IN THE SUPREME COURT OF MISSOURI

No. SC85875

NICK MASON, LAURA JOHNSON, and
NORMANDY NATIONAL EDUCATION ASSOCIATION,

Plaintiffs-Respondents,

v.

NORMANDY SCHOOL DISTRICT, et al.,

Defendants-Appellants.

Appeal from the Circuit Court of St. Louis County
State of Missouri
Honorable Patrick Clifford

SUBSTITUTE BRIEF FOR RESPONDENTS

SCHUCHAT, COOK & WERNER

Loretta K. Haggard, M.B.E. #38737
1221 Locust St., Second Floor
St. Louis, MO 63103
(314) 621-2626
FAX: (314) 621-2378

Attorneys for Plaintiffs-Respondents

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JURISDICTIONAL STATEMENT

This appeal concerns whether the trial court properly granted summary judgment for Plaintiffs-Respondents Normandy National Education Association and two of its officers, and ordered Defendant-Appellant Normandy School District to pay monetary penalties to its teachers. Defendants-Appellants appealed, and on December 2, 2003, the Missouri Court of Appeals for the Eastern District reversed the trial court's Order and Judgment in favor of Plaintiffs-Respondents. On March 13, 2004, Plaintiffs-Respondents filed their Motion for Transfer to this Court. This Court entered its Order granting transfer on March 30, 2004.

This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff-Respondent Normandy National Education Association ("Normandy NEA") represents a group of over 300 teachers employed by Defendant-Appellant Normandy School District ("the District" or "Normandy"). (L.F. at 362). Normandy NEA and two of its officers filed suit against the District and the members of its Board of Education to recover a penalty for the District's failure to comply with the Salary Compliance Act, §165.016, R.S.Mo., during school years 1994-95, 1995-96, and 1996-97. On January 29, 2003, the Circuit Court granted Plaintiffs' Motion for Summary Judgment. Defendants appealed. On December 2, 2003, the Court of Appeals issued its Opinion reversing the trial court's award of summary judgment. (See Appendix to Respondents' Substitute Brief, at A-2 - A-10). This Court granted transfer on March 30, 2004.

The Salary Compliance Act ("Act") requires public school districts to expend a minimum percentage of their current operating costs on compensation for certificated teachers and administrative staff. §165.016, R.S.Mo. (2002). The minimum percentage for each district is the average percentage of current operating costs that the district expended on certificated salaries during two "Base Years," 1991-92 and 1992-93. The statute required districts to spend no less than 3 percent less than their "Base Year Certificated Salary Percentage" during the 1994-95 and 1995-96 school years, and no less than 2 percent less than their "Base Year Certificated Salary Percentage" during 1996-97 and succeeding years. §165.016.1, R.S.Mo.

A district's failure to comply with this requirement triggers a penalty, payable to

certificated staff in the year following notification of non-compliance from the Missouri Department of Elementary and Secondary Education ("DESE"). The penalty is 110 percent of the additional amount that should have been paid to certificated staff during the year of non-compliance. §165.016.6, R.S.Mo.

The Act defines two ways to avoid the penalty. A school district may apply to the State Board of Education ("State Board") for a waiver ("Waiver") of the Act's requirements for a single year. A district also may apply to the State Board for a one-time revision in the Base Year Salary Percentage ("Base Year Revision" or "Revision"). §165.016.4, R.S.Mo. The Missouri Court of Appeals for the Western District held in *Missouri National Education Association v. Missouri State Board of Education*, 34 S.W.3d 266, 286 (Mo. Ct. App. 2000), that "a request for an exemption or revision must be filed in the year following the notice of violation and the State Board may grant an exemption from the requirements of section 165.016 for the preceding year or a permanent revision of the base year percentage for the preceding year."

On October 8, 1996, DESE notified the District that its Certificated Salary Percentage for 1994-95 was 69.38 percent, which was less than the Base Year Certificated Salary Percentage minus 3 percent. (L.F. at 363-64, 386-97, 452). DESE's notification set forth the penalty that the District was to use to calculate the penalty owed to its staff in 1996-97. (L.F. at 397). On December 10, 1996, the District requested that DESE exclude a National Science Foundation grant from the calculation of its Certificated Salary Percentage for 1994-95. (L.F. at 434, 438). The Missouri Commissioner of Education

purported to grant the District's request to exclude the grant from the calculation of its Certificated Salary Percentage for 1994-95. (L.F. at 438). As a result, the Commissioner concluded that the District's revised Certificated Salary Percentage for 1994-95 was 69.83 percent, which was within 3 percentage points of the Base Year Certificated Salary Percentage. (*Id.*). The District did not pay any penalty during school year 1996-97 for non-compliance during school year 1994-95. (L.F. at 364).

