

**BEFORE THE SUPREME COURT
STATE OF MISSOURI**

No.: SC92142

**THERESA BEARD, BETH CARLL AND THE
ESTATE OF LAURAL BEARD, DECEASED
Plaintiff/Appellant,**

v.

**MISSOURI STATE EMPLOYEE'S RETIREMENT SYSTEM
AND STATE OF MISSOURI
Defendant/Respondent.**

On Appeal from the Circuit Court of Cole County, Missouri

Cause No: 10AC-CC00238

The Honorable Jon Edward Beetem

**BRIEF OF APPELLANT
THERESA BEARD, BETH CARLL AND THE ESTATE
OF LAUREL BEARD, DECEASED**

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on October 24, 2011 by Judge Edward Beetem, 19th Judicial Circuit Court of Cole County, Missouri. The judgment was entered in

favor of the Defendant/Respondent Missouri State Employee's Retirement System (hereinafter MOSERS) and the State of Missouri and against Plaintiffs/Appellants.

This action is one involving a question of whether MOSERS' failure to pay retirement benefits of Laurel Beard, deceased, to her assigned heirs violates the constitutional rights given to her and her heirs by the Missouri Constitution, and hence involves the construction of the Missouri statutes regarding MOSERS.

At issue is whether Section 104.1030 RSMo. is unconstitutional and violates Appellants right to equal protection of the law guaranteed by Article 1, Section 2 of the Missouri Constitution; Appellants right to due process of law guaranteed by Article 1, Section 10 of the Missouri Constitution; and/or Appellants rights to certain remedy for every injury guaranteed by Article 1, Section 13 of the Missouri Constitution.

Appellants contend that the validity of the statutes, or alternatively of the acts or omissions, rules, interpretations, applications and determinations of MOSERS and the trial court, violate Appellants constitutional rights resulting in the Appellants being deprived of and/or suffering damages to their property and liberty interests.

The Supreme Court of the State of Missouri has jurisdiction over the constitutional issues involved in this case and as such, jurisdiction is proper.

STATEMENT OF FACTS

Laurel Beard was an employee at the Moberly Correctional Center and was employed as a Correction Officer 1. (Rhonda Kuhler Deposition, p. 8, ln. 5-9). She had been an employee of the Missouri Department of Corrections for 26 years. (L.F. 67). Ms.

Laurel Beard died on July 29, 2009. (TR. 6). She was a member of MOSERS and vested in her retirement plan at the time of her death. (L.F. 58, Anne Rapp Deposition p. 7, ln. 3-5; p 31 ln. 4-5). She was survived by two adult daughters, Beth Carll and Theresa Beard, Appellants. (L.F. 66, 88). She was not survived by a spouse or minor children. (L.F. 69, 89). This appeal is based on a claim by the beneficiaries/Appellants for the vested retirement benefits of Laurel Beard. (L.F. 56-65, 69).

On June 16, 2009 Laurel Beard was informed by her primary care physician, Dr. Daley that she had terminal cancer. (TR. 6).

Laurel Beard gave notice of her retirement to MOSERS and The Missouri Department of Corrections on June 18, 2009. (L.F. 89). On that date, Beth Carll, (Ms. Beard's daughter) and Laurel Beard went to MOSERS' office in Jefferson City. (TR 6, 7). Laurel Beard told MOSERS that she was terminally ill, and wanted to retire immediately. (TR. 6).

Laurel Beard completed her retirement application on June 18, 2009, and met with a MOSERS counselor. (L.F. 67, TR. 7, Anne Rapp Deposition p. 9, ln. 3-14). The MOSERS Employee advised Laurel Beard that she could not retire immediately, and said that the first available date to retire was August 1, 2009. (TR. 7). The MOSERS Employee input the retirement date on the retirement application and not Laurel Beard. (Rhonda Kuhler Deposition p. 26-27).

Laurel Beard never requested that her employment continue until July 31, 2009, but terminated her employment when she notified her employer on June 18, 2009. (TR. 7)

Ms. Beard's last day of work when she was physically present at Moberly Correctional Center was June 13, 2009. (TR. 8, Rhonda Kuhler Deposition, p. 8, ln. 13-16).

On June 30th Laurel Beard completed the remaining paper work and met with a MOSERS counselor. (L.F. 68, Anne Rapp Deposition p. 9, ln. 3-14). She then provided a resignation letter to her employer. (TR. 8, Rhonda Kuhler Deposition, p. 13, ln. 12-18 and See Plaintiffs' Exhibit 5 (Exhibit page 284)). Ms. Beard filed the resignation letter on July 7, 2009. (Rhonda Kuhler Deposition, p. 13, ln. 19-21).

