

IN THE SUPREME COURT OF MISSOURI

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

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RESPONDENT’S BRIEF

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## JURISDICTIONAL STATEMENT

This is an original proceeding for an extraordinary writ in prohibition or mandamus under Article V, Section 4 of the Missouri Constitution. The Supreme Court has jurisdiction to determine original remedial writs. Article V, section 4(1) of the Missouri Constitution.

For purposes of judicial efficiency Respondent chose to try the cases of sixteen separate plaintiffs together. The cases for these sixteen plaintiffs were filed as part of three separate petitions: *Alexander, et. al., v. Fluor, et. al.*, Cause Number 22052-09567 (“*Alexander*”) with four trial plaintiffs; *Pedersen, et. al., v. Fluor, et. al.*, Cause Number 22052-09856 (“*Pedersen*”) with two trial plaintiffs; and *Heilig, et. al., v. Fluor, et. al.*, Cause Number 22052-09866 (“*Heilig*”) with ten trial plaintiffs. At the conclusion of trial the jury entered sixteen separate compensatory and punitive damage verdicts, one of each for the sixteen plaintiffs, and sixteen separate judgments were entered by Respondent pursuant to those verdicts. The Relators are requesting that this Court set aside the sixteen judgments and order Respondent to enter either one or three judgments, after which they request that this Court mandate that Respondent apply § 512.099 collectively to the single judgment or, alternatively, the three judgments and reduce their bonding obligations.

§ 512.099 was enacted under HB 393, 2005. It is the only statute enacted under HB 393 which by its terms would appear to apply, if applicable, to cases already pending at the time of its enactment on August 28, 2005. [ § 512.099.3, “The provisions of this

section shall apply to all judgments entered on or after August 28, 2005.” (L. 2005, H.B. 393)].

If this Court should find in favor of the Relators and determine that Respondent should be mandated to enter either one or three judgments, then this Court should still not require the bond limitation of Section § 512.099, because § 512.099 conflicts with the Missouri Constitution, Article 1, Section 13. Article I, § 13 prohibits application of statutes retrospectively. § 512.099 also conflicts with Article I, § 2 of the Missouri Constitution which guarantees equal protection of the law due to the fact that § 512.099, as it would necessarily be applied to consolidated trials, pits trial plaintiffs against one another. “If a statute conflicts with a constitutional provision or provisions, the Supreme Court must hold the statute invalid.” *State v. Kinder*, 89 S.W.3d 454, 458 (Mo. banc 2002).

## STATEMENT OF FACTS

On August 25, 2005, a Petition for personal injuries was filed on behalf of minor plaintiffs Preston Alexander, Sydney Fisher, Jessie Miller and Jonathan Miller in the *Alexander* case (Writ Exhibit 1), a Petition for personal injuries was filed on behalf of minors Austin Manning and Patrick Blanks in the *Pedersen* case (Writ Exhibit 2), and a Petition for personal injuries was filed on behalf of minor plaintiffs Matthew Heilig, Nathan Davis, Tiffany Bolden, Bryan Bolden, Isaiah Yates, Lauren Shanks, and by adults Heather Glaze, Jeremy Halbrook, Ashley Shanks and Gabriel Farmer in the *Heilig* case (Writ Exhibit 3). The plaintiffs respectively joined to file these three cases pursuant to Supreme Court Rule 52.05.

The allegations against the Relators involve conduct occurring before April 1994. *See*, paragraphs 1 - 4, 10, 16 - 28, of each Petition which allege the time period of the ownership of the Herculaneum smelter by Relators as being before this date with Relators' wrongful conduct also occurring before April 1994. (Writ Exhibits 1, 2, 3).

Respondent consolidated the *Alexander* and *Pedersen* cases for trial on February 2, 2010 (A12-A13), and thereafter simultaneous discovery took place on these two actions. *See*, e.g., Court Order of September 15, 2010, A14. Discovery in the *Heilig* case took place on a separate track. *See*, e.g., *Heilig* Scheduling Order for April 25, 2011 Trial Setting, A15-A16. As late as December 2010 all parties were preparing to try the *Alexander* and *Pedersen* cases on January 31, 2011 with the *Heilig* cases set to be tried at a later setting on April 25, 2011. In response to Defendants' motion to continue the trial

of the *Alexander* and *Pedersen* cases, over Plaintiffs' objection Respondent granted Relator's motion for a continuance by consolidating the *Alexander* and *Pedersen* cases with the *Heilig* case which, as has been stated, was already set for trial on April 25, 2011. (A15-A16, A17). Respondent has clearly stated on the record that this consolidation was for the purpose of trial only. *See*, Relators' Sealed Exhibit 26, Transcript of August 15, 2011 Hearing, at Transcript pages, 54 - 59; Relators' Writ Exhibit pages 268 - 269.

