Summary of SC92317, *Kenneth Pearson, et al. v. Chris Koster, et al.,*
consolidated with
SC92326, *Stan McClatchey, et al. v. Robin Carnahan*
Appeals from the Cole County circuit court, Judge Daniel R. Green
Argued and submitted Thursday morning, Feb. 16, 2012; opinion issued May 25, 2012

Attorneys: In SC92317, the Pearson challengers were represented by Gerald P. Greiman, Frank Susman and Thomas W. Hayde Jr. of Spencer Fane Britt & Browne LLP in St. Louis, (314) 863-7733, and Keith A. Wenzel of Spencer Fane Britt & Browne LLP in Jefferson City, (573) 634-8115. William Lacy Clay, who filed a brief as a friend of the Court, was represented by Richard E. Schwartz, an attorney in St. Louis, (314) 498-0909.

In SC92326, the McClatchey challengers were represented by Jamie Barker Landes, an attorney in Lee's Summit, (816) 877-3891.

In both cases, the state was represented by State Solicitor James R. Layton of the attorney general's office in Jefferson City, (573) 751-3321; and the legislators were represented by Todd P. Graves, Edward D. Greim and Clayton J. Callen of Graves Bartle Marcus & Garrett LLC in Kansas City, (816) 256-4144.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Two groups of individuals challenged the constitutional validity of the new map the legislature drew to divide the state into eight congressional districts. This Court previously affirmed the trial court's dismissal of all claims except whether certain districts met the state constitution's requirement that they be drawn "as compact … as may be." The challengers appeal the trial court's subsequent judgment that they failed to prove the districts were not as compact "as may be."

In a per curiam decision that cannot be attributed to any particular judge and that is joined by four judges, the Supreme Court of Missouri affirms the trial court's judgment. The trial court did not err in interpreting the constitutional compactness standard because the standard does not require absolute precision in compactness and because mandatory and permissible recognized factors can impact the configuration of district boundaries. As to the challengers' claim that the judgment is against the weight of the evidence, this Court will not substitute its judgment for that of the trial court on evidence regarding disputed factual issues. The trial court made credibility assessments and weighed evidence in reaching its judgments in favor of the state defendants, who bore no burden of proof, and neither party requested findings of fact that would assist in appellate review.

Judge Zel M. Fischer wrote a concurring opinion that is joined by one other judge. He agrees that the challengers – who bore the burden of proof – failed to demonstrate that HB 193 clearly and undoubtedly contravened the constitution. Giving due deference to the trial court's evaluation of the credibility of the witnesses and the probative value of the evidence as required by law, the

author states this is not a close case, and the trial court's judgment should be affirmed. He notes that the dissent fails to give due deference to the trial court's determination of the credibility of the witnesses and evaluation of the probative value of the evidence as required by this Court's well-settled precedents and rules.

Judge William Ray Price Jr. wrote a dissenting opinion that is joined by two other judges. He would hold that the requirements of article III, section 45 of the Missouri Constitution – which help safeguard the rights of Missouri voters to fair elections of their congressional representatives – should be enforced, not finessed in deference to the legislature – and, therefore, would reverse the trial court's judgment that districts 5 and 6 are "compact … as may be." The legislature may exercise discretion when redistricting – allowing for certain "minimal and practical deviations" from compactness – so long as it follows the constitutional commands, *Pearson I*, 359 S.W.3d at 40. These discretionary factors, however, cannot be read into the constitution if doing so functionally would erase the requirement that the districts be compact. When a nonpartial and objective observer plainly can see that a district is noncompact, deviations from compactness are not minimal. He would hold that, because the challengers claim the judgment as against the weight of the evidence, this Court must look at each piece of evidence, weigh the probative value of that evidence and determine whether the trial court judgment should stand. Because all the material facts here were stipulated and, therefore, uncontested, no deference is due to the trial court's findings, and the lack of factual findings at the trial court does not prevent this Court from reviewing the weight of the evidence. He would find that, because the noncompactness of district 3 was necessary to comply with the federal voting rights act in the neighboring districts 1 and 2, district 3 is as compact "as may be."

Judge Gary Lynch, a judge of the Missouri Court of Appeals, Southern District, sat in this case by special designation in place of Chief Justice Richard B. Teitelman. Judge Joseph M. Ellis, a judge of the Missouri Court of Appeals, Western District, sat in this case by special designation in place of Judge Mary R. Russell. Judge Karen King Mitchell, also a judge of the Missouri Court of Appeals, Western District, sat in this case by special designation in place of Judge George W. Draper III.

