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

BRIEF OF THE RELATOR

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Preliminary Statement

After dissolution of their marriage, the parties litigated a modification concerning the formula, based on "reservist points", by which Wife's portion of Husband's U.S. Air Force Reserve retirement pay would be calculated. After hearing evidence, in 2014 the court entered a judgment modifying the formula and finding Husband had accrued 2,134 points during the marriage.

More than three years later, in an unverified motion, Wife sought to compel Husband to authorize the Air Force to release to her "without limitation" the contents of his military, personal, medical, and other files from 1985 to 2009 and waive his right to privacy in them, even if it "would result in a clearly unwarranted invasion of [his] personal privacy". She said this was because from alleged, unspecified conversations with unnamed people, she now believed 2,134 was "not the correct number of points".

Husband moved to dismiss, but Respondent, the trial judge assigned to the case, denied his motion and summarily granted Wife's motion to compel.

Respondent's actions exceeded his authority, warranting this Court's writ of prohibition. Wife's attempt to re-litigate the 2014 judgment's finding of the number of points is barred by issue preclusion, claim preclusion, and Rule 74.06(c)'s one-year time limitation for seeking relief from judgment due to "mistake". The law of Missouri bound Respondent to dismiss it, and prohibition lies to compel him to do so. Alternatively, as Wife's motion was unverified and Husband disputed her allegations, the law entitled Husband at least to an evidentiary hearing before requiring him to give up his private information. Prohibition lies to require that hearing.

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Jurisdictional Statement

This is an original action in prohibition in which the relator challenges two non-appealable orders entered in the underlying case. The Honorable Kevin Harrell, in his official capacity as Circuit Judge of the Circuit Court of Jackson County, is the Respondent.

Because a circuit court is the respondent, adequate relief in prohibition cannot be afforded by application to any other circuit court. Rule 84.22(a). The relator previously filed a petition for writ of prohibition before the Missouri Court of Appeals, Western District, where venue lay under § 477.070, R.S.Mo. The Court of Appeals denied Relator's petition without opinion on March 6, 2018. A denial of a writ petition in the Court of Appeals without opinion is not transferrable to this Court. Instead, to seek further review, the relator must file a new petition in this Court.

Accordingly, the relator then filed a petition for writ of prohibition in this Court. On May 1, 2018, this Court sustained the relator's petition and issued its preliminary writ. The respondent filed his return on May 30, 2018. The relator now seeks this Court to make its preliminary writ permanent.

Therefore, under Mo. Const. art. V, § 4, Chapter 530, R.S.Mo., and Rules 97 and 84.22, *et seq.*, jurisdiction lies in this Court.

Statement of Facts

A. Background

Petitioner Janice Scroggin and Relator Jerry Cullen were married in 1985, and the Circuit Court of Jackson County dissolved their marriage in 2009 (Ex. 130-31; App. A9-10[1]). In the dissolution, the parties reached a marital settlement agreement ("the MSA"), which the trial court then approved (Ex. 51, 144; App. A9, A24).

Mr. Cullen had been an officer in the U.S. Air Force Reserve, and § II(B)(8)(a)(1) of the MSA addressed his Air Force retirement benefits (Ex. 61; App. A34). It provided Ms. Scroggin "shall receive a sum equivalent to one-half (1/2) of the benefit accrued from the date of the parties' marriage through and including the date" of the dissolution judgment (Ex. 61; App. A34). It further stated this "shall be calculated in accordance with the following formula: 1/2 [multiplied by] Husband's monthly benefits as and when received [multiplied by] [the total of] # of years of Husband's credit service during the marriage [divided by] # of years of Husband's credited service at retirement" (Ex. 61; App. A34). It also stated "[t]he parties intend that Wife's share of the USAF Retirement benefit be calculated in accordance with the formula as modified and approved in *Lynch v. Lynch*, 665 S.W.2d 20 (Mo. App. 1983)" (Ex. 61; App. A34).

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[1] Per Rule 84.24(g), the record citations in this brief are to the exhibits attached to Mr. Cullen's writ petition and to this brief's appendix. Per Rule 97.03, Mr. Cullen consecutively paginated the exhibits. "Ex. X" refers to page X of the collective exhibits.

Section VII(D) of the MSA, titled "Execution & Delivery of Documents", then stated (Ex. 82-83; App. A55-56):

> 1. The parties will execute any and all documents necessary to carry out the provisions of this Agreement. In the event that either party refuses to execute documents required herein to transfer title to property, each party's signature at the end of this Agreement shall operate as an irrevocable power of attorney to the other spouse for the limited purpose of transferring title to property as provided in this Agreement.
>
> 2. Each of the parties agree that each will deliver to the other party hereto simultaneously with the execution of this Agreement all records or documents necessary to enable the party receiving the asset to determine the basis and holding period for gain or loss in accordance with I.R.S. Temp. Regs. Section 1.1041-IT(a), A-2.

Four years later, in 2013, Ms. Scroggin asked the court under "Rule 74.06(a)" to modify the MSA to use a different formula for the Air Force retirement calculation, substituting "# reservist points accrued by Husband during the marriage [divided by] # of total reservist points earned by Husband" for the "years of service" in the MSA's formula (Ex. 4-6). She alleged this was because Mr. Cullen now had become eligible for payout but the Air Force told her she could not receive any unless the judgment were clarified with this different formula (Ex. 5-6, 10). Respondent Judge Kevin Harrell was assigned to hear Ms. Scroggin's motion to modify (Ex. 15) and has remained the trial judge assigned to the case since then.

Ms. Scroggin's motion to modify was not served on Mr. Cullen, so he did not respond, and Respondent then entered a judgment modifying the formula in the manner Ms. Scroggin had requested and finding she was entitled to

half of any retirement payments Mr. Cullen already had received (Ex. 1, 12-15). Respondent also awarded Ms. Scroggin attorney fees and costs for the modification, holding Mr. Cullen had failed to execute a document, in violation of the MSA's requirement in § VII(D) (Ex. 15).

Three days later, Mr. Cullen moved *pro se* to set aside the modification judgment, arguing he had not received sufficient notice of Ms. Scroggin's motion to modify, he had not yet met Air Force payout requirements and would not until he turned 60 in March 2017, and he had not breached the MSA (Ex. 17). He asked the court to enter a new judgment of modification correcting the MSA's formula as Ms. Scroggin requested but not finding he had begun receiving retirement pay, had breached the MSA, or owed Ms. Scroggin any fees or costs (Ex. 25).

