IN THE MISSOURI SUPREME COURT

MC DEVELOPMENT COMPANY, LLC,	)	
	)	
Plaintiff/Appellant,	)	**Appeal No. SC90022**
	)	
v.	)	**Twenty-Fourth Judicial**
	)	**Circuit**
CENTRAL R-3 SCHOOL DISTRICT OF ST. FRANCOIS COUNTY,	)	**St. Francois County**
	)	
Defendant/Respondent,	)	
	)	
FARMINGTON R-7 SCHOOL DISTRICT OF ST. FRANCOIS COUNTY,	)	
	)	
Defendant/Appellant,	)	
	)	
DAMON BLACK, ASSESSOR OF ST. FRANCOIS COUNTY,	)	
	)	
Defendant/Respondent.	)	

Appeal from the Circuit Court of St. Francois County
Honorable Scott E. Thomsen

SUBSTITUTE REPLY BRIEF OF APPELLANT MC DEVELOPMENT COMPANY, LLC

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ARGUMENT

I. THE TRIAL COURT ERRED IN DECLARING PARCEL 13 AS PART OF THE CENTRAL R-3 SCHOOL DISTRICT IN THAT SAID JUDGMENT MISAPPLIED THE LAW BECAUSE SCHOOL DISTRICTS ARE STATUTORILY REQUIRED TO BE COMPOSED OF CONTIGUOUS TERRITORY AND THE AUTHORITY TO DETERMINE SCHOOL BOUNDARIES LAYS WITH THE SCHOOL DISTRICTS AND VOTERS.

While Respondent Central in the first paragraph of its point contends that Appellant's points misstate and distort Missouri law, it is in fact the statements of Respondent Central in that paragraph which do. Respondent Central asserts that the Missouri Department of Elementary and Secondary Education (hereinafter referred to as "DESE") "sanctions noncontiguous school districts." (Res. Sub. Brief 22-23). DESE though has no independent power to do anything other than what powers and duties the legislature has provided to it under section 161.092 RSMo. Respondent has cited to no authority which grants DESE the authority to "sanction noncontiguous districts". In fact under the statutory scheme in place today and at the time of the 1967 boundary change, the actions authorized by the State Board of Education and DESE in regards to boundaries of school districts are limited and include approving a reorganization plan submitted by districts prior to going to a vote of the people under section 162.181 RSMo and naming the board of arbitrators under section 162.431 RSMo. The citizens of the districts controlled the boundaries thereof through elections and the school districts

themselves were responsible for maintenance of the boundaries. Chapter 162 RSMo. (1963 and 2000 as amended).

Respondent Central further misstates the law in its declaration that "Central's current legal boundaries were determined by the vote of the people pursuant to section 162.431 RSMo." (Res. Sub. Brief 22-23). Central's boundaries were as determined by the vote of the people as to the reorganization that occurred in 1966 as amended by the removal of the property denoted in red on Defendant's Exhibit E in 1967 by the board of arbitration after the vote of the people. Further, according to Respondent's own records, which its expert did not view, Parcel 13 was not within the boundary of Respondent Central. (T. 288, l. 15-T. 289, l. 9; T. 331, l. 3-T.346, l. 6)

Respondent Central contends that Appellant MC Development did not preserve for appeal the issue that school districts are statutorily required to be contiguous because said issue was not pled and not presented to the trial court. (Res. Sub. Br. 23). Respondent though ignores both Missouri Supreme Court Rule 55.05 and 55.33. (2008). "Missouri is a fact pleading state." Jones v. St. Charles County, 181 S.W.3d 197, 202 (Mo. App. E.D. 2005). Appellant MC Development filed a request for a declaration as to in which school district Appellant's Parcel 13 belonged and, as required by Missouri Supreme Court Rule 55.05, set forth "a short and plain statement of facts" of the facts necessary to show a judicable controversy including that "the tax records and map of the Assessor's Office in St. Francois County depicts Plaintiff's parcel as a **noncontiguous** pocket of R-3 surrounded by R-7" and that "the R-7 map adopted by the R-7 school board in 1967 after the annexation of property nearby Plaintiff's parcel shows Plaintiff's parcel as R-7." Mo.

S.Ct Rule 55.05 (2008); LF 62. The legal requirement that school districts be composed of contiguous territory is not a new legal theory of recovery as argued by Respondent Central but is instead part of the theory as to why the records of Appellant Farmington R-7 are correct and Parcel 13 should have been declared part of Appellant Farmington's territory.

