Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Case No. SC 93092

IN THE SUPREME COURT OF MISSOURI

CLINT ZWEIFEL, TREASURER OF THE STATE OF MISSOURI,
Appellant,

v.

RAYMOND SKIRVIN,
Respondent

BRIEF OF *AMICUS CURIAE*
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS
IN SUPPORT OF RESPONDENT

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
Honorable Patricia S. Joyce, Judge

B. Michael Korte No. 27281
THE KORTE LAW FIRM, LLC
10900 Manchester Rd., #203
Kirkwood, MO 63122
Telephone: (314) 821-4727
Facsimile: (314) 821-4580
Email: mike@kortelaw.com

Attorney for *Amicus Curiae* Missouri Association of Trial Attorney

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

CONSENT OF PARTIES 3

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 5

POINTS RELIED ON 6

ARGUMENT 8

I. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT IS AN UNCONSTITUTIONAL DENIAL OR DELAY OF REMEDY IN VIOLATION OF ART. I SEC. 14 OF THE MISSOURI CONSTITUTION. 8

A. The workers' compensation system and the second injury fund fulfill the public policy of the State of Missouri to assist victims of work-related injuries and are the exclusive remedy to enforce that public policy. 8

B. Since a remedy was granted to Respondent by the Labor and Industrial Relations Commission, mandamus is the proper cause of action and should be granted. 11

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

C. The legislature's 2005 amendment of section 287.715.2 made it impossible for Appellant to pay all judgments awarded against the second injury fund. 13

D. Art. I Sec. 14 guarantees a remedy for all rights without sale, denial or delay, which extends to substitute remedies created by law; any denial of that remedy is unconstitutional. 16

E. The legislature's enactment of the 2005 amendment violates the open courts provision of the Missouri Constitution and is therefore invalid. 18

II. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT LEADS TO AN ABSURD RESULT. 22

A. The 2005 amendment to RSMo 287.715 makes it impossible for Appellant to pay valid claims against the second injury fund. 22

B. Statutory language which creates an illogical and absurd result is presumed to be invalid even under strict statutory construction. 22

C. The 2005 amendment is illogical, absurd and contrary to the public policy of the State of Missouri to relieve victims of work-related injuries from having to individually bear the burden of becoming charges upon society, and thus should be stricken from RSMo 287.715. 24

III. THE 2005 AMENDMENT CONTRAVENES THE PURPOSE OF THE SECOND INJURY FUND AND THE RESULTING INSUFFICIENT CAPITALIZATION OF THE FUND BY THE LEGISLATURE IS IMPOSING UNFAIRNESS, INEQUITY AND EXTREME HARDSHIP ON INJURED WORKERS. 26

