

No. SC 92388

IN THE SUPREME COURT OF MISSOURI

R.M.N. and R.D.N., minor children, by and through their father and next friend,
RANDY NOLAN, Appellants,

vs.

CATHY SNEAD, personal representative of the
ESTATE OF ALLEN AUSTIN, deceased, Respondent.

APPEAL FROM THE PROBATE DIVISION OF THE CIRCUIT COURT OF
GENTRY COUNTY, MISSOURI
THE HONORABLE GLEN DETRIECH

APPELLANTS' BRIEF

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The trial court erred in dismissing Appellants’ claims against the estate because application of section 473.360, R.S.Mo. to bar their claims violates the open courts provision of the Missouri

Constitution (Article 1, § 14) in that section 473.360 arbitrarily and unreasonably restricts their recognized causes of action in light of the fact that Appellants are minor children who lack the capacity to protect their own rights by contracting with attorneys and filing lawsuits, including claims against decedent estates, and are at the mercy of adults who may not protect their rights.

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JURISDICTIONAL STATEMENT

This action is one involving whether section 473.360, R.S.Mo. is unconstitutional under Article I, § 10 and Article I, § 14 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution when applied to bar the claims of minor children who lacked the capacity to file a lawsuit themselves and who never received, personally or by their custodial parent, actual notice of a probate estate or the need to file claims within a certain time period even though they were known or reasonably ascertainable creditors of the estate. Therefore, this appeal involves the constitutionality and validity of a state statute and is within the Court's jurisdiction as granted by Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

Respondent has known Allen Austin all her life and helped him with his business and personal affairs. TR 4:2–13. Mr. Austin died in August 2009 and Respondent was appointed personal representative of his estate. TR 4. The estate has two beneficiaries; Respondent is one. TR 19:9–10.

Mr. Austin rented a home in Albany, Missouri to R.M.N. and R.D.N.'s and their mother, Terri Nolan. TR 6:25–7:7, 7:22–25, 8:1–3. Respondent became aware of sexual abuse allegations concerning R.M.N. and R.D.N. in 2006. TR 5:15–20, 7, 8:1–3. She became aware that there was a Division of Family Services investigation when Mr. Austin showed her a letter. TR 9:14–17. Respondent learned of another allegation in 2009, when he showed her another letter. TR 10:23–25. The letter (dated March 9, 2009) was admitted as Exhibit A at the hearing and reads in pertinent part:

I received a letter from your attorney, David Parman, requesting an administrative review of incident #20083260214. Your request is denied due to the new allegations alleged in this report being unsubstantiated. The current incident, 20083260214 included two different sets of allegations of abuse and neglect. The first allegations were the same as those investigated in 2006. The conclusions of those allegations remain as Preponderance of Evidence. The new allegations made in the current report are unsubstantiated. The time period to appeal the Preponderance of Evidence finding for the 2006 allegations has lapsed.

TR Ex. A; TR 11:21; Appendix at A8.

The letter mentions two sets of different allegations, one in 2006 and one in 2008. TR 14:13–15. The 2006 allegations were investigated by DFS and were substantiated by a preponderance of evidence. Ex. A; Ex. 1; TR 14:24–15:4. Mr. Austin never appealed the 2006 finding. Ex. A; Ex. 1; TR 15:21–23. Respondent knew that the letter referred to R.M.N. and R.D.N. TR 16:5–11. She knew about the letter when Mr. Austin died in August 2009. TR 16:18–20. She knew the children were under the age of 18. TR 16:16–17.

Mr. Austin also showed Respondent another letter (dated January 6, 2009) admitted as Exhibit 1 at the hearing. TR 20:2–12. It said in pertinent part:

X The report is substantiated that:

Name of victim:	[R.M.N.]
Type of abuse/neglect:	Sexual maltreatment (6)
Name of alleged perpetrator:	Allen D. Austin
Name of victim:	[R.D.N.]
Type of abuse/neglect:	Sexual maltreatment (6)
Name of alleged perpetrator:	Allen D. Austin

.....

