



**In the
Missouri Court of Appeals
Western District**

G.B., J.B., and W.B., et al.,	)	
	)	
Appellants,	)	WD83756
	)	
v.	)	OPINION FILED: December 8, 2020
	)	
Crossroads Academy - Central Street,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Charles H. McKenzie, Judge

Before Division Three: Edward R. Ardini, Jr., Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

G.B., J.B., W.B., Zach Baker, and Audrey Baker (collectively "the Bakers") appeal from the judgment of the Circuit Court of Jackson County dismissing with prejudice the Bakers' petition requesting a trial de novo or other administrative review regarding the Crossroads Academy-Central Street's ("Crossroads") decision not to allow the Bakers' children to attend Crossroads until they were vaccinated or filed with the school a proper religious objection to the children being vaccinated arguing this decision was "ultra vires, unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involve[d] an abuse of discretion." We affirm.

Factual and Procedural Background¹

G.B., J.B., and W.B. (collectively "the Baker children") were enrolled at Crossroads, a charter school in Kansas City. G.B. enrolled in the fall of 2017, J.B. enrolled in the fall of 2018, and W.B. enrolled in the fall of 2019. The Baker children are not vaccinated because of religious beliefs. Approximately one month after the 2019 school year began, the school nurse informed the Bakers that W.B. could no longer attend school because he was unvaccinated without a proper exemption as required by section 167.181.² On August 19, 2019, Audrey Baker signed a handwritten note, which provided:

PURSUANT TO MISSOURI STATUTE 167.181, I AM MAKING A RELIGIOUS OBJECTION TO VACCINATIONS ON BEHALF OF MY CHILD & AM GIVING IT TO THE SCHOOL ADMINISTRATOR. I AM WILLING TO FILL OUT A FORM IF THE SCHOOL PROVIDES IT TO ME WHICH THEY WILL NOT DO.

Subsequently, on August 29, 2019, Crossroads notified all parents of unvaccinated children claiming a religious exemption that religious exemptions must be provided on an original Department of Health and Senior Services' form Imm.P.11A ("Form 11"), citing 19 CSR 20-28.010(1)(C)(2).³ The letter provided in pertinent part:

In the past, when students were enrolled, the school did not require parents to provide the original Department form for the school to keep on file and accepted copies of the form instead. However, in order to be compliant with the Department, we are now going back over our records and requiring that all students who are religiously exempt provide the original forms.

¹ "[W]e assume all facts alleged in the petition are true and liberally construe all reasonable inferences in favor the plaintiff" when reviewing a judgment dismissing a petition with prejudice. *Taylor v. Curators of Univ. of Mo.*, 602 S.W.3d 851, 853 n.2 (Mo. App. W.D. 2020).

² All statutory references are to the Revised Statutes of Missouri (2016) as currently updated unless otherwise noted.

³ All references are to the Missouri Code of State Regulations as currently updated unless otherwise noted.

Subsequently, on December 5, 2019, the Bakers received a letter from Crossroads providing in part:

As you are likely aware, the court recently entered an order that will terminate the stipulated temporary restraining order on December 16. As of that date, Crossroads is thus reinstating the requirement that families who assert a religious objection to vaccinating their children, including yours, must submit a signed, original [Form 11].

To ensure you have adequate time to submit the [Form 11], Crossroads will allow you a grace period until January 7, 2020—the first day back from school after winter break—to provide a signed, original [Form 11] for [W.B., G.B., and J.B.]. If you do not provide a signed, original [Form 11] for each of your children by the beginning of school on January 7, those children without an original form on file will not be allowed to attend.

The Bakers requested an appeal of Crossroads' administration's decision to Crossroads' Board of Directors ("Board") and demanded that the administration's decision be stayed pursuant to section 167.171 until the Board rendered a final decision. The Bakers received a response from Crossroads in an unsigned e-mail, which denied that the Baker children were being suspended or expelled but provided the Bakers the opportunity to attend a closed session meeting of the Board on December 16, 2019, and address the Board "to 'share factual information' that 'supports why Crossroads should proceed differently in this matter.'"

