs' notice of deposition, would necessarily lead to disclosure of information related to non-party patients of Dr. Mishkin and would therefore compromise both the physician-patient privilege as well as the privacy interests of non-party patients.

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) (Discovery allows non-privileged documents, papers and records in the possession of one party to be available to the other, but it 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.)

Generally, parties may obtain discovery regarding any matter which is not privileged. *State ex rel. Maloney v. Allen*, 26 S.W.3d 244 (Mo. App. W.D. 2000). The physician-patient privilege can only be waived by the patient, and the physician must protect the patient by asserting the privilege when applicable. *Id.* at 247. A physician is incompetent to testify concerning any information which he or she may have acquired from any patient while attending the patient in a professional manner, and which information was necessary to enable him or her to prescribe and provide treatment for such patient. *Id.* Application of privilege is a matter of law and not judicial discretion. *State ex rel. McBride v Dalton*, 834 S.W.2d 890 (Mo. App. E.D. 1992). (Defendant may

not be compelled to sign a medical authorization where he does not plead facts that do not create an issue in his medical condition.) Where a privilege is invoked, relevance is not the critical issue. *Id.*

Respondent makes two arguments against the application of the physician-patient privilege in this case. First, Respondent argues that Plaintiffs' definition of "medical services" is limited only to those services performed pursuant to litigation. To the contrary, the fact that the word "treatment" is included in Plaintiffs' definition belies the fact that Plaintiffs are merely seeking medical services related to an actual or potential legal claim.

Black's Law Dictionary defines "treatment" as a broad term covering all the steps taken to effect a cure of an injury or disease, including examination and diagnosis as well as application of remedies. *Black's Law Dictionary*, Revised Fourth Edition, (1968). Plaintiffs' inclusion of the word "treatment" in its definition of "medical services" means that they intended to inquire about all medical services, including treatment, in the deposition. (A. 8.) The fact that Respondent now claims that Plaintiffs' never intended to inquire as to all "medical services", does not change the fact that the document, on its face, specifically states that Plaintiffs would inquire of Dr. Mishkin, information related to all medical services provided over the course of four years. (A. 8.)

The choice of language used by Plaintiffs leaves no doubt that the area of inquiry includes treatment of patients, and should not be allowed because a physician is incompetent to testify concerning any information which he or she may have acquired from any patient while attending the patient in a professional manner. *State ex rel.*

Maloney, 26 S.W.3d at 247. Because the physician-patient privilege can only be waived by the patient, and the physician must protect the patient by asserting the privilege when applicable, it is unreasonable to require Dr. Mishkin to testify about such matters, and even more oppressive to require him to request a waiver by any of patients. *Id.* at 247.

Respondent's second argument is that the party asserting that material is not discoverable must supply the court with sufficient information to determine that each element of the privilege is satisfied. To great extent, Respondent relies on *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66 (Mo. App. S.D. 1997). Respondent claims that this case stands for the proposition that the opponent to discovery bears the burden of showing how the requested discovery violated the peer review statute R.S.Mo. § 537.035, in a medical malpractice action. *Id.* at 68. R.S.Mo. § 537.035(4) provides for specific privileges associated with attendance at peer review meetings of medical professionals.

The physician-patient privilege is different in that it can only be waived by the patient, and the physician must protect the patient by asserting the privilege whenever applicable. *State ex rel. Maloney v. Allen*, 26 S.W.3d at 247. While there are several exceptions engrafted upon the statute, no such exceptions are present in the case below. *See, Klinge v. Lutheran Medical Center of St. Louis*, 518 S.W.2d 157, 164 (Mo. App. 1974).

Under Missouri Supreme Court Rule 56.01(b)(1), the party seeking discovery shall bear the burden of establishing relevance. In *Dixon*, the Court applied the exception to that rule so that where a privilege is asserted and then challenged, the burden rests on the party claiming the privilege to establish that the material is, in fact, not discoverable.

Dixon, 939 S.W.2d at 70. However, the Southern District in that case also noted that where granting a motion depends on evidence, if no evidence appears in the transcript, it cannot presume that the proper evidence was adduced. *Id.* at 69.

Respondent argues that the burden to demonstrate the physician-patient privilege shifts to Relator merely because she asserted the privilege. However, according to *Dixon*, one of two factors must be met before the burden shifts. First, the party opposing the discovery must be in control of facts peculiarly within that party's knowledge, as was in the case of the notes of the peer review committee in that case. *Id.* Second, the privilege must be asserted *and* challenged. *Id.* Respondent cannot demonstrate either factor sufficient to shift the burden in asserting the privilege.

