SC97008

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI
***ex relatione* JERRY CULLEN,**

Relator,

vs.

THE HONORABLE KEVIN D. HARRELL,
in his official capacity as
Circuit Judge, Circuit Court of Jackson County,

Respondent.

On Original Petition for Writ of Prohibition
Re: *Cullen v. Cullen*, Case No. 0716-FC09041-01
in the Circuit Court of Jackson County

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

The relief requested by Ms. Scroggin in the motion to compel has been mischaracterized by Relator as that of a attempt to modify a judgment. For this Petition to be properly analyzed, it must be remembered that, pursuant to the MSA, Relator unequivocally agreed to transfer one-half (1/2) of the military retirement pay earned during the marriage to Ms. Scroggin. This agreement became the judgment of the Court pursuant to the Judgment of Dissolution. Respondent has the clear authority to make orders to ensure that the judgment of the Court is complied with by the parties. The Modification Judgment did absolutely nothing to affect the parties original agreement; it only corrected the original Judgment of Dissolution to set forth the proper formula for determination of Ms. Scroggin's entitlement for submission to the military by Ms. Scroggin. The Motion to Compel sought relief to determine to what amount one-half (1/2) of Relator's military retirement pay earned during the marriage equated - - *not* relief in the form of the modification of that Modificaton Judgment, as advanced by Relator. Respondent simply ordered Relator to execute a limited authorization for release of Relator's military records related solely to Relator's retirement points to allow Ms. Scroggin to determine the *amount* that the agreed-upon formula should yield after plugging in the denominator number that became available to the parties in March of 2017. Thus, the Modification Judgment did not, as advanced by Relator, finally settle the amount of military retirement pay that Ms. Scroggin would be entitled to when Relator was eligible for retirement some three (3) years subsequent to the entry of the Modification Judgment. This is so because the formula set out in the Modification

Judgment was incomplete due to the fact that the total number of retirement points earned by Relator would not be determinable until he reached retirement eligibility some three (3) years subsequent to the entry of the Modification Judgment.

Subsequent to the entry of the Judgment of Dissolution, it was discovered that the formula for the determination of Wife's entitlement to husband's military retirement pay was incorrect. Without contested or evidentiary hearing, the parties came to an agreement on the proper formula. Relator provided a letter to Wife, ostensibly from United Air Force ("USAF"), which stated that Husband earned 2,134 retirement points during the marriage. Relying on Relator's representations in that regard, the parties inserted that number into the corrected formula. The parties then submitted an agreed-upon judgment that modified the original judgment of dissolution, which Respondent modified and then entered without an evidentiary hearing. At that time, because Relator had not reached retirement age, the total number of points earned throughout his entire service was not ascertainable. This number became available some three (3) years later, which could be inserted as the denominator into the formula, thereby enabling Wife to apply to the USAF for payment to her of her share of Relator's military retirement.

Wife began receiving checks from the USAF in or around May of 2017. Wife could tell that the amount she was receiving was far less than what she was entitled to based upon the fact that she was married to Relator for approximately 60% of Relator's entire military service. Wife's realization that she was not receiving her true entitlement precipitated the Motion to Compel Relator to sign the authorization at issue. Contrary to

Relator's contention, the authorization was not unlimited, but rather, only authorized the release of military records related to Relator's retirement points.

Relator failed to respond in a timely fashion to the Motion to Compel. Rather, Relator chose to proceed with an unconventional response to the Motion to Compel, filing out of time a motion to dismiss the Motion to Compel. This untimely motion to dismiss did not address the substantive allegations set forth in the Motion to Compel.

Because Relator's motion to dismiss the Motion to Compel was untimely and because Relator had the power and authority to enforce the judgment that ordered the Wife receive a share of Relator's retirement pay proportionate to the length of marriage, Respondent acted within its authority in granting Wife's motion. Wife's motion was not an attempt to re-litigate the 2014 judgment, as contended by Relator.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Revised Statutes of Missouri

Missouri Supreme Court Rules

Other Authorities

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court pursuant to Mo. Const. art. V, Sec. 4, Chapter 530, R.S.Mo., and Rules 97 and 84.22, *et seq.*

STATEMENT OF FACTS

Petitioner and Respondent entered into a Marital Settlement Agreement on January 27, 2009 (the "MSA"), and the MSA was adopted by the court pursuant to a judgment entry on April 28, 2009 (the "Judgment of Dissolution"). (Relator's Appendix, Ex. 51, 144; App. A9, A24.)

Pursuant to the Section II.B.8.a)(1) of the MSA (p. 11), Petitioner was awarded one-half (1/2) of Respondent's monthly benefits from Respondent's United States Air Force Retirement Benefit that accrued to Respondent during the parties' marriage. (Relator's Appendix, Ex. 61. 61, A34.)

On March 11, 2017, Relator achieved retirement eligibility age for the purposes of military retirement pay from the United States Air Force. (Relator's Ex. 21, para. no. 24.)

On March 16, 2014, Relator provided a copy of a letter, which Relator represented to Ms. Scroggin was from the Chief of Retirement Branch of the Department of Air Force, Forrest Cupples (the "Letter"). (Relator's Ex. 46, 93 and 98.)

