TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

JURISDICTIONAL STATEMENT

The action upon which this appeal is based involves the interpretation of a Missouri statute, § 167.131, RSMo. This appeal lies from an amended judgment entered by the Circuit Court of St. Louis County. *See* § 512.020, RSMo. This appeal does not involve the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or an imposed punishment of death. Therefore, pursuant to Mo. Const Art. V, § 3, the Eastern District of the Missouri Court of Appeals initially had jurisdiction over this appeal.

On June 23, 2009, the Court of Appeals rendered its opinion in this case and, pursuant to Mo. Const., Art. V, § 10, and Rule 83.02, and transferred this case to this Court due to the general interest and importance of the issues presented hereby.

STATEMENT OF FACTS

At all times pertinent hereto, Appellants Jane Turner, Susan Bruker, Gina Breitenfeld and William Drendel ("Parents"), as well as their respective natural children ("Pupils"), have resided in the City of St. Louis, State of Missouri ("City"). Legal File ("LF") 451, 476, 509. Thus, they live within the territory of the St. Louis Public School District ("SLPSD"), the boundaries of which are the same as the City's. LF 450, 475, 508.

"Since 1994, [SLPSD's] performance had been at or below minimally acceptable levels."[1] Ultimately, in early 2007, the Missouri Department of Elementary and Secondary Education ("DESE") stripped SLPSD of its accreditation.[2]

Parents requested CSD to prepare special tuition bills for the Pupils and present the bills to SLPSD for payment pursuant to § 167.131, RSMo. LF 261. The CSD Superintendent indicated, however, that CSD would not participate in any transfer plan under that statute. LF 446 (see also Affidavit of Don Senti, 12, LF 261). CSD would not have permitted the pupils to attend CSD schools unless their parents signed personal tuition contracts with CSD. See CSD Brief in Court of Appeals, pp. 15-16.

After the Wellston School District ("WSD") lost its accreditation on June 30, 2003, CSD accepted WSD students, prepared special tuition bills for them and sent the

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1 *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W. 3d 1, 5-6 (Mo. banc 2008)

2 *Board of Education*, *supra*, 271 S.W. 2d at 6.

bills to WSD for payment pursuant to § 167.131, RSMo. LF 460-472; LF 451, 477, 510.

Rather than attending school in the City, the Pupils were admitted to public schools operated by CSD. *Id.* As required by CSD, each Parent signed a "Tuition Agreement" with CSD whereby CSD agreed to admit the Pupils in exchange for tuition payments made by Parents. LF 480-506.

The territory comprising CSD is situated wholly within St. Louis County, State of Missouri ("County"). LF 450, 475, 508. The territory of SLPSD is coextensive with that of the City. LF 450, 475, 508. The County and the City adjoin one another. LF 451, 476, 509.

SLPSD is now governed by the Special Administrative Board of Respondent Transitional School District ("TSD"). LF 508. Neither SLPSD nor TSD has maintained, at any time relevant hereto, any schools accredited by the Missouri Department of Elementary and Secondary Education ("DESE"). LF 10-11; 261-262. On the other hand, CSD does, and did at all times relevant hereto, maintain only schools that are so accredited. LF 451, 475, 508.

Parents brought suit against Respondents CSD, BOE, and TSD seeking a declaratory judgment that, pursuant to § 167.131, RSMo, CSD must prepare special tuition bills for the Pupils and that TSD must pay those bills; their pleading also asserts a restitution claim against CSD for recovery of the personal tuition payments the Parents made to CSD after it refused to prepare the special tuition bills. LF 523-528.

CSD and TSD each moved for summary judgment. LF 7, 263. Parents later filed a single cross-motion for summary judgment against CSD and TSD. LF 448.

A hearing was held upon all cross-motions for summary judgment on October 23, 2008. LF 2. On November 5, 2008, the Trial Court entered its amended judgment concluding that "§ 161.131 is not applicable in this case" and ruling there is "no legal basis for the [Parents'] requested legal declarations". LF 530. The Amended Judgment entered final judgment in favor of TSD and CSD and dismissed all of Parents' claims. LF 530. This appeal followed.

On June 23, 2009, the Missouri Court of Appeals issued its opinion in this appeal. That opinion determined that this case should be transferred to this Court for determination. [3]

[3] The opinion of the Missouri Court of Appeals lacks precedential value. *Carrol v. Loy-Lange Box Co*., 829 S.W. 2d 86, 90 (Mo. App. E.D. 1992).

POINTS RELIED ON

I. The Trial Court erred in its November 5, 2008 amended judgment granting TSD's motion for summary judgment because § 167.131, RSMo applies to SLPSD in that a plain reading of § 167.131, RSMo, and other pertinent statutes, cannot support either the interpretation that § 167.131, RSMo applies only to small, rural districts that fail to maintain schools at particular grade levels or the position that SLPSD's accreditation by a private sponsoring agency precludes it from being deemed unaccredited within the meaning of § 167.131, RSMo.

§ 167.131, RSMo

Abrams v. Ohio Pacific Express, 819 S.W. 2d 338 (Mo. banc 1991)

II. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's and TSD's motions for summary judgment because Senate Bill 781 (1998) does not preempt § 167.131, RSMo, as to SLPSD, in that no conflict exists between SB 781 and § 167.131, RSMo, and in any event, SB 781 and § 167.131, RSMo, should be harmonized so as to give effect to all statutory provisions.

