

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel)	
)	
FLUOR CORPORATION, A.T.)	
MASSEY COAL COMPANY, AND)	
DOE RUN INVESTMENT HOLDING)	
CORPORATION,)	
)	No. SC92048
Relators,)	
v.)	
)	
THE HONORABLE DENNIS M.)	
SCHAUMAN,)	
)	
Respondent)	

BRIEF OF RELATORS

John H. Quinn III #26350
 Thomas B. Weaver #29176
 Jeffery T. McPherson #42825
 ARMSTRONG TEASDALE LLP
 7700 Forsyth Boulevard., Suite 1800
 St. Louis, MO 63105
 314-621-5070 FAX 314-621-5065
jquinn@armstrongteasdale.com
tweaver@armstrongteasdale.com
jmcpherson@armstrongteasdale.com

Thomas C. Walsh #18605
 Bryan Cave LLP
 One Metropolitan Square, Suite 3600
 St. Louis, MO 63102
 314-259-2000 FAX 314-259-2020
tcwalsh@bryancave.com

ATTORNEYS FOR RELATORS
 FLUOR CORPORATION, A.T. MASSEY
 COAL COMPANY, AND DOE RUN
 INVESTMENT HOLDING CORPORATION

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JURISDICTIONAL STATEMENT

On August 25, 2005, the plaintiffs in the underlying action filed three petitions for personal injuries, setting forth claims including negligence, trespass, battery, and product liability against these defendants and others. Exhibit 1 (No. 052-09567); Exhibit 2 (No. 052-09856); Exhibit 3 (No. 052-09866). On December 20, 2010, the trial court entered an order consolidating the three cases and ordered that the joint trial of all of the plaintiffs' claims would begin on April 25, 2011. Exhibit 4. After a consolidated trial, the jury returned verdicts in favor of each plaintiff for compensatory and punitive damages in the gross amount of \$358 million.

On August 15, 2011, the trial court entered sixteen documents entitled "Order and Judgment," one for each plaintiff. Exhibits 6-21. On August 24, 2011, the defendants filed a motion for stay of execution or in the alternative to set the amount of a supersedeas bond in order to prevent the plaintiffs from executing on the judgments before post-trial and appeal proceedings are concluded. Exhibit 23. The defendants requested the trial court to set the total amount of any bond or bonds at \$50 million pursuant to section 512.099, RSMo, and grant the defendants thirty days to file a bond or bonds in that amount, during which time execution on any judgment would be stayed.

On August 29, 2011, the trial court entered an order denying the defendants' request for a stay and stating "that the amount of bond for each judgment in favor of each plaintiff shall be the total principal," plus two years of interest. Exhibit 24. The total amount of the bonds ordered by the trial court to prevent execution exceeds \$400,000,000.

On August 31, 2011, the relators filed a writ petition seeking relief from the bond order in the Missouri Court of Appeals, Eastern District. On September 27, 2011, the Court of Appeals denied the writ petition.

On October 20, 2011, after suggestions supporting and opposing the relators' writ petition, this Court ordered the parties to submit briefs on the issues presented in the petition and set the matter for oral argument.

This Court has jurisdiction to issue extraordinary writs under Article V, Section 4 of the Missouri Constitution. The relators sought relief from the Missouri Court of Appeals prior to seeking relief in this Court. *See* Rule 84.22(a). A writ proceeding is an appropriate method to challenge a trial court's ruling on the amount of a bond. *See, e.g., State ex rel. Brickner v. Saitz*, 664 S.W.2d 209 (Mo. banc 1984); *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 806 (Mo. banc 1995); *Burton v. Swann*, 258 S.W.3d 563 (Mo. App. 2008).

STATEMENT OF FACTS

Defendants/Relators Fluor Corporation, A.T. Massey Coal Company, and Doe Run Investment Holding Corporation are defendants in a tort case pending in the Circuit Court of the City of St. Louis. Respondent, the Honorable Dennis M. Schaumann, is the judge presiding over the underlying action.

On August 25, 2005, the plaintiffs in the underlying action filed three petitions for personal injuries, setting forth claims including negligence, trespass, battery, and product liability against these defendants and others. Exhibit 1 (No. 052-09567); Exhibit 2 (No. 052-09856); Exhibit 3 (No. 052-09866).¹ On December 20, 2010, the trial court entered an order consolidating the three cases and ordered that the joint trial of all of the plaintiffs' claims would begin on April 25, 2011. Exhibit 4.

