

IN THE SUPREME COURT OF MISSOURI

No. SC84510

JAMES L. ETLING, SR. AND
JANICE L. ETLING,

Claimants/Appellants

v.

WESTPORT HEATING AND COOLING SERVICES, INC.

Employer/Respondent

TRANSFER FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRIEF OF RESPONDENT WESTPORT HEATING AND COOLING
SERVICES, INC.

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INTRODUCTION

The appellants are the nondependent parents of an adult son who was killed in an accident at work. They contend that R.S.Mo. § 287.240(4) is unconstitutional because 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” in violation of the equal protection and open courts provisions of the Missouri Constitution. (Appellants’ Brief, p. 4). R.S.Mo. § 287.240(4) provides death benefits to a deceased employee’s dependents. The deceased left no dependents, and thus no death benefits beyond medical and burial expenses were paid by the employer for his accidental death.

The appellants allege that they are barred from bringing a wrongful death action against the respondent because the Worker’s Compensation Act is the exclusive remedy for work-related accidental injuries and death. Because they have no wrongful death remedy, the appellants argue that R.S.Mo. § 287.240(4) is unconstitutional because it has left the class of nondependent parents with no forum in which to recover compensation for the loss of their adult children. The appellants ask the Court to find this statute unconstitutional and to permit them to institute a suit for wrongful death if they forego the death benefit provided by the Act. (Appellants’ Brief at 11.)

The respondent contends that the appellants as nondependent parents have not been denied their right of access to the courts because they have no recognized cause of action to enforce. Their remedy lies with the legislature to create a new cause of action for them. Their right to equal protection has not been violated because nondependent parents are not a suspect class, their fundamental right of access has not been infringed

upon, the legislature acted within its power to limit the class of death benefit beneficiaries to dependents of the deceased employee, and that such decision was rationally related to the social policies underlying the Worker's Compensation Act.

STATEMENT OF FACTS

James L. Etling, Jr. was employed by respondent Westport Heating and Cooling Service, Inc. He was electrocuted while on the job and left no dependents. Medical and burial expenses were paid. His parents, appellants herein, filed a claim for death benefits pursuant to R.S.Mo. §287.240(4).

A hearing was held on October 2, 2001, at which the parties stipulated that: James L. Etling was an employee involved in an accident within the course and scope of his employment, he died from his injuries, burial and medical benefits had been paid, he was survived by his parents and seven siblings, and none of these survivors were dependent upon him for their support. The sole issue to be decided was the applicability/constitutionality of R.S.Mo. §287.240(4). (LF, Transcript, 1-4).

On November 29, 2001, Administrative Law Judge Jennifer L. Schwendemann entered findings of fact and rulings of law. (LF 6). In accordance with the stipulations of the parties, the judge found that the deceased was involved in an accident during the course and scope of his employment and sustained injuries that resulted in his death, and that he had left no dependents. Judge Schwendemann took judicial notice of the appellants' "Conversing Affirmative Defense" which had been filed in July 2001 and which raised a constitutional issue. She ruled that beneficiaries are statutorily defined and identified as dependents, and that there was no evidence that the deceased employee had any dependents. She denied counsel's request to substitute the deceased employee's parents (claimants/appellants) or siblings as dependents.

On January 17, 2002 the Labor and Industrial Relations Commission of Missouri affirmed Judge Schwendemann's ruling. (LF 11).

ARGUMENT

POINT ONE

Standard of Review

If a statute operates on a suspect class or infringes on a fundamental right, the standard of review is strict scrutiny to determine whether the classification is necessary to accomplish a compelling state interest. If it does not, the standard of review is whether the classification is rationally related to a legitimate state interest. Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100 (Mo. 1997), cert. denied 524 U.S. 916 (1998). The respondent argues that the rational relationship test is the proper standard of review here.

I. R.S.MO. § 287.240(4) LIMITING DEATH BENEFITS TO DEPENDENTS OF THE EMPLOYEE DOES NOT VIOLATE MISSOURI CONSTITUTION ARTICLE 1, SECTION 2 (EQUAL PROTECTION) OR ARTICLE 1, SECTION 14 (OPEN COURTS) BY ARBITRARILY AND UNREASONABLY BARRING A CLASS OF INDIVIDUALS FROM BRINGING A RECOGNIZED CAUSE OF ACTION AGAINST THE DECEASED EMPLOYEE'S EMPLOYER.

The appellants contend that the class of nondependent parents has been unconstitutionally deprived of a remedy for the accidental work-related death of their adult children. Respondent has divided this claim into its component parts of open courts

and equal protection, and has added an additional argument addressed to the request for relief as stated in the appellants' brief.

A. R.S.Mo. § 287.240(4) does not violate the open courts provision of Article 1, Section 14 of the Missouri Constitution because the appellants do not have a recognized cause of action which they have been prevented from enforcing.

The appellants contend they have been denied access to the courts in violation of the mandatory language of Article 1, Section 14 of the Missouri Constitution. Kilmer v. Mun, 17 S.W. 3d 545 (Mo. 2000). The respondent agrees that the provision is mandatory, but argues that the appellants were not deprived of their access to the courts.

The “open courts” provision of the Missouri Constitution, Article I, Section 14, “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.” (citation omitted). Id. at 549 (emphasis in original). The right of access means the right to pursue in the courts the causes of action the substantive law recognizes. Id.

Access to the courts does not require adoption of substantive law allowing for recovery not presently provided for by existing substantive law. Powell v. American Motors Corp., 834 S.W.2d 184, 191 (Mo.1992). The substantive law does not recognize a cause of action against an employer for accidental work-related death outside of the Worker's Compensation Act, and does not recognize a remedy for nondependent parents within it.

R.S.Mo. §287.240(4) is not unconstitutional for failing to recognize such a right for nondependent parents. The legislature has the power to create, limit, or eliminate a cause of action. Adams v. Children’s Mercy Hospital, 832 S.W.2d 898, 905 (Mo. 1992), cert. denied 506 U.S. 991 (1992).¹ At common law, an employer was liable to his employee for work-related injuries caused by the employer’s negligence. The employer could raise defenses of contributory negligence, assumption of the risk, and fellow-servant doctrine; injuries were many but recoveries were few. Gunnett v. Girardier Building and Realty Co., 70 S.W.3d 632, 635-636 (Mo. App. E.D. 2002). The Workmen’s (now Worker’s) Compensation Act (“Act”) was ameliorative, giving the injured employee rapid and definite compensation and placing the burden for the injury on industry. Id. at 636. The Act created a new statutory right and remedy in substitution of any that may have existed for the employee and his/her dependents, giving injured employees a recovery irrespective of actionable negligence and irrespective of human fault. DeMay v. Liberty Foundry Co., 37 S.W.2d 640, 645 (Mo. 1931). Included in this new remedy was a death benefit to the dependents of the employee, a recovery previously unavailable under the common law. Id. The legislature enacted this new remedy under its power to change or abolish existing common law or statutory rights and remedies. Id.

¹ The points for which Adams is cited as authority in this brief have not been questioned. An evidentiary issue in Adams concerning expert testimony was criticized in Washington by Washington v. Barnes Hosp., 897 S.W.2d 611 (Mo. 1995) and deemed overruled as stated in State v. Butler, 24 S.W.3d 21 (Mo. App. W.D. 2000).

at 646. It changed the rule of employer liability for accidental injury by extending it to all employees irrespective of negligence, creating a death benefit for dependents of the employee, and protecting the employer from negligence suits outside of the Worker's Compensation framework. The legislature was acting within its power to change the common law and substitute a new system of compensation. Id. at 647.

Just as these statutory death benefits under the Act were unknown at common law, the common law provided no recovery for wrongful death either. The legislature created a statutory right, R.S.Mo. §537.080, for certain specifically designated relatives to seek compensation for the death of another. Sullivan v. Carlisle, 851 S.W.2d 510, 513 (Mo. 1993). It was within the power of the legislature to exclude from this statutory remedy those causes of action which the deceased could not have brought himself had he lived. Had James L. Etling, Jr. survived the accident, he could not have sued his employer for negligence. R.S.Mo. §287.120(2) (exclusiveness of remedy).

