IN THE MISSOURI SUPREME COURT
EN BANC

STATE OF MISSOURI ex rel. DAVID M. NOTHUM AND GLENETTE NOTHUM Relators, vs. HONORABLE JOSEPH L. WALSH III St Louis County Circuit Court Judge Respondent.	)	No. SC92268

An Original Proceeding in Prohibition

Reply Brief of Relators David M. Nothum and Glenette Nothum

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Statement of Facts

Relators Mr. David Nothum and Mrs. Glenette Nothum ("the Nothums"), believe that their Statement of Facts fully set forth the factual information necessary for this Court to resolve the purely legal issues presented. The information appearing in Respondent's Brief adds nothing material. It is worth observing that the Bank[1] does not claim that the trial court evaluated each question posed to the Nothums and made a finding that the answer to each question "could not possibly have the tendency to incriminate." Instead, the Bank acknowledges that the trial court relied ***exclusively*** on its interpretation of the grant of use immunity authorized by § 513.380 R.S.Mo. as including transactional immunity in order to reach its determination that the Nothums could not possibly incriminate themselves in response to any questions posed by the Bank. Respondent'sBrief, p.8.

As an additional note, the Nothums must comment on the Bank's factual assertion set forth, not in its Statement of Facts, but rather in its Argument (Respondent's Brief, p. 9), that the Nothums "have attempted to hide assets and frustrate the efforts of the Bank to collect any portion of the judgment." There is nothing whatsoever in the record to support these allegations, and the Bank makes no citation to anything to support them. Such baseless accusations serve only to divert attention from the real issue before this Court, that is, the right of the Nothums to stand on their constitutional rights against self-incrimination rather than forego those constitutional rights in exchange for an insufficient grant of immunity.

[1] Arizona Bank and Trust ("the Bank")

ARGUMENT

In their Argument, the Nothums will not re-argue their initial Relators' Brief, but rather will address the Bank's Argument as it relates to their Points Relied On.

I.

The Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony, Because The Relators Have Federal And State Constitutionally Guaranteed Rights To Exercise Their Privilege Against Self-Incrimination, Giving Rise To The Presumption That Any Potential Answer Will Tend To Incriminate The Relators; 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", Which Finding The Trial Court Did Not Make.

The Bank and the Nothums agree that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the Fifth Amendment privilege. Respondent's Brief, p. 11, *citing Kastigar v. United States*, 406 U.S. 441 (1972). The Bank and the Nothums further agree that the Court did not evaluate each question posed by the Bank to the Nothums, and did not make findings that the answers to the same "could not possibly have the tendency to incriminate."

Nevertheless, the Bank contends that the "Respondent made the required findings to hold the debtors in contempt" and that "Judge Walsh followed the requirements set out

in ('Nothum I')." Respondent's Brief, p. 18. Nothing could be further from the truth. The requirements of Nothum I, as reiterated in the Court of Appeals' opinion that resulted in the transfer of this case to this Court, compel the trial court to "find that the answer, as to each challenged question, could not possibly have the tendency to incriminate the judgment debtor." Opinion dated January 10, 2012, p. 2. This clearly did not occur in the proceedings before Respondent.

II.

The Relators Are Entitled To An Order Prohibiting Respondent From Enforcing The Four Challenged Orders Of October 4, 2011, Or Otherwise Attempting To Coerce The Relators To Give Testimony Because The Legislature Has Expressly Limited § 513.380 R.S.Mo. (2000) To "Use" Immunity.

In its Brief, p. 12, the Bank suggests that the Court's Orders holding the Nothums in contempt were entirely within its sound discretion, citing *Fulton v. Fulton*, 528 S.W.2d 146, 157 (Mo. App. 1975). However, the *Fulton* Court, citing to 17 Corpus Juris Secundum Contempt § 57, pp. 131-133, instructs that the power of contempt "should be exercised with caution, deliberation, ***due regard to constitutional rights, and in accordance with the law***." *Fulton*, 528 S.W.2d at 157. Here, Respondent's contempt orders violate the Nothums' Fifth Amendment protection against self-incrimination and therefore are not within the Respondent's sound discretion.

