No. SC86530

In The

SUPREME COURT OF MISSOURI
EN BANC

STATE ex rel. COOPER TIRE & RUBBER COMPANY

Relator

vs.

THE HONORABLE W. STEPHEN NIXON

Respondent

Petition for Writ of Prohibition
Relating to an Action Pending in the
Circuit Court of
Jackson County, Missouri

Case No. 00CV221072

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an action seeking a writ of prohibition. This Court clearly has jurisdiction to issue such writs under Article V, Section 4 of the Missouri Constitution. However, contrary to the assertions in Relator's Brief, this is not an appropriate action for the application of a writ of prohibition and this Court should vacate its Preliminary Writ and deny Relator's Petition.

The Contempt Judgment entered by Respondent on December 13, 2004, constitutes a finding of civil contempt. As a result, such Judgment is reviewable and adequate relief may be obtained by an appeal and a writ of prohibition is not appropriate under Supreme Court Rule 84.22(a). In addition, Respondent clearly had subject matter jurisdiction to enter both the Final Judgment in the underlying action and the Contempt Judgment and neither judgment is void ab initio. Lastly, an appeal is currently pending in the Missouri Court of Appeals, Western District, from the Final Judgment in the underlying action, appeal number WD64928. This action relates to a matter collateral to that appeal, namely the issuance of the Contempt Judgment against Relator for failing to comply with the Final Judgment. As a result, Supreme Court Rule 84.22(b) directs that this Court should not issue a writ of prohibition since it is not the court in which the related appeal is pending. Therefore, while this Court has jurisdiction to issue writs of prohibition, this Court should decline to exercise jurisdiction in this matter.

STATEMENT OF FACTS

Relator Cooper Tire & Rubber Company, hereinafter Relator Cooper Tire, begins its statement of facts by claiming the issue in this proceeding is whether settlements will be honored and upheld by Missouri courts. (Relator's Brief, p. 12). The Settlement Agreement reached in the underlying litigation was clearly upheld and enforced and this action is not about whether settlement agreements will be enforced. The present action arises because Relator Cooper Tire is unhappy with the final Judgment entered in the underlying litigation but failed to timely appeal such judgment, failed to comply with the terms of such judgment, and is now seeking to avoid the consequences of its actions by requesting this Court to issue a writ of prohibition.[1]

Plaintiffs Thera Oleta Lavelock and Roger Lavelock, hereinafter Plaintiffs Lavelock, filed their Petition in the underlying action, case number 00CV221072, in the Circuit Court

[1] Respondent recognizes that the Statement of Facts is not supposed to include argument, Supreme Court Rule 84.04(c), but feels it is necessary to respond to the argument included in Relator's Statement of Facts. Respondent will limit the remainder of this Statement of Facts to a fair and concise statement of the relevant facts.

of Jackson County, Missouri, on August 25, 2000. (Supp. App., Tab U, p. 263). Relator Cooper Tire was one of the defendants in such action. (Supp. App., Tab U, p. A-263). On August 17, 2001, a Protective Order of Confidentiality, hereinafter the Protective Order, was entered by Respondent with the agreement of Relator Cooper Tire and Plaintiffs Lavelock. (Supp. App., Tab D, p. A-32 thru A-39). The Protective Order governed the use, disclosure and disposition of "confidential material" produced during the underlying litigation and further provided:

> 15. SURVIVAL OF OBLIGATIONS. All obligations and duties arising under this Protective Order shall survive the termination of this action and, in addition, shall be binding upon the Parties to this action, their successors and assigns (whether in whole or in part), affiliates, subsidiaries, their officers, agents, representatives, and employees.
>
> 16. JURISDICTION. This Court shall retain jurisdiction indefinitely with respect to enforcement of and/or any dispute regarding the improper use of confidential material, to modify the terms of this Order, or to enter further Orders regarding confidential material, as may be necessary.

(Supp. App., Tab D, p. A-38 - A-39).

Relator Cooper Tire and the Plaintiffs then reached a settlement which was later reduced to a written Release and Settlement Agreement, hereinafter the Settlement Agreement. (Supp. App., Tab E, p. A-40). The Settlement Agreement is not dated, but was signed by the Plaintiffs Lavelock on January 2, 2004, by counsel for the Plaintiffs on

February 13, 2004, and by officers and agents of Relator Cooper Tire on February 27, 2004. (Supp. App., Tab E, p. A-46 - A-48). The Settlement Agreement provides:

> 8. **Return Materials Produced in Discovery**. As further consideration for the payments made by Cooper Tire, Plaintiffs, Plaintiffs' counsel and any expert retained by Plaintiffs in any capacity whatsoever, or with whom Plaintiffs or their counsel consulted in the Lawsuit will, within twenty (20) days of the date of this Agreement, assemble and return to Bryan Cave LLP, 1200 Main, Suite 3500, Kansas City, Missouri, attention: Juliet A. Cox ("Counsel for Cooper Tire"), all materials for which return is required by the Protective Order entered in the Lawsuit. A copy of the Protective Order is attached hereto as Appendix A and made a part of this Agreement by this reference.
>
> 9. Plaintiffs and their Counsel acknowledge that any violation of Paragraphs 7 or 8 would cause immediate and irreparable harm to Cooper Tire, and that it would be extremely difficult for Cooper Tire to establish the precise amount of such damage. In the event of a breach or threatened breach of any of Plaintiffs duties and obligations under the terms and provisions of Paragraph 7 or 8 hereof, Cooper Tire shall be entitled, in addition to any other legal or equitable remedies it may have in connection therewith (including any right to damages that it may suffer) to temporary, preliminary and permanent injunctive relief restraining such breach or threatened breach.

(Supp. App., Tab E., p. A-43 - A-44).

Plaintiffs filed a Motion for Protective Order for Preservation of Documents with Suggestions in Support on or about April 6, 2004. (Supp. App., Tab F, p. A-49, A-52). On or about May 17, 2004, Relator Cooper Tire filed its Motion to Enforce Settlement Agreement and For Attorneys' Fees. (Supp. App., Tab I, p. A-159 - A-160). Based on these motions, Respondent entered an Order and Judgment of Dismissal With Prejudice, hereinafter Final Judgment, dated June 21, 2004. (Supp. App., Tab C, p. A-29). The Final Judgment granted the motions in part and denied the motions in part, (Supp. App., Tab C., p. A-29), and provided, in relevant part:

> IT IS FURTHER ORDERED, ADJUGED and DECREED, the parties shall perform all terms and conditions of the settlement agreement;
>
> IT IS FURTHER ORDERED, ADJUGED and DECREED, Plaintiffs shall return to defendant Cooper Tire & Rubber company [sic] all existing copies of those depositions in its possession and/or control of Tom Giaponni, Bruce Currie, John Ebert, John Bodart, Kenneth Pearl and Alan Milner;
>
> IT IS FURTHER ORDERED, ADJUGED and DECREED, defendant Cooper Tire & Rubber Company shall preserve and maintain all original transcripts and all copies of the depositions of Tom Giaponni, Bruce Currie, John Ebert, John Bodart, Kenneth Pearl and Alan Milner in a secure location protected from fire, water or other means of destruction;
>
> IT IS FURTHER ORDERED, ADJUGED and DECREED, Defendant Cooper Tire & Rubber Company shall create and file with the Court an index of all

documents it produced that that [sic] were returned to it pursuant to the protective order dated August 17, 2001, including at a minimum, the date the document was created, the subject of the document, the name of the person or persons who created it, and the name, address, and telephone number of the person or persons having custody and control of each document.

