No. SC85834

IN THE
SUPREME COURT OF MISSOURI

MISSOURI DEPARTMENT OF SOCIAL SERVICES,

Appellants,

v.

MP, et al.

Respondents.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Richard G. Callahan

APPELLANTS' BRIEF

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INTRODUCTION AND SUMMARY OF CASE

This case presents the question of whether Missouri's system for the investigation, administrative review, and judicial review of child abuse and neglect cases is unconstitutional because it violates the due process clauses of the United States and Missouri Constitutions. In broad language, and without any analysis, the trial court declared facially unconstitutional the entirety of Chapter 210, RSMo 2000 (the "Act"). The trial court enumerated several general theories upon which the Act was found to be unconstitutional. L.F. pp. 170-173, ¶¶9-10; pp. 175-176, ¶¶ I-II. The Court also found in equally broad language that the Act was unconstitutional as applied in this case. With only one exception, the trial Court did not specify what particular sections of Chapter 210 it found to be unconstitutional, nor did the trial court disclose the analysis that supports a finding of unconstitutionality.

If a court declares a statute unconstitutional it is required to specify, in detail, the legal basis for the declaration. Vague and unsupported assertions of unconstitutionality cannot survive appellate review. It is therefore well settled that the burden to establish that a statute is unconstitutional falls upon the party challenging its constitutionality.

SUMMARY OF ARGUMENT

Reduced to its essence, the trial court found that including a person's name in the Central Registry of those whom there is probable cause to believe committed child abuse violates the due process rights of the person so listed. Thus, petitioners claim and the trial court found that government actors are constitutionally required to withhold relevant information from that small group of people who either have a legal duty to check the Central Registry or who are privileged to do so. This conclusion is not supported by existing law, advances the petitioners' subordinate interests above the citizens' interests in protecting the safety of children, and is wrong. The trial court's secondary conclusions – that the statute is vague, violative of the open courts guarantee, and that petitioner are entitled to costs – are equally devoid of legal support.

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JURISDICTIONAL STATEMENT

This appeal involves the question of whether § 210.010 and all of its subsections fail to comply with the requirements of procedural due process and are unconstitutionally void for vagueness under Missouri Constitution Article I, Section 10. Therefore, jurisdiction lies in the Missouri Supreme Court pursuant to Art. V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

A. General Facts

Beverly Armstrong and Shacura Dearing were placed at Heartland Christian Academy, a faith-based residential training/educational facility. Tr. p. 367, l. 1-25. Heartland provides both education to students in its school and housing for students in its youth dorms and/or houses of staff members. Tr. p. 406, l. 19-25 and Tr. p. 407, l. 15-19.

On June 4, 2001, a call was placed to the Department of Social Services, Children's Division's (formerly known as the Division of Family Services and hereinafter "Division") hot line reporting two allegations of abuse/neglect of Armstrong and Dearing by petitioners Michael Peterson, Charlie Sharpe, Farah Abu Saada, and Amy Wilson. Tr. p. 22, l. 2-7; Tr. p. 25, l. 15-17; and, Tr. p. 26, l. 8-14. The first allegation was that on June 1, 2001 Peterson administered corporal punishment to Armstrong by hitting her buttocks with a wooden paddle hard enough to cause redness, blood blisters, and bruising which was visible on the date of the hotline report Tr. p. 23, l 17. The second allegation concerned an incident approximately a month prior to the events of the first allegation. The report alleged that Sharpe instructed Peterson, Abu Saada and Wilson to physically restrain Dearing while Sharpe administered corporal punishment by hitting her buttocks with a

wooden paddle hard enough to cause severe bruising and bleeding. Tr. p. 25, l. 22; Tr. p. 37, l., 6; and, Tr. p. 38, l. 5; and, Tr. p. 38, l. 23-25.

