IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** Hearing Date: November 19, 2013 Hearing Time: 10:00 a.m. Central Location: Courtroom 7-N, St. Louis

DEBTORS' TWENTIETH OMNIBUS OBJECTION TO CLAIMS
(Willits Litigation Claims)

Patriot Coal Corporation and its affiliated debtors (the "Debtors"), pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, respectfully file this Twentieth Omnibus Objection to Claims (the "Objection"). In support of this Objection, the Debtors show the Court as follows:

Relief Requested

1. By this Objection, the Debtors object to certain claims listed on Exhibit A attached hereto (the "Claims") because the Claims arise from certain litigation determined adversely to the claimants in Missouri state court. The Debtors request entry of an order, pursuant to Section 502 of the Bankruptcy Code and Fed. R. Bankr. P. 3007, disallowing the Claims.

2. **Parties receiving this Objection should locate their names on the attached exhibit.** Any response to this Objection should include, among other things, (i) an appropriate caption, including the title and date of this Objection; (ii) the name of the claimant, both the EDMO and GCG claim numbers of the claim that the Debtors are seeking to disallow or modify, and a description of the basis for the amount claimed; (iii) a concise statement setting forth the

reasons why the Court should not sustain this Objection, including, but not limited to, the specific factual and legal bases upon which the claimant relies in opposing this Objection; (iv) copies of any documentation and other evidence which the claimant will rely upon in opposing this Objection at a hearing; and (v) the name, address, telephone number and facsimile number of a person authorized to reconcile, settle or otherwise resolve the claim on the claimant's behalf. A claimant that cannot timely provide such documentation and other evidence should provide a detailed explanation as to why it is not possible to timely provide such documentation and other evidence.

Jurisdiction

3. This Court has jurisdiction over this Objection under 28 U.S.C. § 1334. Venue of this proceeding is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

4. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

5. Ninety-nine of the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on July 9, 2012 in the United States Bankruptcy Court for the Southern District of New York.

6. On December 19, 2012, these Debtors' cases were transferred to the United States Bankruptcy Court for the Eastern District of Missouri [Dkt. No. 1789].

7. The bar date for filing proofs of claim against these Debtors was December 14, 2012 [Dkt. No. 1388].

8. On March 1, 2013, the Court entered its Order Establishing Procedures for Claims Objections [Dkt. No. 3021].

9. Debtors Brody Mining, LLC and Patriot Ventures LLC filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on September 23, 2013 in this Court. The bar date for filing proofs of claim against these Debtors is October 24, 2013.

Objection and Argument

10. Each of the Claims listed on Exhibit A arises from two related pieces of litigation filed in the Circuit Courts of Missouri, each styled Patricia Willits, *et al*. v. Peabody Coal Company, LLC, *et al.* (collectively, the "Litigation"). Debtors Central States Coal Reserves of Kentucky, LLC; Grand Eagle Mining, LLC; Ohio County Coal Company, LLC; Heritage Coal Company LLC, formerly known as Peabody Coal Company, LLC; and Beaver Dam Coal Company, LLC are among the defendants. Each Claim listed on Exhibit A was filed by a plaintiff in the Litigation.

11. In 2008, the plaintiffs filed a breach-of-contract action in the Circuit Court for the City of St. Louis against the defendants, alleging a failure to pay royalties of percentages of coal mined in areas of Kentucky based on written agreements dating back to the 1940s. This action (the "Contract Action") was assigned Case No. 0822-CC02072.

12. The parties filed cross-motions for summary judgment. On March 29, 2010, the St. Louis City Circuit Court entered an order granting summary judgment in favor of the defendants, including the Debtors. The plaintiffs appealed, and on December 28, 2010, the Court of Appeals affirmed the St. Louis County court's order. See Willits v. Peabody Coal Co.,

LLC, 332 S.W.3d 260 (Mo. Ct. App. 2010), attached hereto as Exhibit B. Transfer to the Supreme Court of Missouri was denied.

13. On August 8, 2011, the plaintiffs commenced a collateral attack on the Contract Action by filing suit in the Circuit Court for the County of St. Louis (the "Constitutional Action"). In the Constitutional Action, Case No. 11SL-CC3193, the plaintiffs claimed that the judgment in the Contract Action was unconstitutional for various reasons and should be vacated. The plaintiffs named the State of Missouri as the principal defendant in the Constitutional Action but also joined the defendant Debtors as interested parties. The defendants filed motions to dismiss, and on February 29, 2012, the St. Louis County Circuit Court entered an order dismissing the petition.

14. On July 9, 2012, the defendant Debtors filed their voluntary petitions for relief under the Bankruptcy Code, and the Litigation was stayed as to the defendant Debtors.

15. Proceeding against the remaining defendants, the plaintiffs again appealed, and on April 9, 2013, the Court of Appeals affirmed the Circuit Court's dismissal order. See Willits v. Peabody Coal Co., LLC, 400 S.W.3d 442 (Mo. Ct. App. 2013), attached hereto as Exhibit C. Transfer to the Missouri Supreme Court was denied.

16. By this Objection, the Debtors respectfully request that this Court disallow the Claims. Because Missouri courts have disposed of all claims in the Litigation on the merits, the claimants have no basis for maintaining the Claims in the Debtors' bankruptcy cases or otherwise pursuing any recovery from the Debtors' estates.

17. Pursuant to 28 U.S.C. § 1738, a federal court must give the same preclusive effect to a state-court judgment that another court in that particular state would give it. The Supreme Court has stated that Section 1738 directs a federal court "to refer to the preclusion law of the

state in which the judgment was entered." In re Asbury, 195 B.R. 412, 415 (Bankr. E.D. Mo. 1996) (citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985)).

18. Pursuant to the doctrine of res judicata, the claimants are bound by the Missouri courts' determination of the invalidity of their claims, and they cannot seek reconsideration of the claims in this Court. "Unlike collateral estoppel, [res judicata] applies not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. banc 1991).

19. Here, because the Litigation has been adjudicated, the Claims, which are based entirely on the underlying Litigation, should be disallowed as a matter of res judicata. Even if the plaintiffs believe that the St. Louis County decision in the Constitutional Action was erroneous, the state court's order remains final and preclusive. "Under Missouri law, a judgment on the merits at the trial-court level is considered a final judgment for purposes of res judicata and collateral estoppel, even if the appeal of that judgment is still pending." Noble v. Shawnee Gun Shop, Inc., 315 S.W.3d 364, 369 (Mo. Ct. App. 2010).

20. Moreover, under the Rooker-Feldman doctrine, this Court does not have the power to disagree with the Missouri courts' determination of the Litigation. Under that doctrine, inferior federal courts lack subject-matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." In

re Athens/Alpha Gas Corp., 715 F.3d 230, 234 (8th Cir. 2013). See generally Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Thus, in any contested matter involving the validity of the Claims, this Court would not have jurisdiction to reach a conclusion.

21. Because the state courts determined that the claims in the Litigation had no merit and that summary judgment in favor of the defendants – including the Debtors – was appropriate, this Court, pursuant to Rooker-Feldman, is barred from reviewing the merits of the state courts' judgments.

WHEREFORE, the Debtors respectfully request that this Court:

(a) disallow the Claims; and

(b) grant such other and further relief as is just and proper.

