



In the Missouri Court of Appeals Eastern District

WRIT DIVISION SIX

STATE OF MISSOURI, ex rel.,)	No. ED97548
DAVID M. NOTHUM and)	
GLENETTE NOTHUM,)	
)	
Relators,)	
)	Writ of Prohibition
v.)	
)	
THE HONORABLE JOSEPH L. WALSH III,)	
Circuit Judge,)	
St. Louis County Circuit Court,)	
)	
Respondent.)	Filed: January 10, 2012

David Nothum and Glenette Nothum (collectively “Relators”) once again seek this Court’s writ of prohibition to prevent a judge (here, the Honorable Joseph L. Walsh, III, hereinafter “Respondent”) from compelling them to testify at a judgment debtors’ examination. Relators once again have asserted their privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution and by Article I, Section 19 of the Missouri Constitution. We issued our preliminary writ, which we would now make absolute. However, finding that the issues raised are of general importance we transfer to the Supreme Court.

I. BACKGROUND

The background of this case is fully set forth in State ex rel. Nothum v Kintz, 333 S.W.3d 512 (Mo. App. E.D. 2011) (hereinafter "Nothum I").

II. DISCUSSION

Two major issues frame our discussion. The first issue is whether the Order of Contempt¹ makes the required findings sufficient to permit incarceration. The second is the extent of the immunity that may be granted under the provisions of Section 513.380 RSMo 2000.²

First, the Order of Contempt does not satisfy the guidelines set forth in Nothum I, or State ex rel. Heidelberg v. Holden, 98 S.W.3d 116 (Mo. App. S.D. 2003). In Nothum I, we clearly reiterated the standard to be applied when a relator asserts his or her privilege against self-incrimination. Nothum I, 333 S.W.3d at 515. In that instance, a presumption arises that any potential answer will tend to incriminate the relator and, as a result, the trial court must evaluate each question posed and make a finding that the answer to that question "could not possibly have the tendency to incriminate." Nothum I, 333 S.W.3d at 515-16 (citing Heidelberg, 98 S.W.3d at 119-20).

In this case, however, the Order does not find that the answer, as to each challenged question, could not possibly have the tendency to incriminate the judgment debtor. Without such a finding for each challenged question, it cannot be determined whether the grant of immunity was sufficient to rebut the presumption that the answers might incriminate the Relators. As we stated previously:

Respondent failed to make required findings as a matter of law, that a response of either Relator could not incriminate them. Therefore, we find that Respondent erred in finding Relators in contempt for invoking their privilege against self-incrimination.

Nothum I, 333 S.W.3d at 516.

¹ The required term "judgment" does not appear in the document pursuant to Rule 74.01(a).

² All further statutory references are to RSMo 2000, unless otherwise indicated.

As to the second issue, the trial court found that the term “use immunity” specifically used in the statute and in the document signed by the assistant prosecuting attorney does not mean “use immunity,” but instead confers the much broader protection afforded by what is commonly referred to as “transactional immunity.”

Statutory interpretation is an issue of law that appellate courts review *de novo*. Finnegan v. Old Republic Title Co. of St. Louis, Inc., 246 S.W.3d 928, 930 (Mo. banc 2008); In re G.F., 276 S.W.3d 327, 329 (Mo. App. E.D. 2009) (on issues of statutory interpretation, we "reach our own conclusions . . . without deference to the trial court's conclusions"). "We approach the task of statutory interpretation mindful that it is the function of the courts to construe and apply the law and not to make it." Renner v. Dir. of Revenue, 288 S.W.3d 763, 765 (Mo. App. E.D. 2009) (quoting State v. Meggs, 950 S.W.2d 608, 610 (Mo. App. S.D. 1997)).

The goal of statutory interpretation is to ascertain the intent of the legislature, as expressed in the words of the statute. United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 909 (Mo. banc 2006). We achieve this goal by giving the language used its plain and ordinary meaning and by applying any "statutory definitions" provided in the statute itself. Gash v. Lafayette County, 245 S.W.3d 229, 232 (Mo. banc 2008). Only when the legislative intent cannot be determined from the plain meaning of the statutory language may rules of construction be applied to resolve any ambiguity. United Pharmacal Co., 208 S.W.3d at 910; Hardt v. Vitae Found., Inc., 302 S.W.3d 133, 138 (Mo. App. W.D. 2009) ("Where the language of a statute is clear and unambiguous, there is no room for construction."). The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical. Donaldson v. Crawford, 230 S.W.3d 340, 342 (Mo. banc 2007).

Here, we find that the Legislature understands the difference between “use immunity” and the broader “transactional immunity.” See, e.g., Sections 136.100, 144.340, 386.470, 491.205, and 622.390. Section 513.380 permits the prosecutor to grant *use* immunity to judgment debtors during a debtor examination. The wording of the prosecutor’s document specifically confers “*use* immunity.” There is no logic or reason to find that *use* immunity means anything other than *use* immunity.³

III. CONCLUSION

We would find that Respondent exceeded his authority in ordering Relators to answer questions at the judgment debtors’ examination over their assertions of their privilege against self-incrimination. We would also find that Section 513.380 grants “use immunity” as clearly stated in that section, and not “transactional immunity” as determined by Respondent. However, due to the general importance of this issue, we transfer this matter to the Missouri Supreme Court pursuant to Rule 83.02.

Roy L. Richter, Presiding Judge

Robert M. Clayton III, J., concurs
Kurt S. Odenwald, C.J., concurs

³ Under Respondent’s theory, an assistant prosecuting attorney could grant immunity in a debtor exam broad enough to foreclose prosecution for embezzlement, other illegal methods of “earning” income, and bar both state and federal tax evasion actions.