Respondent granted Mr. Cullen's request and set aside the modification judgment (Ex. 38). After further proceedings and an evidentiary hearing, during which Mr. Cullen remained *pro se* (Ex. 1-2), in August 2014 Respondent issued a "Judgment and Order Clarifying Marital Settlement Agreement" (Ex. 39; App. A61).

In the judgment, Respondent corrected the formula as the parties requested, found Mr. Cullen "will be eligible to receive Reserve retired pay … on his 60th birthday", March 9, 2017, and found that "[f]or the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 40; App. A62). This number was based on a letter from the Air Force (Ex. 88), which had been admitted into evidence without objection (Ex. 46, 102, 115-16, 125-26).

B. 2017/2018 proceedings

1. Ms. Scroggin's motion to compel

More than three years later, and citing no authority, in December 2017 Ms. Scroggin moved the trial court to order Mr. Cullen

> to provide to [her] any and all correspondence sent to [him] related to, or arising out of, the number of retirement points earned by [him] and to execute and deliver to Petitioner such authorizations, releases and waivers that Petitioner reasonably submits to Respondent, including, without limitation, the Authorization for Release of Military Records to Attorney of My Former Spouse, attached hereto as Exhibit A ….

(Ex. 42). The motion neither was verified nor supported by affidavit (Ex. 43).

The proposed authorization Ms. Scroggin attached, which she requested the court order Mr. Cullen to sign, stated:

> I hereby authorize and direct the release from my files in the possession of the Department of the Air Force, including, without limitation, my military file, my personal file, my medical file and any of my other files in the possession of the Department of the Air Force, of all protected information, in any form, whatsoever, to [the petitioner's attorney], who is the attorney of my former spouse, Janice Scroggin, that relate to, or arise out of, the total number of retirement points earned by me and the number of retirement points earned by me from the date of my marriage to Ms. Scroggin (20 April 1985) through the date of my separation from Ms. Scroggin (30 May 2009). The documents shall include, but not be limited to, notes, e-mails, correspondence, worksheets, retirement point computation documents and retirement point audit documents. This Authorization specifically authorizes and directs the copying of said documents and production and delivery of said copies of the documents directly to [the petitioner's attorney] at the address set forth above which potentially and/or actually would or could be protected under the Freedom of Information Act Exemption 6 (5 U.S.C. 552(b)(6)). In

> that regard, I hereby waive my rights to privacy in regard to the production of the documents described above to [the petitioner's attorney], even if said production would result in a clearly unwarranted invasion of my personal privacy.

(Ex. 44; App. A6).

Ms. Scroggin attached suggestions, also unverified, in which she stated this request was because while in the 2013/2014 modification Mr. Cullen provided a letter from the Air Force stating he had earned the 2,134 points recounted in the August 2014 judgment, she "now believes that [2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46, 88). She alleged this was because she had contacted an unnamed person at Defense Finance and Accounting Service ("DFAS") who "advised [her] that [Mr. Cullen] had earned a total of 5,490 reservist points" (Ex. 47). She alleged that when she asked for an accounting of this, she was referred to DFAS's legal department, where another unnamed person "would not speak specifically to the accuracy of the number of points earned during the marriage," but "concern was expressed … over the contents of that letter … that [Mr. Cullen] has earned 2,134 points during the marriage" (Ex. 47).

Ms. Scroggin alleged her counsel then formally asked the DFAS legal department whether 2,134 was the accurate number and whether the letter provided in the 2013/2014 proceedings was authentic, but DFAS treated this as a Freedom of Information Act request and then refused to answer under an exception to that act (Ex. 47-48, 89-90). She alleged some unnamed person at DFAS then "advised [her] counsel that it had sent [Mr. Cullen] a letter, possibly dated March 23, 2017, notifying [him] of a correction made to

the number of retirement points earned by [him] during the marriage (the 'Correction Letter')" (Ex. 48). She did not attach any proof of this (Ex. 48). She also alleged that when her counsel asked Mr. Cullen about this "Correction Letter", he "did not deny [its] existence" (Ex. 48, 93, 95, 97).

2. Further proceedings

Mr. Cullen, through new counsel, moved to dismiss Ms. Scroggin's motion (Ex. 100). He argued it failed to state a cause of action, as no authority allowed the court to grant Ms. Scroggin's request and the 2014 modification judgment adjudicated the number of retirement points, meaning her claim was barred by collateral estoppel and res judicata (Ex. 103). He argued that if her motion was trying to set aside the 2014 modification judgment for mistake, fraud, or irregularity, and seek discovery on that request, the motion was out of time because Rule 74.06(c) set a limitation period on doing so of one year, and it had been more than three since the 2014 modification judgment (Ex. 104).

On January 10, 2018, Respondent summarily denied Mr. Cullen's motion to dismiss (Ex. 107; App. A1). Simultaneously, and without any hearing (Ex. 2-3), Respondent entered an order making findings of fact and then ordering Mr. Cullen to sign the authorization Ms. Scroggin had requested (Ex. 109-12; App. A3-6).

Mr. Cullen moved to set aside the order to execute, to reconsider both it and the order of dismissal, and at the very least to order an evidentiary hearing on Ms. Scroggin's allegations (Ex. 113). He repeated his arguments from the motion to dismiss and argued Respondent should have dismissed

Ms. Scroggin's motion (Ex. 113-14). But he also argued that even if Respondent did not have to dismiss her motion, at the very least he could not just grant the order to execute and, as a matter of due process, instead had to afford him the opportunity to be heard and contest Ms. Scroggin's allegations, which he disputed and which were based solely on inadmissible hearsay (Ex. 114-18). He specifically disputed that he ever was sent any "Correction Letter" (Ex. 115). As well, he argued the authorization he was ordered to execute was overbroad and in violation of the federal Health Insurance Portability and Accountability Act ("HIPAA") (Ex. 114).