Dated: October 11, 2013
St. Louis, Missouri

Respectfully submitted,

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Exhibit A - Willits Litigation

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
1	PATRICIA WILLITS WILLIAM G PARROTT JR AND DONALD PETRIE TRUSTEE FOR PPW ROYALTY TRUST C/O LAW OFFICES OF GEORGE A BARTON PC ATTN ROBERT G HARKEN ESQ 4435 MAIN ST STE 920 ONE MAIN PLAZA KANSAS CITY, MO 64111 Date Filed: 12/12/12 ED MO Date Filed: 02/27/13 Debtor: CENTRAL STATES COAL RESERVES OF KENTUCKY, LLC	2009	2562-1	Unsecured: $15,000,000.00*
2	PATRICIA WILLITS, WILLIAM G PARROTT JR, AND DONALD PETRIE TRUSTEE FOR PPW ROYALTY TRUST C/O LAW OFFICES OF GEORGE A BARTON PC ATTN ROBERT G HARKEN ESQ ONE MAIN PLAZA 4435 MAIN ST STE 920 KANSAS CITY, MO 64111 Date Filed: 12/12/12 ED MO Date Filed: 02/27/13 Debtor: OHIO COUNTY COAL COMPANY, LLC	2006	2568-1	Unsecured: $15,000,000.00*
3	PATRICIA WILLITS, WILLIAM G PARROTT JR, AND DONALD PETRIE TRUSTEE FOR PPW ROYALTY TRUST C/O LAW OFFICES OF GEORGE A BARTON PC ATTN ROBERT G HARKEN ESQ ONE MAIN PLAZA 4435 MAIN ST STE 920 KANSAS CITY, MO 64111 Date Filed: 12/12/12 ED MO Date Filed: 02/27/13 Debtor: GRAND EAGLE MINING, LLC	2007	2569-1	Unsecured: $15,000,000.00*

Exhibit A - Willits Litigation

Omnibus Objection to Claims

Patriot Coal Corporation
12-51502 (KSS)

Note: Claims on the exhibit are sorted in alphabetical order based on the creditor name as listed on proof of claim form.

SEQ NO.	CLAIM(S) TO BE DISALLOWED			
	NAME	GCG CLAIM NO.	ED MO CLAIM NO.	CLAIM AMOUNT
4	PATRICIA WILLITS, WILLIAM G PARROTT JR, AND DONALD PETRIE TRUSTEE FOR PPW ROYALTY TRUST C/O LAW OFFICES OF GEORGE A BARTON PC ATTN ROBERT G HARKEN ESQ ONE MAIN PLAZA 4435 MAIN ST STE 920 KANSAS CITY, MO 64111 Date Filed: 12/12/12 ED MO Date Filed: 02/27/13 Debtor: BEAVER DAM COAL COMPANY, LLC	2008	2571-1	Unsecured: $15,000,000.00*
5	PATRICIA WILLITS, WILLIAM G PARROTT JR, AND DONALD PETRIE TRUSTEE FOR PPW ROYALTY TRUST C/O LAW OFFICES OF GEORGE A BARTON PC ATTN ROBERT G HARKEN ESQ ONE MAIN PLAZA, 4435 MAIN ST STE 920 KANSAS CITY, MO 64111 Date Filed: 12/12/12 ED MO Date Filed: 02/27/13 Debtor: HERITAGE COAL COMPANY LLC	2005	2563-1	Unsecured: $15,000,000.00*

* Denotes an unliquidated component.

332 S.W.3d 260
Missouri Court of Appeals,
Eastern District,
Division Three.

Patricia WILLITS, et al., Appellants,
v.
PEABODY COAL COMPANY, LLC, et al.,
Respondents.

No. ED 94777. | Dec. 28, 2010. | Motion for Rehearing and/or Transfer toSupreme Court Denied March 1, 2011. | Application for Transfer DeniedMarch 29, 2011.

Synopsis
Background: Alleged royalty interest owners brought action against various mineral interest lessors asserting breach of contract claims for failure to pay royalties pursuant to 50-year old royalty agreements, and seeking a declaratory judgment regarding future royalty payments. The Circuit Court, City of St. Louis, Robert H. Dierker, J., granted summary judgment in favor of lessors, and royalty interest owners appealed.

Holdings: The Court of Appeals, Eastern District, Division Three, Clifford H. Ahrens, J., held that:

[1] overriding royalty interest based on 50 year old mineral lease terminated on termination of lease, and

[2] in a matter of first impression, royalty interest in coal production granted by mineral rights lessor that was binding on lessor was not binding on its tenant in common in leasehold interest once the tenancy was extinguished.

Affirmed.

West Headnotes (7)

[1] **Mines and Minerals**
Construction and operation of assignment or sale in general

Overriding royalty interest based on 50 year old mineral lease terminated on termination of lease, even though royalty agreement expressly stated royalty rights extended to all coal mined from any of the lands in the boundaries by lessor, its successors and assigns, absent a showing of fraud, breach of a fiduciary interest, or an agreement otherwise.

[2] **Mines and Minerals**
Assignment or Sublease

An "overriding royalty interest" is created out of the working interest in a mineral lease; it is an interest in the lease out of which it is carved, and cannot be a property interest of greater dignity than the lease itself.

[3] **Mines and Minerals**
Construction and operation of assignment or sale in general

An overriding royalty interest in a mineral lease cannot survive termination of the lease, absent fraud, breach of a fiduciary relationship, or an agreement otherwise.

[4] **Tenancy in Common**
Termination of cotenancy
Tenancy in Common
Mines and minerals
Tenancy in Common
Contracts

Royalty interest in coal production granted by mineral rights lessor that was binding on lessor was not binding on its tenant in common in leasehold interest once the tenancy was extinguished by severalty ownership of the fee

simple, absent a showing of fraud, bad faith, or a lack of fair dealing; extinguishment of tenancy in common created a subsequent fee simple ownership of the entire leasehold interest.

[5] **Tenancy in Common**
Title and rights in general

In a "tenancy in common," each co-tenant owns a separate, fractional share of undivided property.

[6] **Tenancy in Common**
Enjoyment and use of property in general
Tenancy in Common
Sales and conveyances to third persons

In a "tenancy in common," each co-tenant has the right to unilaterally alienate his interest through gift, sale, or encumbrance; to exclude third parties from the property; and to receive an appropriate portion of any income derived from the property.

[7] **Tenancy in Common**
Nature of the relation
Tenancy in Common
Authority of cotenant in general

Tenants in common are not principal and agent to each other, and they are not partners, and accordingly, neither tenant in common can bind the estate or person of the other by any act relating to the common property when dealing with third parties.

Attorneys and Law Firms

***261** Gerard Carmody, St. Louis, MO, George A. Barton, Kansas City, MO, for appellant.

John S. Sandberg, Thomas B. Weaver, St. Louis, MO, Mason L. Miller, Lexington, KY, for respondent.

Opinion

CLIFFORD H. AHRENS, Judge.

Patricia Willits, William G. Parrott, Jr., and Donald Petrie, Trustee of the PPW Royalty Trust, collectively "Plaintiffs" appeal from the judgment of the trial court denying their motion for partial summary judgment and granting the motions for summary judgment of the Peabody Defendants and the Armstrong Defendants.[1] Finding no error, we affirm.

