

IN THE SUPREME COURT OF MISSOURI

No. SC92142

THERESA BEARD, BETH CARLL, and THE ESTATE OF LAUREL BEARD,
Plaintiffs/Appellants,

v.

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM, and
STATE OF MISSOURI,

Defendants/Respondents.

Appeal from the Circuit Court of Cole County
Honorable Jon E. Beetem, Circuit Judge

BRIEF OF RESPONDENT
MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM

Allen D. Allred, #26367
Jeffrey R. Fink, #44963
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000
(314) 552-7000 (fax)

Attorneys for Defendant/Respondent
Missouri State Employees'
Retirement System

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF FACTS 1

 A. Plaintiffs’ brief does not contain a fair and concise statement of the
 facts relevant to the questions presented for determination 1

 B. The trial court’s factual findings and judgment 2

 1. The parties 2

 2. Laurel Beard’s employment with the Missouri Department of
 Corrections and membership in MOSERS 2

 3. Laurel Beard’s retirement application and retirement election
 form 3

 4. Laurel Beard’s death on July 29, 2009..... 3

 5. MOSERS’s denial of Plaintiffs’ request for retirement
 benefits 4

 6. Plaintiffs’ lawsuit 4

 7. The trial court’s judgment 5

 8. Plaintiffs’ appeal 6

- C. Plaintiffs’ disputed factual assertions..... 6
 - 1. Laurel Beard’s employment with the State terminated on July 29, 2009, not June 18, 2009 7
 - 2. Laurel Beard did not do everything required to receive retirement benefits..... 8
 - 3. MOSERS did not consider Laurel Beard’s retirement application to be void 9
 - 4. MOSERS did not admit that Laurel Beard had any contractual relationship with the State entitling her to retirement benefits 10
- ARGUMENT..... 11
 - I. The Court should dismiss Plaintiffs’ appeal because their brief fails to comply with Rules 84.04(c) and 84.04(d) in that: (A) their brief’s statement of facts is not a fair and concise recitation of the facts relevant to the questions presented for determination without argument; and (B) Plaintiffs’ points relied on are deficient 11
 - A. Plaintiffs’ statement of facts is deficient 11
 - B. Plaintiffs’ points relied on are deficient 12

II. The trial court correctly determined that no benefits are due to Plaintiffs under the MOSERS statutes because Laurel Beard died before her August 1, 2009 annuity starting date and had no surviving spouse or dependent children. (Responds to Plaintiffs' Point Two) 17

A. This is a noncontested case under RSMo § 536.150..... 17

B. The standard of review in a noncontested case 19

C. The Court determines de novo whether Plaintiffs are entitled to any benefits under the MOSERS statutes 20

D. Plaintiffs are not entitled to any benefits under the MOSERS statutes..... 21

1. The applicable MOSERS statutes 21

 a. Membership in MOSERS 21

 b. Eligibility to receive retirement benefits..... 21

 c. The retirement application 22

 d. The retirement election form..... 23

 e. A member's death before her annuity starting date 26

2. No benefits are payable because Laurel Beard died before her annuity starting date and she had no surviving spouse or dependent children 28

3. Plaintiffs' interpretation of Section 104.1030 is wrong 30

E. The benefit option selected by Laurel Beard confirms that no benefits are payable because Laurel Beard died before her annuity starting date and never received an annuity 33

III. The trial court correctly determined that Section 104.1030 is constitutional because Plaintiffs have not been deprived of any constitutional rights in that no retirement benefits are payable under the MOSERS statutes and Section 104.1030 does not deprive Plaintiffs of any fundamental rights, due process, or equal protection of law. (Responds to Plaintiffs’ Point One) 35

A. Plaintiffs’ Second Amended Petition fails to state a cognizable claim for violation of Plaintiffs’ constitutional rights because Plaintiffs have failed to allege any facts to support their contention that Section 104.1030 is unconstitutional 35

B. Plaintiffs have not been deprived of any constitutional rights 38

1. Plaintiffs have not been deprived of any fundamental rights or due process 39

2. Plaintiffs have not been deprived of equal protection of law 42

CONCLUSION 46

CERTIFICATE OF SERVICE 47

CERTIFICATE OF COMPLIANCE 47

TABLE OF AUTHORITIES

Cases

Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989)..... 37

City of Valley Park v. Armstrong, 273 S.W.3d 504 (Mo. banc 2009)..... 18, 19, 20

Cribbs v. Keystone American Service Corp.,
 572 S.W.2d 637 (Mo. App. S.D. 1978)..... 15

Etling v. Westport Heating & Cooling Services, Inc.,
 92 S.W.3d 771 (Mo. banc 2003) 44

Finnical v. Finnical, 81 S.W.3d 554 (Mo. App. W.D. 2002) 13

Fraternal Order of Police Lodge #2 v. City of St. Joseph,
 8 S.W.3d 257 (Mo. App. W.D. 1999) 40

Geary v. Missouri State Employees’ Retirement System,
 878 S.W.2d 918 (Mo. App. W.D. 1994) 40, 41

Hall v. Missouri Bd. Of Probation and Parole,
 10 S.W.3d 540 (Mo. App. W.D. 1999) 13, 16

In re Marriage of Smith, 283 S.W.3d 271 (Mo. App. E.D. 2009) 11

In re Woodson, 92 S.W.3d 780 (Mo. banc 2003)..... 40

*Kansas City Premier Apartments, Inc. v. Missouri Real Estate
 Comm’n*, 344 S.W.3d 160 (Mo. banc 2011) 38, 44

Kansas City v. Travelers Ins. Co., 284 S.W.2d 874 (Mo. App. 1955)..... 31

Ladd v. Missouri Board of Probation and Parole,
 299 S.W.3d 33 (Mo. banc 2009) 17

Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo. App. E.D. 2001)..... 37

Massage Therapy Training Institute, LLC v. Missouri State Bd. of Therapeutic Massage, 65 S.W.3d 601 (Mo. App. S.D. 2002) 37

Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ., 34 S.W.3d 266 (Mo. App. W.D. 2000) 20

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976) 20

Powell v. American Motors Corp., 834 S.W.2d 184 (Mo. banc 1992) 45

Prather v. City of Carl Junction, Missouri, 345 S.W.3d 261 (Mo. App. S.D. 2011)..... 16

Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683 (Mo. banc 2010) 21

St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708 (Mo. banc 2011) 35, 39

State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Comm'n, 429 S.W.2d 723 (Mo. 1968)..... 37

State ex rel. Nixon v. Powell, 167 S.W.3d 702 (Mo. banc 2005)..... 39, 43

State ex rel. Phillip v. Public Sch. Retirement System of City of St. Louis, 262 S.W.2d 569 (Mo. banc 1953) 20

State ex rel. Union Elec. Co. v. Public Service Comm'n, 687 S.W.2d 162 (Mo. banc 1985) 17

Strozewski v. City of Springfield, 875 S.W.2d 905 (Mo. banc 1994)..... 17, 18

Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978)..... 13

United C.O.D. v. State, 150 S.W.3d 311 (Mo. banc 2004) 43, 44

Williams v. Board of Trustees of Public School Retirement System of

Missouri, 500 S.W.2d 31 (Mo. App. W.D. 1973)..... 19

Winfrey v. State, 242 S.W.3d 723 (Mo. banc 2008)..... 17

Statutes

RSMo § 104.330..... 2, 21, 28

RSMo § 104.340..... 2

RSMo § 104.395..... 24-25, 33

RSMo § 104.400..... 21

RSMo § 104.401..... 22, 28

RSMo § 104.420..... 26, 29, 32

RSMo § 104.1003..... 3, 33

RSMo § 104.1009..... 21, 28

RSMo § 104.1015..... 21-24, 28-29

RSMo § 104.1027..... 25, 33-34

RSMo § 104.1030..... passim

RSMo § 536.010..... 17

STATEMENT OF FACTS¹

A. Plaintiffs' brief does not contain a fair and concise statement of the facts relevant to the questions presented for determination.

In violation of Rule 84.04(c), the brief of Plaintiffs/Appellants Theresa Beard, Beth Carll, and The Estate of Laurel Beard ("Plaintiffs") does not contain a fair and concise statement of the facts relevant to the questions presented for determination without argument. Plaintiffs never discuss the procedural history of the case or the trial court's factual findings and judgment.

Plaintiffs' "statement of facts" is replete with argument and is a regurgitation of their motion for summary judgment and their trial brief. (LF 72-87). Instead of providing a concise statement of the evidence in the light most favorable to the trial court's judgment, Plaintiffs make numerous factual assertions that were disputed and not found by the trial court, including factual assertions related to when Laurel Beard's employment with the State of Missouri terminated. These disputed factual assertions are irrelevant to the issues in the case, as apparent from Plaintiffs' failure to discuss any of them in the argument section of their brief.

