

IN THE SUPREME COURT OF MISSOURI

PEGGY STEVENS McGRAW, et al.,

Appellants,

v.

STATE OF MISSOURI, et al.,

Respondents.

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Frank Conley, Circuit Judge**

BRIEF OF STATE RESPONDENTS

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JURISDICTIONAL STATEMENT

Appellants assert jurisdiction in this Court on the basis that the Missouri State Employees' Retirement System (MOSERS) had moved to dismiss Appellants' claim because the 2010 Schedule of Compensation violated Art. XIII, §3 and Art. III, §1 of the Missouri Constitution.

The Circuit Court did not grant dismissal on this basis. The actual constitutional validity of the Compensation Schedule is not directly at issue in this appeal—only whether dismissal of their claim was proper due to failure to state a claim and sovereign immunity.

STATEMENT OF FACTS

The State respondents offer the following additions and clarifications to Appellants' Statement of Facts.

Appellants name as defendants the State of Missouri, Doug Nelson, Clint Zweifel, and the Missouri State Employees' Retirement System (MOSERS). L.F. pp. 7-8. Defendants Nelson and Zweifel are identified as the State Commissioner of Administration and Treasurer with a brief description of their duties. L.F. p. 8.

Appellants' claim is based upon a schedule adopted by the Missouri Citizens' Commission on Compensation that creates a percentage relationship between the salaries of state judges and federal judges. L.F. p. 10. This schedule became effective on July 1, 2012. L.F. pp. 10-11.

As a result of a series of cases in federal court, Appellants allege that federal judges received a salary increase, effective January 1, 2014. L.F. pp. 11-14.

Effective July 1, 2014 state judges received a pay increase that reflected the pay increase federal judges had received. L.F. p. 14. Appellants allege that state judges did not receive any retroactive salary payment for the period between July 1, 2012 and June 30, 2014. L.F. pp. 14-15. There is no allegation that prior to January 1 2014, state judges were not receiving

salaries based upon the appropriate percentage of federal judicial salaries being paid at that time.

Appellants allege that the retirement benefits of state judges are based upon the salary of the judge on the day of his/her retirement . ¶ 81.¹ There is no allegation that state judges who retired in the above two year period are not receiving retirement benefits based upon their salary on the day of retirement. Instead, Appellants allege that state judges who retired in that two year period have not received any additional pension benefits to reflect a retroactive increase to their salaries for that two year period. L.F. p. 23.

¹ Section 476.530 RSMo uses the term “compensation” instead of “salary.” For consistency, Respondents will use Appellants’ terminology of “salary.” In addition, although perhaps not relevant in this case, there may be a distinction between the date of retirement and the date of leaving employment.

SUMMARY OF THE ARGUMENT

This case presents a rare, if not unique, claim for damages against the State of Missouri. Appellants claim to have been damaged, not because of any mistake that the State or its officials made at the time they acted, but because they did not retroactively change those actions based upon an alleged retroactive change in the law.

Appellants' damage claim is based upon the 2010 Compensation Schedule as it relates to state judicial positions. Beginning July 1, 2012 state judicial salaries are indexed as a percentage of federal judicial salaries. For fiscal year 2013, which began on July 1, 2012, Appellants do not allege that state judges did not receive the appropriate percentage of federal judicial salaries as they were being paid at that time. When fiscal year 2014 began on July 1, 2013, Appellants do not allege that state judges did not receive the appropriate percentage of federal judicial salaries as they were being paid at that time. Instead, they allege that the state judicial salaries should be retroactively increased because on January 1, 2014 (in the middle of the State's 2014 fiscal year) federal judges received a salary increase as a result of federal litigation. State judicial salaries were increased on July 1, 2014 – the beginning of the State's next fiscal year.

Damage actions against the State are barred by the doctrine of sovereign immunity unless the State has consented thereto. There is no

explicit consent applicable to this case. And consent to a damage action should not be by inference or implication when such a remedy is not necessary to the enforcement of a right. Under the facts of this case, the right in question, as alleged by appellants, could not be determined at the time the State and its officials needed to act. This makes it even more inappropriate to conclude that State consent to such a claim could be based upon inference or implication. The Circuit Court correctly dismissed on the basis of sovereign immunity.