On June 6, 2001, a second call was placed to the Division's hot line alleging physical abuse to Dearing by Sharpe. Tr. p. 25, l. 18-23; Tr. p. 26, l. 8-14; Tr. p. 33., l. 25; Tr. p. 34, l. 1-25; Tr. p. 35, l. 1-14; and, Tr. p. 36, l. 1-25.

The reports were assigned to investigator Richard Engelhardt of the Out-of-Home Investigations Unit (OHI). Tr. p. 22, l. 19. Engelhardt's investigation included an interview with Dearing in which Dearing provided Engelhardt with a roll of film containing pictures taken by Dearing of her injuries. Tr. p. 42, l. 13; Tr. p. 26, l. 7; and Tr. p. 33, l. 16-19. After obtaining prints, Englehart observed that her buttocks were covered with severe, dark purplish bruising. Tr. p. 46, l. 13-24.

During the remainder of Engelhardt's investigation, he obtained several other documents. Included was a copy of a report summarizing a June 1, 2001 interview of Armstrong conducted by Deputy Juvenile Officer Melissa McCauley Tr. p. 54, l. 1-25 and Tr. p. 55, l. 1-25; photographs of Armstrong's buttocks depicting redness, healing bruising and blood blisters taken by McCauley during the June 1, 2001, interview, Tr. p. 55, l. 24; and a report summarizing a July 13, 2001, interview of Sharpe by OHI Unit Manager Donna Rohrbach. Tr. p. 58, l. 2. During his

investigation, Engelhardt provided Sharpe, Peterson, Abu Saada and Wilson with the opportunity to provide him with their statements. Tr. p. 57, l. 4-22. Nonetheless, petitioners declined to provide any verbal or written statements to Engelhardt. Tr. p. 52, l. 15.

As a result of his investigation, and based upon a full review of all of the evidence available to him at the conclusion of his investigation, Engelhardt made a finding of probable cause to suspect that Armstrong and Dearing were both physically abused by Sharpe, Peterson, Abu Saada and Wilson. Tr. p. 63, l. 23.

On July 12, 2001, an entry was made into the Central Registry of the finding of probable cause to suspect abuse and/or neglect of Armstrong and Dearing by the petitioners in both incidents. Tr. p. 152, l. 15-18 and l. 23-25 and Tr. p. 153, l. 1-2. Pursuant to § 210.152.2, petitioners were notified of the probable cause determinations by letter dated August 1, 2001. Tr. p. 155, l. 19. Engelhardt later acknowledged that he had made an error in some of his findings, and testified that the probable cause findings should be of abuse of Armstrong against Mike Peterson, and the finding of abuse of Dearing would be against Charlie Sharpe and a probable cause finding of neglect against Farah Abu Saada, Mike Peterson and Amy Wilson. Tr. p. 93, l. 2-6.

Following this decision, the alleged perpetrators timely requested an administrative review to the Child Abuse and Neglect Review Board (hereafter referred to as "CANRB") as permitted by §210.152.3, RSMo, and at the CANRB hearing on July 10, 2002, both Engelhardt and the alleged perpetrators attended and provided verbal statements and further documentation. Tr. p. 420, l. 19-25; Tr. p. 421, l. 1-11; Tr. p. 461, l. 5-18; Tr. p. 462, l. 1-25; Tr. p. 463, l. 1-25; Tr. p. 539, l. 19-25; Tr. p. 540, l. 1-10; and, Tr. p. 548, l. 21-25l L.F. p. 32 ¶7.

On August 2, 2002, the CANRB notified the alleged perpetrators of its decision to uphold the findings of the Division.

The petitioners timely filed a Petition for Judicial Review in the Circuit Court of Cole County pursuant to §210.152.5. LF 1; LF 13; LF 19; and, LF 25. An evidentiary hearing was held on October 21-22, 2003. LF 10; LF 17; LF 23; and, LF 29. On January 8, 2004, the Cole County Circuit Court overturned the probable cause finding against the alleged perpetrators and made a determination that the statutes under Chapter 210 were unconstitutional. LF 155 - 177. This appeal followed.