In response (Ex. 120-29), Ms. Scroggin argued the authorization was appropriately limited by stating it went to records "that relate to, or arise out of, the total number of retirement points earned by me and the number of retirement points earned by me from the date of my marriage to Ms. Scroggin (20 April 1985) through the date of my separation from Ms. Scroggin (30 May 2009)" (Ex. 121). She argued the authority for her motion to compel was the language in the 2009 dissolution judgment requiring the parties to execute all documents necessary to carry it out, as well as § VII(D) of the MSA (Ex. 121-22). She also argued Rule 74.06(d)'s "independent action in equity" provided authority for her to relieve her from the prior judgment or set it aside outside of Rule 74.06(c)'s time limitations (Ex. 127). She argued this was because she believed it was possible the Air Force letter recounting 2,134 points was not authentic, so Rule 74.06(d) would provide her an avenue of relief "if [Mr. Cullen] has lied to [her] and the Court about the number of points that he earned during the marriage" (Ex. 125, 127).

Ms. Scroggin also argued "no hearing is necessary" because "[q]uery why [*sic*] the Court would need to make findings when its Order clearly mandates that [Mr. Cullen] comply with the Court's previously entered Judgment", and her allegations were not based on hearsay because her statements were "not offered for the proof of the matter stated" but "for proof that there is other information in existence" (Ex. 127-28).

Mr. Cullen replied, arguing that the number of points was disposed of in the prior judgment and so was barred from re-litigation, hearsay and innuendo cannot support the reopening of discovery on adjudicated claims to try to discover further evidence, and if Ms. Scroggin had any doubt about the authenticity of the Air Force's 2,134-points letter from 2014, she could have remedied that in discovery at that time (Ex. 147).

On February 21, 2018, Respondent denied Mr. Cullen's request to set aside the orders of January 10, for reconsideration, or for a hearing (Ex. 148; App. A7).

On March 2, 2018, Mr. Cullen sought a writ of prohibition in the Missouri Court of Appeals, Western District directing Respondent to vacate his orders of January 10 and February 21, which that court denied on March 6, 2018 (Ex. 150). The next day, he filed a petition in this Court seeking the same relief. This Court issued a preliminary writ on May 1, 2018, and Respondent timely filed a return.

Relator now seeks this Court to make its preliminary writ permanent.

Points Relied On

I. Mr. Cullen is entitled to an order prohibiting Respondent from doing anything in the action below other than vacating his orders issued on January 10, 2018, denying Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel Mr. Cullen to sign her requested authorization and granting her motion to compel, and instead entering an order sustaining Mr. Cullen's motion to dismiss *because* the January 10 orders exceed Respondent's authority and Mr. Cullen is entitled to an order dismissing Ms. Scroggin's motion to compel *in that* the trial court determined the number of Mr. Cullen's retirement points on the merits in 2014 and Ms. Scroggin's 2017 motion to compel seeking to re-litigate that number is barred by issue preclusion, claim preclusion, and the one-year limitation of Rule 74.06(c), her motion to compel does not qualify as an independent action in equity under Rule 74.06(d), and the 2009 dissolution judgment and the MSA do not provide authority to compel Mr. Cullen to execute Ms. Scroggin's requested authorization.

State ex rel. Willey v. Gum, 902 S.W.2d 857 (Mo. App. 1995)
Orem v. Orem, 149 S.W.3d 589 (Mo. App. 2004)
In re Marriage of Rolfes, 187 S.W.3d 355 (Mo. App. 2006)
T.B. III v. N.B., 478 S.W.3d 504 (Mo. App. 2015)
Rule 74.06

II. Mr. Cullen is entitled to an order prohibiting Respondent from doing anything in the action below other than vacating his orders issued on January 10, 2018, summarily granting Ms. Scroggin's motion to compel Mr. Cullen to sign her requested authorization, as well as his February 21, 2018 order refusing a hearing on Ms. Scroggin's motion *because* a motion for relief from judgment is not self-proving and only can be based on competent evidence, a taking of liberty or property requires a hearing, Mr. Cullen is entitled at the very least to a hearing on Ms. Scroggin's motion to compel, and the January 10 and February 21 orders exceed Respondent's authority and *in that* Respondent summarily granted Ms. Scroggin's motion to compel that sought to re-litigate the number of Mr. Cullen's retirement points in the 2014 modification judgment and refused a hearing, but Ms. Scroggin's motion was unverified and did not attach any affidavits, and Mr. Cullen disputed its allegations.

Johnson v. Brown, 154 S.W.3d 448 (Mo. App. 2005)

Partridge v. Anglin, 951 S.W.2d 737 (Mo. App. 1997)

State ex rel. Mo.-Neb. Express, Inc. v. Jackson, 876 S.W.2d 730 (Mo. App. 1994)

State ex rel. Kairuz v. Romines, 806 S.W.2d 451 (Mo. App. 1991)

Argument

Standard of Review for Both Points

A writ of prohibition is an "extraordinary remedy" that

> is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003). A writ of prohibition is proper "to avoid useless suits and thereby minimize inconvenience, and to grant relief when proper under the circumstances at the earliest possible moment in the course of litigation." *State ex rel. Hamilton v. Dalton*, 652 S.W.2d 237 (Mo. App. 1983).

The interpretation of this Court's rules is a question of law reviewed *de novo*. *State v. Ford*, 351 S.W.3d 236, 238 (Mo. App. 2011). The Court's intent is determined from the rule's language, with words used given their plain, ordinary meaning. *Id.*

"[W]hether a claim is barred by the doctrine of *res judicata* … is a question of law" reviewed *de novo*. *Johnson Controls, Inc. v. Trimmer*, 466 S.W.3d 585, 590 (Mo. App. 2015). "Whether [a] claim … is barred by collateral estoppel" also "is a question of law" reviewed *de novo*. *Bresnahan v. May Dept. Stores Co.*, 726 S.W.2d 327, 329 (Mo. banc 1987).

I. Mr. Cullen is entitled to an order prohibiting Respondent from doing anything in the action below other than vacating his orders issued on January 10, 2018, denying Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel Mr. Cullen to sign her requested authorization and granting her motion to compel, and instead entering an order sustaining Mr. Cullen's motion to dismiss *because* the January 10 orders exceed Respondent's authority and Mr. Cullen is entitled to an order dismissing Ms. Scroggin's motion to compel *in that* the trial court determined the number of Mr. Cullen's retirement points on the merits in 2014, and Ms. Scroggin's 2017 motion to compel seeking to re-litigate that number is barred by issue preclusion, claim preclusion, and the one-year limitation of Rule 74.06(c), her motion to compel does not qualify as an independent action in equity under Rule 74.06(d), and the 2009 dissolution judgment and the MSA do not provide authority to compel Mr. Cullen to execute Ms. Scroggin's requested authorization.