Apart from the bar to Appellant's damage claim, their theory of liability is based upon an erroneous interpretation of Art. XIII, § 3.8 of the Missouri Constitution. Article XIII, § 3.8 and the Compensation Schedule filed pursuant thereto, should be interpreted in light of and harmonized with other portions of the Constitution. Other portions of the Constitution that are relevant to the interpretation of Art. XIII, § 3.8 include those relating to the State's financial system based upon a fiscal year and the provisions relating to the appropriations by the General Assembly. When Article XIII, § 3.8 is properly interpreted it becomes evident that Appellants do not allege facts that demonstrate that a violation of Art. XIII, § 3.8 has occurred.

In Point III of their brief Appellants address a separate issue raised by MOSERS in its motion to dismiss – that the Compensation Schedule is in

violation of the Constitution. State Respondents take no position on this issue.

ARGUMENT

Standard of Review

The granting of a motion to dismiss is reviewed *de novo*. *Foster v. State*, 352 S.W.3d 357, 359 (Mo. banc 2011). An appellate court is to review the petition to determine if the facts alleged meet the elements of a recognized cause of action or one that might be adopted. *Id.* If the motion to dismiss can be sustained on any ground alleged in the motion, the trial court’s ruling will be affirmed. *Id.*

I. **The Circuit Court Correctly Determined that the Appellants’ Damage Action Against the State of Missouri Was Barred by the Doctrine of Sovereign Immunity.**

Introduction

The general rule is that the State of Missouri may not be sued without its consent. *McNeill Trucking Co., Inc. v. Missouri State Highway and Transp. Comm’n*, 35 S.W.3d 846, 848 (Mo. banc 2001). It is “appropriate to require a litigant who sues the state . . . to file a petition demonstrating a viable theory of liability.” *State rel. Mo. Dept. of Agriculture*, 687 S.W.2d at 181. Indeed, showing a waiver of sovereign immunity is part of a plaintiff’s *prima facie* case. *Shifflette v. Missouri Dept. of Natural Resources*, 308 S.W.3d 331, 334 (Mo. App. 2010). Waivers of sovereign immunity, whether in the Constitution or a statute, are strictly construed. *Fort Zumwalt School*

Dist. v. State, 896 S.W.2d 918, 923 (Mo. banc 1995); *State of Ohio v. Missouri State Treasurer*, 130 S.W.3d 742, 744 (Mo. App. 2004).

Appellants allege in Counts I-IV of their petition that because the State has not retroactively increased their salaries they have sustained damage, and thus they seek an award of money damages from the State of Missouri. L.F. pp. 21-25. And the facts alleged do not demonstrate a current violation of Appellants' retirement benefits. Appellants do not allege that their retirement benefits are not based on the salaries they received on the date of their retirement, as the statute requires. L.F. p. 23; § 476.530 RSMo. Thus, any award of increased retirement benefits would also have to be based on a retroactive increase in salary for the retirees. Moreover, in order to maintain the soundness of the retirement system, any increase in retirement benefits would have to be funded by a retroactive award by the State to the retirement fund. § 104.438 RSMo.

Appellants' attempt to disguise their claims for retroactive monetary relief as claims for declaratory or injunctive relief are unavailing. In Count V Appellants ostensibly claim to seek prospective declaratory and injunctive relief. But prospective declaratory relief is not a viable claim in this instance because, under the facts alleged in Appellants' petition, the State is currently paying state judges the salary called for by the Compensation Schedule and paying the retirement benefits based on the salary that was being paid on the

date of retirement. L.F. pp. 14, 23. Count V is also retroactive in nature because Appellants request a declaration of a past violation and an injunctive that they are entitled to the remedy sought, i.e. damages. L.F. p. 26. These claims, like the requested damage award, are barred by sovereign immunity.

There is no State consent to a damage action in this case.

