

No. COA 15-829

THIRTEENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF ██████████)
██████████, CLAIM FOR)
COMPENSATION UNDER THE NC) FROM THE NC INDUSTRIAL
EUGENICS COMPENSATION) COMMISSION, I.C. FILE U00750
PROGRAM)

CLAIMANT-APPELLANT'S BRIEF

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CLAIMANT-APPELLANT'S BRIEF

ISSUE PRESENTED

DOES THE LIVING VICTIM REQUIREMENT IN N.C. GEN. STAT § 143B-426.50(1) VIOLATE THE GUARANTEE OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 19 OF THE CONSTITUTION OF THE STATE OF NORTH CAROLINA?

STATEMENT OF THE CASE

This action was commenced by the filing of a claim on 9 April 2014 for compensation under the Eugenics Asexualization and Sterilization Compensation Program, N.C. Gen. Stat. § 143B-426.50 et seq. That claim was denied by Chief Deputy Commissioner Christopher Loutit on 9 December 2014 on grounds that the eugenics victim, Appellant's deceased brother [REDACTED], was not alive on 30 June 2013 and therefore not a qualified recipient under N.C. Gen. Stat. § 143B-426.50(1).

Appellant appealed that determination to the Full Commission on 6 January 2015, and on 8 January 2015, also filed a Motion to Certify the constitutional question of whether N.C. Gen. Stat. § 143B-426.50(1) violates the guarantee of equal protection of law under Article I, Section 19 of the Constitution of the State of North Carolina. The Full Commission held that motion in abeyance pending oral argument, which took place on 18 March 2015.

On 7 May 2015, the Commission entered a Decision and Order denying the claim and certifying the constitutional question to the Court of Appeals. The parties acknowledge that the Industrial Commission had jurisdiction over this claim pursuant to N.C. Gen. Stat. § 143B-426.52, and that the Court of Appeals has jurisdiction pursuant to N.C. Gen. Stat. § 143B-426.53.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Industrial Commission's Order denying Appellant's claim for compensation is a final decision from an administrative agency, and an appeal of right directly to the Court of Appeals lies under N.C. Gen. Stat. § 7A-29 and Rule 18 of the North Carolina Rules of Appellate Procedure. Additionally, in its Decision, the Industrial Commission certified for review by the Court of Appeals the constitutional question at issue in this appeal.

STATEMENT OF THE FACTS

Appellant [REDACTED] was involuntarily sterilized under authority of the Eugenics Board of North Carolina at the age of 17, on 5 July 1950, because he had been deemed "retarded" by the Granville County Department of Public Welfare. (R p 50). Appellant's mother signed the consent form authorizing the sterilization procedure under duress, with the understanding that if she did not consent, county authorities would have [REDACTED] removed from the family home and institutionalized. (R p 50). [REDACTED], [REDACTED], testified that the sterilization procedure and its aftermath caused his family much stress and anguish. (T p 7). He recounted his mother "crying day and night" and "the stress that everybody was under" because of "what the State had done to [REDACTED]". (T p 8).

██████████ was appointed ██████████ legal guardian on 3 February 2000. (R p 51). ██████████ died on 12 June 2006, and ██████████ handled all matters related to his death and burial. (R p 51, T p 25). ██████████ heard Governor Easley apologize on the State's behalf to eugenics victims and their families, and immediately contacted the Governor's Eugenics Task Force, which, under Executive Order 83 was assigned the duty of recommending "possible methods of forms of compensation" to sterilization victims. (R p 36, T p 21). ██████████ also joined other family members of deceased eugenics victims at the Task Force meetings and witnessed the discussions regarding whether compensation would be awarded only to the remaining living sterilized individuals. (T p 26). ██████████ believes that, given the long delay between the State's apology and commitment to provide restitution to the more than 7,600 individuals whom the State had admitted to victimizing and the passage of the Eugenics Compensation Program in 2013, the fact that the Program includes the descendants of some, but not all, eugenics victims, is fundamentally unfair. (R p 36, T pp 25-27).