The appellants have not been deprived of their constitutional right of access to the courts because they have no recognized cause of action to bring. Their remedy lies with the legislature, not the courts, to enact a remedy for them.

As DeMay explains, the courts were open for wrongful injuries, but not for accidental ones which occurred without human fault, negligence or wrong, which was the new remedy created by the legislature. Such injury was not actionable prior to enactment of the Act. Id. at 648. The Court held that because the legislature has the power to change or abolish common law or statutory remedies, the Act was not invalid for creating or abrogating right of action. While the legislature cannot deprive an employee

and his/her dependents of rights with respect to intentional injuries, it has the power to change the common-law rule regarding accidental injuries. Id.

The appellants argue that the 1931 DeMay analysis of the open courts provision is no longer good law. They argue that DeMay was written prior to the 1945 constitutional amendment of “should” to “shall” in the language of the open courts provision, and at a time when compliance with the Act was voluntary for both employer and employee. The appellants rely on Kilmer for its declaration that the open courts provision is mandatory.

The appellants have mistaken the language of the open courts provision extant at the time of the DeMay opinion. In 1875, the Missouri constitution was amended so that the open courts provision, then located Article 2, Section 10, read: “That courts of justice *shall* to be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial, or delay.” DeMay, 37 S.W.2d at 645. The open courts provision contained this mandatory language for fifty-six years at the time of DeMay, even though the clause referring to the administration of right and justice was not changed from “should” to “shall” until 1945.

The thrust of the DeMay analysis upon which respondent relies is that the open courts provision means that the courts shall be open “only for wrongs recognized by the law of the land”. Id. at 645. This was an accurate analysis in 1931 and it is an accurate analysis now. Kilmer is in accord with the DeMay analysis: the courts must be open to all for recognized causes of action. Kilmer at 549-550. While the appellants rely heavily on Kilmer regarding the mandatory nature of the constitutional provision, they fail to

discuss Kilmer's recognition of the power of the legislature to abolish or modify statutory and common law as it relates to the right of access to the courts.

The important distinction that this Court has long recognized is the difference between a procedural barrier which impermissibly denies access to the courts, and a substantive restriction or change in the law which is a valid exercise of legislative power. Kilmer, 17 S.W.3d at 548-550, 555; Adams, 832 S.W.2d at 905; Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6 (Mo. 1992). A statute which creates a procedural impediment to bringing a valid cause of action is unconstitutional, whereas a statute which "simply changes the common law by eliminating a cause of action which had previously existed at common law or under some prior statute" is not. Id. Even if the appellants had some remedy with respect to their son's accidental death prior to the Workmen's Compensation Act, the elimination of that cause of action would be a permissible exercise of legislative power.

The appellants argue that they have no remedy for the death of their son because nondependent parents are barred from receiving any death benefits under R.S.Mo. §287.240(4), and the Act bars them from bringing a wrongful death suit under R.S.Mo. §537.080. R.S.Mo. §287.240(4) limits entitlement to death benefits to dependents of the deceased employee. That these appellants are without a remedy is not due to any violation of their constitutional right to access to the courts. It is only where the legislature erects a procedural bar to a recognized causes of action that the open courts provision is violated. There is no procedural bar here; rather, the appellants have no

remedy because there is no recognized cause of action for their claim. The legislature has not enacted one.

The appellants have not shown that R.S.Mo. §287.240(4) limits their access to the courts or deprives them of a fundamental right they had under the common law. As set forth in Demay and as explored more fully below, the legislature is free to create a new remedy and limit its application, which it did in prescribing death benefits for certain heirs of an deceased employee. The constitutional right of access to open courts is not implicated by this exercise of legislative power.