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

TABLE OF AUTHORITIES

Supreme Court of Missouri

Ahern v. P & H, LLC, 254 S.W.3d 129 (Mo. Ct. App. E.D. 2008).....8, 25

Akins v. Dir. of Revenue, 303 S.W.3d 563 (Mo. 2010) 23

Allcorn v. Tap Enterprises, Inc., 277 S.W.3d 823 (Mo. App. S.D. 2009) 23

Anderson v. Ken Kauffman & Sons Excavating,

248 S.W.3d 101 (Mo. App. W.D. 2008) 23, 24

Breimhorst v. Beckman, 35 N.W.2d 719 (Minn. 1949)..... 18

DeMay v. Liberty Foundry Co., 537 S.W.2d 640 (Mo. 1931) 17, 18

Dubinsky v. St. Louis Blues Hockey Club,

229 S.W.3d 126 (Mo. App. E.D. 2007).....12, 14

Elrod v. Treas. of MO as Custodian of Second Injury Fund,

138 S.W.3d 714 (Mo. 2004)..... 13, 23, 24

Etling v. Westport Heating & Cooling Serv., Inc.,

92 S.W.3d 771 (Mo. banc 2003) 16

Federal Mut. Ins. Co. v. Carpenter, 371 S.W.2d 955 (Mo. 1963)..... 9, 20

Garrison v. Campbell "66" Express, Inc., 297 S.W.2d 22 (Mo. App. 1956).....10

Gervich v. Condaire, Inc., 370 S.W.3d 617 (Mo. 2012).....18

Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6 (Mo. 1992).....17

Hampton v. Chatwin, 505 P.2d 1037 (Ariz. 1973).....18

Harp v. Malone Freight Lines, Inc., 16 S.W.3d 667 (Mo. App. E.D. 2000) 23

Hillyard v. Hutter Oil Co., 978 S.W.2d 75 (Mo. App. S.D. 1998) 12, 23, 24

Injured Workers of Kansas v. Franklin, 942 P.2d 591 (Kan. 1997) 18

Jones v. Carnahan, 965 S.W.2d 209 (Mo. App. W.D. 1998) 12

Lahue v. Missouri State Treasurer, 820 S.W.2d 561 (Mo. App. W.D. 1991) 9, 10

Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240 (Mo. 2003).....24

Loven v. Greene County, 63 S.W.3d 278 (Mo. App. S.D. 2001).....10

Marbury v. Madison, 5 U.S. 137 (1803) 17

Meilves v. Morris, 422 S.W.2d 335 (Mo. 1968).....10

Missouri Highway and Trans. Comm'n v. Merritt,

204 S.W.3d 278 (Mo. App. E.D. 2006).....16

Park v. Rockwell Int'l Corp., 436 A.2d 1136 (N.H. 1981) 18

Pierson v. Treasurer of State, 126 S.W.3d 386 (Mo. banc 2004).....9

Schoemehl v. Treasurer of State, 217 S.W.3d 900 (Mo. banc 2007)..... 8, 25

Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Ore. 2001) 18

St. Louis Police Officers' Ass'n v. Bd. of Police Com'rs of City of St. Louis,

259 S.W.3d 526 (Mo. 2008).....12

State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42,

672 S.W.2d 99 (Mo. App. W.D. 1984) 17

State ex rel. Farley v. Jamison, 346 S.W.3d 397 (Mo. App. E.D. 2011).....12

State ex rel. KCP&L Greater Missouri Operations Co. v. Cook,

353 S.W.3d 14 (Mo. App. W.D., 2011) 12, 24, 25

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

State ex rel. Wolfhole, Inc. v. Scott County Soil and Water Conservation Dist.,

880 S.W.2d 908 (Mo. App. E.D. 1994).....12

State of Missouri v. Teer, 275 S.W.3d 258 (Mo. banc 2009).....11

Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966)..... 9, 10

Taylor v. Hubbell, 188 F.2d 106 (9th Cir. 1951).....18

Texas Workers' Compensation Commission v. Garcia,

893 S.W.2d 504 (Tex. 1995) 18

Tillotson v. St. Joseph Medical Center,

347 S.W.3d 511 (Mo. Ct. App. W.D. 2011).....23, 24

Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. E.D.1995) 10

Missouri Constitution

Mo. Const. Art. I Sec. 14.....17

Mo. Const. Art. IV Sec. 15.....25

Missouri Revised Statutes

Section 3317 RS 1929 9

Section 3709 RS 1939 9

§286.120 RSMo (Supp. 2008)..... 8

§287.010 et seq. RSMo (Supp. 2008)..... 8

§287.120 RSMo (Supp. 2008).....9, 13, 20

§287.220 RSMo (Supp. 2008).....11, 14, 15, 20, 25

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

§287.690 RSMo (Supp. 1993) 14

§287.690 RSMo (Supp. 2008) 8

§287.710 RSMo (Supp. 2008) 9, 14, 25

§287.713 RSMo (Supp. 2008) 15

§287.715 RSMo (Supp. 1988) 14

§287.715 RSMo (Supp. 1993) 14

§287.715 RSMo (Supp. 2008) 13, 14, 15, 25

§287.800 RSMo (Supp. 2008) 22

Other Sources

S.B. 1 & 130, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005) 13, 15, 25

W.D. Opinion 11, 12, 14, 15, 16, 19, 21, 22, 26

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization consisting of approximately 1,300 trial attorneys in Missouri and other states. For more than half a century, MATA members have advanced the interests and protected the rights of individuals throughout the State of Missouri MATA members have dedicated themselves to promoting the administration of justice, preserving the adversary system, and ensuring that those citizens of our State with a just cause will be afforded access to our courts.

MATA members represent injured employees both in their original workers' compensation claim and in regard to any claim that they may have against the Missouri second injury fund. MATA members are interested in this case because they are concerned that the current financial position of the second injury fund will impair the ability of not only current claimants, but also future unknown claimants to collect the judgments they have been awarded against the second injury fund through Missouri's workers' compensation system. The decision handed down by this court will affect all current and future claimants of the second injury fund.

This brief *amicus curiae* is submitted in support of the Plaintiff (Respondent) and addresses the issues presented for review in a broader and different perspective than the perspectives presented by the parties. In particular, MATA wishes to supplement Respondent's arguments by emphasizing and underscoring the significant policy considerations concerning the question as to whether mandamus should have been

granted in this instance. For these reasons, MATA members, on behalf of their clients, have a compelling interest in this case.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

CONSENT OF PARTIES

Counsel for Appellant Clint Zweifel and counsel for Respondent Raymond Skirvin have both consented to the filing of this brief.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

JURISDICTIONAL STATEMENT

MATA adopts Respondent's jurisdictional statement.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

STATEMENT OF FACTS

MATA adopts Respondent's Statement of Facts.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT IS AN UNCONSTITUTIONAL DENIAL OR DELAY OF REMEDY IN VIOLATION OF ART. I SEC. 14 OF THE MISSOURI CONSTITUTION.

Pierson v. Treasurer of State, 126 S.W.3d 386 (Mo. banc 2004)

Schoemehl v. Treasurer of State, 217 S.W.3d 900 (Mo. banc 2007)

Mo. Const. Art. I Sec. 14

§287.710 RSMo (Supp. 2008)

II. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT LEADS TO AN ABSURD RESULT.

