

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)	

REPLY BRIEF OF RELATORS

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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.

In their brief before this Court, the plaintiffs resolutely refuse to address the narrow issue raised in the pending writ petition. The only question in this matter is whether the trial court should be required to set the bond amount in the underlying action in conformity with section 512.099, RSMo, which 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.” The plaintiffs’ arguments addressed to whether the trial court should be required “to reduce the number of judgments” are unresponsive to the issue before this Court.

The undisputed facts show that 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 it is undisputed that

the defendants will incur additional bonding costs of over \$1.1 million dollars per year as a result. 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 plaintiffs' arguments do not support the trial court's bond ruling. As the relators have explained, section 512.099 limits the bond amount to \$50 million per case, regardless of the number of individual judgments entered in the case. Even under the plaintiffs' theory, there is one case pending before the respondent, or at most three cases, so that the bond amount set by the trial court is indefensible. The plaintiffs waived any constitutional arguments when they failed to raise them in the circuit court, in the Missouri Court of Appeals, or in this Court in their suggestions in opposition to the writ petition. The constitutional arguments asserted for the first time in the plaintiffs' most recent brief are baseless.

I. Section 512.099 applies regardless of the number of judgments.

The plaintiffs continue to declare, without analysis, that section 512.099.1 "only applies to each judgment entered." Plaintiffs' Brief at 16. Here is the fullest expression of the plaintiffs' argument in their brief, after setting forth the text of the statute:

"Section 512.099.1 thus by its very terms only caps each judgment entered. Nowhere does it limit the number of judgments which may be entered nor does it ever state that separate judgments entered on behalf of separate plaintiffs should be dealt with collectively. Thus, by the very terms of the statute, the cap would apply here only if a single plaintiff received a judgment greater than \$50 million, but none did." Plaintiffs' Brief at 17.

This non-analysis is refuted by the plain terms of the statute, which shows that the focus of the provision is on cases, not judgments, with the limitation being on the amount that may be demanded of the defendants collectively to post bond in each case:

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 Court gives effect to legislative intent as reflected in the plain language of the statute as written. *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009); *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993).

This statute makes clear that, regardless of the number of plaintiffs or defendants or partial judgments, 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.” § 512.099.1 (emphasis added). The “total” applies in all “cases,” not as to each plaintiff or defendant or partial judgment.

II. The word “judgment” in section 512.099 includes multiple judgments.

The plaintiffs (again without analysis) appear to base their position on the fact that the word “judgment” as used in section 512.099.1 is singular rather than plural. The plaintiffs’ implicit assumption that this fact has some relevance ignores a well known Missouri statute.

It has always been the law in this state that, in construing statutes, the singular includes the plural, and the plural includes the singular. See § 1.030.2, RSMo (“When any subject matter, party or person is described or referred to by words importing the singular number . . . , several matters and persons . . . and bodies corporate as well as individuals, are included.”); see *State ex rel. Ford Motor Co. v. Manners*, 161 S.W.3d 373, 375 (Mo. banc 2005) (use of the singular word “defendant” includes the plural); *State ex rel. BJC Health System v. Neill*, 121 S.W.3d 528, 530 (Mo. banc 2003) (the word “corporation” includes the plural “corporations”); *Vance Bros., Inc. v. Obermiller Constr. Services, Inc.*, 181 S.W.3d 562, 564 n.4 (Mo. banc 2006).

Section 512.099.1, when read in light of section 1.030, requires that the bond cap applies “regardless of the value of the judgment [or judgments].” The plaintiffs’ argument to the contrary is unsupported.

The statutory use of the singular word judgment, in addition to including the plural term judgments, is merely recognition that there is generally one judgment in each case. See Rule 74.01(a). When the legislature enacts a statute referring to terms that have had

other legislative or judicial meanings attached to them, the legislature is presumed to have acted with knowledge of these meanings. *See State ex rel. Costco Wholesale Corp. v. Hartenbach*, 267 S.W.3d 725, 729 (Mo. App. 2008).

A “judgment” can take many forms. In *Magee v. Blue Ridge Professional Building Co.*, 821 S.W. 2d 839 (Mo. banc 1991), the Court explained that an order that would itself be interlocutory can result in a “final judgment” by resolving the last pending claim in an action. Thus, other rulings in the case that would be interlocutory can be appealable. *Id.* at 842. If the combined effect of several orders entered in a case, including an order denominated “final judgment,” is to dispose of all issues as to all parties, leaving nothing for future determination, then the collective orders combine to form the “final judgment” from which an appeal can be taken. *Id.*

The legislature is also charged with knowledge that there can be more than one document denominated “judgment” in a single case. *See* Rule 74.01(b). When the legislature used the term “regardless of the value of the judgment,” it was doing so with knowledge that a judgment (or judgments) can have more than one meaning under this Court’s decisions and rules.