The sovereign immunity from the damage claim in this case is distinct from the State's immunity from a tort action. When this Court abolished immunity from tort liability in *Jones v. State Highway Comm'n.*, 557 S.W.2d 225 (Mo. banc 1977), it did not abolish or limit "the more general rule of sovereign immunity from suit." *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995) (recognizing the legislative reinstatement of immunity); *State of Ohio*, 130 S.W.3d at 744. As this Court explained in *Jones*, its decision was "not meant to impose liability upon the state or any of its agencies for acts or omissions constituting the exercise of a legislative, judicial, or executive function." *Jones*, 557 S.W.2d at 230. But that is exactly what plaintiffs seek to do—impose monetary liability on the State for an alleged error in exercising a government function.

The plaintiffs' argument that there is State consent in this case, erroneously assumes that consent is an all or nothing proposition. In other words, either the State may not be sued at all or it may be sued for everything. But that is not a proper statement of the law and in this case the

State has not consented to an action for money damages such as plaintiffs have brought.

When the State does consent to a suit against it, “it may be sued only in the manner and to the extent provided by statute.” *Charles v. Spradling* 524 S.W.2d 820, 823 (Mo. banc 1975). This Court’s decision in *Fort Zumwalt* illustrates this point.

In *Fort Zumwalt* this Court held that sovereign immunity protects the State from a money judgment for a violation of the Hancock Amendment of the Missouri Constitution. *Fort Zumwalt School Dist.*, 896 S.W.2d at 923. Even though a plaintiff may have a viable Hancock claim, Art. X, § 23 of the Constitution does not authorize a money judgment against the State as a remedy. *Id.* at 923.

In *Fort Zumwalt*, several school districts alleged that the State had violated the unfunded mandate section of the Hancock Amendment. Art. X § 21. They alleged that the State had imposed new duties on school districts but had not appropriated funds to pay for the increased costs of those duties. The school districts alleged that they had incurred increased costs in complying with these new mandates. As a remedy, the school districts sought recovery of amounts of state aid that they alleged the State should have paid in previous years. Assuming, without deciding, that the school districts could prove that the State had not paid for new mandates it had imposed, this

Court held that the school districts were not entitled to a money judgment against the State in any event. 896 S.W.2d at 923.

Section 23 of the Hancock Amendment authorizes suits to enforce the amendment, without specifying the remedies available, other than attorneys' fees and costs. Any State consent for a money judgment would have to be by inference or implication. But this Court held that it would "not infer or imply that a waiver of sovereign immunity extends to remedies that are not essential to enforce the right in question." *Id.* This Court went on to find that there were equally effective and less onerous remedies than a money judgment against the State, *i.e.*, a declaratory judgment relieving the school districts of the duty to perform any inadequately funded activity or service. *Id.* Without consent for a damage action, sovereign immunity barred that remedy.

Here, Art. XIII, § 3.8 of the Missouri Constitution does not contain any explicit waiver of sovereign immunity. Paragraph 54 of Appellants' petition does not identify any constitutional language explicitly waiving sovereign immunity. L.F. p. 16. In particular, Art. XIII, § 3.8 does not contain any consent to allow retroactive monetary awards against the State. Under the principles enunciated in *Fort Zumwalt*, any damage remedy would have to be inferred. But as this Court has held, such inference should not extend to a remedy, such as damages, that is not essential to effectuate the right in

question. As in *Fort Zumwalt*, declaratory relief would be sufficient to enforce Art. XIII, § 3.8 of the Constitution. Indeed, the reluctance to infer a damage remedy should be even greater in this case. Unlike *Fort Zumwalt*, the alleged damages here cannot be determined at the time the State acted – budgeting and making appropriations for fiscal years 2013 and 2014. The alleged damages can only be determined afterwards, when federal judicial salaries were increased. Under these circumstances there is no reason to infer consent to a damage action and the Circuit Court correctly dismissed on the basis of sovereign immunity.

Appellants argue that a damage remedy is necessary here because they have no alternative remedy available. Resp. brief p. 22. But Appellants misunderstand this Court's decision in *Fort Zumwalt*. This Court did not conclude that the proper interpretation of the Hancock Amendment depended on what the particular remedy plaintiffs requested. Instead, it determined that the Hancock Amendment should not be interpreted to infer consent to a money judgment against the State and then applied that interpretation to the school districts' claim. As a result, the school districts' claim for a money judgment was barred even though the school districts could proceed with a claim for a declaratory judgment.

