IN THE MISSOURI SUPREME COURT

Appeal No. SC88813

ROBERT H. SIHNHOLD

Appellant

vs.

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM

Respondent

On Appeal from the Circuit Court of Cole County, Missouri
Cause No. 06AC-CC00220

BRIEF OF APPELLANT ROBERT SIHNHOLD

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JURISDICTIONAL STATEMENT

This matter involves an appeal from a Circuit Court of Cole County judgment granting Respondent's motion for summary judgment against the Appellant, which was issued on May 9, 2007. Appellant filed its Notice of Appeal on June 15, 2007.

The issues on appeal are within the exclusive appellate jurisdiction of the Missouri Supreme Court. This action involves the question of whether the 1999 amendment to § 287.815 as applied to Plaintiff violates Article III, Section 39(3) and Article III, Section 38(a) of the Missouri Constitution. Because this case involves the validity of a state statute, RSMo § 287.815, under the Missouri Constitution, the Supreme Court has exclusive appellate jurisdiction pursuant to Article V, Section 3.

STATEMENT OF FACTS

Appellant Sihnhold was an administrative law judge for the State of Missouri from May 1975 to August 1989. (L.F. p. 7). He is a member of the state ALJ retirement plan, which Respondent administers. (L.F. p. 8). In August 1989, when Plaintiff/Appellant's employment as an ALJ terminated, Section 287.815 RSMO provided that Appellant was eligible to receive retirement benefits at age 65. (L.F. p. 8). In 1999, ten years later, the Missouri General Assembly amended Section 287.815 to lower the age at which an ALJ is eligible to receive retirement benefits from 65 to 62 if the person had twelve years or more of service whether or not the person was so employed upon reaching the age of eligibility. (L.F. p. 8).

Respondent, though it had represented to Appellant that he would be eligible to retire at age 62 based upon the change in the statute and Appellant having relied upon that representation, later determined that Appellant could not retire until the age of 65 and would not be allowed the benefits given to Appellant under §287.815, that specifically allowed him to retire at a lower age. (L.F. p. 8).

Appellant filed suit seeking a declaratory judgment with regard to his rights under the retirement system and specifically under the amended §287.815 and seeking the court's declaration that he was in fact eligible to retire at the age of 62. (L.F. p.9). Such cause of action was brought against the Respondent Retirement System seeking both injunctive and mandatory relief. (L.F. p.9).

Appellant filed a Motion for Summary Judgment and the Respondent likewise filed a Motion for Summary Judgment.

(L.F. pp. 26-28; S.L.F. pp. 19-22). On April 16, 2007 the trial court heard arguments on Appellant's and Respondent's Motion for Summary Judgment. The trial court granted Respondent's Motion for Summary Judgment on May 9, 2007. (L.F. pp. 43-45). The Court stated that §287.815 if applied to Appellant, violates Article III, Section 39(3) and Article III, Section 38(a) of the Missouri Constitution because the amended statute purports to grant "extra" compensation to Appellant. (emphasis added.)
(L.F. pp. 43-45). The trial court held that *Savannah R-III School Dist. v. Public School Retirement System of Missouri*, 950 S.W.2d 854 (Mo Banc 1997) does not stand for the proposition that the legislature can waive the constitutional provisions of Article III and that *Savannah* is limited in its holding to retrospective laws viewed under the Missouri Constitution, Article I, §13. (L.F. p. 45). Appellant Sihnhold appeals the trial court's ruling granting Summary Judgment for the Defendant. (L.F. pp. 47-48).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BY INCORRECTLY HOLDING AND DETERMINING THAT SECTION 287.815 RSMO. COULD NOT BE APPLIED TO APPELLANT TO REDUCE HIS RETIREMENT ELIGIBILITY AGE TO SIXTY-TWO AND THEREBY HOLDING AND DETERMINING THAT APPLICATION OF THAT STATUTORY PROVISION TO APPELLANT WAS PROHIBITED BY ARTICLE III, SECTION 39(3) AND ARTICLE III, SECTION 38 (a) OF THE MISSOURI CONSTITUTION BECAUSE SECTION 287.815 DOES NOT VIOLATE MISSOURI'S CONSTITUTIONAL PROVISIONS PROHIBITING EXTRA COMPENSATION TO STATE EMPLOYEES ARTICLE III, SECTION 39 (3) AND ARTICLE III, SECTION 38 (a) AND SUCH STATUTE DOES NOT GRANT TO APPELLANT EXTRA COMPENSATION