On May 7, 1997, DESE notified the District that its Certificated Salary Percentage for 1995-96 was 68.21 percent, which was less than the Base Year Certificated Salary Percentage minus 3 percent. (L.F. at 363-64, 398-408). DESE set forth the penalty that Normandy was to use to calculate the penalty owed to its staff in 1997-98. (L.F. at 408). The District did not pay any penalty during school year 1997-98 for non-compliance during school year 1995-96. (L.F. at 364).

On March 27, 1998, DESE notified the District that its Certificated Salary Percentage for 1996-97 was 66.36 percent, which was less than the Base Year Certificated Salary Percentage minus 2 percent. (L.F. at 363-64, 409-420). DESE set forth the penalty that Normandy was to use to calculate the penalty owed to its staff in 1998-99. (L.F. at 420). The District did not pay any penalty during school year 1998-99 for non-compliance during school year 1996-97. (L.F. at 364).

On May 19, 1998, the District requested a Base Year Revision due to its financial condition during the base years. (L.F. at 434, 439-443). The District also requested a Waiver for 1996-97, because due to "instability of the leadership in the business office,"

no consideration had been given to certificated salary compliance in the budget during that fiscal year. (L.F. at 435, 444-50). On November 19, 1998, after the filing of this lawsuit, the District amended its request for Base Year Revision, clarifying that it was seeking a retroactive Base Year Revision to excuse its non-compliance with the Salary Compliance Act during 1994-95, 1995-96, and 1996-97; and it requested Waivers for 1995-96 and 1997-98. (L.F. at 364, 421-29).

On April 15, 1999, the State Board granted the District a Base Year Revision of 69.59 percent.[1] (L.F. at 455-456). The State Board did not decide whether the Revision applied retroactively to forgive past due penalties. *Id.* This issue was one subject of a petition for administrative review to the Cole County Circuit Court, seeking review of decisions of the State Board to grant Base Year Revisions and Waivers to 29 Missouri public school districts, including Normandy. *Missouri National Education Association v. Missouri State Board of Education*, No. CV198-1227CC (Cole County Circuit Court). Local school districts were not parties to that case.

On October 5, 1999, the Cole County Circuit Court issued a decision finding that Base Year Revisions apply retrospectively to forgive past due penalties. (L.F. at 502). This decision was appealed to the Missouri Court of Appeals for the Western District, which largely affirmed the Cole County decision. *Missouri National Education Association*, 34

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[1] The State Board has never issued rulings on the District's requests for Waivers. (L.F. at 456, 468-504).

S.W.3d 266 (Mo. Ct. App. 2000). However, the Court of Appeals limited this holding in one major respect: it determined that a school district could not wait forever to apply for a Base Year Revision or Waiver, but rather had to do so within one year following notification from DESE of non-compliance. 34 S.W.3d at 286. The Normandy School District's 1998 applications for Base Year Revision and Waiver came too late to forgive non-compliance during 1994-95 and 1995-96, the Court held; they were timely only with respect to 1996-97. *Id.*

COURT DECISIONS BELOW

Based on the *Missouri National Education Association* decision, Plaintiffs in the present case filed a Motion for Summary Judgment, seeking a judgment that the District owed a penalty of $51,824.54 for non-compliance during 1994-95 and a penalty of $415,925.40 for non-compliance during 1995-96. With respect to the 1994-95 school year, Plaintiffs-Respondents argued that the Commissioner of Education did not have legal authority to recalculate the District's Certificated Salary Percentage after removing a grant from the expenditure figures, and that the District was therefore out of compliance for 1994-95. Plaintiffs also sought a judgment that the District owed a penalty of $390,812.16 for non-compliance during 1996-97 – because although the District's Base Year Revision request was timely as to 1996-97, it merely reduced and did not eliminate that penalty.

The District argued in its Response to Plaintiffs' Motion that it owed no penalties to its teachers because it spent in excess of the required Base Year Percentages in 1999-2000, 2000-01, 2001-02, and 2002-03. In support of this argument it submitted the

affidavit of its Comptroller. (L.F. at 534-36). Plaintiffs-Respondents argued that the District's expenditures on teacher compensation in 1999-00, 2000-01, 2001-02, and 2002-03 were irrelevant to its penalty liabilities during school years 1996-97, 1997-98, and 1998-99. However, Plaintiffs also presented evidence that Normandy spent far less on certificated salaries during 2000-01 and 2001-02 than claimed by Defendants-Appellants. (L.F. at 510, 515, 517). The figures that the District's Comptroller listed as "certificated expenditures" for 1999-00, 2000-01, and 2001-02 were instead the District's expenditures for *all* instructional costs, including operation and maintenance of plant and improvement of instruction services (curriculum development, staff training, and teacher mentoring). (L.F. at 513-14, 516, 518-31).

