

IN THE SUPREME COURT OF MISSOURI

No. SC88954

**ST. LOUIS POLICE OFFICERS' ASSOCIATION,
GARY PHELPS and WILLIAM GOODEN,**

Plaintiff-Appellants

vs.

**BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS,
CHRIS GOODSON, JOANN F. MORROW, MICHAEL J. QUINN,
JULIUS K. HUNTER and FRANCIS G. SLAY,**

Defendant-Respondents

**On Appeal from the Circuit Court of the City of St. Louis
State of Missouri
Twenty-Second Judicial Circuit
The Honorable Julian L. Bush**

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Defendant Board of Police Commissioners (“Board”) agrees with Plaintiffs that the action upon which this appeal is based involves the construction and application of R.S. Mo. § 84.160.8(3). Specifically, the first question raised by this action is whether the health insurance coverage that § 84.160.8(3) requires the Board to provide to its retirees must be provided free of charge, i.e. without payment by the retiree of any premium. It is the Board’s position that the statute does not entitle retirees to “free” health insurance coverage and that the contributory health insurance plan offered by the Board satisfies the mandate of the statute. However, if the statute does require the Board to provide health insurance coverage at no charge to retirees, the second question raised is whether the non-contributory health insurance plan offered by the Board fulfills this mandate.

Additionally, this cause of action raises the question of whether the Board’s action in offering retirees the plan options at issue violated substantive due process. It is the Board’s position that it did not.

On December 18, 2007, this Court granted the Plaintiffs’ motion for transfer of this case pursuant to Rule 83.04, and this Court now has jurisdiction of this matter pursuant to Art. V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiffs' Statement of Facts is neither fair, concise nor without argument.¹

The Police Board has long had a statutory obligation under what is currently R.S. Mo. § 84.160.8(3) to provide its retirees with health insurance. (Appl. App. A30) The statute states the Board "shall provide health, medical and life insurance coverage for retired officers and employees of the police department." (Appl. App. A30)

The Board pays 100 percent of the premium under the more basic of two plan options. (Sup. Tr. 20) In 2001, the Board attempted to implement a plan under which the retirees became responsible for paying a portion of their own premium under both options, and the retirees brought a lawsuit known as Lane v. Roth. (Sup. L.F. 09) The Honorable Timothy Wilson, Circuit Judge, opined that the Board must furnish "some basic health insurance" without the precondition of the retirees paying a monthly premium. (Sup. L.F. 18) Judge Wilson further opined that such plan "may incorporate a less than superlative plan with an array of cost-saving attributes for the Board. For a more comprehensive plan, a monthly charge to retirees could be required." (Sup. L.F. 17). The parties then entered into a consent decree which included a refund to the Plaintiffs of premiums they had paid. (Sup. L.F. 12-14)

For fiscal year 2007, the Board offered two plans through Anthem Blue Cross

¹ Rule 84.04 (c). See also Watson v. Moore, 8 S.W. 3d 909, 911, n. 4 (Mo. App. S.D. 2000) ("A brief that emphasizes facts favorable to the appellant and omits facts essential to the respondents does not substantially comply with Rule 84.04 (c)").

Blue Shield, which includes in its network 87 percent of the health care providers throughout the country and 98-99 percent of the providers in the St. Louis region (Tr. 112-113, 155) The schedule of benefits for each plan are shown on Exhibits A and C, attached in Respondents' Appendix.

The "Base" option provides the retirees with comprehensive medical coverage without the requirement of the retiree paying a premium. (L.F. 61; Sup. Tr. 20)

The following are some of the provisions of the "Base" option:

Annual Individual Deductible:	\$2,250.00
Individual Coinsurance Maximum:	\$5,200.00
Office Visit Co-Pay:	\$30.00
Emergency Room Co-Pay:	\$50.00
Medical Program Maximum	UNLIMITED
3-Tier Co-Pay Prescription Drugs	\$10/\$35/\$75

(Respondents' App. A-1 – A-3)

The "Buy Up" option provides the retirees with the identical comprehensive medical coverage which the current active police officers have. (Tr. 114) The "Buy Up" option requires the payment of a monthly premium in the amount of \$251.00 (Tr. 114)

The following are some of the provisions of the "Buy Up" option:

Annual Individual Deductible:	\$0
Individual Co-Insurance Maximum	\$0
Office Visit Co-Pay	\$15
Emergency Room Co-Pay	\$50

Medical Program Maximum	UNLIMITED
3-Tier Co-Pay Prescription Drugs	\$8/\$25/\$45

(Respondents' App. A-4 – A-6)