Ms. Beard's resignation letter was accepted July 15, 2009 by Dean Minor, the Warden of the facility. (TR 8, 9, Rhonda Kuhler Deposition, p. 13, ln. 21-25 and p. 14, ln. 1). The Warden wrote a letter to Laurel Beard concerning her resignation, indicating the resignation was accepted and stating that Ms. Beard was a dedicated and valued employee, and had been an asset to the Department of Corrections. (TR 10, Rhonda Kuhler Deposition, p. 14, ln. 2-10, page 30 ln 5-24 and See Plaintiffs' Exhibit 5, (Exhibit p. 286)).

Despite the fact that Ms. Beard had stopped working on June 13, 2009 and she submitted her letter of resignation on July 7th, the MOSERS employee, Rhonda Kuhler, put down the date of termination in Ms. Beard's employment file as July 31, 2009. (Rhonda Kuhler Deposition, p. 26, ln. 12-25; p. 27, ln. 1-25, p. 28, ln. 1, p. 27, ln. 18-23)

Ms. Kuhler listed the termination date as July 31st because, in her experience, it was the day before the day the person was to receive their retirement benefits. (Rhonda Kuhler Deposition, p. 28, ln. 3-24).

Rhonda Kuhler is employed by the Missouri Department of Corrections at the Moberly Correctional Center as a personnel clerk. (Rhonda Kuhler Deposition, p. 5, ln. 11-25). She is not in charge of the human resources function of the correctional center, but is only capable of answering some human resource questions, (Rhonda Kuhler Deposition, p. 6, ln. 15-22) and she is not involved in decisions of hiring or firing of employees. (Rhonda Kuhler Deposition, p. 23-25). As a personnel clerk Ms. Kuhler's primary job is keeping records of the correctional center regarding employees. (Rhonda Kuhler Deposition, p. 7, ln. 12-15).

Ms. Kuhler was personally familiar with Laurel Beard. (Rhonda Kuhler Deposition, p. 8, ln. 2-4). According to Ms. Kuhler, Laurel Beard's employment with the Correctional Center terminated on July 29, 2009. (Rhonda Kuhler Deposition, p. 8, ln. 17-18). Ms. Kuhler does not believe that it was fair for a person who had earned retirement benefits and it was vested but who died a few days short of the benefit being paid to be deprived of the benefit. (Rhonda Kuhler Deposition, p. 31, ln. 18-23).

There is no dispute that Laurel Beard did everything that is required under the statutes to receive her retirement benefits. (Anne Rapp Deposition p. 30, ln. 4-13). She properly filled out all the documents required by MOSERS for retirement. (Anne Rapp Deposition, p. 33, ln. 21-24).

Both the election form and the application of retirement included a statement that says they are void under certain conditions. (Joseph Jake McMahon Deposition, p. 9, ln. 17-24).

The election form filled out by Ms. Beard contains a provision that indicates if a person dies prior to retirement that the form is void. (Anne Rapp Deposition, p. 38, ln. 9-15). However, the designated representative of MOSERS has no knowledge where the authority to state that the forms are void comes from. (Anne Rapp Deposition, p. 38, ln. 16-18) and there are no statutes that say the forms are void if a person dies before retirement. (Anne Rapp Deposition, p. 38, ln. 19-22). Another designated representative for MOSERS, Joseph Jake McMahon, also knows of no authority for the statements in the documents that they are void. (Joseph Jake McMahon Deposition, p. 9, ln. 25 and p. 10, ln. 1-3).

Even though the election form signed by Ms. Beard for the 2000 plan indicates that it's void in the event of death before retirement, MOSERS takes the position that that document is **not** void. (Joseph Jake McMahon Deposition, p. 11, ln. 9-13). MOSERS bases its position on the fact that the statutes do not have language with a mandate or a requirement that an election be void upon the death of a member after the election was made. (Joseph Jake McMahon Deposition, p. 11, ln. 14-20).

The application for retirement signed by Laurel Beard, also contained a provision that it was void under certain conditions. (Joseph Jake McMahon Deposition, p. 9, ln. 17-24). The word "void" does not appear anywhere in the MOSER statutes. (Joseph Jake McMahon Deposition, p. 13, ln. 3-6 and RSMO. 104.010 et. seq.). Just like the election form, there is also no statutory authority for the statement in the retirement application that it be void if the person dies before retirement. (Joseph Jake McMahon Deposition, p.

12, ln. 5-7).

However, 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. (Joseph Jake McMahon Deposition, p. 10, ln. 16-25 and p. 11, ln. 1). In the eyes of MOSERS, therefore, Ms. Beard never filed a proper application for retirement. (Joseph Jake McMahon Deposition, p. 11, ln. 2-6).