On December 16, 2019, the Bakers availed themselves of the opportunity to be heard, and the Board met in closed session, which the Bakers attended with counsel. The Bakers were allowed to argue their position but were not allowed to call witnesses, cross-examine witnesses, or present evidence. The session was not recorded, and no transcript was taken. On December 23, 2019, the Board sent a letter to the Bakers providing in part:

[The Board] has voted to uphold the administration's decision that for your children to maintain eligibility to attend school you must comply with the requirements of 10 CSR 20-28.010 [sic] and submit either proof of vaccination or a signed original [Form 11] for each child by January 7, 2020 or be disenrolled from school.

The Bakers have refused to file an original Form 11 with the school for the children, and the Baker children have not been allowed to return to Crossroads.

On December 29, 2019, the Bakers filed, in the Circuit Court of Jackson County ("circuit court"), a Petition for Review for Stay of Expulsion of Children and DHSS Regulation ("Petition") solely against Crossroads, seeking a trial de novo pursuant to section 167.161 alleging that Crossroads did not comply with its own policies when it suspended or expelled the Baker children.⁴ The Petition's prayer for relief requested in its entirety:

WHEREFORE [sic] the petitioner / appellants request that the Court determine that the removal of the Baker children's rights to attend school is ultra vires, unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion, and further request all relief available under the review statute including the issuance of an order of stay, temporary restraining order, or injunction pursuant to 536.120 such that the Baker children will be permitted to attend Crossroads school under the religious exemption statements already provided to the school by the parents allowing those children to attend school without being vaccine injected.

⁴ The definition of "expulsion" is not contained within the record on appeal. The Bakers included the entirety of Crossroads' policies in their appendix to their brief, and those policies do provide a definition of "expulsion." However, "[t]he mere inclusion of documents in an appendix to a brief does not make them part of the record on appeal." *Washington v. Gorden*, 286 S.W.3d 824, 826 (Mo. App. E.D. 2009) (quoting *State ex rel. Miss. Lime Co. v. Mo. Air Conservation Comm'n*, 159 S.W.3d 376, 380 n.2 (Mo. App. W.D. 2004)). We therefore cannot consider those portions of the policies that are not included in the legal file in reaching our decision. As alleged in the petition, Crossroads' policies define an out-of-school suspension as "the removal of a student from school (or school bus) for one to ten school days," and "[t]he Principal may impose an out-of-school suspension of up to ten school days." A long-term suspension is "the removal of a student from school (or school bus) for more than ten school days but not beyond the current school semester."

On January 7, 2020, the Bakers filed an Emergency Motion for Temporary Restraining Order seeking an injunction ordering Crossroads to allow the Baker children to attend school unvaccinated. The circuit court denied the motion on February 13, 2020.

On February 6, 2020, Crossroads filed a Motion to Dismiss alleging the Petition failed to state a claim upon which relief could be granted. After substantial briefing by both parties, the circuit court entered its judgment on April 27, 2020, dismissing the Petition with prejudice holding that:

The right to a review of a school's decision under [section] 167.161 attaches only in the context of a dispute over a Missouri school's disciplinary suspension or expulsion of a student. The decision to continue the enrollment of the Petitioner's children does not involve a disciplinary removal—it relates to eligibility to be enrolled in the school. There are no allegations that the Petitioners' children were suspended or expelled for a disciplinary reason. Petitioners thus have no right to seek a trial de novo reviewing Crossroads' enrollment decision, and their petition should be dismissed in its entirety.

This appeal timely followed.

Ancillary Litigation

In addition to the judgment of the circuit court, which is before us on appeal, the Bakers filed three additional lawsuits before the Petition was filed in the instant case. First, the Bakers filed a petition ("*Baker I*") in the United States District Court for the Western District of Missouri ("District Court") naming Crossroads, the Missouri Attorney General, and the Director of the Missouri Department of Health and Senior Services as defendants. The *Baker I* petition raised both federal and state claims that the vaccination regulations are unconstitutional and sought a preliminary injunction and a permanent injunction ordering the Baker children to be re-enrolled at Crossroads. The District Court denied both

the preliminary and permanent injunctions. *W.B. by and through Baker v. Crossroads Acad.-Cent. St.*, No. 4:19-cv-00682-HFS, 2019 WL 6257963 (W.D. Mo. Nov. 22, 2019). The District Court subsequently dismissed the claims pertaining to the State Defendants. *W.B. by and through Baker v. Crossroads Acad.-Cent. St.*, No. 4:19-CV-00682-HFS, 2020 WL 206718 (W.D. Mo. Jan. 10, 2020).