The trial concluded on July 29, 2011, with the jury returning verdicts in favor of each plaintiff for compensatory damages in amounts between about \$1.6 million and about \$3 million. The jury returned verdicts in favor of each plaintiff for \$20 million in punitive damages. The gross amount of compensatory and punitive damages before setoffs for settling defendants was \$358 million.

On August 4, 2011, the plaintiffs provided to counsel for the defendants their proposed form of judgment, requesting the trial court to enter three judgments (one document for each of the consolidated cases). On August 8, 2011, the defendants filed written objections to this proposal. Later on August 8, 2011, the plaintiffs submitted a

¹ Exhibit references are to the exhibits submitted in support of the writ petition.

new proposed form of judgment, for the first time requesting the entry of sixteen judgments, rather than the three judgments proposed on August 4. In attempting to defend this request, plaintiffs argued that the separate “judgments” would make it easier for the circuit clerk’s office to keep track of which claims had been resolved and easier for the court of appeals to address issues that did not apply to all the plaintiffs.

On August 15, 2011, the defendants filed suggestions in opposition to this proposed form of judgment in part because it improperly requested the trial court to enter sixteen judgments, instead of a single judgment addressing all of the plaintiffs’ claims in the consolidated case. Because there was only one consolidated case, the defendants noted there could only properly be one judgment entered, disposing of all claims of all plaintiffs as to these defendants. Exhibit 5.

On August 15, 2011, the trial court entered sixteen documents entitled “Order and Judgment,” one for each plaintiff. Exhibits 6-21. As a result of the trial court’s decision, there are four separate documents denominated “Judgment” under Cause No. 052-09567 (Exhibits 6-9), two separate documents denominated “Judgment” under Cause No. 052-09856 (Exhibits 10-11), and ten separate documents denominated “Judgment” under Cause No. 052-09866 (Exhibits 12-21). Each judgment was accompanied by a confidential exhibit showing the amount by which the gross amount of the verdict would be reduced on account of setoffs to reach a net judgment. Sealed Exhibit 22A.

On August 24, 2011, the defendants filed a motion for stay of execution or in the alternative to set the amount of a supersedeas bond in order to prevent the plaintiffs from executing on the judgments before post-trial and appeal proceedings are concluded.

Exhibit 23. The defendants requested the trial court to stay execution on the judgments until after ruling on post-trial motions. The defendants further requested the court to set the amount of any supersedeas bond after ruling on post-trial motions. In the alternative, if the court was not willing to stay execution and the setting of the amount of a bond until after it ruled on any post-trial motions, the defendants requested the trial court to set the total amount of any bond or bonds at \$50 million pursuant to section 512.099, RSMo, and grant the defendants thirty days to file a bond or bonds in that amount, during which time execution on any judgment would be stayed.

On August 29, 2011, the trial court entered an order denying the defendants' request for a stay and stating "that the amount of bond for each judgment in favor of each plaintiff shall be the total principal," plus two years of interest, as set forth in a confidential exhibit. Exhibit 24. As set forth in the confidential exhibit, the total amount of the bonds ordered by the trial court to prevent execution exceeds \$400,000,000.

Sealed Exhibit 24A.

The defendants' annual premium for an appeal bond was expected to be at least \$3.25 per \$1000. Exhibit 25. Based on this rate, the annual premium for a bond in the amount of \$50 million would be \$162,500. The annual premium for bonds in the total amount of \$400 million would be \$1,300,000. The difference in annual premium between the maximum bond permitted by section 512.099 and the bonds ordered by the trial court is over \$1,137,500. If the bonds will be required for two years, as ordered by the trial court, the total excess charge for the defendants' bonds will be \$2,275,000.

On September 14, 2011, the defendants filed motions for judgment notwithstanding the verdict, new trial, remittitur, and other relief. These motions are pending.

On August 31, 2011, the relators filed a writ petition in the Missouri Court of Appeals, Eastern District, seeking the relief sought in this petition. On September 27, 2011, the Court of Appeals denied the writ petition.

Pursuant to the respondent's order, the relators filed supersedeas bonds on September 28, 2011, in order to avoid execution by the plaintiffs, who opposed a stay of the judgments pending the resolution of the relators' post-judgment motions. In opposing a stay in the trial court, the plaintiffs emphasized their immediate right to execute immediately upon the entry of judgment: "The law in Missouri says that the right of a party to execute a judgment accrues immediately upon entry of the judgment. . . . What happens if we execute and seize assets then if they post a bond we're required to release those assets back to the defendant and that's how the law keeps the playing field level. There are no time-outs when you get down to, you know, post-judgment relief." Sealed Exhibit 27 at 3-5 (writ exhibits at 279). The relators posted the bonds as ordered to avoid the plaintiffs' expressed right to immediate execution.