This determination is based on the following facts discovered during the investigation:

There was Preponderance of Evidence in 2006 (#20061720021) on Allen Austin in regards to [R.M.N.] and [R.D.N.]. This incident was already investigated and closed in Gentry County (2006). In regards to the new

incident concerning sexual abuse on [R.M.N.] and [R.D.N.] listed in case number 2008326021 it was found to be Unsubstantiated due to lack of evidence.

TR Ex. 1; Appendix at A6.

Respondent knew Appellants' mother, grandfather and aunt. TR 16:12-13, 18:15-24. She knows where their grandfather lives and how to find his phone number. TR 18:15-24, 19:4-5. Their grandfather knows how to contact Appellants and their father. TR 22:21-23:3. Respondent never tried to get contact information for Appellants' mother or father. TR 19:6-8. She never gave Appellants or their parents notice of the estate or the need to file a claim. TR 19:13-20.

Respondent never talked to the children or the state investigators about the allegations, nor did she ask to review the investigation file. TR 17:7-22. She never asked the court to appoint a guardian ad litem to investigate the allegations and represent the childrens' interests. TR 18:8-14.

Randy Nolan is R.M.N. and R.D.N.'s father. TR 22:8-9. The girls were 12 and 13 at the time of the hearing on June 13, 2011. TR 22:10-11. Randy regained custody of them in July 2009 and they have resided together in St. Joseph, Missouri. TR 24:21-25. He did not know of the estate or the need to file a claim until April 2010, when he connected with an attorney. TR 23.

Allen Austin died on August 7, 2009. LF 25. The estate was opened on August 13, 2009. LF 2. Mr. Nolan filed Appellants' claims in the estate on April 23, 2010. LF 3. An amended claim was filed on August 5, 2010. LF 4.

Respondent filed a motion to dismiss, which was granted on August 23, 2011 after a hearing. LF 77. The trial court reasoned that Appellants were not entitled to actual notice because they were not known or reasonably ascertainable creditors. LF 76–77. Appellants filed a motion to amend the judgment on September 20, 2011. LF 79. The motion was never ruled on and this appeal was filed on December 23, 2011. LF 82.

POINTS RELIED ON

FIRST POINT RELIED ON

The trial court erred in dismissing Appellants' claims against the estate because application of section 473.360, R.S.Mo. to bar their claims violates the due process clauses of Article I, § 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution in that (1) Appellants are known or reasonably ascertainable creditors entitled to actual notice of the estate and the need to file claims within a certain time period and Respondent failed to use reasonably diligent efforts to provide Appellants with actual notice, (2) their claims are not conjectural and (3) Appellants are minors.

Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

Estate of Bohannon, 943 S.W.2d 651 (Mo. 1997).

Estate of Wilkinson, 843 S.W.2d 377 (Mo. Ct. App. 1992).

SECOND POINT RELIED ON

The trial court erred in dismissing Appellants' claims against the estate because application of section 473.360, R.S.Mo. to bar their claims violates the open courts provision of the Missouri Constitution (Article I, § 14) in that section 473.360 arbitrarily and unreasonably restricts their recognized causes of action in light of the fact that Appellants are minor children who lack the capacity to protect their own rights by contracting with attorneys and filing lawsuits, including claims against decedent estates, and are at the mercy of adults who may not protect their rights.

Schumer v. City of Perryville, 667 S.W.2d 414 (Mo. 1984).

Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. 1986).

Kilmer v. Mun, 17 S.W.3d 545 (Mo. 2000).

ARGUMENT

FIRST POINT RELIED ON

The trial court erred in dismissing Appellants' claims against the estate because application of section 473.360, R.S.Mo. to bar their claims violates the due process clauses of Article I, § 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution in that (1) Appellants are known or reasonably ascertainable creditors entitled to actual notice of the estate and the need to file claims within a certain time period and Respondent failed to use reasonably diligent efforts to provide Appellants with actual notice, (2) their claims are not conjectural and (3) Appellants are minors.

Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

Estate of Bohannon, 943 S.W.2d 651 (Mo. 1997).

Estate of Wilkinson, 843 S.W.2d 377 (Mo. Ct. App. 1992).

A. *Standard of Review*

Because the constitutional validity of a statute is a question of law, this Court reviews decisions passing on or relating to such questions de novo. *See, e.g., Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations*, 277 S.W.3d 670, 674 (Mo. 2009); *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516–17 (Mo. 1991). If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid. *Blunt*, 810 S.W.2d at 516.