The Letter reported that Relator earned 2,134 retirement points during the period of the parties' marriage (April 20, 1985 to May 30, 2009.) (Relator's Ex. 88.)

Ms. Scroggin alleged that she believed that 2,134 is not the correct number of points earned by Relator during the marriage (Relator's Ex. 93.)

Ms. Scroggin alleged that Relator advised undersigned counsel on June 30, 2014, via e-mail, that Relator's retirement benefits are triggered by his eligibility date, which

was to be March 9, 2017, and that the total number of reservist points earned by Relator would not be final until that time. (Relator's Ex. 46, para. no. 8.)

Ms. Scroggin alleged that Relator also represented to Ms. Scroggin that she would have to submit to DFAS a DD Form 2293, accompanied by a valid court order, to allow Ms. Scroggin to garnish from Relator's military benefit. (Relator's Ex. 46, para. no. 8.)

Ms. Scroggin alleged that, in reliance upon the representations of Relator regarding the number of military retirement points earned by him during the marriage, as set forth in the Letter, Ms. Scroggin did, in fact, submit to the DFAS-HGA/CL, Assistant General Counsel for Garnishment Operations at DFAS, the DD Form 2293, duly executed by Ms. Scroggin. (Relator's Ex. 46, para. no. 9.)

Ms. Scroggin alleges that, on February 28, 2017, she contacted DFAS by telephone to inquire about the amount and timing of the garnished retirement benefit pay to which Ms. Scroggin would be entitled and that she was informed that she would be receiving 19.43% of Respondent's retirement pay, or the sum $659.45 per month, and that Relator would be receiving $3,394.00 in retirement pay per month. (Relator's Ex. 46, para. no. 10.)

Ms. Scroggin alleged that she was astounded at the discrepancy between these two numbers due to that fact Relator and Ms. Scroggin were married for 24 years and 1 month, and Respondent spent a total of 37 years and 4 months as a reservist, or approximately 65% of the total time that Respondent was a reservist. (Ex. 46-47, para. no. 10.)

Ms. Scroggin alleged that, based upon the number of years of the parties' marriage relative to the total time spent by Relator in the United States Air Force, Ms. Scroggin was to received one-half (1/2) of 65% of the total amount of retirement pay accruing to Relator. (Relator's Ex. 47, para. no. 10; 124, para. no. 5.)

Ms. Scroggin alleges that the transfer of one-half (1/2) of Relator's military retirement to her was a material inducement for her to enter into the Agreement and that she would suffer severe prejudice and damage if the number of retirement points earned during the marriage is not corrected and Relator is allowed to keep sums paid to him to which she is entitled under the MSA and the Judgment. (Relator's Ex. 49, para. no. 20.)

The Motion to Compel was filed by Ms. Scroggin on December 7, 2017. Relator did not file a substantive response to Ms. Scroggin's Motion to Compel, but rather, on January 2, 2018, filed a motion to dismiss the Motion to Compel. (Relator's Ex. 100-106.)

Relator's motion to dismiss the Motion to Compel was based on two procedural grounds, the first being that the Motion to Compel failed to state a cause of action for which relief may be granted, and the second being that the Motion to Compel was time barred under Rule 74.06, (Relator's Ex. 100-105.)

Relator failed to deny the allegations set forth in the Motion to Compel. (Relator's Ex.100-105.)

The agreement of Relator under the MSA to transfer one-half (1/2) of his military retirement pay earned during the marriage to Ms. Scroggin became the judgment of the Court:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the Marital Settlement Agreement entered into by the parties is found to be fair and not unconscionable. Said agreement is hereby approved, and the parties are ordered to perform and abide by the terms of said Agreement, as the provisions of that Agreement represent the Judgment of this Court.

(Relator's Ex. 144.)

The Judgment of Dissolution allows for execution to issue in the event of a default by Relator in transferring to Ms. Scroggin her share of the retirement benefit, as follows:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that in default of any orders contained herein, execution shall issue.

(Relator's Ex. 144.)

The MSA further provides that nothing in the MSA shall restrict or limit a party's ability to enforce the terms and provisions of the MSA. Most importantly, the MSA mandates that each party execute whatever documents as are necessary to carry out the terms of the MSA, as follows:

> It is specifically understood and agreed, however, that nothing herein contained in this paragraph will be construed as limiting the right of enforcement of the terms and provisions of this agreement by either party.

> ***D. EXECUTION & DELIVERY OF DOCUMENTS***
>
> 1. ***The parties will execute any and all documents necessary to carry out the provisions of this Agreement.*** In the event that either party refuses to execute documents required herein to transfer title to the property, each party's signature at the end of this Agreement shall operate as an irrevocable power of attorney to the other spouse for the limited purpose of transferring title to prperty as provided in this Agreement.

(Emphasis added.) (Relator's Ex. 82-83, Sections VII.C.2.b. and VII.D.1.)

Finally, the MSA provides that Relator's covenant to transfer a portion of his retirement pay to Ms. Scroggin survives the granting of a judgment and that this covenant remains enforceable to this day under general contract law, as follows:

> 3. All warranties, covenants and provisions of this Agreement shall survive the granting of a Judgment and Decree of Dissolution, if one is granted, and remain enforceable under general contract law.