Plaintiffs' characterization, in their Statement of Facts, of the "Base" option is argumentative and conclusory, rather than factual. Plaintiffs have cited selected portions of testimony out of context, particularly testimony of Respondents' witnesses. For example, they characterize the testimony of Stephen Zoll, in regard to benefits offered by other plans, as "conjecture" when no basis exists for such characterization. (Appl Brief at 12) They fail to mention that Mr. Zoll testified that he considered elements of the "Base" plan offered by the Board to be particularly significant benefits for plan participants. (Tr. 208) In certain instances, the portion of the record cited by Plaintiffs proves their asserted facts to be untrue. At page 13 of their Brief, Plaintiffs assert that Monica Green, the Police Department's benefits manager opined that the "Base" plan, standing alone, provided "inadequate" coverage when, in fact, she testified that the coverage was "adequate". (P. I. Tr. 54)

Although Plaintiffs' Statement of Facts includes many mischaracterizations of the "Base" option, slanted in their favor, it fails to include facts which are less than favorable to their case. Significantly, Plaintiffs' own expert, Susan Carpenter, admitted that the "Base" plan option constituted "comprehensive medical coverage". (Tr. 61) She further testified that whether coverage is "adequate" can only be determined by the individual retiree. (Tr. 41) Ultimately, the trial court remarked that, although the benefits provided by the Board's policy are modest and, in some respects compare poorly with those found

in other employer-provided health care policies, “the benefits are very substantial, and predictably will result in the payment of enormous expenses incurred by some retirees, and the significant expenses incurred by most retirees”. The court went on to note that “any of the millions of Americans without health insurance would be delighted to have these benefits.” (L.F 32)

Further, Plaintiffs’ Statement of Facts mischaracterizes the process by which the two plans for retirees were implemented.

Major Nocchiero began the process of implementing the new plans while he was assisting in the preparation of the budget for fiscal year 2007. (Tr. 129) He reviewed the Police Department’s records for medical costs for current employees and for retirees. (Tr. 131) The rate of expenditure for each employee was \$4,160.00 and the rate of expenditure for each retiree under age 65 was \$6,120.00 or \$6,125.00. (Tr. 131) He instructed the Department’s benefits manager, Monica Green, to contact the Department’s current insurance carrier, Blue Cross Blue Shield, and find out what plans were available for retirees at a cost similar to the cost of the Department’s plans for active employees. (Tr. 131-132)

Ms. Green initially reported back to Major Nocchiero about a plan that had a \$3,000.00 deductible with a maximum out-of-pocket expense of \$10,000.00. (Tr. 132) When compared with the amount of money spent on active employees, the cost was considerably below what Major Nocchiero felt was equitable. (Tr. 132) He told Ms. Green to seek out a plan for retirees that was more equitable in nature with the amount spent on active employees. (Tr. 133) Ms. Green then obtained the two-tiered plan that

was ultimately approved by the Police Board. (Tr. 132)

Contrary to Plaintiffs' assertion, reducing the cost of providing health insurance to retirees was not the only consideration in adopting the new plan. (Sup. Tr. 86) In reviewing the plan that was adopted, Major Nocchiero, the Police Chief and the Police Board gave consideration to changes that would be made from the plan then in effect. (Sup. Tr. 85) Major Nocchiero also reviewed the co-pays for office visits, the expense of prescriptions, the coverage provided and the breadth of the network. (Sup. Tr. 86)

The Benefits Committee, referenced by Plaintiffs in their Statement of Facts, was an entity that would sometimes meet to review insurance plans, particularly when the Department bid out for proposals and several proposals would be received. (Sup. Tr. 25-26) In 2006, Major Nocchiero decided to stay with Blue Cross Blue Shield for fiscal year 2007 because the Department had used the company for many years. (Tr. 132) It was a reputable company with an extremely large list of in-network providers. (Tr. 132) Further, the Benefits Section had advised that the rate increases proposed by Anthem Blue Cross were under the industry average. (Tr. 142) Because the Department did not bid out for insurance plan proposals for fiscal year 2007, the Benefits Committee did not meet. (Tr. 141-142)

Following notification of the retirees of the new plan, Plaintiffs, the retired members of the St. Louis Police Officers' Association, sued, claiming in their petition, under their "Facts Common to All Counts," that R.S. Mo. § 84.160.9(3)² implies "an obligation that the Board provide retired officers with some commercially reasonable

² This provision is now § 84.160.8(3)

level of insurance coverage at no cost” (Petition at ¶6; L.F. 08); that the base option will render the coverage “commercially unreasonable and largely illusory” (¶7; L.F. 08); and that Plaintiffs are entitled to “adequate, free health insurance coverage.” (¶7; L.F. 08) For their claim in Count I, Plaintiffs alleged that they were entitled to injunctive relief so that they would not “be deprived of a commercially reasonable free health insurance plan as mandated by R.S. Mo. §84.160.9(3).” (¶10; L.F. 08)

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS' ASSOCIATION PARTIES BECAUSE THE DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE CONTRIBUTORY PLAN OPTION ALONE SATISFIES THE REQUIREMENT OF R.S. MO. § 84.160.8(3).

Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. banc 2005)

Citizens Elec. v. Dir. of Dept. of Rev., 766 S.W.2d 450 (Mo. banc 1989)

R.S. Mo. § 84.160.8(3)

R.S. Mo. § 376.421.1

II.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS' ASSOCIATION PARTIES BECAUSE THE DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE BOARD HAS MET THE REQUIREMENT OF R.S. MO. § 84.160.8(3) WITH ITS NON-CONTRIBUTORY PLAN OPTION AND THE ASSOCIATION PARTIES OTHERWISE HAVE NO CLEARLY ESTABLISHED RIGHT TO ANY INJUNCTIVE RELIEF.

Conagra Poultry Co. v. Director of Revenue, 862 S.W.2d 915 (Mo. banc 1993)

Bosworth v. Sewell, 918 S.W.2d 773 (Mo. banc 1996)

Missouri Public Service Co. v. Platte-Clay Elec. Coop., 407 S.W.2d 883 (Mo. 1966)

St. Louis Police Officers Ass'n v. Board of Police Comm'rs, 846 S.W.2d 732 (Mo. App. E.D. 1992)

R.S. Mo. § 84.160.8(3)

R.S. Mo. § 84.170

R.S. Mo. § 169.590

III.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS' ASSOCIATION PARTIES BECAUSE THE DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE PLAN OFFERED TO THEM UNDER R.S. MO. § 84.160.8(3) DID NOT VIOLATE DUE PROCESS.

Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157 (Mo. banc 2006)

Chesterfield Dev. Corp. v. City of Chesterfield, 963 F. 2d 1102 (8th Cir. 1992)

Carpenter Outdoor Adverg. v. City of Fenton, 251 F. 3d 686 (8th Cir. 2001)

Iowa Coal Min. v. Monroe Co., 257 F. 3d 846 (8th Cir. 2001)

ARGUMENT

A. Standard of Review applicable to all claims.

This Court reviews the judgment in an injunction action under the standard set out in Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). It should affirm the judgment “Unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” Id.; Maasen v. Shaw, 133 S.W.3d 514, 518 (Mo. App. E.D. 2004). In the trial court, injunctive relief is appropriate only where the rights are clearly established and the right to relief is clear. The burden of proof rested squarely upon Plaintiffs to show their right to an injunction, and the burden is a heavy one. Jones v. Jackson Co. Circuit Court, 162 S.W.3d 53, 60 (Mo. App. W.D. 2005); Coursen v. City of Sarcoxie, 124 S.W.3d 492, 499 (Mo. App. S.D. 2004); Waldorf Inv. Co. v. Farris, 918 S.W.2d 915 (Mo. App. S.D. 1996); Blumenberg v. Minton, 507 S.W.2d 26, 28 (Mo. App. E.D. 1974); Adamick v. Ferguson-Florissant School Dist., 483 S.W.2d 629, 633 (Mo. App. E.D. 1972). An injunction is the “strong arm of equity,” and it is a harsh and extraordinary remedy which should be exercised sparingly and only in clear cases. State ex rel. State Hwy Comm’n v. Dunn, 569 S.W.2d 353, 358 (Mo. App. E.D. 1978); Eyerman v. Mercantile Trust Co., N.A., 524 S.W.2d 210, 220 (Mo. App. E.D. 1975); American Pamcor, Inc. v. Klote, 438 S.W.2d 287, 288 (Mo. App. E.D. 1969). Plaintiffs had the burden to establish both a violation of R.S. Mo. § 84.160.8(3) and the right to an injunction by clear and convincing evidence, State ex rel. Eagleton v. Patrick, 370 S.W.2d 254, 257 (Mo. 1963), and they failed to do so.

B. Argument Summary

R.S. Mo. § 84.160.8(3) requires the Police Board to provide health insurance to its retirees. The statute does not say what level of benefits the Board must provide nor does it say that the Board must pay the premium. The legislature could have mandated such specifics, but it did not. The health insurance industry is a heavily regulated one, and the policy at issue complies with a myriad of statutory and regulatory requirements and was purchased through a bona fide broker and is held by a major carrier. For the current fiscal year, the Police Board offers its retirees two options for health insurance, both known as comprehensive medical coverage from Anthem Blue Cross Blue Shield: one plan under which members pay a modest monthly premium of \$251 and receive an undisputedly “rich” plan, for example, with no deductible and \$15 office visits, and one plan under which members pay no share of the premium and receive a more basic plan, for example with a \$2250 deductible and \$30 office visits. This basic plan provides a myriad of meaningful and valuable benefits. Each option plan more than satisfies the Board’s statutory requirement.

Plaintiffs’ case is flawed, first, in that it hinges on a theory that they are entitled to a plan in which they do not pay any premium and, second, in that they are entitled to dictate the terms of their plan. To the contrary, both options provide Plaintiffs with comprehensive medical coverage that is far from illusory. Anthem Blue Cross Blue Shield is a bona fide insurance provider and the health care coverage is a bona fide plan, the individual elements of which should not be open to second-guessing based on each individual member’s preferences.

