IN THE SUPREME COURT OF MISSOURI

Number SC92653

GINA BREITENFELD

Appellant

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 Numbers 07SL-CC00605/12SL-CC00411 (Consolidated)
The Honorable David Lee Vincent, III, Division 9

BRIEF OF APPELLANT GINA BREITENFELD

BICK & KISTNER, PC

Elkin L. Kistner #35287
Sean M. Elam #56112
101 South Hanley, Suite 1280
St. Louis, Missouri 63105
(314) 571-6823 (Phone)
(314) 727-9071 (Facsimile)
elkinkis@bick-kistner.com
Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

JURISDICTIONAL STATEMENT

Article V, section 3 of the Missouri Constitution provides "[t]he supreme court shall have exclusive appellate jurisdiction in all cases involving 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 and in all cases where the punishment imposed is death." "The grant of authority to this Court to exercise exclusive appellate jurisdiction over questions involving the validity of a statute or constitutional provision is limited to claims that the state law directly violates the constitution—either facially or as applied." *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997).

Here, the issue on appeal is whether a Missouri statute, § 167.131, R.S.Mo, is unconstitutional. Because the issue deals with claims that a statute violates the Missouri Constitution, this issue falls squarely within the exclusive appellate jurisdiction of this Court granted in Article V, section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Gina Breitenfeld hereby adopts and incorporates by reference the Statement of Facts of the Brief of Appellants State of Missouri and Attorney General Chris Koster, filed concurrently herewith. In addition, Breitenfeld offers the following supplemental statement of facts relevant to her argument.

Breitenfeld and her two natural children ("Pupils") are residents of the City of St. Louis, State of Missouri ("City"). Legal File ("LF") Vol. VIII, p 481; Vol. IX, p 506; Vol. X, p 539. 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 Vol. VIII, p 480; Vol. IX, p 505; Vol. X, p 538. "Since 1994, [SLPSD's] performance had been at or below minimally acceptable levels."[1] Therefore, rather than attend SLPSD schools, Breitenfeld enrolled the Pupils in public schools operated by Respondent School District of Clayton ("CSD").

In early 2007, and while the Pupils attended CSD schools, the Missouri Department of Elementary and Secondary Education ("DESE") stripped SLPSD of its accreditation.[2]

---

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.

Breitenfeld requested that CSD prepare special tuition bills for the Pupils and present the bills to SLPSD for payment pursuant to § 167.131, RSMo. (sometimes referred to herein as the "Unaccredited District Tuition Statute") LF Vol. V, p 287-288. The CSD Superintendent indicated, however, that CSD would not participate in any transfer plan established under § 167.131 RSMO. *Id.*; LF Vol. VIII, p 476.

On October 26, 2007, Breitenfeld (together with other named Plaintiffs that have since withdrawn from the litigation) brought suit against Respondents CSD, Board of Education of the City of St. Louis ("BOE"), and Transitional School District ("TSD")[3] seeking a declaratory judgment that, pursuant to § 167.131, RSMo, CSD must prepare special tuition bills for the Pupils and that SLPSD must pay those bills. LF Vol. I, p 28.

The Trial Court dismissed Appellant's case on summary judgment on November 5, 2008. LF Vol. X, p 559-560. The sole basis for the dismissal was the pronouncement that "§ 167.131 is not applicable to this case." LF Vol. X, p 560.

Breitenfeld pursued an appeal of the Trial Court's initial dismissal to the Eastern District Court of Appeals and finally to this Court. Thereafter, on June 23, 2010, this Court issued its opinion reversing the summary judgment and vindicating Breitenfeld's interpretation of § 167.131, RSMo in an opinion reported as *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010) ("Opinion"). LF Vol. XIV, pp 719-749.

In its Opinion, this Court made the following declarations of law as applied to the facts of this case:

[3] For convenience, BOE and TSD are collectively referred to as "SLPSD".

§ 167.131's unambiguous mandatory language requires unaccredited school districts to pay the tuition of its students who choose to attend an accredited school in an adjoining district." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d at 663.

***

§ 167.131, a straightforward and unambiguous statute, was specifically written to apply to the factual scenario of this case.... It is clear that § 167.131 applies to the transitional school district, that it requires the Clayton school district to admit the students and that it mandates the transitional school district pay the students' tuition." *Id.*, at 664.

***

"It is clear that § 167.131 applies to the transitional school district, that it requires the Clayton school district to admit the students and that it mandates the transitional school district pay the students' tuition." *Id.*, at 664.

***

"This Court determines the proper declaration is to recognize that § 167.131 was enacted to cover the factual scenario of this case…." *Id.*, at 668.

***

"The parents first claim that the circuit court erred in granting the transitional school district's motion for summary judgment because a plain

> reading of § 167.131 demonstrates that it applies to the transitional school district. They further assert that the plain and unambiguous language of § 167.131 mandates payment of their children's tuition under the circumstances presented in this case. *This Court agrees*." *Id.*, at 664 (emphasis added).

Thus, it is undisputed, and indisputable, that Breitenfeld has (and has had, since SLPSD's 2007 loss of accreditation) a right to relief under the Unaccredited District Tuition Statute.

Nevertheless, after this Court remanded this case to the Trial Court pursuant to the Opinion and its accompanying mandate, Respondents were then allowed to raise for the first time two affirmative defenses: that compliance with the Unaccredited District Tuition Statute was impossible; and that the Unaccredited District Tuition Statute violated Missouri Constitution Art X, §§ 16-24 (the "Hancock Amendment"). Over Breitenfeld's objection, Respondent Taxpayers intervened to also raise the Hancock Amendment as a defense. LF Vol. 22, pp 1107-1115, 1129-1141; Vol. 23, pp 1150-1156. Additionally, CSD filed a counterclaim against Breitenfeld for payment of tuition pursuant to Residency Affidavits. LF Vol. XVII, pp 866-882.

At trial, the parties stipulated and agreed that Breitenfeld resided in Clayton for two thirds of the 2009-2010 school year, but resided in SLPSD for one third of the 2009-2010 school year as well as all of the 2010-2011 and 2011-2012 school years. LF XXXI, p 1631, ¶ 2. Breitenfeld currently resides within the territory of the SLPSD.

The parties further stipulated and agreed that at all times during which Breitenfeld resided in the City, she intended that her children attend CSD schools pursuant to her claim of rights under R.S. Mo. § 167.131. LF Vol. XXXI, p 1631, ¶ 3.

For the 2009-2010 and 2010-2011 school years, Breitenfeld signed "Residency Affidavits" with CSD. LF Vol. XXVI, p 1347, 1351. Breitenfeld did not sign a Residency Affidavit for the 2011-2012 school year, although the Pupils were nevertheless allowed to attend CSD schools. Furthermore, Breitenfeld and CSD did not enter into personal tuition agreements (such as were the subject of the Opinion, 318 S.W.3d at 669-670) for the 2009-2010, 2010-2011 or 2011-2012 school year.

After a trial on the merits, the Trial Court entered judgment for Respondents on Breitenfeld's claim for declaratory judgment, finding that (1) because compliance with § 167.131 was "impossible", that the statute was "of no force and effect"; and (2) because § 167.131 violated the Hancock Amendment it was unenforceable. LF Vol. XXXVII, pp 1847-1862. On May 1, 2012, nearly five years after she brought suit under § 167.131, the Trial Court entered judgment for CSD on its Counterclaim and ordered Breitenfeld to pay CSD $49,133.33 in tuition costs. LF Vol. XXXVII, pp 1861-1862. Breitenfeld appeals to this Court from that judgment.

