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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

REPLY BRIEF OF APPELLANT GINA BREITENFELD

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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.

School District of Clayton ("CSD") argues that, if § 167.131 is ultimately found to be unconstitutional, that repeal must function retroactively and therefore leave Breitenfeld obligated to CSD for the tuition payments she believed (and this Court held)[1] were to be the obligation of the St. Louis Public School District ("SLPSD"). This is so, CSD maintains, because Breitenfeld is a party to this action and parties are always necessarily bound retroactively and prospectively by repeal of a statute. CSD Brief, pp 100-101. Prior opinions of this Court indicate otherwise.

This Court has been clear that one "may be excepted from such retroactive application of a decision, 'to the extent that [retroactive application] causes injustice to persons who have acted in good faith and reasonable reliance.'" *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139, 144 (Mo. banc 2008), citing *Trout v. State*, 231 S.W.3d 140, 148 (Mo. banc 2007) and *Sumners v. Sumners*, 701 S.W.2d 720, 722-23 (Mo. banc 1985). This Court uses a balancing test to determine the scope of any hardship or injustice that would justify making an exception to the general rule of retroactive

[1] *Turner v. School Dist. of Clayton*, 318 S.W. 3d 660, 663 (Mo. banc 2010).

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application. *Sumners v. Sumners*, 701 S.W.2d at 723. A court must balance the hardship imposed on those who may have relied on the previous rule against the hardship which may result for those who do not benefit from the application of a change in the rule. *Id.; see also Trout v. State*, 231 S.W.3d at 149.

Saliently, in *Trout v. State, supra*, this Court applied the balancing test with respect to the circumstances pertinent to Mr. Trout, a party to that case. Although this Court found that Mr. Trout had "not suggested that he would experience injustice if the decision is applied retroactively to him" and so applied its holding retroactively, the fact that this Court considered whether the invalidation should function retroactively or prospectively as to Mr. Trout, a party, belies CSD's contention that such a holding is impossible. *Trout v. State*, 231 S.W.3d at 149.

Likewise, in the case of *State ex rel. Bloomquist v. Schneider*, *supra*, this court found a statute[2] acting to toll the limitations period on a party who has moved out of Missouri violated the Commerce Clause of the United States Constitution.[3] *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d at 141. Having so concluded, this Court then analyzed whether the tolling provision, once invalidated, should be applied retroactively to bar the plaintiff's suit which was otherwise filed out of time. This Court found that the plaintiff could not have reasonably relied on the tolling statute because the Eighth Circuit

[2] § 516.200, R.S.Mo

[3] U.S. Const. art. I, sec. 8,

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had previously invalidated that statute two years before plaintiff filed her case. *Id.* at 144. Nevertheless, *Bloomquist* also indicates that CSD is incorrect that a party must necessarily suffer the consequences of a retroactive repeal of a statute.

Significantly, neither the reasoning of *Trout* nor *Bloomquist* applies to Breitenfeld. To prevent retroactive application, the plaintiff must be subject to a hardship and have reasonably relied on the invalid statute; in *Trout* the plaintiff did not claim to sufer any hardship, and in *Bloomquist* the plaintiff did not reasonably rely. *Id*; *Trout v. State*, 231 S.W.3d at 149. As Breitenfeld argues in her initial Brief, she had every reason to rely upon § 167.131 and will suffer a real and severe hardship in the form of tuition fees owed to CSD. Appellant's Brief, pp 14-16. Conversely, the comparative hardship that results to other parties is minimal.

Therefore, CSD is incorrect in asserting that Breitenfeld's case law affords no basis for relieving harm from the immensely unfair burden of what to her is an overwhelming tuition judgment in favor of CSD. The unfairness of this judgment is compounded by the fact that Ms. Breitenfeld had to file suit in 2007 to force CSD to comply with § 167.131; that she was constrained to engage in years of litigation to obtain a ruling by this Court acknowledging that "§ 167.131 [is] a straightforward and unambiguous statute"; and that the statute was specifically written to apply to the factual scenario of this case. *Turner*, supra, 318 S.W. 3d at 663-64. Any repeal of § 167.131 should be solely applied prospectively as to Breitenfeld.

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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.

Plaintiff Made Objections in the Manner Approved By the Trial Court

CSD argues that despite an opportunity to do so, Plaintiff failed to make objections to the testimony of Ms. Breitenfeld and has therefore waived and failed to preserve any arguments regarding the sufficiency of the evidence supporting the judgment on CSD's counterclaim. However, the record makes clear that Plaintiff preserved her arguments and made objections regarding the evidence on CSD's counterclaim against Breitenfeld as directed by the Trial Court:

> MR. KISTNER: The question would be, Your Honor, when you want me to submit objections. I think Mr. Bremer is amenable to me doing that *after this proceeding* when we have a chance to breathe, if you're amendable to that, a couple days.
>
> THE COURT: Well, that's fine.