§ 167.131, RSMo

Moats v. Pulaski County Sewer Dist. No. I., 23 S.W.3d 868 (Mo. App. S.D. 2000)

Wilson v. Director of Revenue, 873 S.W.2d 328 (Mo. App. E.D.1994)

State ex rel. Lebeau v. Kelly, 697 S.W.2d 312 (Mo. App. E.D. 1985)

III. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's motion for summary judgment because § 167.151, RSMo does not limit Parents' rights under § 167.131, RSMo in that the discretion regarding admittance of pupils given to school districts under § 167.151, RSMo is specifically revoked as to pupils whose rights are being asserted under § 167.131, RSMo.

§ 167.131, RSMo

§ 167.151, RSMo

State ex rel Burnett v. School District of Jefferson, 74 S.W.2d 30 (Mo.1934)

IV. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's motion for summary judgment to the extent that the amended judgment can be supported by the existence of personal tuition agreements, in that there is no fatal inconsistency between the fact that Parents were constrained to enter into those agreements by virtue of CSD's refusal to comply with § 167.131, RSMo, and the separate statutory obligation on the part of CSD to comply with that statute.

§167.131, RSMo

Sharp v. Interstate Motor Freight System, 442 S.W.2d 939 (Mo. banc 1969)

Petrie v. Levan, 799 S.W. 2d 632 (Mo. App. W. D. 1990)

V. The Trial Court erred in its November 5, 2008 amended judgment, denying Parents' motion for summary judgment, because it misapplied § 167.131, RSMo, in that the Pupils reside within SLPSD, an unaccredited school district, and attend CSD schools, thereby obligating CSD to prepare special tuition bills for the Pupils, and requiring TSD to then pay those bills.

§ 167.131, RSMo

Abrams v. Ohio Pacific Express, 819 S.W. 2d 338 (Mo. banc 1991)

ARGUMENT

I. The Trial Court erred in its November 5, 2008 amended judgment granting TSD's motion for summary judgment because § 167.131, RSMo applies to SLPSD in that a plain reading of § 167.131, RSMo, and other pertinent statutes, cannot support either the interpretation that § 167.131, RSMo applies only to small, rural districts that fail to maintain schools at particular grade levels or the position that SLPSD's accreditation by a private sponsoring agency precludes it from being deemed unaccredited within the meaning of § 167.131, RSMo.

1. Introduction

Respondent TSD argued in the Trial Court that Parents were not entitled to relief under § 167.131, RSMo (sometimes referred to herein as the "Unaccredited District Tuition Statute") because the statute is inapplicable **t**o a large, urban school district. LF 263. Neither the language of this statute, nor its legislative history, can be interpreted to support this position. Consequently, this Court should apply § 167.131 to SLPSD.

Parents note, however, that both TSD and CSD argue that that SLPSD uniquely is exempt from the Unaccredited District Tuition Statute. [4] The ineluctable consequence of Respondents' position would be that no pupil residing in the City would have any right to a free public education in a school deemed worthy by the State of Missouri. Parents

[4] Both Respondents contend that SB 781 effectively preempts the statute only insofar as SLPSD is concerned. *See* Point II, *infra*.

suggest that this appeal does, therefore, have dramatic importance.

2. Standard of Review

The propriety of summary judgment is purely an issue of law, and appellate review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). On appeal, the Court reviews the record in the light most favorable to the party against whom summary judgment was entered. *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997). Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.; Rule 74.04(c).

Moreover, as this case involves interpretation of a statute, which is a question of law, the Trial Court's rulings are reviewed *de novo* for this reason as well. *Dodson v. City of Wentzville*, 216 S.W.3d 173,176 (Mo. App. E.D. 2007).

3. Discussion

A. The Language Of The Unaccredited District Tuition Statute Has Plain Meaning, So There Is No Basis For Resorting To Rules of Construction To Divine Intent That Differs From Its Unambiguous Directive

The Unaccredited District Tuition Statute provides, in pertinent part:

1. The board of education of each district in this state that does not

maintain an accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092, RSMo, shall pay the tuition of and provide transportation consistent with the provisions of section 167.241, RSMo, for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.

2. **** subject to the limitations of this section, each pupil shall be free to attend the public school of his or her choice.

§ 167.131, RSMo.

This statute hardly could be more plain and direct. Consequently, this Court should apply the most fundamental principle governing a court's responsibility when it is required to interpret and apply an unambiguous statute: it should use the ordinary, dictionary-derived meanings of the words and phrases the legislature employed; its task ends there, rendering improper resort to statutory construction. *Abrams v. Ohio Pacific Express*, 819 S.W. 2d 338, 340 (Mo. banc 1991). A court lacks authority to employ a construction that differs from the "intent made evident by the plain language" of a statute. *M.A.B. v. Nicely*, 909 S.W. 2d 669, 672 (Mo. banc 1995).

Confined by the foregoing principles that demarcate the limits of a court's role in applying an unambiguous statute to a certain factual scenario,[5] the task for the Court in

[5] "The Courts cannot transcend the limits of their constitutional powers and engage in judicial legislation... remedying defeats in matters delegated to a coordinate branch of our tripartite government." *Board of Educ. of City of St. Louis v. State of Mo.*, 47

this case is simple. The legislature has directed that a "board of education that does not maintain an accredited school … shall pay the tuition of … each pupil resident therein who attends an accredited school in an adjoining county." § 167.131.1, RSMo. It is undisputed that the Pupils reside in the City and attend CSD schools. LF 451, 476, 509. Further, the parties concur that SLPSD is not accredited by DESE. Also, there is no dispute that CSD is accredited. LF 451, 475, 508. Not only has the statute been left untouched by the legislature, the straightforward interpretation Parents advance has been applied *by CSD itself* to students from other unaccredited school districts, such as the Wellston School District. See LF 460-472; LF 451, 477, 510.

