

POINTS RELIED ON

POINT I

POINT I A

SECTION 287.240[4] DOES IMPAIR A SUBSTANTIVE RIGHT OF NON
DEPENDENT HEIRS.

Thummel v. King, 570 SW2d 679, 686 (Mo. 1978)

DeMay v. Liberty Foundry Company, 37 SW2d 640, 645 (Mo.
1931)

Smith v. Taylor Morley, Inc., 929 SW2d 918, 923-924
(Mo.App. 1996) (rehearing and transfer denied).

Boatmen's Bank v. Foster, 878 SW2d 506, 509 n. 4 (Mo.App.
1996)

McNear v. Rhodes, 992 SW2d 877, 881 (Mo.App. 1991)

Dayharsh v. Hannibal & St. Joseph Railroad Company, 15 SW
554 (Mo. 1891)

Moore v. The Wabash, St. Louis and Pacific Railway
Company, 85 Mo 588 (Mo. 1885)

POINT I B

RESPONDENT HAS FAILED TO MEET ITS BURDEN TO SHOW WHAT
LEGITIMATE STATE INTEREST IS PROTECTED BY THE IMPEDIMENT OF A
NON HEIR'S SUBSTANTIVE RIGHT.

Atkins v. Virginia, _____ S.Ct. _____ (2002); (2002 WL
1338045)

Powell v. American Motors Corporation, 834 SW2d 184,

191[6] (Mo. 1992)

Thummel v. King, 570 SW2d 679, 686 (Mo. 1978)

POINT I C

THE RELIEF REQUESTED BY APPELLANT IS APPROPRIATE.

Rule 84.14

ARGUMENT

POINT I

POINT I A

SECTION 287.240[4] DOES IMPAIR A SUBSTANTIVE RIGHT OF NON DEPENDENT HEIRS.

In Point I A of its Brief Respondent argues that "Appellants do not have a recognized cause of action which they have been prevented from enforcing" (Appl. Br. pg. 9). Appellants count at least ten sub issues in Respondent's Point I A, at least eight of which are not referred to in Point I A statement of the point relied on. Matters that are only alluded to in the argument portion of a brief, without having been stated in the Point Relied on, are not preserved or presented for appellate review. Boatmen's Bank v. Foster, 878 SW2d 506, 509 n. 4 (Mo.App. 1996); McNear v. Rhodes, 992 SW2d 877, 881 (Mo.App. 1991); Smith v. Taylor Morley, Inc., 929 SW2d 918, 923-924 (Mo.App. 1996) (rehearing and transfer denied). "It is not the function of the appellate court to serve as advocate for any party to an appeal." Thummel v. King, 570 SW2d 679, 686 (Mo. 1978). Accordingly, this Court

should not consider Respondent's Point I A.

Assuming arguendo, that this Court will review Point I A, Appellants will attempt to respond to, as best as they can decipher, the points raised therein.

The gist of Respondent's Point I A can be generally classified as 1) because Worker's Compensation was "public welfare" the Worker's Compensation Statute (sometimes referred to herein as the Act) should not be converted to an "insurance policy" for non-dependent heirs; and 2) non-dependent parents of a deceased worker never had a cause of action in wrongful death until the 1979 amendments to Missouri's Wrongful Death Statute, RSMo. 537.080, therefore, because non-dependent heirs of workers had no cause of action in wrongful death at the time of the adoption of the Worker's Compensation Statute in 1929, the Act did not bar non-dependent heirs from a cause of action which the substantive law then recognized and is not, therefore, violative of the Open Courts provision of the Missouri Constitution.

It should be noted that the Act allowed the estate of a deceased worker to receive vested benefits which were unpaid at the time of the worker's death. RSMo. 1929 3318. Yet, the same Act denied death benefits to the worker's non dependent heirs. RSMo. 1929 3319(b). It is hard to imagine how these conflicting provisions can be reconciled.

Respondent claims that the Worker's Compensation

statutory scheme is "public welfare" is not accurate for the reason that, as stated in DeMay v. Liberty Foundry Company, 37 SW2d 640, 645 (Mo. 1931):

The (worker's compensation contractual) liability created has no reference to negligence or tort, and the compensation awarded is intended neither as a charity nor as a penalty. The obligation is viewed as contractual.

