No. SC 88368

IN THE
SUPREME COURT OF MISSOURI

MISSOURI ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,
DIVISION OF WORKERS' COMPENSATION,
Defendant-Respondent.

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
Honorable Byron L. Kinder, Judge

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STATEMENT OF JURISDICTION

The sole issue in this action is the validity of Missouri's Workers Compensation Law, RSMo Chapter 287, as amended by Senate Bills 1 and 130 ("SB1") in 2005, under the Constitution of the United States and the Missouri Constitution. Specifically, whether the Workers Compensation Law as amended by SB1 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the due process and open courts guarantees of the Missouri Constitution, Art. I, §10 and Art. I, §14. This Court therefore has exclusive appellate jurisdiction under Article V, section 3, of the Missouri Constitution.

STATEMENT OF FACTS

I. WORKERS' COMPENSATION IN MISSOURI

The Industrial Revolution brought great material progress to America, but exacted a horrific toll on those who worked in the great factories and mills. The dark side of progress was that injured and disabled workers were discarded like broken machine parts. *See generally* Crystal Eastman, WORK-ACCIDENTS AND THE LAW (1910), a photo documentary of industrial accidents in Pittsburgh mills that ignited broad public support for workers' compensation legislation. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 69-72 (1967).

The common law provided legal recourse for those workers in the form of a tort action against negligent employers. But by the early 20th Century, all sides

had grown dissatisfied with what was known as the law of Employers' Liability. For workers injured in the workplace and their families, often facing destitution, the tort remedy was intolerably uncertain. An "unholy trinity" of common law defenses – contributory negligence, assumption of risk, and the fellow servant rule – often barred recovery, even in the face of clear employer negligence. William L. Prosser, LAW OF TORTS § 80, at 526-27 (4th ed.1971). In Missouri, for example, the General Assembly was informed that only 20 to 25% of injured employees obtained any compensation at all. R. Robert Cohn, *History of Workmen's Compensation Law*, Preface to Chapter 287, 15 V.A.M.S. at 17 (1965).[1]

Employers were no happier. By the 1920s their defenses were eroding, and many became alarmed at the increasing frequency and size of tort awards returned by juries and judges. The cost of liability insurance for employers more than tripled. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation In the United States, 1900-1930*, 41 J. L. & Econ. 305, 317-18 (1998). Indeed, Associated Industries of Missouri warned in 1923 that tort liability

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[1] Workers appear to have fared better in some urban areas. A sample of occupational injury suits in Kansas City, Mo. in 1916 indicates that workers received compensation in 70.8% of cases involving permanent partial disability and 57.7% of cases of temporary disability. Price V. Fishback, *Nonfatal Accident Compensation and the Common Law at the Turn of the Century*, 11 J.L. Econ. & Org. 406, 410 (1995).

for workplace injuries was reaching such a crisis in Missouri that insurance companies were ready to leave the state altogether. Shawn Everett Kantor & Price V. Fishback, *Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911-1926*, in THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY 274 (Claudia Goldin & Gary D. Libecap eds. 1994). In Missouri, as elsewhere, organized labor and businesses backed workers' compensation proposals. Kantor & Fishback, *Coalition Formation*, *supra* at 259-97; R. Robert Cohn, *supra*, at 20-24.

Missouri's legislature began considering such proposals as early as 1909 and passed a workers' compensation law in 1919. But the voters failed to approve it in a referendum in 1920, a referendum in 1922, and in an initiative in 1924. Finally, the people of Missouri gave their approval by a 2-1 margin in a referendum on November 2, 1926, and Missouri became the 43rd state to adopt a workers' compensation program. *See* Cohn, *supra*, at 20-24.

The new law replaced tort actions with an administrative remedy to provide limited but certain compensation for injuries arising out of and in the course of employment, irrespective of fault. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc). Its economic premise is: "The cost of the product should bear the blood of the working man." Prosser, *supra*, at 530. That is, the cost of workplace injuries ought to be borne by employers, who are best able to prevent accidents and spread their cost. *Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 781, 783 (Mo. 1983) (en banc); 1 Arthur Larson, LARSON'S

WORKER'S COMPENSATION LAW § 4.30. Allowing companies to evade the cost of workplace injuries amounts to a public subsidy of irresponsible employers. *Wildman v. Plaza Motor Co.*, 941 S.W.2d 718, 720 (Mo. App. E.D. 1997) ("One of the purposes of the Workers' Compensation Act is to place the burden of paying for injured workers on the employers instead of the public.").

Missouri's law was praised as one of the best compensation statutes in the nation. Robert J. Domrese & Stephen L. Graham, *Workmen's Compensation in Missouri*, 19 St. Louis U.L.J. 1, 1 (1974-75). For decades, it earned the admiration of legal observers for its honest and apolitical administration.

> Missouri was most fortunate from the beginning in having commissioners administer this new social legislation in an honest, efficient manner, always keeping in mind the spirit of the law, and fortunately they have continued to administer this law on a nonpartisan basis.

Cohn, *supra,* at 26.

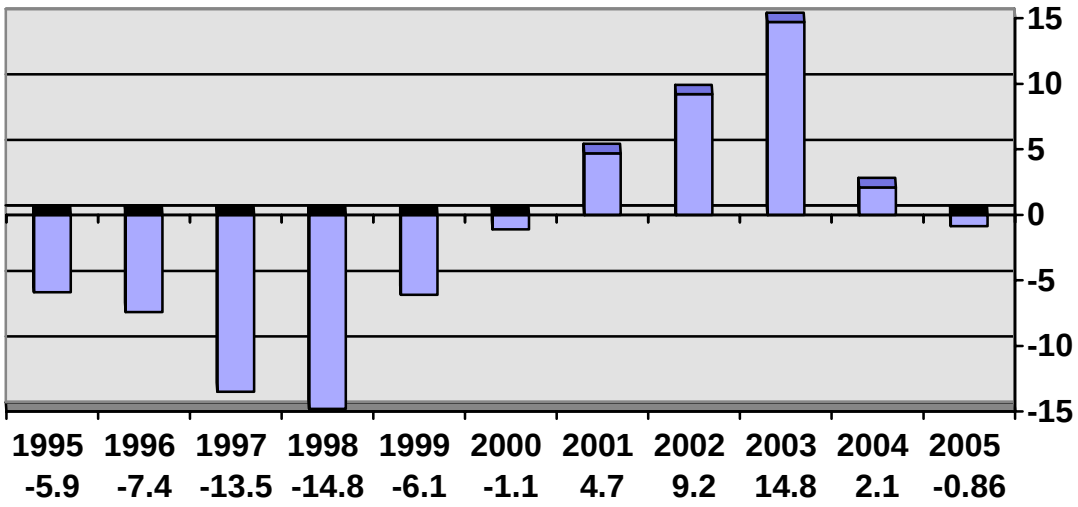
The Assembly has made relatively few substantive amendments to the law. Most changes expanded the protection of workers by, for example, increasing benefits payments, extending the statute of limitations, establishing the Second Injury Fund, and providing for physical rehabilitation. *id*. at 26-31. In 1973, the Assembly made participation mandatory for most employers.

The Assembly enacted another major change in 1993, by deregulating workers' compensation insurance. Allowing rates to be set by the competitive

market, rather than by state regulators, made the system less costly and more efficient. *See* United States General Accounting Office, "Workers' Compensation: Initial Experiences With Competitive Rating" 22-23 & 32 (1986). In addition, deregulation insulated insurance rates from political interference. Martha T. McCluskey, *The Illusion of Efficiency In Workers' Compensation "Reform,"* 50 Rutgers. L. Rev. 657, 693 n.137 (1998).

Missouri's competitive market system was, by and large, a success story. The workers' compensation law made significant progress in one of its primary goals – providing a financial incentive for employers to make workplaces safer. From FY 1995 to FY 2004, while Missouri's workforce grew, the yearly number of on-the-job injuries and deaths steadily declined from 198,619 to 143,157. Missouri Dep't of Labor & Industrial Relations, Annual Report 2004, at 7. The number of workers' compensation claims also declined, from 26,021 in FY1994 to 23,576 in FY2003. Missouri Dep't of Labor & Industrial Relations, A Guide to Missouri Workers' Compensation 13 (2003).

At the same time, the cost of providing workers' compensation coverage declined every year until 2001. The year-to-year percentage rate change, according to the Department of Insurance is as follows:



Annual Percentage Change in Workers' Compensation Costs

Source: Missouri Department of Insurance, Missouri Workers' Compensation Rate History (May 31, 2007).[2]

The spike in premium costs during 2001-2003 prompted a great deal of concern and was seized upon by some as a sign that Missouri's workers' compensation system was broken and in need of major "reform." Governor Blunt, citing the 2003 increase, declared, "High workers' compensation insurance premiums are costing Missouri jobs," adding that "Missouri cannot effectively compete with other states for good, family-supporting jobs unless we address this problem." Gov. Matt Blunt, 2005 State of the State Address, Jan. 26, 2005.[3]

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[2] *Available online at* www.insurance.mo.gov/consumer/wc/wcratehistory.htm.

[3] *Available online at* http://www.gov.mo.gov; click on 2005 State of the State Address – Text.

Defendant Division recognized the importance of understanding the causes of this sudden cost increase and undertook an investigation. One important finding was that the cause was *not* an increase in workers' compensation claims. In fact, Defendant announced that from 2001 to 2004, "the number of workers' compensation claims [] dropped by 17 percent." Heather Carlson, "State hopes to fix workers' comp costs" SE Missourian, Jan. 17, 2005. The number of claims declined in all categories of both disability and medical-only claims between 2001 and 2003. Missouri Dep't of Labor & Industrial Relations Division of Workers' Compensation, 2003 Annual Report, at 19-22.

Instead, the Workers' Compensation Division Director identified three causes for the sharp increases in workers' compensation insurance costs: poor investment returns in a weak economy, terrorism concerns, and sharp price increases charged by reinsurers.[4] Memorandum, Division Director Renee Slusher,

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[4] Courts frequently look to government reports as well as independent studies to determine that a statutory limit on injury remedies has no rational basis. *E.g.*, *Ferdon v. Wisconsin Patients Comp. Fund,* 701 N.W.2d 440, 466 & 470 (Wis. 2005); *Morris v. Savoy,* 576 N.E.2d 765, 771 (Ohio 1991); *Lucas v. United States*, 757 S.W.2d 687, 691 (Tex. 1988).

Workers' Compensation System Overview, at 6.[5] Former Director of the Division on Workers' Compensation Lawrence D. Leip, serving Special Advisor to the Director, further explained the factors responsible for the premium increases:

- A recession in 2001, resulting in a "hard" insurance market in which carriers increased prices to protect reserves and profits.[6]
- Sharp increases in premiums charged to carriers by reinsurers.[7]

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[5] Legal File, vol. 2 at 000252. This memorandum by the Director of the Division was prepared in response to inquiries concerning the increase in workers' compensation premiums and made available to the public.

[6] Workers' compensation is a "long tail" type of insurance. That is, there is a period of years between the carrier's collection of premiums and payment on claims covered. During that time, the insurer invests those premium dollars, and investment income is a significant factor in the insurer's profitability and pricing decisions. See United States General Accounting Office, Workers' Compensation: Initial Experiences With Competitive Rating 16 & 20(1986). *See also* United States Dep't of Justice, Report of Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 25 (1986).

- Uncertainty in the insurance industry following the September 11 terrorist attacks.[8]

Memorandum from Lawrence D. Leip, to Renee Slusher (Jan. 21, 2003) at 5-6.[9]

During 2004, as the economic growth returned, reinsurance rates leveled off, and Congress worked on an extension of the Terrorism Risk Insurance Act, upward pressure on insurance premiums eased. Missouri Dep't of Insurance, News Release, Missouri Heading For Lowest Rate Increase For Workers' Compensation

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[7] Reinsurers providing secondary coverage for large claims began raising premiums after years of bargain rates. *See* Brian Z. Brown, *WC Reinsurers Fight to Regain Profits*, National Underwriter, July 16, 2001.

[8] A particular source of anxiety in the industry was uncertainty as to reauthorization of the Terrorism Risk Insurance Act of 2002 (TRIA) providing a federal backstop for insurers for claims arising out of an act of terrorism. *See* Robert J. Rhee, *Terrorism Risk In a Post-9/11 Economy: The Convergence of Capital Markets, Insurance and Government Action*, 37 Ariz. St. L.J. 435, 454-64 (2005). On Dec. 23, 2005, President Bush signed the Terrorism Risk Insurance Extension Act of 2005, which extended the provisions of TRIA.

[9] Legal File, vol. 2 at 000237.

Since 2000 (Oct. 27, 2004).[10] It was the view of DOI Director Scott Lakin that "the upturn in rates for 2002 and 2003 was a one-time event that did not represent a trend." News Release, Missouri Dep't of Insurance, Workers' Compensation Rate Hikes Drop Sharply In 2004 (Feb 7, 2004).

Events proved that evaluation correct. By the end of the year, the DOI was able to confirm that "the workers' compensation market in Missouri has stabilized." News Release, Missouri Dep't of Insurance, Industry Group, Insurance Department Advise Workers' Comp Rate Cuts In 2005 (Dec. 8, 2004). Director Lakin stated, "The business community has every reason to believe that the pressures on their workers' compensation costs are now under control." *Id*.