The Circuit Court granted Plaintiffs-Respondents final judgment on liability on all three Counts and retained jurisdiction over the remedy. (L.F. at 543). The Court found, based on the authority of *Knob Noster Education Association v. Knob Noster R-VIII School District*, Case No. CV499-700CC (Johnson County Circuit Court, December 19, 2001), *aff'd on other grounds*, 101 S.W.3d 356 (Mo. Ct. App. 2003), that the Commissioner of Education did not have legal authority to exclude the National Science Foundation grant from the District's Certificated Salary Percentage for 1994-95. The Court rejected Defendants' argument that its expenditures on teacher compensation during 1999-00, 2000-01, 2001-02, and 2002-03 satisfied its penalty liabilities during 1996-97, 1997-98, and 1998-99. The parties agreed to stay the remedial proceedings pending the District's appeal on liability. (See Appendix to Respondents' Substitute Brief at A-11 - A-

14).

Defendants argued for the first time on appeal that although the District received notices of non-compliance in 1996, 1997, and 1998 for the three school years at issue in this case, it was entitled to new notices of non-compliance following its applications for Base Year Revision and Waiver. Without addressing Plaintiffs' argument that Defendants waived this point by failing to raise it before the Circuit Court, the Court of Appeals agreed with Defendants and held that, "If a school district requests a revision or exemption and the request is pending or granted, new notice of noncompliance should be given." Slip Op. at 9 (Appendix hereto at A-10). The Court added that, "A denial of a request for revision or exemption may be sufficient," *Id.* n. 4, then explained,

> This comports with the statutory scheme regarding revisions and exemptions and subsection six that provides that a school district shall compensate certain staff "during the year following the notice of violation...." As stated by defendants, a school district should not be required to "self-assess" a penalty. This is the result that could occur if we were to accept plaintiffs' argument that the original notices of noncompliance were sufficient.

Id. at 9 (Appendix hereto at A-10). The Court of Appeals concluded that since the District "did not receive the requisite notice, plaintiffs' claim was barred and plaintiffs were not entitled to judgment as a matter of law." *Id.*

Plaintiffs-Respondents filed their Motion for Rehearing and/or Transfer on December 17, 2003, and the Court of Appeals summarily denied the motions on February

26, 2004. Plaintiffs-Respondents filed their Motion for Transfer with this Court on March 13, 2004, and this Court granted the Motion on March 30, 2004.

POINTS RELIED ON

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PLAINTIFFS-RESPONDENTS ON LIABILITY ON ALL THREE COUNTS OF THEIR SECOND AMENDED PETITION, NOTWITHSTANDING THE DISTRICT'S ARGUMENT THAT IT DID NOT RECEIVE FROM THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (DESE) A REVISED NOTICE OF NON-COMPLIANCE REFLECTING COURT DECISIONS INTERPRETING §165.016, R.S.MO., BECAUSE:

A. A RENOTIFICATION REQUIREMENT HAS NO BASIS IN THE LANGUAGE OF §165.016, R.S.Mo., AND IT STRIPS THE ACT OF ITS INTENDED CONSEQUENCE THAT A NON-COMPLIANT DISTRICT PAY A MONETARY PENALTY TO ITS TEACHERS; AND

Missouri National Education Association v. Missouri State Board of Education, 34 S.W.3d 266 (Mo. Ct. App. 2000)

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc 1993)

Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. 1980)

State ex rel. Holland Industries, Inc. v. Division of Transportation of the State of Missouri, 762 S.W.2d 48 (Mo. Ct. App. 1988)

B. THE DISTRICT WAIVED THIS ARGUMENT, IN THAT IT FAILED TO

RAISE THE ARGUMENT BEFORE THE CIRCUIT COURT.

Newman v. Rice Stix Dry Goods Co., 73 S.W.2d 264 (Mo. 1934)

McCarthy v. Community Fire Protection District of St. Louis Co., 876 S.W.2d 700 (Mo. Ct. App. 1994)

Westbrook v. Mack, 575 S.W.2d 921 (Mo. Ct. App. 1978)

Lawson v. Emerson Electric Co., 809 S.W.2d 121 (Mo. Ct. App. 1991)

Dyer v. General American Life Insurance Co., 541 S.W.2d 702 (Mo. Ct. App. 1976)

Clayton Brokerage Co. V. Raleigh, 679 S.W.2d 376 (Mo. Ct. App. 1984)

Cornett v. Williams, 908 S.W.2d 872 (Mo. Ct. App. 1995)

II. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PLAINTIFFS-RESPONDENTS ON LIABILITY ON ALL THREE COUNTS OF THEIR SECOND AMENDED PETITION, NOTWITHSTANDING THE DISTRICT'S CLAIM THAT IT PAID TEACHERS MORE THAN REQUIRED DURING SCHOOL YEARS 1999-2000, 2000-01, 2001-02, AND 2002-03, BECAUSE THE UNDISPUTED EVIDENCE SHOWS THAT THE DISTRICT DID NOT PAY THE PENALTIES FOR NON-COMPLIANCE WHEN THEY CAME DUE IN THE YEAR FOLLOWING NOTICE OF NON-COMPLIANCE AND ANY EVIDENCE REGARDING TEACHER COMPENSATION IN LATER YEARS IS IRRELEVANT, IN THAT §165.016.6, R.S.MO. MANDATES THAT DISTRICTS PAY THE PENALTY IN THE YEAR

FOLLOWING NOTICE OF NON-COMPLIANCE.