Section 104.540

Section 287.815

Missouri Constitution, Article III, 39(3)

Missouri Constitution, Article III, 38(a)

Breshears v. Missouri State Employees Retirement System, 362 S.W. 2d 571 (Mo. Banc 1962)

Police Retirement System v. Kansas City, 529 S.W. 2d 388 (Mo. Banc 1975)

Police Retirement System of St. Louis v. City of St. Louis, 763 S.W.2d 298 (Mo. App. E.D. 1988)

State ex rel. Cleaveland v. Bond, 518 S.W. 2d 649 (Mo. Banc1975)

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE RESPONDENT RETIREMENT SYSTEM WAS IN FACT GRANTED AUTHORITY CONSISTENT WITH THE MISSOURI CONSTITUTION TO ISSUE AND PAY OUT BENEFITS UNDER THE RETIREMENT SYSTEM TO APPELLANT AFTER HIS 62ND BIRTHDAY, AS PER SECTION 287.815 RSMO. (2005) AND BECAUSE THE LEGISLATURE CONSTITUTIONALLY PASSED A RETROSPECTIVE LAW THAT WAIVED THE RIGHTS OF THE STATE ALLOWING RESPONDENT RETIREMENT SYSTEM TO PAY OUT BENEFITS UNDER THE NEW LAW

Section 287.815

Section 287.845

Am. Family Mutual Insurance Co. v. Fehling, 970 S.W.2d 848 (Mo. App. W.D 1998)

Atchison v. Retirement Board of Police Retirement System, 343 S.W.2d 25 (Mo. 1960)

Savannah R-III School District v. Public School Retirement System of Missouri, *950 S.W.* 854 (Mo Banc 1997)

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE STATE RETIREES HAVE BEEN GRANTED INCREASED RETIREMENT BENEFITS AFTER THEIR RETIREMENT WHEN THE LEGISLATURE HAS CATEGORIZED SUCH RETIREES AS "SPECIAL CONSULTANTS" AND THE COURTS HAVE GIVEN SANCTION TO SUCH LEGISLATION EVEN THOUGH THERE IS NO EVIDENCE THAT SUCH "SPECIAL CONSULTANTS" HAVE EVER PROVIDED ANY SERVICE TO THE STATE IN CONSIDERATION OF SUCH ADDITIONAL OR "EXTRA COMPENSATION" AND AS SUCH THE COURTS, BY FINDING SUCH "SPECIAL CONSULTANT" LEGISLATION TO BE CONSTITUTIONAL AND NOT VIOLATIVE OF ARTICLE III, SECTION 39(3) OR ARTICLE III, SECTION 38(a) OF THE MISSOURI CONSTITUTION CLEARLY ESTABLISHES PRECEDENT FOR INCREASING RETIREMENT BENEFITS FOR THOSE PERSONS NO LONGER WORKING FOR THE STATE, WHETHER THEY HAVE ALREADY STARTED RECEIVING BENEFITS OR AS IN APPELLANT'S CIRCUMSTANCE WHERE HE WORKED IN STATE GOVERNMENT, MADE CONTRIBUTIONS TO

MOSERS, BUT IS NO LONGER WORKING FOR THE STATE AND IS NOT RECEIVING ANY RETIREMENT BENEFITS

Missouri Constitution, Article III, 38(a)

Missouri Constitution, Article III, 39(3)

State ex rel. Dreer v. Public School Retirement System of City of St. Louis, 519 S.W. 2d 290 (Mo. 1975).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BY INCORRECTLY HOLDING AND DETERMINING THAT SECTION 287.815 RSMO. COULD NOT BE APPLIED TO APPELLANT TO REDUCE HIS RETIREMENT ELIGIBILITY AGE TO SIXTY-TWO AND THEREBY HOLDING AND DETERMINING THAT APPLICATION OF THAT STATUTORY PROVISION TO PLAINTIFF/APPELLANT WAS PROHIBITED BY ARTICLE III, SECTION 39(3) AND ARTICLE III, SECTION 38 (a) OF THE MISSOURI CONSTITUTION BECAUSE SECTION 287.815 DOES NOT VIOLATE MISSOURI'S CONSTITUTIONAL PROVISIONS PROHIBITING EXTRA COMPENSATION TO STATE EMPLOYEES ARTICLE III, SECTION 39 (3) AND ARTICLE III, SECTION 38 (a) AND SUCH STATUTE DOES NOT GRANT TO APPELLANT EXTRA COMPENSATION