In 1946, W.G. Parrott, father of William G. Parrott, Jr. and Patricia Willits, conveyed certain lands and mineral rights located ***262** within a 6,000–plus acre tract in Ohio County, Kentucky, to the Beaver Dam Coal Company ("Beaver Dam Coal"). Beaver Dam Coal promptly leased the coal mining rights on those lands back to W.G. Parrott, who then assigned the coal leases ("Beaver Dam Lease") to the Rough River Coal Company ("Rough River"), a company incorporated by W.G. Parrott. Rough River agreed to pay W.G. Parrott and his wife an overriding royalty of five percent of the average gross realization from coal mined and sold by Rough River, its successors and assigns, from any land in the First and Third Boundary, as described in the contract. In 1947, Rough River assigned the coal leases to the Alston Coal Company ("Alston Coal"), another corporation controlled by W.G. Parrott. W.G. Parrott and his wife entered into new royalty agreements with Alston Coal in 1954 ("1954 Royalty Agreements") that changed the royalty obligation to two percent of gross realization on coal produced by strip-mining, and one percent on coal mined by underground mining methods, and added a fourth boundary area. The Parrotts also released Alston Coal from its obligations under the previous royalty agreement. The 1954 Royalty Agreements granted royalty rights to the Parrotts on any coal mined by Alston Coal, its successors and assigns from lands within the First, Third, and Fourth Boundaries. At the time of the execution of the 1954 Royalty Agreements, Alston Coal did not have a fee simple interest in any of the land within the boundaries set forth in the 1954 Royalty Agreements.

Peabody Coal ("Peabody") acquired Alston Coal in 1956, and assumed its obligations and liabilities. The Parrotts

assigned their overriding royalty interests to their children in 1959. From 1956 to 2005, the Beaver Dam Lease was assigned to several Peabody entities. In 2005, the Beaver Dam Lease was assigned to Central States Coal Reserves of Kentucky, LLC ("Central States"). At all times during the period from 1946 until 2005, the lands subject to the Beaver Dam Lease were held in fee simple by Beaver Dam Coal, the lessor. However, in 2002, Peabody Holding Company, LLC, a Peabody subsidiary, acquired Beaver Dam Coal. On January 18, 2007, Beaver Dam Coal, the lessor, and Central States Coal Reserves of Kentucky, the lessee of the Beaver Dam Lease, terminated those leases by agreement.

There were also properties held as tenants in common. W.G. Parrott and Pauline Parrott conveyed one-half interests in two tracts of land, the Bernheim property and the Green River property, to both Rough River and to the Beaver Dam Coal Company as tenants in common as to both properties. Rough River conveyed its one-half tenancy in common interests in the Bernheim and Green River properties to Alston Coal in 1947. Alston Coal owned these one-half tenancy in common interests at the time that it executed the 1954 Royalty Agreements, which encompassed those properties. By 2005, the Peabody Defendants had also acquired Alston Coal's tenancies in common. On September 13, 2007, Beaver Dam Coal and Central States Coal Reserves, which had acquired the Alston tenancies in common, sold them to Cyprus Creek Land Resources ("Cyprus Creek") one of the many Peabody companies, thereby joining the co-tenancies. On March 31, 2008, Cyprus Creek, sold the fee simple to Western Diamond, one of the Armstrong Defendants. Since April 2008, neither the Peabody Defendants nor the Armstrong Defendants have paid royalties to the Plaintiffs on coal mined and sold by the Armstrong Defendants.

On May 28, 2008, the Plaintiffs filed a petition against the Peabody Defendants ***263** and the Armstrong Defendants that asserted breach of contract claims based on the 1954 Royalty Agreements for failure to pay royalties, and also seeking a declaratory judgment regarding future royalty payments. The Peabody Defendants and the Armstrong Defendants separately filed motions for summary judgment, and Plaintiffs filed a motion for partial summary judgment. After a hearing on these motions, the trial court granted summary judgment in favor of the Peabody Defendants and the Armstrong Defendants, and denied Plaintiffs' motion for partial summary judgment. Plaintiffs now appeal from this judgment.

Appellate court review of a summary judgment is essentially *de novo*. *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 52 (Mo. banc 2009). Summary judgment is proper only where the movant has demonstrated that " 'there is no genuine dispute as to the facts' " and that " 'the facts as admitted show a legal right to judgment for the movant.' " *Id.* (quoting *ITT Commercial Finance Corporation v. Mid–America Marine Supply Corporation*, 854 S.W.2d 371, 380 (Mo. banc 1993)). It is the movant's burden to establish both a legal right to judgment and the absence of any genuine issue of material fact necessary to support the claimed right to judgment. *Id.*

[1] The parties do not dispute the facts, but rather the legal effect of the facts.[2] We will consider Plaintiffs' first and second points relied on together. In their first point relied on, Plaintiffs contend that the trial court erred in granting summary judgment in favor of Defendants because their royalty rights are not limited to coal mined under the Beaver Dam Lease, in that the 1954 Royalty Agreements provide that their royalty rights extend to all coal mined from any of the lands in the boundaries by Alston Coal, its successors, and assigns. In their second point relied on, Plaintiffs assert that the trial court erred in granting summary judgment in favor of Peabody Defendants and the Armstrong Defendants because their royalty rights "are not limited to the land or coal mining rights in the boundaries which Alston Coal Company owned or leased on November 17, 1954, in that:" the 1954 Royalty Agreements state expressly that their royalty rights extend "to all coal mined from any of the lands in the boundaries by Alston Coal Company, its successors and assigns" and there is no law of property that prevents the Plaintiffs from enforcing the 1954 Royalty Agreements in accordance with the express terms of those agreements.[3]

[2] [3] As the trial court observed, quoting from a memorandum filed by Plaintiffs, ***264** " 'the central argument in this case hinges upon whether the 1954 royalty agreements between Alston Coal Co. and William and Pauline Parrott are a product of and dependent upon the Beaver Dam lease and the properties then held by Beaver Dam and Rough River as tenants in common.' " As to the nature of the royalty interests, we agree with the trial court's determination that the royalty interest based on the Beaver Dam Leases is an overriding royalty interest. An overriding royalty interest is created out of the working interest in a mineral lease. *See Olson v. Continental Resources, Inc.*, 109 P.3d 351, 354 (Okla.Civ.App.2004). "It is an interest in the lease out of which it is carved, and cannot be a property interest of greater dignity than the lease itself." *Id.* Accordingly, the overriding royalty interest cannot survive termination of the lease, absent fraud, breach of a fiduciary relationship, or an agreement otherwise. *Id. See also Ritter v. Bill Barrett Corporation*, 351 Mont. 278, 210 P.3d 688,

690–91 (2008) ("if a party wishes an overriding royalty to survive the expiration of the lease or sublease, he must include an express provision stating such."). The royalty interest based on the Beaver Dam Leases cannot survive the termination of those leases. There is no allegation of fraud or breach of a fiduciary relationship, and there is no express provision otherwise, despite the arguments of Plaintiffs for a broad reading of the 1954 Royalty Agreements.

[4] [5] [6] Regarding the Bernheim and Green River properties, there is no dispute about the facts of the creation of the tenancies in common, the property transfers, or the creation of the royalty interest in the tenancies in common in those properties by Alston Coal in the 1954 Royalty Agreements. In a tenancy in common, each co-tenant owns a separate, fractional share of undivided property. *United States v. Craft,* 535 U.S. 274, 279–80, 122 S.Ct. 1414, 1421, 152 L.Ed.2d 437 (2002); *State v. Hoskins,* 357 Mo. 377, 208 S.W.2d 221, 222 (1948). Each co-tenant has the right to unilaterally alienate his interest through gift, sale, or encumbrance; to exclude third parties from the property; and to receive an appropriate portion of any income derived from the property. *Craft,* 535 U.S. at 279–80, 122 S.Ct. at 1421. There is no dispute that all of the tenancies in common for the Bernheim and Green River properties were sold to Cyprus Creek, thereby uniting the interests in one owner. Uniting the interests in one owner terminated the tenancy in common, creating a fee simple interest in severalty. *See Davis v. Broughton,* 369 S.W.2d 857, 859 (Mo.App.1963); *Sigman v. Rubeling,* 271 S.W.2d 252, 255 (Mo.App.1954). *See also Shelton v. Vance,* 106 Cal.App.2d 194, 234 P.2d 1012, 1014 (1951); *Sullivan v. McLenans,* 2 Iowa 437 (Iowa 1856); *Smith v. Smith,* 249 N.C. 669, 107 S.E.2d 530, 535–37 (1959); 86 C.J.S. *Tenancy in Common* section 15 (2009) and 2 Bl.Comm. 194.

