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IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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STATE OF MISSOURI, ex rel. Attorney General Chris Koster and THE MISSOURI  
PETROLEUM STORAGE TANK INSURANCE FUND BOARD OF TRUSTEES,

Plaintiffs-Respondents,

vs.

CONOCOPHILLIPS COMPANY and PHILLIPS 66 COMPANY,

Defendants-Respondents,

and

CORY WAGONER,

Proposed Intervenor-Appellant.

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Appeal from the Circuit Court of City of St. Louis, Missouri  
Honorable Robert H. Dierker, Jr.  
Case No. 1322-CC00929

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**APPELLANT'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is taken from the order and judgment of the Circuit Court of the City of St. Louis entered November 13, 2014 by the Honorable Robert H. Dierker, Jr., denying a motion to intervene as a matter of right. Appellant and proposed intervenor, Cory Wagoner (“Wagoner”), on December 5, 2014 filed a motion pursuant to Rules 78.06 and 78.07(c) to amend or alter the order denying the motion for leave to intervene. The Circuit Court did not rule on the motion to amend or alter the order denying intervention. On December 10, 2014, after the motion to amend or alter the order denying intervention was filed, a joint motion to approve a settlement was filed by the State of Missouri as plaintiff, and ConocoPhillips and Phillips 66 Company as defendants. One day later, on December 11, 2014, an order and final judgment was entered by the Circuit Court, approving the proposed settlement between the State of Missouri and ConocoPhillips and Phillips 66 Company. Also on December 11, 2014, an order was entered dismissing the suit with prejudice. The dismissal became final on January 10, 2015, thirty days after it was entered. A Notice of Appeal was timely filed on January 15, 2015, which was within ten days following the date the order of dismissal became final. The motion of Wagoner to amend or alter the order denying intervention was never ruled upon.

Denial of a motion for leave to intervene as a matter of right is an appealable order pursuant to §512.020 RSMo., and Missouri Supreme Court case authority, *State ex rel. Reser v. Martin*, 576 S.W.2d 289 (Mo. 1979).

Appeal to the Missouri Court of Appeals is appropriate pursuant to Article 5, §3 of the Missouri Constitution in that this appeal is not from an order or judgment regarding

the validity of a treaty, statute of the United States, a statute or provision of the Constitution of this state, the construction of the revenue laws of this state, the title to any state office or a case where the punishment imposed is death. This appeal is not within the exclusive jurisdiction of the Missouri Supreme Court. The Court of Appeals has general appellate jurisdiction of all other cases, including appeals from an order denying motion for leave to intervene as a matter of right.

The Eastern District of the Missouri Court of Appeals is the proper district of the Missouri Court of Appeals for this appeal pursuant to §477.050 RSMo., which identifies the Circuit Court for the City of St. Louis, from which this appeal is taken, as being within the Eastern District of the Missouri Court of Appeals.

Notice of Appeal was timely filed on January 15, 2015, which was within ten days after the order of dismissal of the suit became final.

## **STATEMENT OF FACTS**

On November 5, 2012, Wagoner filed suit against ConocoPhillips in the State Circuit Court of Greene County, Missouri. Claims were asserted for recovery of damages due by reason of ConocoPhillips having wrongfully obtained payment from the Missouri Petroleum Storage Tank Insurance Fund (hereinafter “PST Fund”). The claims asserted in the Circuit Court of Greene County, Missouri were premised upon the fact that Wagoner, as a contributor and beneficiary of the PST Fund, a statutory trust, and as a taxpayer in Missouri, was entitled to seek to effect recovery of damages due to money having been wrongfully obtained by ConocoPhillips from the PST Fund. (L.F. pages 63 and 134).

The PST Fund is a special trust fund created by statute, pursuant to §319.129 RSMo. et seq. The PST Fund does not handle money that belongs to the State of Missouri. Section 319.131.4 RSMo. The PST Fund does not have sovereign immunity. The liabilities of the PST Fund and its trustees are not liabilities of the State of Missouri. The PST Fund is subject to the terms and conditions of the Missouri Uniform Trust Code (hereinafter “MUTC”) §456.1-101 RSMo. (L.F. pages 70-73).

ConocoPhillips obtained payments from the PST Fund based upon its false representations regarding its ability to obtain payment for its environmental pollution liabilities, potentially subject to PST Fund reimbursement, over a period of years. More specifically, ConocoPhillips and its predecessors had deliberately refused and failed to disclose to the PST Fund the scope and extent of its insurance relationships and that it had maintained insurance for its obligations and liabilities for environmental cleanup

from leaking petroleum storage tanks. Additionally, ConocoPhillips deliberately refused to disclose that it had received hundreds of millions of dollars in payments from numerous insurers for its pollution liabilities arising from, among other things, leaks from petroleum storage tanks. The insurance payments received, and deliberate refusal to disclose its insured status, were facts which totally disqualified ConocoPhillips from obtaining payments from the PST Fund. (L.F. pages 134-185 and 277-301).

Chris Koster, Attorney General in Missouri, purportedly acting for the State of Missouri, filed a motion to dismiss Wagoner's suit filed November 5, 2012 in the Circuit Court of Greene County (L.F. page 502, ¶6). ConocoPhillips also filed a motion to dismiss Wagoner's Greene County lawsuit. (L.F. page 502, ¶6). Both the motion of the Attorney General, and that of ConocoPhillips, challenged Wagoner's standing to institute the suit. (L.F. page 502, ¶6). Following oral argument, the Honorable Michael J. Cordonnier, Judge of the Circuit Court of Greene County, entered an order on March 8, 2013, denying the motion to dismiss of ConocoPhillips premised upon the asserted lack of standing of Wagoner, and entered an order dismissing the PST Fund as a party and dismissed the State of Missouri from the suit. (L.F. page 563).