(Supp. App., Tab C, p. A-30).

On July 21, 2004, Relator Cooper Tire filed its Motion to Vacate In Part the Court's June 23, 2004 Judgment With Respect to Post-Settlement Relief and Suggestions in Support, hereinafter the Motion to Vacate. (Supp. App., Tab L, p. A-226). The Motion to Vacate began with "Defendant Cooper Tire & Rubber Company . . ., pursuant to Rule 75.01 of the Missouri Rules of Civil Procedure, hereby moves the Court to vacate that portion of its June 23, 2004 Order and Judgment requiring Cooper Tire to file with the Court an index of the confidential and proprietary documents it produced in this case". (Supp. App., Tab L, p. A-226).

A hearing was held on the Motion to Vacate on November 22, 2004. (Supp. App., Tab A, p. A-1 - A-2). Respondent thereafter entered an Order Denying Motion to Partilly [sic] Vacate the Court's Judgment and Judgment of Contempt on December 13, 2004, hereinafter Contempt Judgment. (Supp. App., Tab B, p. A-27 - A-28.1).

On December 17, 2004, Relator Cooper Tire filed its Emergency Petition for Writ of Prohibition and for Immediate Stay of the $1,000 Per Day Sanction Imposed by

Respondent with the Missouri Court of Appeals, Western District. (Supp. App., Tab V, p. A-271). That same day, the Court of Appeals issued both a Preliminary Order in Prohibition and a Stop Order. (Supp. App., Tab S, p. A-257, A-259). Relator Cooper Tire then filed its Provisional Motion for Special Order of Appellate Court Permitting Late Filing of Notice of Appeal Pursuant to Mo. R. Civ. P. 81.07 on December 28, 2004, seeking leave to appeal the Final Judgment despite the time for filing a notice of appeal having expired. (Supp. App., Tab W, p. A-288). The Court of Appeals thereafter issued its Order Quashing Preliminary Order in Prohibition and Denying Petition for Writ of Prohibition on January 3, 2005. (Supp. App., Tab T, p. A-261). On January 6, 2005, Relator filed its Emergency Petition for Writ of Prohibition and for Immediate Stay of the $1,000 Per Day Sanction Imposed by Respondent with this Court. On January 21, 2005, Relator filed a Notice of Appeal from the December 13, 2004, Contempt Judgment. (Supp. App., Tab Z, p. A-343). On January 25, 2005, this Court issued its Preliminary Writ of Prohibition. On January 27, 2005, the Court of Appeals entered its Order allowing Relator to file a late notice of appeal from the Final Judgment. (Supp. App., Tab X, p. A-331). On February 3, 2005, Relator filed its Notice of Appeal from the Final Judgment. (Supp. App., Tab Y, p. A-332). On March 3, 2005, the Court of Appeals entered its Order dismissing the appeal from the December 13, 2004, Contempt Judgment because such judgment was "neither final nor otherwise appealable". (Supp. App., Tab AA, p. A-352).

As a result of the above sequence of events, there are currently two pending actions in this matter. First, the present writ proceeding before this Court. Second, an appeal from

the Final Judgment in the underlying litigation which is pending in the Missouri Court of Appeals, Western District.

POINTS RELIED ON

I. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because the Contempt Judgment Involves Civil Contempt and Is Appealable, In That the Contempt Judgment Imposes a Per Diem Fine Designed To Coerce Compliance With the Final Judgment Previously Entered by Respondent.

General Signal Corp. v. Donallco, Inc., 787 F.2d 1376 (9th Cir. 1986)

In re Crow, 103 S.W.3d 778 (Mo. 2003)

Levis v. Markee, 771 S.W.2d 928 (Mo.App.E.D. 1989)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994)

Supreme Court Rule 84.22

II. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because the Contempt Judgment Is Supported by the Evidence and Review by Appeal Is Available, In That the Final Judgment Was Final Prior to the Hearing On November 22, 2004, Relator Failed to Comply After the Judgment Became Final, and Relator Is Currently Appealing the Final Judgment.

Department of Labor & Indus. Rels. v. Ron Woods Mech., 926 S.W.2d 537 (Mo.App.W.D. 1996)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994)

State ex rel. Crouse v. Mills, 231 Mo. 493, 133 S.W. 22 (en banc 1910)

State ex rel. Eddy v. Rolf, 145 S.W.3d 429 (Mo.App.W.D. 2004)

Supreme Court Rule 75.01

Supreme Court Rule 81.05

III. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Portion of the Final Judgment Requiring the Relator to File an Index, Because Respondent Had Subject Matter Jurisdiction to Enter the Final Judgment and Such Judgment is Not Void, In That Respondent Had Subject Matter Jurisdiction Over the Underlying Personal Injury Action and the Enforcement of the Settlement Agreement and Plaintiffs Had an Interest in the Documents and the Index.

American Economy Ins. Co. v. Powell, 134 S.W.3d 743 (Mo.App.S.D. 2004)

Kontrick v. Ryan, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004)

McKean v. St. Louis County, 964 S.W.2d 470 (Mo.App.E.D. 1998)

Vulgamott v. Perry, 154 S.W.3d 382 (Mo.App.W.D. 2004)

Black's Law Dictionary 742 (Abr. 5th ed. 1983)

IV. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because It Is Not Void as an Order of Contempt for Failing to Comply With a Void Judgment, In That Respondent Had Subject Matter Jurisdiction to Enter the Final Judgment and Such Judgment Is Not Void.

American Economy Ins. Co. v. Powell, 134 S.W.3d 743 (Mo.App.S.D. 2004)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994)

State ex rel. Crouse v. Mills, 231 Mo. 493, 133 S.W. 22 (en banc 1910)

State ex rel. Westmoreland v. O'Bannon, 87 S.W.3d 31 (Mo.App.W.D. 2002)

Supreme Court Rule 84.22

V. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing Either the Final Judgment or the Contempt Judgment, Because a Writ of Prohibition Is Not Available Under Rule 84.22, In That Relator Is Currently Appealing the Final Judgment to the Court of Appeals, Western District, the Contempt Judgment Is Collateral to the Appeal of the Final Judgment, and the Contempt Judgment Is Also Appealable.

In re Crow, 103 S.W.3d 778 (Mo. 2003)

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573 (Mo.banc 1994)

Supreme Court Rule 84.22

ARGUMENT

I. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because the Contempt Judgment Involves Civil Contempt and Is Appealable, In That the Contempt Judgment Imposes a Per Diem Fine Designed To Coerce Compliance With the Final Judgment Previously Entered by Respondent.