¹ In this brief, citations to "A__" are to the Appendix to Appellants' Brief, and citations to "LF __" are to the Legal File.

B. The trial court's factual findings and judgment.

Plaintiffs do not challenge any of the trial court's factual findings. Accordingly, the following statement of facts is taken verbatim from the trial court's judgment with citations to the evidence in the record supporting the trial court's factual findings.

1. The parties.

Pursuant to Missouri statutes, Defendant/Respondent Missouri State Employees' Retirement System ("MOSERS") is a body corporate and an instrumentality of Defendant/Respondent the State of Missouri (the "State") that has been established for providing retirement income and other benefits to employees of the State. (A2; LF 89; RSMo § 104.340.1). Plaintiffs/Appellants Theresa Beard and Beth Carll are the adult daughters of Laurel Beard, a former State employee who is deceased. (A1-2; LF 57, 59, 88-89). Theresa Beard and Beth Carll claim that they are entitled to retirement benefits from MOSERS and the State on account of Laurel Beard's former employment with the State. The Estate of Laurel Beard is also a named plaintiff and appellant, but the estate does not claim that it is entitled to any retirement benefits or other relief in this case.

2. Laurel Beard's employment with the Missouri Department of Corrections and membership in MOSERS.

Laurel Beard worked for the Missouri Department of Corrections at the Moberly Correctional Center for over 26 years, from 1983 to 2009. (A2; LF 57, 89). As a state employee, Laurel Beard was a member of MOSERS. (A2; LF 89; RSMo § 104.330).

3. Laurel Beard's retirement application and retirement election form.

On June 18, 2009, Laurel Beard filed an application for retirement with MOSERS. (A2; LF 59, 89; Appellants' Exhibits, p. 74). In her retirement application, Laurel Beard designated August 1, 2009 as her "retirement date." (A2; LF 89; Appellants' Exhibits, p. 74). This August 1, 2009 "retirement date" was her "annuity starting date."

When she filed her retirement application, Laurel Beard was a member of the MOSERS "closed plan" because she had been employed by the State before July 1, 2000. (A2; LF 89; RSMo § 104.1003(7)). In June 2009, MOSERS provided Laurel Beard with a written comparison of her coverage under the "closed plan" and her potential coverage under the MOSERS "year 2000 plan." (A2; LF 89; Appellants' Exhibits, pp. 66-69). On June 30, 2009, Laurel Beard filed her retirement election form with MOSERS. (A2; LF 59-60, 89; Appellants' Exhibits, p. 59). In her retirement election form, Laurel Beard elected to change from the closed plan to the year 2000 plan. (A2; LF 89; Appellants' Exhibits, p. 59). Laurel Beard's retirement election form states that her date of retirement is August 1, 2009. (A2; LF 89; Appellants' Exhibits, p. 59).

4. Laurel Beard's death on July 29, 2009.

Laurel Beard died on July 29, 2009. (A2; LF 60, 89). On the date of her death, Laurel Beard had no surviving spouse or dependent children (i.e., children who were under the age of 21 or totally incapacitated). (A2; LF 59, 89; Appellants' Exhibits, pp. 39, 74).

5. MOSERS's denial of Plaintiffs' request for retirement benefits.

After Laurel Beard died, Plaintiffs requested that MOSERS pay them, as Laurel Beard's designated beneficiaries, retirement benefits allegedly due. (A3; LF 60, 90). In January 2010, based on RSMo § 104.1030, the MOSERS board of trustees determined that no retirement benefits or survivor benefits are payable to Plaintiffs because Laurel Beard died before her August 1, 2009 annuity starting date and she had no surviving spouse or dependent children. (A3; LF 46-47, 61, 90).

6. Plaintiffs' lawsuit.

On April 15, 2010, Plaintiffs filed the present lawsuit seeking judicial review of the MOSERS decision denying benefits. (A3; LF 1, 90). In their Second Amended Petition, Plaintiffs contend that they are entitled to retirement benefits, either under the MOSERS statutes (Count I) or under an alleged collective bargaining agreement between the Missouri Correction Officers Association and the State (Count II). (A3; LF 56-65, 90). Plaintiffs further contend that the denial of retirement benefits under the MOSERS statutes violates their rights under the Missouri Constitution (Count III). (A3; LF 56-65, 90). Counts I, II, and III are against MOSERS. (A3; LF 90). Count II is also against the State. (A3; LF 90).

7. The trial court's judgment.

On September 12, 2011, the trial court held a bench trial. (A1; LF 7, 88). On October 24, 2011, the trial court entered judgment in favor of MOSERS and against Plaintiffs on all counts of Plaintiffs' Second Amended Petition, and the Court entered judgment in favor of the State and against Plaintiffs on Count II of Plaintiffs' Second Amended Petition (the sole count against the State). (A1-7; LF 88-94).

On Count I, the trial court ruled that whether Plaintiffs are entitled to benefits is determined solely by the provisions of the MOSERS statutes in RSMo Chapter 104. (A3; LF 90). The trial court held that no benefits are payable under the MOSERS statutes because Laurel Beard died before her August 1, 2009 annuity starting date and she had no surviving spouse or dependent children when she died. (A3-5; LF 90-92).

On Count II, the trial court found that Plaintiffs had adduced no evidence of any purported agreement between the Missouri Correction Officers Association and the State that requires the payment of retirement benefits to Plaintiffs. (A5; LF 92). The trial court observed that the obligation to pay benefits is governed solely by the MOSERS statutes. (*Id.*) In turn, because Plaintiffs are not entitled under the MOSERS statutes to any benefits, the trial court held that Plaintiffs have no claim for breach of contract against MOSERS or the State. (*Id.*)

On Count III, the trial court found that Plaintiffs' constitutional claim is meritless because no benefits are due under the MOSERS statutes and, thus, Plaintiffs have not been deprived of any constitutional rights. (A5-7; LF 92-94). First, the trial court observed that retirement benefits are not "fundamental rights" under the United States

Constitution or the Missouri Constitution. (A5; LF 92). Second, the trial court rejected Plaintiffs' contention that Section 104.1030 violates equal protection because the statute limits survivor benefits to a deceased member's surviving spouse and dependent children. (A6; LF 93). The trial court observed that Section 104.1030 treats all similarly-situated members of MOSERS the same, does not burden a "suspect class" of persons, and does not impinge any fundamental rights. (*Id.*) As a result, the trial court ruled that Section 104.1030 need only be rationally related to a legitimate state interest. (*Id.*) The trial court concluded that the legislature could rationally determine that survivor benefits should be paid only if a member has a surviving spouse or dependent children because a member's spouse or dependent children presumably relied on the member for financial support when the member died. (*Id.*)

8. Plaintiffs' appeal.

On November 7, 2011, Plaintiffs filed their notice of appeal. (LF 8, 96-107).

C. Plaintiffs' disputed factual assertions.

In their statement of facts, Plaintiffs make several factual assertions that are disputed, were not found by the trial court, and are not relevant to any of the questions presented on appeal. The major such factual assertions are addressed below to correct the inaccuracies in Plaintiffs' statement of facts.

1. Laurel Beard's employment with the State terminated on July 29, 2009, not June 18, 2009.

Plaintiffs incorrectly assert that "Laurel Beard never requested that her employment continue until July 31, 2009, and terminated her employment when she notified her employer on June 18, 2009." (Appellants' Brief, p. 7). This is contrary to the undisputed evidence. Indeed, Plaintiffs later correctly state in their brief that "Laurel Beard's employment ... terminated on July 29, 2009." (Appellants' Brief, p. 9).

After filing her retirement application with MOSERS on June 18, 2009, Laurel Beard continued to be employed with the Missouri Department of Corrections at the Moberly Correctional Center up until her death on July 29, 2009. (Appellants' Exhibits, pp. 247-48). Laurel Beard's last physical day of work at the Moberly Correctional Center was June 13, 2009. (*Id.*, p. 247). However, between June 13, 2009 and July 29, 2009, Laurel Beard remained an employee of the Missouri Department of Corrections, initially on a paid leave of absence and, after she exhausted her paid leave time, on an unpaid leave of absence. (*Id.*, pp. 247-49).

