SC97008

IN THE SUPREME COURT OF MISSOURI

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

Relator,

vs.

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

Respondent.

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

REPLY BRIEF OF THE RELATOR

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Reply as to Facts

In her brief,[1] Ms. Scroggin prepares her own statement of facts (Brief of the Respondent ("Resp.Br.") 11-15), as Rule 84.04(f) entitles her to do. Several of her assertions there warrant a reply.

When discussing the proceedings in the 2013-2014 modification case and her actions since then, Ms. Scroggin cites only to her unverified 2017 motion to compel that was unsupported by any affidavit (Resp.Br. 11-12). These include her allegations that:

- Mr. Cullen provided the letter in 2014 stating that he had acquired 2,134 retirement points during the marriage (Resp. Br. 11) (citing Ex. 46, 88, 93, 98);
- Mr. Cullen "advised [Ms. Scroggin's] counsel on June 30, 2014, via e-mail that Relator's retirement benefits are triggered by his eligibility date, which was to be March 9, 2017, and that the total number of reservist points earned by Relator would not be final until that time" (Resp.Br. 11-12) (citing Ex. 46); and
- Ms. Scroggin's purported conversations with unknown people at DFAS in 2017 that the 2,134-point number was incorrect (Resp.Br. 12-13) (citing Ex. 46-47, 124).

No evidence supports these purported "facts", and the Court should disregard them. As Mr. Cullen explained in his opening brief, and Ms.

[1] The brief of the respondent was filed in the name of Respondent the Honorable Kevin Harrell (Resp.Br. 1). But as is usual, it was prepared by counsel for Janice Scroggin, petitioner below (Resp.Br. 1, 38). This brief refers to its author as Ms. Scroggin, not Judge Harrell.

Scroggin does not address, her unverified motion to which no affidavits were attached is not self-proving and is not evidence (Brief of the Relator ("Rel.Br.") 38-39) (citing *In re Adoption of C.P.G.B.*, 302 S.W.3d 745, 752 (Mo. App. 2010); *Johnson v. Brown*, 154 S.W.3d 448, 451 (Mo. App. 2005); *Weidner v. Anderson*, 174 S.W.3d 672, 677 (Mo. App. 2005)).

Ms. Scroggin also states "there was no contested, evidentiary hearing" in the 2013-2014 modification proceedings and that she and Mr. Cullen "submitted the agreed upon Modification Judgment [*sic*]" in those proceedings (Resp.Br. 15). For this, she cites only the docket (Resp.Br. 15) (citing Ex. 2).

While there may not have been a hearing with witnesses taking the stand and being cross-examined, there certainly was a court appearance at which evidence was introduced, followed by a decision by the court that the court itself reached based on the pleadings and that evidence (Ex. 39). In its 2014 modification judgment, the court stated it reached that decision "after examining the pleadings and being otherwise well and duly-advised in the premises" (Ex. 39).

Ms. Scroggin also fundamentally omits one crucial thing the trial court found "after examining the pleadings and being otherwise well and duly-advised in the premises": that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39).

Reply as to Argument

A. Ms. Scroggin's "motion to compel" plainly seeks to re-litigate the trial court's express finding in the 2014 modification judgment that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points", which she now claims is "not correct".

In his first point in his opening brief, Mr. Cullen explained that Respondent Judge Harrell could not grant Ms. Scroggin's motion to compel him to give her his private military records so she could re-litigate the number of reservist points the 2014 modification judgment found he had accrued during the parties' marriage as "not correct", because her request is barred by issue preclusion, claim preclusion, and Rule 74.06(c)'s one-year time limitation for seeking relief from a judgment due to "mistake" (Rel.Br. 18, 21-36). In his second point, he explained that even if she somehow could re-litigate this now, as her motion to compel was unverified and he disputed her allegations, the law entitled him at least to an evidentiary hearing before requiring him to give up his private information (Rel.Br. 19, 37-43). Either way, this Court's writ of prohibition lies to enjoin Judge Harrell from enforcing his order summarily granting Ms. Scroggin's motion to compel (Rel.Br. 26, 30, 33, 43).

1. Even if the 2014 modification judgment was a "consent judgment", its finding that Mr. Cullen earned 2,134 retirement points during the parties' marriage is conclusive and must be given full force and effect.