[7] The issue is what becomes of a royalty interest granted by a tenant in common, Alston Coal, to a third party and its assigns, the Plaintiffs, when the tenancies in common are extinguished by severalty ownership of the fee simple, where there is no claim of fraud, bad faith, or lack of fair dealing that might rouse concerns in equity. It is a basic principle that tenants in common are not principal and agent to each other, and they are not partners, and accordingly, neither tenant in common can bind the estate or person of the other by any act relating to the common property when dealing with third parties. *Timothy v. Hicks,* 237 Mo.App. 126, 164 S.W.2d 99, 105 (1942) (quoting 62 C.J., Section 209, page 533). Consequently, when Alston Coal granted a royalty interest from its tenancies in common for the ***265** Bernheim and Green River properties, it did not bind its tenant in common, Beaver Dam Coal or its interest in its tenancies in common. What then, becomes of the royalty interest granted by Alston Coal, binding on its ownership interest, but not that of its tenant in common, when the tenancy in common is terminated? This precise question does not appear to have been addressed by Missouri or Kentucky courts. The closest case on point is *J.M. Shober Farms, Inc. v. Merrill,* 179 Pa.Super. 446, 115 A.2d 384 (1955), which essentially held that a royalty interest created by a tenant in common could not bind the subsequent fee simple owner of the entire interest in the parcel. The trial court explained it by stating "when tenancies in common are joined in a single owner, the prior undivided fractional interests are extinguished, merged as it were, in the subsequent fee." The trial court further noted that the Pennsylvania appellate view was in accord with the common law of property, and that the common law of property applies in Missouri pursuant to section 1.010 RSMo 2000. We agree.

Plaintiffs cite a number of cases for the proposition that the 1954 Royalty Agreements granted them perpetual non-participating royalties that should have survived the extinguishment of the Beaver Dam Leases and the tenancies in common of the Bernheim and Green River properties. Those cases are distinguishable. As the trial court stated, "[t]he leasehold became extinct, the tenancy in common was dissolved, and the 1954 royalty agreements died with it." Alston Coal could not grant greater rights in mineral interests than it held as less than a fee owner. Points denied.

We need not address Plaintiffs' third and fourth points relied on, which raise issues as to whether the Armstrong Defendants are the assigns or successors to the Peabody Defendants and the obligations arising from the 1954 Royalty Agreements. We held above that the royalty interests of Plaintiffs terminated with the termination of the Beaver Dam Leases and the termination of the tenancy in common, when the interests were held by the Peabody Defendants. If the Peabody Defendants have no liability, the Armstrong Defendants, even if successors and/or assigns of the Peabody Defendants could not be liable.

The judgment of the trial court is affirmed.

SHERRI B. SULLIVAN, P.J., and LAWRENCE E. MOONEY, J., concur.

171 Oil & Gas Rep. 697

Parallel Citations

171 Oil & Gas Rep. 697

Footnotes

1 The Peabody Defendants consist of: Peabody Coal Company, LLC, Peabody Energy Corporation, Peabody Development Company, LLC, Peabody Holding Company, LLC, Central States Coal Reserves of Kentucky, LLC, and Beaver Dam Coal Company, LLC. The Armstrong Defendants consist of: Armstrong Coal Company, Inc. and Western Diamond, LLC.

2 The trial court found that the royalty agreements were executed in Kansas, created interests in mineral rights in Kentucky, and were performed or to be performed at least in part in Missouri, where the Peabody defendants are headquartered. All of the parties apparently agreed that "either the law of Missouri or the law of Kentucky should control, but do not insist on one or the other." The trial court was "unable to descry any 'controlling authority' in either Missouri or Kentucky," and relied on "general law." Plaintiffs and Armstrong Defendants appear to agree that the relevant substantive law of contractual interpretation of Missouri and Kentucky is essentially the same. The Peabody Defendants do not argue this issue.

3 In the argument section of their brief, Plaintiffs argue that the Peabody Defendants and the Armstrong Defendants failed to raise what the Plaintiffs term "their erroneous 'tenancy in common' defense" in their motions for summary judgment, but rather raised this issue in their reply briefs in support of their motions, and that the trial court erroneously considered this issue. Plaintiffs did not raise this issue in their points relied on, and we need not consider this issue as it is not preserved for appellate review. Rule 84.04(e); *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 131 (Mo.App.2006).

400 S.W.3d 442
Missouri Court of Appeals,
Eastern District,
Division Three.

Patricia WILLITS, et al., Appellants,
v.
PEABODY COAL COMPANY, LLC, et al.,
Respondents.

No. ED 98674. | April 9, 2013. | Motion for Rehearing and/or Transfer to Supreme Court Denied May 16, 2013. | Application for Transfer Denied June 25, 2013.

Synopsis

Background: Alleged royalty interest owners brought declaratory judgment action against the state and various mineral interest lessors, alleging five constitutional counts against the state related to a prior Court of Appeals ruling regarding the validity of 50–year old royalty agreements. The Circuit Court, St. Louis County, Mary B. Schroeder, J., dismissed owners claims against all defendants. Alleged royalty interest owners appealed.

Holdings: The Court of Appeals, Roy L. Richter, J., held that:

[1] royalty interest owners waived their judicial takings and due process claims when they failed to raise them at the first possible opportunity;

[2] assuming owners' constitutional claims arose only after a Circuit Court judgment in a prior action, they still waived their claims by failing to raise them at the first opportunity; and

[3] assuming, arguendo, that owners were not required to plead their constitutional claims against the state or raise them in a motion for new trial in a prior action, they still waived their claims by failing to raise them at the first opportunity.

Affirmed.

West Headnotes (14)

[1] **Appeal and Error**
Cases Triable in Appellate Court

An appellate court's review of a trial court's judgment sustaining a motion to dismiss is de novo.

[2] **Pretrial Procedure**
Construction of pleadings
Pretrial Procedure
Presumptions and burden of proof

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition; it assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.

[3] **Pretrial Procedure**
Availability of relief under any state of facts provable
Pretrial Procedure
Construction of pleadings

When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted no attempt is made to weigh any facts alleged as to whether they are credible or persuasive; instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause that might be adopted in that case.

[4] **Appeal and Error**
Reasons for Decision

Appeal and Error
Review of correct decision based on erroneous reasoning in general

An appellate court may affirm the trial court's dismissal on any ground before the trial court in the motion to dismiss, even if the trial court relied on other grounds in dismissing the claim; in fact, if a trial court granting a motion to dismiss reaches a correct result for the wrong reason, an appellate court must still affirm.

[5]

Constitutional Law
Delay in assertion of rights; laches

A constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.

[6]

Appeal and Error
Constitutional questions
Constitutional Law
Delay in assertion of rights; laches
Constitutional Law
Form and Sufficiency of Objection, Allegation, or Pleading

For a party to properly raise and preserve a constitutional argument, the litigant must: (1) raise the constitutional argument at the first opportunity; (2) specify the sections of the Constitution, federal or state, claimed to have been violated; (3) state the facts demonstrating the violation; and (4) preserve the argument throughout the appellate process.