Facts: Article III, section 45 of the Missouri Constitution requires the state legislature to draw districts for the federal house of representatives "as compact and nearly equal in population as may be." The legislature enacted a new congressional map embodied in House Bill No. 193. Two groups – one including Kenneth Pearson and the other including Stan McClatchey (collectively, the challengers) – filed suit against the attorney general and secretary of state, respectively, challenging the map on various constitutional grounds. The chairmen of the redistricting committees in the house and senate intervened in both cases. The trial court dismissed both cases, and the challengers appealed. In a consolidated opinion, this Court affirmed the dismissal of their claims regarding partisan gerrymandering, bipartisan gerrymandering, the alleged "good of the whole" violation and the alleged "right to vote" violation, holding the trial court correctly found the challengers failed to state a claim as to those counts. *Pearson v. Koster*, 359 S.W.3d 35, 40 (Mo. banc 2012) (*Pearson I*). As to the singular issue of compactness, however, this Court held that a question of fact existed as to whether some districts in the map were drawn "as compact … *as may be*." *Id.* It reversed the trial court's initial judgment as to this issue and remanded the cases to the trial court for determination of the factual

issues. *Id.* During the three-day trial on remand, the parties made various stipulations – including to the HB 193 map – and presented evidence regarding whether the challenged districts are "as compact … as may be." The trial court subsequently entered judgment in favor of the state defendants. It determined that the phrase "as compact … as may be" means that compactness cannot be achieved with absolute precision and permits districts to be drawn in multiple ways while still meeting the compactness requirement due to other factors. It concluded the challengers failed to prove that HB 193 is unconstitutional because it is not as compact "as may be." The challengers appeal.

AFFIRMED.

Court en banc holds: (1) In a court-tried civil case such as the one here, the trial court's judgment is affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *White v. Director of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2011). The application of this standard of review varies depending on the burden of proof applicable at trial and the error claimed on appeal. When facts relevant to an issue are contested, this Court defers to the trial court's assessment of evidence. Once evidence is contested, or disputed in any manner, a trial court is free to disbelieve any, all or none of the evidence. For example, this Court will overturn a trial court's judgment on the ground that it is against the weight of the evidence only if it has a firm belief that the judgment is wrong, giving the trial court's findings of fact the approximate effect of a jury verdict, especially when weighing and credibility are involved. Questions of law, however, are reviewed *de novo* (independently, without deference to the trial court's conclusions). When an issue is a mixed question of law and fact, this Court must segregate the parts of the issue that are dependent on factual determinations from those that are dependent on legal determinations. The reviewing court will defer to the trial court's factual findings as long as they are supported by competent, substantial evidence but will review *de novo* the application of the law to those facts.

(2) As those challenging the validity of a statute such as the one involving the redistricting map here have the burden of proving it clearly and undoubtedly violates the constitution, the challengers at all times bore the burden of proving the map is unconstitutional. All doubts are resolved in favor of the validity of the statute. In *Pearson I*, the Court held that a subjective test no longer applies, rejecting the good-faith standard and holding that what applies is the objective standard of the constitutional language itself. 359 S.W.3d at 40. Placing the burden of proof on a plaintiff challenging a redistricting map is consistent with the framework used by nearly every state in the nation. The vast majority of states either expressly have rejected shifting the burden of proof or have treated redistricting cases the same as other constitutional challenges and maintained the burden of proof on the plaintiff. Whether the districts in the challenged map are as "compact as may be" is a mixed question of law and fact. The trial court's interpretation of the constitution is a question of law given *de novo* review. In contrast, the court's determinations of whether the characteristics of a particular map satisfy the meaning of the "as compact … as may be" requirement involves questions of fact.

(3) Article III, section 45 of the Missouri Constitution requires that the legislature to draw the congressional districts according to census figures, making the districts contiguous territory, as compact as may be and as nearly equal in population as may be. These requirements are

mandatory and objective – each must be satisfied – although the language used in the requirements may allow some flexibility in their compliance. *See Johnson v. State*, ___ S.W.3d. ___, slip op. at 17 (Mo. banc 2012) (No. SC92351, decided concurrently).

