IN THE SUPREME COURT OF MISSOURI

Number SC90236

JANE TURNER, ET AL.

Appellants

vs.

SCHOOL DISTRICT OF CLAYTON, THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, and THE TRANSITIONAL SCHOOL DISTRICT OF THE CITY OF ST. LOUIS

Respondents

On Appeal from the Circuit Court of St. Louis County,
Cause Number 07SL-CC00605
The Honorable David Lee Vincent, III, Division 9

SUBSTITUTE REPLY BRIEF OF APPELLANTS

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I. Senate Bill 781 Does Not Preempt § 167.131 As Applied To The City Of St. Louis.

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See State ex rel. Burnett v. School District of Jefferson, 335 Mo. 803, 74 S.W. 2d 30 (Mo. 1934)

§ 167.131, RSMo

II. 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.

§ 167.151, RSMo

III. The Parents' Tuition Agreements With CSD Do Not Prohibit Them From Seeking Relief.

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

Chicago v. Northwest Railroad, 82 Wis. 2d 514, 263 N.W. 2d 189(1978)

§ 167.131, RSMo

ARGUMENT

I. Senate Bill 781 Does Not Preempt § 167.131 As Applied To The City Of St. Louis.

Parents initiated this lawsuit because:

(1) their Pupil children reside in a "district…that does not maintain an accredited school"; [1] (2) their children already attend accredited schools maintained by CSD; (3) both Respondents refused to comply with §167.131; and (4) §167.131.2 directs that "subject to [its] limitations…, each pupil shall be free to attend the public school of his or her choice."

Prior to SLPSD's loss of accreditation, Parents arranged for nearly all the children involved herein to attended CSD schools as personal tuition students [2] due to the longstanding poor performance of the SLPSD schools. However, the accrual of their rights under §167.131 at the time of SLPSD's change in status in early 2007 [3] motivated Parents to file this lawsuit because the mandate of the statute is clear and judicial relief should lie to enforce an unambiguous statute. Although Respondents may genuinely believe that this statutory mandate, if applied to SLPSD's unfortunate circumstance, will produce practical problems, Missouri courts do not engage in "judicial side-stepping" or

[1] §167.131.1, RSMo.

[2] *See* §167.151.1, RSMo.

[3] *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).

result-oriented adjudication that fails to respect the constitutionally mandated separation of powers doctrine.[4] Thus, Parents believe that this Court should decline Respondents' multifarious efforts to lead it to dabble in judicial legislation and, instead, stay true to its limited role in our system of government by enforcing the unambiguous command of §167.131.

CSD and TSD are asking this Court to rewrite legislation to reach the conclusion that SB 781 trumps the applicability of §167.131 to SLPSD. Neither CSD nor TSD has identified any language in SB 781 expressly repealing the applicability of §167.131, RSMo, to SLPSD. Nor has either seriously addressed the principle that courts should be reluctant to infer a repeal by implication. *See* Appellants' Substitute Brief, p. 23. Respondents simply are asking this Court to *construe* SB 781to partially repeal §167.131 because of the supposed incompatibilities between the two enactments.

However, resort by a court to statutory construction should be rejected if the words of a statute provide unambiguous guidance as to the legislature's intent. *South Metropolitan Fire Dist. v. City of Lee's Summitt,* 278 S.W. 3d 659, 666 (Mo. banc 2009) (rules of statutory construction should not be applied rigidly; application of such rules, in fact, often produces conflicting results); *Parktown Imports, Inc., supra,* 278 S.W. 3d at

[4] *Parktown Imports, Inc. v. Audi of America,* 278 S.W. 3d 670 (Mo. banc 2009); *Committee For Educational Equality v. State of Mo.,* 2009 WL 2762464 (Mo. banc 2009).

673 (Missouri jurisprudence rejects result-oriented adjudication; courts should apply the plain language of a statute and refrain from "judicial side-stepping").

This Court should he transparent efforts of CSD and TSD to concoct insuperable repugnancies between SB 781 and §167.131 to serve their selfish joint objective of avoiding the applicability of §167.131 to SLPSD's loss of accreditation. The mandate of §167.131 plainly directs that the Pupils here have the right to expect CSD to prepare special tuition bills for them, as directed by that statute, and that TSD must then pay them.[5]

Moreover, Respondents really have no response to the unavoidable conclusion that their invitation to engage in judicial legislation causes SB 781 to be the engine of unconstitutionality. Indeed, Respondents appear to hope this Court will ignore the unavoidable fact that under their construct, SB 781 would become an instrument, unique to the City of St. Louis, that actively *prevents* transfers that otherwise would have been allowed to occur under §167.131. It is uncontroverted that the voluntary transfer program, as created by SB 781, allows some black students to escape the substandard