Standard of Review

"Review of a trial court's grant of summary judgment is essentially de novo. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc 1993); *Brown v. Morgan County*, 212 S.W.3d 200, 202 (Mo. App. W.D. 2007). Summary judgment has long been regarded as "an extreme and drastic remedy and great care should be exercised in utilizing the procedure." *Id* at 377. The criteria on appeal for

testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. *ITT Commercial Fin.* at 376. "When considering appeals from summary judgments, the court will review the record in the light most favorable to the party against whom judgment was entered. We accord the non-movant the benefit of all reasonable inferences from the record." *ITT Commercial Fin.* at 376. "The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record." *Midwestern Health Mgmt., Inc. v. Walker*, 208 S.W.3d 295, 297 (Mo. App. W.D. 2006).

Argument

Both the Appellant and Respondent filed Motions for Summary Judgment. However, the trial court on May 9, 2007 granted Respondent's Motion for Summary Judgment stating that Section 287.815 if applied to Appellant, violates Article III, Section 39(3) and Article III, Section 38(a) of the Missouri Constitution because the amended statute purports to grant extra compensation to Appellant.

The trial court erred in granting summary judgment to Respondent. Respondent is not entitled to summary judgment as a matter of law because application of the 1999 changes to Section 287.815 allowing Appellant Sihnhold to retire at age 62, does not

violate Article III 39(3) or Article III, Section 38(a) as granting extra compensation to Appellant.

Appellant states that there is a **very important distinction** between the cases cited and relied on by the Respondent in support of its motion for summary judgment and the facts of this case. (emphasis added).

Appellant is in a unique position. **While it is true that he is no longer employed as an ALJ, it is also equally true that he is not a retiree, but a former state employee with vested rights, but not yet receiving benefits.** (emphasis added).

In all the cases cited and relied on by Respondent and cited and relied on by the trial court in its judgment, the individuals or individuals as a group had already retired and were receiving benefits.

In *State ex rel. Cleaveland v. Bond,* 518 S.W. 2d 649 (Mo. Banc1975), the Missouri Supreme Court held that provisions of a statute giving retroactive retirement benefits to judges who had ceased holding office prior to the effective date of the statute were unconstitutional under Article III, Sections 38(a) and 39(3) as attempting to grant public money to private persons and to grant extra compensation after services had been rendered. In *Cleaveland*, the county judge had **already retired**, without any retirement benefits. (emphasis added). Subsequently, the judge tried to be included within the established pension pursuant to the provisions of the recently enacted statute. (emphasis added). If allowed, Judge Cleaveland would have gone from receiving no pension (zero) to receiving a monthly pension benefit. In contrast, Appellant Sihnhold's monthly pension benefit was fixed the day he terminated in 1989. Appellant Sihnhold's monthly pension

benefit has been established based upon his years of service and his salary history. It will not change whether he begins receiving his monthly pension benefit at age 62 or age 65.

In *Police Retirement System v. Kansas City,* 529 S.W. 2d 388, 393 (Mo. Banc 1975), the Missouri Supreme Court held that a statute that provided cost-of-living adjustments to police officers who retired prior to the effective date of the statute was unconstitutional, **ruling that adding to pensions "after retirement…..constitutes 'extra' or 'add on' compensation** and violates Article III, Section 39(3). Here the police officers were attempting to get their monthly pension benefit increased with a cost-of-living adjustment. (emphasis added). Again, Appellant Sihnhold's monthly pension benefit is fixed and application of the 1999 changes to 287.815 will not affect that amount. It will only allow him to begin receiving benefits earlier.

