
SUPREME COURT OF MISSOURI

MISSOURI PROSECUTING)
ATTORNEYS AND CIRCUIT)
ATTORNEYS RETIREMENT)
SYSTEM, AN AGENCY OF)
THE STATE OF MISSOURI,)
)
Respondents,)
)
vs.) APPEAL NO. SC88956
)
PEMISCOT COUNTY, CHARLES)
MOSS, WENDELL HOSKINS, SR.,)
and DAVID WILKERSON,)
)
Appellants.)

Appeal from the Circuit Court of Pemiscot County
Thirty-Fourth Judicial Circuit
Honorable Fred W. Copeland, Presiding

BRIEF OF APPELLANTS

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**Article 10, Sections 16 and 21 of the Missouri Constitution, generally
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JURISDICTIONAL STATEMENT

This action is one involving the construction of and a direct challenge to the validity of Sections 56.363, 56.807 and 56.816, RSMo., and the statutory distinction among third-class counties that elected on or before August 28, 2001, to have their prosecuting attorney's position made full-time and those that elected after August 28, 2001, to have their prosecuting attorney's position made full-time. Specifically, the trial court was asked to determine whether the distinction made in Sections 56.363, 56.807 and 56.816, RSMo., was rationally related to any legitimate state purpose or was an unconstitutional violation of the Equal Protection clauses of the Missouri Constitution and the United States Constitution and hence involves the validity and the constitutionality of these Missouri statutes.

Appellants Pemiscot County, Charles Moss, Wendell Hoskins, Sr. and David Wilkerson (hereinafter "Appellants" or "Pemiscot County"), appeal from the October 1, 2007, Judgment and Order of the Circuit Court of Pemiscot County granting summary judgment in favor of Respondent Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System ("Respondent" or "PACARS"). Respondent filed its Petition for Writ of Mandamus in the Circuit Court of Pemiscot County, Missouri, to enforce the provisions of Section 56.807, RSMo., seeking an order from the trial court compelling Pemiscot County to pay into PACARS the sum of \$646.00 per month, the statutory contribution for third-

class counties electing after August 28, 2001, to have their prosecuting attorney's position made full-time, rather than \$187.00 per month, the statutory contribution for third-class counties making the election on or before August 28, 2001. The trial court granted summary judgment in favor of Pemiscot County, and PACARS appealed to the Missouri Court of Appeals for the Southern District. On March 28, 2007, the Missouri Court of Appeals issued its decision upholding the trial court's construction of the relevant statutes, but reversed and remanded the case with a Mandate for the trial court to make a determination on PACARS' Equal Protection challenge.

By Judgment and Order entered October 1, 2007, the trial court reversed its initial Judgment and granted Respondent PACAR's Motion for Summary Judgment, ruling that the distinction made in Sections 56.363, 56.807 and 56.816, RSMo., was not rationally related to any legitimate state purpose and was therefore an unconstitutional violation of the Equal Protection clauses of Article I, Section 2 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The sole issue presented on appeal is whether the distinction made in Sections 56.363, 56.807 and 56.816, RSMo., is rationally related to any legitimate state purpose or is an unconstitutional violation of the Equal Protection clauses of the Missouri Constitution and the United States Constitution. Therefore, this Court

has exclusion jurisdiction of the appeal pursuant to Article 5, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

A. Nature of the Case

The above styled and numbered cause was filed by Respondent Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System (hereinafter referred to as “PACARS”) seeking the issuance of a writ of mandamus directing that the Appellants, Pemiscot County and the Pemiscot County Commission, pay an additional \$4,336.00 to the Missouri Office of Prosecuting Services for deposit in the State Treasury for the credit of Plaintiff PACARS. This additional retirement contribution, according to PACARS, was due under Section 56.807, RSMo. on behalf of Pemiscot County’s full-time prosecuting attorney. However, because Pemiscot County, a county of the third classification, elected to make the position of prosecuting attorney a full-time position *on or before August 28, 2001*, and because the Pemiscot County Commission *did not* elect a full-time retirement benefit pursuant to Section 56.363.3 RSMo., the Appellants denied any additional liability; and in fact, claimed a credit for payments made in excess of its statutory obligation. The County and its Commissioners sought summary judgment based on the clear provisions of Chapter 56; specifically, Sections 56.363.3 and 56.807, RSMo. The trial court agreed with the County and granted the Defendants’ Motion for Summary Judgment and denied the Plaintiff’s Motion for Summary

Judgment. From that adverse judgment, Plaintiff PACARS appealed to the Southern District Court of Appeals.