The granting of original writs is governed by Supreme Court Rule 84.22, which provides:

> (a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.
>
> (b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

Supreme Court Rule 84.22. This Court has also explained that:

> Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances. [Citation omitted]. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo.banc 1994). Likewise, this Court has stated that:

> The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity. [Citation omitted]. The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction. [Citation omitted]. Prohibition cannot be used as a substitute for an appeal or to undo erroneous judicial proceedings that have already been accomplished.

State ex rel. Douglas Toyota III, Inc., v. Keeter, 804 S.W.2d 750, 752 (Mo.banc 1991). Additionally, this Court recently confirmed that a "civil contempt order is appealable." *In re Crow*, 103 S.W.3d 778, 780 (Mo. 2003).

Relator Cooper Tire's main argument for finding that the Contempt Judgment involves criminal contempt is based on circular reasoning. Relator starts with the premise that Plaintiffs Lavelock were not entitled to the relief granted in the Final Judgment requiring that Relator Cooper Tire file an index with the trial court. Based on this faulty premise, Relator reasons that enforcement of the provision in the Final Judgment requiring the filing of an index cannot benefit Plaintiffs Lavelock because they were not entitled to such relief to begin with. Relator Cooper Tire then compounds their faulty reasoning by

misapplying Missouri law in concluding that the Contempt Judgment cannot be remedial, i.e. civil contempt, because it does not benefit the Plaintiffs. Because Relator Cooper Tire begins with an incorrect premise and misapplies the law, Relator has clearly reached an incorrect conclusion. The Contempt Judgment is designed to coerce enforcement of the Final Judgment and is therefore clearly a judgment of civil contempt, reviewable by appeal, and a writ of prohibition is inappropriate in this case.

This Court has explained the distinction between criminal and civil contempt as follows:

> Civil contempt is intended to benefit a party for whom an order, judgment, or decree was entered. Its purpose is to coerce compliance with the relief granted. [Citation omitted]. A civil contemnor has at all times the power to terminate punishment by complying with the order of the court. [Citation omitted]. Criminal contempt is punitive in nature and acts to protect, preserve, and vindicate the authority and dignity of the judicial system and to deter future defiance. [Citation omitted]. The distinction between criminal and civil contempt is reflected in the content of the judgment, whether the remedy is coercive or punitive.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 578 (Mo.banc 1994); *see also In re Crow*, 103 S.W.3d 778, 780 (Mo. 2003). It has also been explained that:

> "The purpose of civil contempt, as contradistinguished from criminal contempt, is to remedy, not to punish: it is to enforce obedience to a judgment by a party the judgment intends to benefit. [Citation omitted]. In like manner, the

> sanctions which follow a judgment of civil contempt are meant to remedy -- to coerce compliance -- and not as a penalty, as in criminal contempt. [Citation omitted]. The civil contemnor retains the power to terminate any sanction, even imprisonment, by the act of compliance -- an alternative not open to the criminal contemnor."

State ex rel. Division of Family Services v. Bullock, 904 S.W.2d 510, 513 (Mo.App.S.D. 1995) (quoting *Wisdom v. Wisdom*, 689 S.W.2d 82, 86-87 (Mo.App. 1985)). One of the possible civil contempt remedies to coerce compliance with the prior court order is a *per diem* fine such as the court ordered in the present case. *In re Crow*, 103 S.W.3d at 781.

The Contempt Judgment in this case provides:

> 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.

(Supp. App., Tab B, p. A-28 - A-28.1). Such judgment imposes a *per diem* fine until Relator Cooper Tire complies with the Final Judgment. Such a fine is a civil contempt remedy.

> The purpose of civil contempt is to remedy, not punish. [Citation omitted]. A fine for civil contempt is remedial and provides a coercive means of *compelling compliance with a court order and/or of compensating complainant* for losses sustained due to noncompliance. [Citations omitted]. Generally, an outright fine, unrelated to actual damages, is not appropriate for civil contempt because it is not designed to cure but is intended to punish. [Citation omitted]. A per diem fine that expires when the contemnor complies with the order is proper.

Levis v. Markee, 771 S.W.2d 928, 932 (Mo.App.E.D. 1989) (emphasis added). "A per diem fine is a proper method of coercing compliance with a court order regardless of whether it also serves a reimbursement or punishment function." *Estate of Zimmerman v. Robertson*, 820 S.W.2d 617, 620 (Mo.App.E.D.1991). "[A] fine in a civil contempt may be coercive, rather than compensatory in nature. . . . [S]uch a fine would ordinarily be a per diem fine until the contemnor complies with the court's order." *State of North Dakota ex rel. Young v. Clavin*, 715 S.W.2d 25, 26 (Mo.App.W.D. 1986).

The Contempt Judgment is intended to coerce compliance with the Final Judgment. Relator Cooper Tire has the ability to purge the contempt and stop the running of the fine at any time by simply filing the index required by the Final Judgment. In fact, if Relator Cooper Tire had filed the required index on the day the Contempt Judgment was entered, there would have been no fine imposed. As a result, the fine is accumulating only due to Relator Cooper Tire's recalcitrance. The Contempt Judgment did not impose any punishment for past actions, only a *per diem* fine while Relator Cooper Tire refuses to

comply with the earlier judgment. There is simply no basis for finding that this case involves criminal contempt. As a result, the Contempt Judgment is reviewable by appeal. *In re Crow*, 103 S.W.3d 778, 780 (Mo. 2003).

Relator Cooper Tire argues the judgment of contempt must be criminal "because the Lavelocks had no interest in Cooper Tire's confidential documents following execution of the Settlement Agreement." (Relator's Brief, p. 29). This argument misconstrues the requirement for civil contempt. Relator's argument is that it should have won on this issue in the trial court, therefore it cannot be held in civil contempt. The Contempt Judgment is designed to coerce compliance with the Final Judgment. As a result, the Contempt Judgment is clearly remedial. The fact that Relator Cooper Tire does not think Plaintiffs were entitled to the relief granted does not change the Contempt Judgment from civil to criminal.

In addition, Plaintiffs Lavelock do have an interest in the index required by the Final Judgment. At the time the Final Judgment was entered, Relator Cooper Tire had not yet paid the settlement proceeds to the Plaintiffs. Until the settlement proceeds were paid, the Plaintiffs had an interest in preserving the evidence. Moreover, such interest continues and Plaintiffs Lavelock still have an interest in the documents returned to Relator Cooper Tire and the requirement in the Final Judgment for the creation and filing of an index was designed to benefit Plaintiffs. First, the Protective Order entered in this case provides:

> 15. SURVIVAL OF OBLIGATIONS. All obligations and duties arising under this Protective Order shall survive the termination of this action and, in

addition, shall be binding upon the Parties to this action, their successors and assigns (whether in whole or in part), affiliates, subsidiaries, their officers, agents, representatives, and employees.