In response, Ms. Scroggin primarily argues that she is not, in fact, attempting to re-litigate the 2014 modification judgment. Over and over again, she insists: her "motion [to compel] was not an attempt to re-litigate

the 2014 judgment" (Resp.Br. 4); she "is *not* attempting to re-litigate a final order" (Resp.Br. 16) (emphasis in the original); the "Motion to Compel [*sic*] does not, in any way, request as relief that the [trial c]ourt set aside or modify a previous judgment" (Resp.Br. 16); she "is NOT seeking to modify a judgment" (Resp.Br. 22) (emphasis in the original); her "Motion to Compel [*sic*] was not an attempt to modify the Judgment" (Resp.Br. 24); she "is not … trying to re-litigate any issues or claims" (Resp.Br. 28); and the "Motion to Compel [*sic*] does not seek to modify a judgment" (Resp.Br. 37).

Ms. Scroggin claims this is because, while the 2014 modification judgment expressly finds that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39), and she brought her 2017 "motion to compel" because she now "believe[s] that 2,134 is not the correct number of points" (Ex. 46), "[t]he issue of [her] entitlement to [Mr. Cullen]'s military retirement pay was not finally resolved by the Modification Judgment rendered in 2014" (Resp.Br. 30). She says, "the number of points earned by Relator during the marriage was not litigated" in the 2013-2014 modification proceedings "as that number was supplied by [Mr. Cullen] and not contested by Ms. Scroggin" (Resp.Br. 18). She says, therefore, she "was not afforded a full and fair opportunity to litigate the issue of the number of retirement points earned by Relator during the marriage" (Resp.Br. 29).

There seems to be some confusion about what occurred in the 2013-2014 modification proceedings. Counsel for Mr. Cullen in this Court was informed that there was a hearing leading to that judgment (Rel.Br. 12).

Conversely, Ms. Scroggin claims the 2014 modification judgment was reached by agreement, without any evidence, and the parties consented to it (Resp.Br. 3, 15, 34). She even calls it a "consent judgment" (Resp.Br. 34). But the judgment itself says the trial court reached it independently after reviewing the pleadings and being advised (Ex. 39).

"Consent judgment" or not, this is a distinction without a difference. Even if, as Ms. Scroggin's asserts, the 2014 modification judgment was a "consent judgment", the law of Missouri is that it is just as conclusive as any other judgment.

Ms. Scroggin cites no authority that a finding in a consent judgment is not accorded issue- and claim-preclusion effect, because the law of Missouri is the opposite. It is well-established that all "[j]udgments, including judgments by agreement, are conclusive of matters adjudicated and are not subject to collateral attack …." *N.W. Elec. Power Co-op., Inc. v. Am. Motorists Ins. Co.*, 451 S.W.2d 356, 365 (Mo. App. 1969) (citing *Payne v. St. Louis Union Trust Co.*, 389 S.W.2d 832, 836 (Mo. 1965); 50 C.J.S. *Judgments* p. 55).

This is because "a judgment pronounced by consent of parties or upon stipulation should be accorded the same force as other judgments." *Moore v. Beck*, 664 S.W.2d 15, 18 (Mo. App. 1984) (quoting *McDougal v. McDougal*, 279 S.W.2d 731, 738-39 (Mo. App. 1955)); *see also*, *Fuller v. Moore*, 356 S.W.3d 287, 289-90 (Mo. App. 2011) ("[a] consent judgment has the same force and effect as any other judgment reached on the merits") (quoting *Boillot v. Conyer*, 826 S.W.2d 95, 97 (Mo. App. 1992)); *Commw. Land Title Ins. Co. v. Miceli*, 480 S.W.3d 354, 362 n.1 (Mo. App. 2015) ("a consent

judgment 'should be accorded the same force as other judgments'") (quoting *Household Fin. Corp. v. Jenkins*, 213 S.W.3d 194, 196 (Mo. App. 2007)).

