

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel.)	
ATTORNEY GENERAL CHRIS KOSTER)	
and THE MISSOURI PETROLEUM)	
STORAGE TANK INSURANCE FUND)	
BOARD OF DIRECTORS,)	
)	Circuit Court No. 1322-CC00929
Plaintiffs-Respondents,)	
)	Court of Appeals No. ED102505
v.)	
)	Supreme Court No. SC95444
CONOCOPHILLIPS COMPANY and)	
PHILLIPS 66 COMPANY,)	Court of Appeals, Eastern District
)	
Defendants-Respondents,)	Circuit Court of the City of St. Louis
)	
and)	
)	
CORY WAGONER,)	
)	
Proposed Intervenor-Appellant.)	

**SUBSTITUTE APPELLANT'S REPLY BRIEF
IN RESPONSE TO SUBSTITUTE BRIEFS SUBMITTED
BY RESPONDENTS CONOCOPHILLIPS AND STATE OF MISSOURI**

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STATEMENT OF FACTS

Cory Wagoner (“Wagoner”) filed suit against ConocoPhillips in the Circuit Court of Greene County, Missouri, on November 5, 2012 (L.F. pg. 63, ¶1; L.F. pgs. 71, 93, 134, 277; L.F. pg. 134). Claims were asserted for recovery of damages from ConocoPhillips by reason of it having wrongfully obtained payments from the Missouri Petroleum Storage Tank Insurance Fund (“PST Fund”) (L.F. pgs. 277-301). Claims were also asserted in suit in the Circuit Court of Greene County 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 and effect recovery of damages due to money having been wrongfully paid and obtained by ConocoPhillips from the PST Fund (L.F. pgs. 323-342).

The PST Fund is a special trust fund created by statute, §319.129 RSMo. et seq. The PST Fund does not handle money that belongs to the State of Missouri. §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 (“MUTC”), §456.1-101 RSMo.

Chris Koster, Attorney General in Missouri, joined with ConocoPhillips in filing a motion to dismiss Wagoner’s Greene County suit. The motions of the Attorney General and ConocoPhillips challenged Wagoner’s standing to institute the suit. The Circuit Court of Greene County, by the Honorable Michael J. Cordonnier, entered an Order on March 8, 2013, denying the motion to dismiss Wagoner’s suit for lack of standing and

ordered the dismissal of the PST Fund as a party and dismissed the State of Missouri from the suit (L.F. pg. 563).

Following Wagoner's amendment of his Petition in the Circuit Court of Greene County, on March 26, 2013 (four and one-half months after suit was filed, well exceeding the thirty day limitation period for removal imposed by Title 28 U.S.C. §1446(a)), ConocoPhillips sought untimely removal of the suit from the Circuit Court of Greene County to federal district court. (L.F. pgs. 302-306; L.F. pgs. 93 and 94, showing removal efforts by ConocoPhillips on or about April 15, 2013). Eight days later, on the 23rd day of April, 2013, the Missouri Attorney General, again purportedly acting on behalf of the State of Missouri, filed suit in the Circuit Court of the City of St. Louis against ConocoPhillips (L.F. pg. 11), claiming to represent the interests of the PST Fund and asserted damage claims against ConocoPhillips premised upon the same facts, transactions and evidence referenced in Wagoner's prior suit filed on November 5, 2012, in the Circuit Court of Greene County.

On May 28, 2013, the Missouri Attorney General, filed a motion with the federal district court to intervene in Wagoner's suit which had been improperly removed to federal district court by ConocoPhillips. The Attorney General's motion to intervene was never ruled upon by the federal district court.

Wagoner filed a motion to remand the untimely removed suit in the federal district court. Wagoner's suit was, and remained pending, when the Missouri Attorney General, claiming to act on behalf of the State of Missouri, instituted suit in the Circuit Court of the City of St. Louis.

On September 6, 2013, the federal district court entered an order improperly denying Wagoner's motion to remand to the Circuit Court of Greene County (L.F. pg. 93). The federal district court found (contrary to prior ruling of Circuit Court Judge Michael J. 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 for removal to federal district court by 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 the Missouri Attorney General and the State of Missouri in the removed lawsuit, and did not have the authority to proceed as federal court authority is limited.

On September 13, 2013, Wagoner amended and refiled his suit in the Circuit Court of Greene County, Missouri, adding as 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 is subject to the Missouri Uniform Trust Code (L.F. pg. 323). The federal district court suit was thereafter dismissed without prejudice by Wagoner (L.F. pg. 320) as the Greene County suit, as amended, defeated and claim of jurisdiction of the federal district court by ConocoPhillips due to absence of requisite diversity jurisdiction required by Title 28 U.S.C. §1332.