(Relator's Suggestions, Ex. 84, Section VII.G.3.)

The Authorization that Relator was ordered by Respondent to execute limited the documents that the USAF could release to Ms. Scroggin to those related solely to Relator's military retirement points. (Relator's Ex. 44, App. A6.)

There was no contested, evidentiary hearing related to the Modification Judgment entered by Respondent on August 6, 2014, as the most recent hearing preceding the Modification Judgment took place in October 30, 2013 on Relator's motion to set aside a judgment. (Relator's Petition in Court of Appeals, Ex. 1, p. 2.)

Relator and Ms. Scroggin submitted the agreed upon Modification Judgment, which Respondent entered on August 6, 2014, without an evidentiary hearing. (Relator's Ex. 39-41, App. 61; Relator's Petition in Court of Appeals, Ex. 1, p. 2.)

POINTS RELIED ON

I. Ms. Scroggin is *not* attempting to re-litigate a final order, as contended by Respondent. Rather, Ms. Scroggin is simply attempting to enforce the MSA and the Judgment of Dissolution entered by Respondent in regard to Ms. Scroggin's entitlement to a portion of Relator's military retirement pay. The MSA, incorporated into the Judgment, expressly provides that all of the parties' respective obligations under the MSA remain enforceable under general contract law. The formula for calculating Ms. Scroggin's entitlement could not be finalized until approximately three (3) years after the modification Judgment was entered by Respondent, as Relator's total retirement points were not determinable until March 11, 2017. The Motion to Compel does not, in any way, request as relief that the Court set aside or modify a previous judgment. The Motion to Compel simply requests that Ms. Scroggin be provided with information directly from the USAF to allow her to determine the true amount of her entitlement to Relator's military retirement pay under the MSA and the Judgment of Dissolution. The MSA and the Judgment of Dissolution are enforceable in the same manner as any other judgment issued by a court in the State of Missouri. Respondent not only had the authority to enter the relief requested, but also, the obligation to enforce Relator's obligations under the MSA and the Judgment of Dissolution.

Swyers v. Swyers, 34 S.W.3d 848, 850 (Mo. App. 2000)

*Keipp v. Keipp, 3*85 S.W.3d 470, 475 (Mo.App. W.D. 2012)

Booher v. Booher, 125 S.W.3d 354, 356 (Mo.App. E.D. 2004)

In re the Marriage of Erickson, 419 S.W.3d 836 (Mo.App. S.D. 2013)

R.S.Mo. 452.325.4(1)

R.S.Mo. 452.324

R.S.Mo. 452.325.5

Rule 74.06(b)

Rule 74.06(d)

II. The doctrines of *res judicata* and issue preclusion have absolutely no application to the case at hand for several reasons. First, these doctrines do not apply unless there has been a judgment entered in one case and a separate action brought involving an issue already litigated in the prior action. Second, the issue of whether Relator should be obligated to execute the Authorization has never been litigated; only the formula itself, from which Ms. Scroggin is not seeking relief. The number of points earned by Relator during the marriage was not litigated either, as that number was supplied by Relator and not contested by Ms. Scroggin. Third, the modification judgment did not resolve all issues related to Ms. Scroggin's retirement due to the fact that the amount of her entitlement to Relator's military retirement pay could not be resolved until Relator became eligible for retirement, which was March 11, 2017, almost three (3) years following entry of the Modification Judgment.

Arizona v. California, 460 U.S. 605, 618 (1983)

Estrada-Rodriguez v. Lynch, 825 F.3d 397, 402 (8th Cir. 2016)

Arizona v. California, 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed2d 318 (1983)

Hudson v. Carr, 668 S.W.2d 68, 770 (Mo. banc 1984)

III. Ms. Scroggin has the right to bring an independent action in equity under Rule 74.06(d) to establish fraud upon the Court. There is no time limitation on bringing such an action. Further, the doctrines of *res judicata* and issue preclusion do not apply in such actions. Providing false information to Ms. Scroggin and the Court for use in a judgment related to Relator's military retirement points constitutes extrinsic fraud, which is actionable under Rule 74.06(d).

Sanders v. Insurance Co. of North America, 904 S.W.2d 397, 401 (Mo.App. W.D. 1995)

Rule 74.06(d)

RESTATEMENT (SECOND) OF JUDGMENTS Sec. 70 cmt. c (1982)

IV. Relator's due process and privacy rights were not violated by entry of the Order. Ms. Scroggin did not seek relief from a judgment under Rule 74.06(b)**.** Second, Relator failed to timely file any opposition pleading to Ms. Scroggin's Motion to Compel. Rather, Relator filed a motion to dismiss the Motion to Compel, which was based solely on procedural grounds. To this day, Relator has never filed any pleading denying the allegations in the Motion to Compel. Since there was no opposition filed, Respondent had the clear authority to grant the relief requested in the Motion to Compel. Finally, the Order does not violate Relator's privacy rights, as it only allows Ms. Scroggin to obtain information related to Relator's retirement points.

Rule 74.06(b)

Local Court Rule 33.5.1

STANDARD OF REVIEW FOR POINTS RELIED ON

The issues raised in Relator's Petition involve questions of law that are to be reviewed *de novo.* *State v. Ford*, 351 S.W.3d 236, 238 (Mo. App. 2011.)