On March 26, 2013, Wagoner filed a third amended petition in Greene County, stating an additional claim under the Racketeer Influenced and Corrupt Organizations Act (Title 18 U.S.C.A. §1961 et seq.). (L.F. page 94). On April 15, 2013 (within 30 days), ConocoPhillips (and only ConocoPhillips) sought removal of the suit from the Circuit Court of Greene County to federal district court. (L.F. page 94).

Eight days later, on April 23, 2013, Chris Koster, Missouri Attorney General, ostensibly on behalf of the State of Missouri, filed a suit in the Circuit Court of the City of St. Louis, against ConocoPhillips, claiming to represent the interest of the PST Fund and its board of trustees. The suit asserted claims against ConocoPhillips premised upon the same facts and transactions as Wagoner's prior suit in Greene County, Missouri. (L.F. page 11).

On May 28, 2013, Koster, again claiming to act on behalf of the State of Missouri, moved to intervene in Wagoner's suit which had been improperly removed to federal district court by ConocoPhillips. The motion of Koster to intervene was never ruled upon.

Wagoner filed a motion to remand the suit from federal district court premised upon the untimely removal and due to the fact that the state courts in Missouri have concurrent jurisdiction over claims under federal RICO statutes. (L.F. page 93).

Wagoner's suit was and remained pending at all times during the time that the Missouri Attorney General, claiming to act on behalf of the State, instituted suit in the Circuit Court of the City of St. Louis on October 2, 2014. (L.F. pages 77 and 81. See Attorney General Koster (Plaintiff's) Suggestions in Opposition to Proposed Intervenor's Motion to Intervene, stating at (L.F. page 81): "The State filed the instant case on April 23, 2013 while Mr. Wagoner's initial suit was pending.")

On September 6, 2013, the federal district court entered an order denying the motion to remand of Wagoner. The federal district court found (contrary to prior ruling of Judge Michael Cordonnier) that Wagoner did not have standing and that the State of Missouri (a non-party) was the real party in interest and that the time limit for removal to federal court as to the State of Missouri (a non-party) had not run at the time removal was effected by ConocoPhillips. The federal district court never granted the motion to intervene of Koster and the State of Missouri in the removed lawsuit. (L.F. page 93).

On September 13, 2013, Wagoner amended his suit by refile in the Circuit Court of Greene County and adding as named defendants, the trustees of the PST Fund and asserted as an additional basis for standing, his status as a beneficiary of the statutory trust (the PST Fund) which, as a statutory trust, is subject to the Missouri Uniform Trust Code (MUTC). (L.F. page 323). The federal district court suit was necessarily thereafter dismissed without prejudice for lack of jurisdiction due to absence of requisite diversity required by Title 28 U.S.C.A. §1332. (L.F. page 320).

On October 28, 2013, Chris Koster, again claiming to act on behalf of the State of Missouri, filed another motion to dismiss Wagoner's suit in Greene County, Missouri. The motion was again denied by order of the Circuit Court of Greene County, Missouri entered on April 2, 2014. (L.F. page 76).

On June 23, 2014, Wagoner filed a motion to intervene and proposed intervenor's motion to dismiss in the suit instituted by Attorney General Koster in the Circuit Court of the City of St. Louis. (L.F. pages 63-76).

Wagoner asserted that the intervention must be allowed as a matter of right; the Attorney General and the State of Missouri had no standing to file suit; the Attorney General's suit could not proceed in the Circuit Court of the City of St. Louis because there had been another and prior action pending in the Circuit Court of Greene County, Missouri, which had, at all times, exclusive jurisdiction over the claims asserted against ConocoPhillips for wrongfully obtaining payments from the PST Fund. (L.F. pages 63-76).

Following hearing on Wagoner's motion to intervene filed with his motion to dismiss, the Honorable Robert H. Dierker, Jr., Judge of the Circuit Court of the City of St. Louis, entered an order on the November 13, 2014, denying Wagoner's motion to intervene (L.F. pages 415-426) and finding that the State of Missouri was the real party in interest. The order of the Circuit Court of the City of St. Louis was directly contrary to two prior orders entered by the Circuit Court of Greene County, Missouri finding that Wagoner had standing to proceed with the suit against ConocoPhillips. (L.F. pages 76. 555 and 563).

On December 5, 2014, Wagoner filed a motion to amend and alter the order and judgment of the Circuit Court of the City of St. Louis denying Wagoner's motion to intervene in the suit filed by Chris Koster, Attorney General. (L.F. pages 427-452).

The Circuit Court of the City of St. Louis refused to schedule a hearing on Wagoner's motion to amend or alter the judgment. (L.F. pages 499-500; 605). On December 10, 2014, ConocoPhillips and Attorney General Chris Koster, entered into a settlement agreement and asked for approval of the settlement agreement by court order.

(L.F. pages 453-498). The Circuit Court of the City of St. Louis entered an order approving the settlement agreement and dismissed the suit instituted by Attorney General Chris Koster. (L.F. pages 499-500).