Under the uncomplicated set of facts presented herein, the Unaccredited District Tuition Statute requires that CSD prepare special tuition bills for all the Pupils, and that TSD then pay them. This result necessarily follows from a plain reading of this law, and

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S.W.3d 366, 371 (Mo. banc 2001). The role of the court is to enforce statutes as written. Consistent with the concept of separation of powers embodied in the Missouri Constitution, Art. II, § 1, a court must refrain from questioning the "wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination." *Batek v. Curators of University of Missouri*, 920 S.W. 2d 895, 894 (Mo. banc 1996). If a court is confronted with what it perceives to be an antiquated statute, it still must apply its plain directive, and leave those dissatisfied with the result to seek relief in the legislature. *Simmons v. City of St. Louis*, 264 S.W. 2d 928, 931-32 (Mo. App. E.D. 1994).

its application to the undisputed facts.

B. A Plain Reading of § 167.131 Cannot Support TSD's Interpretation that It Applies Only to Small, Rural Districts That Fail to Maintain Schools At Particular Grade Levels

Despite the plain language of the Unaccredited District Tuition Statute, TSD argued to the Trial Court that this statute applies only to small, rural districts that fail to maintain schools at particular grade levels. However, this provision explicitly applies to "[t]he board of education of *each district in this state* that does not maintain an accredited school…." § 167.131, RSMo. Thus, the plain language of the statute establishes its universal applicability to all school districts. The Unaccredited District Tuition Statute specifically applies to a district that does not maintain accredited schools "pursuant to the authority of the state board of education to classify schools as established in section 161.092, RSMo". § 167.131.1, RSMo. Notably, § 161.092(9), RSMo, empowers DESE to "formulate rules governing the inspection and accreditation of schools". DESE, in turn, has promulgated a rule implementing §§167.131, 161.092, RSMo, that unmistakably prescribes the consequences of any district's loss of accreditation. *See* 5CSR 50-345.100. Finally, to round out this statutory scheme, § 162.621.2, RSMo, specifically prescribes the transfer of the governing authority for SLPSD if "the school district [of the City of St. Louis] loses its accreditation from the state board of education."

It is uncontested that SLPSD is a school district in the State of Missouri, and does not maintain schools accredited by DESE. On its face, § 167.131, RSMo, is applicable to

SLPSD. No exception for large, urban districts can plausibly be read into the statute, nor is there a basis for TSD's putative distinction between failing to create accredited schools at certain grade levels and failing to keep active accreditation of any schools.

Moreover, § 167.131 has been revised and reenacted many times since 1931, most recently in 1993, as discussed further in Point III, below. If the legislature had intended TSD's interpretation to result, no doubt some modification would have been made in 1993, the last time the legislature examined and re-enacted the statue, when modern concepts of accreditation were understood. *See Mid-America Dairymen, Inc. v. Payne*, 990 S.W.2d 648, 653-54 (Mo. App. S.D. 1999).

C. SLPD's Supposed Accreditation By a Private Agency Does Not Save It From Being Deemed Unaccredited Within The Meaning Of The Statute

TSD has also contended that it remains accredited insofar as the Unaccredited District Tuition Statute is concerned. It predicates this on its supposed satisfaction of certain standards by a private accrediting organization. *See* TSD's Brief in Court of Appeals, pp. 27-28. The language of § 167.131.1 itself belies this contention inasmuch as this provision directs that only accreditation by the State of Missouri counts. The repugnancy between TSD's private agency accreditation contention and a proper application of § 167.131 to the facts of this case is brought into even sharper relief by the repeated references to accreditation by the state in §§ 167.092 and 162.621, as well as 5 CSR 50-345.100.[6]

[6] These authorities are discussed in the immediately preceding sub-part of this brief.

II. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's and TSD's motions for summary judgment because Senate Bill 781 (1998) does not preempt § 167.131, RSMo, as to SLPSD, in that no conflict exists between SB 781 and § 167.131, RSMo, and in any event, SB 781 and § 167.131, RSMo, should be harmonized so as to give effect to all statutory provisions.

1. Introduction

Parents filed the underlying lawsuit to enforce their rights under § 167.131, RSMo, an unambiguous statute. This law requires the unaccredited school district in which the Pupils live to pay special tuition charges set by the accredited school district where they attend schools. Accordingly, Parents contend CSD is obligated, pursuant to §167.131, RSMo, to prepare special tuition bills for the Pupils and to submit those bills to TSD for payment.

In the Trial Court, both Respondents conjured up a parade of horribles that would ensue if the court abided the legislature's clear directive and granted Parents the relief they sought. Respondents then proffered prolix and tortured means by which the Trial Court could wring the plain meaning out of the Unaccredited District Tuition Statute, thereby enabling it to hurdle the abyss they asked the court to imagine. However, when a statute is unambiguous, a court is duty-bound to enforce it as written.

2. Standard of Review

The propriety of summary judgment is purely an issue of law, and appellate review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine,*

854 S.W.2d 371, 376 (Mo. banc 1993). The Court of Appeals reviews the record in the light most favorable to the party against whom summary judgment was entered. *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997). Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.; Rule 74.04(c).

Moreover, this case involves interpretation of a statute; this is a question of law, and a trial court's ruling on such an issue is reviewed *de novo*. *Dodson v. City Of Wentzville*, 216 S.W.3d 173,176 (Mo. App. E.D. 2007).

3. Discussion

A. Senate Bill 781 and § 167.131 can and should both be given effect.

The Unaccredited District Tuition Statute is a model of clarity, and its terms fully support Parents' position. See Point I, above. In a desperate attempt to avoid a logical and straightforward application of this statutory provision, Respondents resort to elegantly complex obfuscation. However, the record provides no evidentiary support for the doomsday scenario Respondents have hypothesized; this Court should disregard their imagined nightmare in its review of this summary judgment adjudication.