As a result of her continued employment while on leave of absence between June 13, 2009 and July 29, 2009, Laurel Beard was issued three paychecks by the State, one dated July 15, 2009 covering the last two weeks of June 2009, one dated July 31, 2009 covering the first two weeks of July 2009, and one dated August 14, 2009 covering the last two weeks of July 2009. (*Id.*, pp. 253-55,289). While on leave of absence, Laurel Beard's position at the Moberly Correctional Center was kept open for her. (*Id.*, pp. 247-49).

On July 7, 2009, Laurel Beard submitted an employment resignation letter to Dean Minor, the warden of the Moberly Correctional Center, stating: “my retirement date is August 1, 2009.” (*Id.*, pp. 249-50, 252, 285). On July 14, 2009, Dean Minor accepted Laurel Beard’s resignation and responded in a letter to Laurel Beard that he “received notification of [Laurel Beard’s] upcoming retirement dated August 1, 2009.” (*Id.*, pp. 249-51, 253, 286). On July 16, 2009, Rhonda Kuhler, the personnel clerk at the Moberly Correctional Center responsible for keeping employment records of employees there, sent an electronic termination of employment form for Laurel Beard to MOSERS. (*Id.*, pp. 244-46, 253, 287). In this electronic termination of employment form, Rhonda Kuhler stated that the termination date of Laurel Beard’s employment would be July 31, 2009 because that was the expected effective date of Laurel Beard’s employment resignation based on Laurel Beard’s statement in her July 7, 2009 resignation letter that her retirement date was August 1, 2009. (*Id.*, pp. 251-53, 272, 284-85, 287).

2. Laurel Beard did not do everything required to receive retirement benefits.

Plaintiffs also assert that “[t]here is no dispute that Laurel Beard did everything that is required under the statutes to receive her retirement benefits.” (Appellants’ Brief, p. 9). This assertion is argument, which Rule 84.04(c) prohibits in a brief’s statement of facts. Even so, Plaintiffs’ assertion is incorrect.

Plaintiffs cite the deposition testimony of Anne Rapp, a MOSERS staff member, in support of their assertion, but Ms. Rapp testified only that Laurel Beard had not done anything “inappropriate or wrong in terms of filing these forms or breaking any rules of

MOSERS that would have disqualified her for retirement” and that Laurel Beard “filed all of the paperwork to retire on August 1st.” (Appellants’ Exhibits, p. 329). Ms. Rapp did not testify that “Laurel Beard did everything that is required under the statutes to receive her retirement benefits.” To the contrary, Ms. Rapp testified that Laurel Beard had not terminated her employment with the Missouri Department of Corrections, “which is a prerequisite to retirement.” (*Id.*, p. 330). In addition, Laurel Beard was not alive on her August 1, 2009 annuity starting date, which was another prerequisite under the MOSERS statutes for her to receive retirement benefits.

3. MOSERS did not consider Laurel Beard’s retirement application to be void.

Next, Plaintiffs incorrectly assert that “MOSERS position is that upon Ms. Beard’s death, her application for retirement is void based on the fact that MOSERS considers her to have died before retirement. In the eyes of MOSERS, therefore, Ms. Beard never filed a proper application for retirement.” (Appellants’ Brief, p. 11). However, neither MOSERS nor the trial court denied benefits to Plaintiffs on the basis that Laurel Beard’s retirement application was “void” or that Laurel Beard had not filed a proper retirement application.

Plaintiffs cite the deposition testimony of Jake McMahon, MOSERS’s Chief Counsel, in support of their assertion, but Mr. McMahon testified that the retirement application was deemed “void” only in the sense that when Laurel Beard died before her August 1, 2009 annuity starting date, her eligibility for benefits became governed by the

MOSERS statutes that apply when a member dies before her annuity starting date. (Appellants' Exhibits, pp. 358-60).

4. MOSERS did not admit that Laurel Beard had any contractual relationship with the State entitling her to retirement benefits.

Plaintiffs also assert: "MOSERS admits that there was a contractual relationship between the Department of Corrections and Laurel Beard, of which her benefits were a part of.... The benefits were statutorily made part of the employment contract between the State of Missouri and Ms. Beard, and MOSERS is not a party to that contract." (Appellants' Brief, pp. 13-14). The trial court found that was no such agreement with the State that requires the payment of retirement benefits to Plaintiffs, (A5; LF 92), and Plaintiffs have not challenged this finding on appeal and have not appealed the trial court's judgment against them on their claim for breach of contract (Count II). Moreover, while Plaintiffs cite the deposition testimony of Jake McMahon in support of their assertion, Mr. McMahon testified that MOSERS has no position as to whether a contract existed between Laurel Beard and the State or the Department of Corrections. (Appellants' Exhibits, p. 399).

ARGUMENT

I. The Court should dismiss Plaintiffs' appeal because their brief fails to comply with Rules 84.04(c) and 84.04(d) in that: (A) their brief's statement of facts is not a fair and concise recitation of the facts relevant to the questions presented for determination without argument; and (B) Plaintiffs' points relied on are deficient.

At the outset, the Court need not consider the merits of Plaintiffs' appeal because their brief violates Rule 84.04(c), which governs statements of facts in briefs, and Rule 84.04(d), which governs points relied on in briefs.

A. Plaintiffs' statement of facts is deficient.

Rule 84.04(c) provides: "The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." "The primary purpose of the statement of facts is to afford an immediate, accurate, complete and unbiased understanding of the facts of the case." *In re Marriage of Smith*, 283 S.W.3d 271, 273 (Mo. App. E.D. 2009). The statement of facts must include relevant facts supporting the trial court's findings and judgment and must exclude matters not relevant to the issues raised on appeal. *Id.* "An appellant may not simply recount his or her version of the events, but is required to provide a statement of the evidence in the light most favorable to the judgment. An appellant's task on appeal is to explain why, even when the evidence is viewed in the light most favorable to the respondent, the law requires that the judgment of the trial court be reversed." *Id.* at 273-74. "Failure to provide a fair and concise statement of the facts that complies with Rule 84.04(c) is a basis for dismissal of the appeal." *Id.* at 274.

Here, Plaintiffs' statement of facts is woefully deficient under Rule 84.04(c). As discussed above, they do not mention the evidence in the light most favorable to the judgment. Indeed, they fail to mention the trial court's findings or judgment at all. They do not recount the procedural history of the case. They include several irrelevant factual assertions that are disputed, were not found by the trial court, and are irrelevant to the questions presented on appeal. As a result, the Court should dismiss Plaintiffs' appeal.

B. Plaintiffs' points relied on are deficient.

Plaintiffs' points relied on are also woefully deficient. Rule 84.04(d) provides that each point relied on shall:

- (A) identify the trial court ruling or action that the appellant challenges;
- (B) state concisely the legal reasons for the appellant's claim of reversible error; and
- (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

Rule 84.04(d). "After stating the ruling the trial court actually made, it stands to reason that the point should then specify Why the ruling was erroneous. This requirement essentially contemplates a statement which ordinarily will closely approximate what

appellant believes should have been the trial court's conclusion of law on the point being addressed." *Thummel v. King*, 570 S.W.2d 679, 685 (Mo. banc 1978).

"The function of this rule is to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review." *Finnical v. Finnical*, 81 S.W.3d 554, 559 (Mo. App. W.D. 2002) (quotation omitted).

Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made. Deficient points relied on force the appellate court to search the argument portion of the brief or the record itself to determine and clarify the appellant's assertions, thereby wasting judicial resources, and, worse yet, creating the danger that the appellate court will interpret the appellant's contention differently than the appellant intended or his opponent understood.

Hall v. Missouri Bd. Of Probation and Parole, 10 S.W.3d 540, 544-45 (Mo. App. W.D. 1999) (quotation omitted).

Neither of Plaintiffs' two points relied on complies with Rule 84.04(d). Plaintiffs' first point relied on states:

The trial court erred in granting judgment against Plaintiffs/Appellants Theresa Beard, et al. because Section 104.1030 RSMo is unconstitutional on its face or as applied to vested members of the Missouri State Employees' Retirement System (MOSERS) who have filed

for retirement and made the proper beneficiary elections but die before their annuity starting date, without a surviving spouse or minor children, in that the Missouri Constitution protects an individual's natural right to the enjoyment of the gains from their own industry; provides that no person shall be deprived of their property without due process of law; and provides that no law shall impair the obligations of contracts.

Plaintiffs' first point relied on is deficient because it does not sufficiently specify any alleged error by the trial court. Plaintiffs say that the trial court erred in entering judgment against them, but they do not explain how the trial court supposedly so erred. While they apparently may have intended to assert that the trial court erred in ruling that Section 104.1030 is constitutional, they do not expressly so assert.