The deal made by Attorney General Koster and ConocoPhillips, on its face, allows for ConocoPhillips to obtain payments from the PST Fund that had been held in abeyance since the filing of Koster's suit and receive payments in the future from the PST Fund, regardless of its fraudulent wrongdoing and the disqualifying fact of the existence of insurance available to ConocoPhillips in the past, and presently. (L.F. page 467, ¶3). The settlement payment purportedly committed to by ConocoPhillips as part of the settlement deal with Attorney General Koster, provides for return of less than one-half of the total funds wrongfully obtained by ConocoPhillips due to its fraudulent misrepresentation, and allows ConocoPhillips to continue to obtain payments in the future and thereby continue to perpetuate its fraud in the future. (L.F. pages 456, 466, and 467). The deal worked out by Attorney General Koster and ConocoPhillips was one arranged without apparent conduct of formal discovery in the course of any suit, without motions or motion hearings in open Court and without the apparent exchange of any documentation between the parties that would thereby have allowed for any interested party to determine the scope, extent, and nature of fraudulent wrongdoing on the part of ConocoPhillips or possibly, the Missouri Attorney General, Chris Koster. See docket sheet of St. Louis case (L.F. pages 1-9).

Wagoner filed a motion to set aside the order approving the settlement and judgment of dismissal in the Circuit Court of the City of St. Louis. (L.F. pages 501-507).

Wagoner also submitted a notice of hearing in order to schedule a hearing on his motion to amend or alter the order denying intervention, as well as the motion to set aside the judgment of the Court dismissing the suit. The Circuit Court of the City of St. Louis struck Wagoner's notice of hearing and ordered that no further proceedings would be had in the case. (L.F. page 605).

The order of the Circuit Court of the City of St. Louis, entered on December 11, 2014, did not become final until January 10, 2015, thirty days after its filing. The Circuit Court of the City of St. Louis failed and refused to rule on the motion of Wagoner to amend or alter the order and instead, proceeded with approval of a settlement and effected dismissal of the case and thereafter refused to indulge any further hearings on pending motions of Wagoner. (L.F. page 605).

Wagoner's timely motion to alter or amend the order denying his motion to intervene was on file and before the Circuit Court of the City of St. Louis when the order of dismissal was entered. (L.F. pages 427 and 499). The Circuit Court of the City of St. Louis had, pursuant to Rule 78.06, ninety days to rule on the motion. The Circuit Court for the City of St. Louis refused to allow scheduling of hearing on the motion and dismissed the suit. (L.F. page 605).

A notice of appeal from the order denying the motion to intervene as a matter of right was filed within ten days of the order of dismissal of the trial court becoming final which occurred on January 10, 2015. (L.F. pages 587 to 604).

**POINTS RELIED ON**

**POINT I**

THE TRIAL COURT ERRED IN DENYING WAGONER'S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER'S MOTION TO DISMISS BECAUSE WAGONER HAD SHOWN BY HIS MOTION, AND AS SUBSTANTIATED BY DOCUMENTARY EVIDENCE BEFORE THE COURT, THAT WAGONER WAS ENTITLED TO INTERVENE AS A MATTER OF RIGHT IN THAT PLEADINGS AND EVIDENCE BEFORE THE COURT SUBSTANTIATED THAT WAGONER HAD AN INTEREST RELATING TO THE TRANSACTION THAT WAS THE SUBJECT OF THE SUIT INSTITUTED BY THE MISSOURI ATTORNEY GENERAL OSTENSIBLY ON BEHALF OF THE STATE OF MISSOURI, AND THAT WAGONER WAS SO SITUATED THAT THE DISPOSITION OF THE ACTION WOULD, AS A PRACTICAL MATTER, IMPAIR OR IMPEDE WAGONER'S ABILITY TO PROTECT HIS INTEREST IN THE PRIOR PENDING SUIT INSTITUTED IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI AND WAGONER'S INTEREST AS ASSERTED BY HIM AND RECOGNIZED TWICE BY THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI WAS NOT ADEQUATELY REPRESENTED BY THE STATE OF MISSOURI, OR OTHER PLAINTIFFS AS NAMED PARTIES IN THE SUIT INSTITUTED IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS.

**POINT II**

THE TRIAL COURT ERRED IN DENYING WAGONER'S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER'S MOTION TO DISMISS BECAUSE THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS LACKED SUBJECT MATTER JURISDICTION IN THAT EXCLUSIVE JURISDICTION OF THE TRANSACTION THAT WAS THE SUBJECT MATTER OF THE SUIT HAD PREVIOUSLY BEEN APPROPRIATED BY THE FILING OF WAGONER'S PRIOR SUIT IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI AS TO WHICH, THE CIRCUIT COURT OF GREENE COUNTY HAD ACQUIRED EXCLUSIVE JURISDICTION WHICH RESULTED IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS NOT ACQUIRING SUBJECT MATTER JURISDICTION OVER THE TRANSACTIONAL SUBJECT OF THE SUIT INSTITUTED BY THE MISSOURI ATTORNEY GENERAL.