Appellants' argument that the Court should infer State consent to their damage action is based on the fact that their claim is only for retroactive

monetary relief. (Even Count V of Appellants' petition, which they describe as for declaratory and injunctive relief, is retroactive in nature. Appellants request a declaration of a past violation and an injunctive that they are entitled to the remedy sought, i.e. damages. L.F. p. 26.) But the fact that the State is currently paying salaries required by the Compensation Schedule, L.F. p. 14, does not mean that declaratory judgment is not an adequate remedy to enforce Art. XIII, 3.8. The absence of a current violation that would justify a declaratory judgment does not mean that the Court must infer consent to an action for damages. What if the State in *Fort Zumwalt* had currently appropriated funds to pay the increased costs? The school districts' claim for a retroactive money judgment would still have been barred but there would have been no viable claim for a declaratory judgment to remand. That is the situation presented in the instant case. There is no State consent to a damage action and no reason such a remedy should be inferred.

This Court has reaffirmed its holding that although the Hancock Amendment authorizes a suit for a declaratory judgment, it does not authorize a judgment for damages. *Taylor v. State*, 247 S.W.3d 546, 548 (Mo. banc 2008). This principle has also been applied to bar a claim for a refund of taxes that were unconstitutionally collected due to absence of voter approval. *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223, 244-246 (Mo.

banc 2013). Because Appellants' claim is only for damages, it is barred by sovereign immunity.

Appellants' Arguments to the contrary are unavailing.

Appellants place much emphasis on the fact that Art. XIII, § 3.8 of the Missouri Constitution was amended to remove the language "subject to appropriation." Appellants argue that because the Compensation Schedule is no longer "subject to appropriation" sovereign immunity has been waived. Appellants overstate the effect of this amendment to Art. XIII, § 3.8.

In *Weinstock v. Holden*, 995 S.W.2d 411, 418 (Mo. banc 1999) this Court held that because of the language "subject to appropriation," Article XIII, § 3.8 did not create an enforceable right unless the legislature made an appropriation to fund salary increases. The amendment removing that language would apparently mean that there is now an enforceable right. But this simply is the same situation as the Hancock Amendment that this Court addressed in *Fort Zumwalt*.

The Hancock Amendment explicitly provided a right to enforce its provisions without a specification of remedies. Now Article XIII, § 3.8, by eliminating the "subject to appropriation" language, inferentially creates a right to enforce it, but again without specification of remedies. For the same reasons that this Court identified in *Fort Zumwalt* it is not appropriate to infer a State consent to a damage action under Article XIII, § 3.8.

Plaintiffs also cite *Crain v. Missouri State Employees' Retirement System*, 613 S.W.2d 912 (Mo. App. 1981), for the proposition that creation of a statutory benefit infers the waiver of sovereign immunity. Plaintiffs' reliance upon *Crain* is misplaced. First, *Crain's* reference to the creation of a statutory benefit as a basis for inferring the waiver of sovereign immunity was mere dicta. The comment was not necessary to the decision because the court had already found sovereign immunity to be waived by the statutory provision authorizing MOSERS to "sue and be sued." 613 S.W.2d at 917. The fact that the "benefit" language was dicta was later recognized in *State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272, 276 (Mo. App. 2010).

Moreover, in *Crain* the inferred waiver of immunity was only "to enforce the benefit or contract." 613 S.W.2d at 917. But enforcement of a right does not automatically infer State consent to a damage claim. *Fort Zumwalt*, 896 S.W.2d at 923. The only claim being asserted in *Crain* was for declaratory judgment. 613 S.W.2d at 914. *Crain* does not support Appellants' assertion that there is a waiver of sovereign immunity regarding their damage claim.

This distinction is illustrated in *Wyman v. Missouri Dept. of Mental Health*, 376 S.W.3d 16, 23-24 (Mo. App. 2012). There, the Department based its sovereign immunity argument solely on § 537.600 RSMo. Although the court reversed dismissal on that basis, it recognized that sovereign immunity

is broader than the statute. As a result, the court stated “we do not decide whether any specific form of equitable relief, or the financial or other consequences of affording particular relief, may implicate sovereign immunity.” As explained above, a waiver of sovereign immunity does not automatically authorize all possible forms of relief. The availability of particular relief depends upon the scope of the waiver.