So, a finding in a consent judgment is just as conclusive, with just as much issue- and claim-preclusive effect, as one in any other judgment. "Under the rule of collateral estoppel and res judicata even though [a consent] judgment may have been erroneous, the issues may not be re-litigated." *N.W. Elec. Power Co-op.*, 451 S.W.2d at 365. As with any other judgment, a "consent judgment [i]s conclusive not only as to those matters actually decided, but as to those matters which could properly have been raised and decided." *Commw. Land Title*, 480 S.W.3d at 362 n.1 (quoting *State ex rel. Sanders v. Martin*, 945 S.W.2d 641, 643 (Mo. App. 1997)).

For example, in *Commw. Land Title*, the Court of Appeals held that under the doctrine of claim preclusion, a consent judgment completely barred new litigation between the parties to it.

There, a construction corporation sought to sell three houses it had built to three private buyers, and an insurer was to underwrite each transaction with a title insurance policy. 480 S.W.3d at 360-61. To secure the insurer's participation, the corporation's president executed sworn affidavits (knowingly falsely) attesting that all subcontractors had been paid in full and requesting the insurer issue its policies without any exception for possible unfiled mechanic's liens. *Id.* at 361. The insurer did so, and the sales were completed. *Id.* Dozens of subcontractors then filed mechanic's liens against the properties, and the insurer was obliged to defend and indemnify the buyers in full. *Id.* The buyers then filed cross-claims against

the corporation, and the trial court ultimately entered consent judgments against the corporation and in favor of the buyers, which the buyers then assigned to the insurer. *Id.*

When the insurer filed its own action for damages against the corporation, the trial court dismissed it, holding that the consent judgments against the corporation that the buyers had assigned to the insurer "barred [the insurer's] claims on the grounds of res judicata." *Id.*

The Court of Appeals affirmed. *Id.* at 362-66. It rejected the insurer's "suggest[ion] that a consent judgment is not treated in the same manner as other types of judgments for the purposes of res judicata." *Id.* at 362 n.1. It then analyzed the four identities of claim preclusion, held they were present from the consent judgments against the corporation and the insurer's claims against the corporation in the new suit, and any additional or different claims the insurer sought to raise against the corporation now could have been raised in the cases that resulted in the consent judgments. *Id.* at 362-66. So, "[t]he consent judgments bar[red the insurer]'s [claims] against" the corporation. *Id.* at 365-66.

The same is true here. Even if the 2014 modification judgment was a "consent judgment" as Ms. Scroggin now insists (Resp.Br. 34), that does not make it any less conclusive of what it found. The law of Missouri gives all its findings and conclusions, including its express finding that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39), full force and effect, and the doctrines of issue and claim preclusion bar re-litigation of those findings and conclusions.

2. If, as Ms. Scroggin now claims, the number of Mr. Cullen's retirement points earned during the marriage was not litigable in the 2013-2014 modification proceedings, then she should have objected to the trial court expressly finding in the 2014 modification judgment that he earned 2,134 points.

Further trying to get around this, Ms. Scroggin argues the number of retirement points were not actually litigable in the 2013-2014 modification proceedings. Relying solely on her unverified and unsupported 2017 allegation that Mr. Cullen had "advised [her] counsel on June 30, 2014, via e-mail that [Mr. Cullen]'s retirement benefits are triggered by his eligibility date, which was to be March 9, 2017, and that the total number of reservist points earned by Relator would not be final until that time" (Resp.Br. 11-12) (citing Ex. 46), she argues:

- "[t]he formula for calculating [her] entitlement could not be finalized until approximately three (3) years after the modification Judgment [*sic*] was entered by Respondent, as [Mr. Cullen]'s total retirement points were not determinable until March 11, 2017" (Resp.Br. 16);
- "the amount of her entitlement to [Mr. Cullen]'s military retirement pay could not be resolved until [he] became eligible for retirement, which was March 11, 2017, almost three (3) years following entry of the Modification Judgment [*sic*]" (Resp.Br. 18); and
- "the parties would not know how the military retirement would be divided between them until March 9, 2017, which is the date upon which [Mr. Cullen] would be advised of the total number of retirement points earned by him to plug into the denominator of the formula" (Resp.Br. 30).

Ms. Scroggin says this means she "did not have the opportunity, much less the need," in the 2013-2014 modification proceedings "to litigate the issue" of the correct number of points Mr. Cullen had accrued during the marriage "until some three years after the Judgment was issued" (Resp.Br. 29-30). She says "there was no need to litigate the issue of the" number of points "until three years" after the 2014 modification judgment "when the final part of the formula, total number of points earned, became available to the parties" (Resp.Br. 29). She says the finding in the 2014 modification judgment only "*ostensibly* se[t] out the number of [Mr. Cullen]'s marriage-related retirement points", not "the *total* number" he had earned (Resp.Br. 36-37) (emphasis in the original).