**POINT III**

THE TRIAL COURT ERRED IN DENYING WAGONER'S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER'S MOTION TO DISMISS BECAUSE THE ATTORNEY GENERAL OF THE STATE OF MISSOURI AND THE STATE OF MISSOURI, AS A PARTY, LACKED STANDING TO INSTITUTE SUIT AGAINST CONOCOPHILLIPS ON BEHALF OF THE STATE AND THE PETROLEUM STORAGE TANK INSURANCE FUND IN THAT THE PETROLEUM STORAGE

**TANK INSURANCE FUND IS A STATUTORILY CREATED TRUST, WITH RECOGNIZABLE BENEFICIARIES, WHICH DOES NOT MANAGE STATE MONEY, WHOSE LIABILITIES ARE NOT THE LIABILITIES OF THE STATE OF MISSOURI AND WHICH HAS NO SOVEREIGN IMMUNITY, THEREBY PRECLUDING THE ATTORNEY GENERAL, SUPPOSEDLY ACTING ON BEHALF OF THE STATE OF MISSOURI, TO INSTITUTE SUIT.**

## **ARGUMENT**

### **POINT I**

THE TRIAL COURT ERRED IN DENYING WAGONER'S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER'S MOTION TO DISMISS BECAUSE WAGONER HAD SHOWN BY HIS MOTION, AND AS SUBSTANTIATED BY DOCUMENTARY EVIDENCE BEFORE THE COURT, THAT WAGONER WAS ENTITLED TO INTERVENE AS A MATTER OF RIGHT IN THAT PLEADINGS AND EVIDENCE BEFORE THE COURT SUBSTANTIATED THAT WAGONER HAD AN INTEREST RELATING TO THE TRANSACTION THAT WAS THE SUBJECT OF THE SUIT INSTITUTED BY THE MISSOURI ATTORNEY GENERAL OSTENSIBLY ON BEHALF OF THE STATE OF MISSOURI, AND THAT WAGONER WAS SO SITUATED THAT THE DISPOSITION OF THE ACTION WOULD AS A PRACTICAL MATTER, IMPAIR OR IMPEDE WAGONER'S ABILITY TO PROTECT HIS INTEREST IN THE PRIOR PENDING SUIT INSTITUTED IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI AND WAGONER'S INTEREST AS ASSERTED BY HIM AND RECOGNIZED TWICE BY THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI WAS NOT ADEQUATELY REPRESENTED BY THE STATE OF MISSOURI, OR OTHER PLAINTIFFS AS NAMED PARTIES IN THE SUIT INSTITUTED IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS.

### **Applicable Standard of Review**

An order denying a motion claiming right of intervention should be reversed by the Court of Appeals if it erroneously declares or applies the law, there is no substantial evidence to support the order denying intervention and the order denying intervention is against the weight of the evidence. *Allred v. Carnahan*, 372 S.W.3d 477 (Mo.App. W.D. 2012); *Gene Kauffman Scholarship Foundation, Inc. v. Payne*, 183 S.W.3d 620 (Mo.App. W.D. 2006); *Johnson v. State*, 366 S.W.3d 11 (Mo. 2012).

### **Argument**

Cory Wagoner, a contributor and beneficiary of a special trust created by statute, the PST Fund, and as a taxpayer in the state of Missouri, instituted suit against ConocoPhillips in the Circuit Court of Greene County on November 5, 2012 for recovery of damages and funds wrongfully obtained by ConocoPhillips from the PST Fund. See Motion for Leave to Intervene filed June 23, 2014. (L.F. page 63).

The PST Fund is a special trust created by statute. Section 319.129 RSMo. The money of the PST Fund does not belong to the state of Missouri. Section 319.131.4 RSMo. The PST Fund does not have sovereign immunity. *Rees Oil Co. v. Director of Revenue*, 992 S.W.2d 354 (Mo.App. W.D. 1999). The liabilities of the PST Fund and its trustees are not liabilities of the State of Missouri. *River Fleets, Inc. v. Carter*, 990 S.W.2d 75 (Mo.App. W.D. 1999).

As a statutorily created trust, the PST Fund is subject to the statutory provisions of the Missouri Uniform Trust Code (MUTC) §456.1-101 RSMo. et seq. Section 456.1-102 defines the scope of the MUTC as follows:

“Sections 456.1-101 to 456.11-1106 apply to express trusts, charitable or noncharitable, testamentary or inter vivos, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. Sections 456.1-101 to 456.11-1106 do not apply to any trust created by the inherent power of the court pursuant to chapter 460.” (emphasis added).

Prior to the ruling of the Circuit Court of the City of St. Louis, denying Wagoner’s motion to intervene, the Circuit Court of Greene County, Missouri, on two separate occasions, denied motions of the Missouri Attorney General and ConocoPhillips to dismiss Wagoner’s suit premised upon claims asserted that Wagoner lacked standing to pursue the suit which he had instituted. The two prior orders were clearly before the Circuit Court of the City of St. Louis at the time of hearing on Wagoner’s motion for leave to intervene. (L.F. pages 76 and 555).

As Wagoner had been previously determined to have standing to assert the claim against ConocoPhillips by a circuit court in the State of Missouri, it was clear that he claimed an interest relating to the transaction that was the subject of the suit filed by the Attorney General in the Circuit Court of the City of St. Louis and was situated such that a

disposition of any portion of the suit in St. Louis, other than dismissal, would, as a practical matter, impair or impede Wagoner's ability to protect his interest, previously recognized by the Circuit Court of Greene County, Missouri.

The documentary record before the Circuit Court of the City of St. Louis established that Wagoner's interest was not adequately represented by Chris Koster, purportedly acting for the State of Missouri or the PST Fund trustees as Attorney General. Koster previously opposed every effort on the part of Wagoner to effect remedy and recovery of damages due from ConocoPhillips for amounts wrongfully obtained from the PST Fund due to its fraudulent activity over a period of years.