[7]

Appeal and Error
Constitutional questions
Constitutional Law
Delay in assertion of rights; laches
Eminent Domain
Limitations and Laches

Alleged royalty interest owners waived their judicial takings and due process claims, in which they alleged that the state, while acting through its judicial branch in a prior decision, failed to give full faith and credit to a prior holding regarding the validity of 50-year-old royalty agreements, when they failed to bring their constitutional claims at the first possible opportunity; royalty interest owners could have argued their constitutional claims beginning with the filing of their petition in the prior lawsuit, but rather, appeared to sit on their hands, raising their constitutional argument only after their application for transfer to the Supreme Court in the prior action was denied. V.A.M.S. Const. Art. 1, §§ 10, 28.

[8]

Appeal and Error
Constitutional questions
Constitutional Law
Delay in assertion of rights; laches
Eminent Domain
Limitations and Laches

Assuming that alleged royalty interest owners' judicial takings and due process claims, in which they alleged that the state, while acting through its judicial branch in a prior decision, failed to give full faith and credit to an earlier holding regarding the validity of 50-year-old royalty agreements, arose only after a circuit court judgment in a prior action, they still waived their claims by failing to raise them at the first opportunity, where they could have raised their constitutional arguments in a motion for a new trial following the prior judgment, but failed to do so, which precluded the defendants in that action from responding and prevented the circuit court from addressing any constitutional issues. V.A.M.S. Const. Art. 1, §§ 10, 28.

[9] **Appeal and Error**
Constitutional questions

Generally, a constitutional issue raised for the first time in a motion for a new trial is not preserved for appellate review; however, although it rarely occurs, a constitutional question may, in a proper case, be first raised in a motion for a new trial.

[10] **Appeal and Error**
Constitutional questions

The rules of preserving a constitutional claim require the claim to be raised at the first opportunity that orderly procedure would allow.

[11] **Appeal and Error**
Constitutional questions
Constitutional Law
Delay in assertion of rights; laches
Eminent Domain
Limitations and Laches
Eminent Domain
Appeal and error

Assuming, arguendo, that alleged royalty interest owners were not required to plead their constitutional claims against the state or raise them in a motion for new trial in a prior action, they still failed to raise their constitutional claims at the first opportunity in accordance with orderly procedure, and thus, waived any such claims; under the plain error review standard, the owners had the opportunity to raise their constitutional claims on appeal in the prior action, even if they did not raise them before the trial court, and could have further sought certiorari to the United States Supreme Court, but failed to do either.

[12] **Appeal and Error**
Constitutional questions

While the United States Supreme Court is not willing to waive the requirement that a federal issue be presented to the state court before it may be raised in the Supreme Court, there is no federal requirement that a federal issue must be raised in the state trial court before it is raised in the state appellate courts.

[13] **Constitutional Law**
Delay in assertion of rights; laches

There is no federal requirement that a constitutional issue be raised at first opportunity; in fact, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

[14] **Federal Courts**
Time and manner of raising federal question in state court

When a constitutional issue could not have been raised by the party in the state court because the issue was first presented in that court's opinion, raising the issue in a petition for rehearing or transfer even though it was denied, will suffice in order to sufficiently preserve for U.S. Supreme Court review.

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Opinion

ROY L. RICHTER, Judge.

Patricia Parrott Willits, William G. Parrott, Jr., and Donald Petrie (collectively, "Appellants") appeal from the trial court's judgment sustaining the Peabody Defendants'[1] and Armstrong Defendants'[2] Joint Motion to Dismiss and denying Appellants' Motion for Summary Judgment. Finding Appellants failed to assert their constitutional arguments at the first opportunity available, we need not consider Appellants' allegations of error absent a showing of plain error. Making no such showing, we thus decline to consider the merits of Appellants' appeal, and affirm the trial court's judgment.

I. BACKGROUND

The facts, procedural background, and arguments of this case are so vast, academic, and novel, that this case is befitting for a law school exam. Thus, for ease of understanding, we begin, not with the underlying action, but, rather, we proceed in a chronological and systematic manner. However, we only convey the facts necessary for the disposition of the underlying claims as the other facts leading to this appeal have not changed and can be found in other judicial decisions referenced throughout this opinion.

Willits I

In 1990, Appellants filed suit against Peabody Coal Company ("Peabody")[3] in the United States District Court for the Western District of Kentucky seeking to recover damages for the alleged breach of contract and fraud perpetrated by Peabody, due to the manner in which Peabody calculated the payment of coal royalties under written agreements (dating back to the 1940s) with the Appellants. At issue in that case was the validity of the 1954 Royalty Agreements as applied to Peabody (i.e., Peabody's duty to pay royalties to Appellants). The district court upheld the validity of the 1954 Royalty Agreements, and, thus Peabody's duty to pay certain royalties to Appellants. After final judgment was entered by the district court in an unpublished opinion, Peabody appealed to the United States Court of Appeals for the Sixth Circuit.

In *Willits v. Peabody Coal Co.*, 1999 WL 701916 (6th Cir. Sept. 1, 1999) ("*Willits I* "), the Sixth Circuit affirmed, in relevant part, the district court's finding of the validity of the 1954 Royalty Agreements as ***446** applied to Peabody. *Willits v. Peabody Coal Co.*, 1999 WL 701916, *13–14 (6th Cir.1999) ("*Willits I* ").

Willits II

At some time after *Willits I*, the Peabody Defendants entered into sales, assignments, and leases of certain lands covered by the 1954 Royalty Agreements with the Armstrong Defendants. Thereafter, neither the Peabody nor Armstrong Defendants paid royalties to the Appellants for the coal mined by the Armstrong Defendants on the land either sold, assigned, or leased to the Armstrong Defendants.

In May 2008, Appellants filed suit against the Peabody Defendants and the Armstrong Defendants in the Circuit Court of the City of St. Louis for an alleged breach of contract based upon the written agreements (dating back to the 1940s) for failure to pay royalties and also seeking declaratory relief regarding future royalty payments. At the trial court, Appellants argued that validity of the 1954 Royalty Agreements had already been conclusively established in *Willits I*, and, thus, the trial court was obligated to give full faith and credit to that judicial decision. Conversely, the Peabody Defendants and Armstrong Defendants contended that *Willits I* dealt with different issues (because the facts had changed since Peabody had entered into certain sales, assignments and leases in the interim) and *Willits I*'s had no bearing on the Armstrong Defendants. Specifically, the Peabody and Armstrong Defendants claimed *Willits I* did not involve the effect of the later sales, assignments and leases with the Armstrong Defendants to the 1954 Royalty Agreements.

At the trial court, cross-motions for summary judgment were filed. On March 29, 2010, the Circuit Court of the City of St. Louis entered its Order and Judgment ("March 2010 Trial Court Judgment") denying Appellants' motion for summary judgment and granting the Peabody

Defendants' and Armstrong Defendants' motions for summary judgment. The trial court further held that the Peabody Defendants and Armstrong Defendants had "no further obligation to pay royalties to plaintiffs on coal mined on or after January 31, 2007 pursuant to [the 1954 Royalty Agreements.]"[4]

Appellants appealed the March 2010 Trial Court Judgment to this Court. *See Willits v. Peabody Coal Co., LLC*, 332 S.W.3d 260 (Mo.App. E.D.2010) ("*Willits II* ").[5] Agreeing with the trial court, this court affirmed the March 2010 Trial Court Judgment. *Id.* at 263–65.

Subsequently, Appellants filed their Motion for Rehearing and/or Transfer to the Missouri Supreme Court ("Rehearing/Transfer Motion"). This Court denied Appellants' Rehearing/Transfer Motion on March 1, 2011. Further, Appellant's Application for Transfer to the Missouri Supreme Court ("Application for Transfer") was denied March 29, 2011. The legal file is void of any evidence indicating that Appellants sought certiorari from the Supreme Court of the United States.