On October 28, 2013, the Missouri Attorney General, 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 asserted, again, that Wagoner lacked standing. The motion was again denied by Order of the Circuit Court of Greene County entered on April 2, 2014 (L.F. pg. 76).

On June 23, 2014, Wagoner filed a motion to intervene and also a motion to dismiss in the suit instituted by the Attorney General in the Circuit Court of the City of St. Louis on April 23, 2013 (L.F. pgs. 63-76). Wagoner asserted that the intervention should be allowed as a matter of right, that the Missouri Attorney General had no standing to file the suit, and that the suit filed by the Missouri Attorney General could not proceed in the Circuit Court of the City of St. Louis because there was another and prior action pending in the Circuit Court of Greene County, which had, at all times, exclusive jurisdiction over the claims asserted against ConocoPhillips for wrongfully obtaining payments from the PST Fund.

Hearing was conducted on Wagoner's motion to intervene in the Circuit Court of the City of St. Louis on the 7th day of October, 2014. An order was entered on November 13, 2014, denying Wagoner's motion to intervene (L.F. pgs. 415-426). The order of the Circuit Court of the City of St. Louis stated 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, finding that Wagoner had standing to proceed with his suit against ConocoPhillips (L.F. pgs. 76, 555, 563).

On December 5, 2014, Wagoner filed a timely motion to alter or amend 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 the Attorney General (L.F. pgs. 427-452). The Circuit Court of the City of St. Louis refused to schedule hearing on Wagoner's motion to amend or alter the Order denying intervention (L.F. pgs. 499-500, 605).

On December 10, 2014, ConocoPhillips and the Missouri Attorney General entered into a settlement agreement and immediately asked the Circuit Court of the City of St. Louis for approval of the settlement agreement. One day later, without notice to Wagoner, proposed intervenor, the Circuit Court of the City of St. Louis executed what it denominated as an “Order and Final Judgment” approving the settlement and dismissed the suit instituted by Attorney General Chris Koster (L.F. pgs. 453-499).

On December 15, 2014, Wagoner filed a motion to set aside the “Order and Final Judgment” of December 11, 2014 (L.F. pg. 501). Wagoner also submitted a notice of hearing in order to schedule hearing on his motion to alter or amend the Order denying intervention (L.F. pg. 578). 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. pg. 605).

A Notice of Appeal was filed in order to obtain review of the Order denying the motion of Wagoner to intervene and consequent refusal of the Circuit Court of the City of St. Louis to consider Wagoner’s proposed motion to dismiss (L.F. pgs. 587-604). The Notice of Appeal attached the only document ever executed by the Circuit Court of the City of St. Louis denominated as a “Judgment”, in effort to effect compliance with Rule 74.01(a). The notice of appeal identified Wagoner as proposed intervenor and also included within the “Brief Description of Case” (L.F. pg. 590) a recitation of the fact that Wagoner’s motion to intervene was denied, among other pertinent grievances.

On the 28th day April, 2015, the Missouri Court of Appeals, Eastern District, entered an Order to Show Cause noting that Appellant (Wagoner) may not have standing to appeal from the underlying “Judgment” but that an Order denying a motion to intervene is appealable. The Court of Appeals noted that the Order denying a motion to intervene was not denominated as a judgment as required by Rule 74.01(a), and further stated:

“In addition, to remove any issue concerning whether the November 13th order must be denominated an ‘Judgment,’ Appellant [Wagoner] may wish to request the circuit court to enter a judgment complying with Rule 74.01(a). Brooks v. Brooks, 98 S.W.3d 530, 532 (Mo. banc 2003). In the event the circuit court enters such a judgment, this Court will treat the notice of appeal as prematurely filed under Rule 81.05(b).”

Complying with the Court of Appeals’ suggestion, Wagoner filed a motion with the Circuit Court of the City of St. Louis with the Court of Appeals’ show cause order attached. Without hearing, the Circuit Court of the City of St. Louis entered a “Judgment” denying Wagoner’s motion for leave to intervene on the 7th day of May, 2015. Wagoner submitted a response to the Order to Show Cause providing the Missouri Court of Appeals, Eastern District, with the “Judgment” which was issued on Wagoner’s motion by the Circuit Court of the City of St. Louis in view of the Missouri Court of Appeals’ Order to Show Cause. The May 7, 2015, Order of the Circuit Court of the City of St. Louis denying Wagoner’s motion for leave to intervene was denominated as a Judgment pursuant to Rule 74.01(a).