The documentary evidence before the Court clearly substantiated the elements necessary for granting Wagoner's motion for leave to intervene as a matter of right. Alternatively, the Court, in exercise of sound discretion, was required to grant permissive intervention as the Missouri Supreme Court has held that intervention should be allowed with considerable liberality. In *Johnson v. State*, 366 S.W.3d 11 (Mo. 2012), the Missouri Supreme Court stated, at page 20 of its opinion, the following:

“This Court reviews permissive intervention for abuse of discretion. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 487 (Mo. banc 2009). Intervention generally should ‘be allowed with considerable liberality.’ *In re Liquidation of Prof'l Med. Ins. Co.*, 92 S.W.3d at 778; *Eakins v. Burton*, 423 S.W.2d 787, 790 (Mo.1968) (noting that the intervention rule should be construed liberally to permit broad intervention)”.

In view of the legal fact that Wagoner, as a beneficiary of a statutorily created trust, and the general rule that a beneficiary of a trust is a proper party in suits involving trust property, it is submitted that the Court's denial of Wagoner's motion to intervene was entirely in error. See *Stabler v. Stabler*, 326 S.W.3d 561 (Mo.App. E.D. 2010), holding that where a party alleges standing as a beneficiary of a trust, a claim by the asserted beneficiary may not be dismissed unless the beneficiary is unable to prove any set of facts establishing beneficiary status. Also, in *Weldon Revocable Trust v. Weldon*, 231 S.W.3d 158 (Mo.App. W.D. 2007) the court stated, at page 168 of its opinion, the following:

“If such issues involving trust property or trustee conduct not only affect the income-producing potential of the trust but the residuary corpus thereof, the residuary beneficiaries are also necessary parties to the litigation as well as income beneficiaries. [citation omitted] It follows that where a judgment adversely affects the residuary beneficiaries' interests in the corpus of the trust, they too are aggrieved parties with standing to appeal.

The Missouri Uniform Trust Code, sections 456.1-101 to 456.11-1106 ... provides support for this proposition that a residuary beneficiary may have standing to appeal a judgment construing a trust. Under the MUTC, 'beneficiary' is defined as 'a person that has a present or future beneficial interest in a

trust, vested or contingent.’ §456.1-103(3)(a).” (emphasis added).

There was no basis in the discretion of the Circuit Court of the City of St. Louis for denying the motion for leave to intervene, as a matter of right. Even assuming some bit of discretion could be located in the facts and the status of the parties in this case, the rule allowing intervention with considerable liberality required the court, in exercise of sound discretion, to grant the motion for leave to intervene.

## **POINT II**

**THE TRIAL COURT ERRED IN DENYING WAGONER’S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER’S MOTION TO DISMISS BECAUSE THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS LACKED SUBJECT MATTER JURISDICTION IN THAT EXCLUSIVE JURISDICTION OF THE TRANSACTION THAT WAS THE SUBJECT MATTER OF THE SUIT HAD PREVIOUSLY BEEN APPROPRIATED BY THE FILING OF WAGONER’S PRIOR SUIT IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI AS TO WHICH, THE CIRCUIT COURT OF GREENE COUNTY HAD ACQUIRED EXCLUSIVE JURISDICTION WHICH RESULTED IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS NOT ACQUIRING SUBJECT MATTER JURISDICTION OVER THE TRANSACTIONAL SUBJECT OF THE SUIT INSTITUTED BY THE MISSOURI ATTORNEY GENERAL.**

## Argument

Wagoner's suit on the claims arising out of the transactions between the PST Fund and ConocoPhillips was pending at the time of the institution of the suit by Attorney General Koster, ostensibly on behalf of the State of Missouri, endeavoring to assert a claim based upon the same subject matter or "transaction". Wagoner's standing had been recognized in the prior pending suit in the Circuit Court of Greene County as both a taxpayer, and as a beneficiary of the statutorily created trust on two occasions, prior to hearing on Wagoner's motion to intervene in the City of St. Louis suit in order to seek its dismissal.

The Circuit Court of the City of St. Louis did not, and could not, have acquired jurisdiction over the subject matter because of Wagoner's prior action pending at the time the suit was instituted in the Circuit Court of the City of St. Louis. The applicable general rule is as set forth in *Planned Parenthood of Kansas v. Donnelly*, 298 S.W.3d 8 (Mo.App. W.D. 2009) in which the court, addressing the rule known as the "pending action doctrine" held that where there are two actions involving the same object and purpose, including the same principles of law, the court in which the first claim is filed acquires "**exclusive jurisdiction**" over the controversy.

This rule has been uniformly espoused. See *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193 (Mo.App. E.D. 1999) in which the Court of Appeals stated that "**exclusive jurisdiction**" over the subject matter is lodged with the court in which the suit is first filed. The opinion in the *State ex rel. Palmer v. Goeke* case relies upon prior Missouri Supreme Court precedent, *State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391 (Mo.

1975) in which the Missouri Supreme Court, after thorough analysis and reliance, in part, on determinations by other state and federal courts, held that a court where a petition is first filed acquires “exclusive jurisdiction”.

As the Circuit Court of Greene County, Missouri had “exclusive jurisdiction” over the subject matter, it follows that the Circuit Court of the City of St. Louis could never have exercised subject matter jurisdiction as exclusive subject matter jurisdiction was lodged in another court. Wagoner’s prior Greene County suit was pending in one form or another, throughout the entire time that the suit filed by the Missouri Attorney General was pending in the Circuit Court of the City of St. Louis. It necessarily follows that the Circuit Court of the City of St. Louis should have been required to dismiss the suit filed by the Attorney General.