During the handling of the Beard matter, MOSERS has changed the basis for the denial of benefits to Ms. Beards. (Joseph Jake McMahon Deposition p. 8, ln. 14-19). The current reason for denial of benefits is based upon the Year 2000 Plan, while the original denial was based upon the Closed Plan. (Joseph Jake McMahon Deposition, p. 8, ln. 20-25 and p. 9, ln. 1-3).

There are no regulations or rules of MOSERS that are applicable to Ms. Beard's case, (Anne Rapp Deposition, p. 38, ln. 23-25 and p. 39, ln. 1-14) and there are no informal rules that apply to Ms. Beard's case. (Anne Rapp Deposition, p. 39, ln. 15-20) (Joseph Jake McMahon Deposition, p. 10, ln. 4-10).

If a person dies prior to retirement, it is MOSERS position that a different benefit is paid to the survivors. (Joseph Jake McMahon Deposition, p. 13, ln. 7-17). The corporate representative of MOSERS has indicated that its position on denial of benefits to the Appellants is interpretive of the statutes, and its position is where there is any death before retirement, the benefits are due only to a surviving spouse or children under 21. (Joseph Jake McMahon Deposition, p. 12, ln. 8-21).

MOSERS corporate representative admitted that if the election form filled out by Ms. Beard is void or did not apply, then Ms. Beard qualified for retirement under the closed plan, and the reasons for denial under the closed plan were articulated in Anne Rapp's letter sent to the plaintiffs. (Joseph Jake McMahon Deposition, p. 15, ln. 5-10)

Under the Year 2000 Plan, MOSERS asserts that Section 104.1030 is a statutory basis for the denial. (Joseph Jake McMahon Deposition, p. 16, ln. 13-15). MOSERS current position is that Laurel Beard fell under the year 2000 plan and their denial is based on the interpretation of those statutes. (Joseph Jake McMahon Deposition, p. 15, ln. 11-15).

Under MOSERS interpretation of the Year 2000 plan statutes, the annuity start date and the retirement date are the same day. (Joseph Jake McMahon Deposition, p. 19, ln. 1-4). MOSERS has adopted this position that they are both the same day because of the definition of annuity starting date (Joseph Jake McMahon Deposition, p. 19, ln. 5-13) which is "the first day of the month the first month with respect to which an amount is paid as an annuity." *Section 104.1003 RSMo.* (Missouri 2000 Plan).

Other than a general interest in following the law, MOSERS has no interest in whether or not benefits are paid to Ms. Beard's adult children. (Joseph Jake McMahon Deposition, p. 16, ln. 16-20). (Anne Rapp Deposition, p. 41, ln. 17-20). Further, the State of Missouri has no interest in the Appellants not receiving the retirement benefits of their mother. (Anne Rapp Deposition, p. 42, ln. 3-6).

MOSERS is not aware of any interest of the state in relation to 104.1030 RSMO.

(Joseph Jake McMahon Deposition, p. 16, ln. 21-23). MOSERS does not know the legislative history or purpose behind the legislation applicable to the statute. (Joseph Jake McMahon Deposition, p. 17, ln. 3-7).

MOSERS basic job is to be the custodian of the funds for the retirement benefits, manage those funds and pay them when they are owed. (Joseph Jake McMahon Deposition, p. 20, ln. 7-11). Those benefits are the retirement funds or the funds of beneficiaries, and those are paid on the annuity start date. With respect to that function, none of the administrative functions regarding how money is handled or invested is affected. (Joseph Jake McMahon Deposition, p. 20, ln. 12-20).

Regardless of which day in the month of June Ms. Beard went in, the retirement application form would have included the retirement date as the date the benefits paid out of MOSERS are paid out of a trust fund. (Joseph Jake McMahon Deposition, p. 48, ln. 16-21).

The State of Missouri, as a benefit to its employees and as part of those benefits, set up and funds MOSERS and MOSERS administers the funds. (Joseph Jake McMahon Deposition, p. 49, ln. 1-3). The funding from the contribution comes from the State of Missouri which is based on a percentage of payroll. (Joseph Jake McMahon Deposition, p. 48, ln. 23-25).

MOSERS admits that there was a contractual relationship between the Department of Corrections and Laurel Beard, of which her benefits were a part of. (Joseph Jake McMahon Deposition, p. 50, ln. 1-11). See also Section 104.330.1 RSMo. which

provides in relevant part: “As an incident to his or her contract of employment or continued employment, each employee of the state shall become a member of the system”. The benefits were statutorily made a part of the employment contract between the State of Missouri and Ms. Beard, and MOSERS is not a party to that contract. (Joseph Jake McMahon Deposition, p. 51, ln. 12-19). Further, the retirement benefits are something that has to be earned by the employee. (Joseph Jake McMahon Deposition, p. 26, ln. 3-5).

The word “retired” is not defined in the MOSERS statutes. (Joseph Jake McMahon Deposition, p. 17, ln. 24-25 and p. 18, ln. 1-3). The word “retirement” is also not defined in chapter 104 RSMo. *104 RSMo. et seq.* However, the word “retirement” is defined in Black’s Law Dictionary as “ Voluntary termination of one’s own employment or career, esp. upon reaching a certain age.: Black’s Law Dictionary, Seventh Edition, and as “(1) an act of retiring (2) the state of being retired from one’s occupation” in Webster’s II, New College Dictionary.

The word “vested” is not defined in the statutes. *104.010 RSMo. et. seq.* (Joseph Jake McMahon Deposition, p. 25, ln. 16-17). Although not defined in the MOSERS statutes, the word “vested” is defined in Black’s Law Dictionary as “having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute.

POINTS RELIED ON

POINT I

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 Employee's Retirement System (MOSERS) who have filed for retirement and made the proper beneficiary elections but die before their annuity start 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.

In re Marriage of Woodson, 92 S.W.3d 780, 783 (Mo. 2003)

Washington v. Glucksberg, 521 U.S. 702, 720 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772, 787 (1997)

Weinschenk v. State, 203 S.W.3d 201, 210-11 (Mo. 2006)

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771, 774 (Mo banc 2003)

Section 1.020 RSMo.

Section 104.010 RSMo.

Section 104.330.1 RSMo.

Section 104.420 RSMo.

Section 104.1003 RSMo.

Section 104.1015 RSMo.

Section 104.1027 RSMo.

Section 104.1030 RSMo.

Section 104.1093 RSMo.

Mo. Const. of 1865, art. 1, sec. 1

Mo. Const. of 1875, art. 2, sec. 4

Missouri Constitution, Article 1, Section 2

Missouri Constitution, Article 1, Section 10

Missouri Constitution, Article 1, Section 13

POINT II

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.

Community Fed. Sav. & L. Ass'n v. Director of Revenue, 752 S.W.2d 794, 798 (Mo. banc

1988), *cert. denied*, 488 U.S. 893, 109 S.Ct. 231, 102 L.Ed.2d 221

Marre v. Reed, 775 S.W.2d 951, 953 (Mo. banc 1989)

United Pharmaceutical Co. of Mo., Inc. v. Mo. Ed. of Pharmacy, 208 S.W.3d 907, 909

(Mo. Banc. 2006)

Section 1.020 RSMo.

Section 104.010 RSMo.

Section 104.330.1 RSMo.

Section 104.420 RSMo.

Section 104.1003 RSMo.

Section 104.1015 RSMo.

Section 104.1027 RSMo.

Section 104.1030 RSMo.

Section 104.1093 RSMo.

Mo. Const. of 1865, art. 1, sec. 1

Mo. Const. of 1875, art. 2, sec. 4

Missouri Constitution, Article 1, Section 2

Missouri Constitution, Article 1, Section 10

Missouri Constitution, Article 1, Section 13

ARGUMENT

STANDARD OF REVIEW

The interpretation of a statute is an issue of law and is therefore reviewed de novo. *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 442 (Mo. 2007). When considering the legal issue of the constitutional validity of a statute, this question of law is to be reviewed de novo. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). “A statute is presumed to be constitutional and will not be invalidated unless it ‘clearly and undoubtedly’ violates some constitutional provision and ‘palpably affronts fundamental law embodied in the constitution.’ ” *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368–69 (Mo. banc 2001) (internal citations omitted). The party challenging the validity of the statute has the burden of proving the statute unconstitutional. *State v. Salter*, 250 S.W.3d 705, 709 (Mo. banc 2008). *State v. Richard*, 298 S.W.3d 529, 531 (Mo. 2009).

ARGUMENT

I

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 Employee's Retirement System (MOSERS) who have filed for retirement and made the proper beneficiary elections but die before their annuity start 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.

Section 104.1030.1 RSMo. is unconstitutional on its face or as applied to vested members who have filed for retirement, made the proper elections but die before their annuity start date.

Article 1, Section 2 of the Missouri Constitution provides:

That all constitutional government is intended to promote the general welfare of the people; and that all persons have a natural right to life, liberty and the pursuit of happiness and the enjoyment of gains from their own industry; and that all persons are created equal and are entitled to equal rights and opportunity under the law; and then to give security to these things is the principle office of government, and that when government does not confer this security, it fails in its chief design.

Article 1, Section 10 of the Missouri Constitution provides:

That no person shall be deprived of life, liberty or property without due process of law.

Article 1, Section 13 of the Missouri Constitution states as follows:

That no ex post facto law, or **nor law impairing the obligation of contracts**, or respective in its operation, or making any irrevocable grants of special privileges or immunities, can be enacted.

1. Substantive Due Process Claim

The due process clause of the Missouri and U.S. Constitutions provide heightened protection against government interference with certain fundamental rights and interests.

Washington v. Glucksberg, 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772, 787 (1997); *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995).

The standard depends on whether the government action is executive or legislative.

County of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043, 1057 (1998). MOSERS is not part of the executive branch of government, therefore, the problem before the court deals with a legislative enactment.

When the action is legislative, due process protects fundamental rights and liberties that are “deeply rooted in this Nation's history and traditions,” and “implicit in the concept of ordered liberty.” *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. at 2268, 138 L.Ed.2d at 787–88. The asserted interests must be carefully described. *Id.* at 721, 117 S.Ct. at 2268, 138 L.Ed. 2d at 788. *In re Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003).

In determining a due process claim, a court must determine if the statute disadvantages a suspect class or impinges a fundamental right *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003) citing *In re Marriage of Kohring v. Snodgrass*, 999 S.W.2d 228, 231 (Mo. App. S.D. 2003) (Mo. banc 1999). If either is present, it triggers strict judicial scrutiny of whether the statute is necessary to accomplish a compelling state interest. Either determination triggers strict judicial scrutiny as to whether the statute is necessary to accomplish a compelling state interest. *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. 2003) citing *Kohring* at 232.

Substantive due process principles require invalidation of a substantive rule of law if it impinges on liberty interests that “are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is ‘narrowly tailored to serve a compelling state interest.’ ” *Doe v. Phillips*, 194 S.W.3d 833,

842-43 (Mo. 2006); citing *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir.2005), quoting, *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); U.S. Const. amend. 14. In such cases, the laws are invalid “regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

2. Equal Protection

Both the United States and Missouri Constitutions guarantee to their citizens the enjoyment of equal protection of the laws. *U.S. Const. amend. 14, sec. 1* (“No state shall ... deny to any person within its jurisdiction the equal protection of the laws”); *Mo. Const. art. 1, sec. 2* (“all persons ... are entitled to equal rights and opportunity under the law”). Courts undertake a two-part analysis to determine the constitutionality of a statute under either the state or federal equal protection clause.

The first step is to determine whether the statute implicates a suspect class or **impinges upon a fundamental right explicitly or implicitly protected by the Constitution.** *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003); accord *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457–58, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). (emphasis added) “If so, the classification is subject to strict scrutiny.” *Etling*, 92 S.W.3d at 774. If not, the classification will be subject to rational basis scrutiny. *Id. Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. 2006).

The second step is to apply the appropriate level of scrutiny to the challenged statute. In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests. *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo.App. E.D.1997) “Any state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *See also Manifold v. Blunt*, 863 F.2d 1368, 1373 (8th Cir.1988) “The application of strict scrutiny for purposes of equal protection challenges ... involves a two-part analysis: the restriction must be necessary to serve a compelling state interest, and may not go beyond what the state's interest actually requires.” *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006).

3. Fundamental Rights

Fundamental rights are the rights to interstate travel, to vote, free speech, and **other rights explicitly or implicitly guaranteed by the Constitution.** *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. 2003) (emphasis added) citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 31–33, 93 S.Ct. 1278, 1311, 36 L.Ed.2d 16, 59 (1973).

The Missouri Constitution, article I, sec. 2 provides: “[T]hat all persons have a **natural right** to life, liberty, the pursuit of happiness and **the enjoyment of the gains of their own industry.**” Taken together, these provisions give persons in this state a fundamental right to lawfully acquire, hold, enjoy and dispose of property, real or

personal. *Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607, 613 (Mo. 1997) citing *Stone v. City of Jefferson*, 317 Mo. 1, 293 S.W. 780, 782 (Mo. Banc. 1927). A necessary adjunct of that right is the right to pursue any lawful business, calling, or profession. Indeed, a citizen's right to pursue a business, calling, or profession is both a liberty and property right to be guarded as zealously as any other fundamental right. *Green v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411, 3 L.Ed.2d 1377 (1959); *Downey v. United Weatherproofing*, 363 Mo. 852, 253 S.W.2d 976, 982 (1953). Given these principles, it necessarily follows that the negligent taking by the State of one's fundamental, constitutionally protected liberty and property right to engage in lawful employment is prohibited absent payment of just compensation or other due process of law. *Fisher v. State Highway Comm'n of Mo.*, 948 S.W.2d 607, 613 (Mo. 1997)

There is no doubt that Laurel Beard and her beneficiaries have fundamental rights at stake. The retirement benefits were provided as a part of her earnings and were clearly protected by the Missouri Constitution as a part of the “gains from [her] own industry” and that she has a constitutionally protected right to dispose of or distribute those benefits as she saw fit.

It is not disputed that her retirement benefits were provided by the State of Missouri as a part of the contract of her employment. It is also not disputed that pursuant to the MOSERS statutes, she had completed the required number of years of employment and was a vested member of the retirement system and had thus earned those retirement benefits. MOSERS admits that Laurel Beard properly filled out all of the required forms

applicable to her retirement including an election form to receive benefits under the Year 2000 Plan and an appropriate application for retirement.

However, those fundamental rights are being impugned as outlined herein. In addition, the statute in question violates the equal protection of all citizens because it treats employees unequally under the law. Because Ms. Beard had no surviving spouse and no minor children, her beneficiaries were denied the right to collect her earned benefits, even though she made the appropriate beneficiary designations and properly completed all the necessary requirements to obtain her retirement.

The state may have an interest in insuring that spouses and minor children are provided for from a members earned benefits. However, in the case at hand, there is no spouse and no minor children, so no state interest is being served. The Missouri statute, 104.1030 RSMo, and/or the trial court's interpretation of that statute, deprives members of their vested and earned retirement benefits and there is no compelling state interest in doing so.

There should be no doubt that fundamental rights are at issue in this case. As stated above, the Missouri Constitution specifically provides “**that all persons have a natural right** to life, liberty and the pursuit of happiness and **the enjoyment of gains from their own industry.**” *Mo. Const. Article I, Section 2.*

It was noted in 1812 that “[i]ndustry and faculties are most valuable property in a republic.” *Byrne v. Stewart*, 3 S.C. Eq. (3 Des.) 466, 471, 477 (1812), *cited by State ex rel Scott v. Roper*, 688 S.W.2d 757 (Mo. banc 1985). Our state constitution expressly

protects an individual's services by providing "that all persons have a natural right to ... the enjoyment of the **gains** of their own industry." Mo. Const. art. 1 § 2. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768-69 (Mo. 1985).

This phrase first appeared in the Declaration of Rights of the Missouri Constitution of 1865 as "the enjoyment of the fruits of their own labor." *Mo. Const. of 1865, art. 1, sec. 1*. Although the 1875 Constitution modified the wording to "the enjoyment of the gains of their own industry," this was not a change in substance. 2 *Debates of the Missouri Constitutional Convention of 1875*, at 7 (Isidor Loeb & Floyd C. Shoemaker, eds., 1932); *Mo. Const. of 1875, art. 2, sec. 4*. The language in the 1875 Constitution continued unchanged in the 1945 Constitution. 5 *Debates of the Missouri Constitutional Convention 1945*, at 1423 (1944). The idea that a person is entitled to the fruits of their labor is a fundamental right and deeply rooted in our history and implicit in the concept of ordered liberty. The concept has both historical and biblical roots. See *Psalms 128:2*.

Thomas Jefferson, a founding father stated, "Here... will be preserved a model of government, securing to man his rights and the fruits of his labor, by an organization constantly subject to his own will." --*Thomas Jefferson to William Plumer, 1815. ME 14:237*. He stated this principal in other forms as well:

"A wise and frugal government, which shall leave men free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned - this is the sum of good government." See <http://www.american-history-fun-facts.com/thomas-jefferson-quotes.html>

The trial court's application of Section 104.1030 RSMo is in direct violation of the protection of fundamental rights afforded by the Missouri Constitution *Article 1, Section 2*.

4. Strict Scrutiny

Fundamental rights created by the constitution or deeply rooted in our nation's history and implicit in the concept of ordered liberty require strict scrutiny of legislative action. *In re Marriage of Woodson*, 92 S.W. 3d 780 (2003) citing *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). In order to survive strict scrutiny, a limitation on a fundamental right must serve compelling state interests and must be narrowly tailored to meet those interests. *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo.App. E.D.1997) ("Any state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."). *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) *See also Manifold v. Blunt*, 863 F.2d 1368, 1373 (8th Cir.1988).

As discussed above, the enjoyment of gains from a person's own industry is a fundamental right protected by the Missouri Constitution. The trial court's ruling impedes the fundamental rights of Ms. Beard to the fruits of her labor by denying her heirs and designated beneficiaries the benefit of her retirement annuity that she undisputedly earned through years of faithful service to her employer.

No evidence has been adduced to show a compelling state interest narrowly

tailored to meet those interests in defense of Section 104.1030 RSMo as required by strict scrutiny. In fact, the undisputed evidence is that the MOSERS and the State of Missouri have *no* interest in depriving Ms. Beard's designated beneficiaries of the contractual and earned benefit of her retirement. In addition, the member is legally allowed to designate other as beneficiaries. *Section 104.1027 RSMo.*

The statute, 104.1030, RSMo., while clearly designed to protect a spouse or minor child from being left out as a beneficiary, goes too far if it denies payment of the same earned benefit to another member's designated beneficiaries where there is no spouse or minor child to protect.

MOSERS position is that it would have honored the designation other beneficiaries if Ms. Beard had lived to August 1, 2009. But she died on July 29, 2009, so no benefits were paid. The waiting period imposed under the Year 2000 Plan between stopping work and annuity payments starting may have an administrative justification, but is not a compelling state interest that justifies avoiding an obligation to pay the benefits earned over 26 years of service.

Laurel Beard earned a retirement through 26 years of faithful and loyal service. She did everything required of her to earn her retirement benefits. She timely filed every form required and gave all the proper notices. She cannot be deprived of the benefits she earned after having fully performed the labor. Because of the trial court's erroneous ruling, Laurel Beard and her designated beneficiaries will be deprived of her previously acquired earned and vested benefits. She is thereby wrongfully deprived by the State of

Missouri of the right to enjoy the gains of her own industry. There is no compelling state interest in stealing the fruit of Laurel Beard's labor. She was lawfully entitled to the retirement and lawfully entitled to designate beneficiaries to receive the lump sum payments in the event of her death. Section *104.1030* RSMo. must be struck down as a violation of fundamentally protected right and therefore, unconstitutional.

ARGUMENT

II

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

Laurel Beard was originally a member of the Closed Plan. As a member of the Closed Plan she was required to make an election to stay in the Closed Plan or move to the Year 2000 Plan. *Section 104.1015.1* RSMo. Pursuant to *Section 104.1015.3* RSMo, the election must be made before the member's annuity start date and benefits cannot be received without making the election. The record is clear that Laurel Beard timely filed the required election.

In pertinent part, *Section 104.1015* RSMo states, "If such person dies **after the annuity start date, but before making such election** and providing for such other information, **no benefits shall be paid** except as required pursuant to *Section 104.420*. RSMo. *Section 104.1027.1* RSMo. provides in relevant part:

1. 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

Laurel Beards died **before** her annuity start date of August 1, 2009 and **after** she filed the election. Thus the only statutory section in the year 2000 plan that states no benefits are to be paid when a vested member dies does not apply to Laurel Beard. Instead, MOSERS claims that Section 104.1030.1 is the basis for not paying the retirement funds Laurel Beard earned through her labor.

Section 104.1030.1 RSMo. provides:

1. 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 shall be paid.

This provision specifically requires that if a vested member dies before their annuity

starts that the annuity be paid. This only makes sense, because the annuity is not a gratuity but is earned by the employee. The retirement benefits are part of the contract between the employer and employee and are thus part of the consideration arising out of the employment contract. *Section 103.330* RSMo. The remaining relevant *sections of 104.1030* RSMo. provides for condition under which specific beneficiaries, spouse and dependent children may receive benefits.

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

3. 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.

Nothing in the remaining sections of 104.1030 RSMo. contradicts the statement that a vested members earned benefits will be paid if the member dies before the annuity start date. The remaining sections merely provide for how benefits will be paid to a spouse or minor child. Unlike Section 104.420 RSMo. (the closed plans corollary section) which states, “No benefit is payable pursuant to this section if no eligible surviving spouse or child under twenty one year’s survive the member.” Section 104.1030 RSMo. (closed plan) includes no such directive. Instead it mandates that the benefits be paid, and provides for certain special provision for some classes of beneficiaries, none of which are relevant in this case, because Laurel Beard had no spouse and no dependent children. The only relevant portion of 104.1030 is section 1 which mandates that the annuity be paid.

Laurel Beard properly and timely designated her adult daughters as her beneficiaries. If there are no special beneficiaries to which subsection 2 or 3 apply, then

the benefits are due and payable. MOSERS position to the contrary is textual unsupportable. In its argument MOSERS states that under Section 104.1030 no benefits are payable, but provides no support for its statement. MOSERS will likely argue that the last part of the sentence “the applicable annuity provided in this section shall be paid” means that no one else other than a spouse or dependent child can receive the benefits. This argument contradicts the plain language and the statutory scheme of the Year 2000 Plan.