In addition, Plaintiffs' first point relied on does not state the legal reasons for their claim of reversible error or why, in the context of this case, those legal reasons support their claim that the trial court erred in entering judgment against them. Most significantly, Plaintiffs do not say why the trial court should have found Section 104.1030 to be unconstitutional. Plaintiffs merely paraphrase unspecified parts of the Missouri Constitution without explaining how Section 104.1030 allegedly violates those unspecified parts of the Missouri Constitution. Plaintiffs' statement that "the Missouri Constitution protects an individual's natural right to the enjoyment of the gains from their own industry; provides that no person shall be deprived of their property without due process of law; and provides that no law shall impair the obligations of contracts" is merely an abstract statement of law, and "[a]bstract statements of law, standing alone, do

not comply with this rule.” Rule 84.04(d). Plaintiffs do not even expressly assert that Section 104.1030 violates *their* rights under these unspecified parts of the Missouri Constitution. *See, e.g., Cribbs v. Keystone American Service Corp.*, 572 S.W.2d 637, 638 (Mo. App. S.D. 1978) (“[T]he assertion that defendant was denied due process when a receiver was appointed without notice of a hearing preserves nothing for review because it does not undertake to say how or in what manner the alleged action denied defendant its constitutional right.”).

Plaintiffs’ second point relied on fares no better. It states:

The trial court erred in granting judgment against Plaintiffs Theresa Beard, et al. because Section 104.1030 RSMo is ambiguous on its face and/or the trial court wrongfully interpreted said statute which leads to an unjust, unreasonable and confiscatory result, in that Laurel Beard was a vested member of the Missouri State Employee’s Retirement System (MOSERS), became ill and stopped working, but her designated beneficiaries were denied earned retirement benefits because she died shortly before her annuity starting date, without a surviving spouse or minor children.

Like their first point relied on, Plaintiffs’ second point relied on is also deficient because it does not state the legal reasons for their claim of reversible error or why, in the context of this case, those legal reasons support their claim of reversible error. While Plaintiffs assert that the trial court erred in entering judgment against them because the trial court supposedly “wrongfully interpreted” Section 104.1030, they fail to say how the trial court

“wrongfully interpreted” Section 104.1030 or how they contend the trial court should have interpreted the statute. *See, e.g., Hall*, 10 S.W.3d at 543-44 (point relied on asserting that trial court “incorrectly construed” statute without explaining how was deficient). (Moreover, Plaintiffs’ assertion that Section 104.1030 is “ambiguous on its face” does not explain how the trial court supposedly erred in interpreting the statute.)

“A deficient point relied on that cannot be understood without resorting to the argument portion of the brief or record fails to preserve the argument for appellate review.” *Prather v. City of Carl Junction, Missouri*, 345 S.W.3d 261, 265 (Mo. App. S.D. 2011). “Merely stating what errors are, without also stating why they are errors, neither complies with the rule or preserves anything for review.” *Id.* (quotation omitted). Because Plaintiffs’ points relied on fail to comply with Rule 84.04(d), Plaintiffs have failed to preserve anything for appellate review, and the Court should dismiss Plaintiffs’ appeal. *Hall*, 10 S.W.3d at 545.

II. The trial court correctly determined that no benefits are due to Plaintiffs under the MOSERS statutes because Laurel Beard died before her August 1, 2009 annuity starting date and had no surviving spouse or dependent children.

(Responds to Plaintiffs' Point Two).

Plaintiffs contest the trial court's denial of benefits under the MOSERS statutes and challenge the constitutionality of Section 104.1030 to the extent that they are not entitled to benefits under the MOSERS statutes. In their brief, Plaintiffs present the constitutional issue first and the statutory issue second. This Court typically determines statutory issues first and then proceeds to determine constitutional issues only to the extent necessary. *See, e.g., Winfrey v. State*, 242 S.W.3d 723, 724 n.2 (Mo. banc 2008); *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985). The trial court followed this practice in its judgment. Accordingly, MOSERS will address the statutory issue first and the constitutional issue second.

A. This is a noncontested case under RSMo § 536.150.

As the trial court concluded (A3; LF 90), judicial review of MOSERS's decision denying benefits is under the Missouri Administrative Procedure Act ("APA"), RSMo § 536.010 *et seq.*, because the MOSERS statutes are silent as to judicial review of MOSERS's decisions. *See Strozewski v. City of Springfield*, 875 S.W.2d 905, 906 (Mo. banc 1994) ("Chapter 536 provides the statutory framework for judicial review of administrative decisions."); *Ladd v. Missouri Board of Probation and Parole*, 299 S.W.3d 33, 37 (Mo. banc 2009) ("Speaking generally, the APA's judicial review provisions are applicable when an agency's organic statutes are silent as to judicial

review of its decisions, or where the organic statute fails to address particular procedural issues.”).

Under the APA, a case challenging a government agency’s decision is either classified as “contested” or “noncontested.” *See City of Valley Park v. Armstrong*, 273 S.W.3d 504, 506-07 (Mo. banc 2009).

In either a contested or a non-contested case the private litigant is entitled to challenge the governmental agency’s decision. The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court.

Id.

A case is “contested” only if the law required the government agency to: (a) conduct a formal, adjudicatory hearing with the presentation of evidence (including sworn testimony and cross-examination of witnesses); and (b) issue written findings of fact and conclusions of law. *City of Valley Park*, 273 S.W.2d at 506-07; *Strozewski*, 875 S.W.2d at 906. “[A]n administrative decision is uncontested if the decision is made without any requirement of an adversarial hearing at which a measure of procedural formality is followed.” *Strozewski*, 875 S.W.2d at 906.

As the trial court concluded (A3; LF 90), the present case is a noncontested case because: (a) no law required MOSERS to conduct any formal, adjudicatory hearing or issue any written findings of fact and conclusions of law as to Plaintiffs’ entitlement to

benefits; and (b) MOSERS did not conduct any such formal, adjudicatory hearing or issue any such written findings of fact and conclusions of law. MOSERS has promulgated a rule, Rule 1-2 (*see* LF 29, 31), that permits, but does not require, members, beneficiaries, and survivors to request that the MOSERS board of trustees review decisions by the MOSERS executive director or his designee concerning benefits. Rule 1-2(5)(A) provides: “Reviews will be held on an informal basis. No formal rules of evidence will be applied.” (LF 31). During any review, there is no sworn testimony or cross-examination of witnesses, there is no evidentiary record, and there is no formal adjudication. As a result, Plaintiffs’ judicial challenge to MOSERS’s decision is classified as a noncontested case. *See Williams v. Board of Trustees of Public School Retirement System of Missouri*, 500 S.W.2d 31 (Mo. App. W.D. 1973) (suit against retirement system by children of deceased member to establish right to survivor benefits was noncontested case under Section 536.150 because no law required retirement system to hold a hearing on children’s entitlement to survivor benefits); *see, e.g., City of Valley Park*, 273 S.W.3d at 507 (“Because section 72.403 does not provide for an adjudicatory hearing where Valley Park was permitted to try its case before the boundary commission and develop the necessary evidentiary record, the case is not a contested case.”).

B. The standard of review in a noncontested case.

“The standard of judicial review of noncontested cases is governed by section 536.150. The circuit court does not review the record for competent and substantial evidence, but instead conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency’s decision is

unconstitutional, unlawful, unreasonable, arbitrary, capricious or otherwise involves an abuse of discretion.” *City of Valley Park*, 273 S.W.3d at 508 (citation omitted).

“On appeal, the appellate court reviews the judgment of the circuit court, not the decision of the administrative agency.” *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 274 (Mo. App. W.D. 2000). “Appellate review of the circuit court’s judgment in a noncontested case is essentially the same as the review for a court-tried case.” *Id.* “Thus, the scope of appellate review is governed by Rule 73.01 as construed in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).” *Id.* at 274-75. “Accordingly, the appellate court reviews the circuit court’s judgment to determine whether its finding that the agency decision was or was not unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly declares and applies the law.” *Id.* at 275.

C. The Court determines de novo whether Plaintiffs are entitled to any benefits under the MOSERS statutes.

The issue in this case is whether Plaintiffs are entitled to any benefits as a result of Laurel Beard’s employment with the Missouri Department of Corrections. Whether Plaintiffs are entitled to benefits is determined solely by the provisions of the MOSERS statutes in RSMo Chapter 104. *State ex rel. Phillip v. Public Sch. Retirement System of City of St. Louis*, 262 S.W.2d 569, 577 (Mo. banc 1953) (“[T]he rights of any beneficiary or member of any retirement system can only be determined by very careful scrutiny of the detailed provisions of the particular statute controlling the creation and operation of the particular retirement system and under the particular facts of the case.”).