Second, the Bakers filed another petition ("*Baker II*") in the Federal District Court that originally entered a temporary restraining order preventing Crossroads from disenrolling the Baker children, but the District Court subsequently dismissed the federal claims against Crossroads and lifted its previous restraining order. *G.B. by and through Baker v. Crossroads Acad.-Cent. St.*, No. 20-00003-CV-W-HFS, 2020 WL 996455, (W.D. Mo. March 2, 2020).⁵

Additionally, on December 29, 2019, the Bakers filed a 100-page petition in the circuit court ("*Baker III*") raising 18 claims against the named defendant in this matter as well as: Karis Parker, Crossroads' Principal; Eva Copeland, Crossroads' School Nurse; the Director of the City of Kansas City, Missouri, Health Department; the Director of the Jackson County, Missouri, Health Department; the Director for the Missouri Department of Health and Senior Services; and the Missouri Attorney General. *G.B., J.B, and W.B. v. Crossroads Acad.*, No. 1916-CV34300. Relevant to this appeal, the Bakers alleged in Count I of that petition that 19 CSR 20-28.010 is ultra vires and improperly modifies and expands the scope of its enabling statute; in Count III that Copeland, Parker, and

⁵ Although not contained in the record before us, and unnecessary for our determination of the issues before us, it appears the District Court transferred this matter to the circuit court for resolution of the remaining state claims.

Crossroads violated Crossroads' policies and the Missouri statutes governing expulsion and suspension of students; in Count XIX, seeking a declaratory judgment, that "Crossroads has no authority to require the Bakers to provide the kind of religious exemption statement on Form 11" *Baker III* is currently being litigated in the circuit court.

Standard of Review

Appellate courts review "a trial court's grant of a motion to dismiss . . . de novo." *Ward v. W. Cty. Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013). "A motion to dismiss for failure to state a claim on which relief can be granted is an attack on the plaintiff's pleadings." *In re T.Q.L.*, 386 S.W.3d 135, 139 (Mo. banc 2012). "Such a motion is only a test of the sufficiency of the plaintiff's petition." *Id.* "When considering whether a petition fails to state a claim upon which relief can be granted, this Court must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader." *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. banc 2012). "The Court does not weigh the factual allegations to determine whether they are credible or persuasive." *Id.* "Instead, this Court reviews the petition to determine if the facts alleged meet the elements of a recognized cause of action" *Id.* (quotation marks omitted).

R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., 568 S.W.3d 420, 424 (Mo. banc 2019). Furthermore, statutory interpretation is a question of law, which we review de novo. *D.E.G. v. Juv. Officer of Jackson Cnty.*, 601 S.W.3d 212, 216 (Mo. banc 2020).

Discussion

The Bakers raise six points on appeal. First, the Bakers assert the circuit court erred in dismissing their petition finding that the Baker children were "disenrolled" rather than "suspended" or "expelled" and further erred in finding that section 167.161 does not provide for a trial de novo except when children are subject to discipline. Second, the Bakers argue the circuit court's dismissal of the petition without providing for a trial de