§165.016.6, R.S.Mo.

Sermchief v. Gonzalez, 660 S.W.2d 683 (Mo. banc 1983)

III. THE CIRCUIT COURT CORRECTLY ORDERED THE DISTRICT TO WITHHOLD TAXES AND RETIREMENT CONTRIBUTIONS FROM THE PENALTY PAYMENTS DUE TO EACH TEACHER WHO WORKED DURING 1996-97, 1997-98, AND 1998-99, AND TO PAY EACH TEACHER PREJUDGMENT INTEREST AT THE RATE OF 9 PERCENT, BECAUSE:

A. PLAINTIFFS-RESPONDENTS DID NOT WAIVE THEIR ENTITLEMENT TO TAX WITHHOLDINGS AND RETIREMENT CONTRIBUTIONS BY NOT SPECIFICALLY PLEADING THESE REMEDIES IN THEIR SECOND AMENDED PETITION, IN THAT TAX AND RETIREMENT WITHHOLDINGS ARE IMPLICIT IN ANY WAGE OR BACKPAY AWARD, AND PLAINTIFFS IN THEIR PLEADING ALSO SOUGHT "SUCH OTHER RELIEF AS THIS COURT DEEMS APPROPRIATE."

§169.010(15), R.S.Mo

Mo. Sup. Ct. R. 55.04

Mo. Sup. Ct. R. 55.05

Mo. Sup. Ct. R. 55.19

B. PLAINTIFFS-RESPONDENTS ARE ENTITLED TO PREJUDGMENT INTEREST EVEN THOUGH IT IS NOT INCLUDED IN §165.016, R.S.MO., IN THAT A PLAINTIFF WHOSE DEMAND FOR A LIQUIDATED SUM IS WRONGFULLY DENIED IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF 9 PERCENT PER YEAR PURSUANT TO §408.020, R.S.MO.

§408.020, R.S.Mo.

C. THE DISTRICT WAIVED THESE ARGUMENTS, IN THAT IT FAILED TO RAISE THE ARGUMENTS BEFORE THE CIRCUIT COURT.

Dyer v. General American Life Insurance Co., 541 S.W.2d 702 (Mo. Ct. App. 1976)

McCarthy v. Community Fire Protection District of St. Louis Co., 876 S.W.2d 700 (Mo. Ct. App. 1994)

Westbrook v. Mack, 575 S.W.2d 921 (Mo. Ct. App. 1978)

Lawson v. Emerson Electric Co., 809 S.W.2d 121 (Mo. Ct. App. 1991)

Clayton Brokerage Co. V. Raleigh, 679 S.W.2d 376 (Mo. Ct. App. 1984)

Cornett v. Williams, 908 S.W.2d 872 (Mo. Ct. App. 1995)

ARGUMENT

Standard of Review

This Court reviews *de novo* a Circuit Court's grant of summary judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court is to review the record in the light most favorable to the non-moving party. *Id.* "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.*

I. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PLAINTIFFS-RESPONDENTS ON LIABILITY ON ALL THREE COUNTS OF THEIR SECOND AMENDED PETITION, NOTWITHSTANDING THE DISTRICT'S ARGUMENT THAT IT DID NOT RECEIVE FROM THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION (DESE) A REVISED NOTICE OF NON-COMPLIANCE REFLECTING COURT DECISIONS INTERPRETING §165.016, R.S.MO., BECAUSE:

A. A RENOTIFICATION REQUIREMENT HAS NO BASIS IN THE LANGUAGE OF §165.016, R.S.Mo., AND IT STRIPS THE ACT OF ITS INTENDED CONSEQUENCE THAT A NON-COMPLIANT DISTRICT PAY A MONETARY PENALTY TO ITS TEACHERS.

Section 6 of §165.016, R.S.Mo. states that, "Any school district which is determined by the department to be in violation of the requirements of subsection 1 or 2 of this section, or both, shall compensate the building-level administrative staff and nonadministrative certificated staff during the year following the ***notice of violation*** by an additional amount which is equal to one hundred ten percent of the amount necessary to bring the district into compliance with this section for the year of violation." §165.016.6, R.S.Mo. (emphasis added). According to the undisputed facts, DESE issued the District a notice of violation for 1994-95 on or about October 8, 1996. (L.F. at 363-64, 386-97, 452). DESE issued the District a notice of violation for 1995-96 on or about May 7, 1997, and a notice of violation for 1996-97 on or about March 27, 1998. (L.F. at 363-64, 398-420). There is no question that the Normandy School District received a "notice of violation" from DESE with respect to each of the years at issue in this lawsuit.