In Goodrum, 824 S.W. 2d at 9, the Court addressed an open courts challenge to R.S.Mo. § 287.120. The parents of a deceased employee had brought negligence and intentional tort claims against their son's employer. The Court held that vesting exclusive jurisdiction in the Labor and Industrial Relations Commission to determine whether a claim falls within the Act does not violate the open courts provision of the Missouri Constitution. The constitutional access claim raised in Goodrum was not precisely the same as the one raised here in connection with R.S.Mo. §287.240(4), but the analysis is equally applicable. The Court held that "*Art. I, § 14* does not create rights but is meant to protect the enforcement of rights already acknowledged by law. The right of access 'means simply the right to pursue in the courts the causes of action the substantive law recognizes'" (citation omitted). Id. at 9.

It is true that the appellants have no remedy under the Worker's Compensation Act and are prevented by the exclusivity of the Act from bringing a wrongful death suit outside it. Their claim is that the legislature should have provided for nondependent heirs as well. Such an argument does not state a violation of Article I, Section 14.

In Sullivan, an estate sought to be included in the list of parties eligible to bring a wrongful death suit. The Court rejected the invitation to extend the scope of the wrongful death statute to include the estate of a decedent, and deferred to the legislature for a statutory change, citing among other reasons the host of ancillary issues implicit in creating a new cause of action for additional beneficiaries. The Court further rejected the claim that the estate had a common law right to recover damages, declining "to discard the statutory framework in order to fashion a common law cause of action out of whole cloth." Sullivan, 851 S.W.2d at 516.

The appellants would have the Court discard the statutory framework of the Worker's Compensation Act to create a cause of action that does not now exist. The Court should refuse to do so.

The legislature has power to design the framework of the substantive law by abolishing or modifying statutorily based claims. A statute may modify or abolish a common law or statutory cause of action, but it cannot arbitrarily or unreasonably erect a barrier for a recognized cause of action. Kilmer, 17 S.W.3d at 550. But the right of access does not assure that a substantive cause of action once recognized in the common

law will remain immune from legislative or judicial limitation or elimination. Adams, 832 S.W.2d at 906. Here, the legislature acted within its power to fashion new remedies and modify any existing ones. By doing so, it has not enacted any impediments to the appellants seeking redress for a recognized cause of action. What the legislature has done is to choose not to provide the appellants with a recognized cause of action.

The appellants further argue that the worker's compensation laws have withstood constitutional challenge because they provide a *quid pro quo* for potential tort victims whose rights are supplanted by the statute. (Appellants' Brief at 8.) The appellants contend that there is no such *quid pro quo* for nondependent heirs who have lost their right of action. The fallacy in this argument is two-fold. First, the parents cannot be said to have lost a right they never had. There was no common law or statutory cause of action for recovery without fault for accidental work-related death, no no-fault death benefits, and no common law cause of action for wrongful death. The legislature created these rights and remedies and limited them for reasons of public policy. It is worth noting that the legislature made the Act mandatory in 1974, but it did not amend the wrongful death statute to include parents of a deceased adult until 1979. R.S.Mo. §§ 287.030, 287.060 (1974) and R.S.Mo. §537.080 (1979).

Secondly, even assuming that the parents were deprived of a right to recover for the loss of their son, this Court has specifically rejected the "reasonable substitute" and *quid pro quo* arguments in upholding the legislature's power to eliminate or restrict a common law or statutory remedy. The Court in Adams rejected the argument that the legislature must establish a reasonable substitute before abolishing or restricting a

common law cause of action. The Court rejected the *quid pro quo* argument as an arbitrary and unnecessary limit on the legitimate lawmaking role of the legislature that was not required by the constitution. Adams, 832 S.W.2d at 906. The Court found that such a *quid pro quo* requirement would make it difficult for the legislature to abolish even arcane causes of action, finding that the legislature should be free to “respond statutorily to changing societal concerns or correct previous policy positions upon the receipt of new information”. Id.