The word “section” is not defined. Black’s Law Dictionary defines “Section” as a distinct part or division of writing. *Black’s Law Dictionary, 7th Edition*. The statute clearly references the Year 2000 Plan which is a distinct section of *Chapter 104* which also includes a distinct section outlining the other different plans. e.g. the Closed Plan. Furthermore, Section 104.1030 RSMo. does not provide an annuity payment that can be obtained by reference to this one section of the statute. Instead, to pay an annuity to spouse or children, other parts of the Year 2000 Plan section must be referred to. Moreover, the purpose of Section 104.1030.2-4 is to protect a surviving spouse or minor child. So for example if a member died and left a designated beneficiary that was someone other than an existing spouse or minor child Section 104.1030 would prevail. However, where a member has earned their benefits as Laurel Beard did, denying her daughters as beneficiaries where there is no spouse or minor child is absurd.

Section 104.1030 cannot be read in isolation from the preceding sections that pertain to retirement benefits and the designation of beneficiaries. In construing statutes,

the Court's primary responsibility is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Provisions of the entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized. *Community Fed. Sav. & L. Ass'n v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988), *cert. denied*, 488 U.S. 893, 109 S.Ct. 231, 102 L.Ed.2d 221; *United Pharmaceutical Co. of Mo., Inc. v. Mo. Ed. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. Banc. 2006). Related clauses are to be considered when construing a particular portion of a statute. *Marre v. Reed*, 775 S.W.2d 951, 953 (Mo. banc 1989). *Hagely v. Bd. of Educ. of Webster Groves Sch. Dist.*, 841 S.W.2d 663, 667 (Mo. 1992).

The law is clear that the primary objective of statutory interpretation is to ascertain the intent of the legislature from the language used. *United Pharmaceutical Co. of Mo., Inc. v. Mo. Ed. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. Banc. 2006). In doing so, a court considers the words used in the statute in their plain and ordinary meaning. Only in those cases “where the language of the statute is ambiguous or where its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute”. *Nicholas v. Dir. of Revenue*, 116 S.W.3d 583, 586 (Mo. App. W.D. 2003). Construction of statute should avoid unjust, unreasonable, absurd or confiscatory results. *Taylor v. McNeal* (App. 1975) 523 S.W.2d 148 (Mo. App. 1975). The law favors construction of statute which avoids unjust or unreasonable results. *Maryland Cas. Co. v. General Elec. Co.* 418 S.W.2d 115 (Sup. 1967). When construing a statute, court should consider results of the construction suggested; it being presumed that Legislature intended

a reasonable construction which will permit beneficial results. *Memmel v. Thomas* 181 S.W.2d 168, (Mo App. 1944). Missouri Revised Statute Section 1.020 favors constructions of an ordinance or statute, which harmonize with reason and which tend to avoid **unjust**, absurd, **unreasonable**, or **confiscatory results**, or oppression. *Laclede Gas Co. v. City of St. Louis* (253 S.W.2d 832, (Sup. 1953) and *Taylor v. McNeal*, 523 S.W.2d 148, (App. 1975). (emphasis added).

In Laurel Beard's case these statutes referenced by defendant in its argument, do not apply to Laurel Beard as she died before the referenced date and after making an election. Section 104.1030 RSMo specifically requires payment of the benefits and unlike Section 104.420 RSMo which specifically states no one other than spouse or dependent children receive the benefits, Section 104.1030 has no such mandate. MOSERS cannot read terms into the statute, to deprive a good, loyal, vested employee who did everything required of her, of her earned benefits.

The statute, Section 104.1030 RSMo, is ambiguous on its face because it provides that the retirement benefits **shall** be paid but then makes no further reference to a situation where an employee does not have a surviving spouse or surviving minor children. Further it does not mandate that if there is no surviving spouse or minor children, that no benefits are to be paid, as the legislature clearly could have done.

Alternately, the statute, Section 104.1030, or the trial court's interpretation of the statute leads to an unjust, unreasonable and confiscatory result by denying Laurel Beard and her properly designated beneficiaries, the gains of her own industry and the right to

distribute those earned benefits to her designated beneficiaries in the manner of her choosing. Therefore, the trial court's judgment against Appellants should be reversed and Laurel Beard's earned retirement benefits distributed to her designated beneficiaries.

CONCLUSION

For the reasons stated herein and the evidence adduced at trial, the decision of the trial court should be reversed and Respondent ordered to pay to Ms. Beard's designated beneficiaries, the benefits that Laurel Beard earned over 26 years of faithful service to the State of Missouri.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this Appellants' Brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 8,530 words, exclusive of the Sections exempted by Rule 84.06(b)(2) of the Missouri Rules of Civil Procedure based on the word count that is part of Microsoft Word.

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I hereby certify that on March 16, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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