Alternatively, if the statement that school districts must be composed of contiguous territory is not already contained within the petition of Appellant, pursuant to Missouri Supreme Court Rule 55.33 (2008) the theory of lack of contiguousness was tried by implied consent. The lack of contiguousness of Parcel 13 with the remainder of Respondent Central's territory and the propriety of same was testified to numerous times without an objection by Respondent Central as being outside or beyond the scope of the pleadings. (T. 128, l. 3-23; T. 130, l. 14-T. 132, l. 10; T. 154, l. 13-17; T. 201, l. 1-T.202, l. 9; T. 203, l. 23-T. 204, l. 1; T. 210, l. 22-T. 211, l. 4; T. 340, l. 22-T. 341, l. 6; T. 344, l. 12-14). "When evidence is admitted without objection, we will deem the pleadings to have been amended to conform to the evidence." RPM Plumbing Mechanical, Inc. v. Jim Plunkett, Inc., 46 S.W.3d 60, 63 (Mo. App. W.D. 2001) *see also* Newbill v. Forrester-Gaffney, 181 S.W.3d 114, 122 (Mo. App. E.D. 2005).

The question though of whether the law in 1967 allowed for a noncontiguous pocket is a legal question. As the trial court ruled that Parcel 13 was part of Central, the assumption is that the trial court determined that the law does allow for a district to be segregated. Mistakes of law are not subject to the requirements of Missouri Supreme Court Rule 78.07(c) and are not waived by Appellant.

Respondent Central urges the court to look at the plain language of section 162.431 RSMo as Respondent claims it is clear and unambiguous and has no requirement of contiguousness. (Res. Sub. Br. 30). Respondent fails to address however Appellant MC Development's argument that the plain meaning of "boundary" requires contiguousness. Black's Law Dictionary 6th Edition defines "boundary" as "every separation, natural or artificial, which marks the confines or line of division of two contiguous properties." Webster's Dictionary (1988) defines "boundary" as the "separating line, point or plane." The statute does not specify "boundaries" but "boundary" in the singular indicating that when the change is complete it is still a single boundary between the districts not boundaries. As such the plain meaning of section 162.431 RSMo establishes the contiguous requirement.

Respondent Central cites no Missouri case law to support its contention that boundary changes do not have to be contiguous. (Res. Br. 26-28). Respondent's reliance on the Nebraska case In re Heartwell School Dist. R-4, 319 N.W.2d 68 (NE 1982) is misplaced in that the Nebraska Constitution does not state that schools should be composed of contiguous territory nor does Nebraska have a similar statutory scheme for school reorganization and boundary change. The Missouri Constitution, unlike the Nebraska Constitution, requires that specific schools be composed of contiguous territory. *see* Mo. Const. Art. 9, §1(b) (1945).

Respondent relies on the testimony of Tom Quinn for its allegation that DESE acknowledges "the existence of non-contiguous territory in numerous districts throughout the state". (Res. Sub. Br. 29) However, Respondent Central misstates the testimony of

Mr. Quinn. Mr. Quinn testified on the pages cited by Respondent that he instructed the University of Missouri-Columbia to include Parcel 13 as a noncontiguous pocket in Respondent Central when it had on previous state school maps been included in Farmington. (T. 127-128). Mr. Quinn never testified to the existence of "non-contiguous territory in numerous districts" as alleged by Respondent or as to DESE acknowledging and allowing same. (T.103, l. 21-T.156, l. 23). Mr. Quinn also acknowledged that there is no written DESE policy to defer to the Assessor over the records of the school districts themselves but that he unilaterally decided same because that was his practice as a superintendent. (T. 124, l. 14-17; T. 118, l. l6-T. 119, l. 10). Further, Respondent cites to no authority either statutory or administrative which authorizes DESE to permit or disallow non contiguous boundaries. (Res. Sub. Br. 30).

In violation of Missouri Court Rule 83.08, Respondent Central has included a new argument that was not presented to the Court of Appeals, specifically that Appellants did not preserve a constitutional attack. This legal theory was not presented to the Court of Appeals and should be stricken by the Court. (Res. Br.1-60). Further, Appellant MC Development has not argued that section 162.431 is unconstitutional. Appellant MC Development requested the court rule in its findings of fact "as to whether state statute would have allowed for a noncontiguous pocket of a school district" (Supp. LF. 2). Section 162.431 RSMo when either read in conformance with Article IX, Section 1(b) of the Missouri Constitution and with other school district statutes or when given its plain and ordinary meaning requires a contiguous district.