A court may not exercise subject matter jurisdiction which is already lodged in another court. Subject matter jurisdiction is a matter of a court’s authority to render a judgment in a particular case. Any action taken by a court that lacks subject matter jurisdiction is null and void. *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010).

In denying the motion to intervene, the Circuit Court of the City of St. Louis focused upon the status of Wagoner and his ability to successfully prosecute the claims against ConocoPhillips. The focus of the City of St. Louis Circuit Court case was misplaced and improper. The ability of Wagoner to prosecute the claim had already been recognized by the Circuit Court of Greene County, Missouri, twice. The Circuit Court for the City of St. Louis completely overlooked the fact that it was not lawfully entitled to

make any such inquiry as the subject matter of the claims against ConocoPhillips asserted in the suit was not before it.

Wagoner had already been determined by the Circuit Court in Greene County to have standing, both as a taxpayer and as a beneficiary of a statutorily created trust pursuant to the provisions of the Missouri Uniform Trust Code. Any questions regarding the correctness of determinations made by the Circuit Court of Greene County, regarding Wagoner's standing, had been answered by the orders of the Circuit Court of Greene County, Missouri. The Circuit Court for the City of St. Louis was not entitled to second guess, re-analyze or review the prior determinations made as to Wagoner's standing made by the Circuit Court of Greene County. Issues regarding Wagoner's standing to pursue claims against ConocoPhillips on the same transactional wrongs asserted subsequently in the City of St. Louis, had already been answered, and were not open for determination by the Circuit Court of the City of St. Louis.

A court which has no subject matter jurisdiction, is not entitled to proceed in any fashion, other than recognizing the fact, and dismissing the suit. Missouri courts have long recognized that once a division of a Missouri court acquires jurisdiction of the subject matter of a suit, it holds it to the exclusion of all other courts of concurrent jurisdiction. *Comfort v. Higgins*, 576 S.W.2d 331 (Mo. 1978). This rule has been more recently exemplified by holding of the Missouri Supreme Court in *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010) in which the court stated, at page 733, in part, the following:

“Subject matter jurisdiction is a matter of ‘the court’s  
authority to render a judgment in a particular category of

cases...’. The Missouri Constitution grants ‘original jurisdiction over all cases and matters, civil and criminal’ to the circuit courts. Mo. Const. art., V sec. 14. Subject matter jurisdiction is derived from the law and cannot be conferred by consent (citation omitted). When a court lacks subject matter jurisdiction, any action it takes is null and void. “

It is anticipated that ConocoPhillips and the Missouri Attorney General will claim that subsequent developments in Wagoner’s prosecution of the suit instituted on November 5, 2012 allowed the Circuit Court in the City of St. Louis to obtain subject matter jurisdiction. Any such position is flawed for two basic reasons. First, Wagoner’s suit was pending when the Attorney General filed suit in the Circuit Court of the City of St. Louis. Second, lacking subject matter jurisdiction, the suit in the Circuit Court of the City of St. Louis was dead on arrival. That is, the suit filing in St. Louis did not invoke subject matter jurisdiction as it was previously lodged exclusively in another court and the Circuit Court of the City of St. Louis was not entitled to proceed further (other than dismissal) once notice of that fact was provided.

Subsequent developments in Wagoner’s suit, including the resubmission of petition for filing in Greene County, following the erroneous order of the federal district court denying remand, is of no consequence. ConocoPhillips has previously endeavored to rely upon the erroneous federal court order denying Wagoner’s motion for remand. The federal court order was illogical and flawed on its face, for two reasons. First, the

Circuit Court of Greene County, Missouri had already ruled that Wagoner had standing and the right to proceed with suit against ConocoPhillips, as a matter of state law. The federal district court was bound to follow state law and was not entitled to revisit that ruling. Secondly, the order of the federal district court denying remand, was premised upon the federal district court finding that removal by the State (a non-party), was not untimely. The problem and clear error in that ruling is that the Court found that removal was effected by a non-party to the suit. A non-party is not entitled to effect removal. The Circuit Court of Greene County had already determined that the State of Missouri was not a proper party to Wagoner's suit pending in Greene County.

The United States Supreme Court has addressed the issues arising when a claimed jurisdictional basis by a court in a second or subsequently filed suit is asserted. In *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), the United States Supreme Court stated the general rule as follows:

“It has long been the case that ‘the jurisdiction of the court depends upon the state of things at the time of the action brought.’ *Mollan v. Torrance*, 9 Wheat. 537, 539 (1824). This time-of-filing rule is hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure.”

In *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998), the United States Supreme Court stated, in regard to the so-called doctrine of hypothetical jurisdiction, the following:

“We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and a venerable line of our cases. ‘Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.’ *Ex parte McCardle*, 7 Wall. 506, 514 (1868).”

. . . .

“While some of the above cases must be acknowledged to have diluted the absolute purity of the rule Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of ‘hypothetical jurisdiction’ that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an

advisory opinion, disapproved by this Court from the beginning... For a court to pronounce upon the meaning or the constitutionality of a state or a federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.”

Missouri case law is consistent with the holdings of the United States Supreme Court as reflected by the decisions in *Comfort v. Higgins*, 576 S.W.2d 331 (Mo. 1978) and *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010). Lack of subject matter jurisdiction cannot be cured by subsequent events in another suit pending in a court with exclusive subject matter jurisdictional authority. The suit filed by the Attorney General in the Circuit Court of the City of St. Louis Missouri was dead on arrival. The Circuit Court of Greene County, Missouri had already acquired jurisdiction over the subject matter and the transactional disputes at issue.