CSD and TSD both argued to the Trial Court that certain statutes, passed collectively by the Missouri legislature as Senate Bill 781 (1998), override § 167.131. LF 7, 263. A brief history of SB 781 and its role in the settlement of the longstanding school desegregation suit against the St. Louis Public School District, *Liddell, et al. v. Board of Education*, Case No. 72-0100SNL, is set out in *Board of Educ. of City of St.*

Louis v. State of Missouri et al, 229 S.W.3d 157 (Mo. App. E.D. 2007).

Liddell was filed in the United States District Court for the Eastern District of Missouri in 1972. LF 13. In February of 1999, the parties entered into a settlement agreement that resolved all the parties' claims and relieved them of the obligations created by the various district court orders in effect at the time of the agreement. *Board of Educ. of City of St. Louis v. State of Missouri et al*, 229 S.W.3d 157, footnote 3; See also *Liddell, et al. v. Board of Education* Memorandum and Order, 1999 WL 33314210 (E.D. Mo.,March 12, 1999). To provide funding and a framework for the agreement settling *Liddell*, the Missouri General Assembly passed SB 781. *Board of Education*, *supra,* 229 S.W. 3d at 159.

CSD and TSD effectively are requesting that this Court expand, without constitutional authority, its limited role in our tripartite system of government, so that it would have the authority to rewrite legislation that they, and perhaps the Court, may deem unwise. Missouri courts repeatedly have disclaimed any such role, and have advised pointedly that their arrogation of such power would be both dangerous and antithetical to the role of the judiciary. *Board of Educ*., *supra*, 47 S.W. 3d at 371; *Pavlica v. Director of Revenue*, 71 S.W. 3d 186, 190 (Mo. App. W.D. 2002).

Regardless of the impropriety of the Respondents' suggested expansion of this Court's powers, there actually is no basis for inferring that any inconsistency arises if both SB 781 and the Unaccredited District Tuition Statute are applied to SLPSD. Saliently, neither TSD nor CSD has cited any language in SB 781 expressly repealing the applicability of §167.131, RSMo, to SLPSD. Rather, their arguments as to the writ-large

role of SB 781 in the regulation of the transfers of pupils from SLPSD reduce to a contention that SB 781 should be *construed* to partially repeal §167.131, RSMo, by implication because of the statute's supposed incompatibility with SB 781.[7]

But under Missouri law, repeals by implication are strongly disfavored: "Repeals by implication are not favored- in order for a later statute to act as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand; where two acts are seemingly repugnant, they must if possible be construed so that the latter may not operate as a repeal of the earlier one by implication; if they are not irreconcilably repugnant, both must stand." *Riley v. Holland,* 362 Mo. 682, 243 S.W. 2d 79, 81 (Mo. 1951).

Moreover, in arguing that SB 781 overrides § 167.131, CSD and TSD misstate the law regarding statutory construction. Under Missouri law, specific statutes do not automatically prevail over more general statutes, as CSD and TSD would suggest. Rather, the rule is that a court should make every effort to harmonize two statutes:

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[7] Although CSD and TSD cite various cases for the general principles that later-enacted and more specific statutes control over earlier and more general statues, neither makes any attempt to demonstrate that the facts or holdings of those cases require such an outcome here. Indeed, in *Goldberg v. Administrative Hearing Commission of Missouri,* 609 S.W.2d 140 (Mo. banc 1980), cited by CSD, the Supreme Court stressed the importance of harmonizing statutes when possible, and refused to hold the statutes under consideration to be repugnant to each other.

"Statutes relating to the same subject are to be considered together and harmonized if possible *so as to give meaning to all provisions of each.*" *State ex rel. Lebeau v. Kelly*, 697 S.W.2d 312, 315 (Mo. App. E.D. 1985) (emphasis added).

Case law cited by Respondents in the Trial Court actually supports harmonization over the harsh result they advocate. One such case, *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578 (Mo. App. W.D. 2007), cited by CSD, clearly requires that "[i]f two statutes appear to conflict, we attempt to reconcile the language to give effect to both." *Id.* at 581.

Missouri law directs that a Court "must construe [a] statute in light of the purposes the legislature intended to accomplish and the evils it was intended to cure." *Moats v. Pulaski County Sewer Dist. No. I.*, 23 S.W.3d 868, 871 (Mo. App. S.D. 2000) (quoting *Wilson v. Director of Revenue*, 873 S.W.2d 328, 329 (Mo. App. E.D.1994). *See also, State ex rel. Casey's General Stores, Inc. v. City of West Plains*, 9 S.W.3d 712, 717 (Mo. App. S.D. 1999) (court should examine "problem in society" in determining legislative intent); *State ex rel. Rhodes v. Crouch*, 621 S.W.2d 47, 49 (Mo. banc 1981) (statute should be given meaning in light of its objectives).

Here, both SB 781 and the Unaccredited District Tuition Statute can be given full meaning as applied to SLPSD. They apply to different situations and are intended to cure distinct problems. Indeed, the Unaccredited District Tuition Statute arguably is the more specific provision, addressing the narrow circumstance in which a district no longer is accredited.

The Unaccredited District Tuition Statute represents the legislature's effort to

ensure vindication of the guarantee to a free public education afforded by Art. IX, § 1 (a) of the Missouri Constitution. See *Kansas City v. School of Kansas City*, 356 Mo. 364, 201 S.W.2d 930 (Mo. 1947) ("The duty to provide for free public education is vested in the legislature."). SB 781, and the settlement terms incorporated therein, are barren of any terms suggesting that the legislature intended to eviscerate the precious rights created by the Unaccredited District Tuition Statute. Rather, SB 781 was intended to resolve a longstanding desegregation case. *Board of Education, supra*, 229 S.W.3d at 163.