Between April 25, 2011, and July 29, 2011, the cases of the sixteen plaintiffs subject to this proceeding, who presently range in age from 10 to 26, were tried. Although a number of the liability facts relating to the massive amounts of lead emanating from Relators' Herculaneum smelter are similar for the plaintiffs, facts relating to exposure, causation, and punitive and compensatory damages are unique to each plaintiff. As a result, proof during trial for each plaintiff included that plaintiff's individual medical history, educational history, residential history, lead exposure, occupational history, as applicable, and Defendants' disregard for the circumstances of that plaintiff. The injuries to each plaintiff occurred before age 7.

During the week of July 25, 2011, separate verdict directors for each plaintiff were read in their entirety to the jury. The jury then returned separate verdicts for each of the sixteen plaintiffs. Each of the sixteen separate verdicts was reduced to a judgment on August 15, 2011. No two judgments are for the same amount. *See*, Relators' Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, at Relators' Writ Exhibit pages 173 - 222. On August 29, 2011, Respondent set bond as to each plaintiff's individual

judgment in an amount sufficient to secure each such judgment as required by Supreme Court Rule 81.09, and § 512.080.2.<sup>1</sup> (Writ Exhibit 4).

On August 31, 2011, Relators filed their writ petition in the Missouri Court of Appeals, Eastern District, seeking the same relief they request in their petition before this Court. The Court of Appeals denied their petition on September 27, 2011.

On September 28, 2011, Relators filed the present writ petition. On the same day, Relators elected to file sixteen bonds in the Circuit Court, one for each judgment entered in favor of each plaintiff. Each bond is signed by principals of the Relators and expressly recognizes that each individual plaintiff has “recovered *a judgment* against the said Fluor Corporation, A.T. Massey Coal Company and Doe Run Investment Holdings Corporation.” (emphasis added) (A18-A112).

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<sup>1</sup> See, *State ex rel Brickner v. Saitz*, 664 S.W.2d 209 (Mo. banc 1984), affirming the trial court’s jurisdiction to set the amount of the bond and the requirement of Supreme Court Rule 81.09(b): “When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay. . .” The Rule contains the same requirements as § 512.080.2 RSMo.

**POINTS RELIED ON**

**Relators are not entitled to an order of mandamus or prohibition directing the Respondent to reduce the number of judgments from one for each separate plaintiff to one judgment for all plaintiffs or three judgments (one for four plaintiffs; one for two plaintiffs, and one for ten plaintiffs) after which the bond amounts for either all plaintiffs (in the case of one judgment) or some but not all (in the case of three judgments) would be reduced:**

**A.**

**For the reason that it was not an abuse of discretion for Respondent to enter separate judgments for separate plaintiffs with separate causes of action, and § 512.099, RSMo Supp. 2010 is, as a result, not applicable, because the statute only applies to “any judgment” where the total appeal bond exceeds \$50 million, but here since no single judgment entered exceeds \$50 million, the Respondent was correct in finding the statute inapplicable.**

Section 512.099, RSMo Supp. 2010

*Newton v. Ford Motor Co.*, 282 S.W.3d 825, 834, n.2 (Mo. 2009) (Wolff, J., concurring).

*See In the Interest of S.M.*, 841 S.W.2d 302, 306 (Mo. App. S.D.1992)

**B.**

**For the reason that if § 512.099, RSMo Supp. 2010 is found to be applicable, the application of the statute is unconstitutional in that it violates plaintiffs’ rights under the Missouri Constitution, and more specifically, the prohibition against**

**retrospective legislation in Article I, Section 13 of the Missouri Constitution, in that the statutory change in amount of the appeal bond in all tort cases is a law affecting substantive rights, and therefore, it cannot be applied retrospectively to the claims of the plaintiffs which accrued at the latest in 2001 when the last of the plaintiffs (Sydney Fisher) was diagnosed with lead poisoning, well before the effective date of H.B. 393, and because it by its very terms applies to actions filed before the law went into effect; and because in its implementation, if applicable to multi-plaintiff settings, will necessarily violate Article I, § 2 of the Missouri Constitution which guarantees equal protection under the law.**

Art. 1, § 13 of the Missouri Constitution

Article 1, § 2 of the Missouri Constitution.

*Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010)

*State ex rel. St. Louis-San Francisco Railway Company v. Buder*, 515 SW.2d 409 (Mo. banc 1974)

## **ARGUMENT**

### **A.**

**It was not an abuse of discretion for Respondent to enter separate judgments for separate plaintiffs with separate causes of action, and § 512.099, RSMo Supp. 2010 is, as a result, not applicable, because the statute only applies to “any judgment” where the total appeal bond exceeds \$50 million, but here since no single judgment entered exceeds \$50 million, the Respondent was correct in finding the**

**statute inapplicable.**

As acknowledged by Relators, the standard of review for writs of mandamus and prohibition is that Respondent must have abused his discretion. Here, it was not an abuse of discretion for Respondent to enter sixteen separate judgments. In fact, it was appropriate for Respondent to enter a separate judgment on behalf of each plaintiff in that the 16 cases were individual and distinct. Given that § 512.099, RSMo Supp. 2010, is inapplicable, there should be no reduction of the appeal bonds set by the Respondent.

During the course of the more than three-month trial, individual facts specific to each plaintiff were presented in great detail to the jury not only by counsel for Plaintiffs but also by counsel for the Relators. Testimony from each plaintiff, along with that of plaintiff's family and/or friends, was presented. The jury thus heard and considered testimony describing each plaintiff's unique lead exposure history, medical history, educational history, and, as applicable, occupational history, as well as punitive facts related to Plaintiffs. (Four of the Plaintiffs are minors represented by their Next Friends). As an example of the extent to which the cases were separate, at the end of trial Relators requested a mistrial regarding just one of the plaintiffs, Preston Alexander, but not the other 15. *See*, Trial Transcript, July 29, 2011, pages 22 - 30; attached as Exhibit E to Respondent's Suggestions in Opposition to Writ Petition. During the trial Relators made several "offers of proof" uniquely directed to the actions brought by specific plaintiffs. *See*, Relators' Sealed Exhibit 26, Transcript of August 15, 2011 Hearing, Transcript pages 52-53, Relators' Writ Exhibit Pages 267-268.

In fact, Relators' argument that this is only one case is newly forged, having been fashioned exclusively for the purpose of attempting to limit their bonding obligation. At trial Relators' counsel said quite the opposite:

“This trial is really about each of those sixteen plaintiffs, we have to remember that. ... [T]his is a long trial, but **this is really separate cases. 16 separate personal injury cases brought by the 16 plaintiffs in this case.** They are each saying somehow lead has affected them and injured them. This is not a case, this is not a cause, this is not a case of society versus lead, or society versus big companies, or society versus companies that have taxes or other things, **this is a personal injury case, 16 of them.** That is what we're here to talk about to see if, in fact, these children have been harmed by lead or not. **Now, what does that mean when you're talking about each of them having a separate case? Because it was talked about in general in their opening about a bigger broader case, like they're all one big case. Each one is actually a separate case.** What does that mean for you when you will ultimately have to decide it? It means that for each of them there will be a set of instructions you will get that will say did the plaintiffs do this, this, this and

this. You will have heard the evidence and you will decide  
yes or no.”

*See*, Opening Statement of Relators’ attorney, Trial Transcript, May 10, 2011, at page 15, line 4, to page 16, line 4; attached as Exhibit D to Respondent’s Suggestions in Opposition to Writ Petition (emphasis added). Thus, by Relators’ own representation to the jury each plaintiff has a separate and distinct case.

Appropriately, and without objection, during the week of July 25 – after more than three months of trial – sixteen separate packages and verdict directors were read in their entirety to the jury. The jury then entered sixteen separate verdicts, and Respondent on August 15, 2011, entered sixteen separate judgments, one for each Plaintiff. No two judgments are for the same amount. *See*, Relators’ Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, at Relators’ Writ Exhibit pages 173 - 222.

In contrast to their own representations made at trial, Relators now insist that Respondent abused his discretion in entering sixteen separate judgments, one for each plaintiff, and insist that only one judgment should have been entered because Respondent had chosen to consolidate several plaintiffs’ cases into one trial pursuant to Supreme Court Rule 66.01(b) [“Consolidation - Common Question of Law or Fact. When civil actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the civil actions; it may order all the civil actions consolidated; and it may make such orders concerning

proceedings therein as may tend to avoid unnecessary costs or delay.”].<sup>2</sup>

Impliedly, Relators concede that to the extent it was not an abuse of discretion for the Respondent to enter sixteen separate judgments, § 512.099 would not apply and they would have no basis for seeking a reduction in the amount of the bond they have had to post. This is because no individual plaintiff’s judgment, even after calculating interest, would exceed the \$50 million cap. As stated in the text of § 512.099, RSMo Supp. 2010, the cap only applies to each judgment entered:

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*.****

(emphasis and italics supplied).