Defendants-Appellants argue, however, that because of subsequent representations by DESE to the District and subsequent court cases interpreting the Salary Compliance Act, the District was entitled to new "notices of violation" from DESE. In December, 1996, the District requested DESE to exclude a National Science Foundation grant from its salary compliance calculations for 1994-95. (L.F. at 434). DESE purported to grant this request on January 23, 1997 – bringing the District into compliance for 1994-95. (L.F. at 438). The Johnson County Circuit Court held in *Knob Noster Education Association v. Knob Noster R-VIII School District*, Case No. CV499-700CC (December 19, 2001), *aff'd on other grounds*, 101 S.W.3d 356 (Mo. Ct. App. 2003), that DESE has no authority to

exclude grants from its calculation of a district's salary compliance figures. (L.F. at 458). Defendants-Appellants do not challenge this ruling, but instead they argue that in light of DESE's prior (but erroneous) representations and DESE's failure to issue a new notice of violation reflecting the Johnson County decision, the District owes no penalty for non-compliance during 1994-95.

Defendants-Appellants make a similar argument with respect to the 1995-96 and 1996-97 school years. In May, 1998 the District filed an application for Base Year Revision with the State Board of Education. (L.F. at 434, 439-43). Normandy also sought a Waiver for the 1996-97 school year. (L.F. at 435, 444-50). In November, 1998, the District clarified that it sought a retroactive Base Year Revision that would forgive past due penalties, it amended its Waiver request for 1996-97, and it filed Waiver requests for 1995-96 and 1997-98. (L.F. at 364, 421-29). On April 15, 1999, the State Board granted the District a Base Year Revision of 69.59 percent. (L.F. at 455-56). Although the State Board did not specify whether the Base Year Revision applied retroactively, the Cole County Circuit Court on appeal held that it did. (L.F. at 502).

The Western District Court of Appeals modified this decision by holding that a school district has only one year after notice of violation to apply for a Base Year Revision or Waiver. *Missouri National Education Association v. Missouri State Board of Education*, 34 S.W.3d 266, 286 (Mo. Ct. App. 2000). Normandy did not file a timely application with respect to 1994-95 and 1995-96, so the District did owe penalties for non-compliance during those years. *Id.* Although the District's application for Base Year

Revision was timely as to 1996-97, the Base Year Revision only reduced and did not eliminate the penalty due for that year. (L.F. at 358, 363-64, 409-20). The Western District reversed the Judgment of the Cole County Circuit Court insofar as it applied Normandy's Base Year Revision retrospectively to the 1994-95 and 1995-96 school years. *Id.* The District does not challenge the merits of the retroactivity ruling in *Missouri National Education Association*, 34 S.W.3d at 286. It argues instead that it was entitled to a new notice of violation following the *Missouri National Education Association* decision, and DESE's failure to issue a new notice saves it from any liability for a penalty for non-compliance during 1994-95, 1995-96, and 1996-97.

The "renotification" requirement urged by Defendants and adopted by the Court of Appeals has no basis in the language of §165.016.6, R.S.Mo., which authorizes only a single notice of violation. "A court may not add words by implication to a statute that is clear and unambiguous." *Asbury v. Lombardi*, 846 S.W.2d 196, 202 n.9 (Mo. banc 1993). Moreover, "ordering the amendment of an enactment is, in essence, legislating, which is not the function of a court." *Treme v. St. Louis County,* 609 S.W.2d 706, 710 (Mo. Ct. App. 1980).

The renotification requirement also undermines the purpose of the Salary Compliance Act to require a school district "to expend a certain percentage of its current operating costs for tuition, teacher retirement, and compensation of certificated staff every year." *Missouri National Education Association*, 34 S.W.3d at 286. According to the Western District, the Normandy School District waited too long to apply for a Revision and

for Waivers for the 1994-95 and 1995-96 school years. "To allow a school district to apply for an exemption or revision anytime in the future for past noncompliance and for the State to grant an exemption or revision effective for more than one year in the past would destroy the statute's purpose," the Court held. *Id.*

The Court of Appeals in the present case invented the renotification requirement out of whole cloth to rescue the Normandy School District from the consequences of its own negligence in failing to expend the required percentage of its current operating costs on certificated salaries three years in a row, and failing to apply for a Revision or Waiver within one year of notice of violation. It would be difficult to imagine a clearer conflict between two Courts of Appeals decisions than that presented in this case.

Defendants have cited no legal authority supporting the novel proposition that DESE should have provided written notice to a school district of a court decision interpreting a statute that DESE administers. School districts like other litigants are subject to the law in effect at the time a court decision is rendered. *See State ex rel. Holland Industries, Inc. v. Division of Transportation of the State of Missouri*, 762 S.W.2d 48, 50-51 (Mo. Ct. App. 1988) ("[An] appellate court must decide a case on the basis of the law in effect at the time of the decision."). The rule of law established by the *Missouri National Education Association* case is that a school district must apply for a Base Year Revision or Waiver within one year following notice of violation - and failure to do so precludes the district from applying a Revision or Waiver retrospectively to evade its penalty liability to its certificated staff.