Briefing on the merits of the issues proceeded before the Missouri Court of Appeals, Eastern District, with oral argument had on the 9th day of September, 2015. Thereafter, on the 3rd day of November, 2015, the Missouri Court of Appeals, Eastern District, dismissed Wagoner's appeal for defect in the Notice of Appeal, and lack of amendment to the Notice of Appeal. The Notice of Appeal filed by Wagoner had attached the only document which the Circuit Court of the City of St. Louis was willing, at the time, to execute, which was denominated as a "Judgment", and in fact referenced that review of the Order denying intervention was being sought.

A motion for rehearing and motion for transfer was filed with the Missouri Court of Appeals, Eastern District, on the 13th day of November, 2015. The Missouri Court of Appeals entered an Order on December 10, 2015, denying the motion for rehearing and transfer, asserting that the appellate court was confined to review the decision identified in the Notice of Appeal.

The Missouri Court of Appeals has determined that Wagoner's Notice of Appeal, attaching the only document denominated as a "Judgment" in order to comply with Rule 74.01(a), was defective by reason of failure of Appellant to subsequently amend the Notice of Appeal. The Missouri Court of Appeals dismissed the appeal relying upon *Maskill v. Cummins*, 397 S.W.3d 27 (Mo.App. W.D. 2013); *Burton v. Klaus*, 455 S.W.3d 9 (Mo.App. E.D. 2014); *Schrader v. QuikTrip Corp.*, 292 S.W.3d 453 (Mo.App. E.D. 2009); *Rea v. Moore*, 74 S.W.3d 795 (Mo.App. S.D. 2002). The circumstances relative to the ruling of the Missouri Court of Appeals dismissing the appeal is contrary to and in conflict with *Weller v. Hayes Truck Lines*, 197 S.W.2d 657

(Mo. 1946); *L.J.B. v. L.W.B.*, 908 S.W.2d 349 (Mo. 1995); *Lake Winnebago v. Sharp*, 652 S.W.2d 118 (Mo. 1983); and *Wills v. Whitlock*, 139 S.W.3d 643 (Mo.App. W.D. 2004).

The decision of the Circuit Court of City of St. Louis denying Wagoner's motion for leave to intervene as a matter of right improperly refused to acknowledge two prior rulings of the Circuit Court of Greene County, Missouri, to the effect that Wagoner had standing to proceed with his suit against ConocoPhillips. The Circuit Court of the City of St. Louis improperly embraced the reasoning of the federal district court regarding Wagoner's standing. The removal of Wagoner's suit to federal district court was statutorily untimely and its reasoning was contrary to a prior State Court order in Wagoner's suit. The Circuit Court of the City of St. Louis improperly refused to acknowledge that Wagoner's interest in pursuing a prior filed claim against ConocoPhillips was premised upon the same facts and circumstances asserted by the Missouri Attorney General and that Wagoner's interest was not adequately protected by the Missouri Attorney General. The denial of Wagoner's motion to intervene, as a matter of right, was in error and appeal should have been allowed from that order, regardless of how it was denominated.

The State of Missouri and ConocoPhillips have each submitted a selective version of the facts giving rise to the appeal. Both routinely failed to report to the court that the order denying Wagoner's motion for leave to intervene entered on November 13, 2014 was the subject of an authorized motion filed pursuant to Rule 78.07(c) to amend and alter the order and judgment denying Wagoner's motion to intervene. The motion was

timely filed on December 5, 2014, within 30 days after the order of November 13, 2014 denying Wagoner's motion to intervene. (L.F. pgs. 427-452). Wagoner did not sit on his rights or otherwise fail to seek timely relief.

The Circuit Court of the City of St. Louis refused to rule on the motion to amend and alter the order denying intervention. The Circuit Court of the City of St. Louis also refused to rule on a subsequent motion filed by Wagoner after the so-called "judgment" was entered on December 11, 2014. Four days later, on December 15, 2014, Wagoner filed a motion to set aside what the circuit court denominated as a "judgment." The circuit court, at the request of the Missouri Attorney General and ConocoPhillips, entered an order refusing to grant hearing on either one of Wagoner's pending motions and struck the notice of hearing submitted by Wagoner as indicated by the docket entry of January 20, 2015. (L.F. pg. 605)

The Missouri Attorney General and ConocoPhillips also have failed to report that the "judgment" entered by the Circuit Court of the City of St. Louis is actually, not a judgment. It is nothing more than an order approving a proposed conditional settlement as evidenced by the joint motion submitted by the Missouri Attorney General and ConocoPhillips to that effect. (L.F. pgs. 453-596). A review of the joint motion indicates that the Missouri Attorney General and ConocoPhillips agreed that there was more than \$2.7 million of claimed unlawful payments having been obtained by ConocoPhillips at issue, (L.F. pg. 456). The "Settlement Agreement And Release" (L.F. pgs. 465-471) provided for conditional return by ConocoPhillips of less than one half of that sum (L.F. pg. 466), with the Attorney General agreeing that the PST Fund should release to

ConocoPhillips “Deferred Claims Payments,” as provided within ¶3 of the “Settlement Agreement And Release” (L.F. pg. 467) which amounts to hundreds of thousands of dollars in additional payments to ConocoPhillips.

