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JURISDICTIONAL STATEMENT

This proceeding in prohibition challenges both a judgment of contempt and the underlying judgment on which the contempt judgment is based. Relator, Cooper Tire & Rubber Co. ("Cooper Tire"), submits that Respondent, the Honorable W. Stephen Nixon, was without subject matter jurisdiction to enter that portion of the underlying judgment that imposed on Relator obligations that exceeded and were contrary to the provisions of an executed Settlement Agreement, by requiring Relator to create and file an index of its confidential documents produced in the underlying lawsuit. The underlying judgment therefore was void *ab initio*. Moreover, analogous to the "fruit of the poisonous tree" doctrine, the separate and subsequent contempt judgment entered by Respondent against Cooper Tire for allegedly refusing to abide by the underlying void judgment is likewise void *ab initio*.[1] Cooper Tire by this action seeks a Writ of Prohibition to prevent Respondent from enforcing those void judgments.

Prohibition is appropriate because void judgments are subject to direct or collateral attack at any time. *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955). Moreover, because Respondent's order of contempt is an order of criminal contempt, it is

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[1] The contempt judgment should be reversed for the further reason that it is based on an alleged statement made by Cooper Tire's counsel in open court, in alleged defiance of Respondent's authority. The alleged statement in fact was never made, as proven by the transcript of proceedings in which the statement allegedly was made. (Apx. Tab A, at A-1–A-26.)

reviewable solely by writ of prohibition and is not appealable.[2] *Int'l Motor Co. v. Boghosian Motor Co.*, 870 S.W.2d 843 (Mo. App. E.D. 1993), *appeal after remand*, 897 S.W.2d 97.

In compliance with the Missouri Rules of Civil Procedure, Cooper Tire originally filed a petition for writ of prohibition in the Missouri Court of Appeals for the Western District. The Western District initially granted the petition, and then quashed it on January 3, 2005, without opinion. Cooper Tire thereafter immediately filed its Petition for Writ of Prohibition in this Court. Pursuant to Article V, Section 4 of the Missouri Constitution, jurisdiction is vested in both the Supreme Court of Missouri and the district courts of appeals, as the action seeks the issuance of an original remedial writ. Jurisdiction is therefore appropriate.

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[2] Notwithstanding that the December 13 Contempt Judgment expressly ***denied*** the underlying plaintiffs' motion for civil contempt and, instead, made a finding of "direct" contempt, Respondent has argued that the contempt judgment is a judgment of civil contempt, not criminal contempt. For the reasons set forth *infra* in Point I, Respondent is incorrect. However, even assuming Respondent were correct, this prohibition proceeding is appropriate and jurisdiction is vested in this Court because the contempt judgment is void, and void judgments may be attacked, directly or collaterally, at any time, in any proceeding, including a prohibition proceeding. *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955); *State ex rel. Mohart v. Romano*, 924 S.W.2d 537, 541, *reh'g & transfer denied* (Mo. App. W.D. 1996).

STATEMENT OF FACTS

The facts that bear on this prohibition action directly implicate the sanctity of settlement agreements in Missouri. The primary issue before this Court is whether parties who settle disputes in this State can be assured that the finality a settlement is intended to bring will be honored and upheld by the Missouri courts.[3]

Rodger and Thera Oleta Lavelock (the "Lavelocks"), plaintiffs in the underlying lawsuit, settled the lawsuit they brought against Cooper Tire. More than five weeks ***after*** the Lavelocks and Cooper Tire executed their highly negotiated Settlement Agreement, the Lavelocks moved Respondent to enter an Order imposing obligations on Cooper Tire that were subsumed within a general release of Cooper Tire, freely given by the Lavelocks as an integral part of the executed Settlement Agreement. The Lavelocks' request that Respondent impose obligations on Cooper Tire—obligations that should have been negotiated as part of the Settlement Agreement if they were sought—was in direct violation of the Settlement Agreement. In addition to filing an Opposition to the Lavelocks' motion to impose additional obligations on Cooper Tire, Cooper Tire moved Respondent to enforce the Settlement Agreement and for its fees and costs, as provided for in the Settlement Agreement.

Although Respondent, on the motion of Cooper Tire to enforce the Settlement Agreement, ordered the parties to abide by the terms of their settlement, he also

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[3] Cooper Tire summarizes the facts in the following three paragraphs, and thereafter provides detailed facts, cited to the record, as required by Mo. R. Civ. Proc. 84.04(i).

contradictorily granted the Lavelocks' request to impose obligations on Cooper Tire that not only were not required by the Settlement Agreement but which contradicted that agreement. Since the Lavelocks first moved the court for post-settlement relief, Cooper Tire has maintained that, as a result of the executed Settlement Agreement, (1) Respondent was without subject matter jurisdiction to grant relief from which the Lavelocks had released Cooper Tire in the Settlement Agreement, and his underlying judgment was therefore void *ab initio*; (2) the Lavelocks were without standing to request post-settlement relief relating to issues they released; and (3) the relief requested by the Lavelocks and granted by Respondent was rendered moot by the Settlement Agreement.

Cooper Tire timely moved Respondent for relief from his void judgment, and a hearing was scheduled, rescheduled, and held on that motion. After that hearing, not only did Respondent deny Cooper Tire's motion for relief from the underlying judgment, but Respondent also held Cooper Tire in contempt for pursuing its authorized post-judgment remedies rather than simply abandoning its rights and complying with Respondent's void judgment. Cooper Tire has sought to prohibit Respondent from enforcing both the underlying judgment and the contempt judgment based thereon, and has simultaneously sought to protect its rights by appeal. Cooper Tire now stands before this Court, seeking relief from this Court to uphold the sanctity and finality of settlements in the State of Missouri.

I. The parties to the underlying lawsuit enter into the Settlement Agreement.

The lawsuit captioned *Thera Oleta Lavelock, et al. v. Cooper Tire & Rubber Co., et al.*, No. 00CV221072 (the "underlying lawsuit"), was filed in the Sixteenth Judicial

Circuit, Division Five, Jackson County, Missouri, on August 25, 2000. (Apx. Tab U, at A-263–A-270.) On October 30, 2003, the parties to the underlying lawsuit reached an agreement in principle to settle their dispute. (Apx. Tab H, at A-130.) For the next two months, the parties engaged in extensive negotiations over the specific terms of their settlement, and reduced it to writing. (*Id.*) On January 2, 2004, the Lavelocks executed the agreed-upon confidential Settlement Agreement. (Apx. Tab E (Under Seal), at A-45, A-47.) Cooper Tire executed the confidential Settlement Agreement on February 27, 2004, shortly after the Lavelocks delivered it to Cooper Tire for execution.[4] (*Id.* at A-46, A-48.)

In the negotiated Settlement Agreement, the Lavelocks specifically released Cooper Tire from:

> all manner of action, causes of action, lawsuits, claims and demands of every kind and nature whatsoever, whether known or unknown, from the beginning of time to the date of this [Settlement] Agreement, that Plaintiffs had or may now have against Cooper Tire, as may have arisen or has arisen, in connection with any and all matters arising out of or related to the

[4] Although the Lavelocks were the first to execute the Settlement Agreement, and in fact executed it on January 2, 2004, counsel for the Lavelocks failed to deliver that signed Settlement Agreement for Cooper Tire's execution until late February 2004. (Apx. Tab K, at A-179.)