Interpretation of the MOSERS statutes is an issue of law that this Court reviews de novo. *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010).

D. Plaintiffs are not entitled to any benefits under the MOSERS statutes.

Plaintiffs are not entitled to any benefits under the MOSERS statutes. Under Section 104.1030, no retirement benefits are payable because Laurel Beard died before her annuity starting date, and no survivor benefits are payable because Laurel Beard had no surviving spouse or dependent children. The trial court, therefore, correctly determined that no benefits are due to Plaintiffs under the MOSERS statutes. This Court should affirm the trial court's judgment.

1. The applicable MOSERS statutes.

a. Membership in MOSERS.

State employees, like Laurel Beard, are members of MOSERS by virtue of their employment. RSMo § 104.330.1 (closed plan); § 104.1009 (year 2000 plan). MOSERS members are members of either the MOSERS "closed plan" if they began employment with the State before July 1, 2000 or the MOSERS "year 2000 plan" if they began employment with the State on or after July 1, 2000. *Id.* Members of the closed plan may elect to switch to the year 2000 plan. RSMo § 104.1009.1(2); § 104.1015.

b. Eligibility to receive retirement benefits.

Section 104.400.1, which applies to members of the closed plan, provides: "Any member who terminates employment may retire with a normal annuity upon obtaining normal retirement age." A member does not automatically receive retirement benefits upon terminating employment and reaching "normal retirement age." Instead, as

discussed below, to qualify for retirement benefits, the member must also: (a) perform several tasks required under Section 104.401.1 (retirement application) and Section 104.1015 (retirement plan election); and (b) be alive on her annuity starting date.

c. The retirement application.

Under Section 104.401.1, a member of the closed plan must submit a written application for retirement with MOSERS in which the member designates her “annuity starting date,” the date on which her retirement annuity starts:

Any member may retire with the annuity provided for in section ... 104.400 upon the member’s written application to the board designating the annuity starting date which shall be the first day of the month with respect to which an amount is paid as annuity; except that at the time of the annuity starting date, the member must have attained the normal retirement age ... and must have sufficient years of creditable service. The annuity starting date shall not be earlier than the first day of the second month following the month of the execution and filing of such application nor later than the first day of the fourth month following the month of the execution and filing of such application. The annuity shall commence in the month of the annuity starting date specified by the member in such application.

Section 104.401.1 allows the member to designate an “annuity starting date” for her retirement annuity as the first day of the second month, the first day of the third month, or the first day of the fourth month after she executes and submits her retirement application to MOSERS. Thus, Section 104.401.1 provides a waiting period of at least one month

and one day after a member submits a retirement application before the member may begin to receive retirement benefits.

d. The retirement election form.

After submitting a retirement application, a member of the closed plan must make two elections before she is eligible to receive retirement benefits. First, the member must elect whether to change from the closed plan to the year 2000 plan: “Persons covered by a closed plan on July 1, 2000, shall elect whether or not to change to year 2000 plan coverage.” RSMo § 104.1015.1. If a member of the closed plan elects to switch to the year 2000 plan, the member’s right to receive benefits is determined exclusively under the year 2000 plan: “Any such person who elects to be covered by the year 2000 plan shall forfeit all rights to receive benefits under this chapter except as provided under the year 2000 plan and all creditable service of such person under the closed plan shall be credited under the year 2000 plan.” RSMo § 104.1015.1.

A member must make this election before her annuity starting date and cannot receive retirement benefits without making this election:

Each person who is an employee and covered by the closed plan and not a retiree of the closed plan on July 1, 2000, shall elect whether or not to change to year 2000 plan coverage prior to the last business day of the month before the person’s annuity starting date, and if such election has not been made within such time, annuity payments due beginning on and after the month of the annuity starting date shall be made the month following the receipt by the appropriate system of such election and any other

information required by the year 2000 plan created by sections 104.1003 to 104.1093; provided, such election must be after the person has received from the year 2000 plan a written comparison of the person's closed plan coverage and the person's potential year 2000 plan coverage and the election must be made in writing on a form furnished by the appropriate board. If such person dies after the annuity starting date but before making such election and providing such other information, no benefits shall be paid except as required pursuant to section 104.420....

RSMo § 104.1015.3. Section 104.1015.3 provides that if the member dies without making this election, "no benefits shall be paid except as required pursuant to section 104.420."

Second, a member must also elect whether to have her normal retirement benefits reduced to provide certain additional benefits to her spouse or other beneficiary upon the member's death. This requirement is found in Section 104.395.1² if the member elects to remain in the closed plan and is found in Section 104.1027.1³ if the member elects to

² Section 104.395.1 provides: "In lieu of the normal annuity otherwise payable to a member pursuant to sections 104.335, 104.370, 104.371, 104.374, or 104.400, and prior to the last business day of the month before the annuity starting date pursuant to section 104.401, a member shall elect whether or not to have such member's normal annuity reduced as provided by the options set forth in this section; provided that if such election has not been made within such time, annuity payments due beginning on and after such

change to the year 2000 plan. A member must make this benefit option election before her annuity starting date and cannot receive retirement benefits without making this election. RSMo § 104.395.1 (closed plan); § 104.1027.1 (year 2000 plan). Under Sections 104.395.1 and 104.1027.1, if the member dies without making this election, “no benefits shall be paid except as required pursuant to”: (a) Section 104.420 if the member elected _____ annuity starting date shall be made the month following the receipt by the system of such election, and further provided, that if such person dies after such annuity starting date but before making such election, no benefits shall be paid except as required pursuant to section 104.420.”

³ Section 104.1027.1 provides: “Prior to the last business day of the month before the annuity starting date, a member or a vested former member shall elect whether or not to have such member's or such vested former member's life annuity reduced, but not any temporary annuity which may be payable, and designate a beneficiary, as provided by the options set forth in this section; provided that if such election has not been made within such time, annuity payments due beginning on and after the month of the annuity starting date shall be made the month following the receipt by the appropriate system of such election and any other information required by the year 2000 plan created by sections 104.1003 to 104.1093, and further provided, that if such person dies after the annuity starting date but before making such election and providing such other information, no benefits shall be paid except as required pursuant to section 104.1030.”

to remain in the closed plan; or (b) Section 104.1030 if the member elected to change to the year 2000 plan.

e. A member's death before her annuity starting date.

The MOSERS statutes contain provisions determining the benefits that are payable if a member dies before her annuity starting date. Section 104.1030, which applies to the year 2000 plan, provides that when a member of the year 2000 plan dies before her annuity starting date, no retirement benefits are payable, but survivor benefits may be payable if the member has a surviving spouse or dependent children.⁴ Section 104.1030.1 states: "If a member with five or more years of credited service or a vested former member dies before such member's or such vested former member's annuity starting date, the applicable annuity provided in this section [104.1030] shall be paid." Section 104.1030.2 provides for a survivor annuity (benefits) for the life of a member's spouse if the member has a surviving spouse:

The member's surviving spouse who was married to the member at the date of death shall receive an annuity computed as if such member had:

- (1) Retired on the date of death with a normal retirement annuity based upon credited service and final average pay to the date of death, and without reduction if the member's age was younger than normal retirement eligibility;

⁴ Section 104.420 has a similar provision when a member of the closed plan dies before her annuity starting date.

- (2) Elected option 2 provided for in section 104.1027; and
- (3) Designated such spouse as beneficiary under such option.

If the member has no surviving spouse, Section 104.1030.3 provides for a survivor annuity (benefits) for the member's dependent children, if any, until they die or reach age 21 (although the age 21 maximum is extended if a dependent child has been found to be totally incapacitated by a court of competent jurisdiction):

If a spouse annuity is not payable pursuant to the provisions of subsection 2 of this section, or when a spouse annuity has ceased to be payable, eighty percent of an annuity computed in the same manner as if the member had retired on the date of death with a normal retirement annuity based upon credited service and final average pay to the date of death and without reduction if the member's age at death was younger than normal retirement eligibility shall be divided equally among the dependent children of the deceased member. A child shall be a dependent child until death or attainment of age twenty-one, whichever occurs first; provided the age twenty-one maximum shall be extended for any child who has been found totally incapacitated by a court of competent jurisdiction. Upon a child ceasing to be a dependent child, that child's portion of the dependent annuity shall cease to be paid, and the amounts payable to any remaining dependent children shall be proportionately increased.

Section 104.1030 does not provide for any annuity or benefits if, as is the situation here, a member dies without a surviving spouse or dependent children.