Undoubtedly, the *Liddell* settlement agreement sets out a transfer plan in detail. LF 312; LF 371, *et seq.* (Appendix C); LF 408, *et seq.* (Appendix D). However, Respondents ignore the reality that, although both the Unaccredited District Tuition Statute and SB 781 address transfer activity, each exists to provide an independent remedy for a discrete problem. SB 781 attempts to rectify past segregation, whereas §167.131 enables pupils residing in an accredited district to obtain education at schools that have been deemed competent by DESE. Consequently, this Court should reject Respondents' strained arguments that the legislature intended SB 781 to work a "silent repeal" of this important law.

Respondents further argued below that the different funding mechanisms for the two types of transfers contemplated by SB 781 and § 167.131, RSMo, cannot coexist. However, they provided no authority for this position, and simply posited that financial disaster would occur if the Trial Court were to rule for Parents. Surely, however, rank speculation as to possible financial problems should not convince this Court to disregard a certain legislative mandate.

Moreover, because SB 781 and the Unaccredited District Tuition Statute deal with two different types of transfers (one to remedy segregation, and the other of general applicability dealing with any unaccredited district), it seems normal that the two programs would have different funding mechanisms. Should CSD or TSD believe that the General Assembly made a poor policy decision in imposing on SLPSD the financial burden of ensuring that its resident pupils receive their constitutionally guaranteed free public education, they should lobby for a change in the law. (*See* discussion of *State ex rel Burnett v. School District of Jefferson*, 335 Mo. 803, 74 S.W.2d 30 (Mo.1934) in Point III, infra.)

B. *The Respondents' Construction Frustrates the Legislature's Intent Regarding Unaccredited Schools and Impairs the Missouri Constitutional Guarantee of A Free Public Education.*

Were this Court to embrace Respondents' construction of the Unaccredited District Tuition Statute and SB 781, SB 781 would be rendered unconstitutional. Respondents argue SB 781 causes § 167.131, RSMo, to be uniquely inapplicable to residents of SLPSD; under their construct, however, residents of every other school district in Missouri are fully protected by the Unaccredited District Tuition Statute. Their view of the interplay between SB 781 and the Unaccredited District Tuition Statute makes SB 781 the engine of unconstitutionality: it would deprive only City pupil residents of the guarantee of an adequate free public education conferred by Art. IX,

§ 1(a) of the Missouri Constitution.

Thus, Respondents' reading of SB 781 causes that legislation to run afoul of the equal protection guarantees set forth in Article I, § 2 of the Missouri Constitution, and the Fourteenth Amendment to the United States Constitution. Manifestly, this Court must interpret the Unaccredited District Tuition Statute in a manner that preserves its constitutionality, so long as such a reading is reasonable. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W. 2d 822, 828 (Mo. banc 1991). Here, Parents' interpretation not only implements the plain meaning of the statute, it avoids the dilemma of constitutional infirmity that Respondents' construction produces.

Parents' interpretation of the Unaccredited District Tuition Statute is also directly supported by the Missouri Constitution's guarantee that all Missouri children shall receive a free public education:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.

Mo. Const. art IX, §1(a). The Supreme Court of Missouri has remarked how the seemingly redundant use of the use of both the terms "free" and "gratuitous" in fact "emphasized and underscored the intention that these schools were to provide free public education." *Concerned Parents v. Caruthersville School Dist. 18*, 548 S.W.2d 554, 559

(Mo. banc 1977).[8] The Unaccredited District Tuition Statute gives life to this guarantee by directing that, when a school district is unable to competently perform its required function of providing an adequate education to its student population, the pupils who reside in that district may go elsewhere and receive an adequate education, free of charge.[9] Respondents' position that, of all the children in Missouri, only those residing in the City are denied the ability to escape an unaccredited school district without having to pay for an education that is constitutionally guaranteed to be free, is morally and

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[8] After Missouri adopted its original constitution in 1820, it embraced "the Jeffersonian concept that education is fundamental to democracy…." Thus, the Missouri Constitution of 1865 required the legislature to "establish and maintain free schools for the gratuitous instruction" of the State's children. *Concerned Parents*, supra, 548 S.W. 2d at 558-59. Further, the maintenance of a public school system, in implementation of this constitutional mandate, is at first the responsibility of the legislature. *State ex inf. Eagleton ex rel. Reorganized School Dist. v. Van Landuyt*, 359 S.W.2d 773, 777-78 (Mo. 1962).

[9] Notably, the Unaccredited District Tuition Statute requires that an unaccredited district pay the special tuition bill to be prepared by the receiving district. This allocation of the financial burden is eminently sensible, as the unaccredited school district continues to receive taxpayer revenues while it is unworthy of accreditation; indeed, Parents' very own tax dollars continue to support the unaccredited SLPSD.

intellectually unfathomable.

In fact, Respondents' position leads to the conclusion that the State, TSD and the accredited county school districts would be in contempt of the federal court decree approving the 1999 settlement of the desegregation case if they were to abide by the Unaccredited District Tuition Statute. That result would be perverse and is unthinkable, as the very purpose of the desegregation case settlement was to further afford a remedy for the unconstitutional racial segregation in the City and to improve the quality of education for City students. If Respondents are correct, far fewer black students will have the opportunity to transfer to predominantly white schools in the County, the potential for greater integration will be thwarted, and the overwhelming majority of City pupils will be denied a free quality education.