447 *Willits III

Next, Appellants filed this underlying Petition for Declaratory Relief in the Circuit Court of Saint Louis County on August 8, 2011, against numerous defendants:

> (1) Peabody Coal Company, LLC and Peabody Energy Corporation and its affiliates[6] (collectively, "Peabody Defendants");
>
> (2) Armstrong Land Company, LLC and its affiliates[7] (collectively, "Armstrong Defendants"); and
>
> (3) the State of Missouri ("State").

In their five-count Petition, Appellants allege five constitutional counts against the State[8]—acting through its judicial branch—in entering the March 2010 Trial Court Judgment and *Willits II:* (1) the State violated Article IV, Section 1 of the United States Constitution (commonly referred to as the "Full Faith and Credit Clause")[9] by failing to give full faith and credit to *Willits I's* holding regarding the validity of the 1954 Royalty Agreements; (2) the State's actions constituted "judicial takings" in violation of the Takings Clause of the Fifth Amendment to the United States Constitution as made applicable to the State through the Fourteenth Amendment to the United States Constitution,[10] in that the State took private property (or more specifically, altered property rights that a private party had an established interest therein) without just compensation; (3) the State's actions violated the Due Process Clause of the Fifth Amendment to the United States Constitution as made applicable to the State through the Fourteenth Amendment to the United States Constitution,[11] in that Appellants were not afforded their substantive due process rights; (4) the State's actions constituted "judicial takings" in violation of Article 1, Section 28 of the Missouri Constitution (Missouri Constitution's "Taking Clause");[12] and (5) the State's actions violated Article 1, § 10 of the Missouri Constitution (Missouri Constitution's "Substantive Due Process Clause"),[13] in that ***448** Appellants were not afforded their substantive due process rights.

The Peabody and Armstrong Defendants filed their Joint Motion to Dismiss—which the State joined—and Appellants filed their Motion for Summary Judgment. After oral arguments before the trial court, on February 29, 2012, the trial court entered judgment sustaining the Peabody and Armstrong Defendants' Joint Motion to Dismiss. The trial court held, *sua sponte*, Appellants' claims against the State were barred under the doctrine of judicial immunity, and Appellants' claims under the United States Constitution did not state a cognizable claim for relief.

This appeal now follows.

II. DISCUSSION

Appellants raise four points on appeal. In all four points, Appellants argue that the trial court erred in sustaining the Peabody and Armstrong Defendants' Joint Motion to Dismiss. Specifically, Appellants claim that the trial court erred in: (1) sustaining the Joint Motion to Dismiss because *res judicata* does not bar Appellants' constitutional claims; (2) sustaining the Joint Motion to Dismiss because the March 2010 Trial Court Judgment and *Willits II* violated the Full Faith and Credit Clause of the United States Constitution; (3) *sua sponte* dismissing Appellants' Petition based upon the doctrine of judicial immunity because the Peabody and Armstrong Defendants did not raise said argument in their Joint Motion to Dismiss; and (4) *sua sponte* dismissing Appellants' Petition based upon a finding that Appellants' "judicial takings" claim failed to state an actionable claim for relief because the Peabody and Armstrong Defendants did not raise said argument in their Joint Motion to Dismiss.

Finding that Appellants failed to assert their constitutional arguments—thus, their entire Petition—at the first opportunity, we need not reach the merits of Appellants' arguments. We affirm the trial court's judgment because Appellants have waived their right to bring their constitutional claims.

Standard of Review

[1] [2] [3] This Court's review of a trial court's judgment sustaining a motion to dismiss is *de novo*. *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 601 (Mo.App. E.D.2009). When reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, we apply the following standard of review:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause that might be adopted in that case.

State ex rel. Henley v. Bickel, 285 S.W.3d 327, 329 (Mo. banc 2009) (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)).

[4] Relevant to this Court's disposition, we may affirm the trial court's dismissal on any ground before the trial court in the motion to dismiss, even if the trial court relied on other grounds in dismissing the claim. *McCarthy v. Peterson*, 121 S.W.3d 240, 243 (Mo.App. E.D.2003). In fact, "[i]f a trial court granting a motion to dismiss reaches a correct result for the wrong reason, we must still affirm." *State ex rel.* ***449** *Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 464–65 (Mo.App. E.D.2000).

Analysis

[5] Under Missouri law, "[i]t is firmly established that a constitutional question must be presented at the earliest possible moment that *good pleading and orderly procedure* will admit under the circumstances of the given case, otherwise it will be waived." *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo.1964) (internal quotation omitted) (emphasis added). This rule has been posited by the Supreme Court of Missouri as necessary in order to prevent surprise to the opposing party and to permit the trial court the opportunity to adequately and fairly address the constitutional claim. *Land Clearance for Redevelopment Auth. of Kansas City, Mo. v. Kansas Univ. Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. banc 1991).

[6] For a party to properly raise and preserve a constitutional argument, the litigant must: (1) raise the constitutional argument at the first opportunity; (2) specify the sections of the Constitution (federal or state) claimed to have been violated; (3) state the facts demonstrating the violation; and (4) preserve the argument throughout the appellate process. *City of Eureka v. Litz*, 658 S.W.2d 519, 521 (Mo.App. E.D.1983).

Appellants argue the constitutional questions arose only after the March 2010 Trial Court Judgment was rendered. Accordingly, Appellants claim their only method of seeking recourse was the filing of a new lawsuit as effectuated in the case at bar. Even when giving the Appellants all reasonable inferences, we disagree. Appellants had multiple opportunities to raise their constitutional arguments: (1) Appellants' constitutional arguments may have been pled in the alternative; (2) throughout the appellate process in *Willits II*, Appellants failed to inform any court of their constitutional claims; and (3) Appellants did not seek certiorari to the United States Supreme Court.

However, we note that this case does not impose upon this Court the opportunity to decide exactly *when* Appellants ought to have brought their constitutional arguments, only that Appellants failed to do so at the first opportunity[14]—which, under Missouri law and in Missouri courts, is not in a separate lawsuit as advanced by Appellants. As such, this Court only demonstrates the wide-ranging possibilities Appellants had in asserting their judicial takings, due process, and other constitutional claims during the pendency of *Willits II*. Exactly *when* such constitutional claims must be brought is left for another day when the facts of a case so require.

1. Appellants could have raised their constitutional claims at the time of filing their *Willits II* Petition.

[7] Good and orderly pleading in Missouri permits a litigant to set forth two or more statements of a claim alternatively or hypothetically, regardless of the consistency of the alternative or hypothetical claims. *See* Rule 55.10. The effect of Rule 55.10 "is to enable parties, as far as practicable, to submit all their controversies in a single action and *avoid a multiplicity of suits.*" ***450** *Kaiser Aluminum & Chem. Sales, Inc. v. Lingle Refrigeration Co.*, 350 S.W.2d 128, 131 (Mo.App.1961)[15] (emphasis added).

Thus, in that vein, Appellants could have argued their "judicial takings" and Due Process claims beginning with the filing of their petition in *Willits II*. *See e.g.*, *Land Clearance for Redevelopment Auth. of Kansas City, Mo.*, 805 S.W.2d at 175–76, (finding that appellant's constitutional claims could not have been so surprising that those claims only became known to appellant after the trial court entered its verdict); *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907–08 (Mo. banc 1992) (overruled on other grounds). A reasonable litigant could have pled constitutional claims in the alternative, knowing that a judicial takings and a Due Process claim were inevitable if the Circuit Court of the City of St. Louis ruled adversely to the other claims set forth in the *Willits II* petition. *See* Ian Fein, *Why Judicial Takings Are Unripe*, 38 Ecology L.Q. 749, n. 187 (2011) ("The plaintiff would claim in effect: 'We win our legislative taking claim, but if not, that state court itself will have committed a taking.' "). This requirement that litigants inform the trial court of a real and substantial constitutional argument at first opportunity "would prohibit them [the litigants] from sitting on their hands and waiting for a 'second bite of the apple,' a litigation strategy that imposes negative externalities on the courts and other parties." *Id.* at 777–78.