TR 273, ln 11-15 (emphasis added).

As requested by the trial court, after the proceeding Plaintiff submitted her Post-Trial Brief. LF Vol. XXXIII, p 1710-1723. That Post-Trial Brief made all of the

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arguments Plaintiff submitted in her Appellant's Brief. See LF Vol. XXXIII, pp 1719-1721.

Regardless, Plaintiff Need Not Have Made Objections to CSD's Evidence for her Point to Stand

CSD argues that, "Given that Breitenfeld at trial raised no defenses to her obligation to pay tuition (other than that §167.131 was enforceable), her defenses now raised in points I and II are not preserved for review and cannot be a basis to overturn the tuition judgment..." CSD's Brief 99-100. However, whether Breitenfeld pled no defenses to CSD's counterclaim or stated no objection to CSD's evidence at trial is immaterial; CSD still had at trial "the burden of proving the existence and amount of damages with reasonable certainty." *Delgado v. Mitchell*, 55 S.W.3d 508, 511-12 (Mo. App. S.D. 2001), quoting *American Laminates, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 23 (Mo. App. W.D. 1998); see also *Manors at Vill. Green Condo., Inc. v. Webb*, 341 S.W.3d 162, 164-165 (Mo. Ct. App. 2011) (even failure to file an Answer or affirmative defenses does not absolve claimant of its duty to prove its damages).

"Proof of actual facts which present a basis for a rational estimate of damages without resorting to speculation is required." *Delgado v. Mitchell*, 55 S.W.3d 508, 512 (Mo. Ct. App. 2001), citing *Meridian Enterprises Corp. v. KCBS, Inc.*, 910 S.W.2d 329, 331. Put more artfully, "a damage award must be based on more than a gossamer web of shimmering speculation and finely-spun theory". *Carmel Energy Inc. v. Fritter*, 827 S.W.2d 780, 783 (Mo. App. W.D. 1992). An appellate court will reverse a judgment that awards damages for breach of contract if the record shows an absence of proof of actual

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facts that present a basis for a rational estimate of damages without resort to speculation. *Delgado v. Mitchell*, 55 S.W.3d at 512.

Nearly all of the facts recited in CSD's Statement of Facts supporting CSD's judgment against Breitenfeld are unsupported by the record, misleading, or irrelevant. CSD's Brief III(C), pp 49-50. There are no facts therein that support CSD's judgment in the amount of $49,133.33.

First, CSD claims Breitenfeld misrepresented her residency with regard to the 2006-2007 school year. However, CSD's Counterclaim addresses only the 2009-2010, 2010-2011 and 2011-2012 school years. LF Vol. XXVI, pp 1340-1341. The assertion is completely irrelevant – the 2006-2007 school year is and has never been at issue in this case, and CSD admits as much.[4]

CSD further asserts that Breitenfeld admitted that her children have attended and are attending Clayton pursuant to Affidavits for the Establishment of Residence. CSD's Brief, p 50. This claim is belied by CSD's subsequent and incompatible stipulation at trial that, "At all times when Breitenfeld resided in the City, she intended that her children attend Clayton pursuant to her claim of rights under R.S.Mo § 167.131" LF 1621.

CSD also claims that the "tuition amounts charge by Clayton are market rates". CSD Brief, p 50. No support for this contention appears at transcript citation given.

[4] "*Prior to the filing of this case* Breitenfeld in sworn statements claimed residency in Clayton for the 2006-2007 school year…". CSD's Brief, p 49 (emphasis added).

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Regardless, even if supported the point is irrelevant – CSD's claimed damages are based on an allegedly contractual *per diem* amount, not on reasonable market rates. See CSD's Counterclaim, LF Vol. XXVI, p 1341, ¶ 5.

Moreover, CSD incorrectly states the obligations created by Residency Affidavits. Although CSD tells the Court that these affidavits contain an "acknowledgement" "that Clayton may recover tuition from non-residents at a per-diem rate" this language appears nowhere in the residency affidavits. CSD Brief, p 50. Rather, the language triggering an obligation to pay per-diem costs states that CSD "may recover the cost of educating my (our) child/children *if false information is filed* at the rate of $53.00 per day for elementary school, and $79.00 per day for middle/high school." LF Vol. XXVI, p 1347, 1351; Ex. B25 and B30 to Deposition of Breitenfeld. Consequently, the relevant question is not whether the Pupils simply attended CSD schools as non-residents, but whether they attended pursuant to false information. Appellant's Brief demonstrates that CSD received notice no later than August 19, 2010 that Breitenfeld no longer resided within CSD. Appellant's Brief , p 18.