Saliently, Parents' view of the law will promote integration by allowing black children who reside in the City to attend accredited schools in the county, whereas the Respondents' position would stifle this process. Surely, this cannot be what Judge Limbaugh intended when he entered his March 12, 1999 Memorandum and Order approving the settlement of *Liddell.*

III. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's motion for summary judgment because § 167.151, RSMo does not limit Parents' rights under § 167.131, RSMo in that the discretion regarding admittance of pupils given to school districts under § 167.151, RSMo is specifically revoked as to Pupils whose rights are being asserted under § 167.131, RSMo.

1. Introduction

CSD founds its right to summary judgment, in part, on the provisions of § 167.151, RSMo. LF 8. CSD argues that, because § 167.151 gives a school district discretion to admit pupils not entitled to free instruction in that district, that discretion somehow also exists with respect to pupils asserting their rights under § 167.131, RSMo.

CSD's contention is untenable. First, § 167.151 makes it clear that it does not apply to student transfers pursuant to the Unaccredited District Tuition Statute. Moreover, CSD's argument that it has discretion under the Unaccredited District Tuition Statute to decline to admit students is not germane to this Court's disposition of Parents' claims because it is undisputed that the Pupils, whose rights are being asserted in this case, already attend CSD schools.

2. Standard of Review

The propriety of summary judgment is purely an issue of law, and appellate review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court of Appeals reviews the record in the light most favorable to the party against whom summary judgment was entered. *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.; Rule 74.04(c).

Moreover, this case involves interpretation of a statute, which is a question of law; such an issue is reviewed *de novo*. *Dodson v. City Of Wentzville*, 216 S.W.3d 173,176

(Mo. App. E.D. 2007).

3. Discussion

Section 167.151, RSMo, the basis for CSD's claim that it has discretion to reject students from an unaccredited district, states: "[t]he school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them, *except as provided in sections 167.121 and 167.131*." (emphasis added). So, this statute, by it very terms, excepts the Unaccredited District Tuition Statute from its ambit.

Further, the Unaccredited District Tuition Statute explicitly provides that "each pupil shall be free to attend the public school of his or her choice." §167.131.2. These statutes, read harmoniously, direct that a school board may exercise discretion in admitting pupils, *except* when the Unaccredited District Tuition Statute is at issue.

CSD cited below *State ex rel Burnett, supra,* to support its contention that § 167.151 somehow relieves it from its ministerial duties pursuant to § 167.131. However, this case actually supports Parents' position. The relator in *Burnett*, a minor, resided in a school district that did not provide any classes above the eighth grade. 74 S.W. 2d at 31-32. Relator sought to attend high school in a neighboring district, and to have her home district pay the tuition charges. *Id*. She based her action on the predecessor of § 167.131 as it existed in 1934. That version provided, in pertinent part:

> The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall

> pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered…

Id., at 811. The *Burnett* Court concluded that, if admitted to the neighboring school district, Relator would not be responsible for the tuition. The Court observed the statute "will be searched in vain for any provision indicating that respondents are under any legal duty or compulsion to admit relator." *Id.*, at 34.

However, since the *Burnett* decision, the legislature has made telling revisions to the Unaccredited District Tuition Statute. These amendments refute CSD's contention that it has discretion to decline to afford a pupil his or her rights under § 167.131, RSMo. The legislature had first amended the statute to provide that "each pupil shall be free to attend the public school of his or her choice; but no school shall be required to admit any pupil." HB 319, 1935 Mo. Laws 352. However, in 1993 the General Assembly took decisive action to make it clear that a pupil who resides in an unaccredited district, and who desires to attend a school in a particular adjoining accredited school district, must be accommodated by that accredited district. It did so by eliminating from § 167.131.2 the language "but no school shall be required to admit any pupil." SB 380, 1993 Mo Laws 581. *See* Appendix hereto, pp. A-7 through A-9.

Thus, the *Burnett* court "searched [§ 167.131] in vain" for a requirement that a school district must admit pupils from unaccredited adjoining districts, but then the legislature filled that void in 1993, supplying just the mandate that the *Burnett* court

found conspicuously absent. This Court should presume that the legislature intended to substantively change the law via this 1993 amendment, and that it was aware of the decision in *Burnett* when it made this important statutory change. *Carter v. Pottenger*, 888 S.W.2d 710, 714 (Mo. App. S.D. 1994). The only sensible reading of the legislature's elimination of language expressly affording an accredited district discretion to decline to accommodate a pupil from an unaccredited district is that it intended to make admittance mandatory, and no longer discretionary.

Moreover, under CSD's construction of §167.151, RSMo, school districts would also enjoy the discretion to reject students assigned to them by the Commissioner of Education pursuant to §167.121.1, RSMo. That result would be forced by the fact that §§ 167.131 and 167.121 both receive the same treatment in § 167.151.1. The result that a district could thwart the Commissioner's assignments pursuant to § 167.121.1 is illogical; this illogic further reveals the fallaciousness of TSD's contention as to the effect of § 167.151 in this case.

Finally, CSD contended below that the plain meaning interpretation of these statutes could not be correct because it would lead to "absurd and untenable" results. No evidence was adduced below regarding how many students would transfer out of SLPSD, nor is there any evidence of whether adjacent districts would suffer any harm. Parents are willing to assume that the Respondents' fear of dire consequences is genuine (even though it is not well-grounded). But, as the *Burnett* Court held, "the remedy is legislative rather than judicial. If unforeseen difficulties have disrupted the plan, it may be repaired or changed by appropriate legislation. We should not try to meet the emergency by

judicial misinterpretation of the plan." *Burnett, supra,* 74 S.W.2d at 34.