The terms of the “Settlement Agreement And Release” at ¶19 (L.F. pg. 469) makes specific provisions for voiding the entire agreement in the event of a challenge to its efficacy, or if it is invalidated or otherwise found insufficient. This was essentially, an agreement to agree, if they could get by with it. This conditional settlement agreement is what the court approved by its “judgment”. The “judgment” is merely evidence of the court having no objection to the terms presented to it. It is not a pronouncement by the court of merits of the dispute and as such, should not be considered to be a “judgment” in any form. *Nations v. Hoff*, 78 S.W.3d 222 (Mo. App. E.D. 2002)

Both the Missouri Attorney General and ConocoPhillips have asserted that there is no basis for Wagoner’s claim of improper removal of his prior filed suit to federal district court by ConocoPhillips. A review of the documentation that was before the Circuit Court of the City of St. Louis, specifically, the order of the federal district court denying remand of Wagoner’s prior filed suit (L.F. pg. 93), reveals that the federal district court allowed removal by a non-party, the State of Missouri by the Missouri Attorney General. The federal district court reached its determination after convoluted reasoning and determination to revisit and nullify prior rulings of the Circuit Court of Greene County, Missouri to the effect that Wagoner had standing to bring suit against ConocoPhillips and that the State of Missouri was not a necessary party. The substitution by the federal

district court of its own flawed reasoning for that of the Circuit Court of Greene County effectively allowed removal of a case by a non-party.

The Circuit Court of the City of St. Louis also revisited or ignored two prior rulings of the Circuit Court of Greene County, Missouri which it was not entitled to do. The Circuit Court of the City of St. Louis had no authority to review prior rulings of the Circuit Court of Greene County, Missouri or contradict them.

POINT I

The Appeal is Timely and Appellant Does Not Lack Standing.

Argument

This case involves an appeal from an order denying a motion for leave to intervene. This Substitute Reply Brief is submitted in response to the briefs of both Respondents, ConocoPhillips and the State of Missouri by Attorney General Chris Koster.

The assertions by the Missouri Attorney General and ConocoPhillips that there is no appealable order before the Court are answered by reference to the record in this case. Appellant filed a motion to amend and alter the order denying the motion for leave to intervene (L.F. pg. 427). The trial court refused to rule on that motion and proceeded to enter what it referred to as a “judgment”, while the motion to alter or amend was pending. Any confusion over the order being appealed, or the timely nature of this appeal is believed to be answered by virtue of the record of proceedings before the Missouri Court of Appeals including the Order to Show Cause entered on April 28, 2015; the Response to Order to Show Cause filed by Appellant with the Missouri Court of Appeals on May 4,

2015; and the Supplemental Response to Order to Show Cause filed with the Missouri Court of Appeals on May 11, 2015 with file stamped copy of an order properly denominated as judgment denying the motion for leave to intervene.

The assertions regarding the appealability of the order denying a motion for leave to intervene in this case and asserting lack of timeliness of appeal are believed to be ill founded in view of the procedural history. This case involves one in which a trial court refused to rule on a motion to alter or amend an appealable order, or denominate its order as a judgment, until it was suggested by the Missouri Court of Appeals, by virtue of its Order to Show Cause, that it would be appropriate for the trial court to refer to its order denying the motion for leave to intervene as a judgment.

The continued assertions by the Respondents that Wagoner lacks standing to institute suit against ConocoPhillips in the first instance, and is not a real party in interest, had been previously briefed before the Circuit Court of Greene County, Missouri on motions to dismiss submitted by the Missouri Attorney General and ConocoPhillips, on two separate occasions, and twice denied. Following erroneous removal of Wagoner's first filed suit from the Circuit Court of Greene County, the federal district court revisited the same arguments of ConocoPhillips and the Missouri Attorney General, who was then seeking to intervene in the federal court suit, as removed (although intervention was never granted). The federal district court made an erroneous determination that the State of Missouri (not a party to the removed suit) was entitled to effect removal, and denied the motion to remand.