16. JURISDICTION. This Court shall retain jurisdiction indefinitely with respect to enforcement of and/or any dispute regarding the improper use of confidential material, to modify the terms of this Order, or to enter further Orders regarding confidential material, as may be necessary.

(Supp. App., Tab D, p. A-38 - A-39). Additionally, the Settlement Agreement incorporated the Protective Order, (Supp. App., Tab E, p. A-43), thereby confirming the continuing obligations of the parties and the continuing jurisdiction of the trial court with respect to the confidential material. Next, the Settlement Agreement recognizes that Relator Cooper Tire may be entitled to damages for any breach of the Settlement Agreement or the provisions of the Protective Order. (Supp. App., Tab E, p. A-43). When considered together, the basis for the provision in the Final Judgment becomes clear.

Under the Settlement Agreement and the Protective Order, Relator Cooper Tire has a possible cause of action against Plaintiffs Lavelock claiming that the Plaintiffs violated either the Settlement Agreement or the Protective Order by disseminating confidential material.[2] However, pursuant to the provisions of the Settlement Agreement and the

[2] Plaintiffs have not violated the Settlement Agreement or the Protective Order and any claim by Relator would be baseless. However, under the Settlement Agreement and

Protective Order, all the confidential material has now been returned to Relator Cooper Tire. As a result, Plaintiffs would be placed in the position of defending themselves against a claim that they disseminated certain documents without having copies of the documents returned to Relator. In addition, the trial court would be faced with determining whether the Settlement Agreement or Protective Order were violated without any record in the court file concerning what documents were actually produced by and then returned to Relator. The index required by the Final Judgment creates an evidentiary record that can be used in addressing any claims under the Settlement Agreement or the Protective Order.

Relator Cooper Tire also argues that the Contempt Judgment is criminal because the fine is payable to the court administrator and is not related to Plaintiffs' damages. The flaw in Relator Cooper Tire's reasoning is the assumption that a civil contempt fine must be both coercive and compensatory. A fine imposed in a civil contempt proceeding may be imposed either to compensate or to coerce compliance with the prior order.

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate [*304] the complainant for losses sustained. [Citation omitted]. Where compensation is intended, a fine is imposed, payable to the complainant.

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the Protective Order, such potential claim exist.

United States v. United Mine Workers of America, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947) (footnotes omitted). "Sanctions for civil contempt may be imposed to coerce obedience to a court order, *or* to compensate the party pursuing the contempt action for injuries resulting from the contemptuous behavior, *or both*." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (emphasis added). "If the fine, or any portion of the fine, is coercive, it should be payable to the court." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986).

> If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721, 731 (1988). "A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. 'One who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid any penalty.'" *Hicks*, 485 U.S. at 633, 108 S.Ct. at 1430, 99 L.Ed.2d at 732.

It is true that any compensatory fine payable to Plaintiffs must relate to the Plaintiffs' damages. While Plaintiffs have been damaged by Relator Cooper Tire's actions with respect to these documents, the *per diem* fine was not designed to compensate Plaintiffs. Such fine was designed to coerce compliance. Regardless of whether Plaintiffs were seeking compensation for Relator Cooper Tire's continued failure to comply with the

Final Judgment, Plaintiffs were still entitled to a finding of contempt and an order coercing Relator Cooper Tire to comply. A *per diem* fine payable to the court is an allowed remedy in a civil contempt proceeding and the $1,000 per day fine imposed in the Contempt Judgment was a proper civil contempt remedy.

It is clear that the Contempt Judgment involves civil, not criminal, contempt and is therefore appealable. Because an appeal is available, prohibition is not proper in this case. "No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal . . ." Supreme Court Rule 84.22(a); *State ex rel. Westmoreland v. O'Bannon*, 87 S.W.3d 31, 34 (Mo.App.W.D. 2002). This Court explained nearly thirty years ago that:

> "Prohibition is no substitute for appeal nor is it a device to correct trial errors or rulings." *State ex rel. Schaper v. Stussie*, 487 S.W.2d 49, 51 (Mo.App. 1972). Furthermore, it has been properly said that, "Prohibition is to be used with great caution and forebearance and only in cases of extreme necessity and not to rule complaints of error which may be adequately reviewed on appeal." *Crackerneck Country Club, Inc. v. Sprinkle*, 485 S.W.2d 652, 655 (Mo.App. 1972).

State ex rel. McCurley v. Hanna, 535 S.W.2d 107, 109 (Mo.banc 1976). Such rule was confirmed more recently when this Court said "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo.banc 1994). As a result, a writ of prohibition is not available and Relator Cooper Tire's Petition should be denied. This is especially true when Relator has

an appeal pending regarding the Final Judgment. Supreme Court Rule 84.22(b). This situation results in two separate appellate courts of this state reviewing the same matter in different proceedings at the same time. Such a situation is a waste of judicial resources and is contrary to the rules and case law governing original writs.

II. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because the Contempt Judgment Is Supported by the Evidence and Review by Appeal Is Available, In That the Final Judgment Was Final Prior to the Hearing On November 22, 2004, Relator Failed to Comply After the Judgment Became Final, and Relator Is Currently Appealing the Final Judgment.

The granting of original writs is governed by Supreme Court Rule 84.22, which provides:

> (a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.
>
> (b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

Supreme Court Rule 84.22. This Court has also explained that:

> Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances. [Citation omitted]. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo.banc 1994).

Relator Cooper Tire's second point is directed to whether the evidence supports the trial court's Contempt Judgment. As an initial matter, since this case involves a finding of civil rather than criminal contempt, the standard of "beyond a reasonable doubt" cited by Relator is inappropriate. Further, it is clear that the evidence did justify the entry of the Contempt Judgment.

At no time has Relator Cooper Tire argued that it has complied with the requirement in the Final Judgment for filing an index. Relator attempts to justify its failure to comply by claiming that it "was not defying Respondent's authority by not filing an index". (Relator's Brief, p. 34). The basis for this argument is that "Cooper Tire could have immediately sought appellate intervention, but instead filed an authorized after-trial motion". (Relator's Brief, p. 34). Relator is attempting to turn its failure to follow the Supreme Court Rules into something to be praised rather than discouraged. Relator's motion was not an authorized after-trial motion and the Final Judgment became final long before the hearing on November 22, 2004, or the entry of the Contempt Judgment on December 13, 2004. In addition, despite the finality of the Final Judgment, Relator Cooper Tire did not timely appeal from such judgment but simply chose to ignore its requirements.

The only post-judgment motion filed by Defendant Cooper Tire was a Motion to Vacate in Part the Court's June 23, 2004 Judgment With Respect to Post-settlement Relief and Suggestions in Support which was filed on July 21, 2004. (Supp. App., Tab L, p. A-226). Such Motion stated that it was filed pursuant to Rule 75.01. (Supp. App., Tab L, p. A-226). Relator's Petition for Writ of Prohibition filed in the Court of Appeals indicated that the Motion to Vacate was filed under Rule 75.01. (Supp. App., Tab V, p. A-272). Because the Motion to Vacate was not an authorized after-trial motion, it did not extend the time in which the trial court retained control over the judgment and the Judgment in this case became final 30 days after it was entered.