(4) The trial court did not declare erroneously the meaning of "as compact … as may be" under the constitution. The test for whether a district is "as compact … as may be" is a single inquiry whether, under the totality of the evidence, there is a departure from the principle of compactness in the challenged district, and, if there are minimal and practical deviations, whether the district nonetheless is "as compact … as may be" under the circumstances. *See Pearson I*, 359 S.W.3d at 40. A century ago, this Court found that, for Missouri redistricting purposes, "compact" means "closely united territory," effectively rejecting the proposition that "compact" refers solely to physical shape or size. *Barrett v. Hitchcock*, 146 S.W. 40, 61 (Mo. banc 1912). Accordingly, a visual observation, although relevant, is not decisive in determining whether a district departs from compactness. Further, modification of "compact" with the phrase "as may be" recognizes that compactness cannot be achieved with absolute precision. *Pearson I*, 359 S.W.3d at 39.

There are other recognized factors that affect the ability to draw boundaries with closely united territory, including the impact of the constitutional standards for compactness for contiguous territory and population equality. By virtue of the supremacy clause (article VI, clause 2 of the United States Constitution), districts also must comply with the federal constitution and federal laws such as the voting rights act. *See Johnson*, slip op. at 23-24. The phrase "as may be" also permits consideration of other recognized factors that inherently are included in constitutional standards governing reapportionment, though not articulated expressly as a separate requirement in the constitution. *Id.*, slip op. at 24. This Court identified these factors in *Preisler v. Doherty*, 284 S.W.2d 427 (Mo. banc 1955); *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962); and *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. 1975). As with this Court, the United States Supreme Court recognizes that legitimate considerations include recognition of natural and historical boundary lines and respect for boundaries of political subdivisions. *See generally Swann v. Adams*, 385 U.S. 440, 444 (1967); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *see also Bush v. Vera*, 517 U.S. 952, 963 (1996).This Court's precedent does not hold that constitutional requirements can be disregarded to consider other factors but instead recognizes that the constitutional requirements themselves incorporate such considerations by the use of the standard "as may be." If a district seems not to be composed of closely united territory because of minimal and practical deviations, it still is "as compact … as may be" if those deviations are due to mandatory and permissible factors. Maps can be drawn in multiple ways, all of which might meet the constitutional requirements. *Pearson I*, 359 S.W.3d at 39. The trial court's judgment, which determined that absolute precision is not required and that other factors may affect compactness, is consistent with proper construction of the constitutional provision.

(5) The trial court's judgment that the challengers failed to prove their claim is upheld. In their claim that the judgment is against the weight of the evidence, "weight" refers to the probative value, not the quantity, of evidence. Though the challengers attack the judgment in favor of the state, the state had no burden of proof and was not required to present any evidence to prevail. The challengers bore the burden of proving that the boundaries of the districts they challenged – districts 3, 5 and 6 – depart from the principles of compactness and that any deviations were not

minimal or practical deviations occurring as a result of the interrelationship in standards for population equality and compactness; the contiguity requirement; federal laws such as the voting rights act; and the recognized factors of population density, natural boundary lines, political subdivision boundaries and historical boundaries of prior redistricting maps.

The parties stipulated to the HB 193 map and statistical evidence regarding compactness, population equality and racial composition of the relevant districts. While these stipulations of fact relieved he parties from proving the matters stipulated, the stipulations do not prove, as a matter of law, that a district does not meet the constitutional standard for compactness. It still was the parties' duty to request, pursuant to Rule 73.01, findings as to the controverted issues of fact and conclusions of law, identifying the issues they wanted the trial court to decide. Merely submitting proposed findings to aid the court does not trigger its duty to make findings of fact and law. Because the parties here did not request such findings, this Court does not have the benefit of specific, articulated conclusions as to the compactness of the districts. Instead, pursuant to Rule 73.01, this Court views the facts in the light most favorable to the judgment.

Evidence was presented that the circular shapes of districts 1 and 2, which were drawn in compliance with the federal voting rights act, necessarily caused the neighboring district 3 to take on a crescent shape. As such, the trial court could conclude the challengers failed to prove that district 3 was not "as compact … as may be."

Evidence presented as to district 5 included the HB 193 map, prior redistricting maps, the results of eight statistical tests measuring compactness, expert testimony and evidence about the effect of political subdivision boundaries on the boundaries for district 5, including both urban and rural areas of Jackson County. As to the expert testimony, to the extent it regards an issue that is solely a question of law, this Court will give no more deference to that opinion than to the trial court's ruling on an issue of law. *See Howard v. City of Kansas* City, 332 S.W.3d 772, 785 (Mo. banc 2011). The record reveals factual disputes regarding whether the deviations in the boundary of district 5 were minimal and practical deviations that could have been drawn to take into account certain recognized factors. The trial court was free to consider the weight and credibility of the evidence on the record and, from that assessment, objectively could have determined that the challengers failed to prove clearly and undoubtedly that district 5 is not "as compact … as may be." This Court will not substitute its judgment for that of the trial court by reevaluating the credibility of that evidence.