Finally, in *Police Retirement System of St. Louis v. City of St. Louis,* 763 S.W.2d 298 (Mo. App. E.D. 1988), a retired police officer challenged a statute that allowed active police officers to obtain a refund of their contributions to the police retirement system upon their future retirement but did not allow **already-retired** police officers to recover their contributions to the police retirement system. (emphasis added). Rejecting the plaintiff's challenge, the court, citing *Police Retirement System v. Kansas City,* held that the statute could not have allowed the plaintiff and other already-retired police officers to recover their contributions because this would violate Article III, Section 39(3): "Whether a pension is regarded as a gratuity or deferred compensation, **'adding' to the pension or retirement benefits after retirement,** in the absence of express authority, constitutes an 'extra' or 'add on' benefit in violation of Article III, Section 39(3)." (emphasis added). *Id* at

303. Plaintiff in *Police Retirement System of St. Louis v. City of St. Louis* was attempting to recover his contributions after he had already retired. On the other hand Appellant Sihnhold has not retired, but is eligible to retire at age 62 under the 1999 changes to Section 287.815 but with no increase in his monthly retirement benefit as calculated when he terminated in 1989. Appellant asserts there is a distinct difference between increasing a retiree's monthly benefit versus one not retired and having his eligible retirement age changed (65 to 62).

There are other cases that speak to this issue. *Atchison v. Retirement Board of Police Retirement System,* 343 S.W.2d 25, 34 (Mo. 1960) (police officers who retired before time when police pension statutes were repealed and reenacted substituting a new formula were not entitled to have their pensions calculated by the new formula); *Breshears v. Missouri State Employees Retirement System,* 362 S.W. 2d 571, 575 (Mo. Banc 1962) (court held that an increase in pensions as to retired members who retired prior to October 13, 1961 (effective date of the benefit increase) is retrospective and runs afoul of the Missouri constitutional prohibition and *Sanders v. Cervantes,* 480 S.W.2d 888 (Mo. Banc 1972) (life insurance coverage for officers retiring after effective date of statute not covered).

In every single case cited above, the individual(s) have attempted to get additional compensation added to their monthly retirement benefit after they have already retired. Appellant states that none of these cases are applicable to his situation. As stated before, Appellant Sihnhold has **not yet retired**. (emphasis added). He is a member of the Missouri State Employees Retirement System just as are current State employees and

with certain vested rights. The only difference is that Appellant is not a current State employee. The application of the 1999 changes to Section 287.815 as applied to him does not violate any constitutional provisions. Although the Court in *Breshears* decided the issue on retrospectivity, it is important to note their discussion concerning state employees already retired versus those that had not yet retired. In *Breshears*, Respondent (Missouri State Employees Retirement System) conceded the existence of a contract relationship "whereby the members have certain vested rights and the state certain obligations". *Id* at 575. "It states that Section 104.540 does create 'vested interests' in the members of the plan which cannot be affected by legislative amendment. We conclude that under our Act those who have retired, as did Relators, have a vested right in the continuance of their respective annuities under the law as it existed at the time of their respective retirements; that active members have certain vested interests, extending at least to all payments which have been made into the retirement fund to the present time; that **the legislature may alter, amend or repeal the law, but only subject to the rights existing at that time**." (emphasis added). *Id* at 576. *Breshears* is consistent with all the other rulings on the issue of increasing retirement benefits to those that have already retired. However, the Court in *Breshears* suggests that the Legislature may alter or amend any criteria affecting active, vested members up until the day they retire. Appellant Sihnhold, although not making any current payments into the system, has not retired. However, his contributions have been in the retirement fund since 1989 (18 years) accruing interest and helping to increase the overall solvency of the system. His payments into the retirement fund for the past 18 years have been in the form of interest on his and

the State's previous contributions made during the time of his actual employment. Under the Court's logic in *Breshears*, the 1999 changes to 287.815 are allowable as to Appellant Sihnhold, who is an active, vested member who has not yet retired. The Legislature could change the age eligibility requirement for when an active, vested member could retire, like Appellant Sihnhold.

A practical economic reason exists to apply the constitutional prohibition against granting future unearned compensation to those already retired. Their contributions made during the time they worked established, in affect, their annuity. Actuarial assumptions and calculations are made with regard to how long a retiree will live and how much money is needed to be placed in the retirement fund to pay for those benefits. For it to be actuarially sound a calculation is made to determine the contributions necessary to adequately fund the payouts at the calculated benefit formula.