### **POINT III**

**THE TRIAL COURT ERRED IN DENYING WAGONER’S MOTION TO INTERVENE AS A MATTER OF RIGHT AND REFUSAL THEREAFTER TO GRANT WAGONER’S MOTION TO DISMISS BECAUSE THE ATTORNEY GENERAL OF THE STATE OF MISSOURI AND THE STATE OF MISSOURI, AS A PARTY, LACKED STANDING TO INSTITUTE SUIT AGAINST CONOCOPHILLIPS ON BEHALF OF THE STATE AND THE PETROLEUM STORAGE TANK INSURANCE FUND IN THAT THE PETROLEUM STORAGE**

**TANK INSURANCE FUND IS A STATUTORILY CREATED TRUST, WITH RECOGNIZABLE BENEFICIARIES, WHICH DOES NOT MANAGE STATE MONEY, WHOSE LIABILITIES ARE NOT THE LIABILITIES OF THE STATE OF MISSOURI AND WHICH HAS NO SOVEREIGN IMMUNITY, THEREBY PRECLUDING THE ATTORNEY GENERAL, SUPPOSEDLY ACTING ON BEHALF OF THE STATE OF MISSOURI, TO INSTITUTE SUIT.**

**Argument**

It should be remembered that the PST Fund in Missouri has unique characteristics which, when taken together, and in view of the law in the State of Missouri, disqualified the Attorney General and the State of Missouri from instituting suit to obtain remedy for wrongful or fraudulent payments obtained by ConocoPhillips from the PST Fund. The unique characteristics of the PST Fund in Missouri are as follows:

1. The Missouri PST Fund is a special trust created by statute.
2. The Missouri PST Fund does not manage money that belongs to the State of Missouri.
3. The Missouri PST Fund does not have sovereign immunity.
4. The liabilities of the Missouri PST Fund and its trustees are not liabilities of the State of Missouri.
5. As a statutorily created trust, the Missouri PST Fund is subject to the terms and conditions of the Missouri Uniform Trust Code, §456.1-101 RSMo. et seq.

The Attorney General, and Circuit Court Judge in the City of St. Louis, relied, in part, on what they asserted was authority on the part of the Attorney General to bring the suit provided in §319.127 RSMo. That section deals with violation of various regulations and statutes in Missouri dealing with petroleum storage tanks and the PST Fund. An actual and complete reading of the provisions of that statute indicates that the so-called “authorization” claimed on the part of the Attorney General and relied upon by the City of St. Louis Circuit Court, is actually optional and consensual, by virtue of the sentence in §319.127.2 RSMo. which provides the following:

“The department [Department of National Resources] **may** request either the attorney general or a prosecuting attorney to bring any action authorized in this section in the name of the people of the State of Missouri.” (emphasis added).

Section 319.127 RSMo. clearly provides that involvement of the Missouri Attorney General at the request of the Department of Natural Resources is optional. It is not mandatory. Additionally, §319.127 RSMo. deals with proceedings to obtain the assessment of a civil penalty authorized up to \$10,000.00 per day. No claim for recovery of a civil penalty authorized by §319.127 RSMo. was ever asserted by the Attorney General in the suit filed in the Circuit Court of the City of St. Louis. The Attorney General’s suit filed in St. Louis was not one authorized by §319.127.2 RSMo. The Attorney General in the State of Missouri had no standing to assert the claims in the Circuit Court of the City of St. Louis.

Reliance upon §27.060 RSMo., by the Missouri Attorney General, ConocoPhillips and the Circuit Court of the City of St. Louis, in justifying the existence of the St. Louis suit, was also misplaced. The Attorney General simply does not have the right to inject itself in the dealings of every state agency, or cause of action which may affect some of the citizens in the State, the administration of trusts and many other matters. The Attorney General is in fact confined to the specific statutory and constitutional authority delegated to him.

In the case of *State ex rel. Champion v. Holden*, 953 S.W.2d 151 (Mo.App. S.D. 1997), the Court of Appeals distinguished the ability of the State Attorney General to sue in its official capacity on behalf of a public trust. In the *Holden* case, the court stated, at page 154 of its opinion the following:

“The Attorney General cannot sue in his official capacity unless the trust is public and indefinite to the point that no individuals or corporations have the right to bring such an action.

. . . .

The above authorities establish that where there are clearly designated beneficiaries of a trust, even when they are well recognized charities, they alone must seek to enforce those provisions benefiting them. There is no need for the involvement of the attorney general in these instances. The attorney general can proceed only where there are no persons

or entities who can reasonably be determined as the benefit is to the general public or a portion of it.”

In *State ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W.2d 857 (Mo. 1943), the Missouri Supreme Court addressed a situation in which the Attorney General sought to intervene in a proceeding on behalf of the Missouri Public Service Commission. The Missouri Supreme Court determined the Attorney General had no place or right to be involved in the suit. Following detailed analysis of the asserted rights on the part of the Attorney General to be involved in the proceeding on the behalf of the Public Service Commission, the court stated, in pertinent part, beginning at page 863 of its opinion, the following:

“We are unable to discover anything in these cases supporting the Attorney General’s theory. In the Debs and Indiana cases the statewide welfare was threatened, in one by violence and in the other by a public nuisance, and there was no adequate remedy at law.”

The Missouri Supreme Court, in the *McKittrick* case, ultimately concluded its analysis with the following at page 865:

“For all the foregoing reasons it is our opinion, and we hold, that the Attorney General had no right to intervene in the proceeding, or to apply for a rehearing, writ of review and appeal.”