Thus, the two agencies responsible for monitoring workers' compensation costs determined that the sharp increase in premiums, while troubling, was caused by external factors and did not indicate that Missouri's program was broken or out of control.

In fact, employers all over the country were hit by dramatic premium increases during this time. The Defendant's findings mirrored the consensus among independent experts that the responsible causes were reinsurance costs, terrorism uncertainty, and low investment returns due to the economic downturn. The National Council on Compensation Insurance, a nonprofit organization that

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[10] DOI News Releases cited herein are available online at http://insurance.mo.gov/news/news.htm.

provides insurance data to underwriters, referred to these factors as creating a "perfect storm" in the workers' compensation markets. NCCI, Workers' Compensation Issues Report '04 at 37.[11]

The spike in prices in 2002-03 did not appear to do lasting damage to the workers' compensation cost picture in Missouri. DOI reported near the end of 2004 that, "Missouri businesses now pay rates that are only 3.7 percent higher than when the state deregulated pricing more than a decade ago." News Release, Missouri Dep't of Insurance, Missouri Heading For Lowest Rate Increase For Workers' Compensation Since 2000 (Oct. 27, 2004). In fact, the Department surveyed Missouri's 320 workers' compensation carriers and found, "Despite a

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[11] *Available online*: http://www.ncci.com/media/pdf/Issues_Rpt_reinsurance.pdf. *See also* Dennis Mealy, State of the Line: Analysis of Workers' Compensation Results (NCCI, 2004) *Available online at*: http://www.riskinstitute.org/FP_DOCS/nccistateofline.pdf; Aaron Bueler, Rethinking Reinsurance, Workers' Compensation Issues Report '03 at 39 (role of reinsurance in upward pressure on workers' compensation in 2001-2003). *Available online at*: http://www.ncci.com/media/pdf/rethinkingReinsurance.pdf. *See also* "Analysis and Perspective, Collaboration Needed to Hold Down WC Costs", Vol. 14, No. 12, *Workers' Compensation Report*, LRP Publications, June 2, 2003 (Naming poor investment returns, medical inflation and terrorism as causes of rising workers' compensation costs).

decade of inflation, 241 companies are still charging lower rates for coverage than they did in 1994." News Release, Missouri Dep't of Insurance, Industry Group, Insurance Department Advise Workers' Comp Rate Cuts In 2005" (Dec 8, 2004).

Moreover, Missouri's costs compared favorably with other states. A 2004 report by NCCI ranked Missouri solidly in the middle – 22nd highest among the states. *See* Tim Hoover, *Missouri Lawmakers Look At Workers' Compensation*, Kansas City Star, Jan. 19, 2005.

II. THE ENACTMENT OF SB1.

Despite the greatly improved conditions during 2004-05, the governor and the majority party in the General Assembly pressed for drastic reform of Missouri's workers' compensation law. As the court below indicated, the Assembly's purpose was to make use of the workers' compensation program as an economic development tool: Reducing the costs to employers so as to attract new businesses into the state and dissuade employers from moving elsewhere. Op. at 5.

SB1's chief sponsor, Senator Loudon, explained: "By decreasing the costs of insurance premiums for employers," SB1 would put Missouri "out in front of the pack in the race for higher revenues, increased market shares and more jobs." News Release, Missouri Senate Gives Final Approval to Senator John Loudon's Workers' Comp Bill (Jan. 20, 2005).

Upon signing SB1 into law, Governor Blunt stated it would "lower workers' compensation costs for Missouri employers and make the state more

competitive with other states in luring jobs." Marc Powers, *Governor Signs Workers' Comp Restrictions*, Southeast Missourian, Mar 31, 2005. SB1 became effective August 28, 2005.[12]

III. THE PROVISIONS OF SB1

SB1 drastically shrinks the coverage of Missouri workers for on-the-job injuries by enacting 39 new sections under Chapter 287. Previously, under § 287.020.2, the law covered injuries that were "clearly work related," that is, where "work was a substantial factor in the cause of the resulting medical condition or disability." SB1 eliminates this clear standard and instead excludes large groups of previously covered employees by various artificial classifications and new fault-based defenses. No state has ever imposed such stringent limitations on its workers' compensation coverage. The changes most relevant to this appeal are as follows:[13]

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[12] It was subsequently discovered that in amending § 287.110.1, the General Assembly accidentally amended the entire Workers' Compensation Law-5.559 out of existence. The Assembly met in Special Session and removed the offending text, effective Dec. 14, 2005. The circuit court issued a declaratory judgment striking the offending text in matters governed by the law prior to Dec. 14. *Liberty Mut. Ins. Co. v. Nixon*, No. 05AC-CC00977 (Cole Cty. Cir. Ct., Jan. 6, 2006).

[13] For the Court's convenience, the text of the changes is provided in footnotes, with new material in **bold** and deleted language [in brackets].

A. Exclusions that Deprive Employees With Clearly Work-Related Injuries of Workers' Compensation Benefits.

1. Requirement of Proof of Separate "Accident"

Under § 287.020.2, as amended, an injury may be work-related but is not compensable unless the claimant establishes that the injury was caused by an "accident," defined as a traumatic event or unusual strain identifiable by a specific time and place during a single work shift.[14]

Under the Act's original design, an unintentional work-related injury was deemed accidental. The injury itself was the "unexpected and unforeseen event" referred to in the statute. *See, e.g., Downey v. Kansas City Gas Co.*, 92 S.W.2d

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[14] Sec. 287.020.2. The word "accident" as used in this chapter shall**[**, unless a different meaning is clearly indicated by the context, be construed to**]** mean an unexpected **[**or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault,**]** **traumatic event or unusual strain identifiable by time and place of occurrence** and producing at the time objective symptoms of an injury **caused by a specific event during a single work shift**. **[**An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.**]**

580, 586 (Mo. 1936) (granting benefits to worker who gradually developed conjunctivitis from constantly getting soot in his eyes).

In *State ex rel. Hussman Ligonier Co. v. Hughes*, 153 S.W.2d 40 (Mo. 1941), however, Missouri courts followed the minority view that required the employee to prove the occurrence of an "accident" separate from the injury itself. *Id*. at 42.

That requirement was widely denounced as inconsistent with the purpose of the Act, the cause of a great deal of litigation, and unfair and inconsistent in its results. See William F. Sutter, Recent Cases, *Workmen's Compensation – Accident Related to Strain – Missouri Courts Apply Narrow Construction*, 29 Mo. L. Rev. 233, 235 (1964); Richard L. Wieler, Recent Cases, *Workmen's Compensation: A Narrow View of the Term Accident*, 32 Mo. L. Rev. 322 (1967); Robert J. Domrese & Stephen L. Graham, *Workmen's Compensation in Missouri*, 19 St. Louis U.L.J. 1, 21-25 (1974-75). A commission created by Congress to assess state compensation statutes strongly recommended that the separate accident requirement be eliminated. Report of the National Commission on State Workmen's Compensation Laws 24-25 (1972). This Court did so in *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 782 (Mo. 1983) (en banc).

The result was to reduce complexity and substantially "reduce litigation of workers' compensation claims." Wm. Joseph Hatley, *Statutory "Accident" Requirement for Missouri Workers' Compensation Judicially Repealed*, 49 Mo. L. Rev. 664, 668 (1984).

SB1 not only turns the clock back to 1941, but imposes an even more restrictive accident requirement, demanding that the accident be identified at a particular time and place during a single work shift. The plaintiff in a tort action is not faced with such arbitrary barriers to recovery.

2. Requirement that Accident or Exposure Be the "Prevailing Factor"

Sec 287.020.3(1) increases the employee's burden of proof on the issue of causation from showing that work was "a substantial factor" in causing the injury to showing that the accident was "the prevailing factor."[15] Similarly, § 287.020.3(4) recognizes cardiovascular, pulmonary, respiratory or other disease, or cerebrovascular accident or myocardial infarction as an injury only where the accident is "the prevailing factor" in causing the medical condition.[16] In like

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[15] Sec. 287.020.3. (1): An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the **[**employment**] accident** is **[**a substantial**] the prevailing** factor in causing the injury;

[16] (4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury

manner, § 287.067.2 (occupational disease) and § 287.067.3 (repetitive motion injury) require the employee to prove that occupational exposure was "the prevailing factor" in causing the disease or injury.[17]

This burden in much higher than the proximate cause standard in ordinary tort cases and excludes clearly work-related claims on an arbitrary and

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only if the accident is the prevailing factor in causing the resulting medical condition;

[17] § 287.067.2: An **injury by** occupational disease is compensable **only** if **[**it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.**]** **the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.**

§ 287.067.3: An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

unreasonable basis. For example, an injury is not compensable if the accident and another cause are each determined to be 50% responsible for the injury. An accident that was only 34% responsible could be the prevailing factor if two extraneous causes were found each to be 33% factors. Such fine calibrations are essentially arbitrary in measuring causation.

3. Requirement that Accident Cause Both Medical Condition and Disability

Previously, an injury was compensable under § 287.020.2 "if work was a substantial factor in the cause of the resulting medical condition or disability." SB1 specifically amended § 287.020.3(1) and § 287.067.2 to require that the accident be the prevailing factor in causing "*both* the resulting medical condition *and* disability." (emphasis added).[18] As a consequence, the great majority of claims – so-called "medical-only" claims in which the worker needed medical treatment, but was not disabled from working – are no longer compensable.[19]

4. Exclusion of Work-Caused Injuries Related to Idiopathic Causes.

Under new § 287.020.3(3), an injury is not compensable, even if the accident was the prevailing factor, if the injury resulted, even indirectly, from

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[18] See note 15 & 17, supra.

[19] *See* Missouri Department of Labor and Industrial Relations, Div. of Workers' Compensation, 2003 Annual Report, at 22, Table 10 (reporting that Medical-Only Cases comprise 88.7% of reported injuries).

idiopathic causes. [20] An "idiopathic" cause is one which is innate or peculiar to the individual. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo. 1993). Previously, such injuries were compensable if workplace conditions contributed to the cause of the accident. *Id.* at 528. This provision invites the employer to cast a very wide net to uncover some characteristic or disability of the claimant that may be linked, even indirectly, to the injury. Such a defense is completely unavailable to tort defendants. *Cf. Woodward v. Research Medical Center*, 2005 WL 2007878 at n.9 (Mo. Ct. App. W.D., Aug 23, 2005) (noting "the classic 'eggshell skull' plaintiff case").

5. Exclusion of Employees With Occupational Diseases or Repetitive Motion Injuries Caused By Exposure or Repetitive Trauma At Work.

SB1 amends § 287.067.2 (dealing with occupational disease) and adds § 287.067.3 (dealing with repetitive motion injury) to deny compensation for gradual deterioration "caused by aging or by the normal activities of day-to-day living."[21] Working is a normal activity of day-to-day living.[22] Under prior §

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[20] §287.020.3 (3): An injury resulting directly or indirectly from idiopathic causes is not compensable

[21] 287.067.2. An **injury by** occupational disease is compensable **only** if **[**it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.**]**

287.020.3(1), "Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, *except where the deterioration or degeneration follows as an incident of employment.*" (emphasis added). Consequently, "the employee is to be compensated for gradual and progressive

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the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

287.067.3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

[22] For example, "working" is defined as a "major life activity" for purposes of the Americans with Disabilities Act, 29 CFR § 1630.2(j)(3)(i). *See Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 523 (1999).

injuries which result from repeated or constant exposure to on the job hazards." *Smith v. Climate Engineering*, 939 S.W.2d 429, 434 (Mo. Ct. App. 1996). By specifically deleting the statutory language italicized above, SB1 excludes claims of employees for occupational disease due to exposure on the job and claims for repetitive motion injuries due to repeated trauma that was part of normal work activity. Such claims are not excluded under tort law.

6. Reduction of Awards to Older Workers or Disabled Workers

Under § 287.190.6(3), any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.[23] Older workers commonly suffer more serious injuries and require longer recuperation from strains, falls and other workplace accidents. *See* Jeff Biddle, Leslie I. Boden, and Robert T. Reville, "Older Workers Face More Serious Consequences From Workplace Injuries," Health and Income Security Brief (National Academy of Social Insurance, Dec. 2003). This section permits reduction of their compensation

[23] 287.190.6 (3) Any award of compensation shall be reduced by an amount proportional to the permanent partial disability determined to be a preexisting disease or condition or attributed to the natural process of aging sufficient to cause or prolong the disability or need of treatment.

solely because a younger, healthier worker would have sustained less serious injury or shorter period of disability or treatment.

7. Requirement of Objective findings

SB1 adds § 287.190.6(2) to provide that in disability determinations "objective medical findings shall prevail over subjective findings." The provision excludes workers whose disability is medically recognized but manifests itself primarily in pain or subjective symptoms.[24]

This section excludes from coverage a substantial number of genuine, medically recognized injuries to soft tissues that manifest themselves in pain or dysfunction but not in objective signs. An example might be an assembly line worker who, after prolonged use of heavy pneumatic power tools, is unable to lift modest weight above shoulder level without excruciating pain, and is diagnosed as suffering tendonitis or carpal tunnel syndrome. *See, e.g., Toyota Mfg Co. v. Williams*, 534 U.S. 184 (2002). Such injuries would be recognized, based on competent medical testimony, in ordinary tort actions.