novo was erroneous because it violated the Baker children's right to an education when other similarly situated students would be entitled to such review. Third, the Bakers assert the circuit court's dismissal was erroneous because section 536.150 provides for review by a circuit court by "suit for injunction, certiorari, mandamus, prohibition or other appropriate action" to determine whether administrative decisions are unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involve an abuse of discretion. Fourth, the Bakers argue the circuit court's dismissal was erroneous because "section 536.050 provides for judicial review regarding decisions that are otherwise unreviewable and also provides for declaratory relief." Fifth, the Bakers assert the circuit court erred in dismissing the Bakers' petition because Crossroads' decision to deny the Baker children their education was unreasonable, arbitrary, and capricious in that Crossroads did not require an original Form 11 as a condition for the Baker Children's prior enrollment, and the Bakers have provided a written religious objection to the vaccination requirement to Crossroads. Finally, the Bakers argue the circuit court's dismissal of the petition was erroneous in that the Bakers plead "they were aggrieved under [section] 536.150 in that the Missouri statutory scheme is unconstitutional by not allowing the Bakers to provide informed consent to vaccine injecting because the Bakers cannot provide voluntary consent, much less voluntary informed consent, in that [the] Baker children are required to attend school vaccinated and the Bakers are subjected to a criminal penalty for the children not attending school."⁶ We address these points out of order for ease of analysis.

⁶ Crossroads has filed a Motion to Dismiss the Bakers' Points I, III, IV, V, and VI on the grounds that these points do not comply with Rule 84.04(e) in that several of the Bakers' points on appeal do not contain a statement describing whether the error was preserved for appellate review and how such errors were preserved. Crossroads is

Point One

In their first point on appeal, the Bakers argue the circuit court erred in dismissing the Petition on the grounds that the Baker children were "disenrolled," and there was no disciplinary reason Crossroads used to remove the Baker children from school because 19 CSR 20-28.010(1)(A) limits Crossroads' authority to suspend or expel students under section 167.161 and 167.171 in that review of Crossroads' denial of the right of the Baker children to attend school is not limited to "student disciplinary hearings" under 167.161(3) but also "proceedings related to the rights of students to attend school." While inartfully drafted, in essence, the issue we must determine is whether a student removed from a school for failing to provide an effective religious exemption from vaccination is entitled to a trial de novo pursuant to section 167.161(3).

Section 167.181 makes it unlawful for any student to attend school in the State of Missouri unless they have been immunized for certain diseases and grants the Department of Health and Senior Services the authority to promulgate rules and regulations governing the immunization requirements for school attendance. Subsection 3 of this section provides for certain children to be exempt from the immunization requirements based on religious beliefs or medical contraindication for a child receiving certain immunizations. Pursuant to the rulemaking authority provided by section 167.181, the Department of Health and Senior Services adopted 19 CSR 20-28.010. 19 CSR 20-28.010(1)(C).2 provides that a student shall be exempted from the immunization requirements if one parent or guardian

correct that Bakers' brief is flawed in this manner. However, because we are able to discern the nature of the Bakers' claims without resorting to advocacy on their behalf or prejudicing Crossroads, *ex gratia*, we decline to dismiss these points on this basis. *Nichols v. Belleview R-III Sch. Dist.*, 528 S.W.3d 918, 927 (Mo. App. S.D. 2017).

objects in writing to the requirements based on religious beliefs. However, that subsection specifically requires, "This exemption *must be provided on an original* Department of Health and Senior Services' [Form 11] and shall be signed by the parent or guardian and placed on file with the school immunization health record." (emphasis added). The regulations also place on the school district the obligation not to enroll or allow attendance by any student that is noncompliant. 19 CSR 20-28.010(1).

These provisions, when read together, make clear that every child must be properly immunized for the listed diseases before they are allowed to attend school in the state. A student may be exempted from the immunization requirements upon compliance with certain very specific criteria for an exemption. The applicable criterion at issue in this case is the regulation's requirement that the exemption be provided to the school district on an *original* Form 11.

Against that background, the question before us is whether sections 167.161 and 161.171 obligate a school district to provide certain due process rights, including a right to a trial de novo in the circuit court, before a student can be denied attendance for failure to comply with the immunization requirements. "Our primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Truman Med. Ctr., Inc. v. Am. Standard Ins. Co.*, 508 S.W.3d 122, 124 (Mo. App. W.D. 2017). Section 167.161(3) provides:

The school board shall make a good-faith effort to have the parents or others having custodial care present at any such hearing. Notwithstanding any other provision of law to the contrary, student discipline hearings or proceedings related to the rights of students to attend school or to receive academic credit shall not be required to comply with the requirements applicable to contested

case hearings as provided in chapter 536, provided that appropriate due process procedures shall be observed which shall include the right for a trial de novo by the circuit court.