Here, the evidence manifests an appearance that Appellants sat on their hands. Not once did Appellants apprise any court during the litigation of *Willits II* of their constitutional arguments, but only four months after the Appellants' Application for Transfer was denied by the Missouri Supreme Court in *Willits II*, Appellants commenced the case at bar. Appellants seek a second bite of the apple.

Furthermore, it must be noted that Appellants cannot attempt to camouflage or shield their omissions of their constitutional claims by arguing that their constitutional claims did not become actionable or viable until after *Stop the Beach Renourishment Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).[16] In *Stop the Beach*, the United States Supreme Court unanimously held that the Florida Supreme Court had not taken any property from members of a non-profit corporation, comprised of beach front property owners, named Stop the Beach Renourishment ("STBR"). *Id.* at 2613. Specifically, the Court found that Florida's Department of Environmental Protection's project to renourish certain Florida beaches was not unconstitutional or in violation of STBR's property rights. *Id.* However, the Supreme Court's reasoning regarding why there had been no judicial taking was far from unanimous.

The plurality opinion, authored by Justice Scalia, held that a judicial takings occurs, "depending on its [the judicial decision's] nature and extent [,]" whenever a court ruling changes an "established right" of property law. *Id.* at 2602. Justice Scalia stated that an owner should be permitted to sue to overturn an alleged taking, ***451** thus rejecting the argument that the sole remedy should be financial compensation. *Id.* at 2607. However, in his view, the aggrieved party challenging a state court ruling should be limited to pursuing the claim through state court appellate process and seeking certiorari to the United States Supreme Court, within the same case. *Id.* at 2609. If the plaintiff was not a party to the original suit, he or she would be permitted to pursue the claim in federal court. *Id.* at 2609–10.

Conversely, in a concurring opinion—on which Appellants premise many of their constitutional arguments—Justice Kennedy argued the Court need not determine the viability of the judicial takings concept in this particular case, but rather, the Due Process Clause was the better alternative or avenue on which to decide such a scenario. *Id.* at 2613–18. However, in contrast to Justice Scalia, Justice Kennedy suggested that the exclusive remedy for a judicial takings would be financial compensation.[17] *Id.* at 2617. Furthermore, Justice Kennedy found it "unclear" how a plaintiff would raise a proper judicial takings claim, and proposed that a party would possibly have to file a second, separate suit challenging the outcome of the first case. *Id.*

Judicial takings and due process jurisprudence existed prior to 2010 and *Stop the Beach*. *See Smith v. United States*, 709 F.3d 1114, 2013 WL 646332, *2–3 (Fed.Cir. Feb. 22, 2013) ("it was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property."); *see also The Debate on Judicial Takings: I Scream, You Scream, We all Scream for Property Rights*, 33 No. 7 Zoning and Planning Law Report 1 (July 2010) ("swimming in the depths of [Supreme] Court dicta as far back as the mid–19th century was the notion of a court taking property through its own actions."); *see also* James S. Burling, *Judicial Takings After Stop the Beach*

Renourishment v. Florida Department of Environmental Protection, 12 Engage: J. Federalist Soc'y Prac. Groups 41, 42 (2011) ("The idea that a *court* can be responsible for a taking is not new. It has been around at least since 1897 in *Chicago, Burlington & Quincy Railroad Co. v. Chicago* [, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)] where the Court obliquely referred to a state court being involved in the taking of private property ..."); *see e.g., Hughes v. State of Washington*, 389 U.S. 290, 296–97, 298, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967) (J. Stewart concurring) ("the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its court than through its legislature"); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 317, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973) (overruled on other grounds); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (indicating the Takings Clause prohibited a court decision from converting private property into public property without just compensation); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S.Ct. 1332, 1334, 127 L.Ed.2d 679 (1994) (Scalia, J., dissenting from denial of certiorari) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation."). Therefore, Appellants' constitutional claims (or cause of action) did not emerge or become actionable only after the Supreme Court of the United States issued its *Stop the Beach* decision on June 17, 2010, but, rather, was ***452** actionable from the filing of their May 28, 2008 petition.

Thus, Appellants could have raised their constitutional claims at the time of filing their *Willits II* petition.

2. Appellants could have raised their constitutional claims in a motion for new trial after the March 2010 Trial Court Judgment.

[8] Assuming, *arguendo*, Appellants' contention is correct—that Appellants' constitutional claims arose only after the March 2010 Trial Court Judgment—Appellants still failed in asserting their constitutional claims at the first opportunity.

[9] [10] Generally, a constitutional issue raised for the first time in a motion for a new trial is not preserved for appellate review. *Mo. Utils. Co. v. Scott–New Madrid–Mississippi Elec. Co–op.*, 450 S.W.2d 182, 185 (Mo.1970); *see also State v. Blair*, 175 S.W.3d 197, 199 (Mo.App. E.D.2005). However, although it rarely occurs, "a constitutional question may, in a proper case, be first raised in a motion for a new trial." *Mesenbrink v. Boudreau*, 171 S.W.2d 728, 730 (Mo.App.1943); *see also e.g., City of Richmond Heights v. Gasway*, 2011 WL 4368522, *2 (Mo.App. E.D. Sept. 20, 2011) (appellant properly preserved its constitutional argument for appellate review because the constitutional challenge did not arise until after judgment was rendered and the appellant properly raised the argument in its motion for a new trial). After all, the rules of preserving a constitutional claim require the claim to be raised at the first opportunity that *orderly procedure would allow*. *Callier v. Dir. of Revenue, State of Mo.*, 780 S.W.2d 639, 641 (Mo. banc 1989).

Accordingly, good pleading and orderly procedure would have permitted Appellants to first raise their constitutional claims in a motion for a new trial after the March 2010 Trial Court Judgment was rendered.[18] Thus, after raising their constitutional arguments in a motion for new trial, Appellants could have then raised the same constitutional arguments on appeal during *Willits II*. However, there is no record that Appellants filed a motion for a new trial after the March 2010 Trial Court Judgment. In failing to do so, Appellants precluded the Peabody and Armstrong Defendants from responding and prevented the trial court from addressing the constitutional issues, thereby, failing to preserve their constitutional arguments for appellate review. *Ingle v. City of Fulton*, 260 S.W.2d 666, 667 (Mo.1953) ("if defendant desired to urge and preserve the point that the trial court erred in ruling any constitutional issue which may have been the basis of the trial court's decree, defendant city could and should have called the trial court's attention to the point by assignment of error in the motion for a new trial"); *see also Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S.W. 1108, 1110 (1908) (overruled on other grounds) ("if the trial court had a chance to correct its error under an appropriate ground in the motion for a new trial, the point would be saved on appeal ... In such case, or cases of a kindred nature, the first door open for a constitutional question to enter would be in the motion for a new trial.").

Therefore, Appellants failed to raise their constitutional claims at first opportunity ***453** in a motion for new trial and, thus, waived the right to assert them now.

