

JURISDICTIONAL STATEMENT

This Appeal involves an attack on the constitutionality of Section 287.240 RSMo. which limits the payment of worker's compensation death benefits only to dependent heirs of a deceased employee.

Provisional jurisdiction of this appeal is in the Eastern District of the Missouri Court of Appeals, which jurisdiction this Court should decline because it involves the constitutionality of a State Statute. Section 288.220 RSMo. mandatorily directs that all appeals by claimants from a decision of the Labor and Industrial Relations Commission of Missouri be brought in the Missouri Court of Appeals, Eastern District. Therefore, provisional jurisdiction is in this Court. However, the Supreme Court of Missouri has exclusive appellant jurisdiction because the issue in this appeal involves the constitutionality of a statutory restriction. Mo. Const. Art. V, sec. 3. Thus, this case does not fall within the general appellate jurisdiction of the Missouri Court of Appeals and this case should be transferred to the Missouri Supreme Court. Territorial jurisdiction rests with the Eastern District of the Missouri Court of Appeals pursuant to Section 288.220 RSMo.

STATEMENT OF FACTS

On 24 May 2000, James Etling, Jr. (Employee) was an employee of Westport Heating and Cooling Service, Inc. (Employer). On that date, while on the job, he suffered death

by electrocution (LF 14). Employee was survived by his parents James L. Etling, Sr. and Janice L. Etling (Appellants) and seven siblings, none of whom were dependent upon him (LF pg. 3).

On 5 June 2000, James L. Etling, Sr. and Janice L. Etling, Employee's natural parents, filed a claim for compensation against his Employer (LF 1). On 2 October 2001, a hearing was held on their claim for death benefits (LF 4). On 29 November 2001 Jennifer L. Schwendemann, Administrative Law Judge, Division of Worker's Compensation, entered findings of fact and conclusions of law (LF 6). Judge Schwendemann's ruling of law was that Section 287.240 RSMo. does not contemplate that any party who is not actually dependent for support, in whole or in part, is to be accepted as a beneficiary of the deceased Employee (LF 7).

On 6 December 2001, Claimants timely filed their Application For Review before the Labor and Industrial Relations Commission of Missouri (LF 8). On 17 January 2002, the Labor and Industrial Relations Commission of Missouri entered its final award denying compensation and affirming Judge Schwendemann's ruling (LF 11). On 24 January 2002, the Labor And Industrial Relations Commission received Claimant's timely Notice of Appeal (LF 16).

POINTS RELIED ON

POINT I

SECTION 287.240 RSMO., SPECIFICALLY 287.240[4], A WORKER'S COMPENSATION ACT STATUTORY PROVISION WHICH LIMITS DEATH CLAIM BENEFITS TO BENEFICIARIES WHO ARE DEPENDENT HEIRS OF THE DECEASED EMPLOYEE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FUNDAMENTAL RIGHTS GRANTED TO NON-DEPENDENT HEIRS OF DECEASED EMPLOYEES IN VIOLATION OF MO.CONST. ART. I, SEC. 2 (EQUAL PROTECTION) AND 14 (OPEN COURTS) BECAUSE IT ARBITRARILY AND UNREASONABLY DENIES DEATH BENEFITS TO AN EMPLOYEE'S NON-DEPENDENT HEIRS FOR THE REASON THAT THE WORKER'S COMPENSATION ACT STATUTE PROHIBITS A TORT, OR OTHER INDEPENDENT ACTION, BY NON-DEPENDENT HEIRS AGAINST THE EMPLOYER, THUS DENYING THEM A REMEDY AGAINST THE EMPLOYER WRONG-DOER WHILE FAILING TO PROVIDE A "QUID PRO QUO" FOR POTENTIAL TORT VICTIMS WHOSE RIGHTS OF ACTION ARE SUPPLANTED BY THE WORKER'S COMPENSATION ACT BECAUSE THERE IS NO COMPELLING STATE INTEREST UNDERLYING THE WORKER'S COMPENSATION ACT (THE STATUTE) WHICH PROTECTS EMPLOYERS FROM LITIGATION IN THE COURTS BY NON-DEPENDENT HEIRS OF A DECEASED EMPLOYEE AND THE STATUTE, IN EFFECT, TREATS THE LIFE OF SUCH AN EMPLOYEE AS HAVING NO VALUE AND IS VOID AS AGAINST PUBLIC POLICY BECAUSE AN EMPLOYER, NO MATTER HOW NEGLIGENT OR EGREGIOUS ITS CONDUCT, MAY, EXCEPT FOR THE POSSIBLE PAYMENT OF FUNERAL EXPENSES, ESCAPE ALL LIABILITY FOR THE WORK RELATED DEATH OF AN EMPLOYEE WITH NON-DEPENDENT HEIRS.