As a retiree receives or draws down those benefits, the underlying fund that was created by the contributions from that employee and the State is eroding away. Theoretically it erodes away the day the employee dies. Obviously all people do not live to be the same age. However, the actuarial calculation, using life expectancy tables, determines how much money will likely be paid out during the assumed life expectancy of the retiree. The actuary calculates the contributions that will be needed to be paid in by the employees and the State in order to adequately fund those payouts. This is done so that the system is maintained in an actuarially sound fashion. That is why benefits cannot be increased in terms of their amounts during a person's retirement unless the State appropriates money to maintain the retirement funds' actuarial soundness. To appropriate

funds after a person retires is giving him additional compensation after the employee retired and was no longer providing service to the State, clearly prohibited by the constitutional provisions.

In this case, Appellant has paid in to the fund and at this time has left employment with the State, but is not retired. At the time he left his employment, his benefit formula was established determining the amount of his monthly retirement benefit. It, too, is based on his salary and years of service. He is different from retirees in that his contribution and the State's contribution have been placed into the fund and for eighteen years have been drawing interest and thereby helping support the fund and make it actuarially sound for the Appellant and others who have yet to retire.

Apparently, by the legislation enacted through §287.815, the State determined, through its actuaries, that the fund was more than sound and of a nature that it could pay the calculated benefits for those persons not yet retired at the age of 62. In other words, there is enough money in the fund to support payment to all of those who are vested, but have yet to retire, and to in fact pay out the benefits at the age of 62. To do so assumes that to make such payment at age 62 is actuarially sound and prudent.

To segregate out persons like Appellant, who have made their contributions to the fund with interest accruing on those contributions, and Appellant is not drawing down on that fund and to say to him that he cannot receive retirement benefits at age 62, like all other not-yet-retired at the time of the legislation employees, may in fact raise an issue of equal protection. The actuarial calculation that the fund is solvent enough to reduce the retirement age to 62 should be applied to Appellant just as it has been to all of those

persons similarly situated to him who were employees during the time that he was an employee but have not yet retired.

The logic of Article III, section 39(3) and 38(a) in not giving "extra compensation" is not applicable to Appellant's circumstances. Reducing his eligibility years from 65 to 62 is not extra compensation. It is merely recognition that the contributions he and the State have made into his retirement fund is now actuarially sound in order to pay that retirement at age 62. It all comes down to actuarial calculations as to what benefits can be paid, what contribution rate has to be made by the State and the employee to make the retirement fund be actuarially sound and at what age those funds can be paid out. This is clearly recognized by the change in §287.815 made in 1999 to allow Appellant and others like him to retire at age 62. To apply §287.815 to the Appellant does not run afoul or made inapplicable by the constitutional provisions against "extra compensation".

For the above state reasons, Appellant requests this Court to remand this cause back to the trial court with instructions to vacate its Judgment and enter judgment consistent with this court's opinion and specifically direct the Respondent to appropriately provide to the Appellant those benefits he is due under the various retirement statutes as of his 62nd birthday.

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE RESPONDENT RETIREMENT SYSTEM WAS IN FACT GRANTED AUTHORITY CONSISTENT WITH THE MISSOURI CONSTITUTION TO ISSUE AND PAY OUT BENEFITS UNDER THE RETIREMENT SYSTEM TO APPELLANT AFTER HIS 62ND BIRTHDAY, AS PER SECTION 287.815 RSMO. (2005) BECAUSE THE LEGISLATURE CONSTITUTIONALLY PASSED A RETROSPECTIVE LAW THAT WAIVED THE RIGHTS OF THE STATE ALLOWING RESPONDENT RETIREMENT SYSTEM TO PAY OUT BENEFITS UNDER THE NEW LAW

Standard of Review

As stated at the beginning of Point 1, the review of a trial court's grant of summary judgment is essentially de novo as provided under *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993); *Brown v. Morgan County*, 212 S.W.3d 200, 202 (Mo. App. W.D. 2007). As also stated, Summary Judgment has long been regarded as "an extreme and drastic remedy and great care should be exercised in utilizing the procedure." *Id* at 377. Appellant will not repeat in the entirety the standard review as stated on pages 10-11, but simply makes reference back to that and suggests that the standard of review for the court for Point 2 is de novo.