On appeal the Missouri Court of Appeals, Southern District, upheld the trial court's construction of relevant statutes, but reversed and remanded the matter to the trial court to consider PACARS' equal protection argument. Upon remand, the trial court granted the Plaintiff's Motion for Summary Judgment and struck certain provisions of Chapter 56 based upon the court's determination that those provisions were in violation of the equal protection clauses of Article 1, Section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution. From that adverse judgment, Defendants Pemiscot County and the Pemiscot County Commission bring this appeal.

B. Procedural History of the Case

On February 25, 2005, Respondent PACARS filed its Petition for Writ of Mandamus. (L.F. 1, 5-8.)

On March 11, 2005, Appellants Pemiscot County and the three members of the Pemiscot County Commission, Charles Moss, Wendell Hoskins Sr. and Dave Wilkerson, filed their Answer; Defendants' Motion for Summary Judgment; Defendants' Statement of Undisputed Material Facts; and Memorandum Brief in Support of Defendants' Motion for Summary Judgment. (L.F. 2, 11-26.)

On April 14, 2005, PACARS filed Plaintiff's Motion for Summary Judgment; Plaintiff's Response to Defendants Motion for Summary Judgment; Plaintiff's Additional Material Facts; and Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. (L.F. 2, 27-60.)

On May 16, 2005, the Respondents filed their Reply Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment; and Defendants' Response to Plaintiff's Statement of Additional Material Facts. (L.F. 2, 61-80.)

On June 2, 2005, PACARS filed Plaintiff's Response in Support of its Motion for Summary Judgment and Sur-Reply in Opposition to Defendants' Motion for Summary Judgment. (L.F. 2, 82-84.)

On August 2, 2005, a hearing was held on Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment. (L.F. 3.)

On September 15, 2005, the trial court granted Defendants' Motion for Summary Judgment, denied Plaintiff's Motion for Summary Judgment and entered judgment in favor of the Pemiscot County and its Commissioners and against PACARS. (L.F. 3.)

On October 20, 2005, the trial court entered its Judgment in accordance with the September 15, 2005, docket entry. (L.F. 3, 85-86.)

On October 24, 2005, PACARS filed a formal Notice of Appeal with the Southern District Court of Appeals. (L.F. 3, 88-89.)

On April 16, 2007, the Southern District Court of Appeals entered its Mandate reversing and remanding the case to the trial court for further proceedings not inconsistent with the Southern District Court of Appeals' March 28, 2007, opinion. (L.F. 4, 90-101.)

On June 5, 2007, Appellants filed their Supplemental Brief in Support of Defendant's Motion for Summary Judgment. (L.F. 4, 102-130.)

On June 5, 2007, Respondent's filed their Memorandum of Law. (L.F. 131-137.)

On June 5, 2007, a hearing was held and both parties stipulated that their respective motions for summary judgment be presented on the pleadings along with their appellate court briefs. The cause was then taken under advisement. (L.F. 4.) (Tr. 1-6.)

On October 1, 2007, the trial court entered its Judgment and Order in accordance with the July 31, 2007, docket entry. (L.F. 4, 138-143.)

On November 5, 2007, Appellants filed a formal Notice of Appeal and Jurisdictional Statement. (L.F. 4, 144-149.)

C. Statement of Undisputed Material Facts

Pemiscot County is a county of third class classification. (L.F. 20, ¶ 3; L.F. 30, ¶ 3.) On August 4, 1998, at the instance of the then part-time prosecutor, Pemiscot County elected to make the position of prosecuting attorney a full-time position. (L.F. 31, ¶ 10-11; L.F. 62, ¶ 10-11.) At no time since August 4, 1998, did the Pemiscot County Commission elect to have the position of full-time prosecutor also qualify for the retirement benefits available for a full-time prosecutor of a county of the first classification pursuant to Section 56.363.3, RSMo. (L.F. 20, ¶ 5; L.F. 30, ¶ 5.)