Anderson v. Ken Kauffman & Sons Excavating, 248 S.W.3d 101 (Mo.App. W.D. 2008)

Elrod v. Treas. of MO as Custodian of Second Injury Fund, 138 S.W.3d 714 (Mo. 2004)

Hillyard v. Hutter Oil Co., 978 S.W.2d 75 (Mo.App. S.D.1998).

Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 519 (Mo. Ct. App. W.D. 2011)

III. THE 2005 AMENDMENT CONTRAVENES THE PURPOSE OF THE SECOND INJURY FUND AND THE RESULTING INSUFFICIENT CAPITALIZATION OF THE FUND BY THE LEGISLATURE IS IMPOSING UNFAIRNESS, INEQUITY AND EXTREME HARDSHIP ON INJURED WORKERS.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT IS AN UNCONSTITUTIONAL DENIAL OR DELAY OF REMEDY IN VIOLATION OF ART. I SEC. 14 OF THE MISSOURI CONSTITUTION.

A. The workers' compensation system and the second injury fund fulfill the public policy of the State of Missouri to assist victims of work-related injuries and are the exclusive remedy to enforce that public policy.

It is the public policy of the State of Missouri to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society. *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo. banc 2007); *Ahern v. P & H, LLC*, 254 S.W.3d 129, 134 (Mo. Ct. App. E.D. 2008). The Missouri Workers Compensation Law ("The Law") creates, defines and regulates the rights of injured workers and their dependents in regard to compensation for work-related injuries and deaths. §287.010 et seq. RSMo (Supp. 2008). The Law is administered by the State of Missouri's division of workers' compensation ("the division") and its director ("the Director"). §286.120 RSMo (Supp. 2008). The administration of The Law by the division is funded by a tax, separate from the surcharge used to capitalize the second injury fund ("the Fund"), on employers' net deposits, net premiums or net assessments. §287.690

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

RSMo (Supp. 2008). The tax collected for implementing the workers' compensation fund is expressly required by The Law, and is to be used for the purpose of making The Law effective. §287.710 RSMo (Supp. 2008). In order to truly fulfill the purpose of The Law, it was made the exclusive remedy for work-related injuries. §287.120 RSMo (Supp. 2008).

Some work-related injuries for which The Law provides compensation pursuant to this public policy are sustained by employees who are already suffering from pre-existing disabilities at the time of their work-related injury. *Id.* The provision of compensation for the enhancement by work-related injuries of workers' pre-existing disabilities is a long- and well-established principle of The Law. *See* Section 3317 RS 1929; Section 3709 RS 1939. Prior to the creation of the Fund, employers were obligated to pay all workers' compensation benefits awarded to their employees, including those employees suffering from pre-existing disabilities at the time of their work-related injuries. *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955, 957 (Mo. 1963).

Missouri's public policy appears to favor the principle that a pre-existing disability should not cause an otherwise capable worker to be denied work. *Stewart v. Johnson*, 398 S.W.2d 850, 853 (Mo.1966). To encourage employers to comply with this policy, the Missouri General Assembly ("the legislature") created the Fund. *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 563 (Mo.App. W.D.1991); *Pierson v. Treasurer of State*, 126 S.W.3d 386, 389-390 (Mo. banc 2004). The Law recognizes that employers have a financial incentive to discriminate against employees who have a pre-existing condition, and especially a serious condition, which renders them potentially more susceptible to a

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

greater degree of disability when compared to employees who have no such condition. *Loven v. Greene County*, 63 S.W.3d 278, 288 (Mo.App. S.D.2001); *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 617-618 (Mo.App. E.D.1995). Therefore, the legislature assumes that employers are less likely to employ people with preexisting disabilities because a given injury could result in greater disability to such a person than the same injury would to a person not suffering from such a previous disability. *Lahue* 820 S.W.2d at 563.

In order to effectuate both public policies, it is necessary not only that The Law partially, at least, relieve an employer of its liability to its employees for their disabilities not specifically attributable to injuries otherwise compensable according to The Law, but also that The Law protect employees by providing a fund from which an employee may be compensated for that portion, if any, of the employee's disabilities which exceed the disability attributable to the last injury alone. *Stewart* 398 S.W.2d at 853. Once the Fund was available, it was reasoned it would be more probable that employers would hire people with disabilities since employers could be reasonably certain that they would not be held liable for a worker's entire disability so long as the employee's disabilities qualified under the conditions set out in The Law for imposition of liability on the Fund. *Meilves v. Morris*, 422 S.W.2d 335, 338 (Mo.1968). While the Fund does provide compensation that would otherwise be provided by employers, duplication of compensation for disabilities is prevented. *Garrison v. Campbell "66" Express, Inc.*, 297 S.W.2d 22, 25 (Mo.App.1956).

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Thus, the purpose of the Fund is to fulfill the dual policies of the state of Missouri: to place the burden of work-related injuries on employers without causing the employer to pay for disabilities which are not specifically attributable to the work-related injury, and to encourage employment of workers' with pre-existing disabilities.

B. Since a remedy was granted to Respondent by the Labor and Industrial Relations Commission, mandamus is the proper cause of action and should be granted.