Argument

In *Am. Family Mutual Insurance Co. v. Fehling*, 970 S.W.2d 844 (Mo. App. W.D 1998) the court recognizes three exceptions to the prohibition against retrospective laws. "They are: where the legislative intent is clearly manifested that the statute is to be applied retroactively, where the statute is procedural only and does not affect any substantive right, or when the legislature may constitutionally pass retrospective laws that waive the rights of the state." *Id* at 848. "In analyzing whether or not any of the exceptions applied in this case, the court in American Family stated that 'shall' does not unmistakably indicate prospective intent only~~a~~any more than it indicates mandatory language." Id. at 849.

Looking at both § 287.845(1) and § 287.815(2) together, the Missouri Legislature's intent becomes clear. The legislature's chosen language in § 287.815(2), "Any aggregate of twelve years or more of such service shall entitle the person to retirement benefits… **regardless of whether or not the person was so employed upon reaching the age of eligibility."** (emphasis added.) This language makes it clear that this statute is intended to apply retrospectively and particularly to Appellant's situation. A vested member, no longer employed by the State but not yet retired, is a description of the Appellant. Therefore he is otherwise contemplated by the statute and there is no reason for that statute to be applied or interpreted in such a fashion to be determined inoperable based upon the constitutional prohibition against extra compensation. The Missouri legislature seems to use § 287.815 as a guidepost for applying § 287.845 to determine retirement benefits under MOSERS.

In the case at hand, the legislature has constitutionally waived the rights of the state expressly by the language of the statutes themselves. The exception that a legislature can constitutionally waive the right of the state comes from *Savannah R-III School District v. Public School Retirement System of Missouri,* 950 S.W.2d 854, 858 (Mo. Banc 1997). The Supreme Court noted in that case that "retrospective law prohibition was intended to protect citizens and not the state". *Id* at 858. The court also stated that "the legislature could only pass retrospective laws that waived the rights of the state". *Id* at 858. This case involved a dispute over whether a public school retirement system should include employer paid medical benefits in calculating the retirement benefit formula. "The court reasoned that because the school district is a part of the state, it is governed by the legislature and the legislature can waive or impair the district's rights without violating the retrospective law violation." *Id* at 858.

Here, Defendant MOSERS is an agency of the State of Missouri. As the court in *Savannah R-III* ruled, "because the agency's powers are governed by the legislature, the legislature may waive or alter the substantive rights of it". *Id* at 858.

This case also falls under the first exception to the ban on retrospective laws. The legislature's language in the applicable statutes seems to suggest that they were intended to be applied retrospectively. "It is true that a statute will not generally be given a retrospective application unless such intent is 'manifest upon the face of the statute." *Atchinson v. Retirement Bd. of Police Retirement System of Kansas City, Mo.* 343 S.W.2d 25 (Mo., 1960). Here, § 287.815(1) explicitly states: "any person, sixty-two years of age or older, who has served or who has creditable service in this state for an aggregate

of at least twelve years as an administrative law judge **who, on or after August 13, 1984, ceases to hold office … shall receive benefits** as provided in sections 287.812 to 287.856." (Emphasis added). The statute expressly provides for ALJs retiring on or after August 13, 1984 to be entitled to these benefits, the legislature clearly saw this statute being applied retrospectively.

Defendant MOSERS asserts that under § 287.845 Appellant's monthly benefits are determined when his employment ended in 1989. § 287.845 states: "MOSERS shall calculate the annuity for an ALJ .. based on the law in effect at the time the ALJ's employment was terminated." While Appellant Sihnhold agrees that the state cannot change his benefit formula based on his years of service and salary, Appellant Sihnhold asserts that the state has the ability and good reason to change a person's retirement age, particularly those who are vested, but not yet receiving benefits. Such change can and should be made up until the time the employee or former employee actually starts receiving his or her retirement benefits. The scenario, as contemplated by §287.815, logically suggests that the General Assembly contemplated such changes to the age of eligibility and such changes would and could be made and may even be necessary in the future. Additionally, the phrase, "age of eligibility" is not limited to specific individuals as it is used in §287.815(2). It is applicable to both current state employees and former state employees who are vested, but not receiving benefits. The State always has the ability to change the criteria applicable to when a vested member is eligible to retire. Nothing requires the member to be currently employed to have their eligibility date changed. Such are the circumstances in Appellant's situation. Appellant will not restate his argument