Pursuant to N.C. Gen. Stat. § 143B-426.50 et seq., on 9 April 2014 ██████████ filed a claim for compensation with the Office of Justice for Sterilization Victims ("OJSV"). (R pp 2-4). Despite the fact that OJSV knew that ██████████ died in 2006, and despite its awareness of the "living victim threshold"

provision of the statute, OJSV repeatedly sent [REDACTED] requests for further documentation to supplement the claim he had filed. (R pp 27-30). The Industrial Commission concluded that because [REDACTED] was not alive on 30 June 2013, he was "not a qualified recipient pursuant to N.C. Gen. Stat. 143B-426.50-143B-426.57." (R p 51).

Prior to the Full Commission hearing, Appellant, through counsel, filed a Motion to Certify the present constitutional question to the Court of Appeals. (R p 51). In its Decision and Order, the Commission certified the question for review by this Court. (R p 53).

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to N.C. Gen. Stat. § 143-293, appeal from the decision of the Industrial Commission to the Court of Appeals "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." See also *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (holding that the Industrial Commission's findings of fact are binding on appeal if supported by any competent evidence, even if the record also contains evidence that would support findings to the contrary, citing *Jones v. Myrtle Desk Co.*, 264 N.C. 401,

141 S.E.2d 632 (1965)). The Industrial Commission's conclusions of law are reviewable *de novo*. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996). Because the Industrial Commission is not an Article III court, it has no jurisdiction to consider the fundamental constitutional question at issue in this case, which is presented as a matter of first impression for this court. See *Carolinas Medical Center v. Employers and Carriers Listed in Exhibit A*, 172 N.C. App. 549, 553, 616 S.E.2d 588, 591 (2005) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985)). It is well settled that "a statute's constitutionality shall be determined by the judiciary, not an administrative board." *Meads v. North Carolina Dep't of Agric., Food & Drug Protection Div., Pesticide Sec. (In re Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155)*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998).

II. N.C. GEN. STAT § 143B-426.50(1) VIOLATES THE GUARANTEE OF EQUAL PROTECTION UNDER ARTICLE I, SECTION 19 OF THE CONSTITUTION OF THE STATE OF NORTH CAROLINA

The principle of equal protection of the law is explicit in both the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution, and requires that, absent some appropriate government interest, all persons similarly situated shall be treated alike. *Walters v. Algernon Blair*, 120 N.C. App. 398, 400, 462 S.E.2d 232, 233-

234 (1995) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 798, 102 S. Ct. 2382, 2394, reh'g denied, 458 U.S. 1131, 73 L. Ed. 2d 1401, 103 S. Ct. 14 (1982) and *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971)).

The U.S. Supreme Court has established varying levels of judicial scrutiny under which to analyze equal protection claims, depending on the nature of the interest at stake or the characteristics of the person or persons being treated differently under the law. Although the living victim threshold soundly fails the lowest tier of scrutiny, rational basis review, it should in fact be subjected to a higher standard of review, because the compensation at issue is supposed to be restitution for the violation of one of the most fundamental constitutional rights that exists: the right to be free from governmental invasion of one's body and one's right to have a family. See *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Loving v. Virginia*, 388 U.S. 1, 14 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 484-485 (1965) (recognizing that personal, marital, familial, and sexual privacy is protected by the Bill of Rights and its penumbras). For over forty years, North Carolina violated these most basic human and constitutional rights through its Eugenics policy, executed by governmental actors in a way that indisputably victimized thousands of our state's most vulnerable citizens. The restitution program at issue in this appeal, N.C.