ARGUMENTS

I. THE DISSOLUTION DECREE ORDERING RELATOR TO TRANSFER ONE-HALF (1/2) OF THE MARITAL PORTION OF HIS MILITARY RETIREMENT PAY IS ENFORCEABLE LIKE ANY OTHER COURT-ENTERED JUDGMENT.

A. Ms. Scroggin is not seeking to modify a judgment.

Relator mischaracterizes Ms. Scroggin's motion for Relator to sign the Authorization as a motion to modify a judgment. Ms. Scroggin simply filed a motion asking that Relator be required to execute an authorization that would allow Ms. Scroggin access to authentic documents that would prove that she is not receiving her true entitlement to the marital portion of Relator's military retirement pay, which entitlement was agreed to by Relator and made a judgment of this Court in the Judgment of Dissolution. Rule 74.06(b) only applies when a litigant seeks to modify a prior judgment, which is not the case here. Judge Harrell's order was issued in response to the Motion to Compel and does not serve to modify the Judgment, but rather, requires Relator to sign a simple authorization for release of records related only to Relator's military retirement points. (See *Swyers v. Swyers*, 34 S.W.3d 848, 850 (Mo. App. 2000), judgment granting motion to quash did not modify decree of dissolution). Simply put, Ms. Scroggin is NOT seeking to modify a judgment under Rule 74.06(b).

B. Missouri law allows for mechanisms other than an independent action under Rule 74.06(d) to cause Relator to comply with his obligations under the MSA and the Judgment.

1. The terms of the MSA are enforceable under principles of general contract law.

Relator improperly asserts that the only way for Ms. Scroggin to remedy the plight suffered by her in the event of a fraud upon the Court is an independent action in equity under Rule 74.06(d). The terms and provisions of the MSA and Missouri law prove otherwise.

Pursuant to the MSA, Relator agreed to transfer one-half (1/2) of his military retirement to Ms. Scroggin, as follows:

> Husband's interest in his United States Air Force Reserve Retirement benefit will be divided pursuant to a Division of Benefits Order, Wife shall receive a sum equivalent to one-half (1/2) of the benefit accrued from the date of the parties' marriage through and including the date the Judgment of Dissolution of Marriage is granted, which shall be calculated in accordance with the following formula:
>
> * * * * *
>
> Wife's share of the benefit shall be paid to her pursuant to a Division Benefits Order.

(Relator's Brief, Ex. 61, Section 2.B.8.a)(1).)

The provisions of the MSA show, without any question, that Relator is incorrect in stating that the only way to enforce Relator's obligations under the MSA is by filing an equitable action under Rule 74.06(d). To the contrary, it is plain to see that Ms. Scroggin has the unfettered right to enforce Relator's obligations to her under the MSA under

general contract law and pursuant to Missouri law relating to the enforcement of judgments even after the entry of the Judgment.

Ms. Scroggin chose to file her Motion to Compel to cause Relator to comply with his contractual obligation to transfer to Ms. Scroggin one-half (1/2) of the marital portion of Relator's military retirement pay. The parties agreed that the obligations under the MSA survived the entry of the Judgment of Dissolution, that their obligations under the MSA would survive the Judgment of Dissolution and that their obligations could be enforced under general contract law. Consequently, the Court had the power to enforce Relator's obligations under the MSA under general contract law, including Relator's obligations to execute documents (i.e., the Authorization) to ensure that Relator was in compliance with his obligations to Ms. Scroggin with regard to Relator's military retirement pay. The arguments of Relator that Rule 74.06 somehow prohibits the Court from enforcing the MSA and the Judgment are just a smokescreen thrown up to try to complicate a very simple legal concept. Ms. Scroggin's Motion to Compel was not an attempt to modify the Judgment, but rather, was simply the procedure that she legally chose to enforce Relator's contractual obligations under the MSA. The Court adopted the terms and provisions of the MSA in its Judgment of Dissolution of Marriage and acted within its power and jurisdiction to order relief in the form of ordering Relator to execute the Authorization for release of retirement point documents, as Relator agreed to do under Section VII of the MSA.

2. The dissolution decree, as well as the MSA, are enforceable like any other court-issued judgment.

The Court acted both within its power to enforce the dissolution Judgment entered by it and also as the Court is required to do when it ordered Relator to execute the Authorization. "Thus under 452.325.4(1), the *court was bound to enforce the terms of the Agreement and to order the parties to perform in accordance therewith*." (Emphasis added.) *Keipp v. Keipp, 3*85 S.W.3d 470, 475 (Mo.App. W.D. 2012). Therefore, Judge Harrell had an obligation pursuant to R.S.Mo 452.324 to enforce Relator's obligations under the MSA. Moreover, R.S.Mo. 452.325.5 provides, as follows:

> 5. Terms of the agreement set forth in the decree are enforceable by all remedies available for the enforcement of a judgment, and the court may punish any party who willfully violates its decree to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court.

As was recognized in Court in *Booher v. Booher*, 125 S.W.3d 354, 356 (Mo.App. E.D. 2004), "[d]issolution decrees, as well as the property agreements incorporated therein, are enforceable like any other judicial judgment. (Citations omitted.)"