This is without merit. First, Mr. Cullen disputes Ms. Scroggin's unverified, unsupported allegation that he ever told her the number of points he had earned during the marriage could not be known until 2017 (Ex. 102-103, 114-16). To the contrary, there was nothing "ostensible" about the letter from the Air Force in 2014: "For the period of your marriage, 20 April 1985 to 30 May 2009, the date of separation, you earned 2134 retirement points" (Ex. 91). And there equally was nothing "ostensible" about the trial court's finding in the 2014 modification judgment: "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39).

Ms. Scroggin now claims that in June 2014, more than a month before entry of the August 2014 modification judgment in which she says she agreed to including the 2,134-point number and did not contest it (Resp.Br. 3, 15, 18,

34), she *knew* this was not the actual number, and instead that number could not be determined until 2017 (Resp.Br. 16, 18, 29-30, 36-37).

But if she knew in June 2014 that 2,134 points was not the actual number of points Mr. Cullen had accrued during the marriage, then she should not have agreed to an express finding in the August 2014 modification judgment that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39). Far from making this an issue she could not have litigated, it makes it into one she plainly "had a full and fair opportunity to litigate … in the prior suit …." *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984). She could have told the court that this number was not final, the number could not be known at the time, and no number should be included in the judgment.

Especially if the 2014 modification judgment was, as Ms. Scroggin now insists, a "consent judgment" (Resp.Br. 34), then this finding is one "on the merits" that "has the same force and effect as any other judgment …." *Fuller*, 356 S.W.3d at 289-90 (quoting *Boillot*, 826 S.W.2d at 97). She makes no showing how she was coerced into agreeing to an express finding on the merits that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39). But – in her own telling – she did agree to it. So, she now is bound by it, *especially* if, as she now says, she knew at the time that it was not correct.

Ms. Scroggin's argument that her 2017 motion to compel, premised on her notion "that [2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46), is not seeking to re-

litigate the 2014 modification judgment, which expressly found that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39), is without merit. Her motion to compel does not give the trial court's finding in the 2014 modification full force and effect, but instead seeks relief from it. The law of Missouri bars her from doing so now.

B. The only procedural vehicle for Ms. Scroggin to relitigate the 2014 modification judgment's finding that Mr. Cullen earned 2,134 retirement points during the marriage would be a Rule 74.06(b) motion, an independent action that is barred by issue preclusion, claim preclusion, and the one-year statute of limitations in Rule 74.06(c).

Mr. Cullen explained in his opening brief that Ms. Scroggin's attempt to re-litigate the 2014 modification judgment's finding that he accrued 2,134 retirement points during the parties' marriage now is barred by issue preclusion, claim preclusion, and the one-year statute of limitations in Rule 74.06(c) (Rel.Br. 23-33).

1. Ms. Scroggin's motion seeking relief from the 2014 modification judgment's finding that Mr. Cullen accrued 2,134 points during the parties' marriage, filed more than 30 days after that judgment, was an independent action subject to issue preclusion and claim preclusion.

As to issue and claim preclusion, Ms. Scroggin responds that those doctrines are inapplicable because they "do not apply within a single action", but rather only in two separate actions (Resp.Br. 27-28). She says there is only one action involved here, not two, because "the [trial c]ourt issued the [2014 modification] Judgment [*sic*] in connection with the dissolution of [Mr. Cullen]'s and Ms. Scroggin's marriage and the Order [granting Ms. Scroggin's

motion to compel] was issued by [Judge Harrell] in very same dissolution action" (Resp.Br. 27).

This is untrue. The law of Missouri is that Ms. Scroggin's motion, regardless of what it was titled, sought relief from an express finding in a judgment more than 30 days after that judgment's entry, and so was an independent, separate action to which issue and claim preclusion apply.