B. THE DISTRICT WAIVED THE RENOTIFICATION ARGUMENT, IN THAT IT FAILED TO RAISE THE ARGUMENT BEFORE THE CIRCUIT COURT.

The renotification argument raised by Defendants-Appellants in Points I and II of their Brief to the Court of Appeals[2] was never presented to the Circuit Court. "[An] appellate court does not review legal propositions not expressly decided by the trial court." *Dyer v. General American Life Insurance Co.*, 541 S.W.2d 702, 706 (Mo. Ct. App. 1976). *Accord Cornett v. Williams*, 908 S.W.2d 872, 875 (Mo. Ct. App. 1995); *McCarthy v. Community Fire Protection District of St. Louis County*, 876 S.W.2d 700, 703 (Mo. Ct. App. 1994); *Clayton Brokerage Co. v. Raleigh*, 679 S.W.2d 376, 379 (Mo. Ct. App. 1984); *Westbrook v. Mack*, 575 S.W.2d 921, 922 (Mo. Ct. App. 1978). This principle applies not only to jury-tried cases but to cases resolved on summary judgment. *McCarthy*, 876 S.W.2d 700; *Clayton Brokerage*, 679 S.W.2d 376; *Westbrook*, 575 S.W.2d 921.

The present case is similar to *Newman v. Rice-Stix Dry Goods Co.*, 73 S.W.2d 264, 267-68 (Mo. 1934), and *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121, 124-25 (Mo. Ct. App. 1991), in which employers claimed for the first time after trial before the Labor and Industrial Relations Commission that the claimant-employees had failed to give statutory notice of injury to them. The Supreme Court in *Newman* explained, "If the

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[2] Defendants-Appellants did not file a Substitute Brief with this Court.

employer, in words or by his conduct and the manner in which he proceeds before such tribunal, there indicates that there is no such disputed issue in the case, he should not be permitted to raise the question for the first time on appeal after the entire original record is made up." 73 S.W.2d at 268. The issue of notice was waived in *Newman* and *Lawson* by the employers' failure to assert lack of notice as a defense at trial. Normandy likewise waived the issue of notice by failing to raise it before the Circuit Court.

II. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PLAINTIFFS-RESPONDENTS ON LIABILITY ON ALL THREE COUNTS OF THEIR SECOND AMENDED PETITION, NOTWITHSTANDING THE DISTRICT'S CLAIM THAT IT PAID TEACHERS MORE THAN REQUIRED DURING SCHOOL YEARS 1999-2000, 2000-01, 2001-02, AND 2002-03, BECAUSE THE UNDISPUTED EVIDENCE SHOWS THAT THE DISTRICT DID NOT PAY THE PENALTIES FOR NON-COMPLIANCE WHEN THEY CAME DUE IN THE YEAR FOLLOWING NOTICE OF NON-COMPLIANCE AND ANY EVIDENCE REGARDING TEACHER COMPENSATION IN LATER YEARS IS IRRELEVANT, IN THAT §165.016.6, R.S.MO. MANDATES THAT DISTRICTS PAY THE PENALTY IN THE YEAR FOLLOWING NOTICE OF NON-COMPLIANCE.

Defendants-Appellants' third Point of Error appears to rely in part on the notice argument addressed above in Points I(A) and (B) of Plaintiffs-Respondents' Substitute Brief. That part of the argument will not be repeated. The District goes beyond the notice issue, however, and asserts that it spent over $3 million more than required on certificated salaries during 2000-01 and 2001-02, and that as a result it has more than satisfied any penalties that may be due. (Appell. Brf. at 32-33). Unlike the notice issue, this argument was presented to the Circuit Court and therefore preserved for appeal. (L.F. at 505-07, 534-36). This argument is both legally and factually wrong.

Legally the argument is baseless, because the Salary Compliance Act requires the penalty to be paid ***"during the year following notice of violation."*** §165.016.6, R.S.Mo.

(emphasis added). The foregoing language is plain and unambiguous, and the Court need look no further to try to ascertain legislative intent. *Sermchief v. Gonzalez*, 660 S.W.2d 683, 688 (Mo. banc 1983). DESE notified the Normandy School District of its non-compliance for the 1995-96 school year in May of 1997, making its $415,925.40 penalty due during the 1997-98 school year. DESE notified the District of its non-compliance for the 1996-97 school year in March of 1998, making its $390,812.16 penalty due during the 1998-99 school year.