Kilmer v. Mun, 17 SW3d 545 (Mo.banc 2000)

Witte v. DOR, 829 SW2d 436, 439, fn. 2 (Mo. 1992)

Park v. Rockwell International Corp., 464 A2d 1136m 1137 (NH 1981)

Page v. Clark, Refining & Marketing, Inc. 3 SW3d 385, 387[2] (Mo.App. 1999)

ARGUMENT

POINT I

SECTION 287.240 RSMO., SPECIFICALLY 287.240[4], A WORKER'S COMPENSATION ACT STATUTORY PROVISION WHICH LIMITS DEATH CLAIM BENEFITS TO BENEFICIARIES WHO ARE DEPENDENT HEIRS OF THE DECEASED EMPLOYEE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FUNDAMENTAL RIGHTS GRANTED TO NON-DEPENDENT HEIRS OF DECEASED EMPLOYEES IN VIOLATION OF MO.CONST. ART. I, SEC. 2 (EQUAL PROTECTION) AND 14 (OPEN COURTS) BECAUSE IT ARBITRARILY AND UNREASONABLY DENIES DEATH BENEFITS TO AN EMPLOYEE'S NON-DEPENDENT HEIRS FOR THE REASON THAT THE WORKER'S COMPENSATION ACT STATUTE PROHIBITS A TORT, OR OTHER INDEPENDENT ACTION, BY NON-DEPENDENT HEIRS AGAINST THE EMPLOYER, THUS DENYING THEM A

REMEDY AGAINST THE EMPLOYER WRONG-DOER WHILE FAILING TO PROVIDE A "QUID PRO QUO" FOR POTENTIAL TORT VICTIMS WHOSE RIGHTS OF ACTION ARE SUPPLANTED BY THE WORKER'S COMPENSATION ACT BECAUSE THERE IS NO COMPELLING STATE INTEREST UNDERLYING THE WORKER'S COMPENSATION ACT (THE STATUTE) WHICH PROTECTS EMPLOYERS FROM LITIGATION IN THE COURTS BY NON-DEPENDENT HEIRS OF A DECEASED EMPLOYEE AND THE STATUTE, IN EFFECT, TREATS THE LIFE OF SUCH AN EMPLOYEE AS HAVING NO VALUE AND IS VOID AS AGAINST PUBLIC POLICY BECAUSE AN EMPLOYER, NO MATTER HOW NEGLIGENT OR EGREGIOUS ITS CONDUCT, MAY, EXCEPT FOR THE POSSIBLE PAYMENT OF FUNERAL EXPENSES, ESCAPE ALL LIABILITY FOR THE WORK RELATED DEATH OF AN EMPLOYEE WITH NON-DEPENDENT HEIRS.

It is Appellants position in this appeal that Section 287.240[4] RSMo., which limits death claim benefits to beneficiaries who are dependent heirs of the deceased employee, is unconstitutional because it violates a fundamental right of equal protection and access to the court, as guaranteed by Art. I, sec. 2 and 14 Mo.Const., for the reason that it arbitrarily and unreasonably bars a class of individuals, of which Appellants are members, from bringing a cause of action against the deceased employee's employer. Appeal is prompted by our Missouri Supreme Court's decision in Kilmer v. Mun, 17 SW3d 545 (Mo. banc 2000) wherein the Supreme Court declared that the Open Courts provision of Missouri's Constitution, Article I, Section 14, was "mandatory in tone and substance", ie., not merely declarative. Id.