POINTS RELIED ON

I. The Trial Court erred in ruling that CSD was entitled to recover on its Counterclaim against Breitenfeld because the Trial Court erroneously declared and applied the law in that any decision to void § 167.131, RSMo, should not be applied retroactively to Breitenfeld.

In re Extension of Boundaries of Glaize Creek Sewer Dist., 574 S.W.2d 357 (Mo. 1978).

II. The Trial Court erred in ruling that CSD was entitled to recover on its Counterclaim against Breitenfeld because the ruling is not supported by substantial evidence and is against the weight of the evidence in that there is no substantial evidence regarding CSD's supposed damages.

III. The Trial Court erred in ruling that § 167.131, RSMo, was of no force and effect and that SLPSD and CSD were excused from compliance with § 167.131, RSMo, because the Trial Court erroneously declared and applied the law regarding the claimed affirmative defense of "impossibility", in that Missouri law makes no provision for such an affirmative defense as applied by the Trial Court so as to excuse a governmental entity's compliance with a statutory mandate.

§ 167.131, RSMo

George v. Quincy, O. & K. C. R. Co., 167 S.W. 153 (Mo. App. 1914)

Egenreither v. Carter, 23 S.W.3d 641 (Mo. App. E.D. 2000)

MacArthur v. Gendron, 312 S.W.2d 146 (Mo. App. 1958)

IV. The Trial Court erred in ruling that § 167.131, RSMo, was of no force and effect and that SLPSD and CSD were excused from compliance with § 167.131, RSMo, because the ruling is not supported by substantial evidence and is against the weight of the evidence in that there is no substantial evidence that compliance with § 167.131, RSMo, is impossible.

§ 490.065 R.S.Mo.

Doe v. McFarlane, 207 S.W.3d 52 (Mo.App. 2006)

V. The Trial Court erred in permitting Respondent Taxpayers to intervene, because the Trial Court erroneously declared and applied the law regarding intervention, in that Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") does not create a right to intervene and Respondent Taxpayers did not satisfy the criteria for permissive intervention under Rule 52.12(b).

Schnuck Mkts. Inc. v. City of Ballwin, 308 S.W.3d 748 (Mo. App. E.D. 2010)

Mo Const. Art X, § 23

Missouri Supreme Court Rule 52.12(b)

VI. The Trial Court erred in permitting SLPSD and CSD to challenge § 167.131, RSMo, as violating Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") because the Trial Court misapplied and erroneously declared the law, in that any constitutional challenge to § 167.131, RSMo was waived as it was not presented at the earliest possible moment that good pleading and orderly procedure permitted.

St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708 (Mo. 2011)

*Walton v. City of Berkel*ey, 223 S.W.3d 126 (Mo. banc 2007)

VII. The Trial Court erred in ruling that § 167.131, RSMo, violates Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") because the Trial Court erroneously declared and applied the law regarding the Hancock Amendment in that CSD and SLPSD will not experience increased costs in complying with § 167.131, RSMo within the meaning of the Hancock Amendment; § 167.131 does not require new or increased activity within the meaning of the Hancock Amendment; and the State is not required to appropriate funds specific to § 167.131 under the Hancock Amendment.

Mo. Const. Art X, §§ 16-24

Sch. Dist. of Kan. City v. State, 317 S.W.3d 599 (Mo. 2010)

ARGUMENT

I. The Trial Court erred in ruling that CSD was entitled to recover on its Counterclaim against Breitenfeld because the Trial Court erroneously declared and applied the law in that any decision to void § 167.131, RSMo should not be applied retroactively to Breitenfeld.

A. Standard of Review

The standard of review for a court-tried case is that the appellate court will affirm the judgment of the circuit court unless it misapplied or erroneously declared the law, the judgment is not supported by substantial evidence, or the judgment is against the weight of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); see also Rule 84.13(d). "If the issue to be decided is one of fact, this Court determines whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence." *Id.*

Where the trial court rules on a question of law, it is not a matter of discretion. *State v. Plastec, Inc.*, 980 S.W.2d 152, 154 (Mo. App. E.D. 1998). The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied. *Id.* at 154-55.

Here, the Trial Court misapplied and erroneously declared and applied the law as discussed below.

B. Argument

Even if this Court determines that the Unaccredited District Tuition Statute is unconstitutional or otherwise relieves CSD and TSD of its clear mandate, Breitenfeld should not be held liable to CSD for tuition for any portion of the school years Pupils attended CSD. Quoting the United States Supreme Court in *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1960), the Missouri Supreme Court has held: "Where a decision of the Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *In re Extension of Boundaries of Glaize Creek Sewer Dist.*, 574 S.W.2d 357, 365 (Mo. banc 1978); See also *Sumners v. Sumners*, 701 S.W.2d 720, 722-24 (Mo. banc 1985).

Here, all three branches of Missouri's state government have spoken to Breitenfeld with one voice regarding the Unaccredited District Tuition Statute: the legislature, which passed the plain and unambiguous § 167.131; this Court, which held that § 167.131 "was specifically written to apply to the factual scenario of this case"[4]; and the executive branch, acting through its Department of Elementary and Secondary Education, which had prior to this lawsuit applied this statute to CSD on behalf of Wellston School District students in just the manner Breitenfeld seeks it to be applied on her behalf.[5]

[4] *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d at 664.

[5] See Exhibits C5-C8 regarding CSD's acceptance of students from the Wellston School

The Missouri government, in the clearest and strongest terms, has given Breitenfeld repeated assurance that the Unaccredited District Tuition Statute authorized her to send her children to school in an adjacent, accredited district at no cost to her. In reliance on that statute and on the guidance she received from this Court, our state's highest Court[6], she exercised that right. It is inequitable in the extreme to hold that Breitenfeld should not only lose that precious statutory right, but also be obligated to pay heavily (for what would ultimately turn out to be her justifiably mistaken reliance) if this Court affirms one or more of the challenges that were first raised in this case years after the litigation commenced.

II. The Trial Court erred in ruling that CSD was entitled to recover on its Counterclaim against Breitenfeld because the ruling is not supported by substantial evidence and is against the weight of the evidence in that there is no substantial evidence regarding CSD's supposed damages.

A. Standard of Review

The standard of review for a court-tried case is that the Supreme Court will affirm the judgment of the circuit court unless it misapplied or erroneously declared the law, or the judgment is not supported by substantial evidence, or the judgment is against the

---

District under § 167.131, R.S.Mo.

[6] *Turner v. Sch. Dist. of Clayton, supra*

weight of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); see also Rule 84.13(d). "If the issue to be decided is one of fact, this Court determines whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence." *Id.*

Here, the Trial Court's Judgment is not supported by substantial evidence and is against the weight of the evidence.

B. Argument

CSD's counterclaim against Breitenfeld seeks payment of tuition for the 2009-2010, 2010-2011 and 2011-2012 school years. LF Vol. XXVI, pp 1340-1341. The Counterclaim essentially is stated as a claim for breach of contract, alleging that Breitenfeld submitted Residency Affidavits to CSD in which she represented that she was "residing until further notice" within the boundaries of CSD and agreed that CSD may recover costs at the rate of $53.00 per day for elementary school and $79.00 per day for middle/high school "if false information is filed". LF Vol. XXVI, p 1347, 1351. CSD alleged that it is entitled to the damages as set out in the Residency Affidavits. The Counterclaim does not specifically identify a theory of recovery; the Judgment, in granting the Counterclaim, appears unsure as well.