Appellant Wagoner's restated claim, naming the trustees as additional defendants, necessarily defeated the exercise of any jurisdictional basis of the federal district court as there was a lack of diversity between Wagoner and the individuals acting as trustees of the Missouri Petroleum Storage Tank Insurance Fund, all of whom are Missouri residents. Thus, any effort to effect amendment of pleadings in federal court would have been of no consequence and the filing in state court of Wagoner's restated claim was entirely appropriate under all the circumstances. A federal district court's subject matter jurisdiction is not concurrent in all matters with Missouri State Circuit Courts.

Appellant Wagoner was determined by prior orders of the Circuit Court of Greene County, Missouri, denying motions to dismiss premised upon an assertion of a lack of standing, to have standing as a real party in interest to bring suit against ConocoPhillips and the Missouri Petroleum Storage Tank Insurance Fund Trustees. Wagoner's efforts to intervene in an improperly and subsequently filed lawsuit by the Attorney General in the Circuit Court of the City of St. Louis as previously discussed in prior briefing before the Court substantiates all the elements of the motion for leave to intervene, as a matter of right.

POINT II

Appellant's Motion to Intervene was Improperly Denied and the Circuit Court of the City of St. Louis Lacked Subject Matter Jurisdiction.

Argument

The core issue presented by the pending appeal is whether Missouri Appellate Courts are going to allow the circuit courts of this state to engage in competitive subject matter jurisdiction. The Court of Appeals should effectively establish, by opinion in this case, the rule already well founded in existing case law, that a court which first acquires subject matter jurisdiction does so to the “**exclusion**” of all other circuit courts in the State of Missouri. This case poses the following question: Are the Missouri appellate courts to indulge the kind of forum shopping and litigation shenanigans evidenced by subsequently filed suits, seeking a politically expedient result, in order to avoid public disclosure of clear conflicts of interest and blatant misuse of money belonging to an identifiable group of citizens in the State of Missouri?

Regarding the exclusive nature of subject matter jurisdiction, there are some older cases in the State of Missouri referenced in the briefs of Respondents, suggesting that perhaps Missouri state courts may second guess the subject matter jurisdiction of another state circuit court. The Missouri Supreme Court should, by decision in this case, develop a clear indication as to the scope and extent of the subject matter jurisdiction of potentially competing courts and find that a court which first acquires subject matter jurisdiction, acquires it to the “**exclusion**” of all other circuit courts in the State of Missouri.

It is undeniable in this case that the Circuit Court of Greene County had obtained the subject matter jurisdiction of the underlying dispute in this case well before the filing of suit by the Attorney General in the Circuit Court of the City of St. Louis, and that Wagoner's suit was pending when the St. Louis suit was filed by the Attorney General. Sustaining the position of the State Attorney General and ConocoPhillips in this case will encourage the filing of second and competing suits in efforts to thwart the first filed suit to seek a more favorable forum and politically expedient settlement. The conduct of the Missouri Attorney General and ConocoPhillips in this case, if approved by the Appellate Court, would effectively defy the concepts of "**exclusive**" subject matter jurisdiction, taxpayer standing as recognized by the Missouri Supreme Court, and prior circuit court orders entered in cases involving the same subject matter.

The filing of competing suits, seeking to obtain political expediency and to avoid what might be viewed as an unfavorable forum, should be discouraged by opinion of the Missouri Court of Appeals.

There is ample existing authority for the results which Appellant Wagoner suggests should be achieved in this case, i.e., reversal of the order denying Wagoner's motion for leave to intervene and directions to the Circuit Court of the City of St. Louis to enter its order dismissing the suit filed before it by the Missouri Attorney General.

The Missouri Supreme Court in 1978 in the case of *State ex rel. General Dynamics Corp. v. Luten*, 566 S.W.2d 452 (Mo. 1978) on page 458, stated the following:

“The law is well settled that the jurisdiction of a court first invoked cannot be defeated by a subsequent proceeding in a court having concurrent jurisdiction of the person or subject matter. While this rule has certain exceptions, [citation omitted] it is given broad application in cases filed in the courts of our state.”

In the *General Dynamics Corp.* case, the Court determined that a subsequent filed suit was one which properly should have been accorded priority status under the factual circumstances inherent in that case and the equitable considerations applicable to them.