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[24] 287.190.6 (2) In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures;

8. Company cars.

SB1 amends § 287.020.5 to preclude benefits available under prior law to employees traveling to or from work in company "automobiles," though it does not, by its terms, apply to trucks or other vehicles. [25] *E.g., Reece v. Neal Chevrolet*, 912 S.W.2d 599 (Mo. Ct. App. 1996) (company-owned vehicle).

9. Owner-Operator Truck Drivers

SB1 adds sections 287.040.4, 287.041, and 287.043 to exclude from coverage for the owner-operator of a motor vehicle working for a for-hire motor carrier, abrogating prior case law under which an owner-operator of a tractor-trailer was deemed an employee of the motor vehicle carrier, rather than an independent contractor, where the carrier exercised control over the driver's service.[26] *E.g., Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. Ct. App. 2004).

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[25] 287.020.5. . . . Injuries sustained in company-owned or subsidized automobiles in accidents that occur while traveling from the employee's home to the employer's principal place of business or from the employer's principal place of business to the employee's home are not compensable.

[26] 287.040.4. The provisions of this section shall not apply to the relationship between a for-hire motor carrier operating within a commercial zone as defined in section 390.020 or 390.041, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of

10. Volunteer Firefighters and Police Officers

SB1 amends § 287.067.6 to limit benefits for lung disease, heart disease and other occupational diseases due to smoke, gases, carcinogens and inadequate

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Transportation, or any of its subagencies, and an owner, as defined in subdivision (43) of section 301.010, RSMo, and operator of a motor vehicle.

287.041. Notwithstanding any provision of section 287.030 and 287.040, for purposes of this law, in no event shall a for-hire motor carrier operating within a commercial zone as defined in section 360.041, RSMo, or section 390.020, RSMo, or operating under a certificate issued by the Missouri department of transportation or by the United States Department of Transportation, or its subagencies, be determined to be the employer of a lessor, as defined at 49 C.F.R. Section 376.2(f), or of a driver receiving remuneration from a lessor, as defined at 49 C.F.R. Section 376.2(f), provided, however, the term "for-hire motor carrier" shall in no event include an organization described in section 501(c)(3) of the Internal Revenue Code or any governmental entity.

287.043. In applying the provisions of subsection 1 of section 287.020 and subsection 4 of section 287.040, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "owner", as extended in the following cases: *Owner Operator Independent Drivers Ass'n., Inc. v. New Prime, Inc.*, 133 S.W.3d 162 (Mo. App. S.D., 2004); *Nunn v. C.C. Midwest*, 151 S.W.3d 388 (Mo. App. W.D., 2004).

oxygen to paid firefighters of paid fire departments and paid police officers of a paid police department.[27]

B. Fault-Based Defenses

1. Refusal of Drug or Alcohol Test

Sec. 287.120.6(3) provides that an employee forfeits all benefits by refusing to take a drug or alcohol test requested by the employer. The forfeiture is required without regard to the nature or intrusiveness of the testing, the reasonableness of the employee's refusal, or any indication that the use of drugs or alcohol played any part in causing the accident or injury.[28]

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[27] **[**5.**] 6.** Disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases for the purposes of this chapter and are defined to be disability due to exposure to smoke, gases, carcinogens, inadequate oxygen, **of paid firefighters of a paid fire department or paid police officers of a paid police department certified under chapter 590, RSMo, if a direct causal relationship is established,** or psychological stress of firefighters of a paid fire department if a direct causal relationship is established.

[28] § 287.120.6 (3) An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed

2. Legal Intoxication Presumption

Sec 287.120.6(3) provides that a blood alcohol level constituting legal intoxication "shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury," resulting in loss of all benefits under §287.120.6(2).[29] The blood alcohol level giving rise to the presumption is that deemed sufficient to show driving while intoxicated under § 577.012, and has no rational connection to whether use of alcohol caused a work injury. The section makes medical treatment and disability benefits for the employee and his family dependent upon the employee's ability to prove a negative – that alcohol use did not cause his or her injury, a higher burden than the claimant would face in a tort action.

3. Violation of Drug-free Workplace Policy

Sec. 287.120.6(1) takes away half the employee's compensation if the injury was sustained "in conjunction with the use of alcohol or nonprescribed

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controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

[29] 287.120.6 (3) The voluntary use of alcohol to the percentage of blood alcohol sufficient under Missouri law to constitute legal intoxication shall give rise to a rebuttable presumption that the voluntary use of alcohol under such circumstances was the proximate cause of the injury. A preponderance of the evidence standard shall apply to rebut such presumption.

controlled drugs," in violation of the employer's rule or policy. This provision applies where the use of alcohol or drugs was not the proximate cause of the injury.[30] It may apply where the injury occurred "in conjunction with" the use of drugs or alcohol by a co-worker or a third party. The violation of the employer's drug/alcohol policy need not be illegal, the employer is relieved of any responsibility to post its rule or make a diligent effort to inform employees, and the forfeiture is required even if the employee has no actual knowledge of the rule or policy.

A "nonprescribed controlled drug," is defined in § 287.120.6(3) by reference to § 195.010. The schedules of controlled drugs enumerated in § 195.017 include not only those commonly understood as illegal drugs, but also such substances as difenoxin and Diphenoxylate (used to control diarrhea), Pseudoephedrine (to relieve runny noses due to colds and allergies), Diethylpropion (an appetite suppressant for weight loss), and codeine (cough suppressant). These and many other substances on the statutory schedules are commonly found in the desks and purses and lockers of employees. It is also common for an individual legally to use medications that may have been

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[30] Sec. 287.120.6(2) continues prior law in providing that when use of alcohol or nonprescribed controlled drugs, "is the proximate cause of the injury, then the benefits or compensation otherwise payable under this chapter for death or disability shall be forfeited."

prescribed for a family member. *See State v. Blocker*, 133 S.W.2d 502, 505 (Mo. 2004) (en banc) (defendant cannot be charged with illegal possession of controlled drug prescribed to a person in the same household). Some controlled substances do not require a prescription at all, such as ephedrine and pseudoephedrine.

In short, the provision not only enlists private parties in the enforcement of the state's drug control policy without the protections of individual rights that bind the state, it also allows an employer to use the workers' compensation system to enforce the employer's own broadly drafted policy as a pretext to deny benefits.

4. Failure to Follow Safety Rules or Use Safety Devices

Sec. 287.120.5 cuts benefits by up to 50% for injury or death caused in part by the employee's failure to use a safety device provided by the employer or obey an employer's safety rule. The provision not only increases the prior 15% penalty, but also increases the duty of care required of employees. The employee's failure need not be willful, and the employer is no longer required to post safety rules or make a diligent effort to cause workers to use the safety device or obey the safety rule.[31] This section essentially reinstates a contributory negligence defense that the workers' compensation law was intended to eliminate.

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[31] 287.120.5. Where the injury is caused by the **[**willful**]** failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, **[**which rule has been kept posted in a conspicuous place on the employer's

5. Post-Injury Termination

§287.170.4 denies temporary disability payments to any employee who is terminated from post-injury employment based upon the employee's post-injury misconduct other than absence from work due to an injury.[32] Post-injury misconduct obviously is not a factor in causing the injury. Nor does the section require that the employer's termination decision be reasonable or non-pretextual. Although workers' compensation is intended to promote return to work, this

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premises,**]** the compensation and death benefit provided for herein shall be reduced **[**fifteen**] at least twenty-five but not more than fifty** percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a **[**diligent**] reasonable** effort to cause his **or her** employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

[32] 287.170.4. If the employee is terminated from post injury employment based upon the employee's post injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section, section 287.170, or 287.180 are payable. As used in this section, the phrase "post injury misconduct" shall not include absence from the work place due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

section provides an incentive for employers to seize upon even minor infractions as an excuse to terminate a disabled employee.

C. Judicial Oversight

1. Initial Offers

SB1 adds § 287.390.5 to provide that an unrepresented employee is entitled to 100% of the amount of a written offer of settlement. This provision appears to preclude a subsequently retained attorney from receiving any part of the initial offer as a fee. If the offer is rejected and there are additional proceedings on the claim, the employee is nonetheless entitled to 100% of the initial offer, regardless of the outcome of the additional proceedings. The section mandates that an attorney representing the employee "shall receive reasonable fees for services rendered," but makes no provision for the source of those fees.[33]

[33] 287.390.5. In any claim under this chapter where an offer of settlement is made in writing and filed with the division by the employer, an employee is entitled to one hundred percent of the amount offered, provided such employee is not represented by counsel at the time the offer is tendered. Where such offer of settlement is not accepted and where additional proceedings occur with regard to the employee's claim, the employee is entitled to one hundred percent of the amount initially offered. Legal counsel representing the employee shall receive reasonable fees for services rendered.

2. Judicial Administration

New § 287.020.10 abrogates all previous judicial interpretations of "arising out of," and "in the course of the employment," but provides no new definitions of those crucial terms.[34]

3. Strict Construction

SB1 amends § 287.800 to abolish the rule of liberal construction of the Workers' Compensation Act and to require that the provisions of the Act be construed strictly.[35] Liberal construction has promoted the effectuation of the

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[34] §287.020.10. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment."

[35] 287.800. **[**All of the provisions of this chapter shall be liberally construed with a view to the public welfare, and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the division and the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto.**] 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers§ compensation, and any reviewing courts shall construe the provisions of this chapter strictly.**

law's purpose, *Corp v. Joplin Cement Company*, 337 S.W.2d 252 (Mo. 1960), and extends the law's benefits to the largest possible class. *Todd v. Goostree*, 493 S.W.2d 411 (Mo. App. 1973). Strict construction will have the effect of restricting benefits of the law to the smallest class.

4. Oversight of Administrative Law Judges

SB1 amends § 287.610 to make significant changes in the retention and removal of administrative law judges. § 287.610.9(2) provides for an "administrative law judge review committee" consisting of the division director appointed by the governor and four other voting members appointed by legislative leaders.[36] The committee must conduct periodic "performance audits" of all

[36] 287.610.9.(2) The review committee shall consist of the division director, who shall be appointed by the governor, one member appointed by the president pro tem of the senate, one member appointed by the minority leader of the senate, one member appointed by the speaker of the house of representatives, and one member appointed by the minority leader of the house of representatives. The governor shall appoint to the committee one member selected from the commission on retirement, removal, and discipline of judges. This member shall act as a member ex-officio and shall not have a vote in the committee. The division director shall serve as the chairperson of the committee, and shall serve on the committee during the time of employment in such position. The term of service for all other members shall be two years. The review committee members shall all serve

administrative law judges, and ALJ's who receive two or more "no confidence" votes may have their appointments immediately withdrawn.[37]

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without compensation. Necessary expenses for review committee members and all necessary support services to the review committee shall be provided by the division.

[37] 287.610.2. The division director, as a member of the administrative law judge review committee, hereafter referred to as "the committee", shall [require and] perform, in conjunction with the committee, a [annual evaluations] performance audit of [an] all administrative law [judge, associate administrative law judge and legal advisor's conduct, performance and productivity based upon written standards established by rule] judges by August 28, 2006. The division[, by rule] director, in conjunction with the committee, shall establish the written performance audit standards on or before [January 1, 1999] October 1, 2005.

287.610.9.(1) The director of the division, in conjunction with the administrative law judge review committee shall conduct a performance audit of all administrative law judges every two years. The audit results, stating the committee's recommendation of confidence or no confidence of each administrative law judge shall be sent to the governor no later than the first week of each legislative session immediately following such audit. Any administrative law judge who has received two or more votes of no confidence under

In addition, § 287.610.3 requires that administrative law judges be subject to a retention vote every twelve years. An ALJ who has received two or more no confidence votes on performance audits is not eligible for retention.[38]

IV. THIS LITIGATION

Plaintiffs, are 66 labor unions representing many of Missouri's two and a half million workers, whose members are directly affected by Missouri's Workers' Compensation Law, along with four labor councils and one not-for-profit organization. On November 30, 2005, Plaintiffs filed their Petition for Declaratory

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performance audits by the committee may have their appointment immediately withdrawn;

[38] 287.610.3. The thirteen administrative law judges with the most years of service shall be subject to a retention vote on August 28, 2008. The next thirteen administrative law judges with the most years of service in descending order shall be subject to a retention vote on August 28, 2012. Administrative law judges appointed and not previously referenced in this subsection shall be subject to a retention vote on August 28, 2016. Subsequent retention votes shall be held every twelve years. Any administrative law judge who has received two or more votes of no confidence under performance audits by the committee shall not receive a vote of retention.

Judgment, challenging the constitutionality of the amendments to the Workers' Compensation Law enacted in SB1.