There is no record evidence that the Breitenfeld children were admitted to CSD based on the Residency Affidavits. To the contrary, CSD has stipulated that Breitenfeld intended that, during the time Breitenfeld lived outside the boundaries of CSD, her children attended CSD schools pursuant to her claim of rights under the Unaccredited

District Tuition Statute. LF XXXI, p 1631, ¶ 3. Without any evidentiary foundation regarding the purpose or use of the application documents or the Residency Affidavits, these materials exist in a factual vacuum, and the Trial Court is necessarily unable to conclude that CSD admitted the Breitenfeld children based on the Residency Affidavits.

Critically, there is no evidence of a Residency Affidavit or any other such agreement to pay tuition to CSD for the 2011-2012 school year was adduced at trial. Without such an agreement, there is no substantial evidence to support any claim for tuition for the 2011-2012 school year.

Moreover, CSD received notice that Breitenfeld and the Pupils no longer resided within CSD's boundaries via Breitenfeld's 2010 Mandamus Action in this Court.[7] By their own terms, the daily tuition fees set out in the Residency Affidavits only apply "if false information is filed". However, CSD plainly received notice no later than August 19, 2010 that Breitenfeld no longer resided within CSD.

Regardless, there is no evidence sufficient to support the amount of damages awarded. The total evidence as to the amount of CSD's damages was contained in the following exchange:

> Q. By the way, have I asked you to calculate the amount of tuition that Plaintiff Breitenfeld would owe for her two children for the two and one-third years where she has not resided in the Clayton School District?
>
> A. Yes.

[7] Cause number SC91127.

Q. Okay. And when I asked you to do that calculation, that was not based on the statutory amounts. Is that correct?

A. Correct.

Q. It was, rather, based on amounts that were in documents signed by her. Is that right?

A. Correct.

***

Q. And do you have what that total, then, would come to?

A. $49,133.33.

Q. And that would be for her two children to attend through the conclusion of the existing school year. Is that right?

A. Correct.

Q. So that would cover the full two years plus -- I think we have a stipulation here -- one-third of the previous year.

A. Correct.

TR 270, ln 14 to 271, ln 15. Although the Residency Affidavits purport to require payment on a per diem basis, there is no evidence regarding the number of days each Pupil attended, either in total or per school year. Consequently, it is impossible for the Court to back out the costs of tuition for the 2011-2012 school year, for which there is no Residency Affidavit. Likewise, it is impossible for the Court to compute a discrete

tuition amount supposedly owed for the time frame prior to August 19, 2010, when CSD was notified the Pupils did not reside within the CSD.

Rather than requiring evidence, the Trial Court's Judgment suggests that both the existence and the amount of the tuition debt were largely assumed, while placing the burden on Breitenfeld to prove that she did *not* owe the debt: "No sufficient evidence was submitted at trial to relieve Breitenfeld of her obligation to pay the tuition…" LF Vol. XXXVII, p 1861.

C. Conclusion

For the foregoing reasons, the Trial Court erred in holding that CSD is entitled to recover from Breitenfeld on its Counterclaim.

III. The Trial Court erred in ruling that § 167.131, RSMo, was of no force and effect and that SLPSD and CSD were excused from compliance with § 167.131, RSMo because the Trial Court erroneously declared and applied the law regarding the claimed affirmative defense of "impossibility", in that Missouri law makes no provision for such an affirmative defense as applied by the Trial Court so as to excuse a governmental entity's compliance with a statutory mandate.

A. Standard of Review

The standard of review for a court-tried case is that the appellate court will affirm the judgment of the circuit court unless it misapplied or erroneously declared the law, the judgment is not supported by substantial evidence, or the judgment is against the weight

of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); see also Rule 84.13(d). "If the issue to be decided is one of fact, this Court determines whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence." *Id.*

Where the trial court rules on a question of law, it is not a matter of discretion. *State v. Plastec, Inc.*, 980 S.W.2d 152, 154 (Mo. App. E.D. 1998). The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied. *Id.* at 154-55.

Here, the Trial Court misapplied and erroneously declared the law in holding that Missouri law provides a defense of "impossibility" to a clear statutory mandate directed to a governmental body.

B. Argument

The Trial Court held that compliance with the Unaccredited District Tuition Statute is "impossible" and that the statute therefore is "of no force and effect". LF Vol. XXXVII, p 1860. There is no support under Missouri law for such a defense of impossibility or such a ruling based thereon.

It is true that, under rare circumstances, impossibility is a defense to a claim for breach of contract. See, e.g. *Farmers' Elec. Coop. v. Missouri Dep't of Corrections*, 977 S.W.2d 266, 271 (Mo. 1998). And in limited cases, impossibility may also be raised as a defense to a cause of action for negligence *per se* that is predicated on a statutory violation. See, e.g. *Edwards v. Mellen*, 366 S.W.2d 317, 319 (Mo. 1963). However,

there is no Missouri precedent supporting the Trial Court's holding that impossibility is a defense to a claim based on a clear statutory mandate directed to a governmental body, such as is imposed by the Unaccredited District Tuition Statute.

No legal foundation exists for the audacious contention that Respondents may ignore the clear directives of the Unaccredited District Tuition Statute, this Court's Opinion, and the corresponding mandate in this case. The Trial Court's determination to relieve Respondent school districts from all obligations under this statute for reasons of "impossibility" is a decision unique in Missouri jurisprudence.

The Trial Court bases its holding upon two cases. The first, of nearly a century's vintage, is *George v. Quincy, O. & K. C. R. Co.*, 167 S.W. 153 (Mo. App. 1914). LF Vol. XXXVII, p 1859. The plaintiff in *George* was the administrator of the estate of a railway worker killed when his foot was caught in a railway switch. *George, supra*, 179 Mo. App. at 285. Plaintiff sued defendant railway company for a cause of action based upon a failure to obey § 3163, RSMo (1909), which required railroad companies to use "the best known appliances or inventions to fill or block all switches . . . to prevent, as far as possible, the feet of employees being caught therein." *George, supra*, 179 Mo. App. at 292. Defendant asserted that § 3163 was void for vagueness, in that no one could be expected to know or agree upon what was the "best known" appliance. However, the *George* Court felt that Defendant misstated its position and that Defendant actually intended to argue that compliance with § 3163 was impossible.

Having summoned the impossibility defense from thin air, the *George* Court then proceeded to completely reject it, holding "we do not think such considerations should

prevent a *practical application* of the statute. Culpability of a railway company would be judged *by the status of things existing at the happening of an injury*". George, *supra*, 167 S.W. at156 (emphasis added).

The impossibility defense as implemented by the Trial Court is considerably more expansive than that briefly outlined (and rejected) in *George*. As envisioned by *George*, an objection of impossibility does not "prevent a practical application of the statute". *Id.* In a complete inversion of this principle, the Trial Court found that, because a hypothetical situation existed [8] in which it would be impossible to comply with the Unaccredited District Tuition Statute, then compliance is prospectively excused in all situations. Specifically, because Respondents could imagine the possibility of many thousands of new City students simultaneously enrolling in CSD schools, not a single City student should be granted the protections of the statute.