In the case of *In re the Marriage of Erickson*, 419 S.W.3d 836 (Mo.App. S.D. 2013), just as in the case at hand, a husband agreed to transfer one-half (1/2) of his military retirement benefit to his wife under their property settlement agreement. Just as in the case at hand, the wife in *Erickson* determined that she was not receiving her true entitlement of fifty percent. The original decree required the husband to "execute all forms, documents and papers necessary in order to have the military payment authority pay directly to [Wife] that percentage share of his retirement which equals her entitlement[.]" *Id.*, at 841. Similarly, in this case, the Judgment and MSA provide that

"[t]he parties will execute any and all documents necessary to carry out the provisions of this Agreement." (Relator's Suggestions, Ex. 82, Subsection D.) The discrepancy in Wife's entitlement was described by the *Erickson* Court, as follows:

> In May of 2006, Wife applied to the military for her share of Husband's retirement pay, and her application used the formula set forth in the original decree. A letter she subsequently received from the military, admitted as Exhibit 4, indicated that her benefit was calculated to be "10.2080 percent [,]" and it indicated that Husband had retired as a lieutenant colonel. Wife believed the military's calculation to be in error because while her share of Husband's retirement pay was to be based upon his *pay* as a major, it was not to be based only upon the *time* that Husband held the rank of major.
>
> * * * * *
>
> Wife believed that her monthly share of Husband's retirement pay should have been 29.9% based upon Husband's 306 months of service in the military and his having been married to Wife for 183 of those months.

Id., at 842. The Court upheld the trial court's determination that Husband willfully and intentionally disobeyed a prior court order which required him to file all necessary documents to that Wife could receive her entitlement to Husband's retirement pay, finding him in contempt and ordering him to pay attorney's fees to Wife. The Court recognized the following principles that supported its holding:

> "Dissolution decrees, as well as the property agreements incorporated therein, are enforceable like any other judicial judgment." *Booher v. Booher*, 125 S.W.3d 354, 356 (Mo.App. E.D. 2004). "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." *State ex rel. Chassaing v. Mummert,* 887 S.W.2d 573,578 (Mo. banc 1994). "Contempt may be used to effectuate all constitutionally permitted orders contained in a dissolution decree." *Ellington v. Pinkston,* 859 S.W.2d 798, 800 (Mo.App. E.D. 1993).

The *Erickson* case, also involving a discrepancy in the amount of military retirement benefits being paid to the wife, shows, without question, that the Motion to

Compel should be treated, not as a motion to modify a judgment, but rather, as an enforcement mechanism to cause Relator to do that to which he agreed -- transfer one-half (1/2) of the marital portion of his military retirement to Ms. Scroggin. Judge Harrell had an obligation to enforce Relator's obligations under the MSA and the Judgment, including ordering Relator to sign the Authorization to allow Ms. Scroggin to receive her entitlement to military retirement benefits.

II. RELATOR'S RELIANCE UPON ISSUE PRECLUSION AND *RES JUDICATA* IS MISPLACED.

A. The doctrines of *res judicata* and issue preclusion do not apply within a single action.

The doctrines of issue preclusion and *res judicata* have no application in the case at hand. These doctrines come into potential play *only* when two separate lawsuits have been filed and one of the litigants attempts to re-litigate one or more claims or issues that already have, or could have, been raised in the initial lawsuit. The United States Supreme Court has so held in *Arizona v. California,* 460 U.S. 605, 618 (1983), stating that "[i]t is clear that *res judicata* and collateral estoppel do not apply if a party moves a rendering court in the same proceeding to correct or modify its judgment." This is precisely the situation at hand, as the Court issued the Judgment in connection with the dissolution of the Relator's and Ms. Scroggin's marriage and the Order was issued by Relator in very same dissolution action.

In *Estrada-Rodriguez v. Lynch,* 825 F.3d 397, 402 (8th Cir. 2016), the Eighth Circuit Court of Appeals stated, as follows:

> After considering these factors, we hold that the IJ was not collaterally estopped from reconsidering the CIMT issue. Collateral estoppel does not apply here because the CIMT issue was not previously determined by a valid and final judgment in a *prior* action between Estrada and DHS. Instead, the CIMT issue was determined at an earlier stage of the *same* action and was reconsidered pursuant to the reopening of the action. *See Arizona v. California,* 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed2d 318 (1983) (finding it "clear that *res judicata* and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment" (citation omitted)).

Relator's Suggestions filed in this cause acknowledge that there must be two separate cases in order for these doctrines to have application. Relator states that, "[t]o bar *subsequent* litigation, claim preclusion requires that 'four identities' be present in *both cases*...." (Emphasis added.) (Relator's Suggestions, p. 16.) Relator also states that "the 'identity of the thing sued for' is satisfied when the 'thing sued for' *in both actions* is the same relief arising out of the same facts." (Emphasis added.) (Relator's Suggestions, p. 16.) Finally, Relator calls the Judgment issued in 2014 a "modification judgment". (Relator's Suggestions, p. 15.) Thus, it is clear that the doctrines of *res judicata* and collateral estoppel do not serve as a bar to the issuance of the order requiring Relator to execute the Authorization.