Plaintiffs' Petition alleged both that the changes made by SB1 rendered the Workers' Compensation Law unconstitutional in its entirety and that specific provisions of SB1 violated the federal and Missouri constitutions. In the interest of judicial economy, Plaintiffs moved for Judgment on the Pleadings and then for Partial Summary Judgment, praying for a declaration that SB1 was unconstitutional in its entirety in that it deprived injured workers of an adequate substitute remedy for their common law remedies and that SB1 lacked a rational relationship to a legitimate state purpose. Plaintiffs reserved their allegations under the remaining counts that specific provisions of SB1 were unconstitutional. Defendant filed cross motions for Judgment on the Pleadings and for Summary Judgment.

On January 9, 2007, the circuit court denied Plaintiff's motion and granted Defendant's Motion for Judgment on the Pleadings with respect to Counts I and III, and granted Defendant's Motion for Summary Judgment as to the remaining counts. Plaintiffs filed a timely notice of appeal on Feb. 13, 2007.

POINTS RELIED UPON

I. The Court Below Erred in Granting Defendant's Motion for Summary Judgment Because Plaintiffs' Petition for Declaratory Judgment Presents A Justiciable Controversy.

Missouri Health Care Ass'n v. Attorney General of the State of Mo., 953 S.W.2d 617 (Mo. 1997)

Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504 (Tex. 1995)

Frank Coluccio Const. Co. v. City of Springfield, 779 S.W.2d 550 (Mo. 1989).

Missouri Bankers Ass'n v. Director of Missouri Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. 2003)

II. The Trial Court Erred in Denying Plaintiffs' Motion for Judgment on the Pleadings and Granting Defendant's Motion Because Missouri's Workers' Compensation Law, As Amended by SB1, Violates the Fourteenth Amendment Due Process Clause and the Due Process and Open Courts Guarantees of the Missouri Constitution in That the Law No Longer Assures Workers Certain Compensation for

Work Related Injuries Without Regard to Fault.

New York Central R. Co. v. White, 243 U.S. 188, 203 (1917)

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

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 340-45 (Ore. 2001)

Injured Workers of Kansas v. Franklin, 942 P.2D 591, 623 (Kan. 1997)

III. The Lower court erred in denying plaintiffs' motion for judgment on the pleadings and granting defendant's motion because the amendments to the workers' compensation law violate due process and equal protection in that the legislation bears no rational Relationship to the Legislature's Purpose.

American Motorcyclist Association v. City of St. Louis, 622 S.W.2d 267, 269 (Mo. App. 1981)

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972)

Missourians For Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 104 (Mo. 1997)

Murphy v. Commissioner of Dept. of Indus. Accidents, 612 N.E.2d 1149 (Mass. 1993)

ARGUMENT

I. THE COURT BELOW ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS' PETITION FOR DECLARATORY JUDGMENT PRESENTS A JUSTICIABLE CONTROVERSY.

The court below erred in holding that Plaintiffs had failed to present a justiciable controversy. The court concluded that Plaintiff's allegations failed to satisfy the requirements of (1) "a presently-existing controversy admitting of specific relief," (2) a "legally protectible interest," (3) "a controversy ripe for judicial determination," and (4) "an inadequate remedy at law." Op. at 6. To the contrary, Plaintiffs' Petition fully satisfies each requirement.

A. Plaintiffs' Petition Presents a Substantial, Presently Existing Controversy and Seeks Specific Relief, Not an Advisory Opinion.

The lower court first concluded that no "real, substantial, presently-existing controversy" exists because "the plaintiffs' claims rest on hypothetical scenarios." Op. at 7.

To the contrary, Plaintiffs allege that, as of the effective date of SB1, all workers covered by Missouri's workers' compensation law are adversely affected. Petition at 6. Plaintiffs' members are employees who are the intended beneficiaries of workers' compensation insurance purchased or provided by their employers, providing benefits that are "in the nature of obligations or payments due under a

contract." *Williams v. S. N. Long Warehouse Co.*, 426 S.W.2d 725, 736 (Mo. App. 1968). SB1 shifted a substantial portion of the risk of medical expense and lost income from employers to the employees. By dramatically shrinking the scope of workers' compensation coverage, SB1 immediately diminished the value of that mandated economic benefit for all Missouri employees.

This immediate impact of SB1 on Plaintiffs' members is a sufficient legally protectible interest to support their petition seeking a declaratory judgment. In *Missouri Health Care Ass'n v. Attorney General of the State of Mo.*, 953 S.W.2d 617 (Mo. 1997), an association representing long-term care facilities challenged a new statute which made it an unlawful trade practice for such facilities to make representations concerning the quality of their care without disclosing supporting documentation. The Court upheld the association's standing to seek a declaratory judgment that the statute was unconstitutional prior to its enforcement against any of its members.

> First, the attorney general argues that MHCA's members have no legally protectable interest at issue. This contention is without merit. The interest in doing business free from the constraints of an unconstitutional law is entitled to legal protection. MHCA has alleged that amended section 407.020 is unconstitutional and that it is affecting its members' businesses; therefore, MHCA's petition places a legally protectable interest at issue.

Id. at 620 (citations omitted). Plaintiffs' members similarly have a protectable interest in challenging the constitutionality of legislation affecting medical care and disability payments for workplace injuries. Nor did the Court require specific evidence to demonstrate the statute's impact on its members.

> The attorney general complains that MHCA failed to introduce evidence in support of MHCA's allegations that amended section 407.020 was affecting the business of its members. As the trial court found, however, amended section 407.020 is plainly directed at MHCA's members and is designed to regulate the way in which these facilities conduct business. Sec. 407.020, RSMo Supp.1996. No speculation or additional fact-finding is required to determine that MHCA's members are sufficiently affected by this law. MHCA has satisfied the requirements to bring a declaratory judgment action.

Id. at 622 (citations omitted).

For this reason, it is well-settled that declaratory actions brought by labor unions challenging the constitutionality of amendments to workers' compensation statutes are justiciable. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 519 (Tex. 1995) (Texas AFL-CIO has standing to bring a declaratory judgment action challenging the constitutionality of recent amendments to the workers' compensation act); *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 780 N.E.2d 981, 985 (Ohio 2002) (union had standing to seek mandamus to bar enforcement of workers' compensation amendment

allowing drug and alcohol testing of injured employees as unconstitutional, even though union alleged only potential harm to its members); *cf.*, *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 596-97 (Kan. 1997) (indicating, without expressly holding, that labor organizations had standing to seek declaratory judgment that amendments to Kansas Workers' Compensation Act were unconstitutional).

In sum, Plaintiffs have demonstrated "a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

B. Plaintiffs Have Representational Standing To Challenge the Unconstitutionality of SB1.

The court below further ruled that Plaintiffs failed to allege a sufficient basis for representational standing to challenge SB1 on behalf of their members. Op. at 7.

At the outset, the lower court erred in imposing this burden upon the Plaintiffs. This Court has made clear that "standing of a party to prosecute an action of a third party" is "a matter to be raised and disproved by the defendant." *Frank Coluccio Const. Co. v. City of Springfield*, 779 S.W.2d 550, 552 (Mo. 1989). As the Court pointed out, "the rule [is] that standing is an affirmative defense for the governmental entity to raise and prove."). *Id*. *Cf. Clinch v.*

Heartland Health, 187 S.W.3d 10, 19 (Mo. Ct. App. W.D. 2006) (plaintiff's lack of standing was an affirmative defense properly raised by defendants in their answer"); *see also International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Dept. of Employment Sec.*, 828 N.E.2d 1104, 1110 (Ill. 2005) ("a plaintiff need not allege facts establishing [representational] standing. Rather, it is the defendant's burden to plead and prove lack of standing.").

Defendant has not met its burden of proving Plaintiffs' lack of standing. Moreover, the allegations in Plaintiffs' Petition are themselves sufficient to establish Plaintiffs' standing.

1. *The interests Plaintiffs seek to protect are germane to their organizational purposes.*

The court below stated that Plaintiffs failed to allege that the interests they seek to protect in this case are germane to their organizational purposes, rejecting the pleading of "broad mission statements" as not sufficient. Op. at 7.

In fact, such broad statements of purpose clearly are sufficient. For example in *Missouri Bankers Ass'n v. Director of Missouri Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. 2003), the Court held that MBA had standing to challenge a Credit Union Commission decision allowing a credit union to expand its geographic scope. The germaneness requirement was satisfied by MBA's general purpose to protect member banks from unfair competition. *Id*. at 363. Likewise in

Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333 (1977),[39] the commission challenged the constitutionality of a North Carolina statute that prohibited labeling closed containers of apples with state grading information. The Supreme Court held the commission had standing to assert the rights of Washington apple growers because challenging the statute's constitutionality was "central to the Commission's purpose of protecting and enhancing the market for Washington apples." *Id*. at 344.

Seventy of the 71 plaintiffs bringing this action are labor organizations.[40] Labor unions played a crucial role in the adoption of Missouri's workers' compensation law. *See supra* at p. 3. Challenging the constitutionality of amendments that undermine their members' coverage is clearly germane to Plaintiffs' organizational purpose. Indeed, Missouri law defines a "labor organization" as existing "for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or

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[39] *Hunt's* three-part test for associational standing, including the germaneness requirement, was explicitly adopted by this Court in *Missouri Outdoor Advertising Ass'n, Inc. v. Missouri State Highways and Transp. Com'n*, 826 S.W.2d 342, 344 (Mo. 1992).

[40] "Only one of the petitioners needs to have standing to permit us to consider the petition for review." *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007).

conditions of employment, *or for other mutual aid or protection in relation to employment.*" Mo. Rev. Stat. § 213.010 (emphasis added).

Those organizational purposes include going to court to challenge the constitutionality of actions infringing upon members' interests. *See, e.g., Transport Workers Union of America, Local 100, AFL-CIO v. New York City Transit Authority*, 342 F. Supp. 2d 160, 168 & n.43 (S.D.N.Y. 2004) (legal challenge to city's sick leave policy was "obviously germane to the Unions' purpose," "to protect [members'] rights in relation to the terms and conditions of their employment"). In fact, several of the named plaintiffs in this case have previously gone to court to vindicate their members' constitutional rights. *E.g., Local 781 Intern. Ass'n of Fire Fighters, AFL-CIO v. City of Independence*, 947 S.W.2d 456 (Mo. Ct. App. 1997) (Union sought declaratory judgment that restriction on political activities of city employees was unconstitutional); *Local Union No. 1, International Brotherhood of Electrical Workers v. Civil Service Com'n of City of St. Louis*, 54 S.W.3d 699 (Mo. Ct. App. 2001) (Union challenge to dismissal of city employee for failing to take a drug test that was not supported by reasonable suspicion).

2. Participation of individual members is not required where Plaintiffs seek declaratory and injunctive relief and do not seek money damages.

The lower court also erroneously stated that Plaintiffs lack standing because they do not allege that "the claims and relief do not require the participation of individual members in this suit." Op. at 7. This Court has held that this

requirement is met where the relief sought "is prospective only, and no request was made for money damages or some other relief that is specific to individual members." *Missouri Bankers Ass'n v. Director of Missouri Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. 2003). Plaintiff's Petition, which seeks a declaratory judgment and does not seek money damages, plainly satisfies this requirement.

3. The exclusive jurisdiction of the Commission does not deprive this Court of jurisdiction.

The court below next indicated that plaintiffs lack standing because individual members could not bring suit in their own right "because these claims are not ripe, and because the Commission has exclusive jurisdiction to decide questions such as whether an incident is covered by the law, or other questions requiring agency expertise. The plaintiffs' individual members have not exhausted their administrative remedies." Op. at 7.

The lower court would require plaintiffs' members to bring a stream of numerous individual claims to the Commission, all of which must be denied because the Commission lacks the authority to declare the amended statute unconstitutional, before seeking a declaratory judgment from a Missouri court. As the court of appeals has correctly explained,

> Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments. Raising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide. The law does not require the

> doing of a useless and futile act. We see no logical reason to require that a constitutional challenge to the validity of a statute be raised before an administrative body in order to preserve the issue for appellate review.

Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors, 744 S.W.2d 524, 531 (Mo. App. 1988). For this reason, it is well settled that "Where there is a constitutional challenge to a statute which forms the *only* basis for granting declaratory judgment, exhaustion of administrative remedies is not required." *Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 353 (Mo. 1995); *Boot Heel Nursing Ctr., Inc. v. Missouri Dept. of Social Serv.*, 826 S.W.2d 14, 16 (Mo. App. 1992). *Cf.* Mo. Rev. Stat. § 536.050.2 ("Any person bringing an action [seeking declaratory judgment respecting the validity of rules] shall not be required to exhaust any administrative remedy if the court determines that . . . (2) The only issue presented for adjudication is a constitutional issue.").

Plaintiffs clearly have representational standing to bring this action.

C. A Ripe Controversy Exists.

Thirdly, the lower court incorrectly held that Plaintiffs have not presented a controversy ripe for judicial determination because their "claims contemplate factual scenarios that have not occurred." Op. at 7.