Because the trial court did not err in its judgment regarding district 5, and because the boundary of that district has a direct correlation to the boundary of the neighboring district 6, the same analysis applies. There is no error, therefore, in the trial court's judgment regarding district 6.

Concurring opinion by Judge Fischer: The author agrees that the challengers failed to demonstrate that HB 193 clearly and undoubtedly contravened the constitution but writes separately to emphasize the standard of review applicable to this Court in cases tried to a judge rather than a jury and to address certain concerns voiced in the dissent. The author points out that the dissenting opinion does not deny that the trial court's judgment was supported by substantial evidence. Giving due deference to the trial court's evaluation of the credibility of the witnesses

and the probative value of the evidence as required by law, the author states this is not a close case, and the trial court's judgment should be affirmed.

As previously decided by this Court, as long as the districts in the map comply with the constitutional requirements, the trial court shall respect the legislature's political determinations, which allow for maps that can be drawn in multiple ways, all of which might meet the constitutional requirements. *Pearson I*, 359 S.W.3d at 39. The trial court applied the standards as instructed by this Court, and now this Court reviews the proof and defenses in accordance with evidence in any other lawsuit. *Id.* at 40. A pure visual observation of the map, as the dissent suggests should be the standard for compactness, is contrary to *Pearson I*, which specifically states that compactness cannot be achieved with absolute precision and that an appropriate standard of review must reflect deference to the predominate role of the legislature and the inability of anyone to draw compact districts with numerical precision. *Id.* at 39.

If an issue to be decided is one of fact, as here, this Court determines whether the judgment is against the weight of the evidence. The trial court has the right to believe or disbelieve any evidence – controverted or uncontroverted – presented by the party bearing the burden of proof, and the party not bearing the burden of proof generally need not offer any evidence. *See White v. Director of Revenue*, 321 S.W.3d 298, 305, 307 (Mo. banc 2010). As such, in a bench-tried case, the trial court is free to believe or disbelieve all, part or none of any witness's testimony. This standard of review does not change just because evidence is derived from stipulations, exhibits and documents. When the facts are contested, as they were here, this Court defers to the trial court's assessment of evidence. The dissent fails to give due deference to the trial court's determination of the credibility of the witnesses and evaluation of the probative value of the evidence as required by this Court's well-settled precedents and rules.

Because neither party here made a proper request for specific findings of fact from the trial court, Rule 73.01(c) mandates that all factual issues on which no findings were made are considered as having been found in accordance with the result the trial court reached. As such, the consideration of favorable evidence by this Court should include all favorable testimony in the record, because the trial court was free to believe it, and this Court should exclude from consideration any evidence contrary to the result the trial court reached because the trial court was free to disbelieve it.

Here, the state bore no burden of proving the map was compact. As such, to find for the state, as it did here, the trial court was not required to find that the map was compact. Rather, it only needed to find that the challengers failed to prove clearly and undoubtedly that the map was not as compact "as may be." And the trial court found that the challengers failed to present credible or probative evidence satisfying their burden of proof. The dissent incorrectly holds the state responsible for introducing evidence explaining the shapes of districts 5 and 6 – including why certain Jackson County residents were moved into district 6 while certain residents of Clay, Ray, Lafayette and Saline counties were moved into district 5 – and as this Court held in *Pearson I*, a visual inspection of the map itself is insufficient evidence as it does not inform as to population density, history, traditional communities of interest or other circumstances the legislature may consider in drawing districts.

Dissenting opinion by Judge Price: The author would hold that the requirements of article III, section 45 of the Missouri Constitution – which help safeguard the rights of Missouri voters to fair elections of their congressional representatives – should be enforced, not finessed in deference to the legislature – and, therefore, would reverse the trial court's judgment that districts 5 and 6 are "compact … as may be."

