In the
Missouri Court of Appeals
Western District

RAYMOND SKIRVIN,	)	
	)	
Respondent,	)	**WD75541**
	)	
v.	)	**OPINION FILED: January 22, 2013**
	)	
TREASURER STATE OF MISSOURI, ET AL.,	)	
	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Before Division Three: Alok Ahuja, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

This is an appeal from the entry of a writ of mandamus which orders Missouri Treasurer Clint Zweifel ("Treasurer") and the Director of the Division of Workers' Compensation, John J. Hickey, ("Director") (collectively "Appellants") to pay a permanent total disability award entered in favor of Raymond Skirvin ("Skirvin") and against the Missouri Second Injury Fund ("SIF"). Appellants claim that the trial court erred because SIF is insolvent and unable to pay all recipients of permanent total

disability awards. We reverse, but order transfer of this case pursuant to Missouri Supreme Court Rule 83.02.

Factual and Procedural Background

On May 6, 2011, the Labor and Industrial Relations Commission entered an award in favor of Skirvin and against SIF finding Skirvin to be permanently totally disabled due to the combination of preexisting disabling conditions and the disability of a primary work injury. The award required SIF to pay Skirvin $99.37 per week beginning on July 26, 2006 and continuing for sixty weeks, with weekly payments thereafter for life in the amount of $464.45. The Appellants do not contest Skirvin's award.

On July 8, 2011, the Missouri Attorney General, on behalf of SIF,[1] wrote Skirvin and acknowledged that his award was scheduled for payment on July 11, 2011. However, SIF advised:

> [W]e regret to inform you that SIF is unable to make that payment due to its current balance and projections for the remainder of the fiscal year. We will notify you in the event SIF is able to make payment in the future.

On September 27, 2011, Skirvin filed a petition for writ of mandamus in the Circuit Court for Marion County, Missouri against the Treasurer seeking to compel payment of the award. The case was transferred to the Circuit Court for Cole County, Missouri on December 9, 2011. The Treasurer answered the petition, and asserted that all necessary parties had not been named. The Treasurer then filed a motion to join all

[1] Pursuant to RSMo section 287.220.2, "all claims filed against the second injury fund on or after July 1, 1994" are to be defended by assistant attorneys general, and "all legal expenses incurred by the attorney general's office in the handling of such claims . . . shall be paid by the fund." That section also provides that "[e]ffective July 1, 1993, the payment of [legal expenses incurred by the attorney general's office in handling SIF claims] shall be contingent upon annual appropriations made by the general assembly, from the fund, to the attorney general's office for this specific purpose."

payees "of regular recurring permanent total disability payments for life from [SIF] and all recipients . . . of permanent total disability awards against [SIF] since March 7, 2011" as necessary parties under Rule 52.04(a). SIF argued that all payees were necessary parties because SIF is insolvent and "unable to determine among the multiple claimants who should have priority in payments."

On June 21, 2012, the trial court concurrently conducted a hearing on the Treasurer's Rule 52.04(a) motion and on Skirvin's petition.[2] Cindy Struemph ("Struemph"), SIF program manager for the Missouri Division of Workers' Compensation, testified for the Treasurer.[3] Struemph testified about the fiscal status of SIF as follows:

> • SIF is funded by a legislatively authorized surcharge ("Surcharge") assessed against all workers' compensation insurance policies and self-insurance coverages as a percentage of each insured's net deposits, net premiums, or net assessments for the previous policy year. The Surcharge was capped by the Missouri General Assembly at 3% in 2005.
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> • SIF receives the Surcharge on a quarterly basis by the end of the month following the end of each calendar quarter.
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> • As of trial, SIF was paying recurring bi-weekly permanent total disability payments to 1079 claimants who received awards against SIF prior to March 7, 2011. The average monthly total of these recurring payments was $2,028,342.82. Bi-weekly permanent total disability payments continue for the life of a claimant.

[2] Skirvin's case was consolidated for purposes of trial with similar requests for writs of mandamus filed by two other claimants, Frank Munger and Dennis Campbell. However, the cases were not formally consolidated, leading to the entry of three separate judgments by the trial court. The judgments entered in Munger's and Campbell's cases have also been appealed by Appellants, and those appeals are pending in this court.

[3] Struemph's testimony was received over Skirvin's objection to relevancy. Skirvin argued at trial that evidence about SIF's insolvency was not relevant or material because there was no dispute that as of the date of trial, SIF had funds on hand sufficient to pay Skirvin's then accumulated claim in the approximate amount of $124,000.00.

• As of trial, SIF was paying approximately $500,000.00 per month in permanent partial disability awards, and was paying approximately $240,000.00 per month to compensate the assistant attorneys general handling claims against SIF.

• In March of 2011, SIF determined it could not meet all of its existing and future payment obligations. SIF decided to withhold the payment of ***new*** permanent total disability awards entered since March 7, 2011. At some point, SIF accumulated sufficient funds to make the bi-weekly permanent total disability payments due on these new awards for the months of March, April, and May of 2011. However, SIF has not made any other bi-weekly permanent total disability payments on awards entered since March 7, 2011.[4]

• The Surcharge received by SIF for calendar year 2011 totaled $43,284,364.00, approximately $10,821,091.00 per quarter.

• In fiscal year 2012 through June 21, 2012, SIF has paid out $39,609,685.50. This sum includes the recurring bi-weekly permanent total disability payments on 1079 awards that predate March 7, 2011; the bi-weekly permanent total disability payments made for March, April, and May, 2011 on awards entered since March 7, 2011; all permanent partial disability awards; and attorney's fees.

• As of trial, SIF owed unpaid permanent total disability awards, including interest, in the amount of $21,313,855.80 (approximately $19,672,000.00 without interest). SIF's liability will continue to increase by: (i) bi-weekly permanent total disability payments in the approximate amount of $386,000.00 per month owed to the 244 individuals who have received awards against SIF since March 7, 2011, (ii) permanent total disability awards expected to be entered after trial to an average of 20 new claimants per month in the average amount of $67,000.00 per person ($1,340,000.00 per month),[5] and (iii) interest.

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[4] Prior to oral argument, Appellants notified the court in a letter brief that some back payments due for the months of June through mid-October 2011 on permanent total disability awards entered since March 7, 2011 have been made.

[5] We assume, though the record is not entirely clear, that this amount is proportionally higher per claimant than the $386,000.00 per month being paid to the 244 bi-weekly permanent total disability recipients receiving awards since March 7, 2011 because it includes a lump sum amount representing bi-weekly permanent total disability due for a period preceding the entry of an award. If our assumption is correct, this initial "average" monthly obligation to new claimants would significantly diminish in each successive month, only to then be owed to the next month's new claimants.

- As of trial, the balance in SIF was $6,500,000.00. As of trial, SIF was facing a deficit of at least $15,000,000.00 that will continue to increase.

- In order to have sufficient funds to pay SIF's past and future obligations, the Surcharge which funds SIF would need to be as high as 9% or 10%.

Skirvin conceded that "[SIF has] no money. It needs to be fixed. . . . It's insolvent, no question about it." However, it was Skirvin's position that "as bad as that might be," SIF's insolvency was not a defense to his client's right to secure a writ of mandamus to compel payment of his permanent total disability award. The unpaid amount of Skirvin's award had accumulated as of trial to approximately $124,000.00.

The Treasurer argued that if permanent total disability awardees could compel SIF to put them first in line for full payment merely by being the first to the courthouse, SIF would be unable to fairly divide its limited resources amongst all similarly situated awardees. The Treasurer argued that all recipients of permanent total disability awards from SIF were necessary parties under Rule 52.04(a), as any writ of mandamus compelling priority payment to one or more recipients from the insolvent fund would have the effect of preferring some claims to the detriment of others. The Treasurer argued that if all recipients were before the court, the trial court could order SIF to make ratable payments. Skirvin responded that SIF should seek bankruptcy protection if it wanted to prioritize the payment of its obligations, but that in the meantime, SIF's limited resources were available on a first come/first served basis to judgment creditors who were able to secure writs of mandamus.

No other testimony was taken. The trial court announced at the conclusion of trial:

> I think I have to grant the mandamus and deny your [Rule 52.04(a)] motion, Mr. Holliger. And that's what I intend to do if I get more cases. But I think there's got to be a remedy for this situation. And these are people that obviously absolutely need their money. I mean, this is an embarrassment to the State of Missouri that we do not have adequate funds to pay people that were injured while they were doing hard work. And something needs to be done to remedy this situation.

The Treasurer pointed out that Skirvin had neglected to name the Director as a defendant in addition to the Treasurer.[6] In response, Skirvin's petition was deemed amended by agreement to add the Director as a defendant. Formal judgment was then entered by the trial court on June 21, 2012 granting Skirvin a writ of mandamus against the Treasurer and the Director and ordering "Skirvin to be paid according to Labor and Industrial Commission Award #06-047647." The judgment effectively denied SIF's motion to join necessary parties.

The Treasurer and the Director filed a motion to reconsider and for new trial, urging that the judgment would wreak havoc on SIF by promoting a "run on the bank," making it impossible to attempt to impose an orderly payout of SIF's limited funds. The motion was denied on August 6, 2012.

The Treasurer and the Director filed their appeal on August 15, 2012. Appellants and Skirvin filed a Joint Motion to Expedite Appeal. The parties advised that "[Skirvin] is awaiting payment of an award and the only reason he has not been paid involves the insolvency of the [SIF]." The parties also advised that:

> There are over 200 unpaid permanent total disability awards at this time because [of] SIF's financial condition. In addition there are over 60

[6] The Treasurer is not authorized to pay compensation and benefits out of the second injury fund until the Director has requisitioned payment. Section 287.220.1.