Plaintiffs stated in their Petition that, as of the effective date of SB1, every employee covered by Missouri's workers' compensation law found his or her coverage for job-related injuries substantially reduced. As a result of SB1, Missouri workers are no longer assured medical treatment and partial income replacement for large numbers of previously-covered injuries and occupational diseases. The burden of those costs has been shifted from employers to the employees themselves. This constitutes a current, existing adverse impact upon Plaintiffs' members that would be remedied by the declaratory judgment sought in this case. No further actions or events need occur before this Court can decide the constitutional issues raised by Plaintiffs. An organization may seek a declaratory judgment that a statute or regulation is unconstitutional prior to enforcement against its members. *Missouri Health Care Ass'n v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. 1997).

See also Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504, 519 (Tex. 1995) (Texas AFL-CIO has standing to bring a declaratory judgment action challenging the constitutionality of recent amendments to the workers' compensation act); *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation*, 780 N.E.2d 981, 985 (Ohio 2002) (union standing to seek mandamus to bar enforcement of workers' compensation amendment allowing drug and alcohol testing of injured employees); *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 596-97 (Kan. 1997) (suit by labor organizations seeking declaratory judgment that amendments to Kansas Workers' Compensation

Act were unconstitutional); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 612 (1989) (union's constitutional challenge to rule mandating drug and alcohol testing of railroad employees after accidents); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 379 n.24 (6th Cir. 1998) ("a union does have representational standing to challenge the constitutionality of an alcohol and drug testing policy on behalf of its members.").

This controversy is therefore ripe for decision by this Court.

D. Plaintiffs Do Not Have an Adequate Remedy At Law.

Finally, the lower court held that plaintiffs' declaratory judgment action is not justiciable because plaintiffs have "an adequate remedy at law – administrative remedies under the workers' compensation law, as provided in Chapter 287 of the Missouri Revised Statutes." Op. at 7.

Those remedies manifestly are not an adequate remedy at law: the Commission is without authority to pass on the constitutionality of the amended workers' compensation law. *Duncan, supra*.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANT'S MOTION BECAUSE MISSOURI'S WORKERS' COMPENSATION LAW, AS AMENDED BY SB1, VIOLATES THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE DUE PROCESS AND OPEN COURTS GUARANTEES OF THE

MISSOURI CONSTITUTION IN THAT THE LAW NO LONGER ASSURES WORKERS CERTAIN COMPENSATION FOR WORK RELATED INJURIES WITHOUT REGARD TO FAULT.

A. Due Process Requires That Injured Workers Whose Common Law Cause of Action Is Eliminated Be Afforded an Adequate Substitute Remedy.

Workers' compensation is not a matter of legislative largesse. It rests upon what is often called the "workers' compensation bargain." 1B Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 1.04 (2004). Employers lost their fault-based defenses in exchange for immunity from unlimited tort liability. Workers gave up their common-law right to sue their employers for job-related injuries. In exchange, they were assured certain, if limited compensation benefits. The legislature's authority to mandate such a quid pro quo was challenged in the Supreme Court of the United States on due process grounds.

The police power of state legislatures is, of course, subject to the constitutional limits of due process. *State ex rel. Carpenter v. City of St. Louis,* 318 Mo. 870, 897 (Mo. 1928).[41] "Due process of law" has strong roots in the

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[41] The broad, but not unbounded police power of the legislature is most often traced to the Court's statement in *Munn v. Illinois*, 94 U.S. 113, 134 (1877), that specific common-law rules "may be changed at the will, or even at the whim of the legislature, *unless prevented by constitutional limitations*." (emphasis added).

common law, but does not freeze in place all the myriad common-law rules. Rather, as Justice Powell explained, the Due Process Clause was intended to guarantee Americans only "those privileges long recognized at common law as essential to the orderly pursuit of happiness." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Those "essential" rights that cannot be wiped away entirely at the whim of the legislature, the Court stated, are those which "Blackstone catalogued among the 'absolute rights of individuals'" 430 U.S. at 661. Those Blackstonian rights consist of the rights to personal liberty, personal property, and personal security, including the right against wrongful injury to person and to reputation. 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *120-34. Indeed, protection of those absolute rights is "the principal aim of society." Blackstone, at *120. Thus, "Under the common law, an invasion of personal security gave rise to a right to recover damages in a subsequent judicial proceeding." *Ingraham* at 675. Chief Justice John Marshall restated this principle for Americans:

The Court in that case upheld a statute setting rates charged by common carriers, replacing the common law rule that such charges must be reasonable. The Court viewed the statute as "only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." *Id*. Thus, *Munn* did not address legislative authority to eliminate common-law remedies.

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). The Due Process Clause of the Fourteenth Amendment likewise made it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). Thus, for example, in *Poindexter v. Greenhow*, 114 U.S. 270 (1884), the Court struck down a Virginia statute that eliminated a cause of action against state tax collectors for trespass to property. "No one," the Court held, "would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law." *Id.* at 306. Abolition of all legal redress for personal injury would likewise violate due process. *See also Oshkosh Waterworks Co. v. City of Oshkosh*, 187 U.S. 437, 439 (1902) (While parties have no vested right in particular remedies, "the legislature may not withdraw all remedies").

Against this backdrop, the Supreme Court upheld the constitutionality of workers' compensation laws. In *New York Central R. Co. v. White*, 243 U.S. 188, 203 (1917), the primary issue was whether the law could eliminate employers' fault-based defenses. Court stated that "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit," and a

legislature may change those rules if it does not act arbitrarily. *White*, 243 U.S. at 197-98. *See also Mountain Timber Co. v. Washington*, 243 U.S. 219, 243-44 (1917); and *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419-20 (1919).

The Court viewed the employee's personal injury cause of action somewhat differently. The Court "doubted" whether a state could abolish rights of action for personal injury "without setting up something adequate in their stead." *Id.* at 201. The Court also suggested that if the substitute remedy was not adequate, for example if it provided only "insignificant" compensation, it "would [not] be supportable" under the due process clause. *Id.* at 205. However, the Court found it was within the state's power to "substitute a system under which, in all ordinary cases of accidental injury, [an employee] is sure of a definite and easily ascertained compensation." *Id.* at 204. Two years later, the Court reaffirmed that abolition of the injured worker's common law cause of action does not violate due process "when established as a reasonable substitute for the legal measure of duty and responsibility previously existing." *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919).

Shortly thereafter, the Court removed any doubt that abolishing a common law cause of action for injury to person or property without providing a substitute remedy violates to due process. *Truax v. Corrigan*, 257 U.S. 312 (1921), struck down an Arizona statute that effectively barred an employer's action for damage to its business caused by union picketers. Commenting on *White*, the Court made clear that the legislature may not take away all remedy:

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve. . . . To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law.

Id. at 329-30. *See also Crane v. Hahlo*, 258 U.S. 142, 147 (1922) ("No one has a vested right in any given mode of procedure, and *so long as a substantial and efficient remedy remains* or is provided, due process of law is not denied by a legislative change.") (emphasis added); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (Denial of right of access to courts only applies "in the absence of a meaningful alternative"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) ("our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy," citing both *Ingraham, supra*, and *New York Central R. Co. v. White, supra*).

Hence, it is recognized that "workmen's compensation laws withstand constitutional attack on due process grounds because they provide a

'quid pro quo for potential tort victims.'" *Park v. Rockwell Int'l Corp.*, 436 A.2d 1136, 1138 (N.H. 1981). *See also Walters v. Blackledge*, 71 So. 2d 433, 441 (Miss. 1954) (the abolition of an employee's common law right of action did not violate due process because, the "certain remedy afforded by the Compensation Act is deemed to be a sufficient substitute," citing *White*); *Breimhorst v. Beckman*, 227 Minn. 409, 436, 35 N.W.2d 719, 736 (1949) ("By the weight of authority, it is recognized that compulsory workmen's compensation acts similar to ours do provide a remedy which is an adequate substitute for the common-law or statutory action for damages," citing *White* and other cases); *Grantham v. Denke*, 359 So. 2d 785, 787 (Ala. 1978) (Workmen's Compensation Act amendments may not "deprive [employee] of rights and remedies he enjoyed under the common law which are preserved under [the open courts provision] of our constitution."); *Carlson v. Smogard*, 215 N.W.2d 615, 619 (Minn. 1974) (workers' compensation ban against third party suits for indemnity from employer violated due process under federal and state constitutions because plaintiff's "common-law right of action will be abrogated without providing a reasonable substitute.").

To be clear: the Assembly may alter or abolish any rule of the common law if it does not otherwise violate the constitution. It might even eliminate causes of action for harm to "absolute rights." But in doing so, the legislature may not leave the individual without an adequate substitute remedy. See the Oregon Supreme Court's excellent discussion of this fundamental principle and its relevance to

workers' compensation in *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 340-45 (Ore. 2001).

B. The Open Courts Guarantee Requires That the Legislature Provide An Adequate Substitute Remedy When It Abolishes A Common Law Cause of Action for Injuries.

This principle is also found in the Missouri Constitution, both in its due process clause, Art I, §10, and in the open courts guarantee, Art. I, § 14,[42] which is taken from the Magna Carta, and which "is but a second due process clause to the state constitution." *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 9 & 10 (Mo. 1992) (en banc). Indeed, the guarantee in § 14 of "certain remedy for every injury to person, property or character" is a clear echo of Blackstone's absolute rights.

Most state constitutions contain provisions similar to Missouri Constitution Art. I, § 14, and among them, "[t]he general view seems to be that legislatures may change a common-law remedy . . . but the remedy may not be denied altogether. Some adequate remedy must remain." Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202, 1206-07 (1964). *See also* Donald B. Brenner, *The Right of Access to Civil Courts Under State Constitutional Law: An*

[42] "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. Art. I, § 14.

Impediment to Modern Reforms, Or A Receptacle of Important Substantive and Procedural Rights?, 13 Rutgers L.J. 399, 426 (1982) (The right of access to court "requires that state legislatures not abolish a common law right of action without providing a reasonable substitute."). Indeed, as the Chief Justice of the Texas Supreme Court has noted, "all states apparently recognize the doctrine of a substitute remedy, or quid pro quo, to justify legislative change." Thomas R. Phillips, *The Constitutional Right to a Remedy,* 78 N.Y.U. L. Rev. 1309, 1335 (2003). The Oregon Supreme Court's scholarly and thorough analysis concludes:

> Drafters of remedy clauses in state constitutions [including Missouri's Art. I, § 14] sought to protect absolute common-law rights [respecting person, property, and reputation] by mandating that a remedy always would be available for injury to those rights. . . The legislature may abolish a common-law cause of action, so long as it provides a substitute remedial process in the event of injury to the absolute rights that the remedy clause protects. At a minimum, to be remedy by due course of law, the statutory remedy must be available for the same wrongs or harms for which the common-law cause of action existed.

Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 356 (Ore. 2001). *See also Berry v Beech Aircraft Corp.,* 717 P.2d 670, 675 & 680 (Utah 1985) (similar).

This Court has consistently adhered to that majority view. As Chief Justice M'Girk wrote for this Court shortly after Missouri entered the Union: "The

Legislature may modify the remedy, but they cannot constitutionally take away all remedy." *Baily v. Gentry*, 1 Mo. 164 (1822). The substitute remedy principle is reflected in the well-settled Missouri rule that a statute which creates a new cause of action will not be construed as eliminating a common-law cause of action unless the statute affords an adequate remedy for the harm. *See Hickman v. City of Kansas*, 25 S.W. 225, 227 (Mo. 1894); *Everett v. County of Clinton*, 282 S.W.2d 30, 34 (Mo. 1955); *Saint Louis County v. Moore*, 818 S.W.2d 309, 310 (Mo. Ct. App. 1991).

The Court relied on this principle in *Mangiaracino v. Laclede Steel Co.*, 145 S.W.2d 388, 391 (Mo. 1940), where the Court rejected an injured worker's argument that applying the Illinois exclusivity provision "would be taking from him a vested common law substantive right without substituting therefor some other adequate substantive right." The Court determined that the plaintiff was indeed afforded a substitute remedy in that he "was given rights under the Illinois Compensation Act which extended his employer's liability beyond what it was at the common law." *Id.* at 391.

This principle also served as the basis for this Court's sole decision regarding the constitutionality of Missouri's workers' compensation law. Plaintiff in *De May v. Liberty Foundry Co.*, 37 S.W.2d 640 (1931), argued that the law deprived her of her cause of action in violation of the open courts guarantee. This Court did not respond that the legislature enjoys unfettered discretion to abolish common law rights of action. Indeed, the Court, echoing Blackstone, stated that

Missourians are guaranteed a remedy for "such wrongful injuries to person, property, or character as are actionable or remediable under the rules of the common law." *Id.* at 645-46. Plaintiff De May, however, was the widow of a worker who died of injuries on the job. Because the common law did not provide a wrongful death cause of action, her claim was "indirect" and she was therefore not deprived of a remedy available under common law. *Id.* at 646.[43]

The *De May* Court nevertheless made it clear that elimination of a recognized common-law remedy comports with the open courts guarantee only where the legislature provides an adequate substitute. The Court found persuasive the Oklahoma Supreme Court's position that the open-courts guarantee does not "preserve a particular remedy," but permits the legislature "to substitute a new system for compensation" in place of tort liability. *Id.* at 647, quoting *Adams v. Iten Biscuit Co.*, 162 P. 938, 942 (Okla. 1915).