As Mr. Cullen explained in his opening brief, the law of Missouri is that a party's "only means of seeking relief from [a] judgment" on the merits of an issue as not being correct, as Ms. Scroggin was in her motion to compel, *supra* at pp. 8-12, "is pursuant to Rule 74.06(b) which allows that 'upon such terms as are just, the court may relieve a party ... from a final judgment or order for ... mistake'" (Rel.Br. 31) (quoting *Willis v. Placke*, 903 S.W.2d 219, 220 (Mo. App. 1995)).

But the law of Missouri is that a Rule 74.06(b) motion filed more than 30 days after entry of the judgment from which it seeks relief is an independent action subject to all the requirements of a new lawsuit. In effect, it is a new lawsuit, even if filed under the previous case's case number.

Under Rule 75.01, a trial court retains jurisdiction of a judgment for 30 days after its entry. So, a Rule 74.06(b) motion challenging the judgment filed within that 30-day period is an authorized after-trial motion in the same case under Rule 81.05(a). *Citimortgage, Inc. v. Waggoner*, 440 S.W.3d 589, 590-91 (Mo. App. 2014).

But a "trial court [does] not have any jurisdiction after thirty days to set aside [a] judgment on its own motion …." *Universal Credit Acceptance,*

Inc. v. Randall, 541 S.W.3d 726, 730 (Mo. App. 2018). So, a "motion to set aside" a judgment filed after that 30th day "trigger[s] the start of an independent proceeding in which the trial court" then has a new "basis of jurisdiction to set it aside under Rule 74.06 …." *Id.*

Put simply, "a Rule 74.06(b) motion must be treated as an independent action if the motion is filed after the underlying judgment becomes final for purposes of appeal." *Citimortgage*, 440 S.W.3d at 591 n.1 (citing *McCullough v. Commerce Bank, N.A.*, 368 S.W.3d 296, 299-300 (Mo. App. 2012) ("a Rule 74.06(b) motion filed after a judgment becomes final is an independent action requiring the trial court to enter a separate judgment")); *see also Bi-State Dev. Agency v. Ames Realty Co.*, 258 S.W.3d 99, 106 (Mo. App. 2008) (same; collecting cases).

And this is not just some ethereal notion. Rule 74.06(c) even expressly requires that a motion for relief from judgment "shall be served upon the parties pursuant to Rule 54", just like a new lawsuit. *See* Martha Charepoo, 16 MO.PRAC. § 74.06(c):1 (3d ed. supp. Oct. 2017) (because of service requirement, "a motion made under [Rule 74.06] should be treated as if a new lawsuit is being filed").

Moreover, as Mr. Cullen explained in his opening brief, the independent quality of a post-finality Rule 74.06 motion also means it is subject to the same issue- and claim-preclusion restrictions as any other new lawsuit (Rel.Br. 31-32).

Ms. Scroggin's response – that she filed her motion under the same case number as the 2014 modification judgment – is without merit. Her

motion, premised on attacking the 2014 judgment's finding that that "For the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 39) because she now believes this is "not correct" (Ex. 46), sought relief from that prior finding due to mistake.

So, regardless of what Ms. Scroggin titled her 2017 motion, it was a Rule 74.06(b) motion seeking relief from a prior judgment on the merits, filed long after finality of that judgment, and so was an independent action. As Mr. Cullen explained, that independent action was barred by issue preclusion, claim preclusion, and the one-year statute of limitations in Rule 74.06(c) (Rel.Br. 23-33).

The trial court lacked authority to grant Ms. Scroggin's "motion to compel", warranting this Court's writ of prohibition.

2. Ms. Scroggin's motion is not analogous to a properly litigated contempt proceeding after notice and hearing.

Arguing that her "motion to compel" need not be viewed only as a Rule 74.06(b) motion, Ms. Scroggin cites *In re Marriage of Erickson*, 419 S.W.3d 836 (Mo. App. 2013). *Erickson*, a contempt case, just goes to show how misplaced Ms. Scroggin's position is.

In *Erickson*, the parties' dissolution decree set forth a simple formula for the husband's military retirement pay: "183 months of marriage while [H]usband in service x 50%" divided by "Number of actual months of Husband's Military Service when he retires (Retirement based upon rank of Major)." *Id.* at 841. The decree also made it the husband's duty on retirement to execute any documents to have the military payment authority pay that amount directly to the wife. *Id.* Unlike here, there were no further

modifications to the decree. *Id.* at 841-42. Also, it appears the husband in *Erickson* had been active-duty, not reserve. *Id.* There is no discussion anywhere in the Court of Appeals' decision of reservist or retirement "points".

