

No. COA 15-763

TWENTY-SECOND JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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)	
In the matter of the Estate)	
of Kay Frances Redmond, Linda)	FROM THE INDUSTRIAL COMMISSION,
R. Nichols, Administrator.)	I.C. FILE U00438
)	
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APPELLANT'S REPLY BRIEF

Claimant-Appellant (hereinafter "Claimant") respectfully submits the following Reply Brief pursuant to Rule 28(h)(2).

By Order entered 25 August 2015, this case was consolidated for oral argument with IN THE MATTER OF MARY LUCILLE HUGHES, by and through VIRGINIA HUGHES INGRAM, Administratrix of the Estate of Mary Lucille Hughes, COA 15-699 and IN THE MATTER OF TOMMIE JUNIOR SMITH, COA 15-829. All three of these appeals turn on the sole constitutional question of whether the Eugenics Compensation Act's "living victim threshold," which excludes as a qualified recipient all victims of North Carolina's eugenics program who were not alive on 30 June 2013 (see, N.C. Gen. Stat. §143B-426.50(1)), violates the guarantee of equal protection of law in Article I, Section 19 of the Constitution of the State of North Carolina. Since the argument section of Appellee's Brief

in the present case is identical to that filed in COA 15-699, in the interest of judicial economy and to avoid repetition, Appellant incorporates by reference the argument portion of Appellant's Reply Brief filed in COA 15-699, and offers the following additional argument in reply.

ARGUMENT

DEFENDANT-APPELLEE'S ERRONEOUS CHARACTERIZATION OF *ZOBEL v. WILLIAMS* MISCONSTRUES ITS APPLICATION TO APPELLANT'S ARGUMENT

At page 12 of its brief, Defendant-Appellee (hereinafter, "Defendant") asserts that *Zobel v. Williams*, 457 U.S. 55 (1982) is "easily distinguishable." However, Defendant fails to distinguish the relevant import of *Zobel*, which is the proper level of judicial scrutiny of a statutory limitation on a government compensation or benefits program under "rational basis" review. *Zobel*, which involved an equal protection challenge to a state dividend program benefiting Alaska residents, requires that a reviewing court *actually* scrutinize the relationship between the legislation's stated purpose and the challenged temporal limitation. See *Zobel*, 457 U.S. at 62-65, 70-71 (exploring the logical connections between the purported reasons for the distinctions the statute made within the class of residents). Simply put, the different facts in *Zobel* are not relevant to the core question either in that case

or now before this court: how to correctly apply the equal protection rational basis test.¹

Zobel makes clear that, even under the lowest level of equal protection review, a court must determine whether the challenged limitation bears a rational relationship to the state's legislative purpose in creating the compensation program. *Id.* at 61. See also *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S. Ct. 251, 253-254 (1971) ("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.") 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)).

Defendant nonetheless seeks to distinguish *Zobel* on its facts, specifically, that the Alaska program involved an ever-

¹ As set forth in Appellant's brief, given the fundamental right violation the Eugenics Compensation program is intended to remedy, the Court should subject the challenged restriction to more than "rational basis" review. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (where the restriction "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.")

increasing fund containing income from a portion of the state's natural resources revenue, while the Eugenics Compensation Program involves a finite sum to be divided equally between sterilization victims and some heirs. (Appellee Brief pp 12-13). Defendant urges that this distinction is relevant because the Eugenics Compensation fund "is not meant to go on indefinitely," and the "statute has clearly identified the class that is intended to receive the funds set aside." (Appellee Brief p 13).

Notwithstanding the fact that the first distinction has no bearing on a proper equal protection analysis, Defendant's second point actually bolsters Appellant's argument. The Eugenics Compensation Program's intended class of recipients are clearly identified as the individuals described in the General Assembly's declaration of the Program's objective: "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) (emphasis added). In other words, the intended class consists of all those who suffered under the State's forty-one year forced sterilization program.

As set forth in the HUGHES Reply Brief (COA 15-699) incorporated herein by reference, Appellee's post hoc justification for the statute's requirement that a victim be

alive on 30 June 2013 [to "assure[] that those victims still living would be better compensated" (Appellee Br. p 9)] bears no rational relationship to the legislative purpose of the Program. COA 15-699, Appellant's Reply p 7. Furthermore, that proffered justification appears pretextual: if the General Assembly wanted to insure that only living victims would be "better" compensated, then it would not have created a compensation program under which the ultimate amount any individual received would be lessened by every additional victim or heir identified. Nor would it have created a program whereby some, but not all, heirs, receive compensation equal to that that living victims receive. See N.C. Gen. Stat. §§ 143B-426.51(a) and (b).

As shown in the HUGHES (COA 15-699) Reply Brief incorporated herein, Defendant side-steps the proper equal protection analysis by refusing to acknowledge the key question in this appeal: whether the 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 compensation program's objective. *Reed v. Reed*, 404 U.S. at 75-76, 92 S. Ct. at 253-254. It is not. Even under the lowest level of judicial scrutiny, denying restitution to some families while granting it to others based on the requirement that a victim-- who has already waited more than a decade for restitution since the state's apology-- stay alive until 1 July 2013 cannot possibly

bear any relationship to the State's identified interest of remedying the egregious injustice of its forty-one years long forced sterilization program.

Defendant also fails to recognize that the Court's analysis in *Zobel* is explicitly based on rational basis review of a governmental justification for a restriction which, like the living victim threshold in this case, indirectly touches on a fundamental right. See *Zobel*, 457 U.S. at 63 (in discussion of Alaska's "past contributions" justification, citing *Shapiro v. Thompson*, 394 U.S. 618, 632-633 (1969) and 66-68 (in discussion of the fundamental right to travel "indirectly affected by the Alaska dividend law"). This context is crucial to the court's review of these appeals, lest it be forgotten that what is at issue is a restitution program to remedy the state's violation of perhaps the most basic human rights-- the right to have a family and the right to be free from governmental invasion of one's body. See, e.g. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that procreation is "one of the basic civil rights of man," and noting that a "person who is sterilized by the state "is forever deprived of a basic liberty.")

The General Assembly recognized that its restitution program touched on a fundamental right when it declared the program's purpose--to remedy "injustices suffered and unreasonable hardships endured by the asexualization or

sterilization of individuals at the direction of the State.” S.B. 421 Gen. Assemb., 2013 Session (N.C. 2013). As the records in all three of these consolidated appeals demonstrate, the victims of forced sterilization and their closest family members suffered the resulting injustices and hardships for many, many years before the State made its apology and began the more than twelve-year process of implementing this restitution program. It would be a sick irony indeed, given the long delay in finally making restitution a reality, to allow the State to wait out the lifetimes of some victims, and then to exclude those victims based on the State’s purported desire to “better compensate” others.

CONCLUSION

The Court should find that N.C. Gen. Stat. §143B-426.50(1)’s proffered purpose of narrowing the class of recipients to allow “better compensation” for only living victims is unconstitutional, because it is not rationally related to the goal of the Eugenics Compensation Program, which is to make restitution for the State’s past wrongdoing, and overturn the Industrial Commission’s denial of compensation to Appellant Redmond.

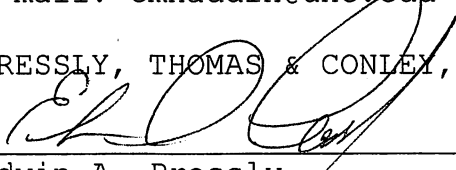
Respectfully submitted, this the 23rd day of September,
2015.

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CERTIFICATE OF SERVICE

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

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