The Missouri Court of Appeals decision in 2000 did not alter in any way DESE's notices of violation during prior years. It only clarified that Normandy's 1998 application for a Base Year Revision came too late to excuse its non-compliance during 1994-95 and 1995-96. *Missouri National Education Association*, 34 S.W.3d at 286. The Base Year Revision request was timely as to the 1996-97 school year, but the retroactive Base Year Revision merely reduced, and did not eliminate, the penalty owed for 1996-97. (L.F. at 358, 363-64, 409-20).

The District admittedly did not pay the penalties due during 1997-98 and 1998-99. Only those teachers who worked during 1997-98 are entitled to share in the payment of the $415,925.40 penalty for non-compliance in 1995-96. Only those teachers who worked during 1998-99 are entitled to share in the payment of the $390,812.16 penalty for non-compliance in 1996-97. As a matter of law, the District is not entitled to carry forward its debt to future years, and claim that it has "paid" the penalty by paying different teachers who worked in future years more than it was required to. The District cites no legal authority

for this novel proposition, and there is none.

Defendants' argument is entirely without factual basis as well. The District simply did not spend over $3 million more than required in the teachers' fund in school years 2000-2001 and 2001-2002. (Appell. Brf. at 32-33). The District expended $27,771,294.27 on certificated salaries during 2000-01, not $32,254,862.11 as the District claimed. (L.F. at 510, 515, 534-36). The District expended $28,791,312.64 on certificated salaries during 2001-02, not $33,999,965.41 as the District claimed. (L.F. at 510, 517, 534-36). The figures the District listed as "certificated expenditures" for 2000-01 and 2001-02 were instead the District's expenditures for *all* instructional costs, including operation and maintenance of plant and improvement of instruction services (curriculum development, staff training, and teacher mentoring). (L.F. at 513-14, 516, 518-31). The District expended over $5 million on these two categories of expenditures alone in 2000-01, and over $4.3 million in 2001-02. (L.F. at 516, 518). Neither of these categories of expenditures has anything to do with teacher compensation.

The District's Comptroller confused the "Fiscal Ratio of Efficiency" (or "FIRE") method of determining compliance with the traditional method of determining compliance. §165.016.3, R.S.Mo. (1998). The FIRE method, which did not go into effect until 1998-99 or 1999-00,[3] asks whether the district expended at least as great a percentage of its adjusted

[3] The statute is ambiguous on this point. §165.016.3, R.S.Mo. (1998). However, the Missouri Court of Appeals in *Knob Noster Education Association*, 101 S.W.3d 356

operating costs on instructional costs as it did during FIRE Base Year 1997-98. Teacher compensation is but one element of instructional costs, and compliance with FIRE does not require an increase or even maintenance of teacher compensation. (L.F. at 510-11). Defendants raised no response to this argument in either the Circuit Court or the Court of Appeals.

III. THE CIRCUIT COURT CORRECTLY ORDERED THE DISTRICT TO WITHHOLD TAXES AND RETIREMENT CONTRIBUTIONS FROM THE PENALTY PAYMENTS DUE TO EACH TEACHER WHO WORKED DURING 1996-97, 1997-98, AND 1998-99, AND TO PAY EACH TEACHER PREJUDGMENT INTEREST AT THE RATE OF 9 PERCENT, BECAUSE:

A. PLAINTIFFS-RESPONDENTS DID NOT WAIVE THEIR ENTITLEMENT TO TAX WITHHOLDINGS AND RETIREMENT CONTRIBUTIONS BY NOT SPECIFICALLY PLEADING THESE REMEDIES IN THEIR SECOND AMENDED PETITION, IN THAT TAX AND RETIREMENT WITHHOLDINGS ARE IMPLICIT IN ANY WAGE OR BACKPAY AWARD, AND PLAINTIFFS IN THEIR PLEADING ALSO SOUGHT "SUCH OTHER RELIEF AS THIS COURT DEEMS APPROPRIATE."

(Mo. Ct. App. 2003), construed the ambiguity in favor of the earlier effective date.

Defendants-Appellants claim in their fourth Point of Error that Plaintiffs-Respondents are barred from receiving tax withholdings and retirement contributions, because they failed to allege in their Second Amended Petition that they were seeking these types of relief. This assertion is simply incorrect. Plaintiffs-Respondents requested the following relief in each Count of their Second Amended Petition: "additional compensation" that should have been paid to the teachers plus interest; and "such other relief as this Court deems appropriate." (L.F. at 322-24). The Missouri Rules of Civil Procedure are not overly demanding in terms of what remedies a plaintiff must plead. Rule 55.04 states, "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." Rule 55.05 states that, "A pleading that sets forth a claim for relief... shall contain (1) a short and plain statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled." Only special damages, which are not at issue in this case, need be pleaded with particularity. Rule 55.19.