> mandamus cases pending in various cases throughout the state. Other than venue questions in some of those cases the issues in this appeal are common to all mandamus cases and will affect as well previously existing bi-weekly payments to over 1000 Missouri citizens.

The parties urged an expedited appeal because "[t]he Missouri General Assembly has an interest in an early resolution so that it can determine what legislative fixes, if any, [are needed]."

We granted the Joint Motion to Expedite Appeal and, following expedited briefing which was completed on December 10, 2012,[7] heard oral argument and the case was submitted on December 20, 2012.

Standard of Review

We review the trial court's grant or refusal of a writ of mandamus for an abuse of discretion. *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991) (citation omitted). "[T]he trial court necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law." *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. W.D. 2009).

"This court 'will affirm a trial court's decision under Rule 52.04 unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it

[7] The State filed its brief on October 10, 2012, and Skirvin filed his brief on October 22, 2012. The State's reply brief was filed October 30, 2012. Supplemental letter briefs were filed on November 30 and December 10, 2012 to address matters brought to the parties' attention by the court, and about which the court expected counsel to be prepared to address during oral argument. Oral argument, originally scheduled for December 5, 2012, was continued at the request of the parties to December 20, 2012.

misinterprets or misapplies the law.'" *Dolphin Capital Corp. v. Schroeder*, 247 S.W.3d 93, 97 (Mo. App. W.D. 2008) (quoting *ADP Dealer Services Group v. Carroll Motor Co.*, 195 S.W.3d 1, 9 (Mo. App. E.D. 2005)).

Analysis

Appellants raise three points on appeal. First, they argue that the trial court erred in denying their motion to join necessary parties under Rule 52.04(a) because SIF is insolvent and complete relief cannot be afforded without joining all permanent total disability awardees who have an interest in whether SIF can continue to pay them while also paying Skirvin or others who seek writs of mandamus. Second, they argue that it is against the public interest to order SIF to pay an individual award for permanent total disability when it is insolvent and has no way to fairly prioritize payments to other new awardees or to awardees who have been receiving payments for some time. Third, they argue that the trial court erred because the evidence established that Appellants were exercising discretion to establish an orderly method for paying permanent total disability awards from an insolvent fund, and mandamus cannot compel a discretionary act.

We address the points on appeal out of order, collectively analyzing the second and third points which combine to claim that it was error to enter a writ of mandamus compelling payment of Skirvin's judgment given the alleged insolvency of SIF. As our resolution of these points is dispositive, we need not address the first point on appeal.

Points II and III

Appellants' second and third points on appeal frame the question we must determine. Can the Treasurer and the Director be compelled by mandamus to pay

permanent total disability awards on a first-come/first served basis where SIF is admittedly unable to pay all present and future permanent total disability awards? We conclude that because SIF is legally insolvent, mandamus cannot issue to compel the Treasurer and the Director to make full payment to Skirvin.

The General Right to Mandamus

It is uncontested that Skirvin holds a judgment against SIF. "Since an execution may not be run against the property of a . . . political sub-division of the State the only other procedure available to a judgment creditor to enable him to collect his judgment is for a court of competent jurisdiction to issue its writ of mandamus." *State ex rel. Hufft v. Knight*, 121 S.W.2d 762, 764 (Mo. App. 1938); *see also Otte v. Missouri State Treasurer*, 141 S.W.3d 74, 76 n.3 (Mo. App. E.D. 2004) ("*Otte I*") ("[T]he preferred means to collect money clearly owed by the state is mandamus.").

Though mandamus is the means by which a judgment against a political subdivision can be enforced, the right to mandamus for this purpose is not absolute. "Mandamus is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Missouri Growth Assoc. v. State Tax Comm'n.*, 998 S.W.2d 786, 788 (Mo. banc 1999). "For mandamus to be appropriate, there must exist a clear, unconditional legal right in the relator and a corresponding present, imperative, unconditional duty of respondent." *State ex rel. Otte v. Missouri State Treasurer*, 182 S.W.3d 638, 641 (Mo. App. E.D. 2005) ("*Otto II*") (citing *State ex rel. St. Joseph Hospital v. Fenner*, 726 S.W.2d 393, 395 (Mo. App. W.D. 1987)). Because the respondent's obligation to act must be "unconditional," "[m]andamus is only appropriate to require the performance of

a ministerial act." *Id*. (citations omitted). "[M]andamus 'cannot be used to control the judgment or discretion of a public official.'" *Id*. (quoting *State Bd. of Health Ctr. v. County Comm'n.*, 896 S.W.2d 627, 631 (Mo. banc 1995)). "A ministerial act is defined as an act that law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case." *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). "A discretionary act is one requiring the exercise of reason in determining how or whether the act should be done." *Id*.

Here, mandamus was sought to require the Appellants to perform what Skirvin alleges to be the ministerial act of payment required by section 287.220.1. "To determine whether the right to mandamus is clearly established and presently existing, the court examines the statute under which the relator claims the right." *Jones*, 965 S.W.2d at 213. We thus examine section 287.220.1 to determine whether it imposes a ministerial duty on the Appellants to pay judgments entered against SIF.

The Appellants' Duties Under Section 287.220.1

Section 287.220.1 provides that a share of the synergistic injury which results from the combination of a preexisting disability with a permanent disability in the workplace ***shall*** "be paid out of a special fund known as the second injury fund."[8] For our purposes, section 287.220.1 provides in pertinent part that:

[8] "The second injury fund is established to assist in the continuing fight against the unemployment of those who are sufferers of some disability at the time of their employment. The fund relieves an employer or his insurer of the responsibilities of liability to an employee for any disability which is not specifically attributable to an injury suffered while in the employment of that particular employer. The obvious, although not necessarily the only, basis for this type of legislation rests in the belief that an employer will not hire a job applicant for work involving danger

> ***All cases*** of permanent disability where there has been previous disability ***shall be compensated as herein provided***. . . . ***out of*** a special fund known as ***the second injury fund***, hereinafter provided for. Maintenance of the second injury fund shall be as provided by section 287.710. ***The state treasurer shall be the custodian of the second injury fund*** which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. ***Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued***.

(Emphasis added.) By its clear and express terms, section 287.220.1 affords the Treasurer no discretion. The Treasurer ***shall*** pay compensation and benefits awarded pursuant to section 287.220.1 out of SIF upon requisition by the Director. The Director is similarly afforded no discretion to determine whether to requisition payment of a SIF award. Requisitioning payment is a mere ministerial step. *See, e.g.*, *Hufft*, 121 S.W.2d at 764 (holding school district "owes the duty to pay an obligation established by judgment against it" which is a duty which "results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised"). In short, section 287.220.1 does not expressly extend to either the Treasurer or the Director the authority to "exercise . . . reason in determining whether" payment of an award should be made. *Jones*, 965 S.W.2d at 213.

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to the extremities if that applicant has previously become disabled in an extremity." James B. Slusher, *The Second Injury Fund*, 26 Mo. Law Rev. 328 (1961). *See Pierson v. Treasurer of State*, 126 S.W.3d 386, 390-91 (Mo. banc 2004) ("The purpose of the fund is to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury.")

Appellants argue that notwithstanding the clarity of section 287.220.1, section 287.710.5 does afford the Treasurer and the Director discretion to determine whether and how to pay judgments entered against SIF given its alleged insolvency. That section provides:

> It is hereby made the express duty of every person exercising any official authority or responsibility in and for the State of Missouri sacredly to safeguard and preserve all funds collected and any interest accruing thereon, under and by virtue of sections 287.690, 287.715, and 287.730[9] for the purposes hereinabove declared.

Section 287.710.5. The Appellants argue that their duty to "sacredly safeguard and preserve" funds collected and deposited into SIF requires them to exercise discretion to elect how and whether to pay awards since SIF does not have the funds available to pay all claimants. We do not agree.

Section 287.710.5 does indeed require those responsible for SIF to "safeguard and preserve all funds collected and any interest accruing thereon." It imposes this obligation, however, for the "purposes hereinabove declared." Those "purposes" are:

> The tax collected for implementing the workers' compensation fund, and any interest accruing thereon . . . ***shall be used for the purpose*** of making effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society and for the further purpose of providing for the physical rehabilitation of the victims of industrial injuries, ***and for no other purposes***.

[9] Section 287.690 authorizes the Director to "impose a tax not to exceed two percent in lieu of all other taxes on net deposits, net premiums or net assessments" against workers' compensation insurance carriers and self-insured employers "for the purpose of administering this chapter." Section 287.715 authorizes the Director to impose an annual surcharge "upon all workers' compensation policyholders and authorized self-insurers" . . . "not to exceed three percent of . . . net deposits, net premiums, or net assessments" "for the purpose of providing for revenue for the second injury fund." Section 287.730 authorizes the Director to assess taxes against self-insured employers at the same rate and on the same basis as taxes against insurance carriers.

Section 287.710.5. Read in context, Appellants' duty to "sacredly safeguard" does not convert the ministerial duty to pay claims to a discretionary one based on the financial condition of SIF. Rather, the phrase "sacredly safeguard and preserve" simply mandates the purposes for which SIF funds can be used, to the exclusion of all others. Stated differently, section 287.710.5 controls *what* SIF can be used for and not *when* funds awarded for an appropriate purpose should be paid.

Though we find nothing in the express provisions of Chapter 287 affording Appellants the discretion to determine whether and when SIF claimants are paid, we cannot ignore that in light of SIF's limited resources Appellants are exercising this discretion as a matter of practical necessity. Though the origin of this discretion is not statutory, Appellants urge that the public interest requires that the exercise of discretion born of financial necessity serve as a bar to the issuance of mandamus. Skirvin counters that Appellants' statutory duty under section 287.220.1 remains ministerial, and that the "first come/first served" rule applies to determine the priority of payment from public funds which are insufficient to satisfy all claims.