Accordingly, the Worker's Compensation statutory scheme has never been "social welfare", as claimed by Respondent. Apparently, Respondent's subliminal message is that, because "welfare" is a "privilege" and not a "right", no constitutional right was impaired.

Next, Respondent's claim that a non-dependent heir of a deceased worker did not have a cause of action in wrongful death prior to adoption of the 1929 Worker's Compensation Statute is equally without merit. At common law, an employer was actionably liable in tort to his employee for injuries suffered while acting within the course and scope of his employment when the employer was guilty of some negligent act or omission. DeMay, Id. at 644. Accordingly, the employee had a right of action against the employer for negligence prior to the adoption of the Worker's Compensation Statute of 1929. Remember, after its adoption in 1929, the Worker's

Compensation Statute was elective:

RSMo. 1929, Sec. 3300. Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter.

Clearly, the right of an employee to bring a tort claim against the employer survived the adoption of the Worker's Compensation Statute if the employee so elected prior to injury. At the time of the adoption of the Worker's Compensation Statute, RSMo. 1929 3299 et seq., there was in existence a wrongful death statute in Missouri RSMo. 1919, 4218 (the Statute). Persons allowed under the Statute (4217) to bring an action for wrongful death were:

* * *

Fourth, if there be no husband, wife, minor child or minor children, natural born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such

case suit may be instituted and recovery held by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent, . . ."

Thus, if the worker had opted out of the Act prior to his death, then his estate, including non dependent heirs, did have a cause of action in wrongful death against the employer.

There can be no dispute that, under the Statute, the parents of an unmarried deceased worker, never having children, would be "heirs" of the deceased worker. See, ie., RSMo. 474.010[2][b] (intestate descendants); RSMo. 1889, 4425, 4467.

In addition, heirs of a deceased worker had a recognized cause of action in wrongful death against the employer prior to 1929. See, ie., Dayharsh v. Hannibal & St. Joseph Railroad Company, 15 SW 554 (Mo. 1891); Moore v. The Wabash, St. Louis and Pacific Railway Company, 85 Mo 588 (Mo. 1885). Accordingly, members of a class of non-dependent heirs, such as Appellants in this case, did have a cause of action under the substantive law in effect at the time of the adoption of the Worker's Compensation Statute in 1929, which substantive right was abrogated.

Accordingly, Respondent's claim that the Worker's Compensation Statute of 1929 did not create an impediment to a

non dependent heir's recognized cause of action is without merit. Clearly, the 1929 Worker's Compensation statute did deny non dependant heirs of a deceased worker the right to pursue in the courts a cause of action which the substantive law then recognized.

Finally, this writer feels compelled to note Respondent's failure to address the public policy argument in Appellants' Brief, pg. 10. Numerous ultra hazardous work activities exist today where either the industry didn't exist in 1929 (ie., atomic energy workers), or the adverse medical effects were either unknown or underappreciated (ie., asbestos workers, lead workers, environmental remediation workers, etc.) This "apple" should not be left in the hazardous industry employer's "Garden of Eden" to tempt them to limit their work force to workers with non dependent heirs in order to control their costs for the death of their worker. This issue merits thoughtful analysis by this Court.

POINT I B

RESPONDENT HAS FAILED TO MEET ITS BURDEN TO SHOW WHAT LEGITIMATE STATE INTEREST IS PROTECTED BY THE IMPEDIMENT OF A NON HEIR'S SUBSTANTIVE RIGHT.

In Point I B of its brief, Respondent claims that, because there is no suspect classification, Appellants cannot prevail. Respondent's claim in this regard is without merit for the following reasons. When either a denial of a

fundamental right or a suspect class is present in a case, the reviewing appellate court must then take a second step of equal protection analysis which requires the court to determine what classifications the legislature established and whether the classification can conceivably be rationally related to a legitimate state interest. Powell v. American Motors Corporation, 834 SW2d 184, 191[6] (Mo. 1992). Under this "rational basis review", the reviewing court will not question the legislature's choices if the classification advances a legitimate public policy. Id. at 191. Since, this Missouri Supreme Court has previously determined that the constitutional right of access assures Missourians the "right to pursue in the courts the causes of action the substantive law recognizes", Id. at 184[7-8], the question for decision becomes "does the classification denying death benefits to non dependent heirs advance a legitimate state interest?"