Preservation Statement

This is an original writ proceeding, and so is not an appellate process requiring preservation. *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 78 (Mo. banc 1974). Still, this point is preserved for appellate review. Mr. Cullen raised the arguments in it below in opposition to Ms. Scroggin's motion to compel and then again in his motion to set aside the order denying his motion to dismiss (Ex. 100, 103-04, 113-18, 147). He then presented them to this Court in his petition for writ of prohibition (pp. 13-23, 26-29).

* * *

The law of Missouri is that the only procedure for seeking relief from a judgment and discovery on that request is a Rule 74.06 motion, which for claims of "mistake" must be filed within one year of the judgment. And in any case, the doctrines of issue preclusion and claim preclusion bar re-litigation of the correctness of a finding in a judgment. Here, more than three years after a judgment finding on the merits the number of Mr. Cullen's military retirement points, Ms. Scroggin moved to compel him to give her access to all his private military records to re-litigate that number, which she now asserted was "not correct". Rather than dismissing her request as barred by issue preclusion, claim preclusion, and Rule 74.06's limitation period, Respondent granted it. This exceeded Respondent's authority, warranting this Court's writ of prohibition.

More than three years after the 2014 modification judgment, which expressly found that "[f]or the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 40; App. A60), Ms. Scroggin sought – in an unverified motion – to compel Mr. Cullen to sign an invasive authorization for the release of all records from his Air Force military, personal, medical, or any other files, "even if" this "would result in a clearly unwarranted invasion of" his privacy (Ex. 44; App. A6). She said this was necessary because she believed, based solely on alleged conversations with unnamed parties at DFAS, that the 2,134-point number was not correct (Ex. 46-48).

The well-established law of Missouri is that the trial court had no authority to entertain Ms. Scroggin's motion to compel. The 2014

modification judgment was long final by the time of her motion to compel in late 2017, so re-litigating the 2,134-point number was barred by issue preclusion or claim preclusion. And if Ms. Scroggin was requesting discovery to seek relief from the 2014 modification judgment based, as she said, on a claim of mistake, her claim was time-barred by Rule 74.06(c), which gave her one year in which to make it.

Either way, the law of Missouri bound Respondent to deny Ms. Scroggin's motion to compel. Respondent's January 10, 2018 orders refusing to dismiss it, and instead granting it summarily, exceeded his authority. This Court's writ of prohibition now lies to enjoin Respondent from doing anything in the action below other than vacating those orders and instead sustaining Mr. Cullen's motion to dismiss.

A. The doctrine of issue preclusion bars Ms. Scroggin's claim more than three years after the 2014 judgment that "[2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage", the sole basis for her motion to compel, warranting a writ of prohibition directing Respondent to dismiss her motion.

First, the law of Missouri is that Ms. Scroggin's motion to compel is barred by the doctrine of issue preclusion, formerly called "collateral estoppel".

This doctrine is "designed to further judicial economy by avoiding continual trials on the same issue" and "precludes parties from re-litigating issues that have been previously adjudicated." *Bd. of Educ. v. City of St. Louis*, 879 S.W.2d 530, 532 (Mo. banc 1994). It means "a fact appropriately

determined in one lawsuit is given effect in another …." *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984).

> Issue preclusion involves four factors:
>
> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication …. Most courts have added a fourth factor to the three enunciated … whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit ….

Id. (citation omitted).

Applying these factors, Ms. Scroggin's claim undergirding her motion to compel, concerning the number of reservist points Mr. Cullen accrued during the marriage, is barred by issue preclusion.

First, the issue in Ms. Scroggin's motion to compel – the correct number of points Mr. Cullen earned during the marriage – is identical with the issue in the 2014 modification judgment. In her motion to compel, Ms. Scroggin claimed "[2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46). But in the 2014 modification judgment, after hearing the evidence, the trial court expressly found that "[f]or the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 40; App. A60).

Second, the 2014 modification judgment was on the merits. It decided a motion to modify, and the trial court heard evidence on the issue of the appropriate formula, the payout date, and the number of points Mr. Cullen

accrued (Ex. 1-2, 39-40; App. A59-60). It was a final judgment that disposed of all pending claims between all parties and was appealable. Rule 74.01(a).

Third, Ms. Scroggin is the same party in both the 2014 modification and the motion to compel.

Finally, Ms. Scroggin had a full, fair opportunity in the 2013-2014 modification proceedings to litigate the issue of the number of points Mr. Cullen earned during the marriage. She had counsel, and Mr. Cullen did not (Ex. 1-2, 41). She could have taken discovery on Mr. Cullen's military retirement account. There was nothing stopping her from litigating this issue to its fullest.

So, issue preclusion bars Ms. Scroggin's claim more than three years after the 2014 modification judgment that "[2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46), the sole basis for her motion to compel. Ms. Scroggin had a full and fair opportunity to litigate the issue of whether 2,134 was the correct number in the 2013-2014 modification proceedings. As a matter of law, she cannot re-litigate it now.

Respondent therefore should have dismissed Ms. Scroggin's motion to compel. *See, e.g.*:

- *Orem v. Orem*, 149 S.W.3d 589, 592 (Mo. App. 2004) (issue preclusion precluded husband from re-litigating whether life insurance policy was marital property, where dissolution judgment held it was and husband "had a full and fair opportunity to litigate the issue of whether the life insurance policy was marital property in the dissolution proceeding");

- *Mo. Mexican Prods., Inc. v. Dunafon*, 873 S.W.2d 282, 284-87 (Mo. App. 1994) (same re: re-litigation of possession of antique automobile, even through replevin action); and
- *Halbrook v. Halbrook*, 740 S.W.2d 687, 689-90 (Mo. App. 1987) (same re: finding there was no marital property; trial court had no authority to entertain equitable action asserting otherwise; reversed).

Accordingly, this Court's writ of prohibition lies to order Respondent to vacate his January 10, 2018 orders and instead grant Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel. *See, e.g.*:

- *State ex rel. Hines v. Sanders*, 803 S.W.2d 649, 653 (Mo. App. 1991) (issuing writ prohibiting trial court from doing anything but dismissing criminal prosecution where barred by issue preclusion); and
- *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 502-03 (Mo. App. 1985) (same re: legal malpractice action).