The Bakers argue that the Board's closed session was a "proceeding[]" related to the rights of students to attend school," however, that interpretation is not supported when considering the language of the statute in its entirety or the caselaw interpreting that provision. "[P]rovisions in the statute are to be considered together, not read in isolation." *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015).

The plain language of section 167.161(3) extends due process rights to student disciplinary hearings or proceedings. The phrase "student disciplinary" modifies not only "hearings" but also "proceedings." Because the closed session regarding the enrollment status of the Baker children was neither a disciplinary hearing nor a disciplinary proceeding, the provisions of section 167.161 are inapplicable. Section 167.161 codifies the minimum due process requirements for suspensions or expulsions for disciplinary reasons, and the purpose of this due process is to "provide the student with notice of his [or her] alleged misconduct and give him [or her] an opportunity to explain his [or her] version of the facts before discipline is imposed." *Reasoner by Reasoner v. Meyer*, 766 S.W.2d 161, 163 (Mo. App. W.D. 1989). The fact that section 167.161(3) is limited to disciplinary proceedings is confirmed by viewing the sub-section in context with the remainder of section 167.161. Section 167.161(3) begins by specifying the right of a student's parents or custodians to attend "any such hearing" – plainly referring to the hearings required by the preceding sub-sections of section 167.161. Section 167.161.1 requires a hearing before suspension or removal of a student "for conduct which is prejudicial to good order and

discipline in the schools or which tends to impair the morale or good conduct of the pupils," while section 167.161.2 provides for a hearing before suspension of a pupil "upon a finding that the pupil has been charged, convicted, or pled guilty in a court of general jurisdiction for the commission of a felony criminal violation of state or federal law." These are the grounds for suspension or expulsion to which section 167.161(3) applies – *disciplinary* proceedings based on student *misconduct*. Section 167.161(3) is inapplicable to the situation here, where Crossroads was required by section 167.181 to refuse to permit the Bakers' children to attend school due to their immunization status.

In *Horton v. Marshall Public Schools*, 769 F.2d 1323, 1333 (8th Cir. 1985), the Court held that federal due process requirements did not extend to a district's policy of excluding minor children from school unless they had a parent or legal guardian living within the district because the matter "involved patently objective facts which are not the type which would foreseeably be controverted." The Court reasoned that the decision to exclude children that do not reside within the district was "not like the suspension from public school for misconduct involved in *Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 739, 42 L.Ed.2d 725 (1975), where 'the controlling facts and the nature of the conduct under challenge are often disputed.'" *Horton*, 769 F.2d at 1333-34. Similarly, in the instant case there are no relevant facts in dispute that would be clarified by formal due process. All parties agree that the Baker children have not been vaccinated and that the Bakers have refused to provide a signed original Form 11 to Crossroads for the children. Therefore, the Board would not have been aided by calling additional witnesses subject to cross-examination, the Bakers have failed to establish what, if anything would be accomplished

by a trial de novo in the circuit court, and our review of the proceeding would not have been enhanced by a transcript of the hearing before the Board or from a trial de novo. Because section 167.171(3) does not provide for a trial de novo of non-disciplinary hearings or proceedings, the circuit court did not err in dismissing the Bakers' petition requesting a trial de novo in the instant case.⁷

Section 167.181 is clear that children must be immunized or establish that they fall under one of the exemptions for immunization before they can attend school. The regulations place on the school district the obligation not to enroll or allow attendance by any student that is noncompliant with the statute. 19 CSR 20-28.010(1). The facts pled in the petition clearly establish that the Baker children are not vaccinated and that the Bakers have not filed the required exemption on an original Form 11 to fall within the relevant exemption. Crossroads, in compliance with their obligations under the law, properly determined that the Baker children were not allowed to enroll or attend school until the Bakers become compliant with the law.

Point One is denied.