Whether Appellants' selective payment of claims against SIF is characterized as the unavoidable exercise of discretion, or as the practical inability to perform an otherwise ministerial act, we must determine whether mandamus can properly issue to compel full payment from a fund possessing insufficient resources to pay all claims.

The Availability of Mandamus to Require Payment from a Fund with Insufficient Resources

Two Missouri Supreme Court cases decided on the same day in 1934, and authored by the same judge, provide critical guidance as to the availability of mandamus to compel payment from a fund with limited resources. The cases are *State ex rel. Sturdivant Bank v. Little River Drainage Dist*., 68 S.W.2d 671 (Mo. banc 1934) and *State ex rel. Drainage Dist. No. 8 of Pemsicot County v. Duncan*, 68 S.W.2d 679 (Mo. banc 1934). Though *Sturdivant* involves a legally insolvent fund and *Duncan* involves a legally solvent fund, both cases reach the conclusion that mandamus cannot issue to compel payment from a fund with limited resources, even if the fund has sufficient resources on hand to pay a relator's claim.

The salient facts in *Sturdivant* are materially similar to the facts of the instant case. In *Sturdivant*, the holder of matured drainage district bonds sought a writ of mandamus to compel the drainage district to pay the bonds. 68 S.W.2d at 671-72. The drainage district had sufficient funds in its treasury to pay the relator's matured bonds. *Id*. at 672. However, the drainage district, which was a creature of statute, argued that it was insolvent. *Id*. The uncontested facts established that the district had insufficient funds on deposit to pay all matured bond claims; that outstanding claims on bonds yet to mature would, when coupled with the matured bond claims, significantly increase the disparity between what the district owed and what it could pay; that by statute the district could only impose a levy up to the value of assessed benefits; and that the district would be required to impose a levy well in excess of 100% of the value of assessed benefits (and

thus, well in excess of its statutory authority) in order to generate sufficient funds to pay all matured and outstanding claims of bondholders. *Id*. The relator conceded that the district was "insolvent and will not be able to fully meet its obligations as they accrue for an indefinite period of time." *Id*. The relator nonetheless contended that the district had a nondiscretionary duty to pay matured bonds, so long as sufficient funds were on hand to pay the amount sought by mandamus. *Id*. at 673. In short, relator argued that matured claims were entitled to be paid on a first come/first served basis, notwithstanding the district's inability to pay all matured and anticipated claims.

The Supreme Court concluded that the district was legally insolvent because "the tax [levies assessable] within [the limits of existing law] are and will be insufficient to pay all bonds and interest in full." *Id*. at 674. The court then crystallized the question before it as "whether, in view of respondent's insolvency, the payment in full of its bonds and coupons held by relator is a duty prescribed by law [that can be compelled by mandamus]." *Id*. at 673 (emphasis added). The court concluded that:

> ***[P]erformance of the requirements*** of [the applicable statute] ***with reference to the payment in full*** of bonds and coupons as they mature ***is contingent on whether the drainage district is solvent***--or, in other words, on whether there are and will be, so far as appears, sufficient tax revenues to pay all bonds and coupons in full. The section assumes the solvency of the district and on that basis provides for disbursements from time to time out of the bond fund to pay matured bonds and interest; and the fund is replenished by successive subsequent tax installments paid in. . . . The matured bonds are entitled to be paid in full because those of later maturity in their turn will be. . . .
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> The ***very reasons which require payment in full of bonds and coupons of the drainage district as they come due, so long as the district is solvent, would require that they be paid only ratably if the district becomes insolvent***. . . . The burden of proving a condition of insolvency would be on

> the party alleging it, no doubt, but in the present case we have the fact admitted.

Id. at 675 (emphasis added). The Supreme Court thus reversed the trial court's grant of mandamus. *Id*. at 679. The Supreme Court observed that:

> The essential point is that the ***relator here has no clear legal right to enforce by mandamus the payment in full*** of its bonds and coupons, ***since the respondent drainage district is admitted to be insolvent***. . . .

Id. at 676 (emphasis added).

The holding in *Sturdivant* is consistent with the general rule:

> Mandamus may issue to compel payment of a claim out of a fund which is sufficient and available therefore, even though the fund may be insufficient to pay all claims which are ultimately payable therefrom, and in such case, ***in the absence of a statute providing otherwise***, the so-called, "first come, first served" rule generally determines priorities.
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> [This rule is limited in its application, however,] to the class of mandamus proceedings which may be brought to sequester and have applied some available fund on hand for the purpose of discharging a matured demand. ***Furthermore, in order for the rule to apply, there must be an inexhaustible fund the debtor can replenish, as by taxation, and the creditor excluded from sharing in the fund on hand must be entitled to require the debtor to exercise its taxing power for their benefit***.

55 C.J.S. Mandamus, section 198, pp. 268-69 (emphasis added). Thus, it is generally said that:

> A public officer or public body will generally not be required to do an act when it is impossible through a want of funds and inability to raise them . . . . A lack of funds is not a legal excuse for failure of a public officer or body to carry out a particular policy, however, if the officer or body has the power to levy taxes and issue obligations for necessary purposes.

55 C.J.S. Mandamus, section 20, p. 19.

Simplified, the general rule is that a public officer cannot be compelled by mandamus to pay the full amount of a claim from an insolvent fund, defined as a fund that has insufficient funds to pay all claims where the public officer does not possess the power to sufficiently replenish the fund. *Sturdivant* is consistent with this general rule.

On the same day that *Sturdivant* was decided, our Supreme Court also decided *Duncan*, a case which imposes restraint on the availability of mandamus with respect to *solvent* funds under certain circumstances, and thus a restraint that is broader than the general rule. 68 S.W.2d 679. In *Duncan*, the holder of matured drainage district bonds sought mandamus to compel payment of the bonds by a county treasurer who served as the custodian of the drainage district's funds. *Id*. at 680. The drainage district, which had not been named in the mandamus action, separately sought a writ of prohibition to prevent entry of mandamus. *Id*. The drainage district argued that mandamus compelling payment of the bondholder "would constitute an abuse and excessive exercise of jurisdiction for the reason that the relator district is insolvent." *Id*.

The uncontested facts before the Supreme Court in *Duncan* were different from those in *Sturdivant*. In *Sturdivant*, the district's insolvency was admitted by the relator because the district not only had insufficient funds on hand to pay all present and anticipated claims, it also had no power to assess within its existing legal limits sufficient funds to cover the shortfall. 68 S.W.2d at 672. In contrast, in *Duncan* the respondent[10] *denied* the district's insolvency. 68 S.W.2d at 681. The respondent claimed that even

[10] The respondent in *Duncan* was the relator who was seeking mandamus in the separate mandamus proceeding which stayed when the district, which had not been named in the mandamus proceeding, secured a preliminary writ of prohibition.

though the district could not pay all matured bond claims from funds on hand, the district's financial woes were "only temporary financial embarrassment because of the hard times, and [the district] will be amply able to pay all its bonds and interest in full out of delinquent tax collections and future tax levies within the benefit assessment made when the district was organized." *Id*. The respondent thus contended that "the county treasurer in his capacity as treasurer of the drainage district is a mere ministerial officer whose absolute duty it is to pay matured bonds and coupons of the district whenever they are presented for payment." *Id*. The Supreme Court was procedurally bound to accept the respondent's well pleaded facts as true, and thus to treat the district as solvent because it had the statutory authority to generate revenue which, when coupled with collected delinquent accounts, would permit the district to pay all present and future claims. The Supreme Court framed the question before it as "[w]hether, ***in [this] situation***, [the claimant] is entitled to payment in full of [his claim]." *Id*. (emphasis added).

The Supreme Court acknowledged numerous cases from other jurisdictions where mandamus had been permitted to compel payment from a fund that had insufficient funds on hand to pay all matured claims, but where "inexhaustible taxing power" existed to replenish the fund. *Id*. at 683. And the Supreme Court acknowledged its own decision in *Bliss v. Grand River Drainage District*, 49 S.W.2d 121 (Mo. banc 1932), where it similarly held that mandamus could compel payment of a matured claim from a solvent fund (a fund that could be sufficiently replenished with the exercise of authority within legal limits to cover all matured and anticipated claims) even though the amounts on hand would not cover all matured claims. *Id*. at 682-83. The Supreme Court nonetheless held:

[F]oreign decisions say that where a drainage district, municipal corporation, or the like, has "an inexhaustible taxing power," the fact that the funds in its hands at a given time are not sufficient to pay all its bonds and interest then due is no reason why particular matured bonds should not be paid in full on demand . . . . since the fund can be replenished by further tax levies. Now drainage districts organized under our Missouri county court and circuit court laws have no inexhaustible taxing power because they are restricted to the amount of benefits assessed. Nevertheless, when they are solvent and the ***collectible reserve*** in the benefit assessment is sufficient to retire all bonds and interest, they can make necessary replenishments of the bond and interest fund, so the effect is the same as if they had an inexhaustible power to tax, and the foreign decisions referred to above are in point. But notwithstanding the ruling in the *Bliss* Case and these cases from other jurisdictions, we indicated a contrary view in [*Sturdivant*], and shall set out the reasons for our conclusion more at length in this opinion.

. . . .

Matured bonds and interest are treated in a class, or classes. Each year all such are to be paid from a trust fund created through an annual tax levy made in advance for that purpose. There is no more reason for saying one matured bond should be preferred over others in its class and be paid in full when the fund is insufficient to pay all, than there is for contending it should be paid in full when the district is insolvent. ***True, if the district is not insolvent the trust fund can be replenished; but that does not justify a diversion of the fund to the full payment of particular matured bonds when other bonds having an equal claim thereon are thereby forced further to abide future collections and eventualities***. All matured bonds should share ratably in the fund as it stands and likewise in replenishments thereof. In that way all will be paid in full without discrimination or chance of miscarriage, receiving interest to the date of payment if the bonds so provide.