B. The doctrine of claim preclusion also bars Ms. Scroggin's claim, equally warranting a writ of prohibition directing Respondent to dismiss her motion to compel.

Second, the law of Missouri is that Ms. Scroggin's motion to compel also is barred by the doctrine of claim preclusion, formerly called "res judicata."

Claim preclusion is broader than issue preclusion. "The distinction between collateral estoppel and res judicata is that the former applies only to issues previously litigated; however, res judicata applies to every point related to the subject matter, including those which might have been brought forward at the time." *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652, 656 (Mo. App. 1994).

To bar subsequent litigation, claim preclusion requires "four identities" to be present in both cases: (1) the identity of the thing sued for; (2) the identity of the cause of action; (3) the identity of the persons and parties to the action; and (4) the identity of the quality of the person for or against whom the claim is made. *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991).

All four identities are present here.

First, the "identity of the thing sued for" is satisfied when the "thing sued for" in both actions is the same relief arising out of the same facts. *Jordan v. City of Kan. City*, 929 S.W.2d 882, 886 (Mo. App. 1996). Even where a subsequent action seeks a different measure of damages, "the thing sued for" is identical. *Palmore v. City of Pac.*, 393 S.W.3d 657, 666 (Mo. App. 2013). Here, Ms. Scroggin sought precisely the same relief in both the 2014 modification and her motion to compel: a clarification of her entitlement to Mr. Cullen's retirement status (Ex. 4, 40, 42).

Second, the "identity of the cause of action" does not mean the "names" of the causes of action at issue, but rather "centers on 'facts' that form or could form the basis of the previous adjudication." *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002). Here, Ms. Scroggin filed her motion to compel in the same modification case, with the same case number, as the 2014 modification (Ex. 1-2). The number of points Mr. Cullen accrued was an issue in the 2014 modification and was decided as 2,134 (Ex. 40; App. A60). Ms. Scroggin now alleges this was "not the correct" number

(Ex. 46). The facts that form or could form the basis of the previous adjudication – the number of points – are identical. This identity is met.

Third, the "identity of the parties" means that the parties must be either the same or in privity with one of the parties to the previous action. *Palmore*, 393 S.W.3d at 667. Here, the parties are the same in both actions. This identity is met.

Finally, the "quality of the person against whom the claim is made" does not mean the identity of the parties, but rather the status of the parties to the action. *Barkley v. Carter Cty. State Bank*, 791 S.W.2d 906, 913 (Mo. App. 1990). If the claim is made against the same person in both actions in his or her individual capacity, this element is satisfied. *Id.* Here, Mr. Cullen has the same status in both the 2014 modification and the 2017 motion to compel: the respondent in a domestic case in his individual capacity. This identity is met.

Beyond the four identities, res judicata "can only be applied where a final judgment on the merits has been rendered involving the same claim sought to be precluded in the cause in question." *Brown v. Simmons*, 335 S.W.3d 481, 485 (Mo. App. 2010). "A judgment on the merits is one rendered after argument and investigation and when it is determined which party is right, as distinguished from a judgment rendered upon some preliminary or technical point." *Id.* As Mr. Cullen explained *supra* at pp. 24-25, the 2014 modification judgment plainly was a judgment on the merits of the number of reservist points he had accrued during the marriage.

Had Ms. Scroggin desired to litigate the correctness of the number of points Mr. Cullen accrued in the 2014 modification further, she certainly could have. She could have sought discovery on Mr. Cullen's military retirement account and questioned the 2,134 number there. And if the trial court still denied her claim and found that number, she could have appealed.

But now, more than three years later, claim preclusion bars her argument that "[2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46), which is the sole premise for her motion to compel.

For this reason, too, Respondent therefore should have dismissed her motion to compel. *See, e.g.*:

- *Rischer v. Helzer*, 473 S.W.3d 188, 192-93 (Mo. App. 2015) (claim preclusion barred wife's argument in opposition to specific performance suit that dissolution judgment's treatment of husband's pension benefits violated law);
- *In re Marriage of Rolfes*, 187 S.W.3d 355, 357-58 (Mo. App. 2006) (reversing grant of motion for relief from divorce decree filed two years after decree seeking to re-litigate portion of property division, as "the judgment was final and res judicata as to all property with which it dealt"; "a trial court's order 'as it affects distribution of marital property shall be a final order not subject to modification'" (citation omitted));
- *In re Marriage of Kenney*, 137 S.W.3d 487, 491 (Mo. App. 2004) (same); and

- *Yates v. Yates*, 680 S.W.2d 361, 362 (Mo. App. 1984) (claim preclusion barred husband's conversion action for property awarded to wife in dissolution judgment, so husband could not re-litigate the possession of that property).

Accordingly, this Court's writ of prohibition lies to order Respondent to vacate his January 10, 2018 orders and instead grant Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel. *See, e.g.*:

- *State ex rel. Conners v. Miller*, 194 S.W.3d 911, 913-14 (Mo. App. 2006) (issuing writ prohibiting trial court from doing anything except dismissing action to require husband to submit to paternity test where barred by claim preclusion);
- *State ex rel. Tinnon v. Mueller*, 846 S.W.2d 752, 756-59 (Mo. App. 1993) (same re: accounting and recovery action);
- *State ex rel. Shea v. Bossola*, 827 S.W.2d 722, 723-24 (Mo. App. 1992) (same re: employee's appeal of layoff before Civil Service Commission);
- *State ex rel. Vicker's, Inc. v. Teel*, 806 S.W.2d 113, 117-18 (Mo. App. 1991) (same re: action for recovery of disability benefits and vexatious refusal);
- *State ex rel. Agri-Trans Corp. v. Nolan*, 756 S.W.2d 203, 207 (Mo. App. 1988) (same re: personal injury action); and
- *Hamilton*, 652 S.W.2d at 239 (same re: personal injury action; a trial court has no authority to proceed in an action barred by a preclusive doctrine, warranting a writ of prohibition).

C. Respondent also lacked authority under Rule 74.06 to entertain Ms. Scroggin's motion to compel, equally warranting a writ of prohibition directing him to dismiss it.

Third, the law of Missouri is that Ms. Scroggin's motion to compel seeking discovery to pursue relief from the 2014 modification judgment's finding of the number of Mr. Cullen's retirement points is procedurally barred under Rule 74.06(b). A motion for relief from judgment under that rule does not undo issue or claim preclusion. Even if it could, her motion is outside the one-year time bar of Rule 74.06(c). And her motion does not allege extrinsic fraud to constitute an authorized independent action in equity outside the one-year time bar under Rule 74.06(d).