Respondent's argument that the contiguous requirement set forth in Article IX, Section 1(b) is only for creation of a new district is without merit. (Res. Sub. Br. 39) After a boundary change pursuant to section 162.431, a consolidation pursuant to section 162.223, the division of a lapsed or disaccredited or dissolved district pursuant to section 162.081 and section 162.451, or a reorganization pursuant to section 162.181, the school that is **created or established** as a result thereof is still a specific school and therefore under Article IX, Section 1(b) must be of contiguous territory. Further, if credence is given to Respondent's argument, Central's boundaries could be gerrymandered to include a commercial high tax area right in the middle of the Farmington district such as the commercial complex on Highway 32 within Farmington's city limits miles from any school building of Central.

Respondent relies on State ex rel. Rolla Dist. No. 31 v. Northern, 549 S.W.596 (Mo. App. S.D. 1977) for its argument that Article IX, Section 1(b) "is not self-executing, therefore, no private cause of action exists." (Res. Sub. Br. 38). Respondent's reliance is misplaced. Article IX, Section 1(b) does not state as does the provision contested in Rolla that the "article may be contested as **provided** by law" rather it states that "specific schools for any contiguous territory may be **established** by law." Mo. Con. Art. VI, Sec 26(g); Art. IX, Sec. 1(b). Article IX, section 1(b) gives the legislature authority to establish contiguous school districts. It is a directive or limitation to the legislature as to what type of territory the districts should be composed. It is not giving the legislature the power to provide or not provide any procedure or guidelines for a legal cause of action for an individual as was Article VI, Section 26(g).

In violation of Missouri Court Rule 83.08, Respondent Central has included another new argument that was not presented to the Court of Appeals, specifically that Appellants' argument is barred by laches and equitable estoppel. This legal theory was not presented to the Court of Appeals and should be stricken by the Court. (Res. Br.1-60). Even if not stricken, Appellants' argument is not barred by laches or equitable estoppel. Laches does not apply to a case of a sovereign right or public rights. Reorganized School District R-I of Crawford County v. Reorganized School District R-III of Washington County, 360 S.W.2d 376, 381 (Mo. App. E.D. 1962) Further the determination of a boundary line of a school district is "neither for the recovery of real property or a personal action within the statute." Id. As such the limitations for the recovery of land and for personal action do not apply. Id.

Respondent attempts to attack Appellant MC Development's reliance on State ex rel. Schwerdt v. Reorganized School Dist. R-3, Warren County by claiming that the statement of the honorable court that "the law does not contemplate that two portions of a district should be left entirely segregated from each other" is dicta. (Res. Sub. Br. 29) However, Respondent wishes the court to give credence to its argument that Missouri boundary changes are not required to be contiguous by citing to a Nebraska case. The Schwerdt court cited to two cases which discussed why the law contemplates governmental districts as being composed of contiguous territory. *See* C. & N. W. Ry. Co. v. Town of Oconto, 6 N.W. 607 (Wis. 1880) and Howell v. Kinney, 27 S.E. 204 (Ga. 1896). The Oconto court does not even reach whether the constitution requires contiguousness as it analyzed the meaning of "town" to determine that the boundaries

were required to be contiguous. 6 N.W. 607-609 (Wis. 1880). The Oconto court stated that

> "a town is a subdivision, in the singular; not subdivisions or many subdivisions, in the plural…there is much force in the general and almost invariable usage, in this country at least, in the organization of towns and counties, as in precincts, districts, cities, and villages, in forming them of adjacent and contiguous territory."

Id. at 609. The same argument is applicable to a school district. A school district is a political subdivision, singular and it should have a single boundary not boundaries as advocated by Respondent.

Respondent urges the court to give deference to the trial court's determination as to the credibility of witnesses. (Res. Sub. Br. 41-42) Respondent however ignored that the trial court in its judgment indicated that the records of both districts' showed parcel 13 within the boundary of Appellant Farmington. (LF 159). Respondent further ignored that the trial court misstated the law by stating that "the authority to establish school district boundaries at the time of reorganization and consolidation of school districts was vested in the County School Superintendent." Id. As set forth in Appellant's Substitute Brief, the authority over the boundary of a district lays with the school board and voters not the county superintendent. (App. Sub. Br. 21-23). The trial court's error of law as to who had authority over the boundary of a district led to more weight being given the assessor's records than the agreeing records of the districts.

Respondent asserts that Appellant MC Development is collaterally attacking the decision of the Board of Arbitration. (Res. Br. 29-30). Appellant has made no such attack. The presentation of evidence regarding the 1967 annexation was to present evidence that Parcel 13 is within the territory of Appellant Farmington in that had Parcel 13 been a noncontiguous pocket of Central, Respondent Central would have voiced same and the Board of Arbitration would not have approved the boundary change. According to the records of both districts, Parcel 13 was part of Farmington at the time of reorganization of the districts. (T. 196, l. 9-24; T. 202, l. 12-19; T. 288, l. 15-T. 289, l. 9).