CSD makes no effort to defend the record evidence as substantial or as presenting a basis for the amount of the judgment. With regard to this burden, CSD simply makes the bald assertion that "Clayton presented evidence at trial to establish tuition owed by Breitenfeld of $49,133.33" and cites this Court to the Trial Transcript at pages 262 through 268. CSD Brief, p 50. These pages of testimony involve only CSD's witness, Mary Jo Gruber, establishing the basis for CSD's calculations pursuant to the statutory reimbursement formula contained in § 167.131. Counsel for CSD specifically confirmed

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with Gruber that the amounts allegedly owed by Breitenfeld was *not* based on the statutory reimbursement formula. TR p 270, ln 20-23.

When pressed by CSD's counsel to explain her calculations, CSD's witness could not recall their basis:

> Q. (By Mr. Bremer) Now let me say this -- let me ask: The documents that she signed from which you calculated these amounts show what -- show what the tuition would be on a per-day basis. Is that correct?
>
> A. Correct.
>
> Q. And do you recall what those amounts are or do you have something that indicates what they are?
>
> A. No, not on the per day.

TR 271, ln 18-25. Although CSD's damages are based on per-diem charges, CSD presented no evidence regarding the number of days each Pupil attended.

CSD's citation to *Wallace v. Wallace*, 269 S.W.3d 469 (Mo. Ct. App. 2008) is inapplicable, for the reason that in this case all evidence substantiating the amount of CSD's claimed damage calculation was provided, including the testimony of CSD's witness, who performed the calculation, and the Residency Affidavits, which appear in the legal file. See LF 1344-1351.

The case of *Catroppa v. Metal Bldg. Supply, Inc.*, 267 S.W.3d 812 (Mo. Ct. App. 2008) is instructive. In that case, plaintiff asserted damages in the form of, *inter alia*, lost income from food sales and lost income from liquor sales. *Catroppa v. Metal Bldg.*

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Supply, Inc., 267 S.W.3d at 819-820. Plaintiff detailed his damages on an exhibit. Although defendant lodged objections to the exhibit, those objections were found to be insufficiently specific to preserve anything for review; the exhibit was therefore properly admitted. However, even with no valid objection to the exhibit the Court of Appeals found that there was no substantial evidence supporting the damage award. In reversing the damage award, the *Catroppa* Court stated:

> There is no evidence in the record as to how this amount was calculated by Respondent. This court does not believe that simply placing a figure on a piece of paper transforms that figure into substantial evidence. Reasonable minds would not consider a figure typed on paper by a party standing alone and without any other evidence of support or explanation as sufficient proof…

Catroppa v. Metal Bldg. Supply, Inc., 267 S.W.3d 812, 820 (Mo. Ct. App. 2008).

Likewise, here, CSD's evidence of damages amounts to no more that a number recited without support. Although CSD's witness attests that calculations underlie this number, no demonstration of these calculations was given. No actual facts were adduced regarding the number of days each Pupil attended; the damage award can therefore not be sustained.

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POINT 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.

POINT 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.

Respondents both make combined responses to Breitenfeld's Points Relied On III and IV. CSD Brief, pp 98-102; TSD Brief 54-65. Breitenfeld likewise makes a single reply to CSD's and SLPSD's response on those Points.

Both SLPSD and CSD insist that Missouri law must provide for an "impossibility" defense, but offer little in support of this position. CSD elides completely over Breitenfeld's Point III, citing without discussion the same two cases[5] Breitenfeld

[5] *George v. Quincy, Omaha & K.C. R.R. Co.*, 167 S.W. 153 (Mo. Ct. App. 1914) and *Egenreither ex rel. Egenreither v. Carter*, 23 S.W.3d 641 (Mo.App.E.D. 2000).

discusses as length in her Brief. CSD's Brief, pp 92-93. As Breitenfeld's treatment of these cases shows, they offer no support for an impossibility defense as envisioned by the Trial Court – one that allows a clear statutory mandate directed to a governmental body to be completely disregarded by that body when it deems full compliance difficult. There is no legal support in *George v. Quincy, Omaha & K.C. R.R. Co.* or in *Egenreither ex rel. Egenreither v. Carter* for the contention that Respondents may in all cases and in all ways ignore § 167.131.