POINTS RELIED ON

- I. The trial court erred in granting summary judgment in favor of PACARS and denying Pemiscot County’s Motion for Summary Judgment because Sections 56.363 and 56.807, and 56.816, RSMo., did not violate the Equal Protection Clauses of the United States Constitution and the Missouri Constitution because the classifications set forth in Chapter 56 bear a rational relationship to a legitimate state purpose – to avoid the imposition of an unfunded mandate after the election to make the prosecuting attorney position full-time in violation of Article 10, Sections 16 and 21 of the Missouri Constitution, generally termed the Hancock Amendment.**

Missouri Constitution, Article 10, Sections 16 & 21

Section 56.807, RSMo. (Supp. 2005)

Section 56.363, RSMo. (Supp. 2005)

Police Retirement System of St. Louis v. City of St. Louis,

763 S.W.2d 298 (Mo. 1989).

ARGUMENT

I. The trial court erred in granting summary judgment in favor of PACARS and denying Pemiscot County’s Motion for Summary Judgment because Sections 56.363 and 56.807, and 56.816, RSMo., did not violate the Equal Protection Clauses of the United States Constitution and the Missouri Constitution because the classifications set forth in Chapter 56 bear a rational relationship to a legitimate state purpose – to avoid the imposition of an unfunded mandate after the election to make the prosecuting attorney position full-time in violation of Article 10, Sections 16 and 21 of the Missouri Constitution, generally termed the Hancock Amendment.

A. Standard of Review

Rule 74.04 of the Missouri Rules of Civil Procedure provides that at any time a party against whom a claim is asserted or judgment is sought may move with or without supporting affidavits for a summary judgment as to all or any part of the pending issues. Mo. R.Civ. P. 74.04(b). Rule 74.04 further provides that if the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith. Mo. R.Civ. P.

74.04(c)(6). The grant of summary judgment by a trial court pursuant to Rule 74.04 is reviewed by the appellate court *de novo*. See, e.g., *ITT Commercial Financial Corp. v. Mid-Am Marine*, 854 S.W.2d 371, 376 (Mo. Banc 1993).

In terms of equal protection, a statute that neither creates suspect classifications, nor impinges on a fundamental right will withstand constitutional challenge if the classification bears some rational relationship to a legitimate state purpose. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. banc 1991). The interpretation of a statute is an issue of law and is therefore reviewed *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003). Statutes are presumed to be constitutional, and the Court is to read the statute in a manner consistent with the constitution whenever possible. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007); *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993).

B. The Distinction Made Between By Chapter 56 Does Not Violate the Equal Protection Clause

The trial court, in its Judgment and Order, found that “As written, these statutes (§§ 56.363, 56.807, 56.816, RSMo) create a disparity in treatment between those prosecuting attorneys from third class counties whose position became full-time prior to August 28, 2001 and those whose position became full-time after that

date.” (L.F. 141 ¶ 5.) However, as this Court observed in *Police Retirement System of St. Louis v. City of St. Louis*, the classification of civil servants by the effective date of a statute does not violate the Equal Protection Clause of the United States Constitution and the Missouri Constitution if it is relationally related to a legitimate state interest. *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d 298, 302 (Mo. 1989).

Under the Equal Protection Clause of the United States Constitution, unless a suspect class is involved or a right is deemed to be fundamental which requires strict scrutiny, a classification which has a rational basis does not violate equal protection. “When social and economic legislation is challenged as being violative of equal protection, a classification or distinction does not violate the Constitution if the classification has some reasonable or rational basis.” *Id.* (citing *U.S.R.R. Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980), and *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct 1153, 25 L.Ed.2d 491 (1970). “A state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.” *Police Retirement System of St. Louis*, 763 S.W.2d at 302 (citing *Langston v. Levitt*, 425 F.Supp. 642, 646 (S.D.N.Y. 1977)). To prevail in an equal protection challenge, the challenger has the burden of showing that a legislatively created classification is not rationally related to a legitimate state interest. *Mullinex-St. Charles Properties v. St. Charles*,

983 S.W.2d 550 (Mo. App. E.D. 1999) (*citing Casualty Reciprocal Exchange v. Missouri Employers Mutual Insurance Co.*, 956 S.W.2d 249, 256 (Mo. banc 1997)).

