

Summary of SC92268, *State ex rel. David M. Nothum & Glenette Nothum v. The Honorable Joseph L. Walsh III*

Proceeding originating in St. Louis County, Judge Joseph L. Walsh III

Argued and submitted April 24, 2012; opinion issued July 31, 2012

Attorneys: The Nothums were represented by Norman W. Pressman, Kathryn M. Koch and Benjamin K. Westbrook of Goldstein & Pressman PC in St. Louis, (314) 727-1717, and Donald R. Carmody and John E. Hilton of Carmody MacDonald PC in Clayton, (314) 854-8644; the bank was represented by Jeffrey T. McPherson and Christopher R. LaRose of Armstrong Teasdale LLP in St. Louis, (314) 621-5070.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A husband and wife seek a writ (order) prohibiting the trial court from compelling them to testify in a judgment debtor's examination. The court ordered the couple to testify, despite their assertion of the constitutional privilege against self-incrimination, after finding that the couple had received immunity that was coextensive with their constitutional privilege. In a 4-3 opinion written by Judge Laura Denvir Stith, the Supreme Court of Missouri orders a permanent writ to issue. The trial court abused its discretion in ordering the couple to testify, as the immunity they received was "use immunity," a type of immunity that does not fully supplant the constitutional privilege against self-incrimination.

Judge Zel M. Fischer wrote a dissenting opinion. He believes the scope of the immunity granted by the legislature is determined by analyzing all the words in the statute to determine the immunity the legislature intended to authorize.

Judge David Miller, a circuit judge in the 8th circuit (Carroll and Ray counties), sat in this case by special designation in place of Judge William Ray Price Jr. Justine E. Del Muro, a circuit judge in the 16th circuit (Jackson County), sat in this case by special designation in place of Judge George W. Draper III.

Facts: A creditor with a judgment against David and Glenette Nothum obtained an order directing them to testify under oath in a judgment debtor's examination regarding their ability and means to satisfy the judgment. Prior to the examination, the St. Louis County prosecuting attorney's office issued a letter, pursuant to authority granted it by a Missouri statute, that provided the Nothums "use immunity" for statements they made during their testimony. The Nothums appeared for the examination but invoked their privilege against self-incrimination, arguing that the immunity they received pursuant to the statute was not coextensive (equal in scope) with their constitutional privilege. Despite their assertion of privilege, however, the trial court ordered them to testify, finding that, although the statute denominated the type of immunity that could be granted as "use immunity," the legislature actually intended to grant a broader form of immunity. When the Nothums continued to assert their constitutional privilege, the court held them in contempt but stayed the contempt orders to allow the Nothums to seek extraordinary relief from the orders compelling them to testify. The Nothums now seek such relief from this

Court.

PERMANENT WRIT TO ISSUE.

Court en banc holds: The trial court abused its discretion in ordering the Nothums to testify over their assertion of the privilege against self-incrimination. For testimony to be compelled over a proper invocation of privilege, the immunity provided to a witness must fully supplant the protection afforded by the federal and state constitutions. According to the United States Supreme Court, this means that a witness must be granted immunity that, at minimum, precludes in future prosecutions the use of the compelled testimony itself (“use immunity”) as well as any evidence directly or indirectly derived from it (“derivative use immunity”).

Here, the Nothums were granted immunity pursuant to section 513.380, RSMo, which by its plain terms solely authorizes prosecutors to provide witnesses appearing before judgment debtor’s examinations with use immunity. Though the statute also states that this “use immunity ... shall protect such person from prosecution for any offense related to the content of the statements made,” there is no evidence that the legislature intended by the use of this language to convert the statute’s express grant of authority to provide use immunity into an implied grant of authority to provide a broader form of immunity. This conclusion is evident from comparing the language in section 513.380 with other statutes – both in Missouri and beyond – that do grant a type of immunity that is broader in scope than mere use immunity.

The Nothums ask this Court to prohibit the trial court from enforcing its orders compelling them to testify. Because section 513.380 provides only use immunity, the Nothums did not have immunity coextensive with the scope of the privilege against self-incrimination. As such, the trial court had no authority to compel the Nothums to testify. Its issuance of the stayed contempt order is rendered moot by the fact that it had no authority to compel their testimony.

Dissenting opinion by Judge Fischer: The author would quash the writ of prohibition. At the outset, he points out the proper review of a judgment of civil contempt is through an appeal of the judgment and not through an extraordinary writ of prohibition. He would hold the circuit court did not abuse its discretion in interpreting section 513.380, RSMo, to give the Nothums the broadest immunity possible, which is sufficient to compel their testimony while protecting their right against self-incrimination. The scope of immunity authorized in section 513.380.2 must consider all the words in the provision and are to be given their plain and ordinary meaning. The plain language of this section reflects legislative intent to create the “broadest immunity possible.” The statute here specifically provides broad protection against prosecution for any offense related to testimony given at a judgment debtor’s examination. In his view, it does not seem reasonable for the Court to interpret the statute to mean a judgment debtor is not required to answer questions concerning the location of assets to collect the judgment. Further, even if the circuit court did misinterpret the statute, it was not an abuse of discretion such that an extraordinary writ should be issued.