Gen. Stat. § 146B-426.50 et seq., is meant to remedy that past wrong. Because the classification at issue in N.C. Gen. Stat. § 146B-426.50(1), which denies restitution to some heirs of eugenics victims while granting restitution to others based on an arbitrary survival date, "touches on [a] fundamental right," the Court should subject it to the higher standard of review and ask "whether it promotes a *compelling* state interest." *Roe v. Wade*, 410 U.S. at 155; *Griswold v. Connecticut*, 381 U.S. at 485 at *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). Here, there is no state interest at all in distinguishing between the heirs in this manner, much less a compelling one.

To survive even the lowest level of judicial scrutiny under Article I § 19, the State must show that N.C. Gen. Stat. § 143B-426.50(1)'s requirement that a eugenics victim be alive on 30 June 2013 is rationally related to the state's legitimate interest. See *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618, 105 S. Ct. 2862, 2865 (1985) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.") See also *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 504, 616 S.E.2d 356, 362 (2005) ("Once the Equal Protection Clause came into play, the question before the Court became "whether N.C. Gen. Stat. § 97-63, which treats employees with asbestosis and silicosis

differently from other occupational diseases, furthers some legitimate state interest.").

"The Equal Protection Clause . . . denies to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, 253-254 (1971). A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* (emphasis added) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

In the present case, Appellant is similarly situated to other heirs of individuals who were "asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina" and who timely filed a claim for compensation. N.C. Gen. Stat. § 143B-426.50(5). Thus the key question in this appeal is whether N.C. Gen. Stat. § 143B-426.50(1)'s differential treatment of heirs of victims alive on 30 June 2013 and heirs of victims who had died by that date is rationally related to the Eugenics Asexualization and Sterilization Compensation Program's ("the Program") objective. *Reed v. Reed*, 404 U.S. at 75-76, 92 S. Ct. at 253-254.

The legislative objective or purpose of the Program is "to make restitution for injustices suffered and unreasonable hardships endured by the asexualization or sterilization of individuals at the direction of the State between 1933 and 1974." S.B. 421 Gen. Assemb., 2013 Session (N.C. 2013). The State set aside a ten million dollar fund to be divided equally among eligible claimants who were "asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina" (N.C. Gen. Stat. §143B-426.50(5)) and who submitted a claim to the OJSV by 30 June 2014. N.C. Gen. Stat. §143B-426.52(a). In addition to the afore-referenced legislative history, the plain language of the statute makes clear that, should the sterilized individual die before the restitution payments issue, her legal heir(s) will receive the individual's equal share of the fund. See N.C. Gen. Stat. §§ 143B-426.51(a)¹ and (b).²

¹"The initial payment to each qualified recipient will be calculated by adding together the number of qualified recipients as of October 1, 2014, and the number of claims outstanding that are pending, then dividing that total number into the sum of ten million dollars (\$10,000,000). The initial payment checks shall be remitted by October 31, 2014.

The final payment calculation will be made by taking the balance of compensation funds remaining after the exhaustion of appeals and dividing that sum equally between the number of qualified recipients determined finally to be eligible to receive compensation. The final payment checks shall be remitted within 90 days of the exhaustion of the last appeal. Any qualified claimant who was successful on appeal and who did not receive an

Ironically, this law, intended to make restitution for prior constitutional harms, arbitrarily grants restitution to heirs of some of the original victims but denies restitution to heirs of others through an additional "living victim" statute of limitation in N.C. Gen. Stat. § 143B-426.50(1), which provides in relevant part, that "[a]n individual must be alive on June 30, 2013, in order to be a claimant."

- A. No rational basis exists for treating the heirs of eugenics sterilization victims who died before 30 June 2013 differently from the heirs of eugenics sterilization victims who died after 30 June 2013

Courts have repeatedly struck down arbitrary classifications such as that made by the living victim threshold under the rational basis standard. See, e.g., *Hooper*, 472 U.S. at 623-24 (striking down an arbitrary date of residency requirement for a tax exemption for Vietnam veterans as an Equal Protection violation); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 174-76 (1972) (striking down the portion of a Louisiana workmen's compensation scheme that irrationally discriminated between acknowledged and unacknowledged illegitimate children); *Roseman v. Firemen's & Policemen's Death*

initial payment shall be paid an amount equal to the initial payment amount, plus the amount from the final payment calculation."