B. Argument

1. Appellants were known or reasonably ascertainable creditors and Respondent failed to use reasonably diligent efforts to provide them notice

Section 473.360.1, R.S.Mo., sometimes referred to as the non-claim statute, provides as follows:

Except as provided in section 473.370, all claims against the estate of a deceased person, other than costs and expenses of administration, exempt property, family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, which are not filed in the probate division of the circuit court within six months after the date of the first published notice of letters testamentary or of administration or, if notice was actually mailed to, or served upon, such creditor, within two months after the date such notice was mailed, or served, whichever later occurs, or which are not paid by the personal representative, within six months after the first published notice of letters testamentary or of administration, are forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the United States Supreme Court emphasized that “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314.

In *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), the United States Supreme Court addressed the constitutionality of non-claim statutes. It held that personal representatives must provide actual notice to known or reasonably ascertainable creditors before non-claim statutes can be used to terminate a creditor’s claim. *Id.* at 490–91. The Court explained that the personal representative has a duty to make “reasonably diligent efforts” to uncover the identities of creditors. *Id.* at 490. It further explained that if “reasonably diligent efforts” would have identified the creditor and its claim, then termination of the claim without actual notice would violate due process. *Id.* at 491. The Court held that non-claim statutes are not self-executing and that they adversely affect property interests. *Id.* at 491.

The *Pope* Court recognized the importance of actual notice to creditors when it noted that:

As a class, creditors may not be aware of a debtor’s death or of the institution of probate proceedings. Moreover, the executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor’s or executrix’s inclination to call attention to the potential expiration of a creditor’s claim. There is thus a substantial practical need for actual notice in this setting.

Id. at 489.

Since *Pope*, two Missouri appellate cases have addressed *Pope* in the context of tort claimants. In *Estate of Wilkinson*, 843 S.W.2d 377 (Mo. Ct. App. 1992), the claimants were in an automobile collision with the decedent and tried to file a claim after the non-claim statute expired. The court held that they were entitled to actual notice of the estate and the claim bar date. *Id.* at 380–82.

Likewise, in *Estate of Bohannon*, 943 S.W.2d 651 (Mo. 1997), this Court held that the claimants, who were involved in an automobile accident with the decedent, were entitled to actual notice if they were reasonably ascertainable creditors and remanded the case to the trial court for that determination.

In light of *Wilkinson* and *Bohannon*, it is clear that Claimants’ status as tort claimants whose claims have not been reduced to a judgment does not negate their entitlement to actual notice of the estate and the claim bar date.

In this case, R.M.N. and R.D.N. and their claims were known or reasonably ascertainable to Respondent and she failed to use reasonably diligent efforts to provide them with actual notice so that application of section 473.360, R.S.Mo. to bar their claims violates due process.

At the time of Allen Austin’s death, Respondent knew R.M.N. and R.D.N. and about the allegations of sexual abuse against Mr. Austin in 2006. TR 5:15–20, 7, 8:1–3, 16:5–11. Respondent helped Mr. Austin with his business and personal affairs. TR 4:2–13. He showed her a letter to him from the Missouri Department of Social Services dated January 6, 2009, which states as follows:

X The report is substantiated that:

Name of victim:	[R.M.N.]
Type of abuse/neglect:	Sexual maltreatment (6)
Name of alleged perpetrator:	Allen D. Austin
Name of victim:	[R.D.N.]
Type of abuse/neglect:	Sexual maltreatment (6)
Name of alleged perpetrator:	Allen D. Austin

.....

This determination is based on the following facts discovered during the investigation:

There was Preponderance of Evidence in 2006 (#20061720021) on Allen Austin in regards to [R.M.N.] and [R.D.N.]. This incident was already investigated and closed in Gentry County (2006). In regards to the new incident concerning sexual abuse on [R.M.N.] and [R.D.N.] listed in case number 2008326021 it was found to be Unsubstantiated due to lack of evidence.

Tr. Ex. 1; TR 20:2–12; Appendix at A6.