B. The issue raised by the Motion to Compel had not been litigated.

One of the factors to be proven for issue preclusion to apply is the issue decided in the prior case is identical with the issue presented in the subsequent action. See *Hudson v. Carr*, 668 S.W.2d 68, 770 (Mo. banc 1984). Ms. Scroggin is not, as represented to the Court by Relator, trying to re-litigate any issues or claims pertaining to the formula that is to be used in determining the Ms. Scroggin's true and proper entitlement to Relator's military benefits. Rather, Ms. Scroggin is attempting to enforce her right to receive fifty

percent (50%) of the marital portion of Relator's military retirement pay pursuant to the Judgment of Dissolution. Ms. Scroggin simply moved the Court to order Relator to execute an authorization that would allow Ms. Scroggin to receive the military retirement point documentation directly from the United States Air Force. The issue of whether Relator must sign an authorization that would enable Ms. Scroggin to obtain information from the Air Force that sets out the number of retirement points earned by Relator during the marriage was never litigated prior to it being litigated pursuant to the Motion to Compel.

C. Ms. Scroggin was not afforded a full and fair opportunity to litigate the issue of the number of retirement points earned by Relator during the marriage.

The Motion to Compel was precipitated by Ms. Scroggin's realization that Ms. Scroggin was receiving military retirement payments that were substantially less than the percentage to which she was entitled. The issue of whether Relator should be required to execute the Authorization to allow Ms. Scroggin to get information directly from the Air Force did not arise, and therefore, was not litigated until the filing of the Motion to Compel. Relator provided Ms. Scroggin with the Letter, which he represented to Ms. Scroggin as accurately setting out the number of retirement points earned by him during the marriage. The issue of the accuracy of this letter was not at issue until some three years later when the final part of the formula, total number of points earned, became available to the parties. Thus, there was no need to litigate the issue of the execution of the Authorization until that time. As such, Ms. Scroggin did not have the opportunity,

much less the need, to litigate the issue of whether Relator should execute the Authorization until some three years after the Judgment was issued.

D. The 2014 modification judgment did not dispose of all pending claims between all parties and was not appealable.

The issue of Ms. Scroggin's entitlement to Relator's military retirement pay was not finally resolved by the Modification Judgment rendered in 2014. This is so because the parties would not know how the military retirement would be divided between them until March 9, 2017, which is the date upon which Relator would be advised of the total number of retirement points earned by him to plug into the denominator of the formula. In fact, it was only when this number became available to the parties in March of 2017 that Ms. Scroggin was able to discern that something was amiss as to the amount of her entitlement. Consequently, the doctrines of *res judicata* and collateral estoppel would not preclude her from litigating her right to an order compelling Relator to execute an authorization that would allow Ms. Scroggin to determine if she is receiving her court-ordered entitlement to one-half (1/2) of Relator's retirement pay.

III. THE COURT DOES HAVE THE POWER TO SET ASIDE THE JUDGMENT FOR FRAUD UNDER RULE 74.06(d).

Relator asserts that Ms. Scroggin has not filed a separate cause of action in equity under Rule 74.06(d), but fails to demonstrate the relevance of the same. (Relator's Suggestions, pp. 20-23.) Ms. Scroggin does not dispute that she has not filed an independent lawsuit in equity. What is illustrated in the previous section, however, is that Ms. Scroggin is entitled to enforce her rights under general contract law, including her right to cause Relator to execute an authorization to ensure that she is receiving her

contractual entitlement, which became the judgment of the Court. Thus, it is not necessary for Ms. Scroggin to proceed under Rule 74.06(d) for purposes of setting aside a judgment.

It is true, as acknowledged by Relator, that Rule 74.06(d) does clearly empower the Court to set aside the Judgment for fraud upon the Court. Therefore, in the event that it turns out that Relator did submit false information to the Court and Ms. Scroggin regarding his retirement points, the Court absolutely has the power to set aside the Judgment so Ms. Scroggin can receive the Court-ordered amounts to which she is entitled under the MSA. Again, Ms. Scroggin has chosen not to proceed with a separate action in equity to set aside the Judgment, but rather, is enforcing her contractual rights as Relator agreed she could under the MSA.

A. *Res judicata* and collateral estoppel do not apply to Rule 74.06(d) actions.

Although Relator's arguments in regard to Rule 74.06(d) are not ripe for discussion at this point, they will be addressed to show the Court that Relator's position is not supported by Missouri law. First, the law is clear that *res judicata* and collateral estoppel can never serve to bar an independent action in equity to set aside a judgment for fraud. In *Sanders v. Insurance Co. of North America*, 904 S.W.2d 397, 401 (Mo.App. W.D. 1995), the Court stated, as follows:

> The trial court erred by not recognizing Sanders' claim as an independent cause of action in equity to set aside a judgment for fraud on the court. Her petition did not cite Rule 74.06, but the rule does not create the cause of action. The action existed long before Rule 74.06. *Jones v. Jones*, 254 S.W.2d 260 (Mo.App. 1953). The rule merely recognizes that the cause of action exists and mandates that courts continue entertaining it.