under Point I above about the actuarial reasons that come about that allow or justify lowering the eligibility of a prospective retiree, whether he is employed with the state at the time the statute changes the age of retirement or not employed by the state, so long as he is not retired and receiving benefits. Again, apparently the state arrived at a conclusion that the fund was actuarially sound enough to reduce the retirement age to 62 for all persons who had contributed to the retirement fund, but not yet retired. There should be no distinction as and between any of those persons who have contributed to the retirement fund but have not yet retired or have not yet started to receive any benefits.

For the above state reasons, Appellant requests this Court to remand this cause back to the trial court with instructions to vacate its Judgment and enter judgment consistent with this court's opinion and specifically direct the Respondent to appropriately provide to the Appellant those benefits he is due under the various retirement statutes as of his 62nd birthday.

III. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE STATE RETIREES HAVE BEEN GRANTED INCREASED RETIREMENT BENEFITS AFTER THEIR RETIREMENT WHEN THE LEGISLATURE HAS CATEGORIZED SUCH RETIREES AS "SPECIAL CONSULTANTS" AND THE COURTS HAVE GIVEN SANCTION TO SUCH LEGISLATION EVEN THOUGH THERE IS NO EVIDENCE THAT SUCH "SPECIAL CONSULTANTS" HAVE EVER PROVIDED ANY SERVICE TO THE STATE IN CONSIDERATION OF SUCH ADDITIONAL OR "EXTRA COMPENSATION" AND AS SUCH THE COURTS, BY FINDING SUCH "SPECIAL CONSULTANT" LEGISLATION TO BE CONSTITUTIONAL AND NOT VIOLATIVE OF ARTICLE III, SECTION 39(3) OR ARTICLE III, SECTION 38(a) OF THE MISSOURI CONSTITUTION CLEARLY ESTABLISHES PRECEDENT FOR INCREASING RETIREMENT BENEFITS FOR THOSE PERSONS NO LONGER WORKING FOR THE STATE, WHETHER THEY HAVE ALREADY STARTED RECEIVING BENEFITS OR AS IN APPPELLANT'S CIRCUMSTANCE WHERE HE WORKED IN STATE GOVERNMENT, MADE CONTRIBUTIONS TO MOSERS, BUT IS NO LONGER WORKING FOR THE STATE AND IS NOT RECEIVING ANY RETIREMENT BENEFITS

Standard of Review

As stated at the beginning of Point 1, the review of a trial court's grant of summary judgment is essentially de novo as provided under *ITT Commercial Fin. Corp. v. Mid-Am.* Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993); *Brown v. Morgan County*, 212 S.W.3d 200, 202 (Mo. App. W.D. 2007). As also stated, summary judgment has long been regarded as "an extreme and drastic remedy and great care should be exercised in utilizing the procedure." *Id* at 377. Appellant will not repeat in the entirety the standard review as stated on pages 10-11 but simply makes reference back to that and suggests that the standard of review for the court for Point 3 is de novo.

Argument

For years public institutions have attempted to find ways to get their retirees additional benefits without violating Article III, Section 39(3) and Article III, Section 38(a). Generally, this has been done under the guise of being appointed a special advisor, consultant or supervisor. See *State ex rel. Dreer v. Public School Retirement System of City of St. Louis*, 519 S.W. 2d 290 (Mo. 1975). The court in *Dreer* stated that "there are a number of precedents in Missouri which embrace the concept of public institutions providing special employment to retired persons in addition to their retirement benefits." *Id* at 296.

> "The obvious precedent and sample is the amendment to Chapter 169 by Section 169.580, RSMo. 1969 (H.B. 337, supra), V.A.M.S., which provides that 'Any person who served as a teacher in the public schools of this state and who

retired prior to July 1, 1957, under the provisions of chapter 169, shall upon application to the state department of education be employed * * * as a special advisor and supervisor * * *. Any person so employed shall perform such duties as the commissioner of education directs and shall receive a salary of seventy five dollars per month, payable out of the general revenue * * *, except that the payment * * * for such services, together with the retirement benefits he receives * * *, shall not exceed one hundred fifty dollars per month. The employment provided for by this section shall in no way affect any person's eligibility for retirement benefits under chapter 169." *Id* at 296.