The statute gives them no right beyond that. It contemplates, of course, that all bonds, and therefore each particular bond, shall be paid in full, but above that it requires equality. ***When the fund on hand will not satisfy all, the holders of matured obligations can bring mandamus to compel payment of the ratable portion due them; or if the board of managers of the district (in this case the county court) refuse to make adequate tax levies which will permit full payment of bonds and interest due, mandamus will lie to correct that situation.*** But a scramble between matured bondholders to obtain full payment of their bonds would seldom

> occur if there were not doubts as to the solvency of the district and the ultimate payment of all bonds in full. ***If, in fact, the district is not solvent every equitable consideration underlying the statute calls for the bondholders to share ratably; if the district is solvent, then the real remedy is to compel the making of sufficient tax levies and collections to pay all matured bonds and interest.***

Id. at 683 (emphasis added).

This lengthy recitation from *Duncan* suggests that Missouri courts do *not* permit mandamus to compel payment from a solvent fund (that is, a fund that can be sufficiently replenished through the exercise of authority within existing legal limits and/or with the collection of delinquent accounts) ***if*** the fund has less on hand than is required to pay all matured claims, and ***if*** the statute in question can be construed to treat all matured claims as within a single class entitled to identical treatment. *Id*. According to the court in *Duncan*, to rule otherwise would impose the risk of "collections and eventualities" on similarly situated matured claims, none of which have a statutory right of priority over the other. *Id*.

If *Duncan* continues to accurately reflect the law in Missouri, then perhaps it matters not whether SIF is legally insolvent, as it is uncontested that SIF does not have sufficient funds on hand to pay all matured claims (without regard to anticipated future claims). Were we to rely on *Duncan*, and were we to construe section 287.200 as creating a single class of matured claimants entitled to identical treatment, we would be required to rule that mandamus is *never* available to compel payment from SIF if SIF does not have sufficient funds on deposit to pay all matured claims, even if SIF's Surcharge was sufficient to generate enough revenue to cover all claims. Despite the

apparent clarity of *Duncan*, we are not so inclined. In reaching this conclusion, we are mindful that *Duncan* effectively reversed *Bliss*, a case decided by the Supreme Court en banc just two years prior, and a case which was in accord with the general rule and with numerous cases from foreign jurisdictions. *Id*. at 741-42. We are also mindful that the court in *Duncan* was restrained by a procedural posture which required it to accept as true well pleaded facts in the respondent's return, and thus to accept respondent's allegation that sizeable delinquent tax collections *would be collected* during the Great Depression and would, when coupled with permissible assessments within the district's taxing authority, generate sufficient funds to pay all matured and anticipated claims. *Id*. at 681. Though unspoken, a thorough reading of *Duncan* reveals a subtext of concern about imposing the risk of collection of delinquent accounts onto other matured bondholders during an extraordinarily difficult economic time, and suggests the Supreme Court was not, in fact, persuaded that the subject fund was legally solvent. Further, we are mindful that the Supreme Court in *Duncan* construed the drainage district statute in question to create a single class of mature bondholders entitled to identical treatment, and thus found a statutory exception to the general rule permitting the "first come/first served" payout when seeking mandamus from a solvent fund. *See* 55 C.J.S. Mandamus, section 198, pp. 268-69. Finally, we are mindful that save one exception,[11] we have been unable to locate any case before or after *Duncan*, in Missouri or any other jurisdiction, which has prohibited mandamus to compel payment from a legally solvent fund merely because the

[11] In *Groner v. United States ex rel. Snower*, 73 F.2d 126, 130 (8th Cir. 1934), decided the same year as *Duncan*, and also during the Great Depression, the United States Court of Appeals for the Eighth Circuit cited *Duncan* favorably to deny mandamus to the holder of a matured bond seeking payment from a solvent fund, and limited the bondholder to sharing ratably with other matured bondholders.

fund did not have sufficient funds on hand to pay all matured claims. Thus, though we respect the view advanced in the Concurring Opinion that *Duncan* is controlling and negates the need to address whether SIF is legally insolvent, our apprehension about the ruling in *Duncan* leads us to conservatively err in favor of reliance on *Sturdivant*, a case which requires proof of legal insolvency to block the issuance of mandamus sought to require payment of a claim.

If we conclude that SIF is *legally* insolvent, defined in *Sturdivant* as an inability to pay matured and anticipated claims with amounts on hand and with amounts that can be generated by assessment within the legal limits of existing law, then *Sturdivant* will require us to reverse the trial court's grant of mandamus compelling payment of Skirvin's judgment.

Is SIF Legally Insolvent?

As discussed, legal insolvency for purposes of mandamus requires proof that a fund lacks sufficient resources to pay all existing and future obligations, ***and*** a demonstration that the person whose act a creditor seeks to compel lacks the authority to sufficiently replenish the fund within existing legal limits. *Sturdivant*, 68 S.W.2d at 674.

(a) SIF's Available Resources

Here, as was the case with the relator in *Sturdivant*, Skirvin conceded that SIF was "insolvent." This concession was made after Struemph testified about SIF's bleak financial situation, and attributed SIF's condition to the fact that the General Assembly had capped the Surcharge which funds SIF at 3% in 2005. Appellants' evidence and Skirvin's concession demonstrate that there is no contest that SIF lacks sufficient

resources to pay all existing and future obligations. Notwithstanding Skirvin's concession, we are obliged to confirm that the Treasurer and the Director do not have the statutory authority to sufficiently replenish SIF, a question of law which requires examination of the history of SIF funding under Chapter 287.

(b) The Power to Replenish SIF

As noted, section 287.220.1 requires injured employees to be compensated for permanent workplace disabilities even if contributed to by a preexisting injury. The inclusion of a right to compensation for "second injuries" has been a fixture within the scope of workers' compensation coverage in Missouri for decades. *See, e.g.*, Section 3317 RS 1929; Section 3709 RS 1939.

Originally, second injuries were compensated *by the employer* in the same manner as other workplace injuries. *Id.* That changed in 1951 with the creation of SIF. Section 287.220.1 RSMo Cum. Supp. 1951. SIF was established as the *exclusive* fund from which an employee could be compensated for the portion of a synergistic second injury attributable to a preexisting injury, thus relieving the employer of this liability. *Id.*

Initially, SIF was funded by employer contributions of statutorily proscribed lump sum amounts assessed for particular types of compensable injury. *Id.* The state treasurer was made the custodian of SIF, and the Director was permitted to suspend employer funding if amounts in SIF exceeded seventy-five thousand dollars more than anticipated expenditures. *Id.* at sections 287.220.1 and 287.220.3.

In 1955, the General Assembly changed the method of funding SIF and provided that "[m]aintenance of the second injury fund shall be as provided by section 287.710."

Section 287.220.1(1) RSMo Cum. Supp. 1955. Section 287.710 authorized a tax upon workers' compensation insurance carriers "at the rate provided in section 287.690." Section 287.710.1 RSMo Cum. Supp. 1955. Section 287.690, which was amended in 1955 to add reference to SIF, provided:

> For the purpose of providing for the expense of administering this chapter ***and providing for the maintenance of the second injury fund*** as created in section 287.220, every [person or insurance carrier obligated to pay worker's compensation claims] shall pay, as provided in this chapter, tax upon the net deposits or net premiums received . . . for such insurance in this state at the rate of two per cent in lieu of all other taxes on such net deposits or net premiums . . . .

RSMo Cum. Supp. 1955 (emphasis added). According to section 287.710.3, the tax collected pursuant to section 287.690 would be divided so that "nine-tenths . . . shall be deposited to the credit of the fund for the support of the division of workmen's compensation and the board of rehabilitation [the general "workers' compensation fund"] and one-tenth thereof to the credit of the second injury fund." RSMo Cum. Supp. 1955.

In 1959, the General Assembly adopted section 287.715 as a second and additional funding source for SIF. Section 287.715 provided that:

> For the purpose of providing revenue for the second injury fund, in addition to that provided by subsection 3 of section 287.710 [one-tenth of the two percent tax assessed pursuant to section 287.690], every [self-insured and insurance carrier] shall pay a sum equal to one-fourth of one per cent of total compensation (including medical costs) actually paid during the calendar year ending December 31, 1958, and during each calendar year thereafter. . . .

RSMo 1959.

In 1967, newly enacted section 287.713 required the Director to "submit to the governor . . . each year, a report on the expenditures made from the second injury fund

. . . for the calendar year next preceding, [and to] make and prepare, as is required, budget requests for payments from the second injury fund." RSMo Cum. Supp. 1967.[12]

In 1971, the General Assembly increased funding for SIF by requiring two-tenths of the now *three* percent tax assessed pursuant to section 287.690 to be allocated to SIF, and by increasing the assessment on employers pursuant to section 287.715 to *one-half* of one percent of total compensation. Sections 287.690, 287.710.3, and 287.715.1 RSMo Cum. Supp. 1971. In 1986, these amounts increased to *three-tenths* of the three percent tax assessed pursuant to section 287.690 and to *one percent* of total compensation. Sections 287.710.4 and 287.715.1 RSMo 1986.

In 1987, section 287.220 was amended to add a new subsection 6 as follows:

> Every three years, ***the second injury fund shall have an actuarial study made to determine the solvency of the fund, appropriate funding level of the fund, and forecasted expenditures from the fund***. The first actuarial study shall be completed prior to July 1, 1988. The expenses of such actuarial study shall be paid out of the fund for the support of the division of workers' compensation.