> Hence, to the extent that Sanders has properly pleaded an independent action in equity to set aside a judgment for fraud on the court, *res judicata* and collateral estoppel have no bearing on the case. After all, the purpose of the action is to set aside an otherwise final judgment which, but for equity, would not be subject to reconsideration because of the doctrine of *res judicata.*

B. Providing false information to Ms. Scroggin and the Court constitutes extrinsic fraud.

Relator improperly categorizes Relator's misrepresentation of the number of retirement points earned during the marriage as intrinsic fraud, which if such were the case here, would not support an independent equitable action under Rule 74.06(d). The Western District clarified the distinction between intrinsic and extrinsic fraud as best as possible, stating:

> An independent cause of action to set aside a judgment must be based on extrinsic fraud, or fraud on the court. *Id.* at 261; *McKarnin v. McKarnin*, 795 S.W.2d 436, 439 (Mo. App. 1990). Missouri courts have had some difficulty in defining extrinsic fraud, but the most recent cases have adopted the definition proffered in RESTATEMENT (SECOND) OF JUDGMENTS Sec. 70 cmt. c (1982): "fraud that induced a party to default or consent to judgment against him." *Thompson v. Columbia Mutual Insurance Company*, 820 S.W.2d 626, 631 (Mo.App. 1991); *The May Department Stores Company v. Adworks, Inc.*,740 S.W.2d 383, 385 (Mo.App. 1987).

Id.

In the *Sanders* case, sued her own auto insurance carrier, INA, in equity to set aside a judgment of settlement based upon fraud on the court. Ms. Sanders claimed that her insurance company committed fraud upon the court by misrepresenting to her the amount of uninsured motorist benefits available to her under her insurance policy. INA represented to Ms. Sanders that her coverage was limited to $25,000.00, when the policy actually afforded her coverage of at least $1,000,000.00. In June of 1987, Ms. Sanders

demanded payment of the full uninsured coverage limit, and in August of 1987, INA offered to settle with her for $25,000.00, which was described as the full extent of the uninsured motorist claim. Ms. Sanders accepted this offer of $25,000.00, and jointly with INA, filed a petition for approval of this wrongful death settlement, which the court ultimately approved in a Judgment Memorandum. In September of 1990, Ms. Sanders learned that INA had provided her with false information regarding the coverage limits of the uninsured motorist policy.

INA argued that the misrepresentation regarding the uninsured coverage limit constituted intrinsic fraud. *Id.* The Western District held otherwise, stating, as follows:

> Although *Sanders* alleges fabricated evidence and thereby appears to make this a close case, we conclude that INA's use of the alleged misrepresentation -- to induce Sanders to settle her claim for much less than she had a right to demand -- causes this to be a case of extrinsic fraud. This was tantamount to her being fraudulently deprived of her day in court. "[W]here the fraud prevented the suitor from a trial or from the full presentation of his case [, the deceit was extrinsic.] ... A judgment procured by fraud is regarded as perpetrated on the court as well as on the injured party." *Daffin v. Daffin,* 567 S.W.2d 672, 678-79 (Mo.App. 1978).
>
> We are especially guided by Judge Satz in *May Department Stores,* 740 S.W.2d at 383. There, in considering an independent action to set aside a judgment for fraud on the court, he concluded that a party's making a false promise to induce the opposing party into a settlement was extrinsic fraud. Noting the difficulty with determining whether a matter involved intrinsic or extrinsic fraud, he said:
>
> > These definitions have been embraced at times and obfuscated at times. We need not concern ourselves here with the obfuscations. As noted, defendant claims its corporate president was fraudulently induced to consent to the judgment of record and, thereby, was induced to waive the corporation's defenses. If properly pleaded, this is a classic claim of "extrinsic fraud."
>
> *Id.* at 385.

> INA argues that we should read *May Department Stores* narrowly; that the turning point of the case was the false promise. Not so. Judge Satz made clear that the turning point was the use of fraud to induce the opposing party to enter into a consent judgment. That seems to be precisely the nature of Sanders' claim. We conclude that she has pleaded "a classic claim" of extrinsic fraud. Hence, the trial court erred in not recognizing the nature of Sanders' claim. As an independent action in equity to set aside a judgment for fraud upon the court, the trial court should not have applied the doctrines of *res judicata* and collateral estoppel to block her claim.

Id., at 401-02.

The *Sanders* case could not be more on point with the case at hand. Just as in *Sanders* where there was a misrepresentation on an amount inducing a party to accept less than that to which the party was entitled, Relator misrepresented to Ms. Scroggin an amount to induce her into accepting less of Relator's military retirement to which she was entitled. Ms. Scroggin and Relator contracted that Ms. Scroggin was to receive one-half (1/2) of Relator's military retirement pay earned during the marriage. Because of Relator's fraud upon Ms. Scroggin, she consented to a judgment wherein she would only receive approximately 35% of Relator's military retirement pay earned during the marriage. This is "a classic claim" of extrinsic fraud, entitling the consent judgment to be set aside pursuant to Rule 74.06(d).