The Court of Appeals has explained:

> Under the current Supreme Court Rules, an "authorized after-trial motion" is a motion for which the rules expressly provide. [Citation omitted]. A motion to set aside or vacate a dismissal is not an authorized after-trial motion because it is not a motion for which the rules expressly provide.

Department of Labor & Indus. Rels. v. Ron Woods Mech., 926 S.W.2d 537, 540 (Mo.App.W.D. 1996) (footnote omitted). Under Rule 75.01, "the court only has jurisdiction to amend, vacate, or modify a judgment for 30 days after entering the judgment." *Department of Labor & Indus. Rels. v. Ron Woods Mech.*, 926 S.W.2d 537, 541 (Mo.App.W.D. 1996). A ruling granting a motion to vacate after the 30 day period is "beyond the jurisdiction of the court and is void". *Department of Labor & Indus. Rels*, 926 S.W.2d at 541. In the absence of an authorized after-trial motion, a trial court's

judgment becomes final after 30 days. *Department of Labor & Indus. Rels*, 926 S.W.2d at 540.

> The Department filed a motion requesting that the court vacate its May 20, 1994 order dismissing the petition under the court's Rule 75.01 authority. Under this rule, the court only has jurisdiction to amend, vacate, or modify a judgment for 30 days after entering the judgment. The court, however, did not rule on the Department's motion until July 11, 1994, 57 days after it dismissed the matter. Such a ruling was beyond the jurisdiction of the court and is void.

Department of Labor & Indus. Rels, 926 S.W.2d at 541.

It is clear from a reading of Rule 75.01 that it only allows a trial court to vacate a judgment during the thirty-day period after it is entered. Supreme Court Rule 75.01. Such rule does not extend the time for such action when a party files a motion to vacate. In contrast, Rule 81.05 only extends the time in which a judgment becomes final by the filing of "an authorized after-trial motion". Supreme Court Rule 81.05(a)(2). These rules were recently discussed by the Court of Appeals, which explained:

> Under Rule 75.01, a trial court retains control over a judgment for thirty days after entry of the judgment, during which it may vacate, reopen, correct, amend, or modify the judgment. [Citations omitted]. A judgment becomes final at the expiration of thirty days after its entry if no action has been taken by the trial court to vacate, reopen, correct, amend or modify the judgment. [Citations omitted]. A court's jurisdiction may be extended under Rule 81.05. Rule 81.05 provides that the

> judgment becomes final at the expiration of thirty days after its entry unless an authorized after-trial motion is filed. [Citation omitted]. Upon the filing of an authorized after-trial motion, the jurisdiction of the court is extended up to ninety days from the date of the motion or the date the trial court rules on the motion, whichever occurs earlier.

State ex rel. Eddy v. Rolf, 145 S.W.3d 429, 432 (Mo.App.W.D. 2004). The Court also reiterated that a motion to vacate is not an authorized after trial motion, stating:

> if an authorized after-trial motion is timely filed, the jurisdiction of the trial court over a judgment is extended to ninety days from the date of the motion. Rule 81.05. An authorized after-trial motion is a motion for which the rules expressly provide. [Citation omitted]. A motion to set aside or vacate a judgment is not an authorized after-trial motion that extends the trial court's jurisdiction because it is not a motion for which the rules expressly provide.

State ex rel. Eddy, 145 S.W.3d at 433 (footnote omitted). As a result, the Final Judgment in this case was final 30 days after it was entered, and any notice of appeal from such judgment was due no later than August 2, 2004. No notice of appeal was filed and the Judgment was final long before the hearing on November 22, 2004, and had been final for One Hundred Forty-Five (145) days when the trial court entered the Contempt Judgment on December 13, 2004.

Relator Cooper Tire argues that its Motion to Vacate should be considered an authorized after-trial motion which extended the time before the judgment became final

under Supreme Court Rule 81.05. There are two reasons why the Motion to Vacate should not be treated as an authorized after-trial motion. First, the Motion indicates that it was filed pursuant to Rule 75.01. Such motion states:

> Defendant Cooper Tire & Rubber Company ("Cooper Tire"), pursuant to Rule 75.01 of the Missouri Rules of Civil Procedure, hereby moves the Court to vacate . . . .

(Supp. App., Tab L, p. 226). In its Petition for Writ of Prohibition filed with the Court of Appeals, Western District, Relator Cooper Tire also indicated that the motion was filed pursuant to Rule 75.01. (Supp. App., Tab V, p. A-272). Relator Cooper Tire wishes to have this Court treat the Motion to Vacate as being filed under some other rule despite Relator's assertions in both of the lower courts that the motion was made pursuant to Rule 75.01. Relator Cooper Tire is simply attempting to rewrite history because it failed to properly follow the rules.

Secondly, at the time it was filed, the Motion to Vacate was clearly not intended to be a motion for new trial. Relator Cooper Tire now argues that the Motion to Vacate should be considered a motion for new trial. (Relator's Brief, p. 35). Relator does not argue that its Motion to Vacate qualifies as any other authorized after-trial motion. Thus, Relator Cooper Tire's only claim that the Final Judgment did not become final 30 days after it was entered is that the Motion to Vacate should be treated as a motion for new trial. Such argument clearly fails.

A review of the Motion to Vacate shows that Relator Cooper Tire was not seeking a new trial in the underlying matter. Relator was simply seeking to have the Judgment vacated in part. Having a portion of a judgment vacated is not the province of a motion for new trial but is rather a power granted under Rule 75.01, the rule relied upon in the Motion to Vacate. In addition, Relator Cooper Tire was offered a new trial during the hearing on November 22, 2004, but argued against such a course. (Supp. App., Tab A, p. A-22 thru A-25). Relator Cooper Tire cannot now be allowed to claim the Motion to Vacate was actually a motion for new trial when Relator made clear that it did not want a new trial when such relief was offered.

In addition, even if Relator Cooper Tire's Motion to Vacate could be considered an authorized after-trial motion, it was deemed overruled ninety days after it was filed, which was October 19, 2004. Supreme Court Rules 78.06, 81.05(a)(2)(A). Likewise, the Final Judgment became final at the latest on October 19, 2004, under Rule 81.05(a)(2)(A). Relator Cooper Tire admits that the Judgment became final on such date. (Relator's Brief, p. 35). As a result, any notice of appeal would have been due no later than October 29, 2004. Again, no such notice of appeal was filed and the Judgment was final long before the hearing on November 22, 2004, and had been final for a minimum of fifty-five days when the trial court entered the Contempt Judgment on December 13, 2004.