2. **No benefits are payable because Laurel Beard died before her annuity starting date and she had no surviving spouse or dependent children.**

Application of the above MOSERS statutes to Laurel Beard's case is straightforward. Laurel Beard was a member of the closed plan because her employment with the State of Missouri began before July 1, 2000. RSMo §§ 104.330.1 and 104.1009. She submitted her retirement application to MOSERS on June 18, 2009. In her retirement application, she designated August 1, 2009 as her "annuity starting date" (called her "retirement date" in the retirement application). (A2; LF 89; Appellants' Exhibits, p. 74). Under Section 104.401.1, August 1, 2009 was the earliest date that Laurel Beard could designate as her annuity starting date.

On June 30, 2009, Laurel Beard filed her retirement election form as required under Section 104.1015. (A2; LF 59-60, 89; Appellants' Exhibits, p. 59). She elected to change from the closed plan to the year 2000 plan. (A2; LF 89; Appellants' Exhibits, p.

59).⁵ Accordingly, she became a member of the year 2000 plan and her right to receive benefits became governed exclusively by the year 2000 plan. RSMo § 104.1015.1.

Laurel Beard died on July 29, 2009. (A2; LF 60, 89). This was before her August 1, 2009 “annuity starting date.” As a result, Section 104.1030 determines the applicable benefits, if any, that are payable. Section 104.1030 does not provide for any retirement benefits, and no survivor benefits are due under Section 104.1030 because Laurel Beard did not have a surviving spouse or dependent children. (A2; LF 59, 89; Appellants’ Exhibits, pp. 39, 74). Thus, MOSERS and the trial court correctly determined that no benefits are due to Plaintiffs. The Court should affirm the trial court’s judgment in favor of MOSERS and against Plaintiffs.

⁵ Plaintiffs do not dispute the validity of Laurel Beard’s election to change from the closed plan to the year 2000 plan. Nor could they because no benefits would be payable absent a valid election whether to change from the closed plan to the year 2000 plan. Section 104.1015.3 provides: “If such person dies after the annuity starting date but before making such election ..., no benefits shall be paid except as required pursuant to section 104.420....” Plaintiffs concede in their brief (p. 34) that no benefits are payable under Section 104.420 because Section 104.420.3 provides that “[n]o benefit is payable pursuant to this section if no eligible surviving spouse or children under twenty-one years of age survive the member....”

3. Plaintiffs' interpretation of Section 104.1030 is wrong.

Plaintiffs concede that Section 104.1030 is the applicable statute, but then insist that they are entitled to benefits under Section 104.1030 contrary to its express language. The gist of Plaintiffs' argument is that benefits are payable to them under subsection 1 of Section 104.1030 because Laurel Beard had no surviving spouse or dependent children to whom survivor benefits would be payable under subsections 2 and 3 of Section 104.1030. Plaintiffs' interpretation of Section 104.1030 is contrary to the plain language of the statute. Nothing in Section 104.1030.1 (or any other MOSERS statute) provides that benefits are payable when a member dies before her annuity starting date without a surviving spouse or dependent children.

Plaintiffs assert that Section 104.1030.1 "specifically requires that if a vested member dies before their annuity starts that the annuity be paid" and that "[t]he only relevant portion of 104.1030 is [sic] section 1 which mandates that the annuity be paid." (Appellants' Brief, pp. 32-34). Section 104.1030.1, however, does not say "that the annuity be paid," but says that "the *applicable annuity provided in this section* shall be paid." (emphasis added).

Section 104.1030.1 does not in itself provide for the payment of any particular annuity or benefits. Instead, it says that the "applicable annuity" must be payable under the other subsections of Section 104.1030. Plaintiffs concede that there is no "applicable annuity" to which they are entitled under the other subsections of Section 104.1030. They are not spouses entitled to a survivor annuity under subsection 2, and they are not dependent children entitled to a survivor annuity under subsection 3. Section 104.1030

simply does not provide for the payment of a survivor annuity or any other type of benefits when, as here, the member dies before her annuity starting date without a surviving spouse or dependent children.

Next, Plaintiffs assert that “[n]othing in the remaining sections of 104.1030 RSMo. contradicts the statement that a vested members [sic] earned benefits will be paid if the member dies before the annuity start date.” (Appellants’ Brief, p. 34). Section 104.1030.1, however, does not state that any so-called “earned benefits” will be paid.

Plaintiffs also argue that the word “section” in Section 104.1030.1 is not defined, that the phrase “this section” in Section 104.1030.1 refers to the entire year 2000 plan, and that Section 104.1030.1 allows for the payment of benefits provided under other sections of the year 2000 plan outside of Section 104.1030. (Appellants’ Brief, p. 35). Plaintiffs’ argument is plainly wrong.

Section 104.1030.1 clearly states that “the applicable annuity provided in *this section* shall be paid.” (emphasis added). The word “section” in Section 104.1030.1 does not need to be defined because Section 104.1030.1 uses the phrase “*this section*,” which clearly means Section 104.1030 and only Section 104.1030. The phrase “this section” is found in a subsection of Section 104.1030—subsection 1—and refers to the entirety of Section 104.1030. *See Kansas City v. Travelers Ins. Co.*, 284 S.W.2d 874, 877 (Mo. App. 1955) (“Generally, when the words ‘this section’ are used, they mean the entire section, and unless the contrary clearly appears, they must be so construed.”).

The word “section” in Section 104.1030.1 is singular, not plural. The entire year 2000 plan is not one statutory “section” of Chapter 104, but, instead, is comprised of

several statutory “sections” in Chapter 104 from Section 104.1003 to Section 104.1093. Section 104.1006 creates the “Year 2000 Plan,” and Section 104.1003(26) defines “Year 2000 plan” as “the benefit plan created by *sections* 104.1003 to 104.1093.” (emphasis added). Each section of the year 2000 plan (and each section of the Missouri statutes) is separately numbered. Thus, the phrase “this section” in Section 104.1030.1 means one specific section of the year 2000 plan—Section 104.1030—and does not include any other section of the year 2000 plan (or the Missouri statutes).

As Plaintiffs acknowledge (Appellants’ Brief, p. 34), Section 104.1030 is the year 2000 plan counterpart to Section 104.420, which applies to the closed plan. Both Section 104.1030 and 104.420 are structured the same; both statutes provide for survivor benefits for spouses and dependent children. Section 104.420 does expressly provide: “No benefit is payable pursuant to this section if no eligible surviving spouse or children under twenty-one years of age survive the member....” RSMo § 104.420.3. While Section 104.1030 does not contain a similar express provision, it is implicit in Section 104.1030 that no benefits are payable if the member dies before her annuity starting date without a surviving spouse or dependent children. It is illogical and counterintuitive that the legislature intended to treat such members of the year 2000 plan differently than similarly-situated members of the closed plan.

If the legislature intended for the payment of benefits notwithstanding the absence of any surviving spouse or dependent children, the legislature would have so provided in Section 104.1030. It did not do so. The Court cannot rewrite the statute to provide what the legislature has not provided.

E. The benefit option selected by Laurel Beard confirms that no benefits are payable because Laurel Beard died before her annuity starting date and never received an annuity.

While Plaintiffs maintain that they are entitled to some annuity under Section 104.1030.1, they never specify the annuity to which they are supposedly entitled. This is not surprising because the annuity that would have been payable if Laurel Beard had been living on her August 1, 2009 annuity starting date is found in Option 4 of Section 104.1027.1, and this statute plainly confirms that no benefits are payable because Laurel Beard died before her annuity starting date and never received an annuity.

In her retirement election form, Laurel Beard elected the retirement benefit option found in Option 4 of Section 104.1027.1 in the year 2000 plan. (A2; LF 89; Appellants' Exhibits, p. 59).⁶ Option 4 of Section 104.1027.1 provides: "A *retiree's* life annuity shall be reduced to ninety percent of the annuity otherwise payable. If the *retiree* dies before having received one hundred eighty monthly payments, the reduced annuity shall be continued for the remainder of the one hundred eighty-month period to the *retiree's* designated beneficiary..." (emphasis added). A "retiree" is expressly defined as "*a person receiving an annuity* from the year 2000 plan based upon the person's employment record." RSMo § 104.1003(22) (emphasis added). Laurel Beard was never

⁶ This benefit option exists only in the year 2000 plan and does not exist in the closed plan. Compare RSMo § 104.395.1 (closed plan benefit payment options) with RSMo § 104.1027.1 (year 2000 plan benefit payment options).

a “retiree” because she died before her annuity starting date and, thus, never received an annuity. Accordingly, because Laurel Beard was never a “retiree,” the condition upon which Plaintiffs would receive retirement benefits—“[i]f the *retiree* dies before having received” 180 monthly payments—was never satisfied and no retirement benefits (or any other type of benefits) are payable to Plaintiffs under Option 4 of Section 104.1027.1 (or any other MOSERS statute).