Then, Mr. Austin showed Respondent a letter to him from the Missouri Department of Social Services dated March 9, 2009, which states as follows:

I received a letter from your attorney, David Parman, requesting an administrative review of incident #20083260214. Your request is denied due to the new allegations alleged in this report being unsubstantiated. The current incident, 20083260214 included two different sets of allegations of

abuse and neglect. The first allegations were the same as those investigated in 2006. The conclusions of those allegations remain as Preponderance of Evidence. The new allegations made in the current report are unsubstantiated. The time period to appeal the Preponderance of Evidence finding for the 2006 allegations has lapsed.

Tr. Ex. A; TR 10:23–25; Appendix at A8.

From these two letters, Respondent knew about Appellants and their claims. She knew that the State of Missouri had investigated the 2006 allegations of sexual abuse and had deemed the allegations substantiated by a preponderance of the evidence. She knew R.M.N. and R.D.N. and that the letters concerned them. TR 16:5–11. Respondent knew their mother, their grandfather and their aunt. TR 16:12–13, 18:15–24. Yet, when Mr. Austin died, she made no effort to find them and give them actual notice of the estate or their need to file a claim within a certain time period. TR 19:6–8, 13–20.

Respondent's failure to provide Appellants with actual notice violates her duty as a personal representative to make reasonable diligent efforts to give actual notice to creditors, who, under *Wilkinson* and *Bohannon*, include tort claimants whose claims have not been reduced to a judgment. And because actual notice was not given to Appellants, application of section 473.360 to bar their claims violates due process.

2. Appellants' claims were not conjectural

The judgment dismissing Appellants' claims reasons that Appellants were not reasonably ascertainable creditors because their claims were conjectural. This stems from Respondent's argument that she did not believe she had a duty to provide

Appellants with actual notice because she found their claims to be without merit. It is based on a strained and unrealistic interpretation of the two letters sent to Mr. Austin, and shared with Respondent, from the Missouri Department of Social Services.

Both letters clearly state that there were two different sets of allegations, one set from 2006 and another from 2008. Tr. Ex. 1; Tr. Ex. A. The letters also clearly state that the 2006 allegations were investigated, found to be substantiated and such finding was never appealed by Mr. Austin. Tr. Ex. 1; Tr. Ex. A. The allegations contained in Appellants' claims filed in the estate concern the 2006 incidents. Consequently, Appellants' claims of sexual abuse in 2006 cannot be regarded as conjectural and Respondent cannot find refuge in the state's findings regarding the *new* 2008 allegations.

Furthermore, Respondent's belief about the merits of Appellants' claims is immaterial. It does not excuse her from providing actual notice. If personal representatives were permitted to avoid the actual notice requirement required by due process by deeming potential claims as without merit, claimants would be denied their right to present evidence establishing the legitimacy of their claims at a hearing. Personal representatives who were also heirs, such as Respondent, would have every incentive to find a way to color potential claimants and claims as meritless.

Appellants have not located a Missouri case addressing Respondent's argument. However, courts in several sister states have decided the issue. In *Estate of Pennington*, 829 P.2d 618 (Kan. Ct. App. 1992), the claimant was the decedent's nephew, Chester. Chester and his uncle had business dealings over the years and their dealings lead Chester to file a lawsuit in 1974 against his uncle. Chester later dismissed it without prejudice.

For some time before his death, Chester's uncle had been under a guardianship and conservatorship. One of the conservators was one of the administrators in the decedent's estate. Chester made an oral claim in the conservatorship estate based on a 1969 contract. A later report of the claim was filed.

The administrators admitted to knowing about Chester's claim on the 1969 contract but decided not to give him actual notice once the uncle died. Their decision was based on their conclusion that the claim had no merit.

The court held that Chester was entitled to actual notice of the estate and the claim bar date because he and his claim were reasonably ascertainable. *Id.* at 797, 799–800. It noted that Chester was known to the administrators, they knew his address and they knew about his claim. *Id.* The court emphasized that “the statute does not confer upon the administrators the discretion to mail notice only to creditors whom the administrators believe have good claims.” *Id.*

The court rejected the administrators' attempt to rely on a few stray comments in *Pope and Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), and *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Like Respondent, the administrators tried to argue that they did not have to give Chester actual notice because his claim was merely conjectural. The court reviewed the statements made in the cases referenced by the administrators and explained that the phrase “**conjectural claims**” means “**interests of parties who are difficult to determine.**” *Id.* at 796. It elaborated that some of the parties in *Mullane* were trust beneficiaries who were remote, distant and hard to

identify—contingent beneficiaries, remaindermen, etc., unlike Chester whose identity and claim were known to the administrators. *Id.* at 796–97.