If the legislative judgment is at least debatable, the issue settles on the side of validity. *Id.*

In *Police Retirement System of St. Louis v. City of St. Louis*, the Missouri Court of Appeals for the Eastern District held that the statute at issue, Section 86.266, RSMo (1986), did not violate the Equal Protection Clause simply because the statute distinguished between officers who retired before and after the effective date of the statute. *Id.* at 304. Rather, the court held that allowing officers who had retired and whose retirement benefits had vested to receive refunds of their contributions, as the appellant urged, would violate the separate state constitutional article that prohibited the grant of “additional compensation” after services had been rendered. *Id.* Crafting the statute to avoid violation of Article III, §39(3), and thereby denying refunds to those retirees already retired, the court reasoned, constituted a rational basis for the distinction between the two classes of retirees. *Id.* at 303.

As was the case in *Police Retirement System of St. Louis v. City of St. Louis*, there is a legitimate state purpose in distinguishing between the two classes of prosecutors identified in Section 56.807, RSMo. Pursuant to the statutory provisions of Section 56.807, a county of the third or fourth classification is not

obligated to pay the higher contribution rate of a full-time prosecutor in a county of the first classification *unless* the election to make the part-time position a full-time position occurred after the passage of a substantial increase in the mandated monthly retirement contributions to PACARS (from \$375.00 to \$1,291.67) by Senate Bill 290 in 2001. *See* 2001 Mo. Legis. Serv. S.B. 290 (Vernon's). A review of the legislative history of Sections 56.807 and 56.363, RSMo, reveals that following the enactment of Senate Bill 290 in 2001, the full-time prosecutor of a third-class county was entitled to an increase from \$375.00 to \$1,291.67 *only if the election was made after August 28, 2001*. *See* 2001 Mo. Legis. Serv. S.B. 290 (Vernon's). Following enactment of Senate Bill 5 in 2003, the full-time prosecutor of a third-class county was entitled to an increase to \$646.00 *only if the election was made after August 28, 2001, or if a majority of the county commission approved the increase*. *See* 2003 Mo. Legis. Serv. S.B. 5 (Vernon's). Otherwise, the rate for a prosecutor in a third-class county is set at \$187.00. *Id.* This is only logical, as the voters of third and fourth-class counties who voted for a full-time prosecutor before the substantial increase in monthly retirement contributions approved by the Legislature in the 2001 legislative session could not make an informed decision about the financial obligations that accompanied their decision until Senate Bill 290 was enacted. *See* 2001 Mo. Legis. Serv. S.B. 290 (Vernon's).

If the Legislature increased the monthly obligation of the county for its prosecutor's retirement account from \$375.00 to \$1,291.67, the legislation would be in direct violation of Article 10, Sections 16 and 21 of the Missouri Constitution, generally termed the Hancock Amendment. Mo. Const., Art. 10, Sec. 16 & 21. Thus, there is clearly a rational basis for the statutory scheme set forth in Chapter 56 – to avoid the imposition of an unfunded mandate on the already financially burdened counties of the third and fourth classifications in violation of the Missouri Constitution. The classification set out in Section 56.807 clearly bears a rational relationship to a legitimate state purpose and does not violate the Equal Protection Clause. *See Police Retirement System of St. Louis*, 763 S.W.2d at 303-04; *accord Hall v. Board of Trustees of Arkansas Public Employees*, 671 F.2d 269 (8th Cir. 1982) (employees who served less than five years could be treated differently than those who served five years or longer without violating Equal Protection Clause); *Gulbrandson v. Carey*, 901 P.2d 573, 578-80 (Mont. 1995) (Montana Supreme Court held that even though retired judges with identical periods of service drew different benefits depending upon whether they retired before or after effective date of amended statute, classification created by amended statute operated equally upon those within the particular class, and there was no violation of Equal Protection Clause); *Hughes v. Judges' Retirement Board*, 282 N.W.2d 160, 162-63 (Mich. 1979) (Michigan Supreme Court held that statutory

distinction drawn between judges who retired before and after specific date was not arbitrary, unreasonable or devoid of rational basis and therefore did not violate Equal Protection Clause).

C. Avoidance of an Unfunded Mandate as a Legitimate State Purpose

There is little or no legislative history related to §§56.363, 56.807, and 56.816, RSMo., to advise the Court of the Legislature's intended purpose in distinguishing between counties of the third class that voted to make their prosecuting attorney position full-time before and after August 28, 2001.