1. Under Rule 74.06(b), a request for relief from a judgment does not allow re-litigation of a claim barred by issue or claim preclusion.

Generally, in Missouri a party's "only means of seeking relief from [a] judgment" on the merits of an issue "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, inadvertence, surprise, or excusable neglect ….'" *Willis v. Placke*, 903 S.W.2d 219, 220 (Mo. App. 1995).

So, generally, where a party alleges that a "mistake" led to the judgment, it can seek relief from that judgment under this rule. *State ex rel. Willey v. Gum*, 902 S.W.2d 857, 859 (Mo. App. 1995). This is what Ms. Scroggin seeks. The 2014 modification judgment expressly found that "[f]or the period of the parties' marriage (April 30, 1985 to May 30, 2009), [Mr. Cullen] earned 2,134 retirement points" (Ex. 40; App. A60). As the basis for her motion to compel, Ms. Scroggin claims this was mistaken, as she "now

believes that [2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46).

But a motion under Rule 74.06(b) "cannot be used to evade the effects of res judicata and collateral estoppel." *Cain v. Porter*, 309 S.W.3d 387, 391 (Mo. App. 2010) (citation omitted). To the contrary, if a party has "a full and fair opportunity to litigate [an] issue, [and] did not appeal the" prior judgment that decided the issue, that prior "judgment is final and collateral estoppel precludes [that party] from re-litigating the issue … in [a] Rule 74.06 motion" for relief from the judgment. *Id.* (citation omitted).

This is true even where the movant alleges actual fraud or perjury as her grounds for Rule 74.06(b) relief. "The law is well settled that a court is not authorized to set aside a judgment founded on a fraudulent instrument or *even upon perjured testimony*, or for any other matter … *which could have been presented at the trial* which resulted in the judgment attacked." *State ex rel. Mo.-Neb. Express, Inc. v. Jackson*, 876 S.W.2d 730, 733 (Mo. App. 1994) (citation omitted) (emphasis in the original).

Ms. Scroggin plainly had a full and fair opportunity in the 2013-2014 modification proceedings to litigate whether 2,134 points was the correct number that Mr. Cullen earned during the marriage. *Supra* at pp. 24-25. Therefore, under Rule 74.06(b), the only procedural vehicle by which she could seek relief from the 2014 modification judgment, issue and claim preclusion still bar her argument that any such relief is appropriate because of a mistake in the number of points the 2014 modification judgment.

2. In any case, Ms. Scroggin's motion to compel, seeking relief from the 2014 modification judgment due to a perceived mistake in it, is time-barred under Rule 74.06(c), warranting a writ of prohibition directing Respondent to dismiss it.

Even if Ms. Scroggin somehow could allege mistake in the 2014 modification judgment under Rule 74.06(b) despite issue and claim preclusion barring her from doing so, she still would run afoul of the one-year time limitation for bringing such a motion. *See* Rule 74.06(c). "Rule 74.06(c) … requires that a claim of mistake leading to [a] judgment under Rule 74.06(b)(1) be filed within a reasonable time and not longer than one year following entry of the judgment." *Willey*, 902 S.W.2d at 859.

The 2014 modification judgment finding Mr. Cullen "earned 2,134 retirement points" during the marriage was in August 2014 (Ex. 39-40; App. A59-60). Ms. Scroggin's motion to compel alleging the 2,134 "is not the correct number of points" was in December 2017, some three years and four months later (Ex. 42). Consequently, even if allowed, it is time-barred.

Accordingly, the trial court should have dismissed Ms. Scroggin's motion, and this Court's writ of prohibition lies to order Respondent to vacate his January 10, 2018 orders and instead grant Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel. *See, e.g.*, *Willey*, 902 S.W.2d at 859. In *Willey*, the "mistake" alleged to obtain relief from a judgment was not cognizable as a mistake under Rule 74.06(b). *Id.* And even if it were, the motion for relief came more than a year after the judgment, making it time-barred under Rule 74.06(c). *Id.* The trial court lacked authority to proceed, so the Court of Appeals issued a writ of prohibition enjoining it from proceeding on the motion. *Id.* This Court should do the same here.

3. Ms. Scroggin's motion to compel is not an independent action in equity under Rule 74.06(d), because it does not contain any of the required elements for such an action and the only "fraud" she (belatedly) suggested below would be intrinsic, not extrinsic as required.

"[A]fter one year from the date of a final judgment, the judgment is subject to attack only by an independent action in equity upon a demonstration of extrinsic fraud when the basis of relief is fraud." *Cody v. Old Republic Title Co.*, 156 S.W.3d 782, 748 (Mo. App. 2004) (citing Rule 74.06(d)). "Extrinsic fraud is limited to the fraudulent procurement of a judgment; it must relate to the manner in which the judgment was obtained and not the merits of the judgment itself." *T.B. III v. N.B.*, 478 S.W.3d 504, 509 (Mo. App. 2015). And to bring such an action, the complaining party must specifically allege the extrinsic fraud and must "plea[d and] prov[e] he was free of fault, neglect, or inattention" to the case. *Id.* The failure specifically to allege any one part of this "is fatal to the action." *Id.*

Below, Ms. Scroggin briefly argued in response to Mr. Cullen's motion to set aside order compelling him to sign the authorization that Rule 74.06(d)'s "independent action in equity" authorized relieving her from the 2014 judgment outside of Rule 74.06(c)'s time limitations (Ex. 127). She argued this was because she believed the letter recounting 2,134 points admitted in the 2014 modification might not be authentic, so Rule 74.06(d) would provide her relief "if [Mr. Cullen] has lied to [her] and the Court about the number of points that he earned during the marriage" (Ex. 125, 127).

This is without merit. Ms. Scroggin's motion to compel and its accompanying suggestions did not invoke Rule 74.06(d) (Ex. 42-50). Nowhere

did they allege any kind of fraud, let alone make specific allegations that Mr. Cullen or someone else committed extrinsic fraud to procure the 2014 modification judgment (Ex. 42-50). Indeed, neither "fraud" nor any related term appears anywhere in her motion or suggestions (Ex. 42-50). Nowhere did she allege she was free of fault, neglect, or inattention (Ex. 42-50). Instead, all she ever alleged was she "now believes that [2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage", and he and DFAS would not tell her otherwise in 2017 (Ex. 46-50).