In *American Home Assurance Co. v. Gaylor*, 894 So. 2d 656 (Ala. 2004), the decedent died in an automobile collision when he collided with the rear of a tractor-trailer. A property damage claim was made and satisfied with respect to damage caused to the tractor-trailer. The driver of the tractor-trailer was awarded workers' compensation benefits. The workers' compensation carrier then filed a claim in the other driver's estate. The estate sought to dismiss the claim as being barred by Alabama's non-claim statute. The insurer argued that the statute did not apply because it, or its insured, were known or reasonably ascertainable creditors entitled to actual notice. The estate's position was that the insurer and its insured were not known or reasonably ascertainable creditors because the accident report said the insured truck driver had not been injured in the collision, a fact later reaffirmed by the insurance adjuster handling the property damage claim, and the property damage claim had been satisfied.

The court held that the administrator had a duty to inquire further to determine whether there was a claim from the truck driver. *Id.* at 660. It explained that the administrator knew about the collision, knew the truck driver's name and address and that the collision was catastrophic, facts which required her to inquire into the possibility of a claim against the estate. *Id.* *Gaylor* thus stands for the proposition that a personal representative cannot just assume that someone does not have a claim once they are aware of facts that put them on notice of the possibility of a claim.

Then, in *Simpson v. Estate of Simpson*, 922 So. 2d 1027 (Fla. Dist. Ct. App. 2006), the decedent's nephew filed a claim against the estate alleging that he was entitled to shares of stock in a farming company. The personal representative disputed the timeliness of the nephew's claim arguing that it was barred by Florida's non-claim statute. The court found that the nephew was known to the personal representative and that his claim was known to her, but that the personal representative had decided not to give the nephew actual notice of the probate proceedings. Instead of allowing the claim to proceed for lack of notice, the court went on to determine that the nephew's claim lacked merit. The court of appeals reversed, holding that the claim should have been allowed to proceed once the court determined that the nephew and his claim were known or reasonably ascertainable. *Id.* at 1029–30. *Simpson* therefore stands for the proposition that a determination of the merits of a claim is not proper when the issue at hand is whether a claim is barred by the non-claim statute or should be allowed to proceed for lack of notice.

Respondent's argument that Appellants were not reasonably ascertainable creditors because their claims were conjectural must fail under *Pennington*, *Gaylor* and *Simpson*. Under *Pennington* in particular, Appellants' claims are not conjectural because their interests are not difficult to determine. 829 P.2d at 796.

When the Court in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), mentioned conjectural claims, it was talking about a very large trust fund that would have required the trustee to conduct "frequent investigations into the status of great numbers of beneficiaries, many of whose interests in the common fund are so remote as to be

ephemeral.” *Id.* at 317. Published notice was good enough for due process if the addresses and interests of beneficiaries were unknown to the trustee—those were the people with conjectural or future claims. *Id.* at 318. However, the *Mullane* court made clear that when it comes to persons whose identity and interests are known, due process requires more; it requires actual notice. *Id.*

Respondent knew Appellants’ identity and she knew about their interests. TR 5:15–20, 7, 8:1–3, 16:5–11, Tr. Ex. 1; Tr. Ex. A. What really happened here is Respondent ignored the language in the state’s letters indicating that the 2006 allegations were substantiated and that Mr. Austin never appealed the state’s findings. If she was confused about what that language meant, she never interviewed anyone from the state for clarification, nor did she ask to talk to the children or their parents. TR 17:7–22, 18:8–14. Because she was one of the estate’s two heirs, Respondent stood to gain from deciding to believe what she wanted in an effort to deny Appellants due process, a circumstance the *Pope* Court intended to prevent. As the Alabama Supreme Court found in *American Home Assurance Co. v. Gaylor*, 894 So. 2d 656 (Ala. 2004), a personal representative cannot just assume that someone does not have a claim once they are aware of facts that put them on notice of the *possibility* of a claim.