**The State Treasurer and Commissioner of Administration are
protected by sovereign immunity.**

Appellants’ assertion that the Treasurer and Commissioner of Administration are not entitled to immunity and are proper parties is confused by the Appellants’ failure to simply identify the capacity in which these officials are sued. In the amended petition Appellants did not explicitly state whether the Commissioner and Treasurer were being sued in their official or individual capacities. Missouri Rule of Court 55.13 allows a plaintiff to plead the ultimate fact of the capacity in which a party is sued. Most plaintiffs plead that a state official is sued in his/her “individual capacity” or “official and individual capacity.” Here, Appellants’ amended petition identified the Commissioner and Treasurer merely by the offices they hold and the duties thereof. Without a specific allegation of capacity, these factual allegations would indicate that the Commissioner and Treasurer were being named in their official capacities.

Further, the amended petition did not appear to seek personal relief against the Commissioner and Treasurer. The declaratory and injunctive relief sought seemed to be against the office---not the particular officeholder individually. And ultimately the Appellants sought monetary relief from the State treasury---not from the Commissioner and Treasurer individually.

When the action is in essence one for recovery of money from the State, the State is the real, substantial party in interest and may invoke its sovereign immunity even though individual officials are the nominal defendants.

Kleban v. Morris, 247 S.W.2d 832, 839 (Mo. 1952). To the extent the Treasurer and the Commissioner are named in their official capacities they are protected from Appellants' damage claim by the doctrine of sovereign immunity. *Crain's* holding that the Treasurer and Commissioner were appropriate parties to a declaratory judgment action does not support a contrary result in considering Appellants' damage claim.

**No individual capacity claim against the Treasurer and
Commissioner is pleaded**

To the extent the Treasurer and Commissioner are named in their individual capacities, Appellants fail to state a claim against them.

A plaintiff must allege facts sufficient to state a viable claim against officials and is subject to a motion to dismiss for failure to do so. *State ex rel.*

Twiehaus v. Adolf, 706 S.W.2d 443, 444 (Mo. banc 1986), citing *State ex rel*

Missouri Department of Agriculture v. McHenry, 687 S.W.2d 178, 181 (Mo. banc 1985); *Collins-Camden Partnership v. County of Jefferson*, 425 S.W.3d 210, 214 (Mo. App. 2014); *Stephens v. Dunn*, 453 S.W.3d 241, 251 (Mo. App. S.D.).

The standards for stating such a claim against State officials are well established. The rule of official immunity protects public officers from liability for discretionary acts or omissions, although they may be liable for torts committed when acting in a ministerial capacity *Twiehaus*, 706 S.W.2d at 444. Ministerial duties are those of a clerical nature which are required to be performed in a prescribed manner. *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. banc 2008). However, the public duty doctrine recognizes that duties of public officers are generally owed only to the public at large. Therefore, to state a claim based on a ministerial duty imposed by statute the statute must create a duty to the individual plaintiff. *Id.* at 445. In addition, official immunity protects against liability for discretionary acts “except those done in bad faith or malice.” *Id.* at 446. To be malicious or in bad faith it must be done with intent to cause harm. *Id.* at 447.

In order to state a claim, these exceptions to official immunity or the public duty doctrine must be supported by factual allegations in the plaintiffs’ complaint *Twiehaus*, 706 S.W.2d at 445-447; *Collins-Camden Partnership*, 425 S.W.3d at 214 (no facts were alleged to support a general claim that

defendants acted with malice). *Stephens* held that a “bare conclusory allegation of bad faith and malice, without specific facts” was insufficient. 453 S.W.3d at 251. Bare allegations of bad faith are conclusions which should not be considered in determining whether a plaintiff has stated a cause of action. *Western Robidoux Printing & Lithographing Co. v. Missouri State Highway Comm’n*, 498 S.W.2d 745, 749 (Mo. 1973)

In addition, “a plaintiff must plead facts establishing an exception to official immunity, including the existence of a statutory or departmentally-mandated duty, to survive a motion to dismiss for failure to state a claim.” *Stephens*, 453 S.W.3d at 251, citing *Adolf*, 706 S.W.2d at 445. Therefore, plaintiffs are required to allege facts which would indicate either actual malice on the part of the defendant or the violation of a mandated ministerial duty that is owed to the individual plaintiff.