Finally, this Court is spared from resolving CSD's contention that an accredited district has discretion to decline to admit students from an unaccredited district because CSD already has admitted the Pupils. All the Pupils presently attend CSD schools, and this Court need only determine that it must treat them in accordance with the Unaccredited District Tuition Statute: CSD must prepare special tuition bills for each of these already admitted Pupils pursuant to § 167.131, RSMo., and send those bills to TSD for payment.

IV. The Trial Court erred in its November 5, 2008 amended judgment granting CSD's motion for summary judgment to the extent that the amended judgment can be supported by the existence of personal tuition agreements, in that there is no fatal inconsistency between the fact that Parents were constrained to enter into those agreements by virtue of CSD's refusal to comply with § 167.131, RSMo, and the separate statutory obligation on the part of CSD to comply with that statute.

1. Introduction

Simply because Parents have agreed to pay CSD, it does not follow that CSD acted lawfully in refusing to follow §167.131, RSMo, with respect to their children, or that TSD is relieved of its obligation to pay CSD. Parents are paying an obligation that is statutorily the responsibility of TSD, and that they have been coerced into paying by virtue of CSD's refusal to comply with §167.131.

2. Standard of Review

The propriety of summary judgment is purely an issue of law, and appellate review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court of Appeals reviews the record in the light most favorable to the party against whom summary judgment was entered. *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.; Rule 74.04(c).

Moreover, because this case involves interpretation of a statute, which is a question of law, the Trial Court's rulings are reviewed *de novo*. *Dodson v. City Of Wentzville*, 216 S.W.3d 173, 176 (Mo. App. E.D. 2007).

3. Discussion

The Pupils attended CSD schools during this lawsuit pursuant to individual contracts identified as personal tuition agreements. LF 480-506. CSD has previously asserted the argument that the contractual obligations Parents incurred by signing the tuition agreements are binding, such that Parents should not be allowed to contend that the agreements are void.

This argument is a straw man, in that Parents have never contended that they will not or should not fulfill the tuition agreements should the courts ultimately determine that they are not entitled to any relief pursuant to the Unaccredited District Tuition Statute.

However, CSD has a separate and unconnected obligation to comply with § 167.131 and seek payment from TSD.

It cannot be said that the tuition agreements control over existing statutory obligations of the parties. Rather, "[i]t is a fundamental rule that the laws which exist at the time and place of making a contract, and at the place where it is to be performed, affecting its validity, construction, enforcement, termination and discharge, enter into and form a part of the contract as if they were expressly referred to or incorporated therein". *Sharp v. Interstate Motor Freight System*, 442 S.W.2d 939, 945 (Mo. banc 1969).

Therefore, should this Court agree with Parents' position with respect to the applicability of §167.131, the existence of their rights thereunder would cause a failure of consideration with respect to their tuition agreements. Those agreements could then be terminated on that basis. *Adbar, LC v. New Beginnings*, 103 S.W. 3d 799, 801 (Mo. App. E.D. 2003)

CSD consistently has refused to comply with the Unaccredited District Tuition Statute insofar as its treatment of the Pupils has been concerned. LF 261 (Senti Affidavit); LF 446 (Senti letter). Under these circumstances, when the cost of the education of Pupils rightfully should have been charged by CSD to TSD, Parents have a right to restitution from CSD for the personal tuition payments they have made to CSD. *See Petrie v. Levan*, 799 S.W. 2d 632, 634-35 (Mo. App. W. D. 1990) (restitution lies to cause a defendant to disgorge to the plaintiff a benefit that it unjustly gained from the plaintiff).

Saliently, CSD did not raise any issue with respect to the Parents' personal tuition

agreements in its opening motion for summary judgment. LF 10-11. Only after the Parents filed their cross-motion, LF 448-49, did CSD seek to inject those agreements into the case. *See* CSD's Statement of Additional Facts in Support of Its Motion For Summary Judgment, LF 479-506. Parents objected to the untimeliness of CSD's effort to turn this case on an irrelevant defense that it had not even pled. Supp. LF 103, n. 4.

Regardless of the procedural propriety of CSD's tactic, it is manifest that personal tuition agreements do not impede this Court's ability to reach and resolve the important issues presented by this appeal. Parents seek a declaration that "CSD is under a statutory mandate to [prepare special tuition bills] for each of the Pupils and to seek payment of those Statutory Tuition charges from…TSD." Amended Petition, Count I, wherefore clause, LF 526. TSD and CSD dispute that §167.131, RSMo, imposes any corresponding obligations on them.

Consequently, the declaratory judgment claim is ripe for resolution by this Court. In short, this Court ought to resolve the important issues as to whether the Pupils have rights under the Unaccredited District Tuition Statute and lay to rest the contentions of CSD and TSD as to its supposed singular inapplicability to SLPSD.[10]

[10] Furthermore, the issues implicated by the declaratory judgment action certainly are of "general public interest and importance." *Mo. Cable Television Ass'n v. Mo Public Serv. Comm'n*, 917 S.W. 2d 650, 652 (Mo. App. W.D. 1996). Thus, should this Court concur with the Court of Appeals as to the mooting effect of the personal tuition agreements, it should nevertheless exercise its discretion to address and resolve the

V. The Trial Court erred in its November 5, 2008 amended judgment, denying Parents' motion for summary judgment, because it misapplied § 167.131, RSMo, in that the Pupils reside within SLPSD, an unaccredited school district, and attend CSD schools, thereby obligating CSD to prepare special tuition bills for the Pupils, and requiring TSD to then pay those bills.