Lawsuit, including but not limited to any matters that were, or could have been, set forth in any of the pleadings relating to the Lawsuit.

(Apx. Tab E (Under Seal), at A-41.) Also pursuant to the terms of the Settlement Agreement, the Lavelocks were required promptly to execute and file a dismissal with prejudice of the underlying lawsuit. (*Id.* at A-42; Apx. Tab K, at A-218.) This they refused to do. (Apx. Tab J, at A-164–A-165; Tab K, at A-196–A-199, A-218, A-221.) In addition, the Lavelocks were required to return to Cooper Tire by March 18, 2004 all confidential documents Cooper Tire had produced during the pendency of the underlying litigation, not only pursuant to the terms of the Settlement Agreement, but also pursuant to an Agreed Protective Order of Confidentiality.[5] (Apx. Tab E, at A-43–A-44; Tab D, at A-38). On April 6, 2004—nearly three weeks late—the Lavelocks, through their attorneys, returned to Cooper Tire its confidential documents. (Apx. Tab K, at A-194.)

II. The Lavelocks move for additional post-settlement relief in violation of the terms of the Settlement Agreement.

Also on April 6, 2004, five weeks after the Settlement Agreement was executed by all parties, having still not dismissed the underlying lawsuit as required by the Settlement Agreement and in the face of their general release of Cooper Tire, the Lavelocks filed a

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[5] The Protective Order of Confidentiality was entered into in August, 2001. In that Protective Order, the Lavelocks agreed to use Cooper Tire's confidential documents solely for purposes of the underlying litigation, and to return those documents to Cooper Tire when the underlying litigation concluded. (Apx. Tab D, at A-35, A-38.)

Motion for Protective Order for the Preservation of Documents ("Post-Settlement Motion for Document Preservation"). In that Motion, in contravention of their release, the Lavelocks asked Respondent to require Cooper Tire to retain indefinitely the confidential documents Cooper Tire had produced during the litigation because such an order would be "***likely to ease the discovery process in other cases***." (Apx. Tab F, at A-51 (emphasis added); Tab G, at A-88–A-128.) In response to the Lavelocks' Post-Settlement Motion, which was itself a violation of the terms of the executed Settlement Agreement, Cooper Tire moved Respondent to enforce the Settlement Agreement by its terms. (Apx. Tab I, at A-159–A-160; Tab J, at A-161–A-177.)

III. Respondent issues his void judgment engrafting requirements on Cooper Tire in addition and contrary to the terms of the Settlement Agreement.

On June 23, 2004, Respondent issued a Judgment and Order (The "June 23 Judgment") dismissing the case with prejudice, and ostensibly requiring the parties to comply with the terms of their Settlement Agreement. (Apx. Tab C, at A-29–A-31.) However, Respondent's June 23 Judgment failed to enforce the general release of Cooper Tire the Lavelocks had given and, instead, imposed obligations on Cooper Tire which went well beyond the requirements of the parties' negotiated Settlement Agreement. Rather than enforce the Settlement Agreement as executed, Respondent required Cooper Tire to create and file with the Circuit Court a detailed index of the confidential

documents Cooper Tire had produced in the underlying litigation.[6] (*Id.*) As a result of the Settlement Agreement and the general release the Lavelocks gave Cooper Tire, the documents were meaningless to the Lavelocks.

IV. Cooper Tire pays the Lavelocks the settlement proceeds and moves Respondent for relief from his June 23 Judgment.

On July 1, 2004, Cooper Tire paid the Lavelocks the monetary consideration set forth in the Settlement Agreement.[7] (Apx. Tab L, at A-228.) On July 21, 2004, Cooper

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[6] While on its face, an obligation to file an index of confidential documents may seem a minor matter, the implications are in fact serious and the repercussions far reaching. Cooper Tire faces the prospect of placing into the public domain a list of its private, confidential documents. The June 23 Judgment says nothing regarding how long Cooper Tire has to maintain the documents on that index, leaving Cooper Tire with no choice but to maintain them indefinitely. By having this index in the public domain, Cooper Tire will be faced with potential meritless disputes regarding those documents in unrelated litigation solely by virtue of the fact that the list is in the public domain. If judges are left free to engraft post-settlement obligations in violation of the terms of litigants' settlement agreements, Cooper Tire, and defendants in other cases, will be loath to settle their cases. Discouraging settlement is contrary to the public interest, and to Missouri public policy. This case highlights the reason why settlement agreements must be upheld and enforced according to the terms on which the parties agree.

Tire timely filed an authorized after-trial motion, denominated a Motion to Vacate in Part the Court's June 23, 2004 Order and Judgment with Respect to Post-Settlement Relief (the "After-Trial Motion"). In its After-Trial Motion, Cooper Tire asked Respondent to reconsider and vacate that portion of the June 23 Judgment which imposed obligations on Cooper Tire that exceeded the terms of the parties' negotiated Settlement Agreement and, thus, exceeded Respondent's subject matter jurisdiction. (*Id.* at A-226–A-234.)

Also on July 21, 2004, the Lavelocks filed a Motion for Civil Contempt asking the Court to find Cooper Tire in civil contempt for failing to file the index of confidential

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[7] The Settlement Agreement provided that Cooper Tire would pay the settlement proceeds within forty-five days from execution of the Settlement Agreement. (Apx. Tab E (Under Seal) at A-41.) Absent any breach by the Lavelocks, that payment would have been due on April 12, 2004. However, the Lavelocks were in breach of the Settlement Agreement and, specifically, of the release they had provided, because they failed to dismiss the lawsuit with prejudice "as promptly as practicable" and, instead, filed the Post-Settlement Motion for Preservation of Documents. (Apx. Tab E (Under Seal), at A-42; Tab F, at A-49–A-86; Tab K, at A-178–A-225.) Despite the Lavelocks' breaches, Cooper Tire offered to place the settlement proceeds in escrow pending resolution of the Lavelocks' Post-Settlement Motion for Preservation of Documents. (Apx. Tab K, at A-180, A-199, A-204, A-207–A-208. The Lavelocks did not accept this offer and, following Respondent's June 23 Judgment, Cooper Tire paid the settlement proceeds to the Lavelocks.

documents with the Circuit Court as required by the June 23 Judgment. (Apx. Tab M, at A-235–A-245.) On July 30, 2004, Cooper Tire filed its Opposition to Plaintiffs' Motion for Civil Contempt. (Apx. Tab N, at A-246–A-250.)

On August 12, 2004, Cooper Tire moved to set its After-Trial Motion for hearing on September 17, 2004. (Apx. Tab P, at A-253–A-254.) On September 2, 2004, the Lavelocks' attorney notified counsel for Cooper Tire that he was not available September 17, 2004 and asked that the hearing date be rescheduled. (Apx. Tab Q, at A-255.)

Respondent's law clerk e-mailed counsel for both parties on September 14, 2004 stating that, due to the court's schedule and plaintiffs' counsel's vacation schedule, the hearing on Cooper Tire's After-Trial Motion would be continued to November 22, 2004. (Apx. Tab R, at A-256.) The following day, Respondent issued a Notice of Hearing continuing the hearing on Cooper Tire's After-Trial Motion from September 17, 2004 to November 22, 2004. (Apx. Tab O, at A-251.) Respondent heard oral argument on Cooper Tire's After-Trial Motion on November 22, 2004. (Apx. Tab A, at A-1–A-26.)