In this case, Appellants’ allegations regarding malice or a ministerial duty are contained in paragraph 55 of the amended petition. L.F. p. 16. But that paragraph includes no factual allegations that would demonstrate that the Commissioner or Treasurer acted in bad faith or that they violated a ministerial duty that was owed individually to the plaintiffs. For these reasons the amended petition does not survive a motion to dismiss. *Stephens*, 453 S.W.3d at 251.

Appellants state that the ministerial duty is to pay the correct salary. But they do not identify a source of this alleged duty within the constitutional or statutory provisions regarding the Commissioner and Treasurer. Nor do they allege what is the “prescribed manner” for the performance of this alleged ministerial duty. Equally importantly, when was this alleged ministerial duty required to be performed? Under Appellants’ allegations, there was no way prior to January 1, 2014 to determine that Commissioner and Treasurer had failed to perform any ministerial duty. Even after that date, Appellants’ allegations do not specifically identify any ministerial duty that the Commissioner and Treasurer failed to perform in connection with the budget and appropriation for fiscal year 2014 which had been enacted in 2013.

The financial administration of the State, including the duties of these two officers, is more complex than plaintiffs’ conclusory allegation of a ministerial duty. See generally Chapter 33 RSMo. Because Appellants seek retroactive monetary relief, it is incumbent upon them to allege facts showing that the Commissioner and Treasurer have a ministerial duty to pay such damages. But they do not.

Without factual allegations sufficient to assert a claim against the Commissioner and Treasurer in their individual capacities, any such claim in the amended petition should be dismissed.

**II. The Circuit Court Correctly Dismissed Appellants' Claim
for Money Damages Because They Allege No Facts
Demonstrating That Article XIII, § 3.8 of the Missouri
Constitution Has Been Violated.**

The 2010 Compensation Schedule that Appellants allege has been violated was filed by the Citizens' Commission on Compensation. The Commission was created by and operates pursuant to Art. XIII, § 3 of the Missouri Constitution. According to § 3.8, the Commission must meet every two years and file a schedule of compensation for various state officials, including judges. The schedule shall become "effective" if not disapproved by the General Assembly by February 1 of the year following the filing of the schedule. If not disapproved, "the schedule shall apply and represent the compensation for each affected person beginning on the first day of July following the filing of the schedule." This date is the beginning of the State's fiscal year. § 33.110 RSMo

In 2010 the Commission filed a report which included the schedule for compensation of judges. Appendix G, RSMo Supp. 2013, p. G-40; Appendix to Appellants brief, p. A5. For fiscal year 2012 the schedule set judicial salaries at the same level as fiscal year 2011. App. p. A9. For fiscal year 2013 it provided that state judicial salaries "shall be indexed to the commensurate judicial position in the federal system." App. p. A8. In other words, state

judicial salaries should be computed as a percentage of federal judicial salaries.

This schedule was not disapproved by the legislature and so, pursuant to Art. XIII, § 3.8 of the Constitution, it applied and represented the compensation of the affected judges beginning July 1, 2012 (the start of the State's fiscal year 2013). Appellants do not allege that state judges' salaries on July 1, 2012 were not the appropriate percentage of federal judges' salaries as they existed on that date. Neither do plaintiffs allege that state judges' salaries on July 1, 2013 (the start of fiscal year 2014) were not the appropriate percentage of federal judges' salaries as they existed on that date. Appellants allege that due to a series of federal cases, an increase in federal judicial salaries became effective January 1, 2014. Appellants acknowledge that state judicial salaries were increased as a result thereof beginning July 1, 2014. L.F. p. 14. This does not, as a matter of law, constitute a violation of the schedule of compensation.

The schedule of compensation must be interpreted in the context of and be consistent with Art. XIII, § 3.8 of the Constitution. *Weinstock v. Holden*, 995 S.W.2d 411, 420 (Mo. banc 1999). The language in § 3.8 "other provisions of this constitution to the contrary notwithstanding" applies only to other provisions of the Constitution that are not only contrary but "not possible of harmonization." *Id.* at 420. Other parts of the Constitution cannot simply be

ignored, as Appellants seem to suggest. Rather, other constitutional provisions must be harmonized with § 3.8 if possible.