Although the Appellate Courts in Missouri have often struggled with the scope and extent of the exclusive nature of subject matter jurisdiction under varying circumstances, there has been a consistent theme in many of the rulings of the Missouri Supreme Court. In 1978, the same year of the decision in the *General Dynamics Corp.* case, the Missouri Supreme Court in *Comfort v. Higgins*, 576 S.W.2d 331 (Mo. 1978) stated the general rule, at page 340, as follows:

“Once a division of the court acquires jurisdiction of the subject matter of a suit, it holds it to the exclusion of all other courts of concurrent jurisdiction [supporting citation omitted].” (emphasis added)

Support for the concept of “**exclusive**” jurisdiction and the order which it can bring in resolution of disputes over competing proceedings in two different circuit courts in the State of Missouri are evident by any number of cases which have dealt with the

concept of concurrent jurisdiction or exclusive jurisdiction over subject matter. See for example *Kelly v. Kelly*, 245 S.W.3d 308 (Mo.App. W.D. 2008) referencing simultaneous proceedings involving the same subject matter and proposing that it is an “error of law” to allow two proceedings involving the same subject matter to go forward as the result might be inconsistent judgments which cannot exist together. As the court in the *Kelly* case stated at page 313:

“We think that the common principle in all of these cases has two purposes. The first is ‘to avoid confusion, inefficiency and unseemly ‘turf battles’ between courts.’ *Barlow*, 114 S.W.3d at 334. The second is to avoid inherently conflicting judgments, both enforceable on their face, in totally inapposite manners. *State ex rel. City of Springfield v. Conley*, 760 S.W.2d 948, 950 (Mo.App. W.D. 1988). Otherwise stated, the principles in these cases are intended to manage the potential conflicts and inefficiency that can occur when more than one court has jurisdiction of the same subject matter. It is, thus, in some sense a misnomer to describe the concurrent jurisdiction doctrine as depriving one court of jurisdiction.”

The finding of “error of law” in exercising authority in a subsequently filed suit is also recognized in the case of *In the Matter of S.J.M.*, 453 S.W.3d 340 (Mo.App. E.D. 2015) in which the Court of Appeals stated, at page 344, the following:

“Where multiple courts have subject matter and personal jurisdiction over the issue and the parties, a court commits an error of law if exercising its authority to enter a judgment in the case results in wasteful duplication or inconsistent judgments.”

See also *In re: J.M.J.*, 404 S.W.3d 423, 430 (Mo.App. W.D. 2013).

It is submitted that the efforts to employ equitable principles in application of the concepts of abatement, the first filed rule and reconciliation of conflicting subject matter jurisdiction between the circuit courts in Missouri, via a court determination of “error of law,” may be resolved by embracing the concept of exclusive jurisdiction. The concept of “exclusive jurisdiction” has supporting case law and promotes the uniformity of a rule in appellate review of conflicts which may arise by virtue of competing jurisdictional claims between the circuit courts in the State of Missouri. *Planned Parenthood of Kansas v. Donnelly*, 298 S.W.3d 8 (Mo.App. W.D. 2009), *State ex rel. Palmer v. Goeke*, 8 S.W.3d 193 (Mo.App. E.D. 1999) and *State ex. Rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391 (Mo.App. 1975) all relied upon the concept of “exclusive jurisdiction” over subject matter which, when enforced, allows for an ordered and predictable result. The Missouri Supreme Court held in *Hightower v. Myers*, 304 S.W.3d 727 (Mo. 2010), that employing the concept of exclusive jurisdiction and the finding that a lack of subject matter jurisdiction results in all proceedings conducted, without subject matter jurisdiction as being null and void, promotes the sort of efficiency and consistency which the “error of law” rule seeks to provide.

POINT III

**The Circuit Court of the City of St. Louis Did Not At Any Time
Acquire Subject Matter Jurisdiction at the Time Suit Was Filed by
the Missouri Attorney General in the Circuit Court of the City of St. Louis.
Subject Matter Jurisdiction Over the Transactional Dispute in Question
Was Exclusively Lodged in the Circuit Court of Greene County, Missouri.
The “Judgment” Entered in the Circuit Court of the City of St. Louis Was Not
An Adjudication of the Merits and Was Nothing More Than An Approval
of a Proposed Conditional Settlement and Any Determination by the
Circuit Court of the City of St. Louis Was a Nullity and Its Judgment
is Void Due to Lack of Subject Matter Jurisdiction.**

Argument

The argument of the Missouri Attorney General and ConocoPhillips is not legally sound in view of the factual circumstances giving rise to the appeal.