As SLPSD observes, the question asked by the *Quincy* court was "is it impossible *in any reasonable application*, to comply with [the statute]?" SLPSD's Brief, p 55, quoting *George v. Quincy, Omaha & K.C. R.R. Co.*, 167 S.W. 153, 156 (Mo. Ct. App. 1914) (emphasis added). However, this is not the question asked by Respondents or answered by the Trial Court. Both SLPSD and CSD ask the court to consider not whether there is any reasonable application of § 167.131 to the Pupils; rather, they stand this test on its head and ask whether there is a hypothetical situation where § 167.131 could *not* be reasonable. This is simply not the law.

SLPSD also continues to maintain that compliance with § 167.131 is made impossible due to its other legal obligations, including the *Liddell* settlement. SLPSD Brief, pp 61-65. However, as this Court has previously determined with regard to § 167.131, "[w]hen two provisions are not irreconcilably inconsistent, both must stand even if 'some tension' exists between them". *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d at 667. This Court has specifically held that the requirements of the Liddell settlement, as enacted into law by SB 781, do not conflict with § 167.131. *Id.*

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Here, there is and can be no denial that it is eminently reasonable and altogether *possible* for CSD to educate the Pupils and for SLPSD to pay their statutory tuition. There can be no application of an impossibility defense to the Pupils.

While CSD claims that evidence "amply, indeed overwhelmingly, demonstrates the impossibility of compliance with §167.131", nowhere do Respondents address the greatest flaw with Dr. Jones' predictive analysis, which underlies all of the evidence regarding the supposed hardships §167.131 will impose upon CSD and SLPSD: *nothing envisioned by Dr. Jones has, will or can now happen.* Now that the St. Louis Public School District has gained provisional accreditation, § 167.131 is no longer applicable to its residents and there cannot be a single student transfer under the Unaccredited District Tuition Statute for the 2012-2013 school year. It is farcical that Respondents continue to maintain that compliance with § 167.131 is "impossible" due a feared adverse impact that is now itself actually impossible.

Through § 161.131, the Missouri Legislature, in "straightforward," "unambiguous" and "mandatory" terms, has instructed Respondents how to treat Pupils in light of the unaccreditation of the St. Louis Public School District. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 663-664 (Mo. banc 2010). CSD and SLPSD advance purely economic arguments as to why they will not comply with § 167.131. Respondents ask this court to overrule the legislature, not when the legislature has overstepped its bounds, but when it makes economical sense to do so. Such is not the place of this or the trial Court.

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POINT 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).

Even under an abuse of discretion standard, it was error to grant Intervenors permissive intervention. At the time Intervenors intervened, they asserted no claim, defense, or interest unique to themselves. They asserted the same defenses made by CSD and SLPSD- impossibility and the Hancock Amendment. They made no showing that CSD and SLPSD could not or did not defend their interests adequately. As such, Rule 52.12(b) provided no mechanism by which Intervenors could join the lawsuit. *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 487 (Mo. banc 2009) (trial court abused its discretion in allowing intervention of taxpayers).

Moreover, Respondents' discussion of permissive intervention pursuant to Rule 55.12 omits that rule's requirement of a "timely" intervention. Rule 52.12(b). The text of Rule 52.12(b) makes clear that, regardless of whether a party meets the other requirements, a timely request to intervene is a prerequisite. While there is "no specific limit" on the time when an application to intervene must be made, the timeliness of a motion to intervene depends upon the posture of the case, and "the balancing of all factors bearing upon the question". *In the Estate of Whitt*, 880 S.W.2d 380, 382 (Mo. App. 1994). Here, Intervention in a case that has been pending for nearly four years and

already been through appellate review can hardly be considered timely. A timely intervention- prior to the first appeal in this case- would have greatly increased judicial efficiency by allowing a simultaneous review of all claimed defenses. Notably, Intervenors, whose Petitions to Intervene were filed on July 7 and 19 of 2011, cannot argue that their decision to intervene was prompted as a result of the subsequent March 6, 2012 *King Willmann* decision. LF 13.

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CERTIFICATION

The undersigned attorney for Appellant, Elkin L. Kistner, Missouri Bar Number 35287, 101 S. Hanley, Ste 1280, St. Louis, Missouri 63105, (314) 727-0777, hereby certifies that the brief complies with the limitations of Rule 84.06(b); and that the number of words in this brief equals 3,544.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2013, a true and correct copy of the foregoing Appellant's Reply Brief was served via the operation of the Court's electronic filing system upon:

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