If this Court were to reduce the bond amount, the bonding companies would release the current appeal bonds, and new appeal bonds would be reissued for the proper bond amount. The bonding companies, in turn, would reimburse the premium paid on the current appeal bonds, minus only that prorated portion of the premium attributable to the period between the date the bonds were issued and the date the bonds were released.

POINT RELIED ON

The court should issue a permanent writ of mandamus or prohibition directing the respondent trial court to reduce the bond amount in the underlying action because section 512.099, RSMo, provides that, in all tort cases, “the total appeal bond or equivalent surety that is required of all appellants collectively shall not exceed fifty million dollars, regardless of the value of the judgment,” and despite this clear statutory requirement, the respondent judge presiding over the underlying tort case entered an order that is directly contrary to section 512.099 in that the order sets the bond amount for all appellants collectively at over \$400 million, which will impose additional bonding costs on the defendants of over \$1.1 million dollars per year.

§ 512.099, RSMo.

Parktown Imports, Inc. v. Audi of America, Inc., 278 S.W.3d 670 (Mo. banc 2009).

State ex rel. Feltz v. Bob Sight Ford, Inc., 341 S.W.3d 863 (Mo. App. 2011).

ARGUMENT

The court should issue a permanent writ of mandamus or prohibition directing the respondent trial court to reduce the bond amount in the underlying action because section 512.099, RSMo, provides that, in all tort cases, “the total appeal bond or equivalent surety that is required of all appellants collectively shall not exceed fifty million dollars, regardless of the value of the judgment,” and despite this clear statutory requirement, the respondent judge presiding over the underlying tort case entered an order that is directly contrary to section 512.099 in that the order sets the bond amount for all appellants collectively at over \$400 million, which will impose additional bonding costs on the defendants of over \$1.1 million dollars per year.

Section 512.099, RSMo, provides that, in all tort cases, “the total appeal bond or equivalent surety that is required of all appellants collectively shall not exceed fifty million dollars, regardless of the value of the judgment.” Despite this clear statutory requirement, the respondent judge presiding over the underlying tort case entered an order setting the bond amount for all appellants collectively at over \$400 million. This order is directly contrary to section 512.099 and will impose additional bonding costs on the defendants of over \$1.1 million dollars per year. The Court should issue a writ directing the respondent to set aside his bond order and set the bond amount in a manner consistent with section 512.099.

The standard of review for writs of mandamus and prohibition is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow

applicable statutes. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007); *State ex rel. Auto Owners Ins. Co. v. Messina*, 331 S.W.3d 662, 664 (Mo. banc 2011). A writ proceeding is an appropriate method to challenge a trial court's ruling on the amount of a bond. *See, e.g., State ex rel. Brickner v. Saitz*, 664 S.W.2d 209 (Mo. banc 1984); *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 806 (Mo. banc 1995); *Burton v. Swann*, 258 S.W.3d 563 (Mo. App. 2008).

When the foundation of a writ is the interpretation of a statute, the statute's meaning is reviewed de novo. *State ex rel. Feltz v. Bob Sight Ford, Inc.*, 341 S.W.3d 863, 865 (Mo. App. 2011).

I. Section 512.099 caps the bond amount in the underlying action.

Section 512.099.1 applies to tort cases and sets a collective cap of \$50 million for all appellants when a trial court sets a supersedeas bond:

In all cases in which there is a count alleging a tort, the amount of the required undertaking or bond or equivalent surety to be furnished during the pendency of an appeal or any discretionary appellate review of any judgment granting legal, equitable, or any other form of relief in order to stay the execution thereon during the entire course of appellate review shall be set in accordance with applicable laws or court rules; except, that the total appeal bond or equivalent surety that is required of all appellants collectively shall not exceed fifty million dollars, regardless of the value of the judgment. Nothing in this section or any other provision of law shall be construed to eliminate the discretion of the court, for good cause shown, to

set the undertaking or bond on appeal in an amount lower than that otherwise established by law.

The trial court erred, misapplied the law, and abused its discretion in refusing to cap the bond amount at \$50 million. In the underlying action, there are numerous counts alleging torts. Thus, by the plain terms of section 512.099, the amount of the bond “required of all appellants collectively shall not exceed fifty million dollars, regardless of the value of the judgment.” The trial court’s order requiring sixteen bonds totaling over \$400 million is in violation of the plain language of the statute. The Court should issue a writ to require the trial court to comply with section 512.099.