The PST Fund is not set up to benefit the general public, except perhaps in a remote and collateral way; in the same way that the general public is benefited by virtue of having state parks and state owned facilities cleaned. The PST Fund in Missouri does not involve the use of public money. PST Fund obligations and its liabilities are not those of the State of Missouri. It has no sovereign immunity. The PST Fund does have beneficiaries, i.e., persons or entities that contribute to the PST Fund and are entitled to receive payments from it.

The determination of the Circuit Court in the City of St. Louis that the Attorney General in this case had standing to prosecute any suit against ConocoPhillips, to the exclusion of Wagoner or other beneficiaries, would liken the authority of the Attorney General to that of being one where he might inject himself, on his whim, into every claim or cause throughout the state. Such is not permitted under the law in Missouri.

Wagoner's standing as a taxpayer and beneficiary of the statutorily created trust, governed by the Missouri Uniform Trust Code, was twice challenged by ConocoPhillips and the State Attorney General. The challenges were denied, both times. Wagoner's attempted intervention, based upon his standing to prosecute suit against ConocoPhillips should have been a "given" under the circumstances. To hold otherwise, as the Circuit Court of the City of St. Louis did, is essentially abrogating the standing of a taxpayer as well as a beneficiary of the statutorily created trust.

The standing of a beneficiary of a statutorily created trust has already been addressed in this brief. The standing of a taxpayer in the state of Missouri remains governed by the rule announced by the Missouri Supreme Court in *Eastern Missouri*

*Laborers District Council v. St. Louis County*, 781 S.W.2d 43 (Mo. 1989). The overriding rule established by the Missouri Supreme Court in the *Eastern Missouri Laborers* case as set forth on page 47 of the opinion, is extremely important in view of the trial court's ruling denying Wagoner's intervention. The reasoning of the court on page 47 is as follows:

“Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts. Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, it is illegal and should be enjoined. Taxpayers must have some mechanism of enforcing the law. Today's decision provides the door through which taxpayers may enter the courts to seek enforcement”.

Wagoner has had standing, at all times, as determined by two prior court orders issued by the Circuit Court of Greene County, denying motions to dismiss which challenged Wagoner's standing as a taxpayer and as a beneficiary of the statutorily created trust governed by the Missouri Uniform Trust Code. The Missouri Attorney General had no specific statutory authorization to be involved in the suit against ConocoPhillips. In addition to Wagoner's standing as a beneficiary, he had standing as a taxpayer. The ruling of the Circuit Court for the City of St. Louis defies two prior rulings

of the Circuit Court of Greene County, Missouri as well as the ruling of the Missouri Supreme Court in the *Eastern Missouri Laborers* case.

### **CONCLUSION**

It is respectfully submitted that, for all the foregoing reasons, the trial court erred in denying the motion to intervene, and in failing and refusing to rule on and grant Wagoner's motion to dismiss the suit instituted by the Missouri Attorney General in the Circuit Court of the City of St. Louis. Wagoner satisfied all of the elements required for intervention as a matter of right. Alternatively, Wagoner clearly satisfied the elements necessary for permissive intervention which was requested in the alternative to mandatory intervention as a matter of right. Collateral to the error in denying intervention, the Circuit Court for the City of St. Louis failed to recognize that it did not have jurisdiction to proceed in the suit under any set of circumstances by virtue of exclusive jurisdiction over the subject matter and transactional dispute having been first lodged in the Circuit Court of Greene County, Missouri. The Circuit Court of Greene County, Missouri had exclusive jurisdiction over the subject matter and claims arising from the transactional dispute at issue. The entire proceedings before the Circuit Court of the City of St. Louis were null and void as it had, from the first instance, lacked subject matter jurisdiction. The Attorney General in the State of Missouri did not have statutory or constitutional authority to institute the suit and lacked standing as a matter of law to endeavor to prosecute suit over the subjects and transactional disputed issues against ConocoPhillips.

The hurried and convoluted resolution by ConocoPhillips and the Attorney General of the suit filed in the Circuit Court of the City of St. Louis, in and of itself, indicates the reason for taxpayer standing in Missouri because of the consistent and very real concern over the integrity of public officials in the discharge of their obligations as evidenced by their willingness to make a showing of compromise, amounting to commercial appeasement, in exchange for political well-being.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

**Thomas W. Millington**, attorney for Appellant, pursuant to Rule 55.03, Rule 84.06 and Local Rule 360, certifies as follows:

(a) **RULE 55.03**: In compliance with Rule 55.03(c), the undersigned hereby certifies to the following that to the best of his knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

(1) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. An attorney providing drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney knows that such representations are false;

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief; and

(5) In all other regards, *Appellant's Brief* complies with the requirements of Civil Rule 55.03

(b) **RULE 84.06 AND LOCAL RULE 360**: This *Appellant's Brief* complies with the word and page limitations set forth within Local Rule 360, in that according to the word counter on the computer software which generated this *Appellant's Brief* (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, appendix, Table of Contents and Table of Authorities) the brief contains 7,723 words, and the font used is Times New Roman, Point size 13, prepared in Microsoft Word, and includes 33 pages. The undersigned further certifies that this *Appellant's Brief* is in further compliance with Rule 84.06.

/s/ Thomas W. Millington

Thomas W. Millington

# **CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of May, 2015, I electronically filed the foregoing ***Appellant's Brief*** with the Missouri Court of Appeals, Eastern District, using the Missouri eFiling System, which sent notification of such filing to the following attorneys of record:

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