B. The Missouri Child Protection System

1. History of the Child Abuse/neglect Reporting Statutes

Prior to 1965, Missouri did not have a formal child abuse reporting law. All incidents of child physical abuse were dealt with in the criminal context. In 1965, House Bill 118 established the first child abuse reporting law. §210.105. This gave physicians the discretion to report to the appropriate law enforcement office physical injuries of children under twelve years of age who were brought to the physician for care, treatment or examination if the physician believed the injuries were intentional and caused by the child's parent(s) or other person responsible for the child's care. This first statute was a permissive statute, not a mandatory statute.

In 1969, House Bill 40 significantly modified §210.105. First, the language was changed from physical injury to physical abuse and neglect. Next, the group of children was expanded to include all children under seventeen years of age. The list of persons expected to report child abuse was also expanded to include professionals from several different fields. Reporting was no longer optional and instead became mandatory and all reports had to be made to either the county welfare office or the county juvenile officer.

HB40 also included §210.107 that provided guidelines on how child abuse reports were to be investigated by either the welfare office or the juvenile office and

how services were to be provided to the family. Section 210.107 did include a provision permitting the welfare office to forward the report on to the appropriate law enforcement office and a requirement to report to the juvenile office. Alternatively, the juvenile office was permitted but not required to forward the report to law enforcement. Finally, each report received by the welfare office or juvenile office was required to forward the report to the central state welfare office. The state office was required to create and maintain a database which cross-referenced all reports to assist officials in determining whether a child had been the subject of previous physical abuse or neglect. This cross-referenced database could be seen as the precursor to the Central Registry. However, no provisions were made for who outside of the Division would have access to the information contained in the database.

In 1974, and in response to the federal Child Abuse Prevention and Treatment Act (CAPTA), PL 93-247, Missouri adopted a greatly expanded child abuse reporting law. House Bill 578 repealed §§210.105, 210.107 and 210.108 and enacted §§210.110 through 210.165. Definitions of abuse and neglect were included for the first time. The expanded list of those required to report could still use a standard of “reasonable cause to believe” but were also required to take into account "conditions or circumstances which would reasonably result in abuse or

neglect." At the same time, a provision for permissive reporters was added. All reports of abuse or neglect were to be made only to the Division. Section 210.145 provided for the creation of the Central Registry and §210.150 defined who was permitted access to the information in the Central Registry. However, it was not until 1994 that a definition of the Central Registry was included in the statute, and at that time the list of persons permitted access to the information contained in the Central Registry was greatly expanded. Since that time, the child abuse reporting law has remained essentially the same.

2. Outline of Child Abuse/neglect Appeal Process

Chapter 210 and 13 C.S.R. 40-31.025 set out specific procedures for appealing a decision of the Division and the CANRB in child abuse and neglect cases. All reports of child abuse or neglect are called in to the Central Reporting Unit (CRU). §210.145.1. After CRU receive the report and determines that there is enough information to merit an investigation or assessment, CRU must then immediately transmit the report and any relevant information contained in the Central Registry to the appropriate local Division office. Upon receipt of the report from CRU, the local office must determine whether to initiate an investigation. §210.145.2. If the local office decides to proceed, an investigation must be commenced within twenty-four hours of receipt of the report, and a determination

must be made as to whether there is probable cause to believe that abuse or neglect occurred. Probable cause is statutorily defined as "available facts when viewed in the light of surrounding circumstances which would cause a reasonable person to believe a child was abused or neglected." §210.110(10); §210.145.4

After an investigation and a finding, the alleged perpetrator is entitled to written notification of local office's decision regarding the report and investigation. 13 C.S.R. 40-31.025(2). Within ninety (90) days of the report, the alleged perpetrator and parents of the victim (if they are not the alleged perpetrators) shall be provided written notification of the decision that there was either probable cause to suspect abuse or neglect or that there was insufficient probable cause to suspect abuse or neglect. §210.152.2. Contained within the alleged perpetrator's notification is information on how to seek an administrative review. 13 C.S.R. 40-3.025(2). Within sixty (60) days from receipt of the notification of the outcome of the investigation, the alleged perpetrator may make a written request for an administrative review. §210.152.3. The request must be made in writing. 13 C.S.R. 40-31.025(2)(A).