The Bank does not dispute that the prosecuting attorney's authority to grant immunity is not inherent, but rather prescribed by statute, and that the decision as to when immunity may be granted is the prerogative of the legislature. The crux of the

Bank's argument is that the legislature meant to grant something other than its specific grant of use immunity in § 513.380. The Bank argues that the legislature must have meant to create transactional immunity, despite the specific reference to "use immunity" in the statute, because the statute declares that "the grant of use immunity shall protect a person from prosecution for any offense related to the content of the statements made." In Respondent's estimation, this conclusively demonstrates that the legislature intended to establish the grant of "transactional immunity".

Of course, as noted by Relators and the Court of Appeals, the legislature has demonstrated its ability in other instances to grant transactional immunity when it saw fit to do so, and with the clarity that individuals have the right to expect when their constitutional rights are at stake. Nevertheless, Respondent takes issue with Relators' and the Court of Appeals' reference to those statutes that grant transactional immunity, claiming that the inclusion of the word "transaction" in those statutes doesn't mean that the legislature intended to grant "transactional immunity". Respondent's Brief, pp. 16-17. Of course, that is precisely what it means. Similarly, the reference to "use" in the title of § 513.380 and again in § 513.380.2 means that the legislature intended to grant "use immunity" by enacting that statute.

The legislature is presumed to know the status of the law at the time the statute in question is drafted. *Cook v. Newman*, 142 S.W.3d 880, 888 (Mo. App. 2004). The United States Supreme Court decided *Kastigar* in 1972; the legislature amended §513.380 to add the use immunity provision of subsection 2 in 1993. The legislature had twenty-one years of knowledge that the Fifth Amendment required at least use and

derivative-use immunity. For reasons best known to it, the legislature chose to authorize the grant of use immunity only.

Where a statute's plain meaning is clear, courts must resist the urge to divine a legislative intent that confers some other meaning. *Miles v. Lear Corp.*, 259 S.W.3d 64, 69 (Mo. App. 2008). If there are any unintended consequences created by the Legislature's plain meaning, they are to be resolved by the legislature and not the judiciary. *Id.* Almost twenty years have passed since subsection 2 of § 513.380 was enacted, and in all of that time, the legislature has made no amendment thereto. This is a strong indication that the legislature is satisfied with its limited grant of use immunity. One would expect that if the legislature intended to grant derivative-use or transactional immunity to judgment debtors, it would have amended subsection 2 to accomplish that. It has not.

The Bank argues that applying the actual language of § 513.380 R.S.Mo. renders the statute a nullity. It does not. Any judgment debtor satisfied with the legislature's grant of use immunity only, rather than the constitutionally required use and derivative use immunity, may testify secure in the knowledge that he or she has use immunity.

III.

The Relators Are Entitled To An Order Prohibiting The Respondent From Making Any Finding That An Assistant Prosecuting Attorney's Grant Of Immunity For A Judgment Debtor Examination Has Any Legal Effect, Because Assistant Prosecuting Attorneys In Missouri Are Not Authorized to Grant Such Immunity In That § 513.380 R.S.Mo. (2000) Grants Only *Prosecuting Or Circuit Attorneys* The Authority To Grant Immunity For Statements Made At Judgment Debtor Examinations.

The Bank argues that § 513.380 R.S. Mo. authorizes assistant prosecuting attorneys to grant immunity for a judgment debtor examination. Again, the Bank would have this Court usurp the legislature's exclusive role. That statute authorizes only "any prosecuting attorney or circuit attorney" to grant use immunity. In support of its position, the Bank cites Supreme Court Rule 19.05's definition of "prosecuting attorney" as including assistant prosecuting attorneys. However, that rule specifies that its definition applies to Supreme Court Rules of ***Criminal*** Procedure 19 to 36. As noted in the Nothums' initial Brief, an examination of judgment debtor does not fall within those rules.

The Bank's remaining arguments as to this Point III are addressed in the Nothums' initial brief, pp.23 to 26.

CONCLUSION

For the reasons set forth in the Nothums' initial Brief and here, the Court should grant the relief set forth in the initial Brief at pp. 27 and 28.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; and (2) contains 1,961 words, including the sections exempted by Rule 84.06(b)(2), based on the word count that is part of Microsoft Word 2010.

/s/ Kathryn M. Koch

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Certificate of Service

I certify that this brief, as required by Missouri Supreme Court Rule 103.08, was served on counsel and Respondent identified below by the electronic filing system, or U.S. Mail, postage paid, on March 19, 2012, as indicated:

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