1. Introduction

Parents initiated this lawsuit because: (1) the Pupils reside in a "district…that does not maintain an accredited school"; [11] (2) these children already attend accredited schools in CSD as Personal Tuition Students; (3) no accredited schools exist in SLPSD; and (4) both Respondents have refused to comply with the Unaccredited District Tuition Statute, §167.131. Parents invoked the Unaccredited District Tuition Statute in seeking a declaration that CSD is under a statutory mandate to prepare a special tuition bill for each of the Pupils who already attend CSD schools and that TSD must pay them.

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declaratory judgment issues under the capable of repetition, yet evading review doctrine. *Jackson County Board of Election Commissioners v. City of Lee's Summitt*, 277 S.W. 2d 740, 745 (Mo. App. W.D. 2008). This Court should also be aware that the record does not indicate that any of the Parents are subject to a personal tuition presently.

[11] §167.131.1, RSMo.

2. Standard of Review

The propriety of summary judgment is purely an issue of law, and appellate review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court of Appeals reviews the record in the light most favorable to the party against whom summary judgment was entered. *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. banc 1997). Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.; Rule 74.04(c).

Moreover, because this case involves interpretation of a statute, which is a question of law, the Trial Court's rulings are reviewed *de novo*. *Dodson v. City Of Wentzville*, 216 S.W.3d 173, 176 (Mo. App. E.D. 2007).

3. Discussion

A. Review of the Trial Court's Denial of Appellants' Motion for Summary Judgment is Proper.

Generally, an order denying a motion for summary judgment is not a final judgment and is not reviewable on appeal. *Reben v. Wilson*, 861 S.W.2d 171, 175 (Mo. App. E.D.1993). However, the denial of a motion for summary judgment is reviewable if the merits of that motion are intertwined with the issue of the correctness of an appealable order granting summary judgment to another party. *Stone v. Crown Diversified Industries Corp.*, 9 S.W.3d 659, 664 (Mo. App. E.D.1999) (citing *Kaufman v. Bormaster*, 599 S.W.2d 35, 38 (Mo. App. E.D.1980)).

Here, Parents and Respondents filed cross-motions for summary judgment in the

Trial Court. LF 7, 263, 448. In response to Respondents' motions for summary judgment, the Trial Court issued a final amended judgment in this case, resolving all claims of the parties. LF 529. This amended judgment therefore was an appealable order granting summary judgment to another party.

Parents' motion for summary judgment is inherently intertwined with the Respondents' motions, in that they all turn on the same set of undisputed facts and interpretation of the same statute; *i.e.*, §167.131, RSMo. Consequently, this Court may review the Trial Court's denial of Parents' motion.

B. *The Unaccredited District Tuition Statute Unambiguously Requires CSD To Prepare A Special Tuition Bill For Each Pupil, And TSD To Then Pay Each Such Bill.*

The Unaccredited District Tuition Statute provides, in pertinent part:

1. The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools as established in section 161.092, RSMo, shall pay the tuition of and provide transportation consistent with the provisions of section 167.241, RSMo, for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.
2. The rate of the tuition to be charged by the district attended and paid by the sending district is the per pupil cost…. Subject to the limitations of this section, each pupil shall free to attend the public school of his or her choice.

§167.131, RSMo.

The Unaccredited District Tuition Statute nearly rings with clarity. Therefore, this Court should use the ordinary, dictionary-derived meanings of the words and phrases the legislature employed in determining what the Unaccredited District Tuition Statute means and requires; its task ends there, rendering improper any resort to rules of statutory construction. *Abrams, supra*, 819 S.W. 2d at, 340. The "intent made evident by the plain language" of a statute is controlling. *M.A.B.*, *supra*, 909 S.W. 2d at 672.

Under the uncomplicated set of facts this case presents, the Unaccredited District Tuition Statute requires that CSD prepare special tuition bills for each of the Pupils, and that TSD then pay them. This result follows from a plain reading of this law, and its application to the undisputed facts.

This result, moreover, not only is consistent with the Missouri Constitution, it gives it efficacy in the face of a severe social hardship whereby students who reside in the City have been deprived of a meaningful public education. See Mo. Const., Art. IX, §1(a) (conferring right to free public education). Respondents' proffered construction of the Unaccredited District Tuition Statute renders it a statutory weapon against City students' constitutional (and statutory) rights to a free and adequate public education. That position not only defies the plain meaning of this statute's words, it would undermine achievement of its salutary purpose.

A straightforward application of the Unaccredited District Tuition Statute to the uncontroverted facts herein compels the conclusion that this Court should declare that CSD is obligated to prepare special tuition bills for the Pupils, and that TSD is required to

then pay them.

Conclusion

For the reasons stated above, this Court should reverse the Trial Court's November 5, 2008 amended judgment granting TSD's and CSD's motions for summary judgment and denying Parents' motion for summary judgment. Additionally, pursuant to this Court's authority under Missouri Supreme Court Rule 84.14 to give such judgment ought to be given and to dispose finally of the case, this Court should grant Parents' motion for summary judgment, and issue the declaratory judgment that Parents sought in the Trial Court. Finally, this Court should remand this case to the Trial Court with specific directions that it take evidence on Parents' claims for restitution, and then issue such judgment as it determines to be appropriate with respect to those claims.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that this Substitute Brief of Appellants was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 9,252 of text. The accompanying diskette, containing a complete copy of Substitute Brief of Appellants, has been scanned and found to be virus-free. The name, address, bar and telephone number of counsel for Parents are stated herein and the brief has been signed by the attorney of record.

_____

Elkin L. Kistner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Substitute Brief of Appellants, along with a copy of the same brief on a diskette, scanned and determined to be virus-free, were served hand-delivered, on July ___, 2009, to:

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