Within fifteen (15) days of the receipt of the request for an administrative review, the County Director of the local office must review the investigation and

make an independent decision as to whether or not the decision of the local office should be upheld or reversed. 13 C.S.R. 40-31.025(2)(B). The County Director's decision must be communicated to the alleged perpetrator in writing and such communication must include information on how to seek administrative review with the Child Abuse and Neglect Review Board (CANRB). 13 C.S.R. 40-31.025(2)(C). Within thirty (30) days of receipt of any decision of the County Director decision to uphold the local office's decision, the alleged perpetrator is entitled to seek a review by the CANRB. 13 C.S.R. 40-31.025(8)(A).

If an administrative review is made, then the CANRB must notify the child or the child's parents, guardian or legal representative of the request for a review 210.152.6 and 13 C.S.R. 40-31.025(8)(G). When a review has been scheduled, the CANRB must provide notice of the date and time of the review with a statement contained in the notification that the alleged perpetrator can either attend in person or submit a written statement to the CANRB . § 210.153.4(2) and 13 C.S.R. 40-31.025(8)(B). Upon notification that the alleged perpetrator has requested a review, the local office must the forward a copy of its investigation to the CANRB. 13 C.S.R. 40-31.025(8)(C). At the review, the local office is represented by the appropriate local and area division staff and/or legal counsel. 13 C.S.R. 40-31.025(8)(D) and §210.153.4(1). The alleged perpetrator may be present alone

or with legal counsel but the alleged perpetrator's presence is not required for a review to be conducted. 13 C.S.R.40-31.025(8)(E) and §210.153.4(2). Each side may have witnesses present to provide statements about pertinent events and other requested information. 13 C.S.R. 40-31.025(8)(F) and §210.153.4(3). CANRB proceedings are closed to all persons except the parties, their attorneys and those persons providing testimony on behalf of the parties. All CANRB proceedings are confidential. 13 C.S.R. 40-31.025(7) and §210.153.6.

The CANRB then reviews and discusses all of the relevant materials and testimony and votes on whether to uphold or reverse the finding of probable cause. 13 C.S.R. 40-31.025(8)(H). The CANRB must issue its decision within 7 days of the review. 13 C.S.R. 40-31.025(9). The CANRB must sustain the local office's decision if the decision is supported by evidence of probable cause and is not against the weight of the evidence. §210.152.4. A written copy of the CANRB decision is provided to alleged perpetrator, the local office, and the Division Director within 35 days. 13 C.S.R 40-31.025(10).

If the CANRB decides to uphold the local office's decision, the alleged perpetrator has 60 days from the date of receipt of the CANRB's decision to seek reversal of the decision. §210.152.5. The Circuit Court is required to conduct a *de*

novo trial. §210.152.5. At this trial, the victim and reporter cannot be compelled to testify. §210.152.5.

C. The Trial Court's Order

` The trial court held that the statute was facially unconstitutional under the Fourteenth Amendment to the U.S. Constitution and Article 1, §§ 2 and 10 of the Missouri Constitution, in that it violates the liberty and/or property rights of those persons whose names are entered in the Central Registry. This, according to the trial court, offends due process because such persons had not been previously convicted of a crime and had not been afforded an hearing prior to entry of their names in the Central Registry.

The trial court specifically held that the Act must possess the following elements in order to past constitutional muster:

> A neutral decision maker;
>
> Testimony under oath or affirmation by all witnesses;
>
> Observance of regular and established Missouri rules of evidence;
>
> The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the Respondent;

The right to cross-examine all witnesses;

Adherence to a "preponderance of the evidence" rather than a "probable cause" standard of evidence; and

Such other constitutional protections as are required by the Court's opinion and conclusions of law that accompany this order.