First, it should be noted that Wagoner sought to appeal the order denying intervention by seeking to submit with his notice of appeal, the only document ever denominated as a “judgment” by the Circuit Court of the City of St. Louis. Counsel for Wagoner is well aware of the difficulty which has arisen in seeking to have an appealable order or judgment reviewed by an appellate court in Missouri when a trial court refuses to denominate its order as a judgment as required by Rule 74.01(a). Effort was made by Wagoner to have the Circuit Court of the City of St. Louis denominate its order denying intervention as a judgment, but it refused to grant hearing on that motion. It also refused

to grant hearing on its motion to set aside its so-called “judgment”. The “judgment” of the Circuit Court of the City of St. Louis was merely an approval of a conditional settlement between respondents ConocoPhillips and the Missouri Attorney General.

Contrary to assertions by the Missouri Attorney General and ConocoPhillips, Wagoner did not sit on his rights. An actual “judgment,” an adjudication of the merits, was never entered. The document denominated as a “judgment” was merely an approval of a conditional settlement. The argument of the Missouri Attorney General and ConocoPhillips is such that one circuit court would be entitled to review, reconsider, and enter contrary rulings of another circuit court in which a prior action, involving the same subject matter, was pending. The Circuit Court of the City of St. Louis did not consider or ignored the rulings of the Circuit Court of Greene County, Missouri, determining that Wagoner had standing to bring suit against ConocoPhillips. Adopting the reasoning advocated by the Missouri Attorney General and ConocoPhillips allows circuit courts to refuse to consider prior rulings of other circuit courts in Missouri, in prior filed lawsuits, involving the same subject matter, which are pending when the second or subsequent suit is filed. Circuit courts in Missouri are not, and should not, be free to second guess or review prior ruling of other circuit courts in prior and pending actions involving the same subject matter.

The conditional nature of the settlement upon which the Circuit Court of the City of St. Louis pronounced “judgment” is shown by the automatic provisions for having the settlement determined to be void, and all consideration returned, in the event that the settlement is challenged.

A judgment made by consent is not a judicial determination and does not ordinarily give rights to appeal. It is typically perceived to be binding only upon the parties to the settlement and does not amount to a merits determination. *Nations v. Hoff*, 78 S.W.3d 222 (Mo. App. E.D. 2002). See also *In re the Formation of the Neosho Transportation Development District v. Missouri Highways and Transportation Commission*, 416 S.W.3d 326 (Mo. App. S.D. 2013), in which the court restated the general rule in footnote nine to its opinion that “a judgment, order or decree entered by consent of the parties is not a judicial determination of rights, but a recital of an agreement...”.

The Circuit Court of the City of St. Louis lacked subject matter jurisdiction in the case, at all times, as there was another and prior action pending involving the same subject matter, in the Circuit Court of Greene County, Missouri when the suit was filed in St. Louis. The Circuit Court of Greene County had previously determined (twice) that Wagoner had standing to bring the claim. The Circuit Court of the City of St. Louis was not entitled to revisit that issue. No subject matter jurisdiction was vested initially in the Circuit Court of the City of St. Louis. It has long been held that a court that acts without subject matter jurisdiction, engages in acts which constitute a nullity and any judgment rendered by a court that lacks subject matter jurisdiction is a void judgment. *Kearth v. Polestar Entertainment*, 325 S.W.3d 373, 388 (Mo. App. E.D. 2010).

The concept of a void judgment, due to lack of subject matter jurisdiction, has continued to be applied and enforced by the appellate courts. In *Ishmon v. St. Louis Board of Police Commissioners*, 415 S.W.3d 144 (Mo. App. E.D. 2013), the Court of

Appeals stated that a consent judgment is not a judicial determination and that the requested intervention in that case should not have been denied due to a lack of a “judgment” that was properly subject to an appeal. In the *Ishmon* case, the court of appeals determined that the consent judgment in question was a mere recital of an agreement of the parties and not a judgment subject to appeal and any determination made by virtue of the consent judgment could not preclude intervention.

In *Williams v. Williams*, 932 S.W.2d 904 (Mo. App. E.D. 1996) the appellate court determined that a judgment is void from its inception if a court that rendered the judgment did not have subject matter jurisdiction.

In *Goins v. Goins*, 406 S.W.3d 886 (Mo. 2013), the Missouri Supreme Court restated the general rule that a judgment is void under Rule 74.06(b)(4) if the circuit court that rendered it lacked subject matter jurisdiction.

It is respectfully submitted that two circuit courts in the State of Missouri, when presented with the same transactional dispute, cannot both exercise subject matter jurisdiction over the transaction and as such, the court in which a second or subsequent suit is filed (in this case the Circuit Court of the City of St. Louis) lacks subject matter jurisdiction under the doctrine of exclusive subject matter jurisdiction afforded to the circuit courts in Missouri by outstanding case precedent. It is further submitted that the entire proceeding before the Circuit Court of the City of St. Louis should be declared null and its judgment void and the case should be reversed with instructions to dismiss the suit instituted by the Missouri Attorney General.