In creating a statutory cause of action for wrongful death, the legislature limited the remedy to those which the deceased, had he or she survived, could have brought against the alleged tort-feasor. Because the employee could not have sued the employer for negligence had he or she lived, the employee’s parents have no remedy under R.S.Mo. § 537.080. Because they have no remedy under the wrongful death statute, the appellants contend that they have been arbitrarily and unreasonably denied the remedy that dependent parents have under the worker’s compensation scheme. The respondent disagrees.

As with wrongful death, there was no right of action for accidental death without fault under the common law or otherwise prior to the enactment of the Worker’s Compensation Act. As part of the creation of this new right, the remedy was limited by statute to the employee and his dependents. R.S.Mo. §287.240(4).

The purpose behind the Act was one of public welfare. The legislature sought to take the burden of loss from the employee and his/her dependents and ultimately the public and place it on industry. Hickey v. Board of Education, 256 S.W.2d 775, 777

(Mo. 1953); Cox v. Copeland Bros. Const. Co., 589 S.W.2d 55, 61. The Act was based largely on the social theory of providing support and avoiding destitution of the employee and those dependent on the employee for their support, and in consideration of the public which would bear the burden of such destitution. American Oil v. Pierce, 472 S.W.2d 458, 462 (Mo. App. Kansas City 1971). Nondependents, whether parents or siblings, did not need this protection.

The Workers Compensation Act was never intended to be blanket accident insurance. Under the appellants' theory, the workers compensation scheme would have to be extended to all nondependents, thus transforming a social welfare program into a blanket life insurance policy for all of the heirs of an employee.

Moreover, R.S.Mo. §287.240 is not arbitrary or unreasonable in its limitation to dependents. The provisions of the Act effect the social policy of the state of maintaining an employer-financed no-fault system of protection for those who are dependent upon the deceased employee for support. Excluding recovery for nondependents is neither an arbitrary nor unreasonable way to further the goals of the statute.

The legislature has the power to change or abolish common law or statutory remedies, and the Act is not invalid for creating or abrogating a cause of action. While the legislature cannot deprive an employee and his/her dependents of rights regarding intentional injuries, it has power to change common-law rules for accidental injuries. DeMay, 37 S.W.2d at 648. "By statute or decision, the common law is in force in Missouri only to the extent that it has not been subsequently changed by the legislature or judicial decision." Adams, 832 S.W.2d at 508.

The legislature could have chosen to allow additional parties to recover under the Act or outside the Act. In Combs v. Maryville, 609 S.W.2d 475 (Mo. App. W.D. 1980), the appellants were the nondependent parents of an adult child who was killed in a work-related accident. The Court noted that had the legislature wanted to allow additional actions to those not compensated for under the Act, it could have done so. Id. at 478. Respondent notes that the legislature could have chosen to follow New York's example, which specifically provides a statutory death benefit to nondependent parents and to a decedent's estate. N.Y. Work. Comp. Law §16(4-b).

In Page v. Clark Refining & Marketing, Inc., 3 S.W.3d 385 (Mo. App. E.D. 1999), the mother of an adult daughter argued, as do the appellants here, that the worker's compensation system allows an employer to escape the consequences of his negligent behavior. Citing Combs, the court found that any remedy for such circumstances was in the hands of the legislature, not the courts. Id. at 388.

B. R.S.Mo. § 287.040 does not violate the equal protection provision of Article 1, Section 2 of the Missouri Constitution because nondependent parents are not a suspect class, the statute does not affect a fundamental right, and because the classification bears a rational relationship to a legitimate state interest.

Equal protection analysis is a two-step process: first the court must determine whether the statute burdens a "suspect class" or impinges upon a fundamental right, and, if not, the court then determines if the classification is reasonably related to a legitimate state interest. Powell, 834 S.W.2d at 190.

This Court has determined that parents are not members of a suspect class. Goodrum, 824 S.W.2d at 10. It follows that a subset of a nonsuspect class, to wit nondependent parents, cannot be a suspect class either. A suspect class is one based on considerations such as race, religion, or similar considerations, "one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection.'" Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 63 & n4 (Mo. 1989). Nondependent parents do not fit into this category.