The law of Missouri is that Ms. Scroggin's motion to compel was not a valid claim under Rule 74.06(d), and her failure to allege either a specific extrinsic fraud that procured the earlier judgment or her lack of fault, neglect, or inattention is fatal to such a claim. *T.B. III*, 478 S.W.3d at 509.

Moreover, as a matter of law Ms. Scroggin's belated suggestion – with no foundation – that "Mr. Cullen … lied to [her] and the Court about the number of points that he earned during the marriage" (Ex. 127) would not even be extrinsic fraud. It would be intrinsic fraud, a Rule 74.06(b) motion for which would have to be brought within one year of the judgment: "[f]alse averments in court pleadings, perjured testimony in court, and fabricated evidence before a court are intrinsic fraud." *T.B. III*, 478 S.W.3d at 509.

So, even if Ms. Scroggin's unsupported, unverified, unfounded allegation that Mr. Cullen "lied to her and the Court" in the 2013/2014 modification were true (and it is not), it would be intrinsic fraud, not extrinsic. The motion still would fall under Rule 74.06(b) and be time-barred under Rule 74.06(c). *T.B. III*, 478 S.W.3d at 509.

D. The standard language in the 2009 judgment and the MSA requiring parties to execute all documents to effectuate the court's orders do not provide Respondent authority to compel Mr. Cullen to execute Ms. Scroggin's authorization.

Finally, Ms. Scroggin also briefly argued below that the authority for her motion to compel was the language in the 2009 dissolution judgment requiring the parties to execute all documents necessary to carry it out, as well as § VII(D) of the MSA, which required this, too (Ex. 121-22).

This is without merit. Ms. Scroggin is not alleging Mr. Cullen failed to sign some document to allow her to obtain the portion of his Air Force retirement to which the prior judgment found she was entitled. Instead, she is alleging the 2014 judgment is "not correct", she should be entitled to *more* than the amount it found, and she seeks some form of discovery to prove so and then set the 2014 judgment aside.

The law of Missouri does not allow Ms. Scroggin to re-litigate that now long-final judgment, and Respondent exceeded his authority in permitting her to do so. Her motion to compel, arguing the number of points the 2014 modification judgment found was not correct, is barred by issue preclusion and claim preclusion. Rule 74.06(b) does not provide her a way around those doctrines, and even if it did her motion would be time-barred under Rule 74.06(c).

Instead, the law of Missouri bound Respondent to dismiss Ms. Scroggin's motion to compel. This Court's writ of prohibition therefore lies to order Respondent to vacate his January 10, 2018 orders and instead grant Mr. Cullen's motion to dismiss Ms. Scroggin's motion to compel.

II. Mr. Cullen is entitled to an order prohibiting Respondent from doing anything in the action below other than vacating his orders issued on January 10, 2018, summarily granting Ms. Scroggin's motion to compel Mr. Cullen to sign her requested authorization, as well as his February 21, 2018 order refusing a hearing on Ms. Scroggin's motion *because* a motion for relief from judgment is not self-proving and only can be based on competent evidence, a taking of liberty or property requires a hearing, Mr. Cullen is entitled at the very least to a hearing on Ms. Scroggin's motion to compel, and the January 10 and February 21 orders exceed Respondent's authority and *in that* Respondent summarily granted Ms. Scroggin's motion to compel that sought to re-litigate the number of Mr. Cullen's retirement points in the 2014 modification judgment and refused a hearing, but Ms. Scroggin's motion was unverified and did not attach any affidavits, and Mr. Cullen disputed its allegations.

Preservation Statement

This is an original writ proceeding, and so is not an appellate process requiring preservation. *T.J.H.*, 504 S.W.2d at 78. Still, this point is preserved for appellate review. Mr. Cullen raised the arguments in it below in opposition to Ms. Scroggin's motion to set aside the order denying his motion to dismiss (Ex. 114-18). He then presented them to this Court in his petition for writ of prohibition (pp. 24-26, 28).

* * *

A motion for relief from judgment due to mistake, even if authorized, is not self-proving and still requires competent evidence to establish its allegations. If the motion is unverified and the non-movant disputes its allegations, a hearing is necessary. Here, Ms. Scroggin's motion to compel seeking relief from the 2014 modification judgment was unverified and Mr. Cullen disputed her allegations. Nonetheless, Respondent refused a hearing, summarily granted it, and compelled Mr. Cullen to execute her requested authorization to release his private military files. This exceeded Respondent's authority, warranting this Court's writ of prohibition.

This point is an alternative to Point I, *supra*. Even if Ms. Scroggin's motion to compel somehow were not procedurally barred, Respondent still exceeded his authority by summarily granting Ms. Scroggin's motion and then refusing even to hold a hearing.

It is well-established that motions seeking relief from a judgment "cannot prove themselves and 'there must be competent evidence to establish mistake, inadvertence, or excusable neglect.'" *In re Adoption of C.P.G.B.*, 302 S.W.3d 745, 752 (Mo. App. 2010) (quoting *Johnson v. Brown*, 154 S.W.3d 448, 451 (Mo. App. 2005)).

This is true even to take discovery on such a motion. Before discovery may be allowed to proceed on a Rule 74.06(b)(2) motion, "[i]t is necessary … to make a prima facie showing of" its allegations. *Jackson*, 876 S.W.2d at 733. This requires "clear, strong, cogent, and convincing evidence" of the allegations. *State ex rel. Willey Enters. v. City of Kan. City*, 848 S.W.2d 14, 17 (Mo. App. 1992). So, for example, "before post-judgment discovery may be

allowed" on a Rule 74.06(b)(2) motion alleging fraud, "the movant must state a prima facie claim of fraud in its motion with specificity to cause the court, if true, to set aside the judgment." *Jackson*, 876 S.W.2d at 735.

This is especially true where, as here, the motion is not verified. *Weidner v. Anderson*, 174 S.W.3d 672, 677 (Mo. App. 2005). "If the [Rule 74.06(b)] motion contains sufficient allegations of fact for its support, the motion thus must be verified, or supported by affidavits or sworn testimony produced at the hearing on the motion.'" *Id.* (citation omitted).