Notably, CSD admitted in testimony that it would be possible for CSD to admit and educate the two Breitenfeld children. TR p 225, ln 19-25. Indeed, CSD could admit 200 new students, and although that number would be "probably disruptive" it would not be impossible. TR 226, ln 25 to TR 227, ln 1. Such an admission is of course unavoidable, as the Breitenfeld children have been in CSD schools since before this litigation was initiated. Manifestly, it is entirely "possible" that CSD admit and educate

[8] It cannot be ignored that, with the recent provisional reaccredidation of SLPSD, this hypothetical situation no longer exists, has not come to pass and now will *never* come to pass.

the Pupils, the *only* two school age children that here seek to attend CSD schools under the statute in question.

As the *George* Court held, any purported impossibility must be judged by the "status of things existing". *George v. Quincy*, 179 Mo. App. at 294. Here, the existing "status" is that two Breitenfeld children sought admission to CSD pursuant to § 167.131, and that their admission is eminently possible and therefore susceptible to a practical application of said statute. The number of laws that must fail under the Trial Court's standard for judging impossibility, in which a conjured hypothetical voids a law *ab initio*, defies calculation.

Significantly, Breitenfeld has been unable to find any case that has ever cited *George* for its discussion of "impossibility". To the extent *George* is good law for the existence of an impossibility defense to a statutory obligation, one court observed, "there is a difference between overruling one hundred and twenty years of law and overruling one one-hundred-and-twenty-year-old case." *Medlen v. Strickland*, 353 S.W.3d 576, 580 (Tex. App. 2011).

The second case cited by the Trial Court, *Egenreither v. Carter*, 23 S.W.3d 641 (Mo. App. E.D. 2000) addresses impossibility strictly in the context of a negligence *per se* action. In *Egenreither*, the thirteen-year-old Plaintiff was bitten by Defendant's dog when Defendant's son left a back yard gate open, allowing Defendant's dog to escape. *Egenreither v. Carter*, 23 S.W.3d at 643. Plaintiff brought a cause of action for negligence *per se* based on violation of a St. Louis City ordinance requiring that dogs be leashed. *Id.* Defendant argued that she was entitled to a jury instruction excusing her

compliance with the ordinance. Although the *Egenreither* Court acknowledged that "considerations of safety, emergency conditions, or impossibility of compliance may constitute valid excuses for noncompliance with a statute", it ultimately disagreed with Defendant, ruling that "[t]he fact that Defendant was not at home when the incident occurred did not relieve her of her affirmative obligation imposed by the statute…." *Egenreither*, *supra*, 23 S.W.3d at 646.

The *Egenreither* Court cites *MacArthur v. Gendron*, 312 S.W.2d 146 (Mo. Ct. App. 1958) as the source of the quoted proposition of law regarding impossibility. *MacArthur* is also a negligence *per se* case, and even less persuasive than *Egenreither* in establishing impossibility as a defense to a direct statutory mandate to a governmental body. *MacArthur*, a negligence *per se* case founded on violation of a traffic law, states that, "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a *statutory rule of the road*, as where non-observance of the statute is induced by considerations of safety, or emergency conditions, or where compliance is impossible…" *MacArthur v. Gendron*, 312 S.W.2d at 150 (emphasis added, internal citations omitted). This is true, *Macarthur* holds, "because traffic regulations imposed by statute are not unyielding and inflexible" and "statutory rules of the road may be qualified by the circumstances". *Id.* Although traffic laws may be enforced or not as circumstances dictate, there is no basis to maintain that a mandatory statute vital to the educational wellbeing of Missouri's children, such as the Unaccredited District Tuition Statute, is subject to the same flexibility.

Even if "impossibility" were a defense cognizable under Missouri law in this context, it has certainly never existed in the form which the Trial Court has applied to the Unaccredited District Tuition Statute. The impossibility defense discussed in *Egenreither* and *MacArthur* is a wholly different animal from that which was created by the Trial Court. In *Egenreither* and *MacArthur,* the courts contemplated impossibility in the context of relieving a party from liability from an occurrence that could not have been foreseen. It does not render a statute wholly void and "without force and effect", which was the Trial Court's characterization of the status of the Unaccredited District Tuition Statute after its application of the supposed impossibility defense.

Pleading "impossibility" allows for a particular statutory transgression, once completed, to be excused; it does not undo the statute. Even if the *Egenreither* Defendant was successful in her impossibility claim, it was not contemplated that all dogs would henceforth be allowed to go about unleashed simply because Defendant was unable to leash her dog on that one occasion. Likewise, even if the Trial Court believes CSD could not admit and educate thousands of new students (even though these new students never materialized, and now never will), it cannot be held that it is impossible for CSD to educate two new students.

C. Conclusion

For the foregoing reasons, in addition to the arguments asserted in the Brief of the State of Missouri and Attorney General Chris Koster, which Breitenfeld adopts and incorporates by reference, "impossibility" is not an effective defense under Missouri law to the clear mandate of the Unaccredited District Tuition Statute.

IV. The Trial Court erred in ruling that § 167.131, RSMo was of no force and effect and that SLPSD and CSD were excused from compliance with § 167.131, RSMo because the ruling is not supported by substantial evidence and is against the weight of the evidence in that there is no substantial evidence that compliance with § 167.131, RSMo is impossible.

A. Standard of Review

The standard of review for a court-tried case is that the Supreme Court will affirm the judgment of the circuit court unless it misapplied or erroneously declared the law, the judgment is not supported by substantial evidence, or the judgment is against the weight of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); see also Rule 84.13(d). "If the issue to be decided is one of fact, this Court determines whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence." *Id.*

Here, the Trial Court's Judgment is not supported by substantial evidence and is against the weight of the evidence.

B. Argument

Even if this Court accepts the existence of the claimed impossibility defense as a matter of law, this Court cannot accept that the speculative, unsubstantiated proof provided by Respondents is sufficient to warrant the extreme remedy of voiding a statute.

In short, the record fails to demonstrate such impossibility. The Trial Court's holding that compliance with the Unaccredited District Tuition Statute is impossible is founded on the expert testimony of Dr. Terrence Jones ("Jones") and the report he prepared (Trial Exhibit C-1, hereafter "Jones Report") regarding the number of students who would transfer from the SLPSD to County districts, including CSD. See LF 1850. The Jones Report uses a telephone survey and statistical extrapolation to reach a conclusion that 3,567 City students would seek to transfer to CSD under the Unaccredited District Tuition Statute. Ex. C-1, p 1. Neither the Jones Report, nor any testimony by Jones relating thereto, should have been received in evidence, because his supposed expert analysis is not reasonably reliable. Having been received, the Report should not have been accorded any weight.

The admission of expert testimony in a civil matter is governed by § 490.065, R.S.Mo., which provides in part:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> ***
>
> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts

> in the field in forming opinions or inferences upon the subject and *must be otherwise reasonably reliable.*
>
> 4. *If a reasonable foundation is laid,* an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

§ 490.065 R.S.Mo. (emphasis added). An expert's opinion must be founded on substantial information, not mere conjecture or speculation. *Doe v. McFarlane*, 207 S.W.3d 52, 62 (Mo.App. 2006).