On May 6, 2011, the Missouri Labor and Industrial Relations Commission entered an award determining Respondent to be permanently disabled and requiring the Fund to pay compensation to Respondent. *W.D. Opinion*, 2. Appellant concedes that Respondent is legally entitled to the full amount of the award. *W.D. Opinion*, 2.

Section 287.220 provides:

> All cases of permanent disability where there has been previous disability shall be compensated as herein provided.... out of a special fund known as the Fund hereinafter provided for.... The state treasurer shall be the custodian of the Fund.... Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the Fund *shall* be issued. §287.220 RSMo (Supp. 2008)(emphasis added).

Section 287.220 creates a mandatory duty on the part of the State of Missouri to pay awards from the Fund to deserving claimants. The use of the word "shall" generally prescribes or connotes a mandatory duty. *State of Missouri v. Teer*, 275 S.W.3d 258, 261

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

(Mo. banc 2009); *St. Louis Police Officers' Ass'n v. Bd. of Police Com'rs of City of St. Louis*, 259 S.W.3d 526, 528-529 (Mo. 2008). The dissenting and concurring opinions of the court of appeals in this case agree: the obligations of the Director and Appellant are clear and unequivocal. The Director must requisition payment to pay valid awards, and Appellant must pay those awards pursuant to the warrants issued by the Director. No discretion is afforded. *W.D. Opinion*, 11. "When a statute mandates that something be done by stating that it 'shall' occur ... it is clear that it is mandatory and must be observed." *State ex rel. Farley v. Jamison*, 346 S.W.3d 397, 399 (Mo. App. E.D. 2011). The clear wording of The Law legally mandates payment.

Whether mandamus is appropriate is determined by the wording of the statute. *Jones v. Carnahan*, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). Mandamus is appropriate when the act to be performed is ministerial and not discretionary. *State ex rel. Wolfhole, Inc. v. Scott County Soil and Water Conservation Dist.*, 880 S.W.2d 908, 910 (Mo. App. E.D. 1994). A ministerial act is an act an official is required to perform by the law based on a given set of facts. *Jones* 965 S.W.2d at 212-213.

A court cannot read discretion into a statute where none exists. Courts must give full effect to the language used by the legislature and cannot read into the statute intent that is not evidenced by the plain language of the statute. *State ex rel. KCP&L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 17-18 (Mo. App. W.D., 2011); *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007). The only subordinate canons of construction that may be applied are those that subserve rather than subvert legislative intent. *Hillyard v. Hutter Oil Co.*, 978 S.W.2d 75, 78 (Mo.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

App. S.D. 1998); *Elrod v. Treas. of MO as Custodian of Second Injury Fund*, 138 S.W.3d 714, 716 (Mo.2004).

Here, according to the clear provisions of The Law, the act of paying judgments against the Fund is ministerial. The plain language of section 287.220.1 leaves no room for interpreting the word "shall" as discretionary. Therefore, mandamus is properly granted.

C. The legislature's 2005 amendment of section 287.715.2 made it impossible for Appellant to pay all judgments awarded against the Fund.

The legislature amended section 287.715.2 in 2005 ("the 2005 amendment") to include the words "not to exceed three percent". S.B. 1 & 130 , 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). The cap on the surcharge established by adding the words "not to exceed three percent" to section 287.715.2 eliminated the Director's authority to set the surcharge at a level necessary to comply with the public policy of the State to provide sufficient capital for the Fund. S.B. 1 & 130 (Mo. 2005). The Law now expressly limits the source of claimants' compensation for that portion of their permanent workplace disabilities attributable to preexisting injuries to the Fund, while at the same time limiting the Fund's revenue, thus preventing Appellant and the Director from being able to pay that compensation. §§287.120, 287.715 RSMo (Supp. 2008). The situation is untenable.

Historically, the Fund has been capitalized by various methods which have been amended from time to time by the legislature. In 1988, the legislature rewrote section 287.715 to authorize the assessment of a surcharge against self-insureds' or policyholders' net deposits, net premiums or net assessment as a capitalization

mechanism for the Fund. §287.715 RSMo (Supp. 1988). In 1993, the legislature deleted language in section 287.690 which had previously provided that the tax it authorized in regard to the administration of the Missouri workers' compensation system by the general workers' compensation fund also provided for the maintenance of the Fund. §287.690 RSMo (Supp. 1993).

Pursuant to the 1993 amendments, section 287.715.2 continued to cap the previously-imposed maximum allowable surcharge at three percent through December 31, 1993. §287.715 RSMo (Supp. 1993). However, each year thereafter the Director was directed to estimate the amount of benefits payable from the Fund during the ensuing calendar year and to calculate the total amount of the annual surcharge, rounded up to the nearest one-half of a percentage point, that generated, as nearly as possible, one hundred ten percent of the amounts projected to be paid from the Fund in the ensuing calendar year after deducting any amounts contained in the Fund at the end of the previous calendar year. *Id.*

As noted by the majority opinion ("the majority opinion") of the court of appeals in this matter, the obvious effect of this amendment was to eliminate the previously-imposed cap on the surcharge, and to permit the Director to annually set the surcharge in an amount sufficient to pay the Fund's anticipated obligations, while also building a reserve in the Fund. *W.D. Opinion*, 27. Thus, sections 287.715, 287.220.6, and 287.710, when taken as a whole, indicate that actuarial soundness and continued solvency is the principle at the heart of the Fund's capitalization mechanism. §§287.220.6, 287.710, 287.715 RSMo (Supp. 2008).