The Court quoted at length from *Middleton v. Texas Power & Light Co.,* 185 S. W. 556 (1916), wherein the court upheld the state's workers' compensation act as within the Legislature's constitutional power to substitute a statutory remedy for accidental injury in place of the common law rule of negligence

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[43] *See also Etling v. Westport Heating & Cooling Services, Inc*, 92 S.W.3d 771, 773 (Mo. 2003) (because the common law did not recognize a cause of action for wrongful death, barring such actions under the Worker's Compensation Law does not violate art. I, § 14).

liability, so that "employers shall no longer be liable as under that rule, but shall be liable according to the rule prescribed by the Act." Id. at 561. The Texas court cited *Jensen v. Southern Pac. Co*., 215 N. Y. 514 (N.Y. 1915), rev'd on other grounds, 244 U.S. 205 (1917), which observed, "It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. . . . [H]e is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer, and is afforded a remedy which is prompt, certain, and inexpensive." *See De May* at 648.

In short, as Chief Justice Billings later observed, "It was only after finding the existence of this alternative remedy that the Court in *De May* upheld the statute." *Simpson v. Kilcher*, 749 S.W.2d 386, 395 n.1 (Mo. 1988) (banc) (Billings, C.J., dissenting).[44]

More recently, this Court has continued to adhere to the adequate substitute remedy requirement. Applying this principle, the Court in *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986), struck down a medical malpractice statute of limitations as applied to minors because it "arbitrarily and unreasonably denies them a set of rights without providing any adequate substitute course of action for them to follow." *Id*. at 12. In *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. 1989), the Court rejected plaintiff's contention that former § 354.125 RSMo,

[44] In *Kilmer v. Mun,* 17 S.W.3d 545 (Mo. 2000), overruling *Simpson,* the Court found it unnecessary to reach the alternative remedy requirement. *Id.* at 552 n.20.

exempting health services corporations from liability for negligent care, violated Art. I, § 14. The Court concluded that "plaintiff has an adequate remedy against the persons actually guilty of malpractice, who are licensed physicians." *Id*. at 61 & 62. *See also Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. 1992) (en banc), where the court interpreted Art. I, § 14 in agreement with *Kandt v. Evans*, 645 P.2d 1300, 1306 (Colo. 1982), and quoted the Colorado court which upheld the constitutionality of workers' compensation provisions barring certain common law suits "as long as an adequate statutory remedy was provided."

The Court appeared to deviate from this principle in *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992), upholding a cap on noneconomic damages in medical malpractice actions. The Court gave no mention to *Strahler*, where the Court had quoted with approval the holding by the Texas Supreme Court that the open-courts guarantee prohibits the legislature from abolishing the "right to bring a well-established common law cause of action without providing a reasonable alternative." 706 S.W.2d at 11, quoting *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983). Instead, the *Adams* Court ventured that decisions by the supreme courts of Texas and Florida applying the "reasonable substitute" principle to damages caps,

> arbitrarily and unnecessarily limit the legitimate lawmaking role of the legislative branch in a manner not intended by our constitution. Even arcane causes of action would be difficult for the legislature to eliminate under a *quid pro quo* requirement. Moreover, the Texas-

> Florida interpretation views the common law as an inviolate body of law, rather than as a starting point from which judicial declarations are subject to modification by legislative policy choices and subsequent judicial decisions necessary to meet the needs of a changing society. . . . The reasoning of the Texas and Florida decisions seem to apply equally to legislatively adopted causes of action. We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.
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> 832 S.W.2d at 906.

This broad dicta was not necessary to the decision in *Adams*, and should not govern this case. As the *Adams* Court recognized, the damage cap did not exclude plaintiffs from court, but allowed plaintiffs to recover full economic damages and substantial noneconomic damages. *Id*. at 904. Nor does the quid pro quo requirement, as we have argued, freeze "arcane" causes of action in place or restrict the Assembly's ability to response to the needs of a changing society. Legislatively adopted causes of action may of course be modified or eliminated by the legislature. Common law causes of action that are relational or derivative may

be abolished.[45] Even those relatively few causes of action for violation of "absolute rights" may be altered or abolished if the legislature provides an adequate substitute in their stead. That is precisely what the Assembly did in adopting the workers' compensation law.

This Court revisited this issue in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), acknowledging that its prior applications of the open courts guarantee, including *Adams*, "seem irreconcilable." *Id*. at 548. The Court clarified its reading of the constitutional provision, stating that Article I, section 14 "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." *Id*. at 549. The Court deemed it unnecessary to base its holding on the

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[45] Thus, neither due process nor the right to remedy precluded statutory abolition of common law tort causes of action for alienation of affection, criminal conversation, seduction, or breach of promise to marry. *See* Note, *Avoidance of the Incidence of the Anti-Heart Balm Statutes*, 52 Colum. L. Rev. 242, 243-44 (1952). First, such actions are not within the "absolute" right to remedy for harm to property because society no longer views the wife or daughter as property belonging to the husband. *E.g.*, *Pennington v. Stewart*, 10 N.E.2d 619 (Ind. 1937). Second, such causes of action vindicated derivative or relational interests, not absolute rights. Leon Green, *Relational Interests*, 29 Ill. L. Rev. 464, 467-68, 479 (1934).

substitute remedy requirement, but it explicitly adopted Chief Judge Holstein's dissent in *Wheeler v. Biggs*, 914 S.W.2d 512, 516 (Mo. 1997), in which he argued that *Strahler*, based on the substitute remedy requirement, is the proper interpretation of Art. I, § 14. 17 S.W.3d, at 550.

As demonstrated earlier, the employee's right to hold the employer liable for workplace injuries is among the "recognized causes of action for personal injury." An employee's medical bills will not be paid and disability benefits will not be forthcoming if he or she cannot meet the strict proof requirements for an "accident," cannot establish the "prevailing cause" of the injury or disease, cannot produce "objective findings" of injury, or cannot overcome a showing that an "idiopathic" cause was even indirectly responsible. He or she will not receive medical care at all if the accident did not also result in disability.

The court below rejected the adequate substitute remedy principle, holding that "the legislature was and is free to change the Workers' Compensation Law as it sees fit. As the plaintiffs acknowledge, the legislature is free to do away with the statutory scheme altogether. The plaintiffs have no "right to a rule of law remaining unchanged for their benefit." Op. at 4.

That is beside the point, however. Elimination of all of chapter 287 would leave injured workers with their previously existing tort remedy. The proposition adopted by the lower court, however, is that the Assembly could abolish all remedies for workplace injuries without providing any adequate substitute in their place. The idea that this Court would be powerless to protect injured workers

would render the open courts provision vacant, which after all was put in place by the people of Missouri to check "renegade legislatures." *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. 2000).

Plaintiffs urge the Court to remove any doubt that the authority of the legislature is not unbounded and to hold that art § 14 protects the absolute right to some remedy for wrongful personal injury.

C. Amendments to Workers' Compensation Statutes Are Valid Only If the Statute Continues to Provide an Adequate Substitute Remedy.

The constitutional requirement that injured employees be afforded an adequate quid pro quo for their common-law cause of action would ring hollow indeed if a subsequent legislative majority were free to amend away that substitute remedy.

Social needs, the workforce, and the nature of work itself all change, and every state has had occasion to amend its workers' compensation laws. *See generally* Martha T. McCluskey, *The Illusion of Efficiency In Workers' Compensation "Reform,"* 50 Rutgers. L. Rev. 657, 767-857 (1998). No state, however, has attempted the wholesale exclusion of such large categories of covered workers as SB1.

This Court has not previously addressed the due process limits on legislative power to restrict or limit the scope of the workers' compensation law. The weight of authority among state courts is that not every amendment that

disadvantages workers must be matched some new advantage. However, the amended act, viewed in its entirety, must continue to maintain "the integrity of the fundamental quid pro quo." *Thompson v. Forest*, 614 A.2d 1064, 1067 (N.H. 1992). *See also Tracy v, Streater/Litton Ind*., 283 N.W.2d 909, 914-15 (Minn. 1979) (the "prevailing approach" is that "a constitutional evaluation looks to the ultimate scheme in its entirety" as "an adequate substitute for the employee's right to sue").

In *Injured Workers of Kansas v. Franklin,* 942 P.2d 591, 623 (Kan. 1997), labor unions and individuals brought a declaratory judgment action challenging amendments that tightened notice provisions and reduced compensation for shoulder injuries. The court restated its holding in *Bair v. Peck,* 248 Kan. 824, 844, 811 P.2d 1176 (1991), that "an originally adequate quid pro quo for the abrogation of a common-law right might become so cut down and diluted that it would no longer be adequate to support the abrogation of the common-law right and would thus violate due process." *Id.* at 620. The *Franklin* court found the amended act had not reached that point. However, the court reiterated its warning:

> We recognize that there is a limit which the legislature may not exceed in altering the statutory remedy previously provided when a common-law remedy was statutorily abolished. The legislature, once having established a substitute remedy, cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy.

Id. at 622, quoting *Blair* at 1191.

Similarly, labor unions in *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Tex. 1995), sought a declaratory judgment that amendments to the Texas workers' compensation law that changed the basis of disability benefits from lost earning capacity to physical impairment, violated due process and the open-courts guarantee of the Texas constitution. The Texas court concluded that the amended statute continued to provide a more certain remedy than the tort system, irrespective of fault, and thus remained an adequate substitute remedy. *Id*. at 521. However, the court cautioned that further amendments could render benefits "so inadequate as to run afoul of the open courts doctrine." *Id*

In *Baldock v. North Dakota Workers' Compensation Bureau,* 554 N.W.2d 441 (N.D. 1996), the Supreme Court of North Dakota upheld statutory amendments that limited vocational rehabilitation retraining benefits. However, the court warned that "sure and certain" benefits were the basis for the workers' compensation bargain and that in reducing benefits, "there is at some point no longer the economic relief bargained for by the injured workers. At that point the legitimate state interest no longer bears any rational relationship to the legislation." *Id.* at 446 n.4.

In *Acton v. Fort Lauderdale Hosp.,* 440 So.2d 1282 (Fla. 1983), the Supreme Court of Florida upheld the validity of an amendment to the state's Workers' Compensation Law that restricted eligibility for lump sum payments for permanent partial disability to those suffering permanent impairment. The court

acknowledged that "the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right." *Id.* at 1284. In this case, where the workers' compensation law continued to provide full medical care and wage-loss payments to injured workers, it "remains a reasonable alternative to tort litigation." *Id. See also Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) (similar).

See also Kandt v. Evans, 645 P.2d 1300, 1306 (Colo. 1982) (upholding modification of the definition of "accident" where the statute continued to provide "an adequate statutory remedy" for work-related injuries). *Breimhorst v. Beckman*, 227 Minn. 409, 436, 35 N.W.2d 719, 735 (1949) ("There is unquestionably a limit in these matters, beyond which, if the legislature should go, the courts could and would declare their action invalid.").

D. SB1 So Eviscerates the Certainty of Compensation Without Regard to Fault that the Missouri's Workers' Compensation Law No Longer Provides an Adequate Substitute For Workers' Common Law Cause of Action.

The essential quid pro quo provided to workers consists of (1) the certainty "a sure and speedy means of compensation for injuries suffered in the course of employment" and (2) the availability of compensation irrespective of fault. *Saint*

Lawrence v. Trans World Airlines, Inc., 8 S.W.3d 143, 149 (Mo. App. E.D. 1999). Unlike the workers' compensation amendments upheld in other states, SB1 did not merely alter the measure of benefits for certain injuries. *E.g.*, *Garcia, supra* (calculation of disability benefits), *Injured Workers, supra* (shortened notice period, reclassification of shoulder injuries, and offset for retirement benefits), *Baldock, supra* (limit on vocational rehabilitation benefits), *Acton, supra* (restriction on lump sum disability payments). SB1 excludes large categories of injured workers from receiving any benefits at all.

Medical bills will not be paid and disability benefits will not be forthcoming if the employee cannot prove the injury resulted from a separate "accident," cannot establish the "prevailing cause," cannot produce "objective findings," or cannot show that no "idiopathic" cause was even indirectly responsible for the injury. He or she may not receive medical care at all if the accident did not also result in disability. Moreover, benefits may be taken away in part or entirely for failing to use a safety device or obey a safety rule, refusing the employer's demand for a drug test, or where the injury occurred "in conjunction with" the use of drugs or alcohol, even if drugs or alcohol was not the cause of the injury. Older or disabled employees may receive only reduced benefits – or none at all – due to their age or pre-existing disability. The employer can stop making disability payments by terminating the injured employee. In short, the law no longer provides the adequate substitute remedy for an employee's tort remedy which was the basis for the constitutionality of the workers' compensation law.