Respondent attacks Appellant's overlay exhibits ignoring that the overlays regarding the various Assessor's maps do show the inaccuracy of the Assessor's records as Exhibits 1, 2 and 28 are all the same map issued for different years by the Assessor showing changes in the school district boundary as more easily seen in Exhibits 1A, 2A, and 3A (the "red and green blotches" referred to by Respondent) when no change in the boundary between the districts has occurred since 1967. (LF 184-188, 277).

Further, the undisputed eye-witness testimony of Dr. B. Ray Henry, Appellant's "lay and colloquial" witness, who was the superintendent of Farmington R-7 before and after its reorganization and during the 1967 boundary change, established that Parcel 13 is within the boundary of Appellant Farmington. Dr. Henry testified as to the actions of the Central Board before the Board of Arbitration and as to the contested nature of the boundary change. (T. 199, l. 12-24; T. 209, l. 15-T. 210, l. 13). Dr. Henry further identified school records showing the approved map of the Farmington district for 1969-70 school year which had no noncontiguous pocket and which Dr. Henry identified as the

reorganization map with the addition of the territory acquired through the 1967 boundary change. (T. 196, l. 9-24; T. 202, l. 12-19, LF 250-253). As testified to by Dr. Mayberry, Central's records agree with the testimony of Dr. Henry in that the records of Central do not show Parcel 13 as a noncontiguous island of Central territory surrounded by Appellant Farmington. (T. 288, l. 15-T. 289, l. 9).

Respondent also misstates the facts of this case when comparing same with the facts of Reorganized School District R-I of Crawford County v. Reorganized School District R-III of Washington County, 360 S.W.2d 376 (Mo. App. E.D. 1962). Respondent once again focuses on the legal description of the 1967 annexation parcel which was not the focus of the suit. (Res. Sub. Br. 31). The only metes and bounds legal description in possession of either school district was of the area of the boundary change which did not include Parcel 13. Like Crawford, the only description of the reorganized school districts was in the form of maps. Dr. Henry testified that he was unaware of an actual legal description of the Farmington district. (T. 194, l. 6-11). Dr. Henry was the superintendent at the time of Farmington's reorganization and he stated that when the reorganization occurred with the Doe Run District "a map was made for the newspapers, and that was generally used by…the district, and it just attached the two boundaries." (T. 196, l. 1-3). Respondent is mistaken in its analysis of the Crawford case as said case was not a boundary line change case and, like the case at hand, the reorganization was not done by legal description but by maps. Reorganized School District R-I of Crawford County v. Reorganized School District R-III of Washington County, 360 S.W.2d at 378;

Res. Br. 31; T. 194, l. 11-196, l. 8. As with Crawford, the only evidence of Parcel 13 not being within Appellant Farmington's district is the records of the Assessor.

As the records of Appellant Farmington and Respondent Central established that Parcel 13 was within Farmington's boundary and as the law does not contemplate two portions of a district be left segregated from each other, the judgment of the trial court must be reversed and Parcel 13 declared to be part of Appellant Farmington's territory.

II. THE TRIAL COURT ERRED IN DECLARING PARCEL 13 AS PART OF THE CENTRAL R-3 SCHOOL DISTRICT IN THAT SAID DECISION IS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE SAID DECISION IGNORED THE TESTIMONY OF DR. B. RAY HENRY AND THE RECORDS OF APPELLANT FARMINGTON.

Respondent asserts to the court that Central graduate, former Farmington superintendent and retired president of Jefferson College, Dr. B. Ray Henry's "lay and colloquial testimony is in clear contrast to the concrete and fully substantiated testimony provided by" Mr. Hutchison. (Res. Sub. Br. 52). Respondent ignores that the testimony of Respondent's own witness, Dr. Mayberry, confirms the testimony of Dr. Henry. Respondent however ignores that Mr. Hutchison relied solely on the assessor's records for his opinion that Parcel 13 was within the boundaries of Respondent. (T. 331, l. 17-22). Mr. Hutchison stated that as to Exhibit E "outside the yellow, I do not know where the school district lines are. Inside the gray, I am only saying that that's what the 1966 tax records showed as Central." (T. 352, l. 17-20). Appellants both pled that the Assessor records showed Parcel 13 as being taxed to Central. (LF 63, 92). Mr. Hutchison asserted that a school map of a reorganization is not reliable yet section 162.161 RSMo in 1966 the year of reorganization provided that a county board of education in submitting plans for reorganization was required to "include charts, **maps**, and statistical information necessary to document properly the plan". (App. Br. A13). No mention is made of a metes and bounds description or a signed surveyor's plat yet that is what Mr. Hutchison