3. Appellants’ status as minors is relevant to due process in this case

Finally, the trial court’s judgment notes that there is no exception for children in section 473.360. However, due process requires that the incapacity of a person be accounted for in determining the means of providing notice. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), the Court held that statutory notice of mailed letters, postings and

newspaper publications was not sufficient under *Mullane* to provide a person the government knew to be mentally incompetent with notice of the pendency of the action or of the opportunity to present their objections. *Id.* at 146–47. The Court suggested that a guardian would have to be appointed and notice given to the guardian so that the guardian could decide how to proceed on behalf of the ward. *Id.*

Similarly, in this case, Appellants’ are minor children who lacked the capacity to file claims in the estate. *Strahler v. St. Luke’s Hospital*, 706 S.W.2d 7, 9 (Mo. 1986). They also lacked the ability to contract for legal services with an attorney. Section 431.055, R.S.Mo.

So even though section 473.360 does not include a statutory exception for minors like there is under the statutes of limitations in chapter 516, Appellants’ status as minors is still relevant to the issues of whether they were known or reasonably ascertainable creditors and whether Respondent used reasonably diligent efforts to give them notice.

Respondent should have known from the state’s two 2009 letters that Appellants had made allegations of sexual abuse in 2006 that were found by the state to be substantiated. Tr. Ex. 1; Tr. Ex. A. Instead of assuming, as she did in this case, that notice was not necessary because no lawsuit arising out of the 2006 allegations had been pursued yet, Appellants’ status as minors required her to do more. TR 22:10–11. It required her to nevertheless provide Appellants notice so that their guardian could decide whether they wanted to present a claim within section 473.360’s time limit. But for Mr. Austin’s death, Appellants’ could have waited to file a lawsuit against him well into adulthood. *See* MO. REV. STAT. §§ 516.120(4), 516.170, 537.046.2. That is why

Respondent's argument that Appellants' did not pursue the 2006 allegations sooner rings so hollow. Appellants could have waited far longer before pursuing anything. Given the nature of their claims, growing up before filing a lawsuit would be wise for a number of reasons.

4. Conclusion

For these reasons, Appellants ask the Court to reverse the trial court's judgment of dismissal and remand the case for further proceedings on the grounds that application of section 473.360, R.S.Mo. to bar their claims violates due process, under the circumstances.

SECOND POINT RELIED ON

The trial court erred in dismissing Appellants' claims against the estate because application of section 473.360, R.S.Mo. to bar their claims violates the open courts provision of the Missouri Constitution (Article I, § 14) in that section 473.360 arbitrarily and unreasonably restricts their recognized causes of action in light of the fact that Appellants are minor children who lack the capacity to protect their own rights by contracting with attorneys and filing lawsuits, including claims against decedent estates, and are at the mercy of adults who may not protect their rights.

Schumer v. City of Perryville, 667 S.W.2d 414 (Mo. 1984).

Strahler v. St. Luke's Hospital, 706 S.W.2d 7 (Mo. 1986).

Kilmer v. Mun, 17 S.W.3d 545 (Mo. 2000).

A. *Standard of Review*

Because the constitutional validity of a statute is a question of law, this Court reviews decisions passing on or relating to such questions de novo. *See, e.g., Missouri Alliance for Retired Americans v. Department of Labor and Industrial Relations*, 277 S.W.3d 670, 674 (Mo. 2009); *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516–17 (Mo. 1991). If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid. *Blunt*, 810 S.W.2d at 516.

B. *Argument*

Article I, § 14 of the Missouri Constitution provides “[t]hat 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 not be administered without sale, denial or delay.”