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

As stated by the majority opinion, the evolution of the legislature's commitment to capitalization of the Fund is revealing. *W.D. Opinion*, 29. From the creation of the Fund in 1951 until 2005, the legislature had steadfastly insured that the capitalization of the Fund would be sufficient to serve the public policy of the State of relieving victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society. The legislature repeatedly fulfilled this commitment by periodically and responsibly adjusting authorized assessments or surcharges allocated to the Fund, by requiring annual reports and periodic actuarial studies intended to determine the solvency and appropriate capitalization level of the Fund, and by making budget requests for payments from the Fund. §§287.220.6, 287.713 RSMo (Supp. 2008). This capitalization mechanism served the public policy of the State well, by sufficiently funding the Fund for more than four decades.

The 2005 amendment imposed an inflexible maximum amount that could be levied as a surcharge to capitalize the Fund. S.B. 1 & 130, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). At the time the legislature enacted the 2005 amendment, it was aware of the purpose of the surcharge to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society, and had already been informed by the fiscal note to the 2005 amendment that the limitation would result in the Fund’s inability to pay valid claims made against it. *Appendix*, 7. The Law continued to permit the Director to cover shortfalls in the Fund by advances from the general workers' compensation fund, but no such advance was made. §287.715 RSMo (Supp. 2008).

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

The record in this case clearly demonstrates that the capitalization of the Fund is inadequate to pay all claims in full, and requires delay, reduction or denial in payment of valid claims. *W.D. Opinion*, 3-5. This inadequacy is because of the voluntary choice of the State and not because of the State's inability to provide capitalization for the Fund. The State designed the capitalization mechanism for the Fund. The Fund's history demonstrates that the method and extent of its capitalization is controlled by legislative action.

The majority opinion notes that issuance of a writ of mandamus would be proper in this matter but for Appellant's practical inability to pay all judgments awarded against the Fund due to the lack of sufficient capitalization of the Fund. *W.D. Opinion*, 13. But for the 2005 amendment, Appellant would be able to comply with the writ requested in this case, as well as to pay the hundreds of other actual and potential actions seeking judgments against the Fund currently at various stages of determination.

D. Art. I Sec. 14 guarantees a remedy for all rights without sale, denial or delay, which extends to substitute remedies created by law; any denial of that remedy is unconstitutional.

The open courts provision of the Missouri Constitution is a procedural safeguard that ensures that claimants have access to the courts when they have a legitimate claim recognized by law. *Etling v. Westport Heating & Cooling Serv., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003). "...Article I, Section 14, prohibits any law that unreasonably or arbitrarily bars individuals or classes of individuals from accessing the courts in order to enforce recognized causes of action...". *Missouri Highway and Trans. Comm'n v. Merritt*,

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

204 S.W.3d 278, 285 (Mo.App. E.D.2006). The elimination of a recognized common-law remedy comports with the open courts guarantee only where the legislature provides an adequate substitute. "The laws may be changed by the legislature so long as they do not destroy or prevent an adequate enforcement of vested rights." *DeMay v. Liberty Foundry Co.,* 537 S.W.2d 640, 647 (Mo. 1931) (quoting *Middleton v. Texas Power & Light Co.,* 185 S.W. 556, 560, 561(Tex.1916)). Therefore, a violation of Art. I Sec. 14 occurs where there is a denial of access to courts in the absence of a meaningful alternative. *Goodrum v. Asplundh Tree Expert Co.,* 824 S.W.2d 6, 10 (Mo. 1992).

As noted by the dissent to the majority opinion, it has long been recognized that the "very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). "Where there is a right, there is a remedy. The essential doctrine is a precept of our law." *State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 109 (Mo. App. W.D. 1984). This "every wrong shall have a remedy" principle is deeply rooted in our nation's culture, and the people of Missouri preserved it in the Bill of Rights in the Missouri Constitution in the "open courts" provision of Art. I Sec. 14, which states:

> That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay. Mo. Const. Art. I Sec. 14

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

The workers' compensation law is a substitution for potential tort claims against employers. *Park v. Rockwell Int'l Corp.*, 436 A.2d 1136, 1138 (N.H. 1981). The legislature, having established an exclusive substitute remedy, cannot constitutionally proceed to emasculate that remedy by amendments to a point where it is no longer a viable and sufficient substitute remedy. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 338-51 (Ore. 2001); *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 622-623 (Kan. 1997). A right without a meaningful opportunity to exercise it is really no right at all. *Taylor v. Hubbell*, 188 F.2d 106 (9th Cir. 1951); *Hampton v. Chatwin*, 505 P.2d 1037 (Ariz. 1973).