V. Respondent denies Cooper Tire's After-Trial Motion for relief from the June 23 Judgment, and holds Cooper Tire in contempt.

On December 13, 2004, Respondent issued his Order denying the Lavelocks' Motion for Civil Contempt and denying Cooper Tire's After-Trial Motion, but finding Cooper Tire in "direct" contempt of Court (the "December 13 Contempt Judgment"). In the December 13 Contempt Judgment, Respondent assessed a sanction of $1,000.00 per day against Cooper Tire, payable to the Court Administrator for the Circuit Court of Jackson County, Missouri, beginning December 13, 2004 until such time as Cooper Tire

creates and files with the Circuit Court a detailed index of its confidential documents produced in the underlying lawsuit. (Apx. Tab B, at A-27–A-28.)

VI. Cooper Tire immediately seeks appellate relief from Respondent's December 13 Contempt Judgment and from the underlying June 23 Judgment.

In response, Cooper Tire promptly (on December 17, 2004) filed an Emergency Petition for Writ of Prohibition in the Missouri Court of Appeals for the Western District. (Apx. Tab V, at A-271–A-287.) That same day, the Court of Appeals issued a Preliminary Order in Prohibition and a Stop Order prohibiting Respondent from enforcing the June 23 Judgment and the December 13 Contempt Judgment. (Apx. Tab S, at A-257–A-260.) On January 3, 2005, the Court of Appeals entered an order quashing and holding for naught its December 17, 2004 Preliminary Order in Prohibition and denying Cooper Tire's Petition for Writ of Prohibition, without opinion. (Apx. Tab T, at A-261–A-262.)

Cooper Tire thereafter promptly filed the instant writ proceeding in this Court, and this Court, *en banc*, issued a preliminary writ of prohibition on January 25, 2005.

VII. Cooper Tire directly appeals the June 23 Judgment in the Missouri Court of Appeals for the Western District.

Although Cooper Tire believes the instant writ proceeding is the proper procedure to challenge the void Judgments, out of an abundance of caution, Cooper Tire has appealed the June 23 Judgment directly, concurrently with the writ proceeding. On December 28, 2004, Cooper Tire moved for a special order to file its Notice of Appeal of

the June 23 Judgment with the Missouri Court of Appeals for the Western District. (Apx. Tab W, at A-288–A-330.) The Court of Appeals granted Cooper Tire's motion on January 27, 2005. (Apx. Tab X, at A-331.) Cooper Tire thereafter filed its Notice of Appeal on February 3, 2005 (Apx. Tab Y, at A-332–A-342) and that appeal currently is pending before the Court of Appeals and proceeding under the standard briefing schedule of the Missouri Rules of Civil Procedure. Cooper Tire also filed with the Missouri Court of Appeals, Western District, a Notice of Appeal of the December 13 Contempt Judgment. (Apx. Tab Z, at A-343–A-351.) The Court of Appeals dismissed that appeal. (Apx. Tab AA, at A-352.) Accordingly, Cooper Tire's sole procedural avenue for relief from the December 13 Contempt Judgment is for this Court to make absolute the Preliminary Writ of Prohibition it entered, *en banc*, on January 25, 2005.

POINTS RELIED ON

Point I

Relator is entitled to seek an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment, because the December 13 Judgment is an order of criminal contempt, which cannot be directly appealed but is properly reviewable only by writ of prohibition, in that the December 13 Contempt Judgment imposes a per diem fine payable to the Administrator of the Circuit Court, requires Relator to create and file an index of confidential documents in which Plaintiffs in the underlying litigation have no interest as a result of their settlement and general release, is based on alleged statements by Relator's counsel purportedly made in open court in defiance of Respondent's authority and is therefore punitive in nature, is a misplaced attempt to vindicate the authority of the court, and does not benefit any party to the underlying litigation.

Teefey v. Teefey, 533 S.W.2d 563 (Mo. banc 1976).

Int'l Motor Co. v. Boghosian Motor Co., 870 S.W.2d 843 (Mo. App. E.D. 1993), *appeal after remand* 897 S.W.2d 97.

Saab v. Saab, 637 S.W.2d 790 (Mo. App. E.D. 1982).

Point II

Relator is entitled to an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment, because the evidence in the record does not support the entry of a contempt judgment in that Respondent based the December 13 Contempt Judgment on an alleged admission by counsel for Relator that Relator "did not intend to comply with the Order of the Court" where the record reveals no such statement was made, and in that Relator was not defying Respondent's authority by not filing an index of its confidential documents, but was actually deferring to Respondent's authority by moving Respondent to reconsider and vacate the void judgment by timely filing an authorized after-trial motion.

State ex rel. O'Brien v. Moreland, 703 S.W.2d 597 (Mo. App. E.D. 1986).

McMullin v. Sulgrove, 459 S.W.2d 383 (Mo. banc 1970).

Taylor v. United Parcel Service, Inc., 854 S.W.2d 390 (Mo. banc 1993).

Niemann v. Carps, Inc., 541 S.W.2d 712 (Mo. App. St. L. 1976).

Mo. R. Civ. Proc. 81.05(a)(2).

Mo. R. Civ. P. 81.04.

Point III

Relator is entitled to an order prohibiting Respondent from enforcing that portion of the June 23, 2004 Judgment ordering Relator to create and file an index of its confidential documents produced in the underlying lawsuit, because Respondent was without subject matter jurisdiction to make such order and the June 23 Judgment was therefore void *ab initio,* in that: the parties had settled the underlying lawsuit; the June 23 Judgment imposed obligations on Relator in addition and contrary to the terms of the Settlement Agreement; Plaintiffs no longer had an interest in Relator's confidential documents after executing the Settlement Agreement; the only persons with an interest in the documents were Plaintiffs' lawyers, whose stated interest was in pursuing unrelated litigation for unrelated third parties; and Plaintiffs therefore lacked any post-settlement justiciable interest in the confidential documents produced by Relator, stripping Plaintiffs of standing to seek relief relating to Cooper Tire's confidential documents and rendering moot all issues relating to those confidential documents.

American Family Mutual Insurance Co. v. Hart, 41 S.W.3d 504 (Mo. App. W.D. 2001).

Lugena v. Hanna, 420 S.W.2d 335 (Mo. 1967).

Kinder v. Holden, 92 S.W.3d 793 (Mo. App. W.D. 2002).

West v. Director of Revenue, 996 S.W.2d 775 (Mo. App. E.D. 1999).

A. Having no post-settlement justiciable interest in the confidential documents produced by Relator, Plaintiffs in the underlying case had no standing to request that Respondent grant them post-settlement relief relating to Cooper Tire's confidential documents, and Respondent was therefore without subject matter jurisdiction to enter post-settlement relief against Relator with respect to the confidential documents.

B. Because Plaintiffs in the underlying action have no post-settlement justiciable interest in the confidential documents produced by Relator, and have executed the Settlement Agreement, issues relating to Relator's confidential documents were and are moot, and Respondent was without subject matter jurisdiction to enter post-settlement relief against Relator with respect to Cooper Tire's confidential documents.

Point IV

Relator is entitled to an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment because it is an order of contempt for failing to comply with a judgment that was void *ab initio* and is therefore void *ab initio* itself, in that the December 13 Contempt Judgment arises solely from Relator's failure to comply with obligations imposed by Respondent in a void judgment — the June 23, 2004 Judgment that Respondent was without subject matter jurisdiction to impose.