L.F. pp. 175.

While it is difficult to discern what precisely the Court means by this last phrase, it appears that the court may be referring to the items enumerated in paragraph 9, page 17-18 of the Judgment (L.F. pp. 171-172, ¶9), wherein the Court concluded that the entire chapter was unconstitutional because:

The names of alleged perpetrators are placed in the Central Registry before any review of the original findings of the DFS investigator assigned to the case;

The Act allows for entering or retaining the name of any alleged perpetrator into the Central Registry after a review by only one person;

The act provides for review based upon a "probable cause" standard and not a "preponderance of the evidence" standard.

The Act does not allow for a "constitutionally sufficient" hearing on the issues at a meaningful time.

The Act does not allow for a meaningful hearing and/or review at any level;

The review of the decisions of the investigator at the administrative level are constitutionally inadequate because the proceedings are not on the record, statements are not made under oath, an alleged perpetrator is not afforded the right to compel the attendance of the victim or witnesses, the alleged perpetrator is not afforded the opportunity to cross examine or confront witnesses and the administrative procedures permit the consideration of hearsay, double hearsay, parol and irrelevant evidence;

The *de novo* judicial review is constitutionally inadequate because the alleged perpetrator is not permitted the right to compel the attendance of the alleged victim and the reporter and that the Court is permitted to consider hearsay, double hearsay, parol, and irrelevant evidence concerning the out of court allegations of the alleged victim and reporter

The statute which describes the judicial review process is void for vagueness because it does not specify whether the rules of evidence apply to the admission of hearsay, double hearsay, parol and

irrelevant evidence concerning the out-of-court allegations of the alleged victim and reporter.

The administrative review conducted by the Child Abuse and Neglect Review Board "constitutes an unreasonable and arbitrary delay" of the alleged perpetrator's right to seek de novo judicial review and therefore the Act violates the Open Courts Clause of the Missouri Constitution, Art. I, § 14.

L.F. p.

The trial court then concluded the rights of the petitioners had been violated because their names were entered into the Central Registry even though they were never charged with a crime and they were not provided with a hearing prior to the entry of their names. The court repeated its list of procedures it found lacking in the Act, and added that the Acts' definition of "abuse" is unconstitutionally vague where it states that "spanking, administered in a reasonable manner shall not be construed to be abuse." § 210.110(1).

STANDARD OF REVIEW

This was a de novo judicial trial to the court pursuant to §210.152. The judgment in a court-tried case will be sustained unless it is unsupported by substantial evidence, against the weight of the evidence, or erroneously declares or erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The issue of whether or not a statute is unconstitutional is purely a question of law, the review is *de novo* and no deference need be given to the trial court's reasoning. *State v. Smith*, 988 S.W.2d 71, 75 (Mo. App. 1998). A statute is clothed with a strong presumption in favor of constitutionality: An appellate court must presume that a contested statute is constitutional and it may only find a statute to be unconstitutional if it clearly contravenes a specific constitutional provision. *State v. Kinder*, 89 S.W.3d 454 (Mo. 2002); *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985). A statute must be interpreted to be consistent with the constitution of the United States if at all possible and any doubts concerning the validity of the statute are to be resolved in favor of its validity. *Id.* at 883-884. Where a statute is susceptible to differing interpretations a court is required to construe and interpret a statute in a manner that is consistent with the constitution. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223 (Mo. 1982). If the law is susceptible to any reasonable

and practical construction which will support it, it will be held valid, and courts must endeavor, by every rule of construction, to give it effect. *City of St. Louis v. Brune*, 520 S.W.2d 12, 16-17 (Mo. 1975).

Finally, Missouri's Due Process Clause is interpreted similarly to the federal Due Process Clause. *See, e.g., Moore v. Board