[5] "A government of laws means a government in which laws, authorized to be made by the legislative branch, are equally binding upon all officers and executives of the legislative and judicial branch as they are upon all other citizens." *State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 137 S.W. 2d 532, 536 (Mo. 1940).

schools in the City of St. Louis. *See* Supp. L.F. 58, 65, 135 n. 2.[6] Respondents' construction of SB 781 would render it violative of precious equal protection rights.[7] The

[6] Although no Missouri Court has determined that Mo. Const., art. IX, §1(a) provides a right to accredited school education, this Court has repeatedly held that it is the prerogative of the legislature to implement this constitutional mandate. *State ex rel. Eagleton v. Van Landuyt*, 359 S.W. 2d 773, 777-78 (Mo. 1962); *Committee For Educational Equality*, *supra*, 2009 WL 2762464, **8-10. The legislature has so spoken through its passage of §167.131.

[7] The equal protection rights of all pupils would be violated because only they, and no pupil residents of any other district, would be deprived of the relief from inadequate education that §167.131 affords. And, although some black students may be afforded an alternate escape route through the voluntary transfer program, that program does not accept all black pupil residents. See Supp. L.F. p. 135, n.2. Respondents do not dispute that their interpretation of SB 781 results in a circumstance whereby only a small portion of black pupil residents, and no members of other racial groups, in the City of St. Louis would be able to attend an accredited school. They would have the Court view SB 781 as a set of "uber-statutes" that, without any textual support, justify treatment of city pupils as second class citizens who are shorn of the otherwise universal right to attend an accredited school. This result is illogical and unconstitutional. Nothing in Parents Involved In Community Schools v. Seattle School District No. 1, 551 U.S. 207, 127 S. Ct. 2738 (U.S. 2007) suggests anything to the contrary. Rather, it held that race-based

legislature could not have intended that result. See *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W. 2d 822, 838 (Mo. banc 1991). Consequently, this Court should reject the argument regarding the trumping effect of SB 781 on §167.131 and enforce the plain meaning of the statute that is intended to ensure all Missouri pupils receive an adequate free public education. If Respondents do not like this result, they should join forces with all the other powerful governmental institutions that also apparently seek to avoid a straightforward application of §167.131 to SLPSD, and lobby the legislature for an amendment to, or repeal of, this statute. *See State ex rel. Burnett v. School District of Jefferson*, 335 Mo. 803, 74 S.W. 2d 30, 34 (Mo. 1934).

II. 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

The text of §167.131 belies the contention that an accredited district in an adjoining county has discretion to decline to accept a student residing in an unaccredited

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classifications in school desegregation schemes would be subject to strict scrutiny, and the Supreme Court ruled the plans under review were unconstitutional. The Court succinctly observed: "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race." Id., p. 2768. The Respondents' effort to make SB 781 a testosterone-enhanced engine of silent repeal of important statutory and constitutional rights would not withstand strict scrutiny, not by a long shot.

district in an adjoining county: "Subject to the limitations of this section, each student shall be free to attend the public school of his or her choice." §167.131.2, RSMo. Section 167.151, RSMo, plainly addresses only admittance discretion directly arising from tuition-pay students and does not modify the plain language of the Unaccredited District Tuition Statute, which explicitly prohibits restrictions on a pupil's ability to go to school in an accredited school of his or her choice. § 167.131.2, RSMo.

As Parents have previously explained, under Respondents' suggested construction of §167.151, school districts would necessarily enjoy discretion to refuse to accept a student assigned to them by the Commissioner of Education pursuant to § 167.121.1, as both 167.121 and 167.131 receive the same treatment in 167.151.1. Neither Respondent has refuted that such a result necessarily follows from their reading of §167.151.1.

However, §167.020, RSMo, is now for the first time advanced as a basis for forcing a reading of §167.151 that somehow causes it to afford districts discretion to decline to accept pupils from unaccredited districts pursuant to §167.131. Parents find the argument wholly confusing, and respectfully suggest that any objective, reasonably intelligent reader would react to it with bewilderment as well. To the extent that §167.020, as part of the Safe Schools Act, is argued to have identified and exhausted the universe of situations in which pupils could be admitted to a district's schools, it certainly does not specify that. More tellingly, it does not mention §167.131's situation, where a pupil resides in an unaccredited district and inarguably can be admitted to school in a neighboring district. Thus, although Parents believe the point to be irrelevant here, it is

obvious that§167.020 does not specify every circumstance in which a pupil can be admitted to a school in a particular district.[8]

III. The Parents' Tuition Agreements With CSD Do Not Prohibit Them From Seeking Relief.

The Parents' children attended CSD schools during this lawsuit pursuant to individual contractual agreements. Simply because Parents have agreed to pay CSD, it does not follow that CSD acted lawfully in refusing to follow §167.131 with respect to these families, or that TSD is relieved of its obligation to pay CSD. The Parents are, and have been, paying to CSD an obligation that is statutorily the responsibility of TSD.