Section 3.8 provides that a schedule “shall become effective” if it is not disapproved by the General Assembly. But it also provides that the schedule does not “apply and represent the compensation” for officials until the next fiscal year. In *Weinstock*, 995 S.W.2d at 417 this Court held that becoming “effective” meant that the schedule “establishes the relationship of compensation to the duties of all elected officials, all members of the general assembly, and all judges, and fixes the compensation for each respective position.” Interior quotations omitted.

But the effect and impact of this still had to be considered in context of the remainder of § 3.8. In *Weinstock* this context included the phrase “subject to appropriation.” *Id* at 418. Although that phrase has since been removed from § 3.8, the context of § 3.8 still includes the language that a schedule shall apply and represent compensation beginning at the next fiscal year. This language must be read “consistent with the remainder of the Missouri Constitution.” *Id.* at 420.

There are several other pertinent parts of the Constitution. Art. IV § 23 of the Constitution provides that the fiscal year of the State shall be 12 months beginning on July 1 of each year and that the General Assembly may make appropriations for one or two fiscal years. Article III, § 36 of the

Constitution provides that no money may be withdrawn from the treasury except pursuant to appropriations made by law. Salaries of elective and appointive official are to be paid out of appropriations for that purpose. § 33.100 RSMo.

Thus, the schedules filed by the Citizens' Commission apply and represent the compensation of elected officials on a fiscal year basis. Past schedules of the Commission were consistent with the State's fiscal year. The schedules filed prior to 2010 either set a single compensation that would apply for both fiscal years between the Commission's meetings or they set separate amounts for compensation for each fiscal year. Appendix G, RSMo Supp. 2013, pp. G-54-55; App. pp. A22-23. There is nothing to indicate that the Citizens' Commission intended to deviate from its past practice of fixing salaries on a fiscal year basis.

Moreover, the Commission stated that the purpose of indexing state judicial salaries to federal judicial salaries was "to attract and retain the best possible judges to the bench." App. pp. A9. This demonstrates that the Compensation Schedule was intended to operate prospectively. Attracting and retaining judges can only be done on the basis of the salary being paid in the present. Making the sort of retroactive increase in salary sought by Appellants cannot attract or retain anyone in the past.

Here, the State has applied the 2010 schedule consistently with the fiscal year system required by the Constitution. The schedule applied and represented compensation of the judges on July 1, 2012—the beginning of fiscal year 2013. The salaries of state judges were based upon the appropriate percentages of federal judicial salaries as such federal salaries existed on that date. Funds were appropriated on that basis. For fiscal year 2014 the salaries of state judges were based upon the appropriate percentages of federal judicial salaries as such federal salaries existed on the first day of that fiscal year—July 1, 2013. Funds were appropriated on that basis.

The contingency upon which state judicial salaries is based—federal salaries---changed in the middle of fiscal year 2014. State judicial salaries could not immediately increase without ignoring the fiscal year structure of the State's finances and the fact that appropriations for that fiscal year had already been made months before. Because of the language of § 3.8 and other parts of the Constitution, the increases in state judicial salaries could not apply until the beginning of the next fiscal year—July 1, 2014. By Appellants' own allegations that is what happened.

Consistent with the Constitution, judicial salaries cannot be retroactively increased. Appropriations expire six months after the period for which they are made. Art. IV, § 28 of the Missouri Constitution. The General

Assembly may not grant extra compensation to any public officer after service has been rendered. Art. III, § 39(3) of the Missouri Constitution.

The Compensation Schedule of the Commission operates prospectively and on a fiscal year basis. The facts alleged in the petition demonstrate that this has been done. As a result, Appellants' petition is insufficient to demonstrate a violation of the Constitution or laws of the State.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

Respectfully submitted,

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Certificate of Service and of Compliance with Rule 84.06(b) and (c)

I hereby certify that on November 6, 2015, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Missouri by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

The undersigned certifies that the foregoing brief complies with the limitation contained in Rule 84.06(b), and that the brief contains 5,474 words.

/s/ Robert Presson
Assistant Attorney General