After the husband retired and was entitled to retirement pay, the wife applied to the military for her share, using the decree's formula. *Id.* at 842. The military sent her a letter stating her benefit "was calculated to be 10.2080 percent" and that the husband had retired as a lieutenant colonel, not a major. *Id.* Solely from the formula, and without any reference to some number of points earned, the wife "believed that her monthly share of [the h]usband's retirement pay should have been 29.9% based upon [the h]usband's 306 months of service in the military and his having been married to [the w]ife for 183 of those months." *Id.*

The wife then moved to hold the husband in contempt of the requirement that he effectuate the formula in the decree. *Id.* at 841. The trial court issued a show-cause order, which was served on the husband, and scheduled a hearing. *Id.* at 841-42. The husband did not appear at the hearing, but the wife introduced evidence to support her claim that the husband had violated the requirement in the decree that he effectuate its formula. *Id.* at 842. The husband was held in contempt, required to effectuate the formula at the pay level of a lieutenant colonel, required to pay the wife back retirement pay, and ordered to pay the wife's attorney fees. *Id.* at 843. The Court of Appeals affirmed. *Id.*

Erickson is inapposite.

First, rather than challenging some portion of a prior decree as "not correct" and seeking relief from it, as Ms. Scroggin has here (Ex. 46), the wife in *Erickson* sought to enforce the prior decree itself in its entirety, against a specific act of the husband that violated that decree. Indeed, contempt presupposes "a valid judgment or order, which the [trial] court has jurisdiction to enter" and the movant is seeking to enforce. *Estate of Johnson v. Kranitz*, 168 S.W.3d 84, 92 (Mo. App. 2005).

Conversely, Ms. Scroggin is expressly challenging a finding and conclusion of the 2014 modification judgment (Ex. 46), not seeking to enforce it. Unlike a properly litigated contempt motion, which accepts the validity of all prior orders, Ms. Scroggin's motion to compel, attacking a material finding in the most recent judgment as "not correct" and seeking to re-litigate it, is barred by issue and claim preclusion, warranting this Court's writ of prohibition (Rel.Br. 23-33).

Second, the wife in *Erickson* only obtained her order granting her contempt motion after the production of evidence on the record under oath at a hearing. That was entirely proper. Indeed, it was required. *State ex rel. Picerno v. Mauer*, 920 S.W.2d 904, 910 (Mo. App. 1996).

Conversely, the trial court here summarily granted Ms. Scroggin's motion to compel without any hearing or any presentation of evidence. It lacked authority to do so, warranting this Court's writ of prohibition (Rel.Br. 37-43).

C. Mr. Cullen's motion to dismiss Ms. Scroggin's "motion to compel" was timely and proper.

Ms. Scroggin also argues Mr. Cullen "defaulted in responding to [her] Motion to Compel [*sic*], *thereby waiving his right to object to the granting of*" it (Resp.Br. 35) (emphasis in the original). She said this is because 16th Cir. Local Rule 33.5.1 only allows ten days in which to respond to motions, and Mr. Cullen filed his motion to dismiss after that (Resp.Br. 35).

This is without merit. Ms. Scroggin's motion began an independent action, in effect a new lawsuit, and as Rule 74.06(c) requires had to be served on Mr. Cullen in person. Under Rule 55.25, Mr. Cullen then had 30 days in which to answer or move to dismiss under Rule 55.27. Ms. Scroggin's motion never properly was served on Mr. Cullen. Regardless, his motion to dismiss filed within 30 days was timely.

First, Local Rule 33.5.1 does not apply to Ms. Scroggin's motion to compel. It only applies to "pre-trial motions", and presupposes the pleadings beginning a lawsuit already were filed. It does not govern answers to new actions, even those initiated by "motion", such as a motion for post-conviction relief under Rules 24.035 or 29.15. And it is well-established that a local court rule does not apply when it is inconsistent with a rule of this Court. *State ex rel. State of Missouri v. Riley*, 992 S.W.2d 195, 196 (Mo. banc 1999).