The plaintiffs in the underlying action argued that there should be sixteen bonds -- and thus sixteen \$50 million caps -- because they were successful in persuading the trial court to enter sixteen judgments. This makes no sense. The entry of sixteen judgments was improper because there was one consolidated action before the trial court, as shown by the consolidation order. Exhibit 4. The effect of the consolidation order was to combine several civil actions into one civil action. *Hudson v. DeLonjay*, 731 S.W.2d 922, 931-32 (Mo. App. 1987). Because there is only one action, there can be only one judgment entered, disposing of all claims of all parties. *Johnson v. Heitland*, 314 S.W.3d 777, 778 (Mo. App. 2010) (where separate trials were not ordered or had, there could only be one final judgment that should dispose of all parties and all issues); *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 217 (Mo. App. 2000) (there should be only one final judgment disposing of all claims of all parties); *Johnson-Mulhern Properties, LLC v. TCI Cablevision of Missouri, Inc.*, 980 S.W.2d 171, 172 (Mo. App.

1998) (generally there is only one judgment in a case); *M.F.A. Control v. Harrill*, 405 S.W.2d 525, 530 (Mo. App. 1966). After the consolidation, there was one case, and the trial court should have entered only one final judgment in the consolidated case, not the sixteen judgments requested by the plaintiffs.

The sixteen separate documents each denominated a “Judgment” do not constitute sixteen separate judgments, but must be recognized and treated as a single judgment in a single case, resolving the claims of the sixteen plaintiffs against these defendants. A court cannot create multiple “judgments” simply by entering a separate document called a judgment for each claim in a case. If that were all it took to circumvent section 512.099, then the statute would be meaningless. Regardless of the number of parties or number of documents denominated “judgment,” the collective maximum bonding obligation is \$50 million.

In the alternative, and without waiving their right to the entry of a single judgment, at most the trial court should have entered three judgments -- one for each of the three cause numbers that were assigned before the trial court’s consolidation order. *See* Exhibits 1-4. Indeed, in the proposed form of judgments sent by the plaintiffs to the defendants’ counsel on August 4, 2011, the plaintiffs submitted three separate judgments under these three cause numbers.

If the Court were to find that there were three “cases” for the purposes of section 512.099 because there were three cause numbers before consolidation, then the Court should direct the trial court to set a total bond amount that “collectively shall not exceed” \$150 million. The annual premium for bonding \$150 million would be \$487,500.

Exhibit 25. This would be \$812,000 per year less per year than the bond amount of \$400 million. If the bonds will be required for two years, the total excess charge for the defendants' bonds will be \$1,625,000 more than a bond amount of \$150 million.

II. Section 512.099 limits the bond amount to \$50 million per case regardless of the number of individual judgments entered in the case.

The Court's order of September 30, 2011, requested the respondent to address the key issue raised by the present writ petition: "Whether section 512.099, RSMo Supp. 2010, limits the amount of the bond to \$50 million per case regardless of the number of individual judgments entered in the case." Notably, in offering suggestions on behalf of the respondent, the plaintiffs avoided addressing this issue.

The plaintiffs' position would require construction of the statute in disregard of the words employed by the legislature. The Court's primary rule of statutory interpretation is to give effect to legislative intent *as reflected in the plain language of the statute*.

Parktown Imports, Inc. v. Audi of America, Inc., 278 S.W.3d 670, 672 (Mo. banc 2009).

Where the language of a statute is clear, courts must give effect to the language as written. *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language, even when a court (or a group of plaintiffs) may prefer a policy different from that enunciated by the legislature. *Id.*

The plain language of section 512.099.1, set forth in full above, shows that its focus is on cases, not judgments, with the limitation being on the amount that may be demanded of the defendants to post bond. Regardless of the number of plaintiffs or

defendants or partial judgments, the statute makes clear that, in all cases in which there is even one count alleging a tort, the “total appeal bond or equivalent surety that is required of all appellants *collectively* shall not exceed fifty million dollars, *regardless of the value of the judgment.*” The “total” applies in all “cases,” not as to each plaintiff or defendant or partial judgment. The reference to the value of the “judgment” appropriately contemplates that there will be one judgment per case, and does not change the fact that the cap applies per case.