RSMo Cum. Supp. 1987 (emphasis added).

In 1988, the General Assembly abandoned dual funding of SIF pursuant to both sections 287.710 and 287.715. Section 287.690 was amended to *reduce* the tax assessed on premiums from three percent back to two percent. RSMo Supp. 1988. At the same time, section 287.710.4 was amended to eliminate the allocation of *any* portion of the tax collected pursuant to section 287.690 to SIF, requiring that "all such moneys shall be deposited to the credit of the [workers' compensation fund]." RSMo Supp. 1988.

[12] Some aspects of this section were previously included in other sections of Chapter 287.

Though section 287.690 continued to provide that it authorized a tax "[f]or the purpose of providing for the expense of administering this chapter and providing for the maintenance of the second injury fund," the mechanism to allocate any portion of the tax to SIF was repealed. In lieu thereof, the General Assembly rewrote section 287.715, eliminating the assessment of employers based on *total compensation*, and authorizing the assessment of a Surcharge against self-insured's or policyholder's "net deposits, net premiums or net assessments." RSMo 1988 Supp. The Director was charged with the responsibility of estimating the amount of benefits that would be payable from SIF during the next calendar year, and with setting the Surcharge in an amount sufficient to cover that estimate, with the caveat that "***the surcharge will not exceed three percent.***" Section 287.715.2 RSMo 1988 Supp. (emphasis added).

In 1993, the General Assembly *deleted* the language in section 287.690 which had continued to provide that the tax it authorized included the purpose of "***providing for the maintenance of the second injury fund,***" RSMo Cum. Supp. 1993, thus eliminating any question that section 287.710 was not intended to be a source of funding for SIF. At the same time, section 287.715.2 was dramatically amended. RSMo Cum. Supp. 1993. Section 287.715.2 continued to cap the maximum Surcharge at three percent through December 31, 1993. *Id*. However, for all subsequent years, the General Assembly provided:

> Beginning October 31, 1993, and each year thereafter, the director of the division of workers' compensation shall estimate the amount of benefits payable from the second injury fund during the ensuing calendar year and shall calculate the total amount of the annual surcharge to be imposed upon all workers' compensation policyholders and authorized self-insureds. The

> amount of the annual surcharge percentage to be imposed upon each policyholder and self-insured for the ensuing calendar year commencing with the calendar year beginning on January 1, 1994, shall be set at and calculated against a percentage of the policyholder's or self-insured's workers compensation net deposits, net premiums or net assessments for the previous policy year, rounded up to the nearest one-half of a percentage point, that shall generate, as nearly as possible, one hundred ten percent of the moneys projected to be paid from the second injury fund in the ensuing calendar year less any moneys contained in the fund at the end of the previous calendar year.

Id. The obvious effect of this amendment was to ***eliminate*** the cap on the Surcharge, and to permit the Director to annually set the Surcharge in an amount sufficient to pay SIF's anticipated obligations, while also building a reserve.[13] The General Assembly also provided for a "safeguard" to cover temporary shortfalls in SIF, by adding the following language to section 287.715.2:

> The director ***may*** advance funds to the second injury fund if surcharge collections prove to be insufficient. Any funds advanced from the workers' compensation fund to the second injury fund ***must be reimbursed*** by the second injury fund no later than December thirty-first of the year following the advance.

RSMo Cum. Supp. 1993 (emphasis added). The General Assembly thus gave the Director the discretion to shift funds from the general workers' compensation fund (funded by the section 287.690 tax) on the condition that SIF must repay any such advance the following year. Because the SIF Surcharge was not capped, the Director

[13] In 1955, the General Assembly relieved the Treasurer of any obligation to transfer fund balances remaining in SIF at the end of any appropriation period to the State's general fund, and expressly provided that unexpended balances in SIF at the end of any appropriation period would "be a credit in the second injury fund and shall be the amount of the fund at the beginning of the appropriation period next immediately following." Section 287.710.7 RSMo Cum. Supp. 1955. This provision has remained in force and effect, essentially unchanged, through the present. Section 288.710.6.

could replenish SIF's resources to permit it to repay advances from the general workers' compensation fund by increasing the Surcharge in the following year.

Finally, the 1993 amendments to Chapter 287 included an amendment to section 287.220.2 to provide that "[e]ffective July 1, 1993, the payment of [legal expenses incurred by the attorney general's office in handling SIF claims] shall be contingent upon annual appropriations made by the general assembly, from the fund, to the attorney general's office for this specific purpose." RSMo Cum. Supp. 1993. Thus, though SIF remained obligated to use assistant attorneys general to handle its claims, it was no longer obligated to pay legal expenses out of its dedicated funds *unless* express appropriation for same was made by the General Assembly.

As a result of the 1993 amendments, the Director was clearly afforded the authority to sufficiently replenish SIF through adjustment of the annual Surcharge as necessary. SIF funding was managed in this fashion until 2005 when the Director's authority was curtailed. In 2005, the General Assembly amended section 287.715.2 to provide that "[b]eginning October 31, 2005, and each year thereafter," the maximum Surcharge the Director could assess was three percent. RSMo Cum. Supp. 2005. Section 287.715.2 continued to permit (but not require) the Director to cover SIF shortfalls by advances from the general workers' compensation fund. However, the original intent of this provision to permit advances to cover temporary SIF shortfalls in one year because the advance could be repaid by a Surcharge adjustment in the next year was rendered impossible to achieve by a cap on the Surcharge. Obviously, if the maximum Surcharge

is already insufficient to avoid SIF shortfalls, it cannot be increased to permit SIF to repay advances in the following year, as required.

The evolution of the General Assembly's commitment to funding SIF is revealing. Since SIF's inception in 1951, and up until 2005, the General Assembly had steadfastly insured that SIF funding would be sufficient to serve SIF's stated objective to make "effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society." Section 287.710.5. The General Assembly had historically evidenced this commitment by periodically and responsively increasing authorized assessments or Surcharges allocated to SIF, and by requiring annual reports and periodic actuarial studies intended to "determine the solvency . . . [and] appropriate funding level of the fund," and to "make budget requests for payments from the second injury fund." Sections 287.220.6 and 287.713. For reasons not explained, the General Assembly abandoned its commitment to sufficient SIF funding in 2005. It did so by imposing the same maximum cap on the Surcharge--three percent--that it had ***abrogated*** in 1993.

Clearly, the 2005 amendment to section 287.715.2 eliminated the Director's authority to set the Surcharge at a level necessary to sufficiently fund and/or replenish SIF.[14] As a result and pursuant to *Sturdivant*, the Director was not subject to mandamus to compel it to pay the full amount of the award to Skirvin.

[14] Even if we could read that portion of section 287.715.2 which permits (but does not require) the advance of funds from the general workers' compensation fund as imposing a ministerial duty on the Director to do so, which we do not, the General Assembly unambiguously obligates SIF to repay advances the following year. Such advances would only serve to exacerbate SIF's insolvency, not resolve it, and are thus not an example of unlimited authority to sufficiently fund and/or replenish within existing legal limits.

Nor does any provision in Chapter 287 afford the Treasurer the authority to sufficiently replenish SIF. Though section 287.220.1 does provide that SIF "shall be protected by the general bond given by the state treasurer," this provision neither authorizes nor requires the Treasurer to "sweep" funds from the State's general revenues to cover SIF shortfalls. General bonds posted by public office holders permit recovery in the event the office holder fails to perform his duties as required by law. *Motley v. Callaway County*, 149 S.W.2d 875, 876 (Mo. 1941) ("A bond is in effect merely collateral security for the faithful performance by an officer, a duty he owes the public in any event, in order to protect the public from loss."). Although the Treasurer is obligated to ***protect*** SIF by not permitting unauthorized expenditures from SIF (*see* section 287.710.5), no provision in Chapter 287 obligates the Treasurer to ***fund*** SIF independent of the funding expressly authorized by the General Assembly. In fact, to read section 228.220.1 as imposing an obligation on the Treasurer to draw money from the state treasury to fund SIF shortfalls would conflict with the Missouri Constitution. Mo. Const. Art. IV, section 28 ("No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law. . . ."); *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 922 (Mo. banc 1995) (holding that to withdraw money from the state's general fund, there must be an appropriation by the General Assembly that is approved by the Governor). As Chapter 287 does not authorize the Treasurer to withdraw funds from the State treasury to subsidize SIF, the Treasurer has

not failed to perform a duty imposed by law. Thus, the Treasurer's general obligation bond is not exposed to the risk of funding SIF shortfalls.[15]

We are left the task of concluding that which the law compels. SIF is legally insolvent, both because (as Skirvin concedes) it does not have sufficient funds on hand to pay all of its current and anticipated obligations, and because neither the Director nor the Treasurer has the statutory authority to generate adequate funding to satisfy SIF's obligations. The General Assembly has expressly limited an employee's source of compensation for that portion of permanent workplace disabilities attributable to preexisting injuries to SIF, while it has at the same time failed to authorize sufficient funding to permit the Treasurer and the Director to remit that compensation. The situation is untenable. We express reservations, but no opinion, as to the constitutionality of the General Assembly's cap on the Surcharge given the General Assembly's mandate that an injured employee's ability to recover for the preexisting portion of second injuries is restricted to SIF.[16] And we acknowledge that a claim that the restriction of recovery to SIF is unconstitutional in light of the legislature's failure to adequately fund SIF was likely theoretical at best prior to our present declaration that mandamus cannot issue to compel payment from a legally insolvent SIF. However, the unfortunate reality is that the ultimate remedy for SIF's financial insolvency cannot be afforded in this proceeding.