The principal cases ruling that the Worker's Compensation Statute (the Act) is constitutional are DeMay v. Liberty Foundry Company, 37 SW2d 640 (Mo. 1931) and Waterman v. Chicago Bridge & Iron Works, 41 SW2d 575 (Mo. 1931). Both of these cases were decided prior to the Amendment to the Open

Courts provision of the Missouri Constitution wherein the word "should" was changed to "shall". Mo. Const. Art. I, Sec. 14 (1945). DeMay determined that the Act did not violate the Open Courts provision of Missouri's Constitution because it was merely declarative and not mandatory, Id. at 645[2-8]. A further basis for the DeMay court's ruling was that in 1931, compliance with the Act was elective and voluntary for both the employee and the employer, therefore, DeMay ruled an employee electing to accept the provisions of the Act "must be deemed to have waived the benefit of the Constitutional guaranty." Id. at 646. Since the Act is no longer voluntary, this finding no longer applies. The Waterman court merely adopted the ruling in DeMay relevant to the Open Courts provision, Waterman, Id at 577[1].

The Missouri Constitution's Bill of Rights, Article I, Section 14 (the Open Courts provision), provides:

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.

In Kilmer, the Missouri Supreme Court, noting that the case presented the question of whether the Open Courts provision, stated a constitutional right or merely an ideal stated:

In the constitution of 1945 the word "should" was changes to "shall" Mo.Const. Art. I, Sec. 14(1945) quoted above. One might question whether these changes

reflect a change in meaning or merely reflect contemporary linguistic conventions. But when the words "ought" and "should" are replaced with the word "shall" it is difficult to escape the conclusion that our drafters changed a passage that could originally have been taken to be mere exhortation to a constitutional provision that is mandatory in tone and substance.

The Kilmer court then stated that effect of this ruling is that the Open Courts provision confers a fundamental right because it is mandatory and not declarative. The result of this declaration that Art. 1 sec. 14 confers a fundamental right is that the standard of review for the reviewing court is that it must employ a strict scrutiny analysis, Witte v. DOR, 829 SW2d 436, 439, fn. 2 (Mo. 1992):

As a general rule, the constitutionality of a statute is presumed, and the burden is on the challenging party to prove the statute is unconstitutional. the strong presumption in favor of the constitutionality of a statute does not apply where the statute creates a classification scheme that affects fundamental rights or involves suspect classifications. See, Gumbhir v. Kansas State Board of Pharmacy, 231 Kan. 507, 647 P.2d 1078 (1982), cert. denied. 459 U.S. 1103, 103 S.Ct. 724 74 L.Ed.2d 950 (1983), in which the Kansas Supreme Court stated:

Cases involving "suspect classifications" or "fundamental interests" force the courts to peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, thus subjecting the classification to strict scrutiny. The effect is to shift the burden of proof to justify the classification from the individual attacking such classification to the State or its agencies. 646 P.2d at 1089 (citing

Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 Ed2d 600 (1969) and Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 LEd2d 534 (1971)).

Nor does the rule concerning the presumption of constitutionality and the burden of proof apply "where, without the necessity for extraneous evidence, it appears from the provisions of the act itself that it transgresses some constitutional provision." McKay Buick, Inc. v. Love, 569 SW2d 740, 743 (Mo. banc 1978).

Kilmer noted that the Open Courts provision "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." Kilmer, Id at 549[1].

Missouri's Wrongful Death Statute, Section 287.240 RSMo., empowers a certain enumerated class of individuals, of which Appellants are members, to bring an action in wrongful death, as allowed by the statute. Section 287.240[4] denies appellants that right because it arbitrarily and unreasonably denies death benefits to an employees' heirs if they are not "dependents" and the Act prohibits a tort or other independent action, by these non-dependant heirs against the employer. Page v. Clark Refining & Marketing, Inc. 3 SW3d 385, 387[2] (Mo.App. 1999). Clearly, this statutory provision creates a class of plaintiffs who have suffered a recognized injury but have absolutely no remedy against the wrongdoer in violation of the Open Courts provision. Kilmer, Id. at 550.

As a result of the foregoing, the reviewing court standard of review is that it must employ a strict scrutiny analysis. Witte, Id. at 439. The burden is on Appellee to defend the constitutionality of the statute. Id. Appellee must demonstrate a compelling state interest which is served by the challenged legislation and which cannot be satisfied by any other convenient legal structure. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

"A statute that creates arbitrary classifications that are irrelevant to the achievement of the statute's purpose may be struck down because the arbitrary classifications violate equal protection." Kansas City v. Webb, 484 SW2d 817 (Mo.banc 1972) cited in Kilmer at 552.

As further noted in Kilmer:

This, of course, could be described as well as the violation of the Constitution guaranty of equal protection of the laws. Mo. Const. Art. I, sec. 2.

Id. at 552 fn. 21.