Mo. Elec. Power Co. v. City of Mountain Grove, 176 S.W.2d 612 (Mo. 1944).

State ex rel. Mohart v. Romano, 924 S.W.2d 537, *reh'g & transfer denied* (Mo. App. W.D. 1996).

State ex rel. Division of Family Services v. Bullock, 904 S.W.2d 510 (Mo. App. S.D. 1995).

La Presto v. La Presto, 285 S.W.2d 568 (Mo. 1955).

ARGUMENT

Point I

Relator is entitled to seek an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment, because the December 13 Judgment is an order of criminal contempt, which cannot be directly appealed but is properly reviewable only by writ of prohibition, in that the December 13 Contempt Judgment imposes a *per diem* fine payable to the Administrator of the Circuit Court, requires Relator to create and file an index of confidential documents in which Plaintiffs in the underlying litigation have no interest as a result of their settlement and general release, is based on alleged statements by Relator's counsel purportedly made in open court in defiance of Respondent's authority and is therefore punitive in nature, is a misplaced attempt to vindicate the authority of the court, and does not benefit any party to the underlying litigation.

Criminal contempt is punitive, designed to vindicate the authority of the court, while civil contempt is remedial, designed to benefit a party to the litigation. *Teefey v. Teefey*, 533 S.W.2d 563, 565–66 (Mo. banc 1976). Criminal contempt judgments are reviewable only by writ of prohibition; they are not appealable. *Int'l Motor Co. v. Boghosian Motor Co.*, 870 S.W.2d 843 (Mo. App. E.D. 1993), *appeal after remand* 897 S.W.2d 97. To determine whether a contempt judgment is civil or criminal, the Court must look to the substance of the order itself rather than the characterizations the parties place on the order. *Saab v. Saab*, 637 S.W.2d 790, 792 (Mo. App. E.D. 1982).

Respondent did not denominate the December 13 Contempt Judgment as civil or criminal. The December 13 Contempt Judgment provides:

> WHEREFORE, IT IS ORDERED, ADJUDGED and DECREED, Plaintiffs' Second **Motion for Civil Contempt** Against Defendant Cooper Tire & Rubber Co. With Suggestions in Support, is **DENIED**. Defendant Cooper Tire & Rubber Co. is adjudged to be **in direct contempt** of Court;
>
> IT IS FURTHER ORDERED that based upon **its intentional failure to comply with the Court's Order and Judgment of June 23, 2004**, and **its stated intent not to comply with the Order and Judgment made on November 22, 2004 in open Court**, Defendant Cooper Tire & Rubber Company shall pay a *per diem* fine **to the Court Administrator of the Jackson County Circuit Court** in the amount of One Thousand and no/100 Dollars ($1,000.00) from and including the date of this Order up to but not including the date upon which Cooper Tire & Rubber Company files the required index with the Court . . . .

(Apx. Tab B, at A-27–A-28 (emphases added).)

For a number of reasons, the December 13 Contempt Judgment is criminal in nature, and prohibition is therefore the sole appropriate remedy. First, the December 13 Contempt Judgment expressly ***denied*** the Lavelocks' Motion for ***Civil Contempt*** while at

the same time finding Cooper Tire in "direct contempt." (*Id.* at A-27.) That Respondent denied the Lavelocks' Motion for Civil Contempt indicates Respondent's intent that the Judgment be one of criminal contempt.

Second, the December 13 Contempt Judgment was not remedial vis-à-vis the Lavelocks—a requirement for civil contempt—because the Lavelocks had no interest in Cooper Tire's confidential documents following execution of the Settlement Agreement. The Lavelocks are contractually bound both by a full and general release of Cooper Tire and by their agreement in the agreed Protective Order of Confidentiality that the documents will not be used for any purpose other than the underlying litigation, which is over. (Apx. Tab E, at A-43–A-44; Tab D, at A-35, A-38.) That the Lavelocks had no continuing interest in Cooper Tire's confidential documents is illustrated by the fact they returned those documents to Cooper Tire as required by the Settlement Agreement. (Apx. Tab I, at A-194.) Because the Lavelocks' interest in Cooper Tire's confidential documents ceased upon their execution of the Settlement Agreement, a judgment of contempt fining Cooper Tire for failing to file an index of such documents cannot be remedial as to the Lavelocks and cannot inure to their benefit. As a result, the December 13 Contempt Judgment is criminal in nature.

Third, the fine imposed by Respondent is payable to the Court Administrator of the Jackson County Circuit Court—not to the Lavelocks—and therefore is not remedial. (Apx. Tab B, at A-28.) Moreover, the amount of the fine is in no way related to any actual damages suffered by the Lavelocks because they have no real or potential damages from Cooper Tire's failure to create and file an index regarding documents in which they

have no interest.[8] This fact indicates the December 13 Contempt Judgment is criminal, not civil. *See Chemical Fireproofing Corp. v. Bronska*, 553 S.W.2d 710, 715 (Mo. App. St. L. 1977) (because purpose of civil contempt is remedial, any fines charged against a civil contemnor must be related to the actual damages suffered by the injured party and must be payable to that party); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994) ("civil contempt is intended to benefit a party for whom an order, judgment or decree was entered").

A fine payable to the court, as the December 13 Contempt Judgment requires, benefits the court, not the Lavelocks. Nothing in the December 13 Contempt Judgment indicates an intent to grant relief designed to redress any alleged damage suffered by the Lavelocks; if such were the case, Respondent would have granted the Lavelocks' Motion for Civil Contempt. He did not. (Apx. Tab B, at A-27.) As a factual matter, the Lavelocks—having settled their claim, having been compensated to their satisfaction, and having fully released Cooper Tire—have suffered no damage and have no potential to suffer damage, because Respondent's post-settlement order imposing an obligation on Cooper Tire with respect to its confidential documents is not and cannot be for the

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[8] In fact, the underlying plaintiffs do not even claim a personal need for Cooper Tire either to retain the documents or to create and file an index. Rather, plaintiffs' Post-Settlement Motion for Document Preservation is based on a desire "to ease the discovery process ***in other cases***." (Apx. Tab F, at A-51 (emphasis added).)

Lavelocks' benefit. Accordingly, the December 13 Contempt Judgment arising from Respondents post-settlement order is criminal in nature.

Fourth, one of the stated bases on which the Court found Cooper Tire in contempt—Cooper Tire's alleged statement on the record that it had no intention of filing an index of its confidential documents—is not supported by the transcript of the hearing at which the statement allegedly was made. (Apx. Tab A, at A-1–A-26.) That Respondent based the December 13 Contempt Judgment on this alleged but non-existent statement of direct defiance to the court's authority, however, clearly indicates that Respondent issued the December 13 Contempt Judgment punitively to vindicate the authority of the court. This is a hallmark of criminal, not civil, contempt. *See Mummert*, 887 S.W.2d at 578 ("criminal contempt is punitive in nature and acts to protect, preserve and vindicate the authority and dignity of the judicial system").

Because the December 13 Contempt Judgment is for criminal contempt, and prohibition is the only means by which an aggrieved party may seek redress of an improvidently issued judgment of criminal contempt, this prohibition proceeding is appropriate. Moreover, however, and even assuming the December 13 Contempt Judgment is for civil contempt and not criminal contempt, prohibition is still an appropriate remedy. As set forth in more detail in Point IV, *infra*, the December 13 Contempt Judgment is void because the underlying June 23 Judgment on which it is based is void. *State ex rel. Mohart v. Romano*, 924 S.W.2d 537, 541, *reh'g & transfer denied* (Mo. App. W.D. 1996). Under Missouri law, void judgments may be attacked at any time, in any proceeding, including by way of a prohibition proceeding. *La Presto v.*

La Presto, 285 S.W.2d 568, 570 (Mo. 1955). Thus, under any analysis, Cooper Tire is properly before this Court in this writ proceeding.