Ms. Scroggin's motion and suggestions were unverified (Ex. 42-50), and no affidavits or sworn testimony supported them. Indeed, they did not even allege a mistake or explain specifically how she knew there was one. Instead, she merely alleged she "now believes that [2,134 retirement points] is not the correct number of points earned by [Mr. Cullen] during the marriage" (Ex. 46, 88). And her foundation for this appeared just to be unspecified hearsay statements from unidentified people:

- she contacted some unnamed person at DFAS who "advised [her] that [Mr. Cullen] had earned a total of 5,490 reservist points" (Ex. 47);
- when she asked for an accounting of this, she was referred to DFAS's legal department, where another unnamed person "would not speak specifically to the accuracy of the number of points earned during the marriage," but unspecified "concern was expressed … over the contents of that letter … that [Mr. Cullen] has earned 2,134 points during the marriage" (Ex. 47);

- her counsel then formally asked the DFAS legal department whether 2,134 was the accurate number and whether the letter provided in the 2013/2014 proceedings was authentic, but DFAS treated this as a Freedom of Information Act request and then refused to answer under an exception to that act (Ex. 47-48, 89-90);
- some unnamed person at DFAS then "advised [her] counsel that it had sent [Mr. Cullen] a letter, possibly dated March 23, 2017, notifying [him] of a correction made to the number of retirement points earned by [him] during the marriage" (Ex. 48); and
- when her counsel asked Mr. Cullen about this "Correction Letter", he "did not deny [its] existence" (Ex. 48, 93, 95, 97).

As well, Mr. Cullen contested Ms. Scroggin's allegations and argued that they were founded solely on inadmissible hearsay (Ex. 114-18). He specifically disputed that he ever had received any "Correction Letter" (Ex. 115). He stated:

> This allegation is false. This allegation is premised on hearsay statements that have no foundation to be included as a basis for this Court to order Respondent to sign Petitioner's attached authorization. This allegation is completely premised on Petitioner's desire to believe that the points used in calculating her portion of the military benefit is in error. This document neither exists nor was sent to the Respondent. Petitioner is required to produce the very basis of her assertion and to authenticate it so as to comply with evidentiary foundational grounds.

(Ex. 115).

Accordingly, even if Ms. Scroggin's motion somehow was cognizable and stated a valid claim of "mistake" for relief from judgment (and it does not,

Point I, *supra*), as it was unverified, unsupported by affidavit, unspecific, founded solely on hearsay, and Mr. Cullen disputed its allegations, the law of Missouri is that at the very least, sufficient competent evidence had to be introduced in its support at a hearing, and it could not be granted summarily. *See, e.g.*:

- *Johnson*, 154 S.W.3d at 450-52 (reversing grant of unverified motion for relief from judgment without evidentiary hearing);
- *Partridge v. Anglin*, 951 S.W.2d 737, 738-39 (Mo. App. 1997) (same);
- *Dallas-Johnson Props., Inc. v. Hubbard*, 823 S.W.2d 5, 5 (Mo. App. 1991) (same); and
- *Dixon v. Tate*, 810 S.W.2d 366, 368 (Mo. App. 1991) (reversing grant of unverified motion for relief from judgment where evidence at hearing was insufficient to prove its allegation of extrinsic fraud).

This is especially true here, where the trial court allowed Ms. Scroggin's attack on the judgment by depriving Mr. Cullen of his protected private information without hearing. This violated Mr. Cullen's right to procedural due process under Mo. Const. art. I, § 10. "Any governmental taking of a" right to liberty or property "implicates the right to procedural due process and thus requires notice and an opportunity to be heard." *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995).

The authorization Respondent ordered Mr. Cullen to sign authorizes the release to Ms. Scroggin's attorney of his "medical file … in the possession of the Department of the Air Force," including "all protected information, in any form, whatsoever" in it, "that relate to, or arise out of, the total number

of retirement points earned by me and the number of retirement points earned by me from the date of my marriage to Ms. Scroggin (20 April 1985) through the date of my separation from Ms. Scroggin (30 May 2009)", which "shall include, but not be limited to, notes, e-mails, correspondence, worksheets, retirement point computation documents and retirement point audit documents", "even if said production would result in a clearly unwarranted invasion of my personal privacy" (Ex. 44; Appx. A6).

This violates 45 C.F.R. § 164.512(e), a regulation promulgated under HIPAA, which sets the "standard" for "disclosures for judicial and administrative proceedings." Section 164.512(e) sets a detailed procedure, involving protective orders, other disclosures, and assurances, including an objection period to the court, for a health recordkeeper to be forced to disclose those records in a judicial proceeding. Compelling one party to execute a blanket authorization to the other party without any opportunity for a hearing is not an included option. *Id.*

The proceedings resulting in the disclosure in this case violate § 164.512(e). And they deprive Mr. Cullen of his protected, private health records based solely on Ms. Scroggin's unverified allegations, which themselves were founded solely on equally unverified hearsay, all of which Mr. Cullen disputed (Ex. 114-18).

As in any Rule 74.06 case, but especially here, where Ms. Scroggin obtained the right to access Mr. Cullen's federally-protected medical records, Ms. Scroggin had to support her allegations with substantial evidence and

use the procedure HIPAA required, and Mr. Cullen had to be given the opportunity to be heard and contest Ms. Scroggin's allegations.

Respondent had no authority summarily to grant Ms. Scroggin's unverified, unsupported motion to compel, seeking relief from the 2014 modification judgment, without a hearing. This Court's writ lies to prohibit Respondent from doing anything in the action below other than vacating his orders issued on January 10, 2018 summarily granting her motion to compel, as well as his February 21, 2018 order refusing a hearing, and instead holding a hearing on Ms. Scroggin's motion to compel. *See, e.g.*:

- *Jackson*, 876 S.W.2d at 735 (issuing writ prohibiting trial court from ordering discovery and proceeding on hearing motion for relief from judgment where movant failed to make prima facie showing of alleged grounds for relief);
- *State ex rel. Kairuz v. Romines*, 806 S.W.2d 451, 455-59 (Mo. App. 1991) (issuing writ of prohibition enjoining order setting aside judgment without hearing); and
- *Lacy v. Dalton*, 803 S.W.2d 664, 665-66 (Mo. App. 1991) (same);
- *cf. Yarber*, 915 S.W.2d at 328 (issuing writ prohibiting suspension of student from school without hearing).

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 10,662 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that, on June 27, 2018, I filed a true and accurate Adobe PDF copy of this Brief of the Relator and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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