I.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS' ASSOCIATION PARTIES BECAUSE THE DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE CONTRIBUTORY PLAN OPTION ALONE SATISFIES THE REQUIREMENT OF R.S. MO. § 84.160.8(3).

As a threshold matter, Plaintiffs cannot possibly prevail unless they are entitled to health insurance coverage for “free” that is, if they are entitled to participate in an insurance plan or option under which they do not share in the premium. This is referred to as a non-contributory plan. (Plaintiffs have not at any time argued that by “free” coverage they mean that they are entitled to completely free health care; indeed, such a contention would be absurd, as any health insurance coverage will provide for the plan participants to share in the cost of health benefits via responsibility for co-pays, deductibles or the like.)

Defendant Board offers its retirees a contributory plan under which a retiree may pay a mere \$251 monthly premium, which amounts to approximately \$3000 annually, for an undisputedly “rich” Anthem Blue Cross benefits plan. Such plan includes a *zero* deductible and *zero* co-insurance. Unlimited visits to a primary care doctor and specialists cost a co-pay of \$15 each. There is *no* maximum annual or lifetime payout. The three-tier pharmacy co-pay plan is \$8/\$25/\$45. This plan option, which is undisputedly far richer in benefits than any plan in evidence at trial, alone should satisfy

the Defendant Board's statutory obligation.

Section 84.160.8(3) is silent as to who pays the premium for the coverage of the retirees. There is no reason the legislature could not have specified under § 84.160.8(3) that the Board must pay the entire premium amounts if that is what the legislature so intended. In the absence of any such legislative mandate, either the Board or the retiree could pay the premiums or a portion of them. Certainly in the other group health insurance plans introduced into evidence, the employees or retirees pay some or all of the premiums.

In interpreting a statute, it is appropriate to take into consideration statutes involving similar or related subjects when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times. Lane v. Lensmeyer, 158 S.W.3d 218, 226 (Mo. banc 2005); Citizens Elec. v. Dir. of Dept. of Rev., 766 S.W.2d 450, 452 (Mo. banc 1989).

R.S. Mo. § 376.421.1 imposes certain requirements on group health insurance policies issued to an employer. This is a general statute, applying to all group health insurance policies. Subsection 376.421.1(b) provides:

The premium for the policy shall be paid either from the employer's funds or from funds contributed by the insured employees, or from both. Except as provided in paragraph (c) of this subdivision, a policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, except those who reject such coverage in writing.

Absent § 84.160.8(3) explicitly dismissing this provision, which it did not, or expressly addressing who pays the premium, which it also did not, this Court should take § 376.421.1(b) into consideration.

Next, to further illustrate that this Court should not read in any mandate that the Board must pay the total premium where § 84.160.8(3) is silent on the matter, an analogous statute pertaining to group health insurance provided by Missouri school districts to retirees, R.S. Mo. § 169.590, is instructive. In § 169.590, the legislature placed some specific requirements on the school districts (as more fully discussed in Point II below) and expressly stated which party must bear the entire premium cost -- the retirees. Subsection 169.590.1 requires that any insurance contract or plan “*which provides*” group health insurance or benefits for employees shall permit retirees to “*receive benefits*” at the same rate as employees, but then it goes on to say in subsection 169.590.3 that the retirees shall pay the premium. This school district statute does not equate the notion that a person who is “provided” with insurance or is entitled to “receive benefits” is entitled to such as Plaintiffs argue, “for free” or without payment of a premium. Just the opposite is true -- the school district is statutorily required to “provide” insurance but it is the retiree who pays the premium. Thus, Plaintiffs’ argument that the word “provide” must mean “provide for free” is a misplaced assumption.

As noted at trial, the benefits of being provided with group health insurance, also known as employer-sponsored insurance, regardless of who pays the premium, are many -- employers can negotiate lower rates, members do not have to individually qualify, they

can qualify regardless of pre-existing health conditions, regardless of age and other factors affecting individual cost, networks like Blue Cross are large, and medical care cost is discounted. (Tr. 156-58.) And the benefits under this contributory plan are undeniably “rich.” The plain language of the statutory requirement is met and any underlying purpose in protecting retirees is more than served.

In the trial court, Plaintiffs argued that they were entitled to a non-contributory plan based on the interlocutory order entered by the Honorable Timothy Wilson, Circuit Judge, in the matter of Lane v. Roth et al., Cause No. 014-01454, Div. 5 and upon the “consent decree” dated March 3, 2005, in that same case. (Sup. L.F. 12-14) These materials serve as neither binding precedent upon this Court or parties nor as any obligation on the part of Defendant Board to provide "free" insurance, and the Plaintiffs seem to acknowledge this in their appellant’s brief.³

³ Although in general a consent decree may serve as a contractual obligation between the parties thereto, the Consent Decree in Lane contained no prospective obligations. (Sup. LF. 12-14) The “Summary of Settlement” obligates Defendant Board only with regard to retrospective monetary relief. The “Binding Nature” clause speaks only of claims preclusion to the Plaintiffs. The “Miscellaneous” section states that the decree contains the entire agreement of the parties and that it “does not impose any obligations on the parties beyond the terms and conditions stated herein.” The “Summary of Settlement” expressly states that the proposed settlement is “without any admission of liability by the [Police] Department.” (Sup. LF. 12) Accordingly, the decree contains no

Accordingly, the contributory option alone fulfills the Board's legal obligation to provide insurance coverage. The Court's inquiry should end here.