The only explanation given for Relator's actions in this matter is that "at the time the June 23 Order became final, Respondent had scheduled a hearing to take place on November 22, 2004." (Relator's Brief, p. 35). Yet it is clear under the rules that the trial

court lost jurisdiction when the judgment became final prior to the hearing. Relator Cooper Tire's argument is that it was entitled to refuse to comply with the Final Judgment while it waited for a hearing on a motion that was deemed overruled as a matter of law. Such a ruling would allow a party to continue to file motions after a judgment becomes final and thereby avoid being found in contempt despite the trial court's lack of jurisdiction to grant the motions.

As a result, it is clear that Relator Cooper Tire *was* obligated to comply with the Final Judgment long before December 13, 2004. Relator Cooper Tire was refusing to comply with a final judgment of the trial court. A judgment which Relator Cooper Tire did not timely appeal but now wishes to have this Court vacate by use of a writ of prohibition.

Additionally, a writ of prohibition is not a proper method to review a final judgment. "Prohibition stops the court from acting, but does not undo what has been done by the court." *State ex rel. Crouse v. Mills*, 231 Mo. 493, 501, 133 S.W. 22, 25 (en banc 1910). The Final Judgment has already been entered and has long since become final. Despite the fact that Relator Cooper Tire failed to timely appeal such Judgment, Relator has now obtained leave to appeal under Rule 81.07. Since an appeal is the proper method for review of the Final Judgment, the Petition for Writ of Prohibition should be denied. In addition, since the Final Judgment was final, the judgment of contemp is clearly supported by the evidence.

III. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Portion of the Final Judgment Requiring the Relator to File an Index, Because Respondent Had Subject Matter Jurisdiction to Enter the Final Judgment and Such Judgment is Not Void, In That Respondent Had Subject Matter Jurisdiction Over the Underlying Personal Injury Action and the Enforcement of the Settlement Agreement and Plaintiffs Had an Interest in the Documents and the Index.

The granting of original writs is governed by Supreme Court Rule 84.22, which provides:

> (a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.
>
> (b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

Supreme Court Rule 84.22. This Court has also explained that:

> Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances. [Citation omitted]. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo.banc 1994).

In its third Point, Relator Cooper Tire argues that the trial court did not have subject matter jurisdiction to enter the portion of the Final Judgment requiring the Relator to file an index of the confidential documents. (Relator's Brief, p. 36). Relator Cooper Tire misconstrues the requirements for "subject matter jurisdiction".

Relator repeatedly cites *American Family Mut. Ins. Co. v. Hart*, 41 S.W.3d 504, 510 (Mo.App.W.D. 2001), for the proposition that a "trial court is without jurisdiction to order payment of prejudgment interest if the parties' agreement does not so provide", (Relator's Brief, p. 37), and that a "trial court was without jurisdiction to order payment of prejudgment interest if not provided for in the parties' agreement". (Relator's Brief, p. 38). Such statements are not supported by *Hart*. The Court in *Hart* actually states:

> Thus, the judgment entered is based upon the terms of the agreement between the parties. Other jurisdictions that have addressed this issue have found that a party's failure to expressly provide for prejudgment interest in an agreement precludes a court from entering a judgment that includes prejudgment interest in addition to the amount of the parties' agreement.

Hart, 41 S.W.3d at 510. The only discussion of "jurisdiction" in *Hart* related to the fact that the trial court's judgment became final after 30 days so the trial court did not have

jurisdiction to enter its later order and the notice of appeal was not timely and the Court of Appeals did not have jurisdiction over the appeal. *Hart*, 41 S.W.3d at 513. Nothing in *Hart* indicates that the requirement that terms be included in settlement agreements is a basis for subject matter jurisdiction.

The Supreme Court of the United States recently discussed the over use of the term "jurisdiction", complaining that:

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. "Jurisdiction," the Court has aptly observed, "is a word of many, too many, meanings." . . . Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

Kontrick v. Ryan, 540 U.S. 443, 454-55, 124 S.Ct. 906, 915, 157 L.Ed.2d 867, 879 (2004). The Court also explained that "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct". *Kontrick*, 540 U.S. at 456, 124 S.Ct. at 916, 157 L.Ed.2d at 880.

Relator's entire case hinges on the claim that the Final Judgment enter in June, 2004, is void.

> A [*748] judgment is void in only three circumstances: (1) if the trial court did not have subject matter jurisdiction; (2) if the trial court did not have personal

jurisdiction over the parties; or (3) if the trial court acted in a manner inconsistent with due process of law.

American Economy Ins. Co. v. Powell, 134 S.W.3d 743, 747-48 (Mo.App.S.D. 2004). On the other hand:

> A voidable judgment is one rendered by a court having jurisdiction, but which is irregularly and erroneously rendered. Such a judgment is valid until vacated by direct proceeding instituted for that purpose or until reviewed on appeal or by writ of error; it becomes valid by failure within the proper time to have it annulled or by subsequent ratification or confirmation.

Powell, 134 S.W.3d at 748. Relator's argument for the Final Judgment being void is based on a claimed lack of subject matter jurisdiction. Black's Law Dictionary defines "subject matter jurisdiction" as follows:

> Term refers to court's competence to hear and determine cases of the general class to which proceedings in question belong; the power to deal with the general subject involved in the action. Subject matter jurisdiction deals with court's competence to hear a particular category of cases.

Black's Law Dictionary 742 (Abr. 5th ed. 1983).

There can be no question that the trial court had subject matter jurisdiction over Plaintiff Lavelock's personal injury claims. It is also clear that the court had subject matter jurisdiction over enforcement of the parties Settlement Agreement. The Court of Appeals recently discussed this issue, explaining "Settlement agreements are a species of contract.

'A motion to compel settlement adds to a pending action a collateral action for specific performance of the settlement agreement.'" *Vulgamott v. Perry*, 154 S.W.3d 382, 387 (Mo.App.W.D. 2004) (quoting *McKean v. St. Louis County*, 964 S.W.2d 470, 471 (Mo.App.E.D. 1998)). A trial court has jurisdiction regarding enforcement of a settlement agreement even if it lacked subject matter jurisdiction over the initial claim. *Vulgamott*, 154 S.W.3d at 388. It has also been stated that:

> a cause which has been passed for settlement is open until actually dismissed by the court, [citation omitted], and the court retains jurisdiction. [Citation omitted]. The settlement agreement becomes an "accord executory," or an agreement for the future discharge of an existing claim by a substituted performance. [Citation omitted]. An enforceable accord executory suspends the original claim. [Citation omitted]. If, however, the defendant refuses to comply with the terms of the settlement agreement, the plaintiff may abandon the settlement agreement and proceed under the original cause of action. [Citation omitted].
>
> Here, it is undisputed that the parties reached a settlement agreement. When the County acted contrary to the terms of the agreement, plaintiff chose to enforce the settlement agreement against the County by filing a motion to compel settlement. Because the case had not been dismissed, it was still pending and the parties remained before the court. Plaintiff was therefore entitled to bring a collateral action seeking specific performance of the terms of the agreement.

McKean v. St. Louis County, 964 S.W.2d 470, 471 (Mo.App.E.D. 1998).