Point II

Relator is entitled to an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment, because the evidence in the record does not support the entry of a contempt judgment in that Respondent based the December 13 Contempt Judgment on an alleged admission by counsel for Relator that Relator "did not intend to comply with the Order of the Court" where the record reveals no such statement was made, and in that Relator was not defying Respondent's authority by not filing an index of its confidential documents, but was actually deferring to Respondent's authority by moving Respondent to reconsider and vacate the void judgment by timely filing an authorized after-trial motion.

The evidence must support a trial court's factual findings underlying a criminal contempt judgment **beyond a reasonable doubt**. *State ex rel. O'Brien v. Moreland*, 703 S.W.2d 597, 599 (Mo. App. E.D. 1986) (emphasis added). The record must demonstrate that the party found in contempt—in this case, Cooper Tire—indeed "acted as stated in the specific facts found." *Id.*; *see also McMullin v. Sulgrove*, 459 S.W.2d 383, 388 (Mo. banc 1970). Thus, where there is no evidence supporting a trial court's factual findings, the contempt judgment should be reversed. *O'Brien*, 703 S.W.2d at 600. Respondent's December 13 Contempt Judgment sets forth two findings of fact on which the Contempt Judgment is based: (1) "as of . . . November 22, 2004, Cooper Tire & Rubber Co. still had not filed the required index" and (2) "During the hearing on November 22, 2004,

counsel admitted on behalf of Cooper Tire & Rubber Co. that Cooper Tire & Rubber Co. did not intend to comply with the Order of the Court by filing the required index." (Apx. Tab B, at A-27–A-28). For the reasons set forth below, neither of these findings of fact supports an order of contempt.

First, there is **no evidence** to support Respondent's finding that counsel for Cooper Tire "admitted" during the November 22, 2004 hearing that it "did not intend to comply with the Order of the Court by filing the required index." In fact, the transcript of that hearing unequivocally demonstrates that Cooper Tire's counsel made no such admission.[9] Accordingly, this Court should make its preliminary writ absolute. *See, e.g.*, *McMullin*, 459 S.W.2d at 388; *O'Brien*, 703 S.W.2d at 600.

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[9] The only place in the transcript where a stated disagreement exists between Respondent and counsel for Cooper Tire is the following exchange:

> THE COURT: Well, until a case is dismissed, the Court retains jurisdiction over that case. Any dispute with that principle?
>
> MS. COX: Yes, I believe that once a settlement agreement that contractually governs the obligations of the parties to each other has been entered and executed, that at that time the standing issue within that case changes, and I believe the jurisdiction issue changes with respect to what orders can be issued.

Second, in the case at bar, Cooper Tire was not defying Respondent's authority by not filing an index of its confidential documents, but rather clearly deferred to the power and authority of Missouri courts to reconsider and vacate judgments by timely filing an authorized after-trial motion. (Apx. Tab L, at A-226–A-234.) Cooper Tire could have immediately sought appellate intervention, but instead filed an authorized after-trial motion with Respondent, giving him an opportunity to correct his error. Cooper Tire's After-Trial Motion, denominated a Motion to Vacate, was "an authorized after-trial motion" pursuant to Mo. R. Civ. P. 81.05 because it placed before the trial court allegations of legal error. *See Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 393 (Mo. banc 1993) (motion seeking relief from judgment on basis that judgment was void was authorized after-trial motion, notwithstanding it was denominated in an "odd style"); *Niemann v. Carps, Inc.*, 541 S.W.2d 712, 714 (Mo. App. St. L. 1976) ("The motions to vacate are treated as motions for new trial."); *In re Franz' Estate*, 221 S.W.2d 739, 740 (Mo. 1949); *Kuhn v. Bunch*, 529 S.W.2d 200 (Mo. App. 1975); *Love Mortgage Props., Inc. v. Horen*, 639 S.W.2d 839, 840 (Mo. App. 1982).

THE COURT: All right. For the record it should appear that this Court disagrees with that proposition of law. The Court does not believe this is the law in Missouri.

MS. COX: I understand that.

THE COURT: All right. Who wants to argue for the plaintiffs?

(Apx. Tab A, at A-20–A-21.)

A motion for new trial (*i.e.*, an authorized after-trial motion) extends the date on which a judgment becomes final to the earlier of ninety days following the date the motion is filed or the date the court rules on the motion. Mo. R. Civ. Proc. 81.05(a)(2). Because Cooper Tire's After-Trial Motion was filed July 21, 2004 (Apx. Tab L, at A 226–A 234), it became final ninety days thereafter, or October 19, 2004. Cooper Tire had until October 29, 2004 to file a Notice of Appeal under Mo. R. Civ. P. 81.04.

Respondent originally scheduled a hearing on Cooper Tire's After-Trial Motion for September 17, 2004. (Apx. Tab P, at A-253–A-254.) At the request of the Lavelocks' counsel, the date for the hearing was continued from September 17 and rescheduled for November 22, 2004. (Apx. Tab Q, at A-255; Tab R, at A-256; Tab O, at A-251.) Accordingly, at the time the June 23 Order became final, Respondent had scheduled a hearing to take place on November 22, 2004, at which time Respondent would take up Cooper Tire's position that part of the June 23 Order was void because Respondent was without jurisdiction to enter it.

The hearing proceeded on November 22, 2004. (Apx. Tab A, at A-1–A-26.) Respondent thereafter entered the December 13 Contempt Judgment, in which he denied Cooper Tire's After-Trial Motion and, at the same time, found Cooper Tire in criminal contempt for failing to abide by the Court's June 23 Order. (Apx. Tab B, at A-27–A-28.) It is incongruous for Respondent to find Cooper Tire in contempt when Cooper Tire was pursuing, ***with Respondent*****,** by authorized after-trial motion, the post-judgment remedies available to it by Missouri law and rule (although it could have immediately sought appellate court intervention), and in fact was acting in compliance with the schedule

Respondent had set (at the request of the Lavelocks' attorney) regarding resolution of its After-Trial Motion. "[A] court should not, and can not [sic] in a jurisdictional sense, punish for contempt when it is manifest no contempt of its authority was intended." *McMullin*, 459 S.W.2d at 388. Not only is the record devoid of any evidence of contempt for the trial court's authority by Cooper Tire, but to the contrary, Cooper Tire affirmatively invoked the trial court's authority by filing an after-trial motion rather than an immediate appeal. Accordingly, this Court should make absolute its preliminary writ of prohibition. *See, e.g., id.; O'Brien*, 703 S.W.2d at 600.