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<sup>2</sup> The fact is that Respondent only consolidated the cases for trial. Relators point to no finding where Respondent consolidated all of the cases into a single action.

§ 512.099.1. 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.

Simply put, if Respondent did not abuse his discretion when he entered sixteen separate judgments for sixteen separate plaintiffs, by the very terms of the statute each judgment should be fully bonded if Relators intend to appeal that judgment and avoid execution prior to the opinion of the last appellate court to rule on the merits of the appeal.<sup>3</sup> And just as certainly, Respondent did not abuse his discretion. Respondent had the discretion to try each plaintiff's individual case separately (back-to-back over the next four years given the length of the trial) or, in the interests of judicial economy, to try sixteen or even fifty plaintiffs' cases at one time. The exercise of such discretion should not operate to relieve Relators of their obligation to bond the separate individual verdicts and judgments obtained by separate individual victims of their tortious conduct.

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<sup>3</sup> The statute's use of the words, "In all cases in which there is a count alleging a tort" defines the type of cases to which the statute applies. It does not say, in all such cases where "one or more judgments are entered for one or more plaintiffs." Neither does it say "regardless of the value of the judgments" or "regardless of the value of the judgments collectively."

Indeed, there are important public policy considerations behind the legislature's decision not to write the statute in the manner Relators wish this Court to read it. There can be no question that Respondent or any similarly situated trial judge needs to have the discretion to try the case of one plaintiff at a time or multiple plaintiffs simultaneously in a mass tort situation. Here, for purposes of judicial efficiency, Respondent chose to try 16 separate cases at one time. There is no indication that the legislature meant to provide a disincentive to such docket management by potentially penalizing plaintiffs whose cases happened to be tried together.

Further, even if Respondent had signed just one piece of paper instead of sixteen separate documents, Relators' contention that each plaintiff does not have a judgment for the purpose of Section 512.099.1 would still be both factually and legally wrong. "Though judgments may be entered on the same document, they are separate judgments entered, respectively, as judgments on the verdicts." *Newton v. Ford Motor Co.*, 282 S.W.3d 825, 834, n.2 (Mo. banc 2009) (Wolff, J., concurring). See *In the Interest of S.M.*, 841 S.W.2d 302, 306 (Mo. App. S.D.1992) (holding that "[t]he joinder of the five children as the subject matter of the petition to terminate parental rights and for disposition without objection by any party, and with the tacit approval of the Juvenile Division, does not cause the judgment as to each child to be less than a final judgment.").

To be sure, in their attempt to recast the nature of what constitutes a judgment, Relators do cite to a few cases that they claim stand for the general principle that there is to be a single final judgment in a case. However, the cases they cite involve "cases"

between the same parties (not wholly distinct plaintiffs whose claims legally may just as easily be tried separately as together). These cases have no bearing on the issues before this Court. In *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188 (Mo. App. S.D.2000), for instance, the trial court entered several judgments between the same parties at different times which were described by the appellate court as “fragmented rulings erroneously denominated as judgments.” *Id.* at 217. The opinion mentions that the confusion caused by such fragmentation could have been avoided by designating the “judgment” at issue as “final for purpose of appeal” as provided for by Rule 74.01(b). In the case at bar, the first words of each “Order and Judgment” states, “This Order and Judgment is entered as final and appealable pursuant to Missouri Supreme Court Rule 74.01(b) upon the claims of Plaintiff [name] against Defendants Fluor Corporation, A.T. Massey Coal Company and Doe Run Investment Holding Corporation (DRIH), upon the express determination and finding by the Court that there is no just reason for delay in that all of the claims of plaintiff against these defendants have been fully adjudicated and all of the claims of plaintiff against all other parties have been settled or dismissed.” *See*, Relators’ Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, at Relators’ Writ Exhibit pages 173 - 222.