III. Section 512.099 requires the total bond amount to be added up.

The plaintiffs ignore the language of section 512.099 in asserting, “If the legislature had intended for circuit courts to add up the amount of all judgments entered in favor of multiple plaintiffs against all Relators, as Relators apparently argue, it could easily have done so.” Plaintiffs’ Brief at 20. Contrary to the plaintiffs’ unsupported

assertion, this is *exactly* what the General Assembly intended in using the plain language of the statute.

In the absence of a statutory definition, the plain meaning of a term may be derived from a dictionary. *E&B Granite, Inc. v. Director of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011).; *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008).

Reference to a dictionary forecloses the plaintiffs’ arguments. “Total” means “an amount obtained by addition; a sum.” *American Heritage College Dictionary* 1429 (3d ed. 1993); see *Merriam-Webster’s Collegiate Dictionary* 1242 (10th ed. 2000) (“a product of addition: SUM”). As a verb, “total” means to “add up.” *American Heritage College Dictionary* 1429.

Similarly, the word “collective” means “denoting a number of persons or things considered as one group or whole,” with the synonym “AGGREGATED.” *Merriam-Webster’s Collegiate Dictionary* 225. “Collective” means “assembled or accumulated into a whole.” *American Heritage College Dictionary* 274.

In the terms of the statute (“total appeal bond or equivalent surety that is required of all appellants collectively”), substituting the dictionary definitions of “total” and “collective,” the legislature intended that the \$50 million limit would apply to the “[added-up amount or sum obtained by addition of an] appeal bond or equivalent surety that is required of all appellants [considered as one group or whole, assembled or accumulated into a whole].”

Contrary to the plaintiffs’ efforts to ignore the meanings of the statutory terms, the bond cap is on the combined amount that can be imposed on all defendants as a whole.

There is no limitation on the number of partial judgments that can make up the “total” or be part of the amount determined “collectively.”

IV. There is one consolidated case pending in the trial court.

The plaintiffs concede that they did not file sixteen cases in the circuit court. Rather, they admit that they filed only “three separate petitions” that were assigned three cause numbers. Plaintiffs’ Brief at 6. The plaintiffs admit that these cases were consolidated by two orders of the circuit court. The first order, dated February 2, 2010, consolidated two of the cases into one: “By Consent of Parties, Plaintiffs’ Motion for [Consolidation] . . . is GRANTED.” Plaintiffs’ Appendix at A13. Contrary to the plaintiffs’ assertion, this order does not state that the consolidation was merely “for trial.” Rather, the plaintiffs’ own exhibit states “Case Consol into Another Case.” Plaintiffs’ Appendix at A13.

On December 20, 2010, the trial court entered another order consolidating a third case with the first two. Plaintiffs’ Appendix at A17. Similarly, and contrary to the plaintiffs’ assertion, this order does not state that the consolidation was merely “for trial.”

This undisputed evidence shows that the three cases were consolidated and became one case. *See Hudson v. DeLonjay*, 731 S.W.2d 922, 931-32 (Mo. App. 1987). As to this one action, there should be only one judgment disposing of all claims of all parties (regardless of the number of documents required to obtain this final judgment). *See Magee v. Blue Ridge Professional Building Co.*, 821 S.W. 2d 839 (Mo. banc 1991); *Johnson v. Heitland*, 314 S.W.3d 777, 778 (Mo. App. 2010); *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 217 (Mo. App. 2000).

In the alternative, if the Court accepts the after-the-fact claim that these cases were merely consolidated “for trial,” at most there are three cases pending in the underlying action -- one for each of the three cause numbers that were assigned before the trial court’s consolidation orders. *See* Exhibits 1-3. Indeed, the plaintiffs initially proposed that the trial court should enter three separate judgments under these three cause numbers (as opposed to the sixteen documents denominated “judgment” that the plaintiffs eventually sought and obtained). 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.

V. The plaintiffs have waived any constitutional issues.

The plaintiffs failed to preserve any constitutional issues for review in this action. The rule that a constitutional challenge must be raised at the earliest opportunity applies in writ proceedings. *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33-34 (Mo. banc 2010); *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998) (“Constitutional violations are waived if not raised at the earliest possible opportunity.”).

To preserve a constitutional issue, a party must not only have presented the issue to the trial court, but the trial court must have ruled on it. *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 525 (Mo. App. 2007). An attack on the constitutionality of a statute is significant enough and important enough that the record touching on such issues should be fully developed and not raised as an afterthought. *Land Clearance for Redevelopment Auth. v. Kansas U. Endowment Ass’n*, 805 S.W.2d 173, 176 (Mo. banc

1991). The reason for this requirement is to prevent surprise to the opposing party and to permit the trial court an opportunity to fairly identify and rule on the issues. *Strong*, 261 S.W.3d at 525.

The plaintiffs waived any constitutional arguments when they failed to raise them in the circuit court, in the Missouri Court of Appeals, or in this Court in their suggestions in opposition to the writ petition.