What Ms. Scroggin titled a "motion to compel", filed more than three years after the previous proceedings ended, procedurally was a request for relief from the 2014 modification judgment due to mistake under Rule 74.06(b). *Supra* at pp. 16-19; Rel.Br. 31-32. But this made it a new, independent proceeding – a new lawsuit. *Supra* at pp. 16-19.

Rule 74.06(c) requires that, as with any new proceeding, a motion under Rule 74.06(b) "shall be served upon the parties to the judgment pursuant to Rule 54." Unless the motion is made within 30 days of the judgment on a party represented by counsel, *Tompkins v. Baker*, 997 S.W.2d 84, 87-88 (Mo. App. 1999), and so is just an authorized post-judgment motion, *supra* at p. 17, this requires personal service on an individual. Rule 54.13.

> Service of process on an individual must be made
>
> by delivering a copy of the summons and petition personally to the individual or by leaving a copy of the summons and petition at the individual's dwelling house or usual place of abode with some person of the individual's family over the age of fifteen years ….

Id. And this must be done personally, "by a sheriff, or such sheriff's deputy", or a qualified special process server – a person "specially appointed by the court or the circuit clerk following procedures established by local court rules for service of process …." § 506.140, R.S.Mo. Service by anyone else, and in any other manner, is insufficient and invalid. *Maul v. Maul*, 103 S.W.3d 819, 821 (Mo. App. 2003).

Once this service of process is completed, Rule 55.25(a) allows the responding party 30 days in which to file an answer to the action. Rule 55.25(c) then provides that within those 30 days, the responding party may file a motion under Rule 55.27, which alters the response time until ten days after that motion is denied.

Ms. Scroggin failed to serve her motion to compel on Mr. Cullen as Rule 74.06(c) requires. At the time she filed it, the 2014 modification judgment had been final for more than three years, and Mr. Cullen was not represented

by counsel (Ex. 2, 43). But rather than obtaining personal service of her motion to compel as Rule 74.06(c), Rule 54.13, and § 506.140 require, Mr. Scroggin certified merely that she mailed it to Mr. Cullen first-class (Ex. 43). But service by mail – and *registered* mail at that – requires approval of the court or consent of the party. Rule 54.16; *see Collier v. Dunne*, 712 S.W.2d 38, 41 (Mo. App. 1986). Ms. Scroggin's mere service by first-class mail was invalid. *Id.*; *Maul*, 103 S.W.3d at 821.

Nonetheless, despite the invalid service, within 30 days after Ms. Scroggin filed her motion, Mr. Cullen still did file his motion to dismiss, which he expressly stated was "pursuant to Rule 55.27(a)(6)" (Ex. 100). Ms. Scroggin filed her motion to compel on December 7, 2017, and Mr. Cullen moved to dismiss January 2, 2018 (Ex. 42, 100).

So, service or not, Mr. Cullen met Rule 55.25(c) and filed a timely Rule 55.27 motion to dismiss Ms. Scroggin's "motion to compel", an independent proceeding under Rule 74.06(b). The trial court had no authority to overrule it (Rel.Br. 21-36). And even if Mr. Cullen's motion to dismiss could be overruled, the trial court had no authority to grant Ms. Scroggin's motion to compel summarily, without a hearing (Rel.Br. 37-43).

This Court's writ of prohibition now lies to enjoin Respondent Judge Harrell from enforcing his orders of January 10, 2018 and February 21, 2018 in the underlying case and doing anything other than vacating them and dismissing Ms. Scroggin's motion to compel or, alternatively, holding an evidentiary hearing on Ms. Scroggin's motion to compel. The Court should make its preliminary writ permanent.

Conclusion

The Court should make its preliminary writ permanent and enjoin Respondent from enforcing his orders of January 10, 2018 and February 21, 2018 and doing anything other than vacating those orders and dismissing the petitioner's motion to compel. Alternatively, the Court should make its preliminary writ permanent and enjoin Respondent from enforcing his orders of January 10, 2018 and February 21, 2018 and doing anything other than vacating those orders and holding an evidentiary hearing on the petitioner's motion to compel.

Respectfully Submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 5,959 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this reply brief, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that, on July 27, 2018, I filed a true and accurate Adobe PDF copy of this reply brief via the Court's electronic filing system, which notified the following of that filing:

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