In *Hudson v. DeLonjay*, 731 S.W.2d 922 (Mo. App. E.D. 1987), the actions consolidated were separate cases filed by Hudson against DeLonjay arising out of assets acquired during cohabitation and counterclaims by DeLonjay. The consolidation order in that case was specifically founded upon Rule 66.01(a), titled “Consolidation—Same

Parties.” *Id.* at 930-931. *Johnson v. Heitland*, 314 S.W.3d 777, 779 (Mo. App. E.D. 2010), also involved claims between the same parties where the judgment was modified on appeal “so that it is shown to have been entered in favor of the [defendants] and against [plaintiff] for the difference between the amount of damages allowed.” *Johnson-Mulhern Properties, LLC v. TCI Cablevision of Missouri, Inc.*, 980 S.W.2d 171 (Mo. App. E.D. 1998), involved a judgment between a plaintiff and a defendant which lacked finality because it did not dispose of all counts of the petition. *M.F.A. Central Co-op. v. Harrill*, 405 S.W.2d 525, 530 (Mo. App. S.D. 1966), involved the issue of one judgment being required to dispose of a suit on account against husband and wife and counterclaims.

At best then, Relators seek to have this Court rewrite Section 512.099.1 so it applies collectively to “judgments” (plural) rather than the “judgment” (singular) entered in favor of each plaintiff by Respondent. It is not surprising that this reading does not comport with the statute on its face nor do Relators cite to any statute or case that supports their proposed statutory construction. 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. But Section 512.099.1 only imposes a cap on the amount of a bond as to each judgment.

In conclusion, if this Court concludes that each of the plaintiffs has an individually cognizable case against Relators, then Relators’ writ should fail. The jury returned separate verdicts for each plaintiff, and Respondent appropriately entered separate

individual judgments for each plaintiff in accordance with the verdicts for that Plaintiff. Pursuant to Missouri statutes, including Section 512.099.1, each Plaintiff is entitled to have his or her case bonded should Relators wish to appeal the judgment duly entered against them without any risk of execution.

**B.**

**For the reason that if § 512.099, RSMo Supp. 2010 is found to be applicable, the application of the statute is unconstitutional in that it violates plaintiffs' rights under the Missouri Constitution, and more specifically, the prohibition against retrospective legislation in Article I, Section 13 of the Missouri Constitution, in that the statutory change in amount of the appeal bond in all tort cases is a law affecting substantive rights and therefore it cannot be applied retrospectively to the claims of the plaintiffs which accrued at the latest in 2001 when the last of the plaintiffs (Sydney Fisher) was diagnosed with lead poisoning, well before the effective date of H.B. 393, and because it by its very terms applies to actions filed before the law went into effect; and because in its implementation, if applicable to multi-plaintiff settings, will necessarily violate Article I, § 2 of the Missouri Constitution which guarantees equal protection under the law.**

**1. § 512.099, RSMo Supp. 2010 is unconstitutional in that it applies retrospectively.**

In 1984 in *State ex rel Brickner v. Saitz*, 664 S.W.2d 209, 213 (Mo. banc 1984), this court recognized that Rule 81.09 requires that if the defendants “want to stay

enforcement of the judgment they must put up security sufficient to assure the plaintiff that, if the judgment is affirmed in whole or in part, payment will be forthcoming.” Rule 81.09(b) requires, “When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.” It is this that operates to guarantee that funds will not be depleted while a judgment lawfully entered is appealed.

The allegations against the Relators herein have involved conduct occurring while *Brickner* stood unabridged. Relators’ wrongful conduct at issue occurred before April 1994 (Writ Exhibits 1, 2, 3), while the youngest plaintiff, Sydney Fisher, was diagnosed as being lead poisoned in 2001. *See Carter v. Pottenger*, 888 S.W.2d 710, 713 (Mo. App. S.D. 1994) (“In a negligence case the cause of action accrues when there is a breach of a duty owing to the plaintiff resulting in injury.”). In fact, all petitions were filed before § 512.099 went into effect on August 28, 2005.

Despite this, the Relators seek this Court to apply § 512.099 to the within Plaintiffs. They make this argument because § 512.099 was the only statute enacted as

part of HB 393, 2005, which by its terms may apply retrospectively.<sup>4</sup> [ § 512.099.3, “The provisions of this section shall apply **to all judgments** entered on or after August 28, 2005.” (L. 2005, H.B. 393) (emphasis supplied)].

Yet, as this Court has consistently made clear, the “legislative intent to apply [a] law retrospectively [cannot] supersede the specific prohibition on retrospective laws.” *Doe v. Phillips*, 194 S.W.3d 833, 851 (Mo. banc 2006) (citing *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993)). It is immaterial that there might be “cogent reasons” for amended § 512.099 to operate retrospectively. The constitutional bar to the retrospective operation of law cannot be superseded by the Legislature, “cogent reasons” or not. *See Phillips*, 194 S.W.3d at 851.