The Jones Report is manifestly unreliable, and cannot amount to substantial evidence, for a number of reasons. First, although the Jones Report supposedly attempts to accurately determine how many City pupils will transfer under the Unaccredited District Tuition Statute, it omits consideration, or even acknowledgment, of the most obvious and straightforward source of information regarding transfers: the number of students *who have actually inquired about, or applied for, transfer pursuant to the Unaccredited District Tuition Statute*. CSD's testimony established that over the five year period (during which this case has received frequent, high-profile media attention), CSD has only received 200 to 300 inquiries from parents seeking to transfer their

students.[9] TR p 234, ln 15 to p 235, ln 11. Of those inquiries, only 100 (20 per year) bothered to leave their name and contact information. TR p 234, ln 15 to p 235, ln 7. Nevertheless, Jones completely ignored the known, concrete fact that in past years only about 20 persons per year have sought to transfer a student under the Unaccredited School District Tuition Statute, in favor of a conclusion that over 3,500 new students will seek to attend CSD. Ex. C-1, p 1.

In his testimony at trial, Dr. Jones himself admits that there is no evidence that the Jones Report has any "predictive validity":

> Q. What is "predictive validity"?
>
> A. It's how the answer to a particular – in this case, how the answer to a particular question will enable one to predict a certain decision.
>
> Q. Okay. So in the case of research like surveys, what predictive validity means is someone does a survey and then someone does follow-up research to determine whether or not the survey has at all predicted the behavior that actually occurred; correct?
>
> A. That's correct.

[9] Coincidentally, 200 new students is the number that CSD testified would be "probably disruptive" but not impossible. TR 226, ln 25 to 227, ln 1.

> Q. And there is zero research proving that your survey has any predictive validity. Is that correct?
>
> A. We have not had a situation like this, to my knowledge, in the United States, so there's little research on which to base that.

TR, p 145, ln 15 to p 146, ln 5.

The Jones Report is hearsay testimony about the supposed forecasts that various unknown persons have made regarding their anticipated behaviors in a presented hypothetical situation. Although Jones testified and reported upon the statements of these anonymous individuals (which are taken as fact), the individuals themselves were not made available to testify or even identified. Indeed, the subject interviews were conducted by a company, Telephone Contact, Inc. ("TCI"), and Jones himself did not speak to the survey subjects. TR p 147, ln 24 to p 148, ln 2. Jones in fact testified regarding *what he was told* the subjects told TCI.

Moreover, the Jones Report makes no attempt to adjust for the bias that is necessarily introduced by the simple fact that those persons sufficiently interested in their children's education to complete a survey on the subject would be more likely to take the extra effort to transfer their children to another district. TR 150, ln 4-12. Indeed, 80 to 85 percent of the eligible individuals reached chose not to complete the survey, and their responses are not reflected in the Report. TR 159, ln 21 to 160, ln 5.

Without the unreliable evidence provided by Jones as to the inflated number of hypothetical students CSD may expect, the Trial Court's judgment with regard to Respondents' impossibility defense is unsupported.

Tellingly, what the Trial Court specifically found from the evidence was that "enforcement of § 167.131 RSMO (2000) would overwhelm area school resources to the extent of adversely impacting local districts". LF Vol. XXXVII, p 1860. From this finding, the Trial Court concludes that compliance is therefore "impossible". To the contrary, if compliance would result in an "adverse impact," compliance is necessarily possible. Regardless, there is no basis in law to declare a statute to be "of no force and effect" simply because it could have an adverse impact.

The implicit assumption of the Jones Report was that SLPSD would remain unaccredited for the 2012-2013 school year. TR 79, ln 21 to 80, ln 3. However, as this court has noted, as of October 16, 2012, SLPSD became provisionally accredited. *City of St. Louis et al. v State of Missouri,* SC92159 at *3, note 3 (Mo. November 13, 2012). The result is that there cannot be a single student transfer under the Unaccredited District Tuition Statute for the 2012-2013 school year. It is now a known certainty: not a single one of the transfers projected by the Jones Report will occur. The entire conjectural premise of the Jones Report was false, and the Trial Court issued its ruling based on a wholly inaccurate anticipation of events projected by an expert whose every forecast and every word of testimony was simply not to be. Nevetheless, on the basis of what is now known to be incorrect conjecture, the Trial Court held that Brietenfeld never had rights

under § 167.131, and that she in fact owed CSD tuition for the time the Pupils were enrolled.

C. Conclusion

For the foregoing reasons, in addition to the arguments asserted in the Brief of the State of Missouri and Attorney General Chris Koster, which Breitenfeld adopts and incorporates by reference, the Trial Court's judgment that Respondents' compliance with the Unaccredited District Tuition Statute is "impossible" is not an not supported by substantial evidence and is against the weight of the evidence.

V. The Trial Court erred in permitting taxpayer-intervenors to intervene, because the Trial Court erroneously declared and applied the law regarding intervention, in that Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") does not create a right to intervene and Intervenors did not meet the qualifications for permissive intervention under Rule 52.12(b).

A. Standard of Review

The applicable standard of review regarding motions to intervene is found in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *Allred v. Carnahan*, 372 S.W.3d 477, 482 (Mo. App. W.D. 2012). The trial court's judgment will be reversed if it erroneously declares or applies the law. *Id*. The burden is on the intervenor, as pleader, to show all the elements required for intervention as of right. *Id*.

B. Argument

Of all the Respondents, only CSD's and SLPSD's taxpayer-intervenors have standing to enforce the Hancock Amendment.[10] However, Respondent Taxpayers should not have been permitted to intervene. They asserted that, based on the grant of *standing* contained in Article X, Section 23 of the Missouri Constitution, they were entitled to intervene as a matter of right pursuant to Missouri Rule of Civil Procedure 52.12(a)(1). LF Vol. 22, pp 1107-1115, 1129-1141. However, Rule 52.12(a)(1) provides, "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an *unconditional right to intervene*" (emphasis added).

The Hancock Amendment does not confer an unconditional right to intervene in any case. The relevant portion of the Hancock Amendment provides, "any taxpayer of the state, county, or other political subdivision shall have *standing* to bring suit in a circuit court of proper venue and additionally, when the state is involved". Mo Const. Art X, § 23 (emphasis added).

In determining to allow respondent Taxpayers to intervene, the Trial Court incorrectly conflated the concept of *standing* with the right to *intervene*. Respondent

[10] It is settled law that CSD and SLPSD themselves, as school districts, lack standing to bring actions to enforce the Hancock Amendment because such an entity is not a taxpayer. *King-Willmann v. Webster Groves Sch. Dist.*, 361 S.W.3d 414, 416 (Mo. banc 2012) ("The question is whether the school district, which is not a taxpayer, has standing to use the Hancock amendment as a defense. The answer is, 'No.'").

Taxpayers were, of course, entitled to their own action to enforce their Hancock Amendment claims, as they qualify as taxpayers and therefore have *standing* to do so (regardless of whether the claim has merit). However, there is no right or justification, in the Hancock Amendment or elsewhere, granting them a right to *intervene* in this long-ongoing dispute.