IV. THERE IS NO DUE PROCESS OR PRIVACY VIOLATION.

A. Once again, Rule 74.06(b) is not applicable.

Relator again brings Rule 74.06(b) into the fray in arguing that the Court's enforcement of the clear terms and provisions of the property settlement agreement somehow violates Relator's due process rights. First, it has already been established

above that Rule 74.06(b) has absolutely no applicability here. Ms. Scroggin is not asking the Court to modify or set aside a judgment pursuant to Rule 74.06(b).

B. Pursuant to Local Court Rule 33.5.1, Relator defaulted in responding to the Motion to Compel, *thereby waiving his right to object to the granting of said Motion.*

Ms. Scroggin filed her Motion to Compel on December 7, 2017. Relator never requested a hearing on that motion. Furthermore, Relator waited some 28 days, or until January 2, 2018, to file a motion to dismiss Ms. Scroggin's Motion to Compel, asserting that it failed to state a claim upon which relief could be granted and that it was time barred.

Local Court Rule 33.5.1 provides, as follows:

> A party filing any motion, except motions for new trial, shall serve and file at the same time brief written suggestions in support thereof together with authorities relied upon and any affidavits to be considered in support of the motion. Failure to file clear concise suggestions shall be grounds for refusing the relief requested. ***Within ten (10) days*** following service and filing of such motion, any party opposing the motion ***shall serve and file suggestions in opposition*** with citation of authorities and affidavits to be considered in opposition to the motion." (Emphasis added.)

Consequently, Relator had to and until December 20, 2017 within which to file his suggestions in opposition to the Motion to Compel. Because he did not file suggestions in opposition on a timely basis or ask for leave to file the motion to dismiss out of time due to excusable neglect, the Court acted properly in granting the Motion to Compel without a hearing and without giving consideration to the untimely motion of Relator.

C. Relator's privacy rights are not violated by the execution of the Authorization.

Relator improperly advises this Court that the order requiring Relator to execute the Authorization will violate Relator's privacy rights. The authorization clearly restricts the documents to be released by the United States Air Force to the following:

> that relate to, or arise out of, the total number of retirement points earned by [him] and the number of retirement points earned by me from the date of my marriage to Ms. Scroggin (20 April 1985) through the date of my separation from Ms. Scroggin (30 May 2009). The documents shall include, but not be limited to, notes, e-mails, correspondence, worksheets, retirement point computation documents and retirement point audit documents.

The Authorization is crystal clear in its limitation of the documents authorized to be produced to those related to Relator's retirement points earned by him. There is absolutely no reference to, or mention of, the health or medical records of Relator in the Authorization or for the release of any other documents not related to Relator's retirement points. Plain and simple, this Authorization has absolutely zero to do with the health or medical records of Relator. This is just one more attempt by Relator to cloud up a simple issue, just as he has done when he injected Rule 74.06(b) into this case.

Finally, Relator has no right to privacy as it relates to the number of retirement points earned by him. Relator's obligation regarding his military retirement point disclosure is no different than an obligation of a spouse or ex-spouse to provide income tax returns, pay stubs and W-2s for purposes of calculating child support and spousal support obligations. The MSA and Judgment clearly provide that Relator is to transfer one-half (1/2) of his marital military retirement benefits to Ms. Scroggin. Relator gave Ms. Scroggin the Letter *ostensibly* setting out the number of his marriage-related

retirement points that he earned. Upon Relator's reaching retirement eligibility status in March of 2017, Ms. Scroggin became entitled to know the *total* number of retirement points earned by Relator. Consequently, Ms. Scroggin absolutely is entitled to this information under the Judgment and the MSA. Relator's privacy rights will, in no way, be affected by the Court's order or the execution by Relator of the Authorization.

Finally, Relator has provided Ms. Scroggin with the Letter, which he has represented to her as accurately setting forth the number of points earned by him during the marriage. Query how Relator's privacy rights could be affected by an Authorization allowing Ms. Scroggin to obtain another copy of the Letter directly from DFAS.

CONCLUSION

The Motion to Compel does not seek to modify a judgment, but rather, is an attempt to enforce the MSA, which is incorporated into the Judgment of Dissolution. The parties have never litigated the issue of whether Relator should be required to execute the Authorization. The Authorization is limited to documents related solely to Relator's military retirement points. Once one looks at the true nature of Ms. Scroggin's underlying Motion to Compel and the Court's Order pertaining to the Authorization at issue and discards the improper characterizations of the same by Relator, it becomes crystal clear that there is no basis for the issuance of a writ of prohibition. Respondent had the authority and the obligation to enforce the MSA and the Judgment of Dissolution. Consequently, Respondent did not exceed his judicial power or exceed his jurisdiction in making an order necessary for the enforcement of the Judgment, nor did he issue an order that would cause Relator to suffer any harm, whatsoever. The Court should dissolve and

vacate the Temporary Writ of Prohibition and deny the issuance of a permanent writ of prohibition.

WHEREFORE, Ms. Scroggin respectfully prays that the Petition for Writ of Prohibition be denied, that the Preliminary Writ of Prohibition be set aside and dissolved and for such other and further relief as the Court deems just.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this Respondent's Brief using Microsoft Word in 13-point, Times New Roman font. I hereby further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 8,499 words.

/s/ John J. Benge

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing via e-mail, this 17th day of July, 2018, addressed to:

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