As set forth in Appellant's Brief (Appl. Br. pg. 6), the "presumption of constitutionality" of this provision of the Act has been stripped away thereby subjecting the offending provision to "strict scrutiny". When that occurs, the burden of proof to justify the classification shifts to Respondent to show a "legitimate state interest" the classification advances (Appl. Br., pg. 6). Respondent has failed to meet this burden and this Court should not attempt to cure this failure for Respondent for the reason that it is not the function of this

Court to serve as an advocate for any party to an appeal. Thummel v. King, 570 SW2d 679, 686 (Mo. 1978).

If Respondent is arguing that the 1929 Worker's Compensation Statute, having been adopted prior to the 1945 amendment to the Open Courts provision, is beyond review by this Court, it would be without merit for the reason that, under that logic, this Court could never review any old statute in light of the present constitutional grant of rights. Remember, even "changing consensus" can constitute grounds for reversal on constitutional grounds. Atkins v. Virginia, _____ S. Ct. _____ (2002 WL 1338045).

The courts must be open to all for a recognized cause of action. Here that principle is trampled upon by a preferred classification. Accordingly, Respondent's Point I B is without merit.

POINT I C

THE RELIEF REQUESTED BY APPELLANT IS APPROPRIATE.

In Point I C of its Brief, Respondent complains that the relief requested at the end of Appellants Brief was not requested before the Labor And Industrial Relations Commission and "is contrary to law" (Rsp. Br. pg. 24). The argument portion of Respondent's Point I C fails to cite any case law, or any other matters, which support their contention that Appellants requested relief "is contrary to law". Accordingly, this Court should disregard Respondent's Point I

C. Arguendo, Rule 84.14 allows this Court to ". . . give such judgment as the court ought to give". Accordingly, Respondent's Point I (C) is without merit.

CONCLUSION

Accordingly, this Court should declare that Section 287.240[4] violates the open court provision of Mo. Const. Art. I, Sec. 4 (1945) and the equal protection provision 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, or, alternatively, remand this matter to the Missouri Industrial Relations Commission for further proceedings.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

NO. SC84510

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

Claimants/Appellants,

vs

WESTPORT HEATING AND COOLING
SERVICES, INC.,

Employer/Respondent.

TRANSFER FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

**REPLY BRIEF OF APPELLANTS
JAMES L. ETLING, SR. AND
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TABLE OF CONTENTS

Page No.

| | |
|-------------------------|----|
| TABLE OF AUTHORIES..... | ii |
| POINTS RELIED ON..... | 1 |
| ARGUMENT..... | 2 |
| POINT I A..... | 2 |
| POINT I B..... | 7 |
| POINT I C..... | 8 |
| CONCLUSION..... | 9 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page No.</u> |
|---|-----------------|
| <u>Atkins v. Virginia</u> , _____ S.Ct. _____ (2002); (2002 WL 1338045)..... | 8 |
| <u>Boatmen's Bank v. Foster</u> , 878 SW2d 506, 509 n. 4 (Mo.App. 1996)..... | 2 |
| <u>Dayharsh v. Hannibal & St. Joseph Railroad Company</u> , 15 SW 554 (Mo. 1891)..... | 6 |
| <u>DeMay v. Liberty Foundry Company</u> , 37 SW2d 640, 645 (Mo. 1931)..... | 3, 4 |
| <u>McNear v. Rhodes</u> , 992 SW2d 877, 881 (Mo.App. 1991)..... | 2 |
| <u>Moore v. The Wabash, St. Louis and Pacific Railway Company</u> , 85 Mo 588 (Mo. 1885)..... | 6 |
| <u>Powell v. American Motors Corporation</u> , 834 SW2d 184, 191[6] (Mo. 1992)..... | 7 |
| <u>Smith v. Taylor Morley, Inc.</u> , 929 SW2d 918, 923-924 (Mo.App. 1996)..... | 2 |

Thummel v. King, 570 SW2d 679, 686 (Mo. 1978).....

2, 8

Statutes

RSMo. 1929, Sec. 3300.....

4

RSMo. 1929 3299

5

RSMo. 1919, 4218.....

5

RSMo. 474.010[2][b].....

5

RSMo. 1889, 4425, 4467.....

5

Missouri's Wrongful Death Statute, RSMo. 537.080.....

3

Worker's Compensation Statute in 1929.....

4, 6

RSMo. 1929 3318.....

3

RSMo. 1929 3319(b).....

3

Rule 84.14.....

9