Instead of providing a legal analysis of whether the bond cap applies collectively to an entire case as opposed to individually for each partial judgment, the plaintiffs simply declare that section 512.099.1 “only caps a single entered judgment, not multiple judgments.” Plaintiffs’ Suggestions at 4. According to the plaintiffs, the statute “by its very terms only caps each judgment entered.” *Id.* Under the plaintiffs’ reading, section 512.099 never states that “separate judgments entered on behalf of separate plaintiffs should be dealt with collectively.” *Id.*

These unsupported declarations are refuted by the plain language of the statute, which mandates that the maximum bond amount that may be imposed “collectively” on all defendants in all tort “cases” is \$50 million, “regardless of the value of the judgment.” The trial court is explicitly authorized to exercise discretion to set a lower bond amount, but not a higher one, for all defendants collectively.

The public policy advanced by section 512.0999 is expressed in the statutory language. *Parktown*, 278 S.W.3d at 672. The explicit purpose of this statute is to limit

the amount of bonds required in “all cases in which there is a count alleging a tort.” No other public policy is shown by the statutory language or explained by the plaintiffs.

There is one case -- one consolidated “civil action” -- pending before the trial court, as shown by the respondent’s consolidation order (Exhibit 4). *See* Rule 42.01. If the Court finds otherwise, at most the trial court is presiding over three “cases” as that term is used in section 512.099 -- one case for each of the three cause numbers that were pending before the trial court’s consolidation order. *See* Exhibits 1-4. The plaintiffs’ claim that there are sixteen “cases” as that term is used in section 512.099 is contrary to the record.

III. This matter is not moot.

The relators have previously responded to the plaintiffs’ baseless motion to dismiss on the theory of mootness. A case is only moot if a judgment would have no practical effect upon an existing controversy. *Royster v. Rizzo*, 326 S.W.3d 104, 108 (Mo. App. 2010). Justiciability requires the existence of an actual and vital controversy susceptible of some relief. *Id.* A case is not moot when a court’s order would have a practical effect upon an existing controversy. *Id.* at 109.

The relators will be harmed by the imposition of hundreds of thousands of dollars in bonding costs if the Court denies relief. If the Court issues a writ enforcing the clear terms of section 512.099, the relators will be relieved of the improper burden and save hundreds of thousands of dollars. Since the Court can provide real and substantial relief through the issuance of the requested writ, this proceeding is not moot.

The plaintiffs claim that it would not be a financial hardship on the relators to post bond in an amount eight times higher than allowed by section 512.099. This assertion ignores the undisputed fact that the excessive bond amount costs the relators over a million dollars per year. This is an obvious and quantifiable hardship. The fact that a party may have the resources to pay for an unlawfully imposed bond does not make it any less a hardship.

CONCLUSION

Defendants/Relators Fluor Corporation, A.T. Massey Coal Company, and Doe Run Investment Holding Corporation respectfully request the Court to issue a writ directing Respondent, the Honorable Dennis Schaumann, to set the bond amount that is required of all defendants collectively at not more than \$50 million. In the alternative, the Court should direct the respondent to set the bond amount that is required of all defendants collectively at not more than \$150 million.

Respectfully submitted,

/s/ Jeffery T. McPherson

John H. Quinn III #26350
Thomas B. Weaver #29176
Jeffery T. McPherson #42825
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard., Suite 1800
St. Louis, MO 63105
314-621-5070 FAX 314-621-5065
jquinn@armstrongteasdale.com
tweaver@armstrongteasdale.com
jmcperson@armstrongteasdale.com

Thomas C. Walsh #18605
One Metropolitan Square, Suite 3600
St. Louis, MO 63102
314-259-2000 FAX 314-259-2020
tcwalsh@bryancave.com

ATTORNEYS FOR RELATORS
FLUOR CORPORATION, A.T. MASSEY
COAL COMPANY, AND DOE RUN
INVESTMENT HOLDING
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

Mark I. Bronson, Esq.
NEWMAN, BRONSON & WALLIS
2300 West Port Plaza Drive
St. Louis, MO 63146

James R. Dowd
LAW OFFICES OF JAMES R. DOWD
34 N. Brentwood, Suite 209
St. Louis, MO 63105

I hereby certify that on November 9, 2011, the foregoing was mailed by United States Postal Service to the following non-participants in Electronic Case Filing:

Gerson H. Smoger
SMOGER LAW FIRM
3175 Monterey Blvd., Suite 3
Oakland, CA 94602

The Honorable Dennis M. Schaumann
Circuit Judge, Division 12
Circuit Court of the City of St. Louis
10 N. Tucker Blvd
St. Louis, MO 63101

/s/ Jeffery T. McPherson

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4,112, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

/s/ Jeffery T. McPherson