In *Schumer v. City of Perryville*, 667 S.W.2d 414 (Mo. 1984), this Court addressed a statute requiring plaintiffs to give a city notice of an accident within ninety days thereof before maintaining a lawsuit. The plaintiff was a twelve year old boy. The Court held that the statute violated the open courts provision because the plaintiff was a minor. *Id.*

In *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7 (Mo. 1986), this Court addressed a statute of limitations applicable to medical malpractice cases. It began by noting that “a person who is under the legal disability of minority still lacks capacity to institute, in his own right, a civil lawsuit.” *Id.* at 9. The Court rejected the defendant’s contention that the plaintiff was free to initiate her own lawsuit because it ignored the “disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years—who has little if any understanding of the complexities of our legal system.” *Id.* at 10. It emphasized that the “fact of the matter is that for most minors the opportunity to pursue a common law cause of action for injuries sustained from medical malpractice is one that is inextricably linked to the diligence and willingness of their parents to act in a responsible and timely manner.” *Id.* The Court expressed concern that “parents . . . may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit within the time provided.” *Id.* It concluded that it was “unreasonable to expect a minor, whose parents fail to timely vindicate his legal rights, to independently seek out another adult willing to serve as a next friend. Such an expectation would ignore the realities of the family unit and the limitations of youth.” *Id.*

This Court ultimately held that the statute of limitations of two years, as applied to minors, violated the open courts provision of the Missouri Constitution because “it deprives minor medical malpractice claimants the right to assert their own claims individually, makes them dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, . . . [thereby] interfering with a minors’ state constitutionally enumerated right of access to the courts.” *Id.* at 12. It went on to stress that “[o]ur society takes great pride in the fact that the law remains forever at the ready to ‘jealously guard’ the rights of minors.” *Id.* **This Court deemed the statute of limitations, as applied to minors, to be an arbitrary and unreasonable denial of a set of rights without an adequate substitute course of action.** *Id.*

In more recent years, this Court has clarified that the open courts provision “prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.” *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. 2000). In *Kilmer*, it addressed a statute that required a bar owner to be convicted for selling intoxicating liquor to an obviously intoxicated person before a civil suit could be maintained. The Court declared that the statute violated the open courts provision because it was “entirely dependent upon whether or not the county prosecutor has prosecuted and obtained a conviction.” *Id.* at 550.

Later decisions by this Court have applied *Kilmer* as requiring a showing of three things to establish an open courts violation: (1) a party has a recognized cause of action;

(2) the cause of action is being restricted; and (3) the restriction is arbitrary and unreasonable. *Snodgrass v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. 2006) (citing *Kilmer*, 17 S.W.3d at 549–50).

In this case, there is no dispute that Appellants' claims contain recognized causes of action and there is no dispute that those causes of action are being restricted by the time limitation prescribed by section 473.360, R.S.Mo. The issue is whether the time limitation is arbitrary or unreasonable.

As applied to minors, like Appellants, section 473.360's time limitation is arbitrary and unreasonable. This Court has already decided as much in *Schumer* and *Strahler*. See *Strahler*, 706 S.W.2d at 12 (“**Section 516.105, RSMo arbitrarily and unreasonably denies them a set of rights without providing an adequate substitute course of action for them to follow.**”). Like the plaintiffs in *Schumer* and *Strahler*, Appellants lacked the capacity to file claims themselves or to even hire an attorney to do that for them. Moreover, they are at the mercy of adults who may not timely protect their rights. Significantly, if Mr. Austin had not died, Appellants could have sued him well into adulthood. See MO. REV. STAT. §§ 516.120(4), 516.170, 537.046.2. They were perfectly free to grow up and become adults before they decided what to do.

Section 473.360 does not leave Appellants with an adequate substitute course of action. If the period to file claims expires and a minor's parent fails to file a claim on behalf of the minor, the minor cannot meaningfully pursue their claim later, either when they become an adult or when their parent decides to act.

Accordingly, Appellants ask the Court to declare that section 473.360, R.S.Mo., as applied to their claims, violates the open courts provision of the Missouri Constitution under *Strahler* and *Schumer* and to reverse the trial court's judgment of dismissal and remand the case for further proceedings.

CONCLUSION

For the reasons set forth above, Appellants ask the Court to reverse the trial court's judgment dismissing their claims pursuant to section 473.360, R.S.Mo. and remand the case for further proceedings, including a trial of their claims.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

I hereby certify that Appellants' Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 6,251 words and 922 lines of text.

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CERTIFICATE OF SERVICE

I hereby certify that Appellants' Brief was served on this 18th day of June, 2012 via the Court's electronic filing system to David Parman, P.O. Box 187, 108 W. Wood Street, Albany, Missouri 64402, Attorney for Respondent.

/s/ **Benjamin S. Creedy**