At any rate, income tax withholdings are implicit in the concept of "compensation." The District would risk incurring penalties from the Internal Revenue Service if it remitted additional "compensation" to its teachers without withholding taxes from the payments. The Missouri Public School Teacher Retirement statute defines "salary" or "compensation" as "the regular remuneration... which is earned by a member as an employee of a district." §169.010(15), R.S.Mo. It is Plaintiffs' position that the penalties which Normandy should have paid to its teachers in 1996-97, 1997-98, and 1998-99 would have constituted

"regular remuneration... earned by a member as an employee of a district." If this is a correct construction of the retirement statute, it would not matter whether Plaintiffs specifically requested retirement contributions in their pleadings – the contributions would be required by law. The impact of retirement contributions on a teacher who retired in the years since 1996-97 is substantial, because the Public School Retirement statute computes a teacher's pension based on the average of the three highest consecutive years of salary. §169.010(8), R.S.Mo. If these teachers are to be made whole, the District must remit retirement contributions to the Public School Retirement System.

B. PLAINTIFFS-RESPONDENTS ARE ENTITLED TO PREJUDGMENT INTEREST EVEN THOUGH IT IS NOT INCLUDED IN §165.016, R.S.MO., IN THAT A PLAINTIFF WHOSE DEMAND FOR A LIQUIDATED SUM IS WRONGFULLY DENIED IS ENTITLED TO PREJUDGMENT INTEREST AT THE RATE OF 9 PERCENT PER YEAR PURSUANT TO §408.020, R.S.MO.

Plaintiffs-Respondents do not rely on the Salary Compliance Act itself as a source of authority for prejudgment interest. Instead, they rely on §408.020, R.S.Mo., which states in pertinent part that "Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made..., and for all other money due...." The penalty for the District's non-compliance during 1994-95 was due during school year 1996-97; the penalty for the

District's non-compliance during 1995-96 was due during school year 1997-98; and the penalty for the District's non-compliance during 1997-98 was due during school year 1998-99. §165.016.6, R.S.Mo. Plaintiffs-Respondents demanded payment both informally and by filing this lawsuit on September 8, 1998. The District undisputedly did not pay any penalty to the teachers who worked during any of these three years. The plain language of §408.020, R.S.Mo. entitles Plaintiffs-Respondents to prejudgment interest at the rate of 9 percent per year.

C. THE DISTRICT WAIVED THESE ARGUMENTS, IN THAT IT FAILED TO RAISE THE ARGUMENTS BEFORE THE CIRCUIT COURT.

The District waived its challenge to the Court's Orders concerning tax withholdings, retirement contributions, and prejudgment interest by not objecting to these remedies before the Circuit Court. Both parties submitted proposed orders for the Court on Plaintiffs' Motion to Reopen Case and Motion for Summary Judgment. (L.F. at 538-43; Appell. Brf. at 38).[4] Plaintiffs-Respondents served their proposed Order and Judgment by facsimile and first-class mail on January 6, 2003, two days before the oral argument on

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[4] Plaintiffs' proposed Order and Judgment is not included in the Legal File, but Defendants-Appellants correctly note in their Brief (at 38) that the Circuit Judge signed Plaintiffs' proposed Order without modification. The signed Order and Judgment appears at pages 541-43 of the Legal File.

Plaintiffs' Motion to Reopen Case and Motion for Summary Judgment. Defendants did not address at oral argument the remedies sought in Plaintiffs' proposed Order and Judgment, nor did they file a Motion to Amend or for New Trial after the Order and Judgment was issued, seeking a ruling on these issues from the Circuit Court in the first instance. "[An] appellate court does not review legal propositions not expressly decided by the trial court." *Dyer*, 541 S.W.2d at 706. *Accord Cornett*, 908 S.W.2d at 875; *McCarthy*, 876 S.W.2d at 703; *Clayton Brokerage*, 679 S.W.2d at 379; *Westbrook*, 575 S.W.2d at 922. Accordingly, this Court should decline to reach the merits of Point IV of Defendants-Appellants' Brief.

CONCLUSION

For the foregoing reasons, Plaintiffs-Respondents respectfully request this Court to affirm the January 29, 2003 Order and Judgment issued by the Circuit Court, granting summary judgment for Plaintiffs on all three Counts of their Second Amended Petition, and remand this case for proceedings concerning the implementation of the remedy.

Respectfully submitted,

SCHUCHAT, COOK & WERNER

Loretta K. Haggard (M.B.E. #38737)
1221 Locust Street, Second Floor
St. Louis, MO 63103
(314)621-2626
FAX: (314) 621-2378

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

(1) this brief contains the information required by Rule 55.03;

(2) this brief complies with the limitations contained in Rule 84.06(b);

(3) there are 6,599 words in this brief;

(4) the floppy disk containing a copy of this brief filed contemporaneously herewith has been scanned for viruses and is virus free.

Loretta K. Haggard

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2004, two copies of the foregoing were mailed by first-class mail to Cindy Reeds Ormsby and Charles L. Ford, Crotzer and Ford, 222 S. Central, Suite 500, St. Louis, MO 63105, FAX (726-5120).

Loretta K. Haggard

APPENDIX

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