II.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS' ASSOCIATION PARTIES BECAUSE THE

contractual obligations relevant to this case. Cf. St. Louis Police Officers Ass'n v. Board of Police Comm'rs, 846 S.W.2d 732, 740 (Mo. App. E.D. 1992) (consent decree contained language that Board "must henceforth pay").

Also, there is no indication from either the record in this case or the court file in Lane that the Lane case was reduced to a final judgment. In fact, it was not. There is a distinction between a court filing that is denominated "Consent Decree and Judgment" versus merely "Consent Decree." A court order is not a final judgment unless it is denominated as a judgment. City of St. Louis v. Hughes, 950 S.W.2d 850 (Mo. banc 1997). Nor is a judgment a final one unless it disposes of all issues in the case, which Judge Wilson's order clearly did not do. See In re Marriage of Boden, 136 S.W.3d 824 (Mo. App. E.D. 2004). Absent a final judgment, there is no collateral estoppel, and so accordingly the trial court below was free to decide on its own whether Plaintiffs were entitled to a non-contributory plan. See Oates v. Safeco Ins. Co., 583 S.W.2d 713, 719 (Mo. banc 1979) (collateral estoppel factors).

DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE BOARD HAS MET THE REQUIREMENT OF R.S. MO. § 84.160.8(3) WITH ITS NON-CONTRIBUTORY PLAN OPTION AND THE ASSOCIATION PARTIES OTHERWISE HAVE NO CLEARLY ESTABLISHED RIGHT TO ANY INJUNCTIVE RELIEF.

In their petition, under their “Facts Common to All Counts,” Plaintiffs aver that R.S. Mo. § 84.160.9(3) implies “an obligation that the Board provide retired officers with some commercially reasonable level of insurance coverage at no cost to the retirees” (Petition at ¶6 L.F. 08); that the base option will render the coverage “commercially unreasonable and largely illusory,” (¶7; L.F. 08); and that Plaintiffs are entitled to “adequate, free health insurance coverage.” (¶7; L.F. 08). For their claim in Count I, Plaintiffs allege that they are entitled to injunctive relief so that they will not “be deprived of a commercially reasonable free health insurance plan as mandated by R.S. Mo. § 84.160.9(3).” (¶10; L.F. 08).

Plaintiffs’ Count I fails to aver any clearly established right. The mere fact that Plaintiffs must delve beneath the plain words of the statute to assert an “implied obligation” indicates that they are not entitled to injunctive relief. The statute requires the Police Board to provide the retirees with health insurance coverage. The Board has done that, with a dual-option plan that includes the “free” base option at issue. (Respondent’s App. A-1-A-6) The statute on its face does not require any particular level of benefits under that coverage or that they be provided for free, i.e., without payment by Plaintiffs of any premium.

“The primary rule of statutory construction requires courts to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute.” Conagra Poultry Co. v. Director of Revenue, 862 S.W.2d 915, 917 (Mo. banc 1993) citing Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992). Such legislative intent can only be derived from the words of the statute itself. Spradlin v. City of Fulton, 982 S.W. 2d 255, 258 (Mo. banc 1998). But if the intent of the legislature is clear and unambiguous, then there is no room for the principles of statutory construction. Tuft v. City of St. Louis, 936 S.W.2d 113, 118-19 (Mo. App. E.D. 1996). Only when a statute is considered ambiguous may a court apply rules of statutory construction. Bosworth v. Sewell, 918 S.W.2d 773, 777 (Mo. banc 1996).

Standing alone, the statute is clear and unambiguous in that it merely requires that health insurance coverage be provided to Plaintiffs and the Certificate of Coverage does just that. (Appellants’ App. A30) The statute does not state that any particular level of benefits are required, and so none should be presumed. Interpretation of the plain language of a statute may not include expanding the meaning beyond the terms of the statute. Harris v. Treasurer, 192 S.W.3d 531, 537 (Mo. App. E.D. 2006). Such expansion of terms is what Plaintiffs seek.

The construction of a statute is a question of law, not judicial discretion. Delta Air Lines, Inc. v. Director of Revenue, 908 S.W.2d 353, 355 (Mo. banc 1995). It is inappropriate for a court to add provisions to a statute under the guise of construction unless such provisions are plainly written or necessarily implied, even if it is to accomplish an end the court deems beneficial. State ex rel. D.M. v. Hoester, 681 S.W.2d

449, 452 (Mo. banc 1984); Bradley v. Mullenix, 763 S.W.2d 272, 276 (Mo. App. E.D. 1988); Missouri Public Service Co. v. Platte-Clay Elec. Coop., 407 S.W.2d 883, 891 (Mo. 1966). "Effect must be given to the legislative intent from what the legislature said and not from what the legislature may have intended to say or inadvertently failed to say." Missouri Div. of Empl. Security v. Labor and Indus. Rel. Com'n of Missouri, 637 S.W.2d 315, 318 (Mo. App. W.D. 1982). The Supreme Court instructed long ago concerning statutory interpretation that

“... Provisions not found plainly written or *necessarily* implied from what is written will not be imparted or interpolated therein”. “... [Courts] are guided by what the legislature says, and not by what [they] may think it meant to say.”

Missouri Public Service, 407 S.W.2d at 891 (internal citations omitted) (quoting St. Louis County Library Dist. v. Hopkins, Mo. Sup. 375 S.W.2d 71, 75 and United Airlines, Inc. v. State Tax Comm'n, Mo. Sup. 377 S.W.2d 444, 448, (emphasis added).

Plaintiffs apparently seek to fashion a new standard such that they are entitled to coverage that they would deem, collectively or individually, either “adequate” or “commercially reasonable.” And they claim that the Board’s dual option plan, or base option plan alone, does not provide such an “adequate”, or “commercially reasonable” plan. Plaintiffs’ own expert Susan Carpenter testified at trial that whether coverage is “adequate” can only be determined by the individual insured. (Tr. 41) So, under Plaintiffs’ evidence, there can be no uniform standard of adequacy to impose upon the Board, nor can there be any objective analysis of whether that standard has been met.

How is it that the Board should be required to provide insurance that each retiree subjectively deems “adequate” for his own personal situation?⁴ This cannot be. While Plaintiffs spend much time lamenting the alleged inadequacies of the comprehensive health care coverage provide by the Anthem Blue Cross plan at issue, nowhere do they offer an objective standard that the courts or the Police Board could realistically follow and implement as to what would be “adequate.”

As to commercial reasonableness, this is not a case arising under the Uniform Commercial Code, nor is it a contract case. While there may be some implied commercial standards in certain types of commercial transactions, there is no such commercial contractual transaction here. Plaintiffs adduced no evidence at trial of any particular standard of commercial reasonableness. Nor have they alleged or produced evidence that the certificate of coverage between the Board and Anthem Blue Cross is not commercially reasonable. The Board matched the contribution of its retiree benefit to the contribution of its active employee benefit. The carrier, Anthem Blue Cross Blue Shield, is the same. The type of insurance, known as comprehensive medical coverage, is the same. The level of benefits provided for free differs.

⁴ It is also worth noting that the State Department of Insurance approves the “adequacy” of policy forms before they can be sold in the State, R.S. Mo. §376.405.3, and there is no allegation in this case that the policy at issue was not so approved, nor that the policy does not otherwise comply with Chapter 376.

As a matter of evidence, the coverage to be provided without payment of any premium is far from illusory. The evidence simply does not prove that the coverage to be provided either by the dual option plan as a whole or by the base option alone is tantamount to “no coverage.” First, the base option was described at trial by Plaintiffs’ own expert, Susan Carpenter, as comprehensive medical coverage. (Tr. 61) This evidence should end the inquiry; it indicates the Board has complied with the clear mandate of the statute. This is not, as the Court queried in its Preliminary Injunction Order, a limited benefits plan, limited to hospital care only or some specified disease. Second, the plan provides coverage in the network of Anthem Blue Cross Blue Shield, which gives Plaintiffs a choice of 98-99 percent of all health care providers in the St. Louis region and 87 percent nationwide. (Tr. 155) The benefit of this wide access to providers cannot be ignored. It is not as if the Board has crafted some limited in-network provider list that requires Plaintiffs to travel 30 miles to a doctor. Third, the benefits levels by no means amount to illusory primary health care. Plaintiffs can see a primary physician or specialist of their choice for \$30, or they can decide to go to the emergency room with a bad cough for \$50. (Sup. L.F. 01) Plaintiffs can get their prescriptions filled for a three-tiered co-pay, whereas some Blue Cross health plans no longer even cover pharmaceuticals, or cover only generic drugs, or require a limitless co-pay percentage on designer drugs and injectables. (Tr. 209-211) Fourth, the prevention of financial hardship is far from illusory and the plan provides a very real and substantial benefit, with an unlimited lifetime maximum and a maximum annual out-of-pocket expense of \$5200 co-insurance plus the \$2250 deductible. (Sup. L.F. 01-02) Additionally, the co-

insurance is applied on services that are heavily discounted in the first instance, due to Anthem Blue Cross Blue Shield's negotiation of charges at a greater discount than any company in the industry. (Tr. 158) Testimony at trial under various claims scenarios showed that substantial monetary benefits inure to the retirees even in instances where Plaintiffs' expert argued the coverage was not high enough. Nothing in the law guarantees that a Plaintiff with a major illness may not have to re-budget some of his own funds. Also, the mere participation in employer-sponsored group health insurance is a benefit in that participants do not have to individually qualify, regardless of pre-existing conditions, and they get the benefit of group rates. (Tr. 157)