Under Relator's theory, a trial court that misconstrues the parties settlement agreement would lose subject matter jurisdiction and the resulting judgment would be void. Subject matter jurisdiction is not so narrowly defined. Even if the Final Judgment was erroneous, which it was not, the trial court clearly had subject matter jurisdiction to enter such Judgment and such Judgment is not void.

In subparts A and B to Relator's third Point, Relator argues that Plaintiffs Lavelock did not have standing and that the issue regarding the index of the confidential documents was moot.

> Standing is closely related to its sister doctrine, mootness, and both are derived from their parent doctrine, justiciability. Justiciability is the general [**8] requirement that the cause present "a real, substantial, presently existing controversy which is admitting of specific relief." *Willis v. Most Worshipful Prince Hall Grand Lodge*, 866 S.W.2d 875, 878 (Mo. App. 1993). A party has standing if he or she has "a personal stake [in the action] arising from a threatened or actual injury." *State ex rel. Williams v. Mauer*, 722 S.W.2d 296, 298 (Mo. banc 1986). A case becomes 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." *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. banc 1984).

Thruston v. Jefferson City School Distr., 95 S.W.3d 131, 134 (Mo.App.W.D. 2003). As discussed above, Plaintiffs have a continuing interest in the index required by the Final Judgment and therefore have standing and the issues involved are clearly not moot.

At the time the Final Judgment was entered, Relator Cooper Tire had not yet paid the settlement proceeds to the Plaintiffs. Until the settlement proceeds were paid, the Plaintiffs had an interest in preserving the evidence. Moreover, such interest continues and Plaintiffs Lavelock still have an interest in the documents returned to Relator Cooper Tire and the requirement in the Final Judgment for the creation and filing of an index was designed to benefit Plaintiffs. First, the Protective Order entered in this case provided for the survival of the obligations under such Order and provided for continuing jurisdiction in the trial court. (Supp. App., Tab D, p. A-38 - A-39). Additionally, the Settlement Agreement incorporated the Protective Order, (Supp. App., Tab E, p. A-43), thereby confirming the continuing obligations of the parties and the continuing jurisdiction of the trial court with respect to the confidential material. Next, the Settlement Agreement recognizes that Relator Cooper Tire may be entitled to damages for any breach of the Settlement Agreement or the provisions of the Protective Order. (Supp. App., Tab E, p. A-43). The provisions provide the basis for the Plaintiffs' interest in the index required by the Final Judgment.

Under the Settlement Agreement and the Protective Order, Relator Cooper Tire has a possible cause of action against Plaintiffs Lavelock claiming that the Plaintiffs violated either the Settlement Agreement or the Protective Order by disseminating confidential

material.[3] However, pursuant to the provisions of the Settlement Agreement and the Protective Order, all the confidential material has now been returned to Relator Cooper Tire. As a result, Plaintiffs would be placed in the position of defending themselves against a claim that they disseminated certain documents without having copies of the documents returned to Relator. In addition, the trial court would be faced with determining whether the Settlement Agreement or Protective Order were violated without any record in the court file concerning what documents were actually produced by and then returned to Relator. The index required by the Final Judgment creates an evidentiary record that can be used in addressing any claims under the Settlement Agreement or the Protective Order.

Without the index requirement, Plaintiffs are left in the position of being subject to claims under the Settlement Agreement and Protective Order at the whim of Relator Cooper Tire. Relator would have in its possession all the evidence regarding what documents were involved. The trial court would have no record of the documents produced

[3] Again, Plaintiffs have not violated the Settlement Agreement or the Protective Order and any claim by Relator would be baseless. However, under the Settlement Agreement and the Protective Order, such potential claim exist.

by and then returned to Relator and Plaintiffs would be forced to defend themselves without access to the documents or even a record of the documents.

Relator recognized the need for on going jurisdiction for the trial court to make additional orders concerning these documents when it agreed to the Protective Order, (Supp. App., Tab D, p. A-39), and incorporated the Protective Order in the Settlement Agreement. (Supp. App., Tab E, p. A-44).

Relator is desperately seeking to elevate its claim of trial court error to the level of jurisdictional so as to justify this writ proceeding. If Relator had timely appealed the Final Judgment, it is unlikely that the Contempt Judgment would have been entered prior to the Final Judgment being upheld on appeal. This proceeding is a direct result of Relator's failure to follow the rules of civil procedure. Relator has a pending appeal and this proceeding is unnecessary and the Petition for Writ of Prohibition should be denied.

IV. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing the Contempt Judgment, Because It Is Not Void as an Order of Contempt for Failing to Comply With a Void Judgment, In That Respondent Had Subject Matter Jurisdiction to Enter the Final Judgment and Such Judgment Is Not Void.

The granting of original writs is governed by Supreme Court Rule 84.22, which provides:

> (a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.
>
> (b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

Supreme Court Rule 84.22. This Court has also explained that:

> Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances. [Citation omitted]. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo.banc 1994).

Relator's argument in its last Point is that a finding of contempt for failing to comply with a void judgment is void and therefore a writ of prohibition with respect to the Contempt Judgment is proper. As discussed above, the Final Judgment is not void and the trial court had subject matter jurisdiction to enter the Final Judgment. Further, the Contempt Judgment is not seeking to enforce a void judgment and is therefore not void either. As a result, a writ of prohibition is not proper.

Regardless of the validity of the Final Judgment and the Contempt Judgment, a writ of prohibition is not proper in this case. This Court explained nearly a century ago that:

> If the judgment of the probate court of St. Louis county was void upon its face, *and the parties had no other available remedy*, [**26] then prohibition would lie to stop the court from further proceeding under such judgment. In 32 Cyc. 621, the rule is thus stated: "The enforcement of a judgment, where there is a remedy by appeal or otherwise, or the enforcement of an execution issued thereon where there is a remedy by motion to quash, will not be restrained by prohibition. But if there is no other remedy available to the party aggrieved, prohibition will lie to restrain the enforcement of a void decree or judgment."

State ex rel. Crouse v. Mills, 231 Mo. 493, 503, 133 S.W. 22, 25-26 (en banc 1910) (emphasis added). Further,

> 'To determine, in the first instance, its own jurisdiction, as far as the same rests upon contested facts, is a legitimate exercise of [*501] the judicial powers of any

> tribunal, and though it may err in such determination, its so doing is not a usurpation of judicial authority, but error for which the proper remedy of the party aggrieved is by appeal.' [Citation omitted] 'If the inferior court has jurisdiction of the subject-matter in a controversy, a mistaken exercise of that jurisdiction or of its acknowledged powers, will not justify a resort to the extraordinary remedy by prohibition. It is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals.' [*State ex rel. v. Burckhartt*, 87 Mo. 533.] There is no doubt as to the jurisdiction of the probate court of Bates county over the subject-matter of the action, that is, over that class of cases. And being so possessed, the defendant, as judge of said court, had power and authority to hear and determine all the issues presented, whether relating to the residence of the alleged insane party or other issues belonging to the case. It was as much the duty of said probate judge to hear and decide the issue of domicile as any other issue within the limits of that controversy, and his judgment was as final and conclusive upon that question as upon any other.