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[15] We are aware of the contrary decision reached in *Elsbury v. Stann and Associates*, 861 N.E.2d 1031 (Ill. App. 2006), where the Illinois Appellate Court, addressing a shortfall in a workers' compensation fund intended to compensate those whose self-insured employers had become insolvent, construed its state treasurer's general obligation bond as a legislatively assured funding source, and thus as the treasurer's "inexhaustible taxing power" sufficient to permit the issuance of mandamus. That decision has been withdrawn, however, and even had it not been, we would not be persuaded by its holding.

[16] Nor do we express an opinion as to whether the General Assembly's failure to authorize the assessment or other appropriation of funds sufficient to permit SIF to pay its obligations restores to injured employees avenues of recovery that would otherwise have been available but for the purported exclusivity of section 287.220.

As our Supreme Court expressed in *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981) when faced with a similar scenario--inadequate appropriations to fund appointed counsel for indigent criminal defendants:

> What are we to do? . . . We are reminded of our limitations by Alexander Hamilton in The Federalist No. 78: "The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights or every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no discretion either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Id. at 65 (quoting The Federalist Papers 465 (New York: New American Library, 1961)).

Though we share the trial court's view of the state of affairs created by the General Assembly's failure to provide adequate funding for an exclusive avenue of recovery to which it requires injured employees to resort, we have no alternative in this action but to conclude that the trial court abused its discretion in entering a writ of mandamus compelling the Treasurer and the Director to pay from SIF the full amount of Skirvin's award. At best, Skirvin ***might*** have been theoretically entitled to compel ratable payments from SIF until the SIF funding crisis is resolved. However, Skirvin's petition for writ of mandamus did not seek ratable payment, and sought only mandamus to compel full payment of his claim. Typically, we are not permitted to modify the relief sought in a petition for writ of mandamus. *Bliss*, 49 S.W.2d at 124 ("[R]elators are entitled to the specific relief they seek, or none at all."); *Sturdivant*, 68 S.W.2d at 770 (reversing mandamus where writ petition sought full payment and not ratable payment);

State ex rel. Grafeman v. Mulliniks, 74 S.W.2d 93, 96 (Mo. Ct. App. 1934) (reversing mandamus where writ petition sought full payment and not ratable payment). In any event, Skirvin's counsel confirmed during oral argument that Skirvin is not seeking an award of ratable payment.

Even had Skirvin's petition sought ratable payment in the alternative to full payment, the trial court's ability to issue a writ of mandamus compelling ratable payment to Skirvin would be substantially complicated, if not prevented, by several factors, not the least of which are: (1) determining whether there is any supportable basis for distinguishing between classes of SIF recipients who should receive ratable, and not full, payment based on when awards were entered or on the type of compensation to be paid;[17] (2) the fact that SIF's payment obligations vary from day to day depending upon the number of awards against it and on the number of permanent total disability recipients who remain living; and (3) the fact that all SIF recipients cannot practicably be joined in a proceeding to determine the proper mechanism for ordering ratable payments as the members in the class of SIF recipients varies frequently. Moreover, even if these thorny issues could be resolved, a judgment compelling ratable payments would almost certainly require ongoing court supervision, as the ratable payment would necessarily require an

[17] We note that Appellants are currently paying all permanent partial disability awards, and are paying all permanent total disability awards entered before March 7, 2011. Appellants offered no explanation for their decision to pay all permanent partial disability awards. Appellants explained the disparate treatment of permanent total disability recipients in part because of the relationship between the amount of a recipient's bi-weekly payment and the amount of other benefits (such as social security) the recipient is eligible to receive. From the Appellants' perspective, this factor warranted the decision to continue making payments to those already receiving payments, and to make no payments (at least until SIF could afford to do so) to those receiving awards since March 7, 2011. We observe that the interrelationship between the calculation of social security benefits and the receipt of bi-weekly permanent total disability payments would significantly complicate any ratable payment structure that might be devised, regardless the class of recipients to which the ratable payments might apply.

evolving calculation, inconsistent with the remedy of mandamus. *See State ex rel. Flanagan v. South Dakota Rural Credits Board*, 189 N.W. 704, 707 (S.D. 1922) ("Mandamus is not an appropriate remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties. The proper function of a mandamus is to compel the doing of a specific thing; something that can neither be diminished or subdivided."); *State ex rel. Star Pub. Co. v. Associated Press*, 60 S.W. 91, (Mo. 1900) (holding court has no authority to compel performance of an executory contract by mandamus where to do so would contemplate "the exercise of judgment, continuous supervision, special experience, and business discretion").[18] Skirvin's counsel volunteered at oral argument that in the context of a mandamus proceeding, ordering ratable payment of SIF claims would be virtually impossible to manage, and would likely require, as a function of minimum due process requirements, the joinder in some fashion of all SIF claimants.

Thus, we are required to reverse the trial court's judgment. Our Opinion does not prevent Skirvin from pursuing other remedies for this untenable situation. Unfortunately, until the General Assembly provides for full funding of SIF, or until some other resolution of the SIF financial crisis is ordered or fashioned by the courts in an appropriate proceeding,[19] we are unable in this mandamus action to remediate the General Assembly's failure to sufficiently fund SIF.

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[18] We express no opinion about the advisability or the availability of some other mechanism to manage the complicated process of determining and managing ratable payment of claims from SIF, such as a receivership.

[19] See footnotes number 16 and 18.

One hopes that the General Assembly will remediate the SIF funding crisis as soon as possible, as the insufficient funding of SIF is imposing unfairness, inequity and extreme hardship on injured workers who possess largely unrecoverable judgments. Moreover, the trade off for exclusivity in workers compensation was that workers gave up the right to file a civil action against employers. Workers, employers and insurers rely on that trade off. If the SIF funding crisis is left unresolved, and the exclusivity of SIF is thereafter found to be unconstitutional as a consequence, employers and insurers would then likely face potential liability in civil proceedings or increased liability in workers' compensation proceedings. In other words, the instability and uncertainty that business and labor both abhor would once again prevail.

Appellants' second and third points on appeal are granted.

Point I

Because we have concluded that Skirvin was not entitled to mandamus to compel full payment of his award, Appellants' claim that the trial court erred in denying their Rule 52.04(a) motion to join as necessary parties all individuals entitled to receive permanent total disability recipients from SIF is rendered moot.

Point one is denied.

Transfer Pursuant to Rule 83.02

The dissent expresses a different interpretation and application of *Sturdivant* and *Duncan* and would reach a different result. Though we do not share the dissent's views, we agree that the result herein reached is neither satisfying nor equitable for the hundreds of SIF claimants who are not receiving timely payment of their SIF claims.

However, we simply do not read *Sturdivant* and *Duncan* as limited in their application to statutory sources for payment that are "legal entities." We believe the central and consistent theme between *Sturdivant*, *Duncan*, and the instant case is that a *statute* restrained the party being compelled by mandamus from generating, *within the bounds of the law*, sufficient resources to pay everyone, an equitable principle not facially conditioned, at least, on whether the statutory source for payment is a legal entity.

We are also reluctant to conclude that the "entity" to be examined here is not SIF, but is instead the State of Missouri. The Dissent concludes that "the ultimate obligation for the payment of SIF claims lies with the State of Missouri, which is not insolvent and is not without the ability to pay all claims." And the Dissent concludes that "the ultimate obligor for claims against [] SIF is the State itself." There is an emotional appeal to such declarations. But the declarations belie serious questions. Is it, in fact, the case that merely because the General Assembly has established a discrete fund to serve as the exclusive source for *payment* of SIF claims (claims that would otherwise have been the employer's legal obligation to pay)[20] that the State of Missouri has assumed or undertaken legal liability for those claims? *See, e.g., Bd. of Public Bldgs. v. Crowe*, 363 S.W.2d 598 (Mo. banc 1963). And, can we conclude that the State's general fund, comprised largely of tax revenues, is exposed to the payment of SIF claims once employer paid Surcharges are depleted notwithstanding the absence of an express appropriation to that effect by the

[20] James B. Slusher, *The Second Injury Fund*, 26 Mo. Law Rev. 328 (1961) ("The fund relieves an employer or his insurer of the responsibilities of liability to an employee for any disability which is not specifically attributable to an injury suffered while in the employment of that particular employer.").

General Assembly? Mo. Const. Art. IV, Sec. 28; *Fort Zumwalt Sch. Dist.*, 896 S.W.2d at 922.

Despite our disagreements, we share the Dissent's concern about the potential constitutional ramifications of an underfunded SIF in light of the "open courts" provision set forth in article I, section 14 of the Missouri Constitution.[21] In fact, we believe the Majority opinion crystallizes and ripens that concern for future judicial review. However, any such review will undoubtedly require assessment of the constitutionality of the statutory provisions creating and/or funding SIF--matters that are beyond our authority to determine as they are relegated to the exclusive jurisdiction of the Missouri Supreme Court. Mo. Const. Art. V, section 3.

Supreme Court Rule 83.02 provides that:

> A case disposed of by an opinion . . . in the court of appeals, may be transferred to [the Supreme Court] by order of the majority of the participating judges . . . on their own motion . . . . Transfer may be ordered because of the general interest or importance of a question involved in the case or for the purpose of reexamining existing law.

We can think of no more compelling case than the instant one for exercise of our authority pursuant to this Rule. The enormity of the looming SIF crisis warrants accelerated consideration of the serious issues presented by this case. Accordingly, because of the general interest and importance of the issues involved in this case,

[21] But for SIF, employers (and their insurers) would be liable under the traditional rubric of worker's compensation law for the combined synergistic effect of a workplace injury and a pre-existing injury. SIF simply shifts a claimant's source of recovery for the pre-existing injury component of the synergistically combined disability to a discreet fund--a fund that is funded by a Surcharge paid by employers. Thus, the practical effect of an underfunded SIF is to exculpate employers for the "spread" between the amount of a SIF award and the Surcharge available to pay the award.

pursuant to Rule 83.02, the Court orders the case transferred to the Missouri Supreme Court.