² "If any claimant shall die during the pendency of a claim, or after being determined to be a qualified recipient, any payment shall be made to the estate of the decedent."

Benefit Fund, 579 N.E.2d 560 (Ohio Ct. of Common Pleas, 1991),
aff'd by *Roseman v. Firemen and Policemen's Death Benefit Fund*,
66 Ohio St. 3d 443 (1993) (finding unconstitutional a
compensation scheme for widows of firemen that gives a lesser
benefit to widows with children than widows without).

The seminal case concerning state benefits burdened with
unconstitutional restriction is *Zobel v. Williams*, 457 U.S. 55
(1982). There the Supreme Court struck down an Alaska statute
which distributed to state residents through a dividend program
a portion of the income derived from natural resources. Under
the program, each citizen 18 years of age or older annually
received one dividend unit for each year of residency after 1959,
the first year of statehood. The plaintiffs, residents who had
moved to Alaska two years before the dividend program became law,
brought an equal protection challenge to the statutory
preference given to people who were residents when Alaska became
a State in 1959 over all those who had arrived since then, as
well as the distinctions made between all bona fide residents
who settled in Alaska at different times during the 1959 to 1980
period. 457 U.S. at 59. The Court applied rational basis
review before addressing whether heightened scrutiny should
apply. *Id.* at 60.

The Court found the residency duration distinction was not
rationally related to the three purposes of the program

articulated by the state: (1) creation of a financial incentive for individuals to establish and maintain residence in Alaska (because newer residents receive less under the program than established residents); (2) encouragement of prudent management of the Permanent Fund (the retrospective aspect of the program bears no rational relationship to this objective); and (3) apportionment of benefits in recognition of contributions of various kinds, both tangible and intangible, which residents made during their years of residency (an invalid purpose under *Shapiro v. Thompson*, 394 U.S. 618, 632-633 (1969)). 457 U.S. at 61-64.

Demonstrating that even under the lowest level of Equal Protection review it is proper--indeed, required--for a court to truly scrutinize both the means and the objective proffered by the State, the Supreme Court in *Zobel* concluded that "[t]he only apparent justification for the retrospective aspect of the program, favoring established residents over new residents, is constitutionally unacceptable." *Id.* at 65 (citing *Vlandis v. Kline*, 412 U.S. 441, 450 (1973)). It is also noteworthy that *Zobel* dealt purely with benefits awarded to residents, not a restitution program for intentional and especially pernicious constitutional violations committed by government actors for more than forty years.

North Carolina courts have similarly voided arbitrary classifications under our state constitution's equal protection clause. In *Payne v. Charlotte Heating and Air Conditioning*, supra at 8, the Court of Appeals struck down a provision that limited death benefit claims for victims of asbestosis or silicosis to a two-year period following the final asbestos or silica dust exposure. 172 N.C. App. at 506, 616 S.E.2d at 363. There was no similar limitation placed on claims for death benefits related to other occupational diseases. The court found that the plaintiff in *Payne* was similarly situated to victims of other occupational diseases, and reasoned that "the purposes for which the statute was enacted were equally applicable to all claimants suffering from occupational diseases." *Id.* The court held there was no rational basis for treating asbestosis and silicosis differently from other latent occupational diseases, and declared the distinction unconstitutional. *Id.*

The court's analysis of the defendants' proffered legitimate state interest in *Payne* is instructive here, firstly because the purpose for which the Eugenics Compensation Program was enacted (to make restitution for the state's constitutional wrongdoing) is equally applicable to all victims and their heirs. Secondly, in *Payne*, defendants argued that the statute limiting eligibility for recovery furthered a legitimate state interest

because as "a statute of repose," it advanced the State's interest in finality. 172 N.C. App. at 505, 616 S.E.2d at 362.