Finally, one way to look at the level of coverage the Board provides is that the Board pays \$351.33 per retiree per month, which is an annual value of \$4215.96. (Sup. L.F. 0007) This is a benefit of substantial value, and it is the same amount spent on active employees. (Tr. 131) Even if it buys less coverage than Plaintiffs would like, Plaintiffs have not shown it is an insubstantial benefit tantamount to no coverage. And, if they are not satisfied with their level of coverage, they can "buy up" to the more comprehensive plan.

The evidence plainly does not support any notion that the coverage is illusory, tantamount to no coverage, cf. Melton v. Country Mut. Ins. Co., 75 S.W.3d 321, 327 (Mo. App. E.D. 2002) (insured argued that a maximum coverage clause of \$50,000 in uninsured motorist coverage was illusory because the other policy terms made it impossible ever to obtain the maximum), or that the policy is a sham to avoid the statutory obligation to provide coverage. Cf. McNair v. Jones 892 S.W.2d 338, 341 (Mo.

App. S.D. 1995) (holding that daughter's enrollment in one 3-hour class was not a sham to continue child support where she held a good-faith motivation to attend school).

A stark contrast to Defendants' limited obligation to provide coverage is found at R.S. Mo. § 169.590, which expressly sets out certain provisions that Missouri school districts must include in any insurance contract or plan which provides group health insurance or benefits for employees. Section 169.590.1-.4 states:

169.590. 1. *Any insurance contract or plan*, including a noninsurance health benefit program, *which provides group health insurance or benefits for employees* who are members of any retirement system established pursuant to this chapter *shall contain provisions that permit*:

(1) *Any employee who retires*, or who has retired, and is receiving or is eligible to receive retirement benefits under this chapter *to remain or become a member of the group*, including a noninsurance health benefit program, *and to receive benefits at the same rate as all other members of the group*;

(2) The spouse or surviving spouse of any employee to remain or become a member of the group, including a noninsurance health benefit program, so long as such spouse is receiving or is eligible to receive retirement benefits under this chapter; and

(3) The children or children who survive any employee to remain or become members of the group, including a noninsurance health benefit program, so long as they are receiving or are eligible to receive retirement benefits under this chapter.

2. The plan or contract may provide a different level of coverage for any person electing to remain or become a member of an eligible group, including a noninsurance health benefit program, as provided in subsection 1 of this section if such person is eligible for Medicare under the federal Health Insurance for the Aged Act, 42 U.S.C. 1395, as amended.

3. A person electing to become or remain a member of a group, including a noninsurance health benefit program, under subsection 1 of this section shall pay the premium for such coverage, including the premium for any covered dependents.

4. School districts entering into a contract with an insurance company which provides group health insurance or benefits for employees, including provisions for a noninsurance health benefit program, shall specify that such contract provides coverage for persons who have retired, their spouses and unmarried dependent children and that the enrollment period for such coverage shall be clearly stated for a period of time of not less than thirty

days. Employees shall have one year from the date last employed by a school district that is subject to coverage pursuant to this section to qualify for the coverage provided.

(Emphasis added).

Section 169.590 expressly addresses the level of benefits to which school district retirees are entitled, establishing it the same as the level for employees, and it expressly addresses who shall pay the premium for the coverage provided—the retiree. There is no reason that the Missouri legislature could not specifically have addressed these matters in § 84.160.8(3), as it did with regard to school districts. In fact, § 84.160.8(3) was amended as recently as 2005, and while the legislature added language specifically about the rate at which spouses and dependents of deceased retirees could purchase insurance, setting it to the same rate as the coverage would cost if the retiree were still living, it chose to leave the remainder of the section as it was, with only the general obligation to provide coverage. Certainly it could have legislated benefit levels. But it did not.

Section 84.160 authorizes certain compensation and other employment benefits that the Board may implement, and, in various versions, has established some specific parameters, such as a salary matrix. Section 84.170 in turn “represents a broad grant of authority” to the Police Board “to run the affairs of the police department.” St. Louis Police Officers Ass’n v. Board of Police Comm’rs, 846 S.W.2d 732, 737 (Mo. App. E.D. 1992). Anything in § 84.160 that is not specifically provided for is a matter left to the Board’s broad discretion. Id.