If a suspect class is not involved, the court then looks to see whether a fundamental right has been infringed. The fundamental right claimed to have been infringed is the appellants' access to the courts. As argued above, R.S.Mo. §287.240(4) does not infringe upon the appellants' right of access to the courts because the appellants have not been arbitrarily and unreasonably barred from bringing a recognized cause of action. There is no recognized remedy for the accidental death of an adult child against an employer in a work-related accident outside the worker's compensation framework, and no remedy for his/her nondependent parents within it.

Because the appellants have not been able to establish that they belong to a suspect class or that their fundamental right of access to the courts has been violated, strict scrutiny is not the standard of review and the burden has not shifted to the respondent to establish a compelling state interest. Instead, the classification is subjected to a "rational basis" analysis. As set forth above, the social welfare purpose of the Worker's Compensation Act in general and of the subject statute in particular was to provide

economic support for an employee and his/dependents in case of accidental injury or death on the job. ““In matters of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classification is imperfect...[and] results in some inequality”” (citation omitted) so long as the classification has a reasonable basis. St. Louis S. Park v. Missouri Dep’t of Social Services, 857 S.W.2d 304, 307 (Mo. App. W. D. 1993), cert. denied 510 U.S. 1072. The legislature here created a remedy that was not available at common law and limited it to those for whose benefit it was created, namely, those dependent upon the deceased employee for their support. It is clear that the subject classification was rationally related to the legitimate public policies underlying the Act.

Respondent believes that the foregoing analysis of the purposes and policies underlying the Act and its limitation of death benefits to dependents also establishes a compelling state interest sufficient to withstand strict scrutiny had such been the applicable test. respondent notes that the appellants do not cite any authority for their list of wholly employer-favorable policies which they claim underlie the Act (Appellants’ Brief at 9).

The appellants ask the Court to agree with Park v. Rockwell International Corp., 436 A.2d 1136 (N.H. 1981), in which the New Hampshire Supreme Court found that the administrator of the estate of a dependentless employee was entitled to bring a wrongful death suit against his employer. The administrator was the employee’s father. The court held as a matter of public policy and equal protection that the estate could elect to reject the burial benefits under the worker’s compensation law. One of the bases for the finding

was that the estate of an employee had previously had the right to sue for wrongful death. Id. at 897. Four months before the employee died, the worker's compensation law expanded the definition of "employee" to include the employee's personal representatives, thus barring the remedy. The court found that this right had been taken from the estate and the nondependent relatives without their being given anything in return for the elimination of their right of action. The court also noted that in all other wrongful death cases, the estate of a dependentless person could receive up to \$50,000. Finding that the decedent should be worth more than a limited amount toward his burial expenses, the court permitted the estate to maintain a wrongful death suit if it declined the benefits under the worker's compensation act. The dissent in Park believed that a remedy belonged with the legislature.

Park differs from our case in several ways. As argued above, in Missouri the legislature is free to create, abolish, and limit rights without offering a *quid pro quo* or "reasonable substitute". Moreover, the Missouri wrongful death statute did not offer a cause of action that included parents of a deceased adult child until 1979, which was after the Worker's Compensation Act became mandatory. Therefore, R.S.Mo. §287.240 (4) was not eliminating a previously recognized right to sue for wrongful death. Finally, Missouri does not allow a choice of remedy whereby worker's compensation benefits can be declined in order to pursue a civil remedy.

While the appellants argue that R.S.MO. §287.240(4) renders the value of their son's life worthless, the same could be said in certain other non-work-related wrongful death situations. See *e.g.* State ex rel Missouri Highway and Trans. Commission v.