Therefore, this Court should hold that § 512.099.3 violates Article 1, Section 13 of the Missouri Constitution (“That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.”). Indeed, this constitutional prohibition reflects “the underlying repugnance to the retrospective application of laws.” *State ex rel.*

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<sup>4</sup> “Retroactive laws have been defined ‘as those which ‘take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed.’ ” *Stewart v. Sturms*, 784 S.W.2d 257, 260-61 (Mo. App. E.D. 1989) (citing *Buder*, 515 S.W.2d at 410).

*St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974). That ban “has been part of Missouri law since this State adopted its first constitution in 1820,” and is recognized as being “broader than the *ex post facto* bars in other states.” *Phillips*, 194 S.W.3d at 850.

Moreover, § 512.099 cannot operate to limit the vested right of Plaintiffs pursuant to Rule 81.09(b) to receive a full appeal bond. Missouri courts have made clear that vested rights – substantive rights – cannot be affected by subsequent legislation. Just as this Court in *Klotz* found that “the new non-economic damages cap established by HB 393 may not be applied to a cause of action that accrued prior to August 28, 2005,” *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 781-84 (Mo. banc 2010) (Teitelman, J., concurring), so too the severe resultant limitation of the bond for each plaintiff pursuant to Relators’ argument may not be applied to alter the amount of the bond which would have been required when Plaintiffs’ causes of action accrued before August 28, 2005.

**2. Any application of the Relators’ proposed alternate remedies would suffer from both practical and Constitutional infirmities which cannot be overcome.**

While arguing for their artificial bond limitation across unrelated individuals, Relators do not even attempt to state how they would divvy up the bond between plaintiffs nor do they explain how much of each Plaintiff’s judgment would go without the security of a bond. In fact, Relators utterly ignore both the impracticality and constitutional infirmities of implementing the collective bonds they seek. First, if this court were to limit the total of all bonds to Relators’ requested \$50 million, how much

would each Plaintiff's individual judgment be bonded for when each plaintiff received a different verdict amount? If one or more Plaintiffs settled, would that operate to increase the bonds for the other Plaintiffs? If it does, then by how much and how would that be apportioned among the remaining plaintiffs? And if this Court rules in favor of Relators' alternative request for three judgments, would that mean that the two plaintiffs in the *Pedersen* case would have their judgments fully bonded but the four plaintiffs in the *Alexander* case would split the \$50 million bond in some unspecified fashion and the ten *Heilig* plaintiffs would divide the same amount between themselves as the four *Alexander* plaintiffs divide? How would this be done?

Moreover, however it is done, it is clear that Relators' request would pit each child against the others in a battle for greater security. The disparate nature of Relators' bonding proposal is only amplified by their alternative suggestion. Under that scenario, Relators would fully bond all of the plaintiffs in one case (*Pedersen*), while leaving the plaintiffs in the *Heilig* case to fight over less than 25% of the bond security received by each of the *Pedersen* plaintiffs.

Relators' proposed regime makes light of the fact that each of the 16 children are separate individuals who received separate and distinct verdicts. Instead of treating each verdict and judgment equally under the law, Relators suggest rampant inequality. Although these sixteen plaintiffs are not a "suspect class," they cannot be treated differently by a Missouri statute without a rational basis.

The United States Supreme Court has explicitly held that plaintiffs like these may

pursue claims of equal protection violations as a “class of one,” based on the principal that “the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination.” The Court explained:

Our cases have recognized successful equal protection claims brought by a “class of one,” where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

*Village of Willowbrook, et al., v. Olech*, 120 S.Ct. 1073, 1075 (2000) (internal citations omitted). Indeed, the express purpose of the equal protection clause is to protect similarly situated individuals from different treatment.

Here, the sixteen plaintiffs are individuals, each with unique and distinct injuries, but they will necessarily be treated dissimilarly pursuant to either of Relators’ proposals. Applying a statute to their judgments in a way that treats them differently when there is no rational basis for the unequal treatment of the different plaintiffs, is a violation of the constitutional right to due process. Relators’ writ thus requests this Court to institute a

remedy which suffers not only from severe practical limitations but obvious constitutional infirmities.

**CONCLUSION**

The Relators' Petition for Writ of Prohibition or Mandamus should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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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 WordPerfect 12 program, the undersigned certifies that the total number of words contained in this brief is 5,704, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

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