However, a review of the amendments to these statutes leads to a single obvious conclusion – the distinction created coincides with the substantial increase in the mandated monthly contribution to PACARS, which from \$375.00 to \$1,291.67 by Senate Bill 290 in 2001. Such an increase, without an accompanying “state appropriation,” would constitute an “unfunded mandate” and a clear violation of the Hancock Amendment, Article 10, Sections 16 and 21 of the Missouri Constitution.

Article 10, Section 16 of the Missouri Constitution prohibits the Legislature from “requiring any new or expanded activities by counties and other political subdivisions without full state financing,” while Section 21 provides that “[a] new activity or service or an increase in the level of any activity or service beyond that

required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.” Mo. Const., Art. 10, Sec. 16 & 21.

When the voters of Pemiscot County elected to make the position of prosecuting attorney full-time in August, 1998, the county was obligated by statute to pay \$375.00 per month into PACARS. Three years later, in 2001, the Legislature amended §56.807 to more than triple the monthly contribution for full-time prosecutors by third-class counties to \$1,291.67. *See* 2001 Mo. Legis. Serv. S.B. 290 (Vernon’s). As such, the Legislature included a distinction between those third-class counties making the full-time election before Senate Bill 290 was enacted and those making the election with the knowledge of the substantial financial commitment associated with that election. Section 56.807, RSMo. (Supp. 2005). Furthermore, in order to allow those third-class counties making the full-time election before August 28, 2001, to “elect to have that position also qualify for the retirement benefit available for a full-time prosecutor of a county of the first classification” (*i.e.*, the retirement benefit for third-class prosecutors made full-time after August 28, 2001), the Legislature included Section 56.363.3. Section 56.363.3 provides that the county commission “may at any time elect to have that

position also qualify for the retirement benefit . . . by [an irrevocable] majority vote of the county commission.” Section 56.363.3, RSMo. (Supp. 2005).

Thus, the statutory provisions are clear and the legislative purpose is obvious. Moreover, the distinction drawn between counties of the third class that elected to make their prosecuting attorney positions full-time before and after August 21, 2001, is rationally related to the legitimate state purpose of avoiding the imposition of an unfunded mandate in violation of the Hancock Amendment. *See Schnorbus v. Director of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990) (“A classification will be sustained if any state of facts reasonably can be conceived to justify it.”); *see also Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991) (“States are not required to convince the courts of the correctness of their legislative judgments. . . [rather] “those challenging the legislative judgment must convince the court the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”).

CONCLUSION

Based upon the above and foregoing, Appellants respectfully request this Court find that the trial court erred in finding in favor of Respondents and against Appellant on Respondent’s Motion for Summary Judgment, and that the trial court

erred in holding certain provisions of §§ 56.363, 56.807, and 56.816, RSMo., to be unconstitutional, in that said sections are rationally related to a legitimate state purpose, avoiding the imposition of an unfunded mandate after the voters of Pemiscot County made their election to make the position of prosecuting attorney full-time.

CERTIFICATE OF COMPLIANCE

Comes now, Wendell L. Hoskins II, attorney for Appellants, and pursuant to Rule 84.06(c) certifies that the Appellants' Brief:

1. Includes the information required by Rule 55.03; and
2. Complies with the limitations contained in Rule 84.06(b) in that the brief does not exceed 31,000 words and otherwise complies in all other respects with the length requirements; and
3. The brief contains 4,410 words; and
4. The undersigned further certifies that a copy of the floppy disk in Microsoft Word is included herein and served on all counsel of record and that the undersigned further certifies that the disk has been scanned for viruses and that it is virus-free. The floppy disk complies with the requirements of Rule 84.06(g) governing size, labeling, format and virus scanning.

WENDELL L. HOSKINS II
Attorney for Appellants

CERTIFICATE OF SERVICE

I, WENDELL L. HOSKINS II, attorney for Appellants in the above styled and numbered cause, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to James E. Spain, Esquire, Spain, Merrell & Miller, L.L.C., 1912 Big Bend, Post Office Box 1248, Poplar Bluff, Missouri, 63902.

THIS, the _____ day of February, 2008.

WENDELL L. HOSKINS II