Dierker, 961 S.W.2d 58 (Mo. banc 1998) (unless waived, sovereign immunity bars wrongful death action); Miller v. Smith, 921 S.W.2d 39 (Mo. App. W.D. 1996) (public duty and official immunity doctrines limit right to recover under wrongful death statute). Additionally, there is no wrongful death action where a decedent leaves no kin. The legislature could have, but did not, make provision in its wrongful death statute for the estate of a deceased with no heirs to have a cause of action against an alleged tort-feasor. Similar to the policy underlying the Worker's Compensation Act, the policy behind the wrongful death statute began with compensation to certain relatives for the lost economic support of a decedent. Sullivan, 851 S.W.2d at 513. Although the statute has been amended to include additional parties and damages, the list of those who may bring suit has never been amended to extend a cause of action to the decedent's estate where there are no beneficiaries who can take under the laws of descent. Id. at 514. Accordingly, when there is a wrongful death with no heirs, there is, as appellants argue with respect to the Worker's Compensation Act when there are no dependents, no compensation for the lost life and no remedy to insure that tort-feasors pay for their actions and are deterred from future similar conduct. Id.

As this Court has stated, desirable as those objectives may be, it is the legislature, not the courts, which must rewrite the wrongful death statute to achieve those goals. Id. at 514-515. So, too, with any changes that may be desirable to extend death benefits to nondependent parents under R.S.Mo. §287.240(4). Page, 3 S.W.3d at 388. If the public policy of Missouri is to afford a remedy to nondependent heirs in the case of accidental

work-related death, such question must be answered by the legislature. Powell, 834 S.W.2d at 191.

C. The relief requested at the end of appellant's brief was not requested before the Labor and Industrial Relations Commission and is contrary to law.

In addition to a declaration that R.S.Mo. §287.240(4) is unconstitutional, the appellants want the Court to extend death benefits to them, and then to permit them to decline the benefits in favor of instituting an action under the wrongful death statute. The appellants did not request this alternative relief at Hearing or in their Conversing Affirmative Defense, and even if they had, the Worker's Compensation Act does not permit the declination of benefits in order to institute a lawsuit for accidental death. One of the purposes of the exclusivity of the statutory scheme is to protect employers from just such litigation. In accordance with the statutory scheme, the wrongful death statute, which has not been challenged as unconstitutional by the appellants, does not permit a cause of action which the employee could not have brought if he had lived. As respondent argues above, such changes to the framework of the substantive law are for the legislature to enact.

CONCLUSION

Death benefits for an employee's dependents and a cause of action for wrongful death did not exist before the legislature created them. In creating these rights, the legislature chose not to provide for nondependents under either statute when the deceased was covered by the Worker's Compensation Act. R.S.Mo. 287.240(4) is not unconstitutional for providing a death benefit that is limited to certain beneficiaries in accordance with the social policies to which the Worker's Compensation Act is addressed. The Court should affirm the constitutionality of R.S.Mo. § 287.240 (4) and affirm the finding of the Labor and Industrial Relations Commission that appellants as nondependents are not entitled to death benefits under the statute.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c) and (g)

I, Patrick N. McHugh, hereby depose and state as follows:

1. I am an attorney for respondent Westport Heating & Cooling, Inc.
2. I certify that the foregoing respondent's Brief, contains 6,686 words and 514 lines (including footnotes) and thereby complies with the word and line limitations contained in Supreme Court Rule 84.06(b).
3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 2000 (9.0.3821 SR-1) word processing software.
4. I further certify that the accompanying floppy disk containing a copy of the foregoing Respondent's Brief, required to be filed by Rule 84.06(g), has been scanned for viruses and is virus-free.

Patrick N. McHugh

CERTIFICATE OF SERVICE

I, Patrick N. McHugh, hereby depose and state as follows:

1. I am an attorney for respondent, Westport Heating & Cooling, Inc.
2. On June 7, 2002, I served two copies of the foregoing Respondent's Brief upon Thomas A. Connelly, by mailing same to him by United States Mail to Thomas A. Connelly, P.C., 1007 Olive Street, 2nd Floor, St. Louis, Missouri 63101, attorney for appellants James L. Etling, Sr. and Janice L. Etling.
3. At that time, pursuant to Supreme Court Rule 84.06(g), I further served upon Mr. Connelly by U.S. mail one copy of a floppy disk containing the foregoing Respondent's Brief.

Patrick N. McHugh