Conclusion

The trial court's judgment is reversed and vacated.[22] This case is transferred to the Missouri Supreme Court pursuant to Rule 83.02.

Cynthia L. Martin, Judge

Ahuja, Presiding Judge, joins in the majority's result and concurs in separate opinion.
Howard, Judge, dissents in separate opinion.

[22] Skirvin filed a Motion for Sanctions for Frivolous Appeal, which was taken with the case. That motion is denied.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

RAYMOND SKIRVIN,	)	
Respondent,	)	
	)	
v.	)	**WD75541**
	)	
TREASURER STATE OF MISSOURI, ET AL.,	)	**FILED: January 22, 2013**
	)	
Appellant.	)	

CONCURRING OPINION

I share the concerns expressed by both Judges Martin and Howard concerning the untenable position in which far too many disabled workers have been placed, due to the significant underfunding of the Second Injury Fund. Nevertheless, under existing caselaw which we are bound to follow, and in light of the narrow claim Mr. Skirvin has chosen to assert, I agree with Judge Martin that reversal is required.

While I agree with much of what is said in Judge Martin's thoughtful opinion, and with the result that opinion reaches (including the decision to transfer this important case to the Missouri Supreme Court), I believe this appeal can be decided without reaching many of the novel and difficult legal issues she addresses. In particular, in my view it is unnecessary for this Court to decide whether the Second Injury Fund is "insolvent," or has an "inexhaustible taxing power," to decide this appeal. To the contrary, reversal is required by *State ex rel. Drainage*

District No. 8 of Pemiscot County v. Duncan, 68 S.W.2d 679 (Mo. banc 1934), whether or not the Fund has the ability to replenish itself.

Duncan was decided on the assumption that, although the drainage district at issue did not have sufficient funds on hand to pay all of its then-matured bonds, it had the ability to "pay all its bonds and interest coupons in full out of delinquent tax collections and future tax levies." *Id.* at 681. The Supreme Court observed that, on this assumed state of facts, "the effect is the same as if [the district] had an inexhaustible power to tax." *Id.* at 683.

Yet, even though it assumed that the debtor drainage district was "solvent," in the sense that it had the ability to raise additional revenues sufficient to satisfy all of its obligations, the Supreme Court in *Duncan* held that an individual bondholder was *not* entitled to the payment of its matured bonds in full. Instead, the individual bondholder was entitled to receive only a ratable share of the monies the district then had on hand:

> There is no more reason for saying one matured bond should be preferred over others in its class and be paid in full when the fund is insufficient to pay all, than there is for contending it should be paid in full when the district is insolvent.[1] True, if the district is not insolvent the trust fund can be replenished; but that does not justify a diversion of the fund to the full payment of particular matured bonds when other bonds having an equal claim thereon are thereby forced further to abide future collections and eventualities. All matured bonds should share ratably in the fund as it stands and likewise in replenishments thereof. In that way all will be paid in full without discrimination or chance of miscarriage, receiving interest to the date of payment if the bonds so provide.

68 S.W.2d at 683. In reaching this result, *Duncan* expressly refused to follow the two-year-old decision in *Bliss v. Grand River Drainage District*, 49 S.W.2d 121 (Mo. banc 1932), or the "doctrine . . . followed in several other jurisdictions," under which an individual claimant would

[1] As Judge Martin's opinion explains, the debtor drainage district was conceded to be insolvent in *Duncan*'s companion case, *State ex rel. Sturdivant Bank v. Little River Drainage District*, 68 S.W.2d 671 (Mo. banc 1934). *Sturdivant Bank* held that, given the district's insolvency, its creditors were entitled only to ratable payment on their bonds; *Duncan* reached the same result where a district was solvent, but had insufficient cash on hand to satisfy all of its matured obligations.

be entitled to payment in full if the obligated entity had the ability to raise additional funds to satisfy its other obligations. *Duncan*, 68 S.W.2d at 683.

Just a few months after the decisions in *Duncan* and *State ex rel. Sturdivant Bank v. Little River Drainage District*, 68 S.W.2d 671 (Mo. banc 1934), the United States Court of Appeals for the Eighth Circuit summarized the holdings of those cases:

> If the record here made establishes solvency, appellee is not entitled to have his bonds paid in full but must share ratably with the other matured bonds and coupons [(the rule established by *Duncan*)]; if insolvency is shown, he must share ratably with all of the outstanding bonds [(the rule of *Sturdivant Bank*)].

Groner v. United States ex rel. Snower, 73 F.2d 126, 130 (8th Cir. 1934). Thus, whether the debtor is deemed to be "solvent" or insolvent, if the funds on hand are insufficient to pay all similarly situated claimants, an individual claimant is not entitled to payment in full, but only to a ratable share of the money available.[2]

Duncan states that, when the funds on hand are insufficient to satisfy all similarly situated claimants, those claimants may have a right to a writ of mandamus to force the debtor to raise additional funds. 68 S.W.2d at 683. Such a judicial remedy may not be available here. But assuming the lack of such a remedy makes the argument for application of *Duncan* stronger, not weaker. In *Sturdivant Bank* and *Duncan*, the Missouri Supreme Court applied the equitable maxim that "equality is equity," *Sturdivant Bank*, 68 S.W.2d at 675; it held that this principle of equal treatment of similarly-situated claimants superseded the principles that "equity aids the vigilant," and that "where equities are equal the first in order of time must prevail." *Id.* Given the substantial uncertainties as to when additional funds will be made available to claimants like Mr. Skirvin, *Duncan*'s equal-treatment principle prohibits one claimant from being paid in full,

[2] As *Groner* explains, the calculation of an individual claimant's ratable share is different if the obligor is "solvent" (in the sense that term is used in *Duncan*), or is instead insolvent. But in either case, the claimant is not entitled to payment in full. Because Mr. Skirvin does not seek partial payment, the differences in the calculations required by *Duncan* and *Sturdivant Bank* are irrelevant here.

while others are "forced further to abide future collections and eventualities," facing the "chance of miscarriage" before their awards are fully satisfied. 68 S.W.2d at 683.

Under *Duncan* Mr. Skirvin is currently entitled, at most, to the ratable payment of his award, because – as he concedes – the Fund does not have sufficient funds on hand to satisfy all of the liabilities which are currently due.[3] As Judge Martin's opinion explains, however, Mr. Skirvin does not seek such a ratable payment, but has instead requested only the payment of his worker's compensation award in full. That result is foreclosed by the Supreme Court's decision in *Duncan*. I accordingly concur in the reversal of the circuit court's judgment, and in the decision to transfer this case to the Missouri Supreme Court.

/s/ Alok Ahuja

Alok Ahuja, Judge

[3] Although the dissenting opinion argues that the liability to Mr. Skirvin is owed by *the State*, not simply by the Second Injury Fund, the only statutory authorization for payment of Mr. Skirvin's claim provides for payment *from the Fund*. § 287.220.1, RSMo. Payment of Mr. Skirvin's claim from any other State funds, or transfer of any other State funds to the Second Injury Fund, would require an appropriation or other legislative action (or potentially a judgment taking the place of such legislative action). *See generally State ex rel. Redmond v. State*, 328 S.W.3d 818 (Mo. App. W.D. 2011); *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. W.D. 2010). *Duncan* focuses on the funds which are legally available, *now*, to satisfy a particular claim. Here, it is undisputed that those funds are insufficient to pay all claims presently due.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

RAYMOND SKIRVIN,	)	
	)	
Respondent,	)	WD75541
	)	
vs.	)	Opinion filed: January 22, 2013
	)	
TREASURER OF THE STATE OF MISSOURI, ET AL.,	)	
	)	
Appellant.	)	

DISSENTING OPINION

On May 6, 2011, the Labor and Industrial Relations Commission entered an award finding Raymond Skirvin to be permanently disabled and requiring the Second Injury Fund ("SIF") to pay the award. It is conceded that Mr. Skirvin is legally entitled to the full amount of his award and that the SIF has adequate funds to pay him. The State of Missouri created SIF and designed its funding mechanism. If that funding is inadequate to pay all claims in full, it is because of the voluntary choice of the State and not because of the State's inability to do so.

It is the public policy of our state to provide compensation to previously disabled workers who suffer a permanently disabling injury due to a second workplace accident. To effectuate this policy our legislature created the SIF. "The second injury fund is established to assist in the

continuing fight against the unemployment of those who are sufferers of some disability at the time of their employment." James B. Slusher, *The Second Injury Fund*, 26 Mo. Law Rev. 328, 328 (1961). The SIF was created in part on the "belief that an employer will not hire a job applicant for work…if that applicant has previously become disabled." *Id.* "The purpose of the fund is to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of State*, 126 S.W.3d 386, 390-91 (Mo. banc 2004). "The fund relieves an employer or his insurer of the responsibilities of liability to an employee for any disability which is not specifically attributable to an injury suffered while in the employment of that particular employer." Slusher, *supra* at 328. Liability related to a SIF claim is separate and distinct from the liability of an employer or insurer. *Tiller v. 166 Auto Auction*, 65 S.W.3d 1, 5 (Mo. App. S.D. 2001).

Where applicable, the Missouri Workers' Compensation Law supplants and supersedes rights and remedies a worker might have had at common law, and those rights and remedies become exclusive. *State ex rel. Tri-County Elec. Co-op. Ass'n v. Dial*, 192 S.W.3d 708, 710 (Mo. banc 2006). The workers' compensation law has been referred to as a "bargain" in which the employer forfeits common law defenses and assumes liability for workplace injuries and the employee forfeits the right to a potentially higher common law judgment in return for swift and assured compensation. *Mo. Alliance for Retired Ams. v. Dep't of Labor & Indus. Relations,* 277 S.W.3d 670, 675 (Mo. banc 2009).

The record in this case indicates there are hundreds of cases where permanently disabled citizens are being denied payments on their awards by the State. And claimants have pointed to the unfairness of the situation---that the "bargain" has been broken. While it is emotionally compelling to argue that those suffering from crippling injuries should promptly be paid their

duly awarded compensation on the basis of morality, such an argument is legally ineffective and unnecessary. The clear wording of the law legally mandates that payment. Section 287.220 states in pertinent part that:

> ***All cases*** of permanent disability where there has been previous disability ***shall be compensated*** as herein provided. . . . ***out of a special fund*** known as **the second injury fund** hereinafter provided for. . . . ***The state treasurer shall be the custodian of the second injury fund*** which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. . . . Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment ***of all amounts payable*** for compensation and benefits out of the second injury fund ***shall be issued***.

The obligations of the Director and the Treasurer are clear and unequivocal. The Director must requisition and the Treasurer must pay. No discretion is afforded. These duties are ministerial.

Mandamus is appropriate when a public official with a present, imperative, unconditional duty defaults on an existing, clear, unconditional legal right. *State ex rel. Costco Wholesale Corp. v. Hartenbach*, 267 S.W.3d 725, 727 (Mo. App. E.D. 2008). "Mandamus will issue only when there is an unequivocal showing that the public official failed to perform a ministerial duty imposed by law." *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). "A ministerial act is defined as an act that law directs the official to perform upon a given set of facts, independent of what the officer may think of the propriety or impropriety of doing the act in a particular case." *Id*. "[T]he preferred means to collect money clearly owed by the state is mandamus." *Otte v. Mo. State Treasurer*, 141 S.W.3d 74, 76 n.3 (Mo. App. E.D. 2004). No one disputes Mr. Skirvin's prima facie entitlement to a writ of mandamus. The right is there, the duty is there, and the money is there. The crucial issue boils down to this: If SIF does not have sufficient funds to timely pay the claims of all those similarly situated to Mr. Skirvin, does that defeat his writ?

Historically the SIF has been funded by various methods which have been amended from time to time by the legislature. In 2005 the legislature capped the current surcharge that is used to fund the SIF. At the time that legislation was passed the fiscal note indicated that the capped amount would be ultimately insufficient to maintain the fund. All agree that currently the SIF is drastically and intentionally underfunded. There is not enough money to pay every disabled citizen the amount to which they have been finally adjudicated to be entitled from the State. Those administering the special fund must lie awake at night plotting the bi-weekly triage. But, the ultimate obligation for the payment of the SIF claims lies with the State of Missouri, which is not insolvent and is not without the ability to pay all claims. Accordingly, the case law relied on to deny relief is inapplicable.

The cases relied on by the majority are *State ex rel. Sturdivant Bank v. Little River Drainage District*, 68 S.W.2d 671 (Mo. banc 1934), and *State ex rel. Drainage District. No. 8 of Pemsicot County v. Duncan*, 68 S.W.2d 679 (Mo. banc 1934).[1] S*turdivant* involved a legally insolvent drainage district, and *Duncan* involved a legally solvent drainage district without the funds on hand to pay all matured bonds. Both cases determined that mandamus is not appropriate to compel payment from a political subdivision with limited resources, even if it has sufficient funds on hand to pay a relator's claim. The cases also recognized that even if an entity did not have sufficient resources on hand to pay all claims, if that entity has the power and ability to acquire the resources to pay all claims, then claims can be paid on a "first come, first served" basis. The districts did not have that ability under the law, so the claims were found to be payable on a pro-rata basis from the funds that were available. Both cases highlight the struggle

[1] In discussing *Sturdivant* and *Duncan* the majority refers to the solvency or insolvency of "funds" or accounts. However it is clear from the cases that the relevant analysis is focused on the solvency of the public entity and the ability of that entity to replenish funds. A fund or an account can't make payments or replenish itself. It is not an entity but is, instead, a source of funds controlled by an entity. Mandamus is not directed at an account; it is directed at a public entity or official.

to treat Depression-era investors in government bonds in an equitable manner given the drastic economic conditions of that time. It is of some concern to equate the situation of a willing investor taking a calculated business risk to that of an unwilling and disabled person thrust into an underfunded, state-devised, required redress system. But even accepting the premise of *Sturdivant* and *Duncan*---that an underfunded or insolvent **entity** cannot be compelled to pay on a first come first served basis---what is the "entity" in our case? It is the State of Missouri. The SIF is not a separate entity but merely an account controlled by the State.

We previously alluded to the workers' compensation law as a "bargain." Part of that bargain was to encourage employment of the disabled. Another part was the exchange, by workers, of some common law causes of action against an employer for a predictable and reliable substitute remedy. The SIF was established to provide that remedy for certain workplace injuries. This is for the protection and benefit of both employer and employee and is embraced as a matter of public policy. This policy was not established by employers or employees. It was established by the legislature on behalf of the State of Missouri.

The ultimate obligor for claims against the SIF is the State itself. Only the legislature has the authority to fund the SIF. The majority effectively details the history of the SIF's funding sources. The SIF is presently funded by taxes and surcharges against employers and their insurance companies. But the SIF's history demonstrates that the method and extent of its funding is controlled by legislative action. Nothing prohibits general revenue from being placed into the SIF to pay the claims against the State.[2] The funds to pay SIF claims are deposited to the credit of the SIF account, but the journal entry is not an "entity" that can be solvent or

[2] Certainly, when the legislature placed a cap on the surcharges that were used to fund the SIF, with full knowledge that the capped amount would at some point become insufficient to pay all valid, adjudicated claims, it had to have been anticipated that alternative sources of funding would be required.

insolvent. The relevant entity is the State of Missouri, and the State is not insolvent or unable to timely pay it legal obligations. Accordingly, *Sturdivant* and *Duncan* are inapplicable.

Mr. Skirvin's request for relief tracks general rules regarding mandamus:

> Mandamus will lie to compel a state officer to take action on a claim properly presented… [and] [a] special state fund is subject to suit for mandamus for failure to perform mandatory, ministerial duties relating to the handling of claims against the fund.

55 C.J.S. *Mandamus*, § 199, pp. 269-270 (2009).

While appellants acknowledge that the SIF has the funds to pay Mr. Skirvin's claim, they denied payment because there are not enough funds to pay all claims, and it would not be equitable for Mr. Skirvin to go to the front of the line. But he is legally entitled to do so under the "first come, first served" rule:

> Mandamus may issue to compel payment of a claim out of a fund which is sufficient and available therefore, even though the fund may be insufficient to pay all claims which are ultimately payable therefrom, and in such case, in the absence of a statute providing otherwise, the so-called, "first come, first served" rule generally determines priorities.
>
> [However,]…in order for the rule to apply, there must be an inexhaustible fund the debtor can replenish, as by taxation, and the creditor excluded from sharing in the fund on hand must be entitled to require the debtor to exercise its taxing power for their benefit.

55 C.J.S. *Mandamus* § 198, pp. 268-69 (2009). Put another way:

> A public officer or public body will generally not be required to do an act when it is impossible through a want of funds and inability to raise them . . . . A lack of funds is not a legal excuse for failure of a public officer or body to carry out a particular policy, however, if the officer or body has the power to levy taxes and issue obligations for necessary purposes.

55 C.J.S. *Mandamus* § 20, p. 19 (2009).

The legislature, on behalf of the State, has complete control over the funding of the SIF and has the ability to replenish the special fund to pay all similar claims, even without requiring

additional taxation.[3] The final issue to determine is whether claimants can require the State to replenish the SIF.[4]

It has long been recognized that the "very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). This "every wrong shall have a remedy" principle is deeply rooted in our nation's culture, and the people of Missouri preserved it in the Bill of Rights in the Missouri Constitution in the "open courts" provision of article 1, section 14, which states:

> That the courts of justice shall be open to every person, and ***certain remedy afforded for every injury*** to person, property or character, and that right and justice shall be administered without sale, denial or delay.

(Emphasis added.)

This provision of the Missouri Bill of Rights prevents the government from arbitrarily or unreasonably barring or interfering with the peoples' ability to enforce recognized causes of action for personal injury. *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000). It has been referred to as a "second due process clause to the constitution." *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. banc 1992). Frequently this "open courts" provision is thought of in the context of preventing government from unreasonably abrogating or altering a common law cause of action. *See, e.g. State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner,* 583 S.W.2d 107 (Mo. banc 1979) (requirement that a medical malpractice plaintiff submit his or her claim to a professional liability board for a recommendation prior to filing a lawsuit unconstitutional). In the present case, the potential for the denial of a recognized right is

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[3] General revenue is available to replenish the fund, and under Article 3, Section 36 of the Missouri Constitution, the first obligation of the legislature is to appropriate money "For payment of sinking fund and interest on outstanding obligations of the state."

[4] It is beyond the authority of this Court to declare a statute unconstitutional. This discussion relates to Mr. Skirvin's ability to require application of the "first come, first served" rule.

every bit as clear. The rights at issue here were created by the legislature, and the claimants of the SIF are seeking access to the exclusive remedy devised and implemented by the legislature. Inadequate funding of the SIF emasculates that remedy, and there is no substitute available.

Mr. Skirvin has a present, clear, and unconditional right to be paid his award in full. The funds are available, and the State has the ability and obligation to replenish the funds for others. I would affirm the trial court. I concur in the majority's order to transfer.

/s/ Victor C. Howard

VICTOR C. HOWARD, JUDGE