There is no evidence in the record below to suggest that Relator is in possession of any specific facts that are peculiarly within Relator's knowledge. Dr. Mishkin is merely a physician requested to examine Mr. Pooker to determine the extent and cause of his injuries. Any information Dr. Mishkin might have concerning his personal patients is beyond the scope of Relator's knowledge. However, because the physician-patient privilege can only be waived by the patient, Dr. Mishkin is bound to assert it whenever applicable. *State ex rel. Maloney v. Allen*, 26 S.W.3d at 247.

Furthermore, there is no evidence in the record that the privilege was asserted *and* challenged. The physician-patient privilege was asserted paragraph 18 of Relator's Motion to Quash. (A. 24.) However, there is no evidence to suggest that Plaintiffs challenged that assertion. Plaintiffs did not file a reply to Relator's motion, nor did they enter any evidence to at the hearing.

Respondent's order suggests that Relator's assertion of the physician-patient privilege was not even considered by the Respondent. (A. 14.) Respondent's order merely overrules Relator's motion with a citation to *Creighton*. (A. 14.) Since *Creighton* did not address the privilege, then it necessarily follows that Respondent did not consider the it in making his ruling. If the record suggests anything, it suggests that Relator raised the physician-patient privilege, Plaintiffs failed to challenge it, and Respondent dismissed it without careful consideration. Therefore, Respondent abused his discretion in overruling Relator's Motion to Quash and this Writ in Prohibition should be made permanent.

E. Production of all correspondence between Dr. Mishkin and counsel for Relator, as well as production of all documents related to the names of all attorneys for which Dr. Mishkin may have performed medical services is overly broad and would necessarily include documents which violates the attorney 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).

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).

In ruling on an objection to a discovery request, the trial court must not only consider questions of privilege, work product, relevance, and the tendency of the request to lead to the discovery of admissible evidence, it must also balance the need of the interrogator to obtain the information against the respondent's burden of furnishing it, including the extent to which the request will be an invasion of privacy, *particularly the privacy of a non-party*. *State ex rel. Anheuser*, 692 S.W.2d at 328. (emphasis added). Even if information sought is properly discoverable, upon objection, the trial court should consider whether the information runs against an interest in privacy or against an

assertion that the proposed discovery is burdensome. *State ex rel. Creighton*, 879 S.W.2d at 642.

“Work product” doctrine applies to two types of information: opinion work product and trial preparation materials. *Edwards*, 85 S.W.3d at 26. Opinion work product is absolutely immune from discovery; it concerns a client’s litigation and includes mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party. *Edwards*, 85 S.W.3d at 26. The discovery of facts known and opinions held by an expert are the work product of an attorney retaining the expert, until that expert is designated for trial. *State ex rel. Tracy v. Dandurland*, 30 S.W.3d 831, 834 (Mo.banc 2000). Where such a potential expert has not been designated as a witness, facts known and opinions held by him are protected and not discoverable. *Edwards*, 85 S.W.3d at 28.

Again, because Plaintiffs’ subpoena requires production of **all** correspondence between Dr. Mishkin and counsel for Relator, it is overly inclusive and necessarily extends to any correspondence between Dr. Mishkin and Brown & James, or any of its attorneys. Furthermore, Plaintiffs’ subpoena requires production of **all** documents related to the names of attorneys requesting medical services of Dr. Mishkin. In order to properly comply with Plaintiffs’ subpoena, Dr. Mishkin would necessarily have to produce **all** correspondence with **any attorney**, regardless of whether they were seeking his services as an expert witness or as a consulting expert. With regards to any correspondence generated between Dr. Mishkin and any attorney, before Dr. Mishkin is

named as an expert, any such document would be absolutely privileged. *See Edwards*, 85 S.W.3d at 28.

Furthermore, if Dr. Mishkin were to turn over such correspondence without objection, it would constitute a voluntary waiver of the work product privilege because the disclosure would not be made in the pursuit of trial preparation and would be inconsistent with maintaining secrecy against opponents and third parties. *State ex rel. Humphrey v Provaznik*, 854 S.W.2d 810, 813 (Mo. App. E.D. 1993). To do so would violate the trust of any non-party attorney seeking such consultation from Dr. Mishkin and could potentially force discovery of privileged information in any number of suits, should Dr. Mishkin be involved as a consulting, non-testifying expert.

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 OF SERVICE

The undersigned hereby certifies that Relator's Brief and a disk containing same were hand delivered 27th day of November, 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 27th day of November, 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 Reply Brief includes the information required by Rule 55.03.
2. The Realtor's Reply Brief complies with the limitations contained in Rule 84.06.
3. The Realtor's Reply Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, table of contents, and table of authorities contains 7,726 words, as determined by the word-count tool contained in the Microsoft Word 2000 Software with which this Realtor's Reply Brief was prepared; and
4. The computer disk accompanying the Realtor's Reply Brief has been scanned for viruses and, to the undersigned's best knowledge, information, and belief, is virus free.

Troy A. Brinson

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