The Court in St. Louis Police Officers Ass'n explained that before 1979, § 84.160.9 was worded in a permissive manner, but as part of an emergency measure passed by the General Assembly in 1979, the language in the three subsections was changed from “may” to “shall.” Id. The Court believed that the phrase “salary continuation coverage” in § 84.160.9(2) was ambiguous, but interpreted it to mean that salary continuation benefits must be supplied by the Board to officers. Id. It noted that § 84.160.9(2) was silent as to the amount to be paid, and stated, “[i]n light of the silence of the statutes and the broad discretionary powers granted Board in § 84.170(2), we conclude that Board has the authority and discretion to pay full salary in the event of total temporary disability but that it is not required to do so.” Id. at 738.

If the Court believes that the statutory mandate of § 84.160.8(3) needs interpretation, then § 84.160.8(3) should be interpreted similar to the language at issue in the earlier case. While § 84.160.8(3) mandates that the Board provide retirees with health insurance coverage, the statute does not provide for any further specifics. In light of the silence of the statute and the broad discretionary powers granted to the Board, this Court should conclude that the Board has authority and discretion to choose the health insurance coverage it provides.

Plaintiffs would have this Court believe that the Board would abuse its discretion by citing some absurd examples of truly illusory coverage if this Court does not intervene and hold the plan at issue to be illegal. This is not so. The point is that the comprehensive medical coverage offered this fiscal year is a very real, tangible and costly

benefit. Granted, health insurance costs have risen for everyone, employers and insureds alike. And employers have tried many ways to address those rising costs – HMO’s, limited coverage, cheaper plans, cafeteria benefits and more. In this case, the Board stayed with Anthem Blue Cross, a reputable company with a large network of providers and competitive rates, and is paying for its retirees the same amount as its employees.

III.

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE BOARD OF POLICE COMMISSIONERS AND AGAINST THE ST. LOUIS POLICE OFFICERS’ ASSOCIATION PARTIES BECAUSE THE DENIAL OF A PERMANENT INJUNCTION WAS PROPER IN THAT THE PLANS OFFERED TO THEM UNDER R.S. MO. § 84.160.8(3) DO NOT VIOLATE DUE PROCESS.

As an initial matter, Plaintiffs cannot establish that Defendant’s conduct in implementing a new insurance plan for retirees deprives them of a constitutionally protected property interest. Under the health plan for retirees, Plaintiffs will continue to receive health insurance coverage as required by § 84.160.8(3).

Furthermore, in Furlong Companies, Inc. v. City of Kansas City, 189 S.W.3d 157, 170-171 (Mo. banc 2006), this Court held that a person is deprived of his property without due process only when the government action is “truly irrational,” which is something more than a mistaken, arbitrary, or capricious application of the law. Indeed, even a bad faith violation of state law does not rise to the level of a substantive due process violation; it remains only a violation of state law. Chesterfield Dev. Corp. v. City

of Chesterfield, 963 F. 2d 1102, 1105 (8th Cir. 1992); see also Carpenter Outdoor Adverg. v. City of Fenton, 251 F. 3d 686 (8th Cir. 2001) (state law error, no matter how fundamental, cannot be a federal due process claim); Iowa Coal Min. v. Monroe Co., 257 F. 3d 846 (8th Cir. 2001) (no due process violation by official, absent evidence of corrupt personal motive).

The Board’s dual option plan clearly and carefully follows the guidance set forth in The Honorable Timothy Wilson’s interlocutory order of April 30, 2002, which opined that the Board was required to furnish insurance without the retirees sharing in the premium, and that such a basic plan may incorporate an “array”⁵ (not just one or two) of cost-saving attributes and that a “more comprehensive plan” could include a monthly charge to retirees. (Sup. LF. 17) While the Defendant Board respectfully disagrees that the statute mandates a plan with an option under which the Board pays the entire premium, the Board’s action in complying with the guidelines set forth in that interlocutory order, an order which these same Plaintiffs sought in prior litigation, cannot be said to be truly irrational. Indeed, if anything is irrational, it is for these Plaintiffs now to claim that the Board’s compliance with the court order that they sought now deprives them of their due process.

⁵ “Array” means an impressive display of numerous persons or objects. Webster's II New Riverside University Dictionary (1988).

CONCLUSION

In conclusion, the Trial Court did not err in denying Plaintiffs a permanent injunction and entering judgment in favor of Defendants because the contributory plan the Board offers its retirees does not violate the mandate of R.S. Mo. § 84.160.8(3). Alternatively, judgment in favor of Defendants was proper because the non-contributory plan that it offers satisfied the statute. Lastly, the plans offered by the Board do not violate due process. The judgment of the Trial Court should therefore be upheld.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Substitute Brief of Respondents was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 7,271 words of text. The accompanying diskette, containing a complete copy of Brief of Respondents, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Respondents are stated herein and the Brief has been signed by the attorney of record.

Nancy R. Kistler

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Substitute Brief of Respondents, along with a copy of the same Substitute Brief on a diskette, scanned and determined to be virus-free, were served by U.S. Mail, postage prepaid, on February 15, 2008, upon:

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