Point III

Relator is entitled to an order prohibiting Respondent from enforcing that portion of the June 23, 2004 Judgment ordering Relator to create and file an index of its confidential documents produced in the underlying lawsuit, because Respondent was without subject matter jurisdiction to make such order and the June 23 Judgment was therefore void *ab initio,* in that: the parties had settled the underlying lawsuit; the June 23 Judgment imposed obligations on Relator in addition and contrary to the terms of the Settlement Agreement; Plaintiffs no longer had an interest in Relator's confidential documents after executing the Settlement Agreement; the only persons with an interest in the documents were Plaintiffs' lawyers, whose stated interest was in pursuing unrelated litigation for unrelated third parties; and Plaintiffs therefore lacked any post-settlement justiciable interest in the confidential documents produced by Relator, stripping Plaintiffs of standing

to seek relief relating to Cooper Tire's confidential documents and rendering moot all issues relating to those confidential documents.

Settlement Agreements are favored by Missouri courts, and once an agreement is reached, the parties thereto may not rescind. *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 480–81 (Mo. banc 1972). When a judgment is the result of an agreement between the parties to resolve their differences, it is "contractual in nature" and "does not represent the decision of a judge after a hearing upon disputed issues." *See Am. Family Mut. Ins. Co. v. Hart*, 41 S.W.3d 504, 510 (Mo. App. W.D. 2001) (noting that trial court is without jurisdiction to order payment of prejudgment interest if the parties' agreement does not so provide). In such circumstances, the judgment entered by the court must be "based upon the terms of the agreement between the parties." *Id.; Vulgamott v. Perry*, 154 S.W.3d 382, 393 (Mo. App. W.D. 2004) (reversing and remanding "for the trial court to enter such orders and or judgment as is necessary to complete the settlement agreement reached by the parties.") (emphasis added).[10]

Upon executing the Settlement Agreement on January 2, 2004 (Apx. Tab E (Under Seal), at A-45, A-47), the Lavelocks retained no legal right to seek an order against

[10] Had Respondent enforced the terms of the Settlement Agreement, Respondent would have denied the underlying plaintiffs' motion for post-settlement relief and would have awarded Cooper Tire its attorneys' fees incurred in enforcing the Settlement Agreement and opposing the underlying plaintiffs' Motion for Post-Settlement Relief. (Apx. Tab E (Under Seal), at A-45.)

Cooper Tire regarding areas released in that Agreement. "In the absence of words in the operative part of a general release which indicate an intention to limit or restrict its effect, it must be concluded that the instrument was contemplated and intended to be a complete settlement of ***all matters*** between the parties to the release." *Lugena v. Hanna,* 420 S.W.2d 335, 341 (Mo. 1967) (emphasis added). For a party to retain any legal rights relating to the dispute, there must be an ***express reservation*** of such rights ***in the settlement agreement***. *Swope v. Gen. Motors Corp.,* 445 F. Supp. 1222, 1228 (W.D. Mo. 1978) (applying Missouri law); *Sexton v. First Nat'l Mercantile Bank & Trust Co. of Joplin*, 713 S.W.2d 30, 31 (Mo. App. S.D. 1986).

Absent an express reservation by the Lavelocks, Respondent was without subject matter jurisdiction to enter an order imposing an obligation on Cooper Tire not required and in fact foreclosed by the terms of the Settlement Agreement. *Hart*, 41 S.W.3d at 510 (trial court was without jurisdiction to order payment of prejudgment interest if not provided for in the parties' agreement); *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288 n.13 (5th Cir. 1989) (applying Texas law) (finding settlement agreement precluded court from considering motion for sanctions following execution of settlement agreement); *Ingram v. Star Touch Communications, Inc.,* 450 S.E.2d 334, 336 (Ga. App. 1994) (party could not move for attorneys' fees and costs following general release settlement which did not provide for recovery of such fees).

Here, Respondent's June 23, 2004 Judgment went beyond the terms of the parties' negotiated Settlement Agreement. The Settlement Agreement did not require Cooper Tire to create and file an index of Cooper Tire's confidential documents or to preserve

deposition testimony containing confidential information; to the contrary, it required the Lavelocks to return to Cooper Tire all confidential documents which had been produced, vesting absolute control over those documents with Cooper Tire alone. (Apx. Tab E, at A-43–A-44; Tab D, at A-38.) Moreover, the Lavelocks expressly obligated themselves, both in an August 2001 agreed Protective Order of Confidentiality and in the Settlement Agreement, to use the confidential documents only for purposes of the underlying litigation and to return possession and control over those documents to Cooper Tire at the termination of the underlying litigation. (Apx. Tab E (under Seal), at A-43–A-44; Tab D at A-35, A-38.)

Rather than negotiate into the terms of the Settlement Agreement a provision dictating the actions Cooper Tire was to take with respect to its own documents once returned, the Lavelocks broadly released Cooper Tire from all demands and claims of any nature whatsoever relating to the underlying lawsuit. (Apx. Tab E (Under Seal), at A-41.) This release unquestionably covered Cooper Tire's confidential documents produced in the lawsuit. Accordingly, under well-settled Missouri law, the Lavelocks released any and all legal rights with respect to Cooper Tire's confidential documents in the Settlement Agreement. *See Lugena*, 420 S.W.2d at 241. When Respondent included in his June 23, 2004 Judgment the requirement that Cooper Tire create and file an index of confidential documents (Apx. Tab C, at A-29–A-31), he exceeded the jurisdictional limits to enter a judgment as "necessary to complete the settlement agreement." *See Vulgamott*, 154 S.W.3d at 393.

Instead of encouraging and facilitating settlement, an important public policy of the State of Missouri, the requirement that Cooper Tire create and file a document index thwarted the parties' intent as expressed in the four corners of their written Settlement Agreement. Respondent thereby exceeded his subject matter jurisdiction, and that portion of the June 23 Judgment is void *ab initio*. *See Christian Health Care of Springfield West Park, Inc. v. Little*, 145 S.W.3d 44, 55 (Mo. App. S.D. 2004) (holding that portion of trial court's judgment that exceeded its subject matter jurisdiction was void but affirming judgment in all other respects); *accord In re Marriage of M.A. & M.S.*, 149 S.W.3d 562, 570 (Mo. App. E.D. 2004); *Rouse Co. of Mo. v. Justin's, Inc.*, 883 S.W.2d 525, 529 (Mo. App. E.D. 1994). To hold otherwise would render the effect of settlements uncertain and leave parties, like Cooper Tire—who have the right to trust that their dispute has been resolved and that the courts will give full effect to their the right that their Settlement Agreement—open to ongoing litigation.

That the public policy of the State of Missouri has been thwarted in this case is made more evident by the fact that here, the post-settlement litigation is directed not for the benefit of plaintiffs, but for the apparent benefit of unknown potential litigants in some unrelated future lawsuit. If not rectified by this Court, the result in this case likely will discourage parties from settling cases in Missouri because a party could never be guaranteed finality of litigation through settlement. Absent this Court's intervention, that is exactly the result Cooper Tire has been subjected to in the underlying litigation, and what every other defendant will be subjected to in the future if other Missouri courts follow this dangerous precedent.

Importantly, part of the significance of the Settlement Agreement is that the Lavelocks had no justiciable interest in the confidential documents Relator had produced as of the date the Lavelocks executed the Settlement Agreement (January 2, 2004). As a result, with respect to Cooper Tire's confidential documents, the Lavelocks had no standing to request post-settlement relief, and Respondent had no subject matter jurisdiction to issue orders relating thereto.