Amendments to statutory provisions can render benefits so inadequate as to run afoul of the open courts doctrine. *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504, 517 (Tex. 1995). If a statutory provision so erodes a remedy that it is no longer meaningful or adequate, the statute must be struck down as a violation of Art. 1 Sec. 14. "The laws may be changed by the legislature so long as they do not destroy or prevent an adequate enforcement of vested rights." *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640, 648 (Mo. 1931). *See also Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 623 (Mo. 2012). "There is unquestionably a limit in these [workers' compensation] matters, beyond which, if the legislature should go, the courts could and would declare their action invalid." *Breimhorst v. Beckman*, 35 N.W.2d 719, 734 (Minn. 1949).

E. The legislature's enactment of the 2005 amendment violates the open courts provision of the Missouri Constitution and is therefore invalid.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

The 2005 amendment erodes the substitute remedy created by the workers' compensation system and the Fund to the point where it is no longer meaningful or adequate; it must be declared invalid. The majority opinion concludes mandamus cannot issue to compel payment from the Fund as long as the Fund is unable to pay all its current obligations. *W.D. Opinion*, 31. The majority opinion crystallizes and ripens the issue of whether the three percent limitation on the surcharge imposed by the 2005 amendment creates a denial or delay of remedy for review by this Court. *W.D. Opinion*, 37.

This case was transferred to this Court by the court of appeals due to its concern about the potential constitutional ramifications of the under-capitalization of the Fund in light of the "open courts" provision set forth in Art. I, Sec. 14 of the Missouri Constitution. *W.D. Opinion*, 37. Specifically at issue is the constitutionality of the legislature's cap on the surcharge imposed by the 2005 amendment, considering the combined effect of the legislature's mandate that recovery by an injured employee for the enhancement of the employee's pre-existing disabilities is exclusively restricted to the Fund and the practical impossibility of a claimant receiving that recovery despite the public policy of the State to capitalize the Fund in order to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society.

The record in this case shows that the Fund is drastically and intentionally under-capitalized; there is not enough money to pay every claimant the amount to which he or she has been finally adjudicated to be entitled from the State. *W.D. Opinion*, 3-5. The purposes of the Fund are not being met. Claimants with valid claims are not being

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

compensated. Victims of work-related injuries are bearing the burden of misfortune or becoming charges upon society. Employment of the partially disabled is being discouraged. The immunity of employers from their employees' claims for compensation for permanent disabilities that are not entirely attributable to work-related injuries is now clearly in jeopardy; the failure of The Fund to provide compensation for those injuries suggests, if not requires, that liability for the compensation previously provided by the Fund must now revert to employers. Prior to the creation of The Fund, employers were obligated to pay all workers' compensation benefits awarded to their employees, including those employees suffering from pre-existing disabilities at the time of their work-related injuries. *Federal Mut. Ins. Co. v. Carpenter*, 371 S.W.2d 955, 957 (Mo. 1963). The inability of The Fund to pay claims made against it will inevitably invite claimants to seek payment of those claims from employers.

Nevertheless, when a worker suffers a work-related injury resulting in the enhancement of a pre-existing permanent disability, section 287.120 currently extinguishes the liability of employers for such disabilities and limits such claims to be made against the Fund. §287.120 RSMo (Supp. 2008). The Law not only creates the claim against the Fund, but also limits the source of payment for those claims to the Fund. §287.220 RSMo (Supp. 2008). The Law, therefore, creates both a substantive right and the exclusive remedy to enforce that right.

Whether payments to claimants are delayed, reduced, deferred or otherwise denied to those with valid claims against the Fund, the rights at issue here were created by the legislature, and claimants are seeking access to the exclusive remedy devised and

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

implemented by the legislature. Inadequate capitalization of the Fund by the legislature emasculates that remedy and there is no substitute available.

As stated by the Circuit Court, "...[T]here's got to be a remedy for this situation. And these are people that obviously absolutely need their money. I mean, this is an embarrassment to the State of Missouri that we do not have adequate funds to pay people that were injured while they were doing hard work. And something needs to be done to remedy this situation." *W.D. Opinion*, 6. The majority opinion shares the Circuit Court's view, noting that the insufficient capitalization of the Fund by the legislature is imposing unfairness, inequity and extreme hardship on injured workers who possess largely unrecoverable judgments against their exclusive source of recovery, acknowledging (as noted by the concurring opinion) that its refusal to issue the writ of mandamus requested by Respondent is neither satisfying nor equitable for the hundreds of claimants who are not receiving timely payment of their claims against the Fund. *W.D. Opinion*, 32-34.

The 2005 amendment prevents the Fund from paying valid claims made against it, and, by doing so, eliminates claimants' underlying substantive rights. By eliminating the only remedy available to claimants, the 2005 amendment has rendered their substantial rights a nullity that exists only in the abstract. There is no other way to enforce those rights, except as against the Fund. The legislature has created a situation where there is a substantial right without a remedy. By denying a remedy from the Fund for the right created by The Law in accordance with the public policy of the State, the language denying that remedy in the 2005 amendment violates Art. I Sec. 14 of the Missouri Constitution.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

II. THE TRIAL COURT PROPERLY GRANTED THE WRIT OF MANDAMUS BECAUSE MANDAMUS IS THE APPROPRIATE REMEDY AND THE IMPEDIMENT TO THAT REMEDY IN THE FORM OF THE THREE PERCENT LIMITATION ON THE SURCHARGE USED TO CAPITALIZE THE SECOND INJURY FUND IS VOID IN THAT IT LEADS TO AN ABSURD RESULT.