* * *

In sum, Plaintiffs’ argument on appeal is not grounded in the text of the MOSERS statutes, but is simply a request that the Court ignore the outcome dictated by the MOSERS statutes because Plaintiffs believe that outcome is somehow unfair to Plaintiffs. The Court must enforce the MOSERS statutes as written. Under the plain language of the MOSERS statutes, Plaintiffs are not entitled to any benefits. The Court, therefore, should affirm the trial court’s judgment in favor of MOSERS and against Plaintiffs.

III. The trial court correctly determined that Section 104.1030 is constitutional because Plaintiffs have not been deprived of any constitutional rights in that no retirement benefits are payable under the MOSERS statutes and Section 104.1030 does not deprive Plaintiffs of any fundamental rights, due process, or equal protection of law. (Responds to Plaintiffs' Point One).

At trial and on appeal, Plaintiffs have limited their constitutional challenge to Section 104.1030. The trial court rejected Plaintiffs' constitutional challenge and held that Section 104.1030 is constitutional. This Court should affirm the trial court's ruling because: (a) Plaintiffs' Second Amended Petition fails to state a cognizable claim for violation of Plaintiffs' constitutional rights; and (b) Plaintiffs have not been deprived of any constitutional rights.

A. Plaintiffs' Second Amended Petition fails to state a cognizable claim for violation of Plaintiffs' constitutional rights because Plaintiffs have failed to allege any facts to support their contention that Section 104.1030 is unconstitutional.

The Court need not consider Plaintiffs' constitutional challenge to Section 104.1030 because Plaintiffs did not properly raise this challenge in the trial court. "It 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." *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (quotation omitted). "To properly raise a constitutional question, one must: (1) raise the constitutional question at the first available opportunity;

(2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.” *Id.*

In Count III of their Second Amended Petition, Plaintiffs purport to challenge the validity of several MOSERS statutes, including Sections 104.401, 104.420, 104.1027, and 104.1030. (LF 63-64). Plaintiffs allege that these statutes are “unconstitutional and violate: ... plaintiffs’ right to equal protection of the law, guaranteed by Article I, Section 2 of the Missouri Constitution, plaintiffs’ right to due process of law, guaranteed by Article I, Section 10 of the Missouri Constitution, [and] plaintiffs’ right to certain remedy for every injury, guaranteed by Article I, Section 13 of the Missouri Constitution.” (LF 63-64). Plaintiffs further allege that “[t]he validity of the statute(s) ... violate[s] Plaintiffs’ constitutional rights” and that “[a]s a direct result of the violations of Plaintiffs’ rights, Plaintiffs have been deprived of, injured in and suffered damages to their property and liberty interests.” (LF 64). Plaintiffs also allege that Laurel Beard “had a protected property interest in her compensation, including her retirement benefits,” “had a protected property and liberty interest in reaping the fruits of her labor, to wit: the money owed as part of the contractual and/or statutorily vested retirement benefits,” “and had a protected property and liberty interest in transferring or disposing of her property to her beneficiaries, heirs and objects of her bounty Theresa Beard and Beth Carll, Plaintiffs herein.” (LF 59). Plaintiffs further allege that “Plaintiffs Theresa Beard and Beth Carll have a protected property and liberty interest in the vested retirement benefits as the

designated beneficiaries and sole legal heirs of their mother Laurel Beard....” (LF 61-62). Plaintiffs allege that all of these purported rights “are protected by the Constitution of the State of Missouri and the Constitution of the United States and are part of the fundamental rights and liberties that are deeply rooted in our state and nation’s history and implicit in the concept of ordered liberty.” (LF 59, 62).

In their Second Amended Petition, Plaintiffs allege no facts or grounds as to how Section 104.1030 is unconstitutional. Instead, they simply allege in a conclusory manner, without any supporting facts, that Section 104.1030 violates Plaintiffs’ “right to equal protection,” “right to due process of law,” or “right to certain remedy for every injury.” (LF 63-64). This does not suffice to state a constitutional challenge to a statute. “The party challenging the constitutionality of a statute must plead facts to rebut the presumption of constitutionality. And it is not sufficient that certain sections of the Constitution be set out and the assertion made that rights of appellant thereunder have been violated, but the facts which constituted such violation must be set out.” *Leiser v. City of Wildwood*, 59 S.W.3d 597, 606 (Mo. App. E.D. 2001); *see also Massage Therapy Training Institute, LLC v. Missouri State Bd. of Therapeutic Massage*, 65 S.W.3d 601, 609 (Mo. App. S.D. 2002) (petition is insufficient to challenge legislative enactment if it does not plead facts showing a constitutional violation); *Callier v. Director of Revenue*, 780 S.W.2d 639, 642 (Mo. banc 1989) (“The petition ... pleads no facts showing a constitutional violation. It is patently insufficient to raise a constitutional issue and a question concerning the validity of [the statute].”); *State ex rel. Chicago, R. I. & P. R. Co. v. Public Service Comm’n*, 429 S.W.2d 723, 726 (Mo. 1968) (“Merely asserting that

some provision of the constitution has been violated, without alleging any supporting facts, is the assertion of a legal conclusion and does not contain a satisfactory statement of facts.”). Because Plaintiffs’ Second Amended Petition is insufficient to raise any constitutional issue, Plaintiffs may not challenge the validity of Section 104.1030.

B. Plaintiffs have not been deprived of any constitutional rights.

Even if Plaintiffs properly pleaded a constitutional challenge, Plaintiffs have not been deprived of any constitutional rights. “This Court reviews a constitutional challenge to a statute *de novo*.” *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm’n*, 344 S.W.3d 160, 167 (Mo. banc 2011). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision.” *Id.* “The person challenging the statute’s validity bears the burden of proving the act clearly and undoubtedly violates the constitution.” *Id.*

In the argument section of their brief, Plaintiffs’ constitutional argument is two-fold. First, Plaintiffs contend that they have “fundamental rights” to benefits and that the denial of benefits under Section 104.1030 deprives them of substantive due process. Second, Plaintiffs contend that Section 104.1030 violates their rights to equal protection. Neither argument has any merit.⁷

⁷ In their point relied on, Plaintiffs also apparently intended to contend that Section 104.1030 violates unspecified provisions of the Missouri Constitution that “protect[] an individual’s natural right to the enjoyment of the gains from their own industry” and “provide[] that no law shall impair the obligations of contracts.” Plaintiffs have waived

1. Plaintiffs have not been deprived of any fundamental rights or due process.

Without citation to any authority, Plaintiffs repeatedly contend that they have fundamental rights to retirement benefits that they have been deprived of without due process. This Court, however, has previously held that retirement benefits are not fundamental rights under the United States Constitution or the Missouri Constitution. In *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005), this Court rejected a prisoner's claim that he had fundamental rights in his disability and retirement pension benefits such that statutes allowing his benefits to be used for the cost of his care violated substantive due process. This Court found "no authority holding that a disability pension

any constitutional challenge under these provisions because: (a) these unspecified provisions of the Missouri Constitution are mentioned nowhere in Plaintiffs' Second Amended Petition; and (b) Plaintiffs have not briefed these unspecified provisions beyond mentioning them in Plaintiffs' point relied on. *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) ("St. Louis County and CVC waived their article III, section 39(5) constitutional challenge by failing to raise it at the earliest opportunity."). In addition, while Plaintiffs' Second Amended Petition contends without any supporting factual allegations that Section 104.1030 violates "plaintiffs' right to certain remedy for every injury, guaranteed by Article I, Section 13 of the Missouri Constitution," (LF 63-64), Plaintiffs have abandoned this constitutional provision altogether on appeal.

is a fundamental right or liberty deeply rooted in the nation’s history and tradition.” *Id.*; *see also In re Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003) (husband did not have a fundamental right to equitable division of wife’s teacher retirement benefits upon marital dissolution). Plaintiffs cite no authority to the contrary.