VI. Section 512.099 is not retrospective.

In addition to being waived, the plaintiffs' constitutional arguments are baseless. A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 903 (Mo. banc 1992). When the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional. *Id.* A statute will be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution. *Id.*

Article I, Section 13 of the Missouri Constitution prohibits the enactment of a law that is "retrospective in its operation." A retrospective law is one that creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006). It must give to something already done a different effect from that which it had when it transpired. *Id.*

A law is not retrospective in its operation, within the terms of the constitution, unless it impairs some vested right. *Fisher v. Reorganized Sch. Dist.*, 567 S.W.2d 647,

649 (Mo. banc 1978). A vested right “must be something more than a mere expectation based upon an anticipated continuance of existing law.” *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. banc 2006). Procedural and remedial statutes, not affecting substantive rights, may be applied retrospectively, without violating the constitutional ban on retrospective laws. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007).

Section 512.099 expressly applies to “all judgments entered on or after August 28, 2005.” § 512.099.3. The statute merely prescribes the method of determining the amount of a bond and does not deprive the plaintiffs of any vested right. Rather than imposing a new duty on the plaintiffs, section 512.099 merely substitutes a new or more appropriate remedy for the enforcement of an existing right -- the defendants’ right to post a bond to stay enforcement of a judgment. *See Hess*, 220 S.W.3d at 770. To the extent it simply “prescribes a method of enforcing rights or obtaining redress for their invasion,” the statute is procedural and can be applied retrospectively. *Id.* The operation of this statute is not unconstitutional. *See Cates v. Webster*, 727 S.W.2d 901, 904-05 (Mo. banc 1987) (finding no unconstitutional retrospective law where a statute that ascribed “certain legal effects” to judgment was applied to a case where judgment had not yet been entered, after effective date of statute).

Further, the plaintiffs ignore subsection 2 of section 512.099, which provides important safeguards for the rights of plaintiffs. If it is proven by a preponderance of the evidence that a party receiving the benefit of section 512.099.1 “is purposefully dissipating or diverting assets outside of the ordinary course of its business for the

purpose of avoiding ultimate payment of the judgment, the limitation granted under subsection 1 of this section may be rescinded and the court may enter such orders as are necessary to prevent dissipation or diversion of the assets.” § 512.099.2. In addition, a party whose bond has been reduced under subsection 1 is required to provide its most recent statement of assets and liabilities filed with any federal, state, or foreign regulatory agency; provide quarterly updated statements of assets and liabilities that are filed with any federal, state, or foreign regulatory agency; and agree that it will not dissipate or divert assets outside the ordinary course of its business for the purpose of avoiding ultimate payment of the judgment. *Id.*

This statute merely substitutes one system of safeguards in place of the system that had existed previously. This is not unconstitutionally retrospective. *See Hess*, 220 S.W.3d at 770.

VII. Section 512.099 does not violate equal protection.

In an equal protection challenge, the first step is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004). If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. *Id.* The plaintiffs do not argue that the statute lacks a rational basis.

Classes receiving heightened scrutiny in equal protection analysis include race, alienage, national origin, gender, and illegitimacy. *Id.* As for fundamental rights, those requiring strict scrutiny are the rights to interstate travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution. *Id.* The plaintiffs fail to identify any suspect classification or fundamental interest. Indeed, the plaintiffs concede that these sixteen plaintiffs are not a suspect class. Plaintiffs' Brief at 25.

Citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000), the plaintiffs claim that they are each a class of one. This is nonsense. In *Olech*, property asked to connect their property to a municipal water supply, and the village conditioned the connection on the property owners' granting an easement. The property owners sued the village, claiming the demand of an easement was irrational and motivated by ill will resulting from the property owners' previous filing of an unrelated, successful lawsuit against the village. In this context, the Supreme Court held that the Equal Protection Clause can give rise to a cause of action on behalf of a "class of one" where the plaintiff alleges that he or she has been *intentionally* treated differently from others similarly situated and that there is no rational basis for the difference in treatment.

This case is nothing like *Olech*. The plaintiffs do not allege that section 512.099 was intentionally passed to harm them. Indeed, by its terms, the section applies equally to "all judgments" entered on or after August 28, 2005. § 512.099.3.

The plaintiffs purport to raise a series of questions on the operation of section 512.099. How would the bond amount be divided between plaintiffs? If one or more plaintiffs settled, would that operate to increase the bonds for the other plaintiffs? These

are questions for another day. The trial court has the power to rule on these issues, and if the plaintiffs perceive error in the court's ruling, they can seek appropriate relief. Further, if the plaintiffs would like to suggest amendments to the statute, they are free to petition the General Assembly. It is not for litigants or courts to rewrite statutes. The plaintiffs cite no authority suggesting that these concerns could render the statute unconstitutional.

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,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 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:

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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 3,840, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

/s/ Jeffery T. McPherson