Appellants decline to hypothecate Appellee's defense of the constitutionality of 287.240[4] and then rebut it in this brief. Instead, Appellants will reply to Appellee's response.

Arguendo, should this Court determine that the burden is upon Appellants, to show the unconstitutionality of the challenged statutory provision, they state that generally,

Worker's Compensation laws withstand constitutional attack on due process grounds because they provide a "quid quo pro for potential tort victims whose . . . rights of action are supplanted by the statute". Park v. Rockwell International Corp., 464 A2d 1136, 1138 (NH 1981).

This quid quo pro argument fails when applied to nondependent heirs of employees killed in work related accidents because nothing has been given in return for eliminating their rights of action. *Id.* As a result, the lives of persons like the employee decedent, or those similarly situated, are literally worth nothing except a payment toward one creditor -- the funeral director. *Id.* In Park, the New Hampshire Supreme Court held that New Hampshire's Worker's Compensation Statute limiting death benefits to dependent heirs:

Must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

In order to hold that these provisions of our Worker's Compensation law are constitutional, we would have to determine that the lives of deceased employees, leaving no one dependent upon them at the time of their work related death, are essentially "worthless". This we cannot do.

Id. at 1139[3,4].

This Court should adopt the same reasoning as the New Hampshire Supreme Court and declare Section 287.240[4] arbitrary and unreasonable and, therefore, violative of the

Open Courts provision of the Missouri Constitution.

In addition, there are strong public policy reasons why this Court should declare Section 287.240[4] unconstitutional.

Employers employing employees whom they know to have no dependent heirs might be tempted to be less diligent in the training and supervision of their employees if they knew that they could not suffer any harm no matter how negligent or egregious their conduct. This would also be violative of the equal protection provisions of the Missouri Constitution.

Kilmer, 17 SW3d at 554.

Usually, the "compelling state interest", underlying the Act has been that it lowers insurance costs for employers, reduces a deterrent for businesses to locate in Missouri and protects employers from litigation in the courts.

This argument fails in the face of logic which would dictate that, by allowing the beneficiary payment to nondependent heirs of the deceased employee, as opposed to allowing nondependent heirs of a deceased employee to bring a wrongful death action against the employer, interests of the employer are met. This would also be fair and equal for the reason that it would not create a situation where nondependent heirs have an advantage over dependent heirs of a deceased employee.

Section 287.240[4] RSMo. also violates Mo. Const. Art. I sec. 2, the equal protection clause, which mandates that all persons are entitled to equal rights and opportunity under the

law. Appellants acknowledge that this clause does not require that the legislature treat every state's citizen equally. City of St. Louis v. Liberman, 547 SW2d 452, 458 (Mo. 1977). Instead, traditionally, equal protection principles operate to insure that a legislatively created classification bear a rational relationship to a legitimate state concern. State ex rel. Public Defender v. County Court of Greene County, 667 SW2d 490 412 (Mo. 1984). The rational relationship is utilized when an ordinary interest is involved. Liberman, 547 SW2d at 458. If a fundamental right is implicated, then the standard of review is strict scrutiny. Witte, Id. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available. Bernal, 467 U.S. at 219. In addition, the burden is on the Appellee to demonstrate that it could not use a less onerous alternative to achieve its objective. Witte v. Director of Revenue, 829 SW2d 436, 439 (Mo. 1992). Park, noted that an employer, no matter how negligent or egregious its conduct, may, except for the possible payment of funeral expense, escape all liability for the work related death of an employee. Id. 464 A2d at 1139-40. "This we believe, is not only contrary to sound public policy but also violates the equal protection provisions of our State Constitution." Id. This Court should rule likewise.

CONCLUSION

Accordingly, this Court should declare that Section

287.240[4] violates the Open Courts provision of Mo. Const., Art. I, sec. 4 (1945) and the equal protection guarantee of Mo. Const. Art. I, sec. 2 and rule that Appellants are entitled to proceed with an action for wrongful death against the decedent's employer if they elect to forego the death benefit provided by the Act.

Respectfully submitted,

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED 80705

JAMES L. ETLING, SR. and JANICE L. ETLING

Claimants/Appellants,

vs.

WESTPORT HEATING AND COOLING SERVICES, INC.

Employer/Respondent

ON APPEAL FROM THE HUMAN AND INDUSTRIAL
RELATIONS COMMISSION OF MISSOURI

BRIEF OF APPELLANTS

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