If a court is without subject matter jurisdiction to issue a judgment, that judgment is void *ab initio*. *Am. Economy Ins. Co. v. Powell*, 134 S.W.3d 743, 748 (Mo. App. S.D. 2004); *West v. Dir. of Revenue*, 996 S.W.2d 775, 776 (Mo. App. E.D. 1999). Respondent lacked subject matter jurisdiction to order Cooper Tire to create and file an index of confidential documents with the Circuit Court because that requirement went beyond the terms of the parties' Settlement Agreement in the underlying case. Accordingly, that portion of the Court's June 23, 2004 Judgment requiring Cooper Tire to create and file an index of its confidential document is void *ab initio,* and this Court should make absolute its preliminary writ of prohibition as to both the June 23 Judgment and the December 13 Contempt Judgment based thereon.

A. Having no post-settlement justiciable interest in the confidential documents produced by Relator, Plaintiffs in the underlying case had no standing to request that Respondent grant them post-settlement relief relating to Cooper Tire's confidential documents, and Respondent was therefore without subject matter jurisdiction to enter post-settlement relief against Relator with respect to the confidential documents.

A party has standing if he or she has "a personal stake [in the action] arising from a threatened or actual injury." *Thruston v. Jefferson City Sch. Dist.*, 95 S.W.3d 131, 134 (Mo. App. W.D. 2003) (quoting *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. banc 1986)); *State ex rel. Twenty-Second Judicial Dist. v. Jones*, 823 S.W.2d 471, 475 (Mo. 1992); *Lakewood Arrowhead Prop. Owners Ass'n v. Bagwell*, 100 S.W.3d 840, 842 n.4 (Mo. App. W.D. 2003). If the only interest in the subject matter being adjudicated is that of a third party, there is no standing. *Wahl v. Braun*, 980 S.W.2d 322, 325 (Mo. App. E.D. 1998); *see Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. App. W.D. 2002); *In re Estate of Juppier*, 81 S.W.3d 699, 702 (Mo. App. E.D. 2002).

"Standing is a threshold requirement. Without it, a court has no power to grant the relief requested." *Querry v. State Highway & Transp. Comm'n*, 60 S.W.3d 630, 634 (Mo. App. W.D. 2001) (quoting *In re Estate of Scott*, 913 S.W.2d 104, 105 (Mo. App. E.D. 1995)). "Standing to sue is an interest in the subject matter of the suit . . . ." *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992). Where the issue of standing is raised, it must be considered by the Court, because the

Court has no subject matter jurisdiction over the case if the party seeking relief lacks standing. *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002).

The Lavelocks had no standing to seek an order from Respondent directing Cooper Tire's actions with respect to Cooper Tire's own confidential documents, the control of which was vested in Cooper Tire under the provisions of the parties' negotiated, fully executed Settlement Agreement. As previously noted, on January 2, 2004, the Lavelocks executed the Settlement Agreement, which fully compromised their claims and fully released Cooper Tire from

> all manner of action, causes of action, lawsuits, claims and demands of every kind and nature whatsoever, whether known or unknown, from the beginning of time to the date of this Agreement, that Plaintiffs had or may now have against Cooper Tire, as may have arisen or has arisen, in connection with any and all matters arising out of or related to the Lawsuit, including but not limited to any matters that were, or could have been, set forth in any of the pleadings relating to the Lawsuit.

(Apx. Tab E (Under Seal), at A-41.) Once the Lavelocks fully compromised their claims, the confidential documents Relator produced in the underlying case could have no further relevance to them. Notwithstanding having absolutely no remaining justiciable interest in Cooper Tire's confidential documents, the Lavelocks—or, more pointedly, their lawyers—sought Respondent's order requiring Cooper Tire to retain those documents

indefinitely. (Apx. Tab F, at A-51; Tab G, at A-88–A-128.) At the time the Lavelocks sought this order, they no longer had standing to seek relief from Respondent regarding discoverable documents that were unique to the specific facts of their underlying claims, because they no longer had any cognizable legal interest or injury.

The Lavelocks' ***lawyers*** certainly do not have standing, independent of their capacity as the underlying plaintiffs' representatives, to obtain an order for the indefinite retention of Cooper Tire's documents. Discovery is for the benefit of the parties to the lawsuit, not their lawyers. The lawyers' role in this case was limited to their representative capacity of the Lavelocks. Lawyers are not parties for standing purposes and have no rights in addition to those of their clients. That the Lavelocks' lawyers in the future may represent other hypothetical claimants against Cooper Tire in unrelated litigation does not somehow confer standing for the relief they sought here—the indefinite preservation of documents that "may" have some bearing on some future, as-yet-unidentified litigation. By entering an order that, in practical effect, forces Cooper Tire to retain indefinitely the confidential documents produced in the underlying litigation, Respondent issued the type of advisory judgment that is prohibited under Missouri law. *See Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. App. W.D. 2002).

Respondent's June 23 Judgment requiring Cooper Tire to create and file an index, where the party requesting relief had no standing to do so, imposes a serious burden on Missouri courts to oversee and manage document retention efforts of past litigants. If every court were to take this position, the judicial system would be inundated and overburdened with issues relating to post-judgment document management. *See Hinton*

v. City of St. Joseph, 889 S.W.2d 854, 858, *reh'g and transfer denied* (Mo. App. W.D. 1994) (concept of standing serves function of promoting an efficient allocation of access to scarce judicial resources).

Cases have a beginning, a life, and an end. Cooper Tire believed this case ended long ago, and but for Respondent exceeding his jurisdiction and ordering post-settlement relief relating to Cooper Tire's own confidential documents (and in direct conflict with the parties' Settlement Agreement), it would have ended long ago. The Lavelocks have no alleged injury not already resolved by the Settlement Agreement, no justiciable interest in Cooper Tire's confidential documents, and no standing. Thus, that portion of Respondent's June 23, 2004 Judgment requiring Cooper Tire to create and file a document index is advisory and is void *ab initio*, and this Court should make its preliminary writ of prohibition absolute on that basis. *Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. App. W.D. 2002); *Powell*, 134 S.W.3d at 748; *West*, 996 S.W.2d at 776; *Chipman v. Counts*, 104 S.W.3d 441, 445 (Mo. App. S.D. 2003).

B. Because Plaintiffs in the underlying action have no post-settlement justiciable interest in the confidential documents produced by Relator, and have executed the Settlement Agreement, issues relating to Relator's confidential documents were and are moot, and Respondent was without subject matter jurisdiction to enter post-settlement relief against Relator with respect to Cooper Tire's confidential documents.

"In terms of justiciability, a cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered,

would not have any practical effect upon any then-existing controversy." *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001). "It is premature to render judgment or opinion on a situation that may never occur." *Local Union 1287 v. Kansas City Area Transp. Auth.*, 848 S.W.2d 462, 463 (Mo. banc 1993). "The doctrine of mootness is triggered when an event occurs that alters the position of the parties and any judgment would be a hypothetical opinion." *Shaw v. Ferguson Med. Group, L.P.*, 121 S.W.3d 557, 558 (Mo. App. E.D. 2003).