A. The 2005 amendment to RSMo 287.715 makes it impossible for Appellant to pay valid claims against the Fund.

As discussed more fully in Point I, Appellant concedes that Respondent has a valid judgment against the Fund. *W.D. Opinion*, 2. Mandamus would be proper if not for the current insufficiency of the Fund. Only Appellant's consideration of the practical impossibility of paying all of the actual and potentially valid claims against The Fund has caused Appellant to refuse to satisfy Respondent's judgment. The three percent limitation on the surcharge used to capitalize the Fund created by the legislature by the 2005 amendment is the only cause of Appellant's refusal.

B. Statutory language which creates an illogical and absurd result is presumed to be invalid even under strict statutory construction.

Regardless of the constitutionality of the 2005 amendment, its provision restricting the surcharge to no more than three percent creates an illogical and absurd result and should be stricken from The Law.

Chapter 287 is to be strictly construed. §287.800 RSMo (Supp. 2008). However, "the rule of strict construction does not mean that the statute shall be construed in a

narrow or stingy manner...". *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009) (citing 82 C.J.S. Statutes § 376 (1999)). All laws are passed with a view to the welfare of the community at large. *Hillyard v. Hutter Oil Co.*, 978 S.W.2d 75, 78 (Mo.App. S.D.1998).

A Court may look beyond the plain language of a statute if the plain language leads to an absurd or illogical result. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. 2010) (citing *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. banc 1998)). Statutes should be construed so as to avoid illogical, unjust or absurd results. *Elrod v. Treas. of MO as Custodian of Second Injury Fund*, 138 S.W.3d 714 (Mo. 2004); *Anderson v. Ken Kauffman & Sons Excavating*, 248 S.W.3d 101 (Mo.App. W.D. 2008); *Harp v. Malone Freight Lines, Inc.*, 16 S.W.3d 667 (Mo.App. E.D.2000). When a statute's plain meaning would lead to an illogical result, extrinsic matters such as the statute's history and legislative intent may be considered; *Anderson* 248 S.W.3d at 109.

The legislature is presumed to know the subject matter of The Workers' Compensation Law. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 519 (Mo. Ct. App. W.D. 2011). A section of a statute should not be read in isolation from the context of the whole statute. *Hillyard* 978 S.W.2d at 78. Different sections of a statute bearing on the same subject must be harmonized, if possible; apparently conflicting provisions must be reconciled, if possible, with the general purpose of the legislature in enacting the provisions in question, so as to resolve any ambiguity or obscurity in a statute in favor of an interpretation of the provisions that will best meet the demands of natural justice. *Anderson* 248 S.W.3d at 107.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Where a statute is amended only in part, it is presumed that the legislature intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act. *Tillotson* 347 S.W.3d at 519. Courts are not authorized to read a legislative intent into a statute that is contrary to the intent made evident by the plain and ordinary meaning of the statutory language as a whole, and must give full effect to the language used by the legislature. *State ex rel. KCP&L Greater Missouri Operations Co. v. Cook*, 353 S.W.3d 14, 17-18 (Mo. App. W.D., 2011); *Dubinsky v. St. Louis Blues Hockey Club*, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007). Once the intent of the legislature in regard to a statute has been determined, courts must effectuate that intent if possible. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251-252 (Mo. 2003). The only subordinate canons of construction that may be applied are those that subserve rather than subvert legislative intent. *Hillyard* 978 S.W.2d at 78; *Elrod v. Treas. of MO as Custodian of Second Injury Fund*, 138 S.W.3d 714, 716 (Mo.2004).

C. The 2005 amendment is illogical, absurd and contrary to the public policy of the State of Missouri to relieve victims of work-related injuries from having to individually bear the burden of becoming charges upon society, and thus should be stricken from RSMo 287.715.

The reason for a law should prevail over the letter of the law. Thus, courts, in extreme cases, may strike out words or clauses as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature. *Anderson* 248 S.W.3d at 107.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

The 2005 amendment requires the Director to set a surcharge at a rate sufficient to meet the needs of the upcoming fiscal year and also requires that surcharge to be no more than three percent. S.B. 1 & 130, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). The Fund must be capitalized so as to effectuate the public policy of the State to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society. *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo. banc 2007); *Ahern v. P & H, LLC*, 254 S.W.3d 129 (Mo. Ct. App. E.D. 2008). This was still the purpose of The Law after the 2005 amendment. *Ahern* 254 S.W.3d at 134. This Court cannot ignore the plain language of The Law, in accordance with the public policy of Missouri, mandating that all cases of permanent disability where there has been previous disability shall be compensated, so as to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society. *KCP&L* 353 S.W.3d at 17.