Under these circumstances, when the cost of the education of these children rightfully should have been charged by CSD to TSD, the 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).

Respondents incorrectly assert that Parents failed to challenge the Tuition

[8] Neither *Washington v. Ladue School Dist.*, 564 F. Supp 2d 1054 (E.D. Mo. 2008) nor *Board of Educ. of City of St. Louis v. Elam*, 70 S.W. 3d 448 (Mo. App. E.D. 2000) support this awkward construction of the interplay between §167.020 and §167.131. Both simply address the issue of the residency requirement set forth under §167.020 for normal qualification to attend a school where one lives.

Agreements in the trial court, and that they have raised a new argument that the contracts are "void". However, Parents' argument in its Substitute Brief in this Court is the same as it was in the trial court: "It is inequitable for CSD to retain the Personal Tuition Payments because its receipt of the Personal Tuition Payments was caused by its refusal to abide by §167.131, R.S.Mo., and issue the Statutory Tuition bills to BOE and TSD." L.F. 526, Amended Petition, ¶ 22.

Executive Board of Missouri Baptist Convention v. Windermere Baptist Conference Center, 280 S.W.3d 678 (Mo. App. W.D. 2009) does not suggest that Parents have failed to preserve any arguments. In that case, the plaintiff pled only that the defendant's "Authorized Charter" should be rescinded for failure of consideration and constructive fraud; plaintiff did not plead that it was seeking rescission of other agreements by which the plaintiff transferred property and operations to defendant. *Id.*, at 696-697. The court refused to consider reversing the trial court for its failure to rescind those other contracts. *Id.* Here, the only contracts under consideration are those directly addressed by the First Amended Petition.

Moreover, the contention that Parents have waived all arguments connected with the Tuition Agreements by failing to delineate them to Respondents' satisfaction in the summary judgment proceeding below is, sadly, perversely ironic. CSD filed the first motion for summary judgment in the trial court, and made no mention of the Tuition Agreements. Only after the Parents filed their cross-motion, LF 448-49, did CSD raise any argument based upon the Agreements. *See* CSD's Statement of Additional Facts in Support of Its Motion For Summary Judgment, LF 479-506. Now CSD attempts to rely

on the Tuition Agreements to support not the denial of Plaintiff's Motion for Summary Judgment, but the granting of CSD's Motion. Under the law cited by CSD, it actually is CSD that has waived its ability to argue about the Tuition Agreements. [9]

By pleading and arguing in the trial court that TSD and CSD were acting unlawfully, and that they were entitled to restitution of the payments they had made should the trial court agree with their interpretation of §167.131,[10] the Parents were fairly asserting their contention that the agreements were voidable (Parents do not argue the agreements were void, as Respondents suggest). *See, e.g.,* Restatement (2d) Contracts, §§240a, 272 (describing circumstances under which restitution may be appropriate due to frustration of purpose of contract); *Arons v. Charpontier,* 828 N.Y.S. 2d 482, 36 A.D.3d 636, 637 (2007); *Chicago v. Northwest Railroad,* 82 Wis.2d 514, 263 N.W. 2d 189, 193-94 (1978). Here, it is manifest that the Tuition Agreements are based on the premise that relief under §167.131 would be unavailable, either because the legal rights thereunder had not yet accrued, or because the Respondents refused to comply with the statute. Thus, should this Court agree with Parents as to the proper application of that statute here, the purpose of the Tuition Agreements will have, thankfully, been frustrated, and the Parents would then be entitled to restitution of their personal tuition payments.

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[9] *See* Appellants' Substitute Brief, pp. 36-37. Furthermore, because CSD attempted to inject these agreements into the summary judgment record without having filed a pleading making them relevant to a claim or defense, they were improperly included. *Glasgow Enterprises v. Bowers,* 196 S.W.3d 625, 630 (Mo. App. E.D. 2006).

[10] L.F. 523-27.

Conclusion

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 as it ought to give and to dispose finally of the case, this Court should grant Parents' motion for summary judgment, and issue the declaratory judgment that they 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 the Trial Court 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 Reply Brief of Appellants was prepared in the format of Microsoft Word, using Times New Roman typeface in font size 13. This Brief contains approximately 3011 words. The accompanying diskette, containing a complete copy of Substitute Reply 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.

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Elkin Kistner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Substitute Reply Brief of Appellants, along with a copy of the same brief on a diskette, scanned and determined to be virus-free, were served via U. S. Mail on September 14, 2009, to:

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