For the same reasons set forth in the immediately preceding section, the Lavelocks' April 6, 2004 request that Respondent issue an Order requiring Cooper Tire to indefinitely retain confidential documents produced in the underlying case should have been denied as moot. Had this occurred, there would have been nothing on which Respondent could have based his December 13 Contempt Order. The Lavelocks agreed to use the documents only for the underlying case, and to return those documents to Cooper Tire upon termination of the case (which they have done). (Apx. Tab E (Under Seal), at A-43–A-44; Tab D, at A-38.) The underlying case has ended, a Settlement Agreement was executed over one year ago, and the Lavelocks have been paid the settlement proceeds. (Apx. Tab E (Under Seal), at A-45–A-48; Tab L, at A-228.) That these documents may be relevant to some future, as-yet-unknown, unrelated litigation in some other jurisdiction makes no difference. *Smith v. State ex rel. Rambo*, 30 S.W.2d 925, 930 (Mo. App. S.D. 2000) ("a question is no less moot because the issue may arise again at some future time"). Because confidential documents relating to a case that has been resolved are no longer relevant to the underlying plaintiffs, there is no justiciable

controversy, and Respondent was without jurisdiction to enter an order imposing obligations on Cooper Tire regarding a moot issue. *See, e.g., Group Health Plan, Inc. v. BJC Health Sys., Inc.*, 30 S.W.3d 198, 201 (Mo. App. E.D. 2000) (Missouri courts do not determine moot cases). Because Respondent's June 23 Judgment requiring Cooper Tire to file an index of its confidential documents addressed a moot issue, it is void *ab initio*. *See Powell*, 134 S.W.2d at 748; *West*, 996 S.W.2d at 776; *Chipman*, 104 S.W.3d at 445. Accordingly, the resulting December 13 Contempt Order also is void *ab initio*. The preliminary writ of prohibition should be made absolute.

Point IV

Relator is entitled to an order prohibiting Respondent from enforcing the December 13, 2004 Contempt Judgment because it is an order of contempt for failing to comply with a judgment that was void *ab initio* and is therefore void *ab initio* itself, in that the December 13 Contempt Judgment arises solely from Relator's failure to comply with obligations imposed by Respondent in a void judgment—the June 23, 2004 Judgment that Respondent was without subject matter jurisdiction to impose.

Missouri law is settled that the violation of an order which is beyond the court's subject matter jurisdiction to enter is not punishable by contempt. *Mo. Elec. Power Co. v. City of Mountain Grove*, 176 S.W.2d 612, 616 (Mo. 1944); *State ex rel. Girard v. Percich*, 557 S.W.2d 25, 39 (Mo. App. St. L. 1977). An order of contempt, whether criminal or civil, for failing to comply with a void judgment is itself void and is properly challenged by a writ of prohibition. *State ex rel. Mohart v. Romano*, 924 S.W.2d 537,

541, *reh'g & transfer denied* (Mo. App. W.D. 1996) (citing *White v. Hutton*, 240 S.W.2d 193, 200 (Mo. App. K.C. 1951) and *State ex rel. Chem. Dynamics v. Luten*, 581 S.W.2d 921, 923 (Mo. App. K.C. 1979)); *State ex rel. T.A.B. v. Corrigan*, 600 S.W.2d 87, 93–94 (Mo. App. E.D. 1980) (preliminary writ of prohibition made absolute where "[r]espondent's finding of contempt was based on his stated misinterpretation and misapplication of the law, and cannot be upheld on that basis"). Further, this Court may resolve in this writ proceeding that the underlying order on which the contempt is based is void because a judgment may be collaterally attacked on jurisdictional grounds at any time. *See State ex rel. Div. of Family Servs. v. Bullock*, 904 S.W.2d 510, 512 (Mo. App. S.D. 1995) (quoting *K&K Invs., Inc. v. McCoy*, 875 S.W.2d 593, 597 (Mo. App. E.D. 1994)).

A void judgment "is entitled to no respect, and may be impeached at <u>any</u> time in <u>any</u> proceeding in which it is sought to be enforced or in which its validity is questioned by anyone with whose rights or interests it conflicts." *La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955) (emphases added). In other words, a void judgment is subject to direct or collateral attack at any time. *Taylor v. Taylor*, 47 S.W.3d 377, 389 (Mo. App. W.D. 2001). Because the rights to direct and collateral attack are coexistent, "[j]udgments that are void because of lack of jurisdiction are subject to <u>collateral attack as well as appeal</u>." *Hampton v. Hampton*, 536 S.W.2d 324, 326 (Mo. App. Spr. 1976) (emphasis added).

While it also was proper for Cooper Tire to appeal the June 23 Judgment directly (which Cooper Tire has done to protect its rights) (Apx. Tab Y, at A-332–A-342),

Missouri case law is clear that an appeal is not Cooper Tire's sole means of redress. Because the June 23 Judgment is void *ab initio*, it can be collaterally attacked at any time a party seeks to enforce it—whether now or five years from now. A writ of prohibition is an appropriate method to collaterally attack a void judgment. Moreover, there is no requirement that a litigant exhaust—or even pursue at all—its means of direct attack before attacking a judgment collaterally. *See State v. Kosovitz*, 342 S.W. 2d 828, 830 (Mo. 1961). Here, Respondent's December 13 Contempt Judgment is void because it is based on Relator's failure to comply with the June 23 Judgment (*see* Apx. Tab B, at A-27–A-28)—which, as set forth *supra*, was void *ab initio* for lack of subject matter jurisdiction. Accordingly, a writ of prohibition is appropriate as to **both** the December 13 Contempt Judgment—regardless of whether it is an order of criminal or civil contempt—**and** the underlying June 23 Judgment imposing post-settlement obligations on Cooper Tire with respect to its confidential documents.

The underlying judgment was improper because, when entered, there was no justiciable controversy between the parties with respect to Cooper Tire's confidential documents. The Lavelocks were compensated to their satisfaction, fully released Cooper Tire, and no longer had any interest in Cooper Tire's confidential documents. Once the Lavelocks executed the parties' Settlement Agreement on January 2, 2004, they were stripped of standing to seek relief against Cooper Tire not reserved under the Settlement Agreement. No justiciable controversy remained because the Lavelocks reserved no rights with respect to Cooper Tire's confidential documents or information and instead generally released Cooper Tire in the broadest possible terms. Respondent therefore

lacked subject matter jurisdiction to require Cooper Tire to take actions beyond the scope of the parties' Settlement Agreement. Accordingly, because the underlying judgment is void, Respondent's Contempt Judgment also is void, and the preliminary writ of prohibition should be made absolute. *See Romano*, 924 S.W.2d at 540–41 (trial court's order of contempt was void because the court was without jurisdiction to enter the prior order on which the Contempt Judgment was based).

CONCLUSION

For the foregoing reasons, Relator Cooper Tire & Rubber Company respectfully requests that the Court make its preliminary Writ of Prohibition against Respondent, the Honorable W. Stephen Nixon, absolute. Because both Judgments are void, Cooper Tire requests that this Court enter its order vacating both the December 13 Contempt Judgment and that portion of the June 23 Judgment that imposes an obligation on Relator to create and file an index of its confidential documents. Respondent should be precluded from enforcing both his June 23, 2004 Judgment as it relates to the imposition of an obligation on Relator to create and file an index of confidential documents it produced in the underlying case, and his December 13, 2004 Contempt Judgment finding Relator in contempt and assessing a *per diem* sanction.

Respectfully submitted,

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CERTIFICATION PURSUANT TO RULE 84.06(c)

I hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and that it contains 10,872 words. I further certify that Microsoft Word for Windows 2000 was used to prepare this Brief and that I have provided the Clerk of the Court and Respondent's counsel with a 3-1/2 inch computer diskette containing the full text of this brief, labeled with the case name and number. I further certify that the diskettes were scanned and are virus-free.

ATTORNEY FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via First-Class U.S. mail, postage prepaid, on this _____ day of March, 2005, upon the following:

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