The legislature may exercise discretion when redistricting so long as it follows the constitutional commands. *Pearson I*, 359 S.W.3d at 40. As such, the constitutional inquiry is separate from any inquiry into the minds of legislators or any analysis as to the exercise of legislative discretion. Discretionary factors cannot be read into the constitution if doing so functionally would erase the requirement that the districts be compact. The majority cites dicta from *Johnson* for the proposition that the legislature may draw districts whose constitutional validity is gauged according to the presence of "traditional redistricting factors" that may include natural and historic boundary lines and population density, although it does not explain how the use of such discretionary factors can be squared with the objective constitutional standard set out in *Pearson I*. Further, the majority does not articulate how factors like population density or historical boundaries apply to the requirement of compactness or population equality, abdicating this Court's duty to review a map for validity under article III, section 45 in favor of complete deference to the legislature for any number of unspecified, undefined, discretionary factors. When redistricting, the legislature may consider factors like those proposed by the majority, but these do not make the resulting map compact "as may be" and, therefore, constitutionally compliant. As long as districts comply with constitutional requirements, allowance is made for "minimal and practical deviations" required to preserve the integrity of existing boundaries of political subdivisions. *Pearson I*, slip op. at 40. But when a nonpartial and objective observer plainly can see that a district is noncompact, deviations from compactness are not minimal. *See id.* (finding the compactness of district 5 was "particularly suspect, as can be confirmed by any rational and objective consideration of [its] boundaries"). The deviations from compactness here breach, rather than preserve, boundary lines of major political subdivisions.

Because the challengers claim the judgment is against the weight of the evidence, this Court must look at each piece of evidence, weigh the probative value of that evidence and determine whether the trial court judgment should stand. The result of a challenge that a judgment is against the weight of the judgment depends on what evidence was before the trial court. If evidence is not contested, no deference is due to the trial court's findings. *White v. Director of Revenue*, 321 S.W.3d at 307. Here, all the material facts were stipulated and, therefore, uncontested. As such, the lack of factual findings at the trial court does not prevent this Court from reviewing the weight of the evidence.

The map, which was stipulated, carves out a "teardrop"-shaped portion of the Kansas City suburbs in Jackson County, which otherwise is in district 5, and places this portion in district 6. It then places part of Clay, Ray, Lafayette and Saline counties into district 5. Specifically, the effect of the teardrop is that Blue Springs, Independence, Lee's Summit, Oak Grove and other Jackson County communities are split between the two districts. This split – which displaces more than 150,000 Missouri voters from two otherwise-compact voting districts – is not a "minimal and practical deviation" from compactness. In contrast, the alternative maps introduced into evidence by the challengers visually are contiguous and compact; they do not have the same

teardrop-shaped carve-out as HB 193 and still respect the mandatory principles of contiguity, population equality and compliance with federal laws. Further, the challengers' expert testified that the HB 193 map is not as compact "as may be" based on the statistical scores of compactness tests in comparison with the alternative maps. Even the state's expert stated that district 5 in one of the alternative maps was more compact than that in HB 193 on all eight measures of compactness, and the difference in the scores was significant. In contrast, there is little probative evidence that supports finding the HB 193 map compact. Because there was no evidence showing why splitting the cities between districts 5 and 6 made the map more compact; why the citizens of central Jackson County should be displaced into district 6; and why citizens from Clay, Ray, Lafayette and Saline counties should joint the rest of Jackson County in district 5, there can be no weight assigned to it. Evidence of prior maps from 1992 and 2002 is not compelling. A protrusion in the 1992 map is not in the same location, the prior maps were not adjudicated to be compact, and expert witnesses' opinions that the current map is compact are conclusory statements of opinion and law that is this Court's sole province to determine and, therefore, carry no weight. After weighing the evidence before the trial court, the author would hold the evidence strongly is in favor of noncompactness. The majority requires the challengers to prove this noncompactness is not a "minimal or practical deviation" that occurs from the legislature taking into account "other recognized factors," which is a vague and flexible term. This Court cannot determine that district 5 scored "well" on the compactness test when experts cannot state what constitutes a good score; the majority never defines what "population density" or "historical boundary lines" mean in relation to compactness of districts and the challengers' burden; the majority provides no instruction as to what other evidence the challengers could or should submit relating to population density; and there is no evidence that the legislature considered population density or historical boundary lines in drawing the map or how such a subjective consideration could factor into an objective standard of review. The majority also fails to require that the other recognized factors be applied uniformly across the state.

District 3, which has appendages resembling a "lobster claw" clamping down on districts 1 and 2, is noncompact in shape. The evidence before the trial court, however, showed that this noncompactness was necessary to comply with the federal voting rights act. District 3, therefore, is as compact "as may be."