"House Bill 1178, also effective August 13, 1972, now Section 104.610, RSMo. 1969, V.A.M.S., provides that 'Any person, other than a person receiving retirement benefits because of service in the general assembly, who, on August 13, 1972, is receiving state retirement benefits from the Missouri state employees' retirement system or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he is receiving retirement benefits, shall be made, constituted, appointed and

> employed by the board as a special consultant * * * and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if he had retired on January 1, 1972. * * * This compensation * * * shall be paid out of the general revenue * * *. The employment provided for by this section shall in no way affect any person's eligibility for retirement benefits under this chapter, or in any way have the effect of reducing retirement benefits."
>
> Id at 296.

Finally, the court in *Dreer* stated "whether relators-respondents actually perform services is immaterial, because the legislature in enacting House Bill 613 did not attach any conditions to their right to be compensated for their employment as special school advisors and supervisors." *Id* at 297.

These "special consultant" statutes have been utilized to provide to retirees increased benefits without having to return to work and by placing the "special consultant, advisor or supervisor" language in the legislative enactment the courts have allowed such legislation to pass muster in light of Article III, Section 39(e) and Section 38(a). To be candid, these "special consultant" statutes are a mere sham simply to get around the constitutional prohibition .

A simple word designation "special consultant" apparently is enough to get around the constitutional prohibitions that otherwise prevent other retirees from getting an increase in their benefits. That's just wrong. There are hundreds of retirees, maybe even thousands that have been designated "special consultants, advisors or supervisors" in order for them to get their monthly pension increased periodically.

Appellant Sihnhold is in a much stronger position than those retirees who have been designated "special consultants, advisors or supervisors". He has not retired yet and his money that has been in the system has at least earned interest and contributed to the solvency of the fund for the past 18 years. In contrast "special consultant" retirees have not contributed to the fund, but rather have drawn down the fund.

For the above state reasons, Appellant requests this Court to remand this cause back to the trial court with instructions to vacate its Judgment and enter judgment consistent with this court's opinion and specifically direct the Respondent to appropriately provide to the Appellant those benefits he is due under the various retirement statutes as of his 62nd birthday.

CONCLUSION

WHEREFORE, Appellant Sihnhold prays that this Court remand this cause back to the trial court with instructions to vacate the trial court's judgment in favor of the Respondent and to enter a full and final judgment in favor of Appellant Sihnhold. Additionally, Appellant Sihnhold prays that this court further instruct the trial court to reverse Respondent's previous determination that Appellant was ineligible to receive normal retirement benefits at age 62, find that Appellant became eligible for normal retirement benefits on June 26, 2005, consistent with the provisions of §287.815 as amended in 1999, issue an order for the payment of past due retirement monies, plus interest, for an order awarding past due medical premium monies', and for an order awarding reasonable attorney fees, and for any further orders this Court deems just and necessary.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

ROBERT H. SIHNHOLD	)	
	)	
Appellant	)	
	)	Appeal No. SC888813
vs.	)	
	)	
MISSOURI STATE EMPLOYEES RETIREMENT SYSTEM	)	
	)	
Respondent	)	

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULES 84.06(c) AND 84.06(g)

COMES NOW counsel for Appellant Sihnhold and for his Certificate of Compliance, state as follows:

1. The undersigned do hereby certify that Appellant Sihnhold's Brief filed herein complies with the word limitations contained in Supreme Court Rule 84.06(b) and contains 5,876 words of double spaced, proportional typeface, using Times New Roman 13-point.

2. Microsoft Word for Windows was used to prepare Appellant Sihnhold's Brief.

3. The undersigned do hereby certify that the accompanying floppy disk containing a copy of the foregoing brief, required to be filed by Supreme Court Rule 84.06(g), has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of October, 2007 two (2) copies of Appellant Sihnhold's Brief and one copy of the accompanying disk, were mailed, postage prepaid, to Allen Allred and Jeffrey Fink, Thompson Coburn, LLP, One US Bank Plaza, St. Louis, Missouri 63101.

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APPELLANT'S APPENDIX

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