The court below did not disagree with this analysis. Instead, the court ruled that, even accepting that SB1 eliminated the quid pro quo for injured workers, those workers are not deprived of a remedy because they can bring a tort action against their employers. The court, quoting a court of appeals decision, stated:

> The Workers' Compensation Law ... bars common lawsuits for only those damages covered by the law and for which compensation is made available under its provisions. Section 287.120.2, RSMo 1994; *Gambrel1 v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163, 166 (Mo. App. 1978). Thus, an employee is free, despite the Workers' Compensation Law, to bring suit at common law for wrongs not comprehended within the law.
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> *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6, 14 (Mo. App. W.D. 2000) (emphasis added). In short, the *Deckard* court held, if compensation is not available under the Workers' Compensation Law for a particular injury, the employee is entitled to assert a common law claim in circuit court. SB1 did not change § 287.120 in this regard - employees remain entitled to assert common law claims where the Law does not apply.

Op. at 4.

It is true that some courts have held that employees whose injuries are not compensable due to restrictive amendments to the workers' compensation statute must constitutionally be afforded a tort cause of action. *E.g.*, *Automated Conveyor Systems v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (Ark. 2005) (employee whose gradual onset neck injury did not meet the separate "accident" requirement and was not compensable under the Act be afforded a negligence cause of action); *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 362 (Ore. 2001) (where accident was not "the major contributing cause" of the injury or disease as required by statute, worker must be afforded tort remedy). *O'Regan v. Preferred Enterprises, Inc*., 758 So.2d 124, 134 (La. 2000) (by severely restricting the definition of occupational disease, "the Legislature has, in effect, withdrawn the *quid pro quo* between labor and industry" and employee must be permitted to pursue an action in tort). *See generally* Eston W. Orr, Jr., *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 Ga. L Rev. 325, 353-56 (2002).

This Court, however, has never construed the exclusivity provision in § 287.120 so narrowly.[46] The appellate court in *Deckard* upheld an employee's

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[46] § 287.120.1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of

defamation action against his employer, holding, unsurprisingly, that the harm to Mr. Deckard's reputation caused by false accusations of theft was not due to an "accidental injury or death" provided for in § 287.120.2. The lower court here adopted the view, indicated by its added emphasis, that the exclusivity provision only encompasses injuries that are both provided for and compensated under the Workers' Compensation Law. This Court, however, has never waivered from the contrary interpretation: "We do not understand the words 'provided for' to mean 'compensated for'." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936).

Additionally, it is entirely improbable that the Assembly intended the interpretation adopted by the lower court. As the court indicated, the legislature enacted SB1 to make Missouri more attractive to businesses by lowering workers' compensation costs. That it would do so by removing large categories of injured workers from a system limited benefits and allowing them to pursue unlimited

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and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person. . . .

2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next of kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

damages for lost income, pain and suffering, and even punitive damages is utterly irrational.

III. THE LOWER COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING DEFENDANT'S MOTION BECAUSE THE AMENDMENTS TO THE WORKERS' COMPENSATION LAW VIOLATE DUE PROCESS AND EQUAL PROTECTION IN THAT THE LEGISLATION BEARS NO RATIONAL RELATIONSHIP TO THE LEGISLATURE'S PURPOSE.

Separate and apart from the evisceration of the quid pro quo basis of the Workers' Compensation Law, the amendments made by SB1 violate the Due Process guarantee of Art 1, §10 of the Missouri Constitution as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution because they lack a rational relationship to a legitimate state objective.

A. The Rational Basis Test Requires Both a Legitimate State Purpose and a Factual Basis for the Legislature Reasonably to Believe Its Enactment Would Accomplish That Objective.

The court below indicated that because no "fundamental right" is at stake, plaintiff's challenge is governed by the rational basis test. Op. at 2.[47]

[47] Although Plaintiffs argue that SB1 does not satisfy even this minimal constitutional standard, Plaintiffs submit that strict scrutiny is the appropriate level

of judicial review in this case. Under the Equal Protection Clause, a statute that "impinges upon a fundamental right explicitly or implicitly protected by the Constitution" is not presumed to be constitutional and must be shown to be necessary to further a compelling state interest. *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999), quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

The fact that money changes hands does not render a statute it "mere" economic regulation. *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (poll tax). The appropriate inquiry is whether the statute is one "touching upon" constitutionally protected rights. *San Antonio Indep. Sch. Dist*. at 38-39. *See also Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. 1991) (strict scrutiny appropriate where legislation "touches a fundamental right").

The right of access to the courts is expressly guaranteed by Art. I, § 14 of the Missouri constitution and is implicitly guaranteed by the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). This Court held that the open courts guarantee was not implicated to trigger strict scrutiny in *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 10 (Mo. 1992) (en banc), because plaintiff who was denied a common-law remedy was provided an alternative remedy under workers' compensation; in *Etling v. Westport Heating & Cooling Services, Inc*, 92 S.W.3d 771, 773 (Mo. 2003), because claimants'

The rational basis standard requires the same analysis under either the due process or equal protection guarantees. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring); *see also American Motorcyclist Association v. City of St. Louis,* 622 S.W.2d 267, 269 (Mo. App. 1981) (applying the identical rational-basis test under both due process and equal protection challenges). That standard is a two-part test, assessing both the legislative ends and the means used to achieve those ends. The level of judicial scrutiny is appropriately deferential to legislative judgment and policymaking, and "is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective." *Kelo,* 545 U.S. at 488 n.20, quoting *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1015, n.18 (1984). *See also Western and Southern Life Ins. Co. v. State Bd. of Equalization of California,* 451 U.S. 648, 671 (1981) ("Having established that the purpose of California's lawmakers in enacting the retaliatory tax was legitimate, we turn to the second element in our analysis: whether it was reasonable for California's lawmakers to believe that use

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wrongful death claim was not recognized at common law, and in *Adams v. Children's Mercy Hosp*., 832 S.W.2d 898 (Mo. 1992), because plaintiffs who were subject to a statutory cap on damages were still able to recover all their economic losses and substantial noneconomic damages. In this case, however, where workers are completely deprived of any remedy for their injuries, SB1 clearly touches upon a fundamental right.

of the challenged classification would promote that purpose."). *See also State ex rel. Classics Tavern Co., Inc. v. McMahon,* 783 S.W.2d 463, 465 (Mo. App. E.D. 1990) ("The rational basis test requires the ordinance have a legitimate governmental interest as its purpose and employ a rational or reasonable means of accomplishing its objective."); *American Motorcyclist Association v. City of St. Louis*, 622 S.W.2d 267, 269-70 (Mo. App. 1981) (Upholding a ban on motorcycles in public parks, the court found it obvious that preserving public peace and safety are legitimate municipal interests. As to the second step, the city had demonstrated that, by eliminating loud noise and danger to park users, "enforcement of the ordinance would produce the above benefits.").

SB1 does not satisfy even this minimal constitutional standard. Although making Missouri more attractive to businesses is a legitimate state interest, there was no basis for the Assembly rationally to believe that SB1 would achieve that purpose.

1. *Under the first step of rational basis analysis, Legislation is be deemed to have a proper purpose if under "any conceivable set of facts" it is related to a legitimate state objective.*

The court below erred by focusing solely on the first step one of the analysis. The lower court stated that "All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of the court . . . nor do the courts have to be sure of the precise reasons for the legislation." Op. at 2, quoting *State v. Day-Brite Lighting,*

Inc., 240 S.W,2d 886, 893 (Mo. 1951) (en banc). The court concluded that the "changes made by SB1 plainly bear a real and substantial relationship to the police power," Op. at 3, and that "the legislature may seek to foster a pro-business climate through its enactments." Op. at 5.

Legislatures need not – and frequently do not – declare their purpose in making statutory classifications. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 179 (1981) ("because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); *F.C.C. v. Beach Communications, Inc*., 508 U.S. 307, 315 (1993) (similar).

Courts in deference to the legislative role may supply a plausible legitimate purpose based on any conceivable state of facts. *See, e.g., Beach Communications, supra*, at 317 (suggesting two possible explanations for statutory classifications relating to cable television franchises); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (surmising that a legitimate purpose in exempting gas stations from Sunday closing laws would be that "a family which takes a Sunday ride into the country will need gasoline for the automobile").

In the two decisions cited by the lower court, this Court invoked the "any conceivable set of facts" language to ascertain whether challenged legislation had a legitimate purpose. *State v. Day-Brite Lighting, Inc.,* 240 S.W,2d 886, 893 (Mo. 1951) (en banc), held that a statute requiring employers to provide employees with

paid time off to vote was within the police power, reasoning that, "If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also." *Id*. at 892.

Similarly, in *Poole & Creber Market Company v. Breshears*, 126 S.W.2d 23 (Mo. 1938), this Court rejected the company's argument that a ban on the sale of "filled milk," had no relation to the preservation of public health, safety or welfare. *Id*. at 30. The Court identified "extensive and reliable information" indicating that filled milk was deleterious to health. It was not necessary, the Court stated, that the state prove the precise reasons for the legislation or that the legislature actually considered this information. The court must assume that the legislature had such information in mind, so that the statute was for the proper purpose of protecting public health and welfare. *Id*. at 31.

The lower court's ruling addressed only the first step – whether SB1 is within the police power. In this case, there is no mystery surrounding the Assembly's purpose. As noted at pages 12-13, above, SB1 was enacted as an economic development measure to lower workers' compensation insurance costs for employers so as to attract new businesses to Missouri and dissuade existing businesses from relocating elsewhere.

The court did not take up Plaintiffs' central argument – that the Assembly lacked any rational basis to expect SB1 would accomplish its objective. This case is less like *Day-Brite Lighting* and more like *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972), where the Court struck down a state workers' compensation

provision under which unacknowledged illegitimate children received less in death benefits than legitimate children. The Court's focus was not on the state's interest in protecting the family unit. "We do not question the importance of that interest; what we do question is how the challenged statute will promote it." Similarly, the focus of Plaintiffs' challenge is whether the Assembly could reasonably expect SB1 to accomplish its purpose of lowering workers' compensation costs and attracting businesses to Missouri.

2. *The second step of the rational basis analysis requires some factual, objective basis for the legislature reasonably to believe that the legislation would accomplish its purpose.*

"[T]he Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). It is not the Court's role to rubber-stamp every legislative act that has a plausibly legitimate goal. As the Supreme Court has explained, even under "the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

In this second step of the rational basis test, the "any conceivable set of facts" analysis has no place. Because "it is difficult to imagine a legislative classification that could not be supported" by some conceivable set of facts, as Justice Stevens has pointed out, such judicial review would be "tantamount to no review at all," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring), and "constitute a mere tautalogical recognition of the

fact that Congress did what it intended to do." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring).[48]

Review of a statute's rational relationship to its legitimate state purpose looks to the real world in which the statute will operate. "The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, *must have some objective basis*." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 537 (1982) (Blackmun, J., concurring) (emphasis added). It "will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys." *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 184 (1981) (Brennan, J., dissenting). Independent judicial review of the factual basis for legislation ensures that the stated public purposes are not merely

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[48] The U.S. Supreme Court has itself candidly acknowledged that "this Court in earlier cases has not been altogether consistent" in distinguishing between statutes upheld "if any state of facts reasonably can be conceived that would sustain it" and those lacking "a fair and substantial relation to the object of the legislation." *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 174 (1981). Nevertheless, as Professor Gunther stated in his highly influential article, the Court's scrutiny of legislative means as well as legislative ends is now well settled. Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972).

"incidental or pretextual public justifications" for disadvantaging the burdened group or benefiting special interests. *Kelo, supra,* at 491 (Kennedy, J., concurring).

The U.S. Supreme Court has not hesitated to strike down legislation that had a permissible objective but did not have "a sufficient factual context for us to ascertain some relation between the classification and the purpose it served." *Romer*, 517 U.S. at 632-33. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-50 (1985) (examining actual conditions of the neighborhood where a facility for the mentally retarded was to be located and concluding that "the record does not reveal any rational basis for believing" that barring the home would further the municipality's asserted goals); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (striking down a tax preference for in-state insurers, since the manner in which insurers actually operate made it irrational to believe that the law would induce insurers to invest in the state); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 619 (1985) (property tax break for Vietnam veterans who were longtime New Mexico residents "cannot plausibly encourage veterans to move to the State," and, as a practical matter, might have discouraged some); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (similarly holding that Alaska statute allocating a larger share of the state's oil dividend to long-term residents was not rationally related to the stated goal of encouraging new settlers); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas law denying free public education to undocumented children where the Court found "no credible supporting evidence" that this would be an effective

method of dealing with the problem of illegal immigration); *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (exclusion of illegitimate children of disabled worker from Social Security disability benefits had no rational relationship to government's goal of preventing spurious claims); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 533-36 (1973) (striking down denial of food stamps to households composed of unrelated persons, finding that the "practical operation" of the regulation was not rationally based); *Lindsey v. Normet*, 405 U.S. 56 (1972) (requirement of double bond for tenants appealing adverse landlord-tenant adjudications had no substantial relationship to objectives of protecting landlord's property or discouraging frivolous appeals); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972) (no basis to believe that workers' compensation provision, under which unacknowledged illegitimate children received less in death benefits than legitimate children, would further the state interest in protecting the family).

State courts applying rational basis scrutiny have struck down specific restrictive workers' compensation amendments on similar grounds. For example, in *Murphy v. Commissioner of Dept. of Indus. Accidents*, 612 N.E.2d 1149 (Mass. 1993), the court struck down a filing fee for appeals by workers represented by counsel. The court acknowledged that discouraging frivolous appeals and imposing costs of appeals on those who could afford to pay were legitimate state purposes. However, the legislature lacked any factual basis to believe the fee would accomplish these goals. The state made no showing that workers

represented by attorneys are more prone to frivolous appeals than pro se claimants (in fact, the opposite is more likely true), and it failed to show that workers retaining counsel on a contingency fee basis were any better off financially than those representing themselves.

See also; *Payne v. Charlotte Heating & Air Cond.*, 616 S.E.2d 356 (N.C. App. 2005) (time limitation on claims for asbestosis and silicosis lacked rational basis); *Pepper v. Industrial Claim Appeals Office*, 2005 WL 2298149 (Colo. Ct. App. 2005) (exclusion of volunteer police from coverage not rationally related to controlling costs); *Reesor v. Montana State Fund*, 103 P.3d 1019 (Mont. 2004) (no rational basis for age limit on disability benefits);*Walters v. Blair*, 462 S.E.2d 232 (N.C. App. 1995), *aff'd*, 476 S.E.2d 105 (1996) (per curiam), *cert. denied*, 520 U.S. 1196 (1997) (exposure requirements for victims of silicosis and asbestosis lacked rational basis); *Nyitray v. Industrial Comm'n of Ohio*, 443 N.E.2d 962 (Ohio) (no rational basis for denial of payment of accrued benefits to dependents of decease worker).

In this case, assuming that "the purposes of the law are legitimate, all that remains is to determine whether the means chosen to implement the law is rationally related to achieving that purpose." *Missourians For Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 104 (Mo. 1997).[49]

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[49] The Court in that case, upholding the "Hancock Amendment," emphasized the important distinction between step one and step two of the rational basis test. To

B. There Was No Factual Basis Showing a Substantial Relationship Between the Exclusion of Previously Compensable Claims and the Goal of Attracting Businesses To Missouri.

Making Missouri more competitive with other states in attracting employers and jobs is a legitimate state objective. Certainly the General Assembly has a wide range of options at its disposal to do so.[50] However, there was no

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illustrate, the Court pointed to *Zobel v. Williams*, 457 U.S. 55 (1982), which struck down an Alaska law allocating a larger share of the state's oil dividend to long-term residents. As Judge Robertson explained, the Court in *Zobel* held that Alaska's purpose of creating "a financial incentive for persons to establish and maintain residence in Alaska" was a legitimate purpose but allocating the largest refunds to the longest residents was not a rational means to further that end. 457 U.S. at 61-63. *See* 959 S.W.2d at 104.

[50] At the same time the Assembly was considering SB1, a study prepared for the Missouri Economic Development Council concluded that Missouri was not competitive with neighboring states and that a significant number of companies had decided against locating or investing in Missouri due to cumbersome, unfocused or unresponsive incentive programs administered by the Department of Economic Development. "Moving Missouri To the Vanguard: An Analysis of Incentives and Statewide Development Programs in Missouri" 28-34 (Taimerica Mgt. Co. Nov. 2004).

objective, factual basis for the legislature reasonably to believe that its attempt to regulate the price of workers' compensation insurance by reducing the number of compensable claims would achieve this objective. Indeed, the factual data available to the Assembly strongly suggested that it would not.

1. Eliminating Compensation for Injuries Is Arbitrary and Does Not Address the Causes of Increased Workers' Compensation Costs.

Jobs are essential to Missouri's healthy economy, but the workplace continues to take its toll on workers. Controlling workers' compensation premiums through accident prevention and administrative efficiency would be worthwhile endeavors. But reducing the costs of the program simply by shrinking its coverage is irrational and arbitrary.

First, a legislature does not rationally address the problem of accidental injuries simply be redefining the terms "accident" and "injury." The Montana Supreme Court, striking down money-saving workers' compensation amendment, made this compelling point:

> Cost-control alone cannot justify disparate treatment which violates an individual's right to equal protection of the law. Discrimination, that is, offering services to some while excluding others for any arbitrary reason, will always result in lower costs. We do not, however, allow discrimination merely for the sake of fiscal health.

Heisler v. Hines Motor Co., 937 P.2d 45, 52-53 (Mont. 1997). In a similar vein, the Alaska Supreme Court stated:

> [T]he asserted goal of lowering insurance premiums can have no independent force in the state's attempt to meet its burden under [the rational-basis test]. Although reducing costs to taxpayers or consumers is a legitimate government goal in one sense, savings will always be achieved by excluding a class of persons from benefits they would otherwise receive.

Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 272 (Alaska 1984). *See also Pierce v. LaFourche Parish Council*, 739 So. 2d 297, 300 (La. Ct. App. 1999) ("Reducing the cost of workers' compensation premiums is a legitimate state goal," but it was arbitrary to place the burden of reducing premiums on the backs of older workers.); *Nyitray v. Industrial Comm'n of Ohio*, 443 N.E.2d 962, 966 (Ohio) ("conserving funds is not a viable basis for denying compensation to those entitled to it.").

Secondly, as discussed earlier, the Assembly ignored the evidence available from the Division of Workers' Compensation that increases in insurance premiums during 2001-2003 were due to the higher cost of reinsurance, uncertainty about terrorism exposure, and insurers' loss of investment income during the economic downturn. *See supra* at 8-10. SB1 addressed none of these causes and would not prevent future increases under similar circumstances. Instead, the legislation sought lower premiums by reducing the number of compensable claims. Yet it is undisputed that the number of claims did *not* cause

the rise in premiums. Indeed, claims declined significantly at the very time premiums were going up. *Supra* at 7.

Third, the Assembly had no objective, factual basis for believing that the very modest savings expected under SB1 would influence employers' decisions to locate in Missouri. NCCI estimated that SB1 would result in a mere 1% decrease in costs, a reduction that the Department of Insurance characterized as "almost no impact." Missouri Dep't of Insurance, Review of the National Council On Compensation Insurance Workers' Compensation Insurance Advisory Loss Cost Filing Effective January 1, 2006 at 6 & Exhibit 3a. DOI generally agreed with the NCCI forecast, but suggested that an additional 1.6% might be saved by the provisions dealing with drugs and alcohol. *Id.* at 7 & Exhibit 3b.[51]

The Assembly assumed that workers' compensation insurers would pass along any savings from fewer compensable claims to employers in the form of lower premiums, rather than increasing their investments, shareholder dividends, executive compensation, administrative expenditures, or corporate profits.

Studies of the impact of reductions in workers' compensation benefits enacted in many states in the early 1990s found that the savings did not translate

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[51] DOI acknowledged that this figure may be unreliable, noting that there "are not many studies relating directly to workplace injuries involving drugs or alcohol," and the studies the DOI relied on are "old and may not accurately reflect current Missouri circumstances." *Id.* at Exhibit 3c.

into corresponding reductions in employers' premiums. Instead, employer's costs continued to rise while insurers' profits soared. See John F. Burton, Florence Blum & Elizabeth H. Yates, *Workers' Compensation Benefits Continue to Decline*, Workers' Compensation Monitor (July/Aug. 1997); "Benefits Paid Declined But Employers Costs Increased in Early '90s, Researchers Say," 8 BNA's Workers Comp. Rep. 488-89 (Sept. 29, 1997); *see also* McCluskey, *supra*, at 713 & 714 ("[W]hile benefit costs declined sharply through the early 1990s nationwide, employers' average costs continued to increase until the mid-1990s [and] on the whole employers' gains have taken the form of stabilized costs rather than major premium reductions." At the same time, "profits for workers' compensation insurers have soared".)

But even assuming a 1% or larger reduction in workers' compensation premiums, the Assembly had absolutely no objective factual basis for expecting that such a reduction would motivate any employer to relocate to Missouri or change its decision to move elsewhere. The General Assembly was truly legislating in the dark.

2. SB1Can Rationally Be Expected to Result in Increased Costs to Missouri Employers.

The anticipated cost savings did not take into account *increases* to costs to employers under SB1.

First, SB1 replaces a fairly straight-forward standard for compensating injuries substantially caused by work, substituting a complicated definitional

matrix that invites more litigation. The Department of Labor and Industrial Relations itself forecast that SB1 would result in an increase in contested cases. Fiscal Note to SB1 & 130, Committee on Legislative Research Oversight Division. at 4. Certainly the added complexity of issues and the number of defenses available to employers, will have that effect. For example, § 287.020.2 requires proof of a separate accident resulting in the employee's injury. *See* pp. 14-15, *supra*. During the years when proof of an accident was required by Missouri courts, disputes concerning this requirement accounted for a majority of litigated workers' compensation cases. Domrese & Graham, *supra*, at 6.

Second, narrowing the definition of "injury" or "accident" by legislative fiat does not change matters for the employee facing medical bills due to an accidental injury at work. Those denied workers' compensation coverage for medical care due to SB1 will rely instead on employee health insurance, if available. For employers providing health benefits, SB1 simply promises to trade lower workers' compensation premiums for higher medical insurance premiums. As a result, Missouri will be attractive only to companies that provide no medical benefits at all, shifting those costs, at least in part, onto the taxpayer.

Third, some provisions in SB1 overtly increase the cost of claims. One example is the new § 287.390.5. *See* p. 30, *supra*. Under new provision, if an employee rejects an initial offer, and if an ALJ or the Commission or the appellate court rules that the injury is not compensable, the employee is still entitled to 100% of the initial offer. The result will be higher payments than are legally

required or, more likely, an abrupt end to early offers. In either event, the result will be higher costs to employers.

Fourth, courtesy of the law of unintended consequences, SB1 may actually increase claims. The Workers' Compensation Law provides a financial incentive for employers to invest in workplace safety. Surely Justice Holmes was correct that "There is no more certain way of securing attention to the safety of the men . . . than by holding the employer liable for accidents." *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 432-33 (1919) (Holmes, J., concurring). Indeed, empirical studies indicate that higher workers' compensation costs result in a "dramatic safety effect" as employers invest in reducing hazards. Michael J. Moore and W. Kip Viscusi, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 122 (1990). To the extent that SB1 shield the employer from responsibility for workplace injuries, SB1 reduces the incentive for safety and may rationally be expected to lead to an increase the number of on-the-job injuries and increased claims.

Finally, if the lower court is correct in concluding that workers whose claims are excluded under SB1 are entitled to bring a civil action, then SB1 relieves the employer of the obligation to pay limited benefits to those workers, but imposes potential liability for unlimited tort damages, including full compensation for lost income, damages for pain and suffering, and punitive damages. The notion that such "reform" would attract businesses to Missouri truly is irrational.

3. There was no rational basis to believe SB1 would result in attract and keep more employers in Missouri.

The legislature could not rationally believe that using the workers' compensation law as an economic development tool would put Missouri "out in front of the pack" in the competition for higher revenues and more jobs. Even if – despite the bleak prospects for success outlined above – SB1 showed signs of attracting businesses to Missouri, other states can be expected to adopt similar and even more restrictive "reforms." In the end, Missouri would simply become the early leader in a race to the bottom in the protection of workers.

* * *

Ours is not a system of legislative supremacy. The American people tried such a system and found it wanting. Under the Articles of Confederation, "in most of the states, the popular assembly had become for practical purposes the supreme sovereign power." Stanley Elkins & Eric McKitrick, THE AGE OF FEDERALISM 10 (1993). Professor Wood, whose work has been cited repeatedly by the Supreme Court, concluded that "the major constitutional difficulty experienced in the Confederation period [was] the problem of legal tyranny, the usurpation of private rights under constitutional cover." Gordon Wood, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 412 (1967). As Justice Scalia memorably stated, "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). Assemblies acting at the behest of various special interests

interfered with legal rights, "depriving people of common law causes of action for damages." William Nelson, THE AMERICANIZATION OF THE COMMON LAW 91-92 (1975). Such "elective Despotism," Thomas Jefferson bitterly complained, "is not what we fought for." Wood, *supra*, at 451-52.

Similarly, as Judge Michael Wolff has observed, the drafters of Missouri's first constitution adopted the open court's guarantee to combat the evil of "renegade legislatures" that had deprived citizens of their judicial remedies. *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. 2000).

For this reason, our constitutional plan divides the powers of government among three independent and equal branches and makes it "emphatically the province and duty of the judicial department to say what the law is" and to hold invalid legislative acts that contravene the constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). In so doing, as the Kansas Supreme Court has stated, the court is "not made the critic of the legislature, but rather, the guardian of the Constitution." *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 256 (Kan. 1988).

In the end, there can be no better judicial maxim to guide the Court than that which this state has adopted as its motto and which is emblazoned on the Great Seal of the State of Missouri: Salus Populi Suprema Lex Esto. The welfare of the people shall be the supreme law.

CONCLUSION

For the foregoing reasons, Plaintiffs urge this Court to reverse the judgment of the court below and to grant Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

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(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

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No. SC 88368

IN THE
SUPREME COURT OF MISSOURI

MISSOURI ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,
DIVISION OF WORKERS' COMPENSATION,
Defendant-Respondent.

Appeal from the Cole County Circuit Court
Nineteenth Judicial Circuit
Honorable Byron L. Kinder, Judge

APPENDIX TO APPELLANTS' BRIEF

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