State ex rel. Crouse v. Mills, 231 Mo. 493, 500-01, 133 S.W. 22, 25 (en banc 1910). As Relator's Motion to Vacate raised the issue of Respondent's subject matter jurisdiction, Respondent decided that issue when it denied the Motion. Relator can pursue its claim regarding subject matter jurisdiction in its pending appeal and a writ of prohibition is not proper.

As discussed above, judgments are void for only limited reasons.

> A [*748] judgment is void in only three circumstances: (1) if the trial court did not have subject matter jurisdiction; (2) if the trial court did not have personal jurisdiction over the parties; or (3) if the trial court acted in a manner inconsistent with due process of law.

American Economy Ins. Co. v. Powell, 134 S.W.3d 743, 747-48 (Mo.App.S.D. 2004). Because the trial court clearly had subject matter jurisdiction, neither the Final Judgment nor the Contempt Judgment are void and a writ of prohibition is not proper on that basis.

Additionally, whether a judgment is void or not, a writ is not appropriate when an appeal is available. "No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal . . ." Supreme Court Rule 84.22(a); *State ex rel. Westmoreland v. O'Bannon*, 87 S.W.3d 31, 34 (Mo.App.W.D. 2002). More recently this Court said "If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo.banc 1994).

Prohibition is not the only remedy, or even an proper remedy, in this case. The Final Judgment is not void and an appeal from that Judgment is pending in the Court of Appeals, Western District. The Contempt Judgment involves civil contempt and is itself appealable. Under Rule 84.22(b), this is not the proper court to hear a writ proceeding since the appeal of the Final Judgment is not pending in this Court. As a result, a writ of prohibition is not appropriate and Relator Cooper Tire's Petition should be denied.

V. Relator Is Not Entitled To an Order Prohibiting Respondent From Enforcing Either the Final Judgment or the Contempt Judgment, Because a Writ of Prohibition Is Not Available Under Rule 84.22, In That Relator Is Currently Appealing the Final Judgment to the Court of Appeals, Western District, the Contempt Judgment Is Collateral to the Appeal of the Final Judgment, and the Contempt Judgment Is Also Appealable.

The granting of original writs is governed by Supreme Court Rule 84.22, which provides:

> (a) No original remedial writ shall be issued by an appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court.
>
> (b) If a judgment has been entered and an appeal of the judgment is pending or the time for filing an appeal has not expired, no original remedial writ shall be issued by an appellate court, or any district thereof, with respect to any matter collateral to the appeal unless the appeal is pending in the court and district, if the appeal has been filed, or the court and district would have jurisdiction of the appeal if one is timely filed. For purposes of this Rule 84.22(b), a motion filed pursuant to Rule 24.035 or Rule 29.15 is a matter collateral to the appeal.

Supreme Court Rule 84.22. This Court has also explained that:

> Interlocutory review of trial court error by writ of prohibition . . . should occur only in extraordinary circumstances. [Citation omitted]. If the error is one of law, and reviewable on appeal, a writ of prohibition is not appropriate.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo.banc 1994).

Relator Cooper Tire is currently appealing the Final Judgment to the Court of Appeals, Western District, appeal number WD64928. (Supp. App., Tab X, p. A-331; Tab Y, p. A-332). As a result, not only can "adequate relief can be afforded by an appeal", an appeal is actually being pursued with respect to the Final Judgment. As a result, Rule 84.22 provides that "No original remedial writ shall be issued". Supreme Court Rule 84.22(a).

Additionally, review of the Contempt Judgment is a matter collateral to the appeal of the Final Judgment. Rule 84.22 states:

> If a judgment has been entered and an appeal of the judgment is pending . . ., no original remedial writ shall be issued by an appellate court . . . with respect to any matter collateral to the appeal unless the appeal is pending in the court . . . .

Supreme Court Rule 84.22(b). Because the appeal from the Final Judgment is not pending in this Court, Rule 84.22(b) provides that this Court will not issue a writ with respect to the Contempt Judgment.

Moreover, as discussed above, the Contempt Judgment involves civil contempt and is therefore appealable. *In re Crow*, 103 S.W.3d 778, 780 (Mo. 2003). Therefore, issuance of a writ with respect to the Contempt Judgment is also improper under Rule 84.22(a).

Because both the Final Judgment and the Contempt Judgment are appealable and an appeal from the Final Judgment is actually pending, this Court should not issue a writ of prohibition with respect to either Judgment. This Court should deny Relator Cooper Tire's Petition and quash the Preliminary Writ of Prohibition previously issued.

CONCLUSION

Relator seeks a writ of prohibition regarding the Final Judgment and the Contempt Judgment. The Final Judgment is currently being appealed to the Court of Appeals, Western District. The Contempt Judgment involves civil contempt and is therefore appealable. As a result, Relator is not entitled to a writ of prohibition under Supreme Court Rule 84.22.

Further, it is clear that Respondent had subject matter jurisdiction over both the underlying action and the enforcement of the settlement agreement. As a result, despite Relator's attempts to argue otherwise, the Final Judgment is not void. Therefore, the Contempt Judgment is not an attempt to enforce a void judgment and is likewise not void. Regardless of the validity of such Judgments, prohibition is not proper in this instance because Relator is pursuing an appeal from the Final Judgment and an the Contempt Judgment is appealable. A writ of prohibition is simply not appropriate when adequate relief may be obtained by appeal.

On the merits, Relator does not claim to have complied with the Final Judgment's requirement for filing an index. Relator also admits that such Judgment was final prior to the hearing on November 22, 2004. Despite such finality, Relator neither complied with the Judgment nor timely appealed. Relator sought to make itself the judge of the Final Judgment's validity and was therefore properly found in contempt.

Lastly, Relator is simultaneously seeking review of the Final Judgment by this writ proceeding and by direct appeal in the Court of Appeals. Such dual review is not provided for in the Supreme Court Rules and is clearly not proper under Rule 84.22. Likewise,

because review of the Contempt Judgment is collateral to the appeal of the Final Judgment, a writ of prohibition is not proper with respect to the Contempt Judgment under Rule 84.22. Relator's Petition for Writ of Prohibition should be denied and the Preliminary Writ of Prohibition previously entered by this Court should be quashed.

Respectfully Submitted,

JAMES, TOTTA & PARRISH

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of Respondent's Brief together with a copy of the floppy disk required by Supreme Court Rule 84.06(g) on the following counsel of record by depositing in the United States Mail, postage prepaid, on this 13th day of April, 2005.

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RULE 84.06(c) AND (g) CERTIFICATE

I hereby certify that this Appellants' Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 12,376 words. I hereby further certify that the floppy disks containing the brief and filed with the Court and served on the Attorney for Respondents were scanned for viruses by an anti-virus program and are virus-free according to such program.

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APPENDIX

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