The Missouri Constitution does not provide any retirement benefits, so Plaintiffs cannot have any fundamental right to retirement benefits. Instead, the extent of a governmental employee’s rights to retirement benefits is determined solely by statute. *Fraternal Order of Police Lodge #2 v. City of St. Joseph*, 8 S.W.3d 257, 264 (Mo. App. W.D. 1999). In turn, a governmental employee is not deprived of due process, any property, or any constitutional rights if she is denied retirement benefits to which she is not entitled under the governing statutes. *Geary v. Missouri State Employees’ Retirement System*, 878 S.W.2d 918, 925 (Mo. App. W.D. 1994). In *Geary*, the court rejected constitutional claims—identical to Plaintiffs’ claims here—brought by a MOSERS member who complained that MOSERS deprived him of property without due process of law when it denied him certain retirement benefits to which he was not entitled under the MOSERS statutes:

[T]he premise of Geary’s purported cause of action is misplaced. As we have held, Geary was ineligible for benefits based on his past legislative service until he retired as circuit judge. Therefore, he became entitled to receive such benefits on September 1, 1992, not February 5, 1987. Since he was not eligible for those benefits during the period from February 5, 1987

to September 1, 1992, he was not, and could not have been, deprived of property, with or without due process of law, and his claim must fail.

Id.

The MOSERS statutes govern whether Plaintiffs are entitled to any retirement benefits. Under the MOSERS statutes, Plaintiffs are not entitled to any retirement benefits because Laurel Beard did not fulfill one of the eligibility requirements for retirement benefits—being alive on her annuity starting date.⁸ Notwithstanding Plaintiffs’ protestations, Laurel Beard had no “vested and earned retirement benefits” under the MOSERS statutes. As a result, Plaintiffs have not been deprived of any property, with or without due process of law, by MOSERS’s denial of benefits pursuant to Section 104.1030. *Geary*, 878 S.W.2d at 925.

⁸ Plaintiffs are incorrect in arguing that Laurel Beard “did everything required of her to earn her retirement benefits.” (Appellants’ Brief, p. 29). Under the MOSERS statutes, retirement benefits are not payable unless the member is alive on her annuity starting date. RSMo § 104.1030. If the member is not alive on her annuity starting date, the only potential benefits are survivor benefits payable to a member’s surviving spouse or dependent children. *Id.*

2. Plaintiffs have not been deprived of equal protection of law.

In the argument section of their brief, Plaintiffs also contend that Section 104.1030 “violates the equal protection of all citizens because it treats employees unequally under the law.” (Appellants’ Brief, p. 26). Plaintiffs have waived any purported equal protection challenge to Section 104.1030 because: (a) Plaintiffs’ Second Amended Petition contains no facts or grounds as to how Section 104.1030 purportedly violates Plaintiffs’ equal protection rights; and (b) Plaintiffs’ point relied on does not mention any alleged equal protection violation. But even if considered, Plaintiffs’ equal protection challenge to Section 104.1030 is meritless. Indeed, Plaintiffs fail to cite a single authority to support their equal protection challenge.

This Court has repeatedly summarized the standards governing equal protection challenges to a statute:

As to an equal protection challenge, the first step is to determine whether the challenged statutory classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. If so, the classification is subject to strict judicial scrutiny to determine whether it is necessary to accomplish a compelling state interest. Otherwise, review is limited to a determination of whether the classification is rationally related to a legitimate state interest.

A class receiving heightened scrutiny in equal protection analysis includes race, alienage, national origin, gender, and illegitimacy. As for fundamental rights, those requiring strict scrutiny are the rights to interstate

travel, to vote, free speech, and other rights explicitly or implicitly guaranteed by the Constitution....

As to the rational basis for the statutes, there only need be a conceivably rational basis to uphold the regulatory scheme. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. banc 2004) (citations omitted).

Section 104.1030 treats all members the same. If *any* member dies before her “annuity starting date,” Section 104.1030 governs the survivor benefits, if any, that are payable. MOSERS has treated Laurel Beard (and Plaintiffs) the same as any other member who has died before her annuity starting date. The fact that Section 104.1030 provides for survivor benefits in some circumstances (*i.e.*, when there is a surviving spouse or dependent children), but not in other circumstances (*i.e.*, when there is no surviving spouse or dependent children), is not a denial of equal protection because all similarly-situated members are treated the same.

In essence, Plaintiffs are complaining because they are not within the class of persons eligible for survivor benefits under Section 104.1030. Plaintiffs and other adult children of MOSERS members are not members of any suspect class. Moreover, as discussed above, there is no fundamental right to receive retirement or survivor benefits under a pension system. *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005). Consequently, review of Section 104.1030 is limited to a determination of whether the classification is rationally related to a legitimate state interest, meaning there only

need be a conceivably rational basis to uphold the statute. *United C.O.D.*, 150 S.W.3d at 313. “Review under this standard is not an opportunity for this Court to question the wisdom, fairness, or logic of legislative choices.” *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm’n*, 344 S.W.3d 160, 170 (Mo. banc 2011). “Instead, all that is required is that this Court find a plausible reason for the classification in question.” *Id.*

In enacting Section 104.1030, the legislature could rationally determine that survivor benefits should be paid when a member dies before her annuity starting date only if the member has a surviving spouse or minor or incapacitated children because a member’s spouse or minor or incapacitated children presumably were the member’s dependents and relied on the member for financial support when the member died. Similarly, the legislature could rationally determine that a member’s adult children (and parents, siblings, and other relatives) are not entitled to survivor benefits because they presumably were not the member’s dependents and did not rely on the member for financial support when the member died.⁹

In *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774-75 (Mo. banc 2003), this Court held that a state statute allowing dependent relatives of an adult child, but not nondependent relatives of an adult child, to recover workers’ compensation death benefits based on the adult child’s work accident did not deprive the

⁹ Section 104.1030.3 does provide survivor benefits for a member’s adult children who are “found totally incapacitated by a court of competent jurisdiction.”

equal protection rights of nondependent relatives. After concluding that the classification did not involve any suspect class or impinge upon a fundamental right, the Court found that the statute passed constitutional muster under rational basis review:

No doubt the legislature sought to allow recovery to those financially harmed by the death of an employee, by providing for burial expenses to anyone who paid them and by providing additional compensation to those reliant on the wages the deceased provided. Excluding nondependent heirs is rationally related to a legitimate purpose of compensating those financially harmed and thus does not offend notions of equal protection.

Id. at 775. The same reasoning applies to the legislature's choice in restricting survivor benefits under Section 104.1030 to spouses and dependent children of MOSERS members.

Moreover, in *Powell v. American Motors Corp.*, 834 S.W.2d 184, 189-91 (Mo. banc 1992), this Court held that allowing a spouse, but not parents or children, to assert a cause of action for loss of consortium does not violate the equal protection rights of parents and children. After concluding that "neither a denial of a fundamental right nor a suspect class is present in this case," this Court determined that there was a rational basis for allowing spouses, but not parents or children, to recover for loss of consortium and that whether parents or children should be allowed to recover for loss of consortium "is really a public policy decision that ... the legislature is best equipped to make." *Id.*

Similarly, in the present case, the choice where to draw the line as to which family members are eligible for survivor benefits under Section 104.1030 is a public policy

decision for the legislature to make. The choice made by the legislature in Section 104.1030 does not violate Plaintiffs' equal protection rights.

In sum, Plaintiffs have failed to plead any viable constitutional claims, and, in any event, Plaintiffs have not been deprived of any constitutional rights. The Court, therefore, should affirm the trial court's judgment in favor of MOSERS and against Plaintiffs.

CONCLUSION

For these reasons, the Court should affirm the trial court's judgment.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Allen D. Allred

Allen D. Allred, #26367

Jeffrey R. Fink, #44963

One US Bank Plaza

St. Louis, Missouri 63101

314-552-6000

FAX 314-552-7000

aallred@thompsoncoburn.com

jfink@thompsoncoburn.com

Attorneys for Defendant/Respondent
Missouri State Employees' Retirement System

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2012, I electronically filed the foregoing Respondent’s Brief with the Clerk of the Court using the Missouri eFiling System, which sent notification of such filing to:

Sidney E. Wheelan
Tatlow, Gump, Faiella, and Wheelan, LLC
110 North Fifth Street
Moberly, Missouri 65270

Ronald Hollinger
General Counsel
Broadway State Office Building
P.O. Box 899
Jefferson City, Missouri 65102

Attorneys for Plaintiffs/Appellants
Theresa Beard, Beth Carll, and
The Estate of Laurel Beard

Attorney for Defendant/Respondent
State of Missouri

/s/ Allen D. Allred_____

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rules 55.03 and 84.06, is proportionately spaced, using Times New Roman, 13 point type, and contains 12,441 words, excluding the cover, the certificate of service, the certificate of compliance required by Rule 84.06(c), and the signature block.

/s/ Allen D. Allred_____