The limitation on the surcharge imposed by the 2005 amendment is clearly contrary to the general purpose of The Law and to the direction for the Director to set the surcharge sufficient to meet the needs of the upcoming fiscal year for the Fund. §287.715 RSMo (Supp. 2008). Thus, the insufficiency of the Fund has placed Appellant in a position to either ignore his duty to sacredly safeguard monies in the Fund under section 287.710.5 or to ignore his duty to satisfy judgments against the Fund in section 287.220. §§287.220, 287.710.5 RSMo (Supp. 2008). Additionally, Appellant has a duty to "disperse [monies] as required by law". Mo. Const. Art. IV Sec. 15. The 2005 amendment requires Appellant to ignore his legal and Constitutional duties, and puts the

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Director in a position to have to meet two conflicting directives. Such a position is not logical, and inevitably leads to an absurd result.

III. THE 2005 AMENDMENT CONTRAVENES THE PURPOSE OF THE SECOND INJURY FUND AND THE RESULTING INSUFFICIENT CAPITALIZATION OF THE FUND BY THE LEGISLATURE IS IMPOSING UNFAIRNESS, INEQUITY AND EXTREME HARDSHIP ON INJURED WORKERS.

The State has the ability and obligation to comply with its stated public policy by sufficiently capitalizing the Fund. The State has multiple options available to it in order to properly capitalize the Fund.

The option available to the State which is authorized by The Law but has yet to be utilized is to advance monies from the general workers' compensation fund. The Director may advance monies to the Fund if surcharge collections prove to be insufficient. §287.715.2 RSMo (Supp. 2008). Any such advances must be repaid, however, and, while a continuous succession of loans and repayments (possibly requiring more loans) is authorized by law, its long-term viability seems implausible, at best.

The concurring opinion to the majority opinion suggests that capitalization of the Fund could involve other legislative action, or a judgment taking the place of such legislative action, without further discussion. *W.D. Opinion*, 37. The dissent to the majority opinion notes that nothing prohibits general revenue from being placed into the Fund to pay the claims against the State: "The legislature, on behalf of the State, has

complete control over the financing of the Fund and has the ability to replenish the Fund to pay claims, even without requiring additional taxation." *W.D. Dissenting Opinion*, 5

Whatever the practical viability of these suggestions, the action from this Court that would most clearly fit with the stated purpose and history of the Fund is to strike from Section 287.715.2, the words added by the 2005 amendment "not to exceed three percent" as void under either of the above arguments. To fail to do so would put the future stability of the Fund and the vested rights of those who have judgments against the Fund in immediate jeopardy.

At the time the legislature enacted the 2005 amendment, it was aware of the purpose of the surcharge to relieve victims of work-related injuries from having to individually bear the burden of misfortune or becoming charges upon society. Nevertheless, the cap on the surcharge established by the 2005 amendment eliminated the Director's authority to set the surcharge at a level necessary to comply with the public policy of the State by sufficiently funding the Fund, even though actuarial soundness and continued solvency is the principle at the heart of the Fund's capitalization mechanism.

The capitalization of the Fund is inadequate to pay all claims in full, and requires delay, reduction or denial in payment of valid claims. This inadequacy is because of the voluntary choice of the State. The 2005 amendment requires Appellant to ignore his legal and Constitutional duties. But for the 2005 amendment, Appellant would be able to comply with the writ requested in this case, and pay the hundreds of other actions seeking judgments against the Fund currently at various stages of determination.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Insufficient capitalization of the Fund by the legislature is imposing unfairness, inequity and extreme hardship on injured workers. The purposes of the Fund are not being met. Claimants with valid claims are not being compensated. Victims of work-related injuries are bearing the burden of misfortune or becoming charges upon society. Employment of the partially disabled is being discouraged. The immunity of employers is threatened. The rights at issue here were created by the legislature, and claimants are seeking access to the exclusive remedy devised and implemented by the legislature. Inadequate capitalization of the Fund by the legislature emasculates that remedy, and there is no substitute available.

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

CONCLUSION

For the foregoing reasons, we urge this Court to declare the language "not more than three percent" in RSMo 287.215.2 to be invalid, to strike that language from The Workers' Compensation Law, and affirm the order of the Circuit Court and to grant the writ of mandamus to Respondent.

Respectfully Submitted,

THE KORTE LAW FIRM, LLC

/s/ B. Michael Korte
B. Michael Korte No. 27281
10900 Manchester Rd., #203
Kirkwood, MO 63122
Telephone: (314) 821-4727
Facsimile: (314) 821-4580
Email: mike@kortelaw.com

Counsel for *Amicus Curiae* Missouri Association of Trial Attorneys

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 7,605 words (as determined by Microsoft Office Word 2010 software);

/s/ B. Michael Korte

Electronically Filed - Supreme Court - March 22, 2013 - 03:25 PM CDT

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to following, and further that I sent a electronic copy hereof by email to :

MARTY , ANDREW HAMPTON , Attorney for Respondent
5500 Mexico Rd
Suite 200
St Peters, MO 63376

HOLLIGER , RONALD R. , Assistant Attorney General
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

PHILLIPS , JOHN R. , Assistant Attorney General
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

/s/ B. Michael Korte