Points Three, Four and Five

In their third, fourth, and fifth points on appeal, the Bakers assert that the circuit court erred in dismissing their Petition because section 536.150 provides the circuit court

⁷ We recognize that 19 CSR 20-28.010(1)(A) states that "[t]he school administration shall exercise its power of pupil suspension or expulsion under section 167.161, RSMo . . . until the violation [of the immunization requirement] is removed." This DHSS regulation cannot alter the fact that, by its plain language, section 167.161 is limited to *disciplinary* suspensions or expulsions. The mandate to exclude the Baker children from school does not derive from section 167.161. Instead, it derives from section 167.181.2, which categorically states that "[i]t is unlawful for any student to attend school unless he has been immunized as required under the rules and regulations of the department of health and senior services, and can provide satisfactory evidence of such immunization," unless the child is otherwise exempted, or is in the process of obtaining the necessary immunizations.

authority to review administrative decisions as to whether they are unconstitutional, unlawful, unreasonable, arbitrary or capricious or involve an abuse of discretion, and section 536.050 provides authority for declaratory relief. Crossroads asserts that these claims are precluded by Missouri's prohibition of claim splitting, arguing that the Bakers invoked these statutes and made identical claims and arguments in *Baker III*, which is currently being litigated in a separate case in the circuit court. Because the *Baker III* petition was filed before the Petition in the instant case and contains all of the necessary parties to adjudicate this claim, we decline to address the merits of these points.

A single cause of action may not be split and filed or tried piecemeal. *Roy v. MBW Constr., Inc.*, 489 S.W.3d 299, 305 (Mo. App. W.D. 2016).⁸ "In general, the test for determining whether a cause of action is single and cannot be split is: 1) whether separate actions brought arise out of the same act, contract or transaction; 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions." *Id.* (quoting *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991)). We broadly interpret the term "transaction" to mean "the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose." *Id.* The purpose of the rule against claim splitting is "to prevent a multiplicity of suits and appeals with respect to a single cause of action, and is designed to

⁸ Although the claim-splitting doctrine generally applies to suits filed after the conclusion of a prior suit, the doctrine also applies to actions pending simultaneously. *HFC Invs., LLC v. Valley View State Bank*, 361 S.W.3d 450, 457 n.6 (Mo. App. W.D. 2012) (citing *Welch v. Contreras*, 174 S.W.3d 53, 57 (Mo. App. W.D. 2005); *Bagsby v. Gehres*, 139 S.W.3d 611, 615 (Mo. App. E.D. 2004); *Hutnick v. Beil*, 84 S.W.3d 463, 466 (Mo. App. E.D. 2002)).

protect defendants against fragmented litigation, which is vexatious and costly." *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 716 (Mo. banc 2008) (internal quotation omitted). However, "[a] plaintiff does not violate the rule if it 'bring[s] separate **and distinct** causes of action separately, even if they arise out of the same transaction.'" *Old Republic Nat. Title Ins. Co. v. Cox*, 453, S.W.3d 780, 788 (Mo. App. W.D. 2014) (quoting *Shores v. Express Lending Servs., Inc.*, 998 S.W.2d 122, 127-28 (Mo. App. E.D. 1999)).

In the *Baker III* petition, the Bakers alleged that "Crossroads has already permitted the Baker children to participate in school activities unvaccinated and without the Form [11] Crossroads demands be completed which demonstrates that the policies of Crossroads and DHSS are arbitrary and inconsistent." Similarly, the Bakers requested in relevant part that the circuit court declare "the DHSS regulation and practices requiring a religious statement be made in the language required on [Form 11] is ultra vires and impermissibly modifies and adds to Section 167.181.3 RSMo." Because these are nearly identical claims to what the Bakers raise in the instant case arising from the same transaction, these claims are precluded by the claim-splitting doctrine.

Furthermore, because this matter involves ongoing litigation between the parties, it would be inappropriate for us to render any opinion as to the merits. This Court lacks authority to issue advisory opinions. *Cope v. Parson*, 570 S.W.3d 579, 586 (Mo. banc 2019). "An opinion is advisory if there is no justiciable controversy, *such as if the question affects the rights of persons who are not parties in the case*, the issue is not essential to the determination of the case, or the decision is based on hypothetical facts." *Id.* (emphasis added). Because an opinion in the instant case would affect the rights of the Department

of Health and Senior Services, a necessary party pursuant to Rule 52.04, our opinion on the merits would be advisory in nature. It is far better for the circuit court to reach a decision in *Baker III* than for us to reach a premature decision in the instant case without the necessary parties before us.