The full scope and extent of the impact in adopting the reasoning argued by the Missouri Attorney General and ConocoPhillips is disclosed by the language within page thirty-four of the substitute brief of ConocoPhillips. ConocoPhillips stated there, that following Wagoner's voluntary dismissal of the erroneously removed suit in federal district court, the Circuit Court of the City of St. Louis was somehow magically vested with subject matter jurisdiction which it had never had previously. ConocoPhillips stated the following: "Thus, when Wagoner voluntarily dismissed Wagoner I, he lost his place in line and the Fund's action gained priority". This sort of reasoning allows for competing suits to be filed, with the second or potentially third suit to leapfrog the first in the event of some adverse ruling resulting in termination of the first filed suit. Legitimizing such a scenario would promote the very type of activity which has been undertaken as evidenced by the facts in this case.

The notion of "getting in line" by filing a subsequent suit, in hopes of gaining "priority" flies in the face of the concept of exclusive jurisdiction recognized by the Missouri Supreme Court in the *Comfort* and *Hightower* cases. An initial lack of subject matter jurisdiction should not be allowed to be cured by subsequent events in another and prior pending suit in a court with exclusive subject matter jurisdictional authority.

The U.S. Supreme Court addressed the concept advocated by the Missouri Attorney General and ConocoPhillips in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004), in which the U.S. 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.”

Embracing the reasoning of Respondents would allow unsatisfied parties to simply ignore the jurisdiction of a state circuit court in which a prior or first filed action is pending, proceed with filing a separate suit in another venue, and seek the consideration of what is perceived to be a more favorable forum.

This sort of reasoning ignores the concept of exclusive subject matter jurisdiction, defies the “time of filing” rule for determining jurisdictional authority discussed in *Grupo Dataflux, supra* at 24, and promotes “hypothetical jurisdiction” rejected by the U.S. Supreme Court in *Steel Co., supra* at 24. The reasoning advocated by the Missouri Attorney General and ConocoPhillips would allow leapfrogging and forum shopping efforts among state circuit courts. Put simply, this flawed reasoning is completely obviated by application of the concept of exclusive jurisdiction, thus rendering the second and subsequent filed suit in the Circuit Court of the City of St. Louis as being one which

was initially and continually without subject matter jurisdiction (dead on arrival), a concept that could not be cured by developments in another case.

CONCLUSION

It is submitted that the Missouri Supreme Court should rule that not only Wagoner's motion to intervene should have been granted, but, in addition, that the Circuit Court of the City of St. Louis did not at any time obtain subject matter jurisdiction over the dispute regarding payments made from the PST Fund to ConocoPhillips as another and prior action was pending at the time suit was instituted by the Attorney General in the Circuit Court of the City of St. Louis. The concept of exclusive subject matter jurisdiction should control in this case which renders the judgment of the Circuit Court of the City of St. Louis a nullity and void. The Missouri Supreme Court should issue opinion to the effect suggested and direct that upon remand the "judgment" of the Circuit Court of the City of St. Louis should be vacated as void and the suit dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Thomas W. Millington, attorney for Appellant, pursuant to Rule 55.03 and Rule 84.06, 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, *Substitute Appellant's Reply Brief in Response to Substitute Briefs Submitted by Respondents ConocoPhillips and State of Missouri* complies with the requirements of Civil Rule 55.03

(b) **RULE 84.06**: This *Substitute Appellant's Reply Brief in Response to Substitute Briefs Submitted by Respondents ConocoPhillips and State of Missouri* complies with the word and page limitations set forth in that according to the word counter on the computer software which generated this *Substitute Appellant's Reply Brief in Response to Substitute Briefs Submitted by Respondents ConocoPhillips and State of Missouri* (excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix), the brief contains 7,286 words, and the font used is Times New Roman, Point size 13, prepared in Microsoft Word, and includes 26 pages. The undersigned further certifies that this *Substitute Appellant's Reply Brief in Response to Substitute Briefs Submitted by Respondents ConocoPhillips and State of Missouri* is in further compliance with Rule 84.06.

/s/ Thomas W. Millington
Thomas W. Millington

CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of April, 2016, the foregoing was electronically filed with the Missouri Supreme Court, using the Missouri eFiling System. Pursuant to Rule 103.08, service was made to the attorneys of record who are registered users as maintained by the Clerk's office through the Court's electronic filing system.

/s/ Thomas W. Millington

Thomas W. Millington