The court responded:

This contention begs the real question: what is the State's rationale for imposing a harsher statute of repose for claims involving asbestosis than for other latent occupational diseases, including other diseases resulting from exposure to asbestos?

Id. Applying that analysis to this case makes the question simple: what is the State's rationale for denying restitution to heirs of forced-sterilization victims alive on 30 June 2013 and heirs of forced-sterilization victims who had died by that date? The answer is equally simple: there is none.

- B. The State can show no legitimate interest in denying compensation to the heir(s) of an otherwise qualified claimant who was not alive on 30 June 2013

There are two primary potential justifications the State may offer in defense of the arbitrary distinction of the LVT, and both fail to suffice as a defense to Appellant's equal protection claim: 1) the Program is meant to compensate the victims themselves, not their heirs; 2) sharing the fund with heirs of victims who died before June 30, 2013 would result in lower payment to claimants who were alive on that date, and giving more compensation to living victims who were alive when the statute was passed is a legitimate state objective. The

first justification fails to constitute a legitimate purpose because the program already compensates some heirs (those of victims alive on 30 June 2013), making this Court's analysis in *Payne* instructive once again:

As was true in [*Walters v. Algernon Blair*, 120 N.C. App. 398, 462 S.E.2d 232 (1995)], the general goals articulated by defendants for the statute are legitimate state interests, but N.C. Gen. Stat. § 97-61.6 [the two-year temporal limitation on eligibility] -- like the statute at issue in *Walters* -- is "grossly underinclusive in that it does not include all who are similarly situated."

172 N.C. App. at 505, 616 S.E.2d 362-363. If the state's interest was to limit restitution only to the actual living victims, then it should have so provided in the statute. For example, it could have made a distinction as to the amount of compensation that would be paid to living victims as opposed to heirs. Furthermore, the statute provides the same amount of compensation to included heirs as it does to the living sterilization victims, which contradicts any assertion that the purpose of the legislation was to provide restitution only to surviving eugenics victims.

The second potential justification--to allow qualified victims more compensation--is not rationally related to the remedial purpose of the program, nor is it related to the requirement that a victim survive until 30 June 2013. If the

State's purpose was to give more or better compensation to living victims, it would have compensated victims through lump-sum payments (as the Task Force recommended), or at a minimum, it would have distinguished between the share due victims who were alive on the pay-out date and the estates of victims who predeceased that date. Instead, it allocated a finite sum to be divided equally between certain sterilization victims and/or their heirs, thereby creating a model under which the ultimate amount any individual received would be lessened by every additional victim identified.³ One could indeed surmise that the apparent purpose of the living victim threshold is to limit the number of compensation recipients. Even if the Legislature's motive was benign (to issue larger shares of the fund to each recipient), not only does that purpose bear no rational relationship to the Program's remedial purpose, but it would perniciously incentivize the rejection of claims, including at the OSJV stage of the process. Such a rationale cannot withstand even the lowest level of Equal Protection review.

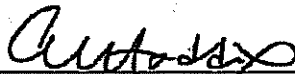
³This funding structure, with a maximum amount of \$10,000,000 already allocated, also undercuts any justification that the living victim threshold is designed to protect the state treasury or avoid unlimited liability.

CONCLUSION

Appellant respectfully requests that this Court hold that the living victim threshold contained in N.C. Gen. Stat. §143B-426.50(1) (2015) denies Appellant equal protection in violation of Article 1, Section 19 of the Constitution of the State of North Carolina, and reverse the Industrial Commission's denial of his claim.

Respectfully submitted, this the 28th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that the forgoing document entitled CLAIMANT-APPELLANT BRIEF was served on the following individual by First Class U.S. Mail, with a courtesy copy by electronic mail.

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