required in order to take a document into consideration. (T. 331, l.15-T. 332, l. 25). Central's own witness, Tom Quinn stated that he was not aware of "any district that has a complete legal description of their district boundaries". (T. 120, l.7-10). Mr. Quinn also stated that in the maps created by DESE the boundaries of districts as set forth are obtained from historical data from the local level, and he acknowleded that the boundary determination is a local function not a state function. (T. 121, l. 20-T. 122, l. 15). All the historical data, other than the assessor's records, whose duty all parties agree is ministerial, place parcel 13 within Farmington.

Respondent further misunderstands the purpose of the testimony of Mr. Truska. Mr. Truska was not asked to give a definitive boundary location between Appellant Farmington and Respondent Central, but rather was asked to review individual historical maps and render individual opinions as to the boundary location and school district designation of parcel 13 as shown on each of these individual maps. What the overlays show and what is visible on the maps themselves is that Parcel 13 was only considered to be a noncontiguous pocket of Respondent Central by the Assessor. The 1995 DESE map and the 1967 Farmington map and the 1969-1970 Farmington map show Parcel 13 within Farmington. Ex. 1-5A, 7A.

Further, the practice of Mr. Quinn or any school district in deferring to the assessor is irrelevant. Mr. Quinn testified that when he received a boundary question, he deferred to the Assessor's records of the county of the school district no matter what the historical records of the school district showed. (T. 134, l. 7-T. 135, l. 12). Mr. Quinn testified that no statutory provision for DESE deference to the assessor's records existed

and that there was no written policy or regulation of DESE to allow for deference. (T. 124, l. 14-17). Mr. Quinn stated that deference to the assessor's records was his standard response when he was a superintendent and it has continued to be his standard response as Director of School Governance. (T. 118, l. 16-T. 119, l. 10). Mr. Quinn does not have the power to establish policy for DESE that power lays with the state board of education pursuant to section 161.092 RSMo (2008). Further any policy adopted by DESE is subject to change by the state board of education and DESE "has an affirmative duty to seek comment on its rules, regulations, and policies after their final approval or implementation" which would require said rule, regulation, or policy to be in writing. Section 161.209 RSMo (2008). Further, as shown by the statutory references in this brief and Appellant's original brief, the authority over the boundary lines of districts lays with the districts themselves not DESE. As such the deference to the assessor for boundary line questions has no basis in the law.

Dr. Henry's testimony and the records of Farmington established, and Central's records agreed, that no noncontiguous and completely segregated pocket of Central territory was contained within the boundary of Appellant Farmington and that Parcel 13 was within Farmington's territory at the time of reorganization and at the time of the 1967 boundary change and therefore the judgment of the trial court must be reversed.

CONCLUSION

School districts are required by statute to be contiguous. The historical evidence from the Farmington R-7 School District, an entity which is statutorily bound to maintain its boundary, and the testimony of Dr. B. Ray Henry established that parcel 13 is within Appellant Farmington's boundary. As, since the establishment of school districts in Missouri, it is the district's duty, not the assessor, nor the county superintendent in 1967, to maintain the boundary of the district, more weight should be given the identified records of the districts establishing Parcel 13 with the boundary of Farmington. The Farmington R-7 School District complied with their duty by historically maintaining a proper boundary map, and this map has continually shown that Parcel 13 is a part of the Farmington R-7 School District. As school districts are required to be composed of contiguous property, the judgment of the court must be reversed and Parcel 13 be declared within the territory of Appellant Farmington.

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AFFIDAVIT OF SERVICE OF APPELLANT'S BRIEF

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state that on the 17th day of June, 2009, one (1) copy on paper and one (1) copy on disk of the foregoing Appellant's Substitute Reply Brief were mailed by United States mail, postage prepaid to:

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Subscribed and sworn to before me this 17th day of June, 2009.

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Notary Public

AFFIDAVIT OF COMPLIANCE

STATE OF MISSOURI)
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BIANCA L. EDEN, being first duly sworn, does state as follows:

1. That Appellant's Substitute Reply Brief complies with the limitations set forth in Missouri Supreme Court Rule 84.06(a);

2. That the number of words in Appellant's Brief is 4,550;

3. That the disk of the Appellant's Substitute Reply Brief has been scanned for viruses and is virus-free.

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Subscribed and sworn to before me this 11th day of July, 2008.

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APPENDIX INDEX