3. Appellants could have raised their constitutional arguments during the appellate process of *Willits II*.

[11] A motion for a new trial was not a prerequisite to perfecting an appeal in *Willits II*. *See* Rule 73.01(d). Thus, again, assuming, *arguendo*, that Appellants were not required to plead their constitutional claims or raise them in a motion for new trial, this Court still finds that Appellants failed to raise their constitutional claims at the first opportunity in accordance with orderly procedure.

Appellants correctly assert that, in Missouri, a constitutional issue cannot be raised for the first time on appeal. *Chambers v. State*, 24 S.W.3d 763, 765 (Mo.App. W.D.2000). Nevertheless, unpreserved points on appeal—including, and especially, constitutional claims—may be reviewed under the plain error review standard. *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo.App. E.D.2012); *see also* Rule 84.13(c). Although plain error review of such unpreserved points are solely within this Court's discretion, and, in fact, rarely granted in a civil case, Appellants still had the *opportunity* to raise their constitutional claims. *MB Town Center, LP*, 364 S.W.3d at 602–04. In failing to raise their constitutional claims on appeal, Appellants did not even afford this Court, in 2010, the possibility of reviewing their constitutional claims under plain error.

Continuously, Appellants bypassed the opportunity to allow the courts to consider their constitutional claims. First, Appellants' Rehearing/Transfer Motion and Appellants' Application for Transfer did not raise Appellants' constitutional claims. Second, after the Missouri Supreme Court denied transfer, Appellants did not seek certiorari to the United States Supreme Court.

[12] [13] [14] Appellants' failure to do either is detrimental to their present argument that they did not waive their constitutional claims. While the United States Supreme Court is not willing to waive the requirement that a federal issue be presented to the state court before it may be raised in the Supreme Court, there is no federal requirement that a federal issue must be raised in the state *trial court* before it is raised in the state appellate courts. *Whitfield v. State of Ohio*, 297 U.S. 431, 435–36, 56 S.Ct. 532, 80 L.Ed. 778 (1936). There is no federal requirement that a constitutional issue be raised at first opportunity. In fact, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Osborne v. Ohio*, 495 U.S. 103, 125, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (quoting *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923)). Where the constitutional issue could not have been raised by the party in the state court because the issue was first presented in that court's opinion, raising the issue in a petition for rehearing (or transfer), even though it was denied, will suffice in order to sufficiently preserve for U.S. Supreme Court review. *See e.g.*, *Saunders v. Shaw*, 244 U.S. 317, 319–20, 37 S.Ct. 638, 61 L.Ed. 1163 (1917) (a federal question may be noted for the first time in a motion to rehear a matter in a state supreme court if the federal question unanticipatedly arose in that court's opinion); *Herndon v. State of Georgia*, 295 U.S. 441, 443–44, 55 S.Ct. 794, 79 L.Ed. 1530 (1935) ("[T]he question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ***454** ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."); *State of Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320, 50 S.Ct. 326, 74 L.Ed. 870 (1930). Thus, while the Appellants' constitutional claims may not have been preserved for appellate review (except for plain error review) by this Court or the Missouri Supreme Court in 2010, review by the United State Supreme Court was possible[19] if Appellants asserted their constitutional claim in either their Rehearing/Transfer Motion or in their Application for Transfer (and then sought certiorari).

In failing, at the minimum, to assert their constitutional arguments in their Rehearing/Transfer Motion or their Application for Transfer, and then failing to file an application for writ of certiorari, we find that Appellants have waived their constitutional arguments.

III. CONCLUSION

For the foregoing reasons, the trial court's judgment is affirmed.

ROBERT G. DOWD, JR. P.J., ANGELA T. QUIGLESS, J., concur.

Footnotes

1 Peabody Defendants include: Peabody Development Company, LLC; Central States Coal Reserves of Kentucky, LLC; Cyprus Land Creek Land Resources, LLC; Grand Eagle Mining Company; Ohio County Coal Company, LLC; Cyprus Creek Land Company; Beaver Dam Coal Company, LLC; and Peabody Holding Co., LLC.

2 Armstrong Defendants include: Armstrong Coal Company, Inc.; Western Diamond, LLC; Western Land Company, LLC; Ceralvo Holdings, LLC; Armstrong Coal Reserves, Inc.; and Ceralvo Resources, LLC.

3 Peabody is also a named Defendant in the case at bar.

4 Significantly, the trial court held in its 2010 judgment that the Peabody Defendants' sales and assignments of the lands covered by the 1954 Royalty Agreements with the Armstrong Defendants (that occurred in the interim between *Willits I* and *Willits II)* extinguished Appellants' royalty interests. Thus, while the 2010 judgment never mentioned *Willits I*, the trial court also never expressly invalidated the 1954 Royalty Agreements, but, rather, only applied the 1954 Royalty Agreements under the new and differing facts that had occurred since *Willits I.*

5 *Willits II* was handed down on December 28, 2010.

6 Refer to n. 1, *supra.*

7 Refer to n. 2, *supra.*

8 No count in the Petition is directed at either the Peabody or Armstrong Defendants. Rather, the Peabody and Armstrong Defendants, as stated by the Appellants at oral argument, were joined as "affected parties" under Section 527.110, RSMo.

9 "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *See* U.S. Const. art. IV, Section 1.

10 "... nor shall private property be taken for public use, without just compensation." *See* U.S. Const. Amend. V; *see also Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (holding the Takings Clause of the Fifth Amendment applicable to the States).

11 "... nor be deprived of life, liberty, or property, without due process of law ..." *See* U.S. Const. Amend. V; *see also* U.S. Const. Amend XIV, Section 1 ("... nor shall any State deprive any person of life, liberty, or property, without due process of law ...").

12 "That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public." *See* Mo. Const. art. I, Section 28.

13 "That no person shall be deprived of life, liberty or property without due process of law." *See* Mo. Const. art. I, Section 10.

14 We note that in the Peabody and Armstrong Defendants' Joint Motion to Dismiss, Appellants' failure to timely raise their constitutional arguments was asserted: "Plaintiff's failure to raise the constitutional challenge at the earliest moment in the trial court or the Court of Appeals should doom their Petition's attempt to do so in this subsequent proceeding." Thus, this Court may affirm the trial court's grant of dismissal. *See McCarthy, supra.*

15 Interpreting the identical statutory provision, Section 509.110.

16 *Stop the Beach* was handed down by the Supreme Court of United States on June 17, 2010. Appellants filed their *Willits II* Petition in May 2008. Giving Appellants all reasonable inferences, they, at the very least, knew or should have known of *Stop the Beach* before the filing of their *Willits II* appeals brief (July 8, 2010) and their Reply Brief (October 4, 2010). However, Appellants made no mention of *Stop the Beach* throughout *Willits II.*

17 Peculiarly, Appellants seeks invalidation of *Willits II* and the March 2010 Trial Court Judgment.

18 The trial court entered its March 29, 2010 judgment after competing summary judgment motions were filed. A motion for new trial may be filed after trial or after entry of any judgment dismissing the claim on the merits. *See e.g., Edwards v. Hyundai Motor Am.,* 163 S.W.3d 494, 497 (Mo.App. E.D.2005) (motion for new trial filed after court dismissed the petition).

19 We note that the underlying case of *Stop the Beach* involved this procedural background—landowners sought certiorari to the

United State Supreme Court for their constitutional claims after the state supreme court decision was rendered. *Stop the Beach*, 130 S.Ct. at 2600–01. In fact, while Justice Scalia wrote that persons that were not parties in the original state court case could possibly challenge that original decision in a different federal court case (as a judicial takings), Justice Scalia held that the only remedial avenue for parties aggrieved in state supreme courts is a request for certiorari to the United States Supreme Court. *See* Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, 24–Dec Prob. & Prob. 10, 13.

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