Points Three, Four, and Five are dismissed.

Points Two and Six

In their second point on appeal, the Bakers argue the circuit court's dismissal of the petition violated the Baker children's right to an education when other similarly situated students would be entitled to such review. Similarly, in their sixth point on appeal, the Bakers assert that the circuit court's dismissal was erroneous in that the Bakers pleaded "they were aggrieved under [section] 536.150 in that the Missouri statutory scheme is unconstitutional by not allowing the Bakers to provide informed consent to vaccine injecting because the Bakers cannot provide voluntary consent, much less voluntary informed consent, in that [the] Baker children are required to attend school vaccinated and the Bakers are subjected to a criminal penalty for the children not attending school." Crossroads argues these constitutional claims have not been preserved for review. We agree.

"The rule has long been established that to preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). To properly raise a constitutional challenge, a party must:

(1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to be have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

Mayes v. Saint Luke's Hosp. of Kan. City, 430 S.W.3d 260, 266 (Mo. banc 2014). The Bakers asserted for the first time in their Emergency Motion for Temporary Restraining Order that Crossroads' actions violated article I section 2 of the Missouri Constitution, which provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." However, that motion was denied, and the Bakers failed to raise that argument in any fashion in their response to Crossroads' Motion to Dismiss.

In *Mayes*, 430 S.W.3d at 267, our Supreme Court held that a party failed to preserve a constitutional question when the "trial court did not have the opportunity to consider these constitutional claims when ruling on the defendants' motion to dismiss because the plaintiffs neglected to raise them." A party is required to make a timely request, which is one "made when the occasion for the ruling desired first appears." *Id.* (quoting *Brown v. Thomas*, 316 S.W.2d 234, 237 (Mo. App. 1958)). The Court held that the plaintiff's desired ruling on the constitutional validity of a statute first appeared when the trial court was ruling on a defendant's motion to dismiss, and the plaintiffs did not apprise the court of these claims. *Id.* at 267-68. Furthermore, the plaintiffs opposed the motion to dismiss, but raised different bases for its opposition than those claimed on appeal. *Id.* at 268. Thus, the Court concluded that the constitutional issue had not been preserved for review. *Id.*

Similarly, when responding to Crossroads' Motion to Dismiss, the Bakers asserted without specificity that requiring individuals to obtain an original Form 11 from the health department "violate[s] the Missouri Constitution regarding freedom of religion, separation of religion, as well as the Missouri RFRA which prohibits discrimination against the Bakers on the basis of their religious viewpoint." Now on appeal, the Bakers raise an equal protection claim asserting that similarly situated plaintiffs would be entitled to a trial de novo, but because this equal protection argument was never articulated to the circuit court, the constitutional question has not been preserved for review. While the Bakers asserted in their Opposition to Crossroads' Motion to Dismiss that Missouri's statutory scheme was unconstitutional, the Bakers failed to cite to any specific provisions in the Missouri Constitution or the United States Constitution that they claim were violated by the statutory scheme. Therefore, this second constitutional question has not been preserved for our review.

Although we have discretion to review unpreserved claims for plain error, we decline to do so here. *Mayes*, 430 S.W.3d at 269. Plain error review is rarely granted in civil cases. *Id.* "The Court will review an unpreserved point for plain error only if there are 'substantial grounds for believing that the trial court committed error that is evident, obvious and clear' and where the error 'resulted in manifest injustice or miscarriage of justice.'" *Id.* Because the circuit court in the instant case has not committed clear error, Points Two and Six are denied.⁹

⁹ Because the Bakers' constitutional claims were not preserved for appellate review, they are not "real and substantial," and therefore do not trigger the Missouri Supreme Court's exclusive appellate jurisdiction under Article V, section 3 of the Missouri Constitution. See, e.g., *Ritter v. Ashcroft*, 561 S.W.3d 74, 84 (Mo. App. W.D. 2018).

Conclusion

The judgment of the circuit court is affirmed.



Gary D. Witt, Judge

All concur