Schnuck Mkts. Inc. v. City of Ballwin, 308 S.W.3d 748 (Mo. App. E.D. 2010) is instructive. In that case, certain taxpayers attempted to intervene in an action seeking to create a Transportation Development District under the Missouri Transportation Development District Act.[11] The *Schnuck Mkts. Inc.* Court noted, "[t]o intervene as a matter of right, Movants' interest in the action must be a direct and immediate claim to, and have its origin in, the demand made or the proceeds sought or prayed by one of the parties to the original action. The interest must be so immediate and direct that the would-be intervenor will either gain or lose by the direct operation of the judgment that may be rendered therein. It does not include a consequential, remote or conjectural possibility of being affected as a result of the action." *Schnuck Mkts. Inc., supra,* 308 S.W.3d at 753 (internal citations omitted). In affirming the denial of taxpayer-intervenors' motion to intervene, the Court held that, "Movants' alleged taxpayer interest is speculative and based on conjecture." *Id.*, at 754.

Likewise, Respondent Taxpayers simply speculated regarding feared results of the application of the Unaccredited District Tuition Statute. These interests are insufficient to support a claim of intervention under *Schnuck Mkts. Inc. v. City of Ballwin, supra.*

[11] §§ 238.200 to 238.275, RSMo

Similarly, there is no justification for permissive intervention under Missouri Supreme Court Rule 52.12(b). That Rule provides, "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene when a statute of this state confers a conditional right to intervene or (2) when an applicant's claim or defense and the main action have a question of law or fact in common". As discussed above, the Hancock Amendment addresses standing, but does not create a right, conditional or otherwise, to intervene. In addition, Respondent Taxpayers' Hancock Amendment defense did not implicate questions of law or fact in common with CSD and SLPSD's then-available defenses. Thus, Respondent Taxpayers' claim for permissive intervention under Rule 52.12(b) was likewise baseless, and should have been denied. Consequently, the Hancock defense was not properly raised before the Trial Court.

VI. The Trial Court erred in permitting SLPSD and CSD to challenge § 167.131, RSMo as violating Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") because the Trial Court misapplied and erroneously declared the law, in that any constitutional challenge to § 167.131, RSMo, was waived as it was not presented at the earliest possible moment that good pleading and orderly procedure permitted.

A. Standard of Review

The standard of review for a court-tried case is that the appellate court will affirm the judgment of the circuit court unless it misapplied or erroneously declared the law, or the judgment is not supported by substantial evidence, or the judgment is against the weight of the evidence. *JAS Apartments, Inc. v. Naji*, 354 S.W.3d 175, 182 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)); see also Rule 84.13(d).

Where the trial court rules on a question of law, it is not a matter of discretion. *State v. Plastec, Inc.*, 980 S.W.2d 152, 154 (Mo. App. E.D. 1998). The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied. *Id.* at 154-55.

Here, the Trial Court misapplied and erroneously declared the law in holding that Respondents had not waived their challenge to the constitutionality of § 167.131, RSMo.

B. Argument

"It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived." *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011), citing *Callier v. Dir. of Revenue, State of Mo.*, 780 S.W.2d 639, 641 (Mo. banc 1989).

Furthermore, the doctrine of law of the case provides that a previous holding in a lawsuit is binding thereafter in the action and precludes relitigation of the issue on remand and subsequent appeal. The doctrine governs successive adjudications involving

the same issues and facts. Generally, the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication that could have been raised but were not. *Walton v. City of Berkel*ey, 223 S.W.3d 126, 128-129 (Mo. banc 2007), citing *State ex rel. Alma Telephone Co. v. Public Service Comm'n*, 40 S.W.3d 381, 388 (Mo. App. 2001) (internal citations omitted).

CSD and SLPSD had every opportunity to raise their Hancock Amendment challenge when this case was pending before the Trial Court in the 2007-2009 time frame. Their failure to timely advance their constitutional challenge to the validity of 167.131 caused a waiver of that claim. Hence, the Trial Court erred in allowing Respondents to try their constitutional claim upon remand.

VII. The Trial Court erred in ruling that § 167.131, RSMo, violates Mo. Const. Art X, §§ 16-24 (the "Hancock Amendment") because the Trial Court erroneously declared and applied the law regarding the Hancock Amendment in that CSD and SLPSD will not experience increased costs in complying with § 167.131, RSMo within the meaning of the Hancock Amendment; § 167.131 does not require new or increased activity within the meaning of the Hancock Amendment; and the State is not required to appropriate funds specific to § 167.131 under the Hancock Amendment.

A. Standard of Review

The Missouri Supreme Court reviews the constitutional validity of a statute *de novo*. *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 411 (Mo. banc 2012). "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011). The Court "resolve[s] all doubt in favor of the [statute's] validity" and in doing so should make every reasonable intendment to sustain its constitutionality. *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. banc 2011) (quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984)). "The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution." *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 167 (Mo. banc 2011) (quoting *Brasch*, 332 S.W.3d at 119).

Statutes enacted by Missouri's legislature and signed into law by the governor enjoy a strong presumption of constitutionality. An act is "presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). Thus, a litigant attacking a statute as unconstitutional bears one of the highest burdens in a civil case: that of "proving the act clearly and undoubtedly violates the constitutional limitations." *Id*.

B. Argument[12]

[12] Breitenfeld borrows heavily here from the argument made below by Attorney General Chris Koster in opposition to Respondents' Hancock claims. Attorney General

"Read as a whole, the Hancock Amendment, Mo. Const. art. X, §§ 16-24, aspires to erect a comprehensive, constitutionally-rooted shield erected to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980." *Ft. Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). Hancock's introductory section summarizes its prohibitions. It provides:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in sections 17 through 24, inclusive, of this article.

Mo. Const. art. X, § 16. Sections that are not relevant here implement the Amendment's limitation on state revenue and prohibit state or local tax increases without voter

---

Koster was made a party to this action after Appellant opposed CSD's Motion to Dismiss partially on the basis that CSD had not notified the Attorney General of its constitutional challenge to § 167.131 as required by Rule 87.04. See the February 22, 2011 Response to CSD's Motion to Dismiss, LF Vol. XX, pp 993-994; February 28, 2011 Notice of Challenge to Missouri Statute, LF Vol. XXI, pp 1038-1039.

approval. *Ft. Zumwalt*, 896 S.W.2d at 921. The taxpayers rely upon section 21, which provides:

> The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

Mo. Const. art. X, § 21.

Section 21 "is violated if both (1) the State requires a new or increased activity or service of a political subdivision, and (2) the political subdivision experiences increased costs in performing that activity or service without funding from the State." *Neske v. City of St. Louis*, 218 S.W.3d 417, 422 (Mo. banc 2007).

First, the Trial Court incorrectly concluded that the Unaccredited District Tuition Statute requires new or increased activity or service within the meaning of the Hancock Amendment. Moreover, it is immediately evident upon the face of the Judgment that the Trial Court did not properly apply the two-pronged analysis set out in *Neske*:

> Because there was no evidence submitted during the trial that the § 167.131 RSMo (2000) mandate included funding for student transfers, the Court finds that this mandate did not include any State funding. Therefore, *the only issue regarding the enforceability of the § 167.131 RSMo (2000)*

mandate is whether or not it requires a new or increased activity or service after November 4, 1980.

LF Vol. XXXVII, p 1887 (emphasis added). Likewise, the Judgment concludes, "Therefore, because the unfunded mandate created new or increased activity or service, § 167.131 RSMo (2000) violates the Hancock Amendment and is not enforceable." LF Vol. XXXVII, p 1888. Thus, the Trial Court completely omitted the vital step of making a determination whether or not the political subdivision experiences increased costs *as a result* of the new or increased activity.

Finally, the Trial Court erred as a matter of law in determining that, under the Hancock Amendment, the State is required to appropriate funds specific to § 167.131.

1. *Section 167.131 does not create a new or increased activity or service of a political subdivision within the meaning of the Hancock Amendment*

The statute by which the legislature established Missouri's "system of free public schools ... throughout the state for the gratuitous instruction of persons between the ages of five and twenty-one years," § 160.051, RSMo, conditions eligibility for "gratuitous instruction" on the age of a student, but not her residence. School districts may primarily educate students residing within their boundaries,[13] but there are exceptions to that general rule other than the statute at issue here. See, e.g., § 167.020.6 (exempting, among others, homeless children, children enrolled in a court-ordered interdistrict transfer

[13] See, e.g., § 167.020.2, RSMo (requiring, subject to school board waiver, proof of residency in the district for registration).

program, and children placed in residential care facilities by the state or a juvenile court); § 167.121 RSMo (allowing Commissioner of Education to assign a child to another district due to hardship).

Missouri issues a basic mandate to school districts: "to provide a free public education to all eligible pupils who attend[ ]". *Sch. Dist. Of Kansas City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010). This mandate existed long before the Hancock Amendment, and § 167.131 does not change that mandate. If the Breitenfeld children were to show up at SLPSD's doorstep today, it would be required to educate each of them at no charge. Should CSD admit the Breitenfeld children pursuant to 167.131, the role each district would play in satisfying the basic mandate would change – CSD providing gratuitous instruction and SLPS transferring funds it would have otherwise used to educate the children in its own schools – but the state's mandate would remain the same. See *Neske*, 218 S.W.3d at 422 (finding no violation where the mandate was unchanged even though the cost of compliance had increased).

In this respect, the Trial Court misconstrues both the purpose and the text of §§ 16 and 21. The Hancock Amendment protects only taxpayers; it "makes no pretense of protecting one level of government from another." *Ft. Zumwalt*, 896 S.W.2d at 921. Nor does it guard against state legislation that reallocates revenues or existing responsibilities between political subdivisions. Rather, by its plain terms, Hancock only prohibits the state from shifting the tax burden from itself to local government, either by requiring its political subdivisions to assume new obligations (without corresponding state funding) or by reducing the proportion of total state funding for activities previously required of local

government. *Berry v. State*, 908 S.W.2d 682, 683, 685 (Mo. banc 1995). Thus, this Court upheld a statute that changed the distribution of tax revenues among municipalities even though some municipalities lost revenue as a result. *Id.* at 685. Likewise, this Court found no Hancock violation where a statute did not shift the tax burden from the state to the county but merely authorized the "reallocation of local revenues." *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 491 (Mo. banc 1995).

Just as Missouri's foundation formula for allocating state aid among school districts[14] sends different amounts to each district based on changes in its enrollment (and other factors), § 167.131, operates only to reallocate revenue flow and responsibilities between the districts. It does not alter the basic mandate or shift the tax burden from the state to school districts.

In *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 611 (Mo. banc 2010), this Court held that no new duty was created when the legislature enacted §§ 160.400, *et seq.*, R.S.Mo (2009), enabling the establishment of charter schools. "Before the act, the KCMSD (and other public school districts) were required to provide a free public education to all eligible pupils who attended. This requirement remains." *Id.*, 611. Likewise, CSD's mandate to provide an education to all eligible pupils has not changed simply by the passage of the Unaccredited District Tuition Statute, any more than the burden on CSD changes when students move in and out of the district.

Kansas City should be contrasted with *Rolla 31 Sch. Dist. v. State of Missouri*, 837 S.W.2d 1 (Mo. banc 1992), in which this Court determined a violation of the Hancock

[14] § 163.031, RSMo

Amendment occurred when a new statute required *all* school districts to provide services to an entirely new population of students that *no district* was previously required to serve. *Rolla 31 Sch. Dist. v. State of Missouri*, 837 S.W.2d at 6.

Here, the facts are more similar to *Kansas City* than *Rolla 31*. Section 167.131 requires school districts to provide services to the same population of students that they were previously required to serve. Although it allows greater mobility between districts, it applies only to students who were already eligible for education. As such, § 167.131 does not require a new or increased activity within the meaning of the Hancock Amendment.

2. *The taxpayers did not establish that the school districts experience increased costs in complying with § 167.131 without funding from the State.*

Even assuming § 167.131 requires a new or increased activity or service by the school districts, the taxpayers have not established the second element necessary to prevail on their § 21 claim: increased costs without funding from the state.

The Trial Court's analysis is fatally flawed. Missouri courts do not "presume increased costs resulting from increased mandated activity." *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993). Rather, the taxpayers must "prove that an unfunded mandate exists by offering specific proof of new or increased duties and increased expenses, and these elements cannot be established by mere common sense, or speculation and conjecture." *Sch. Dist. of Kansas City*, 317 S.W. 3d at 610.

First, the supposed evidence upon which the taxpayers relied at trial is built entirely on speculation and conjecture. This case is about the obligations of two school districts as to the two Pupils. There is no authority for the proposition that a statute may be stricken entirely under Hancock because its operation in some hypothetical "doomsday scenario" would create an unfunded mandate. Rather, case law is clear that the districts must provide specific proof of new or increased duties. *Sch. Dist. of Kansas City*, *supra*, 317 S.W.3d at 610. Arguments based upon "mere common sense, or speculation and conjecture" are not acceptable. *Id*. As such, the Trial Court should have considered only evidence that relates directly to the two Breitenfeld children.

The Trial Court's Judgment is founded upon the Jones Report and Jones' testimony at trial. Breitenfeld discusses the flaws of the Jones evidence in Point IV, *supra*. In light of those flaws, the Jones evidence cannot possibly constitute the "specific proof of new or increased duties and increased expenses" required to demonstrate a Hancock violation. Jones provided only (ultimately incorrect) speculation and conjecture, and this Court should not accept what he imagined as proof of a Hancock violation.

Second, the Trial Court did not apply a proper Hancock Amendment analysis requiring a finding that CSD necessarily will experience increased costs to comply with § 167.131. Subsection 2 of § 167.131 authorizes a school district that enrolls a student pursuant to § 167.131 to charge the district of residence tuition equal to "the per pupil cost of maintaining the district's grade level grouping which includes the school attended. "§ 167.131.2, RSMo.

In other words, should CSD enroll the two Pupils, it will recoup from SLPS its cost of educating students in each child's grade level. In fact, the evidence presented at trial established that the maximum tuition rate § 167.131 permits Clayton to charge exceeds Clayton's average per pupil education cost. Tr. 294, ln 10-18. Hancock is simply not implicated under these circumstances. *City of Jefferson*, *supra*, 916 S.W.2d at 797; *Missouri State Employees' Retirement System v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987).

Apparently recognizing this problem, CSD's taxpayers argued at trial that this case is about something other than what it is really about – which is the Breitenfeld children, their rights under § 167.131, and what effect, if any, actual enforcement of their rights under § 167.131 would have on the Respondent districts.[15] . In doing so, Taxpayers asked the Trial Court to engage in presumption, speculation, and conjecture on a grand scale.

Due to the flaws of the Jones Report, a specific claim of increased costs by CSD based thereon is completely speculative. CSD admits that they will be able to set a tuition amount and charge tuition to SLPSD. Tr. 294, ln 10-17. Dr. Wilkinson testified that CSD had a "payment problem" with tuition payments from Wellston School District, not SLPSD, when students transferred from Wellston to CSD, and that this was a big

[15] Breitenfeld of course maintains her position that her rights under this statute were definitively determined by this Court's Opinion, and that the Trial Court never should have expanded this case on remand to consider issues about, *inter alia*, the effect on the two districts if the Trial Court were to enforce her rights under § 167.131.

factor in refusing transfer students from SLPS. TR 222, ln 4-17. For purposes of Hancock analysis, a "payment problem" with one district in the past does not establish increased costs for accepting transfers with another district in the future.

CSD argued at trial that § 167.131 will cause it to incur increased costs to the district because the Jones Report's projection of an influx of 3,500 transfer students will require the construction of new buildings. But CSD could not adduce evidence as to what the cost to the district would be if something less than that speculated number of students were to transfer to CSD. TR 299 ln 6 to 300, ln 4. In the event that some lower number of students were to transfer, modular classrooms may be used, as CSD agreed that modular classrooms are appropriate for temporary situations. TR 219, ln 20-25. In the event of the transfer of students from St. Louis City, modular classrooms could be utilized by CSD relatively quickly. TR 258 ln 6-16. Cafeterias at the existing schools could also be easily prepared for classroom instruction. TR 258, ln 17 to 259, ln 18. CSD also owns and operates two buildings which are not currently in use by the district. TR 259, ln 19 to 260, ln 22. Considering all of this, the Chief Financial Officer of CSD agreed that it would not need to build new buildings if fewer students than Jones's speculated number of 3,500 were to transfer to CSD. TR 306, ln 4-9. Thus, it was not established that § 167.131 will result in increased costs to the CSD.

Third, the Trial Court did not apply a proper Hancock Amendment analysis requiring a finding that will experience increased costs to comply with § 167.131. Because SLPSD's evidence of increased costs relies entirely on the Jones projections, its taxpayers claim fails for the same reason. In addition, the evidence at trial was that it is

impossible to determine, without resort to speculation or conjecture, whether SLPSD will necessarily experience a net cost increase for any particular student who elects to transfer. Depending on which St. Louis County district such a student might select, SLPSD's tuition cost may be higher or lower than it spends, on average, to educate students in its own schools because the statutory tuition rate of many St. Louis County districts is considerably less than SLPSD's average per pupil expenditure. In fact, only three of the twenty county school districts have a tuition rate that is higher than SLPSD's average current expenditures per ADA. TR 412, ln 16-23. As for concerns about the cost of transporting transfer students to St. Louis County schools, SLPSD will be able to designate school districts for transportation. TR 419, ln 21 to 420, ln 6. As a result, SLPSD taxpayers failed to meet their burden under Hancock.

3. Trial Court erred in determining that, under the Hancock Amendment, the State is required to appropriate funds specific to § 167.131.

At trail, the taxpayers argued that § 167.131 *per se* violates the Hancock Amendment because the Legislature does not appropriate funds specifically earmarked to cover any school district's costs associated with implementing it. In agreement, the Trial Court pre-supposed the requirement for state funding of § 167.131, holding, "[b]ecause there was no evidence submitted during the trial that the § 167.131 RSMo (2000) mandate included funding for student transfers, the Court finds that this mandate did not include any State funding".

This holding mischaracterizes both the manner in which Missouri appropriates and distributes funds to school districts and the Hancock Amendment itself. Missouri is,

largely, a "local control" state. The Missouri Constitution requires the legislature to "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, § l(a). The Constitution also specifies how the General Assembly is to maintain that system: it must "set apart [not] less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools." Mo. Const. art. IX, § 3(b). The Legislature satisfied the former requirement by enacting § 160.051, RSMo, and other statutes authorizing the creation of school districts (and empowering them to structure their programs); and it annually satisfies § 3(b)'s requirement by appropriating funds in excess of $6 billion to the Department of Elementary and Secondary Education ("DESE") for distribution to school districts pursuant to the foundation formula and other statutory apportionment mechanisms. See, e.g., § 163.031, RSMo. The annual DESE appropriation bill, however, does not specifically earmark funds for compliance with virtually any state requirement. Rather, Missouri law allows districts largely unfettered discretion regarding how to best allocate state and local tax revenues to comply with minimal state requirements and otherwise provide "gratuitous instruction'" to their students. If this system violates the Hancock Amendment, then numerous Missouri statutes requiring activities of school districts – from adopting student discipline, alcohol possession, anti-bullying, and allergy prevention policies to conducting criminal background checks of school staff – are arguably unenforceable because no appropriation bill contains the level of specificity the taxpayers' argument would demand.

Fortunately, § 21 contains no such requirement. Instead, the Legislature need only provide "appropriation of sufficient state monies to finance the costs of the new or increased activity." *Neske, supra*, 218 S.W.3d at 422; see also *Ft. Zumwalt, supra*, 896 S.W.2d at 921 (same). Hancock's concern is with new state mandates requiring local expenditures that exceed available state funding, not the form of appropriations bills. *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794, 797 (Mo. banc 1996) (holding that "actual receipt of grant funds defeats an Article X, § 21 violation, in the absence of evidence that the increased costs exceed the grant"); *Missouri State Employees' Retirement System v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987) (finding no violation despite substantial initial cost because long-term "net fiscal effect" of the legislation would favor county). Therefore, this argument should not have been considered by the Trial Court.

C. Conclusion

For the foregoing reasons, in addition to the arguments asserted in the Brief of the State of Missouri and Attorney General Chris Koster, which Breitenfeld adopts and incorporates by reference, the Trial Court erred as a matter of law in holding that 167.131 violates the Hancock Amendment.

BICK & KISTNER, P.C.

By: /s/ Elkin L. Kistner

Elkin L. Kistner #35287
Sean M. Elam #56112
101 South Hanley, Ste 1280
St. Louis, Missouri 63105
(314) 727-0777 (Phone)
(314) 727-9071 (Facsimile)
elkinkis@bick-kistner.com
Attorneys for Appellant Gina Breitenfeld

CERTIFICATION

The undersigned attorney for Appellant, Elkin L. Kistner, Missouri Bar Number 35287, 101 S. Hanley, Ste 1280, St. Louis, Missouri 63105, (314) 72-0777, hereby certifies that the brief complies with the limitations of Rule 84.06(b); and that the number of words in this brief equals 11,428.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2012, a true and correct copy of the foregoing Appellants' Brief was served via the operation of the Court's electronic filing system upon:

Richard Walsh
600 Washington Ave., Suite 2500
St. Louis, MO 63101
rwalsh@lewisrice.com
Attorney for Respondents Transitional School District and Board of Education of the City of St. Louis and St. Louis Taxpayer Intervenor

James Layton
Solicitor General
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899
james.layton@ago.mo.gov
Attorney for the State of Missouri and Attorney General Chris Koster

Mark Bremer, Esq.
1 North Brentwood, Suite 800
St. Louis, MO 63105
mbremer@ksegg.com
Attorney for Respondent School District of Clayton and Clayton Taxpayer Intervenors

/s/ Elkin L. Kistner