

STATE OF MICHIGAN
COURT OF APPEALS

PAUL HARVEY and BRUCE A. FOX,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF
MANAGEMENT AND BUDGET, BUREAU OF
RETIREMENT SYSTEMS and JUDGES'
RETIREMENT BOARD,

Defendants-Appellees.

UNPUBLISHED

January 3, 1997

No. 187112

Ingham Circuit Court

LC No. 94-77760-AZ

Before: McDonald, P. J., and Bandstra and C. L. Bosman*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Plaintiffs are retired state district judges who challenged certain statutory provisions for district judge compensation as a denial of equal protection of the laws under the Michigan Constitution. We vacate the order of the trial court and remand.

We note that the statutory scheme challenged by plaintiffs is clearly discriminatory on its face. The statute provides thirty-sixth district judges "shall" receive an additional salary from the local district control unit, while all other district judges "may" receive such an additional salary as determined by a local governing body. MCL 600.8202(2); MSA 27A.8202(2).

Plaintiffs contend the trial court applied the wrong level of judicial scrutiny when it applied the "rational basis" test to review the statutory scheme in question. We agree.

When legislation is challenged as violative of the equal protection guarantee, it is subject to one of three levels of judicial scrutiny, the "rational basis", "strict scrutiny", or "intermediate" or "heightened scrutiny" tests. *Doe v Dep't of Social Services*, 439 Mich 650, 661-662; 487 NW2d 166 (1992).

* Circuit judge, sitting on the Court of Appeals by assignment.

The intermediate level of scrutiny applies when legislation classifies based on gender or mental capacity, or when it carves out a discrete exception to a general rule and the exception is no longer “experimental”. In these cases, the legislation will only be upheld if it is substantially related to an important state interest. *Id.* at 662 & n 19; *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 671; 232 NW2d 636 (1975). The statutory provisions involved in this case appear to belong in this category. In support of their claim the classification is “rationally” related to a legitimate governmental purpose, defendants contend the State was free to begin with a limited or experimental classification in its move to fully fund all State courts. If in fact the legitimacy of the classification is, in part, tied to its experimental nature, the classification should fall under the heightened or intermediate level of scrutiny. Because both sides below presumed the burden of proof rested with the other, defendants presented very little evidence to justify the statutory scheme.

We therefore remand for further factfinding and application of the proper level of scrutiny which is the heightened or intermediate level rather than the rational basis test utilized by the trial court.

We also note for purposes of remand that when legislation is subject to intermediate scrutiny, the state bears the burden of showing the legislation is substantially related to an important state interest. *Dep’t of Civil Rights ex rel Forton v Waterford Twp Dep’t of Parks & Recreation*, 425 Mich 173, 196; 387 NW2d 821 (1986). Thus, defendants must show the facially discriminatory provisions attacked by plaintiffs are substantially related to an important state interest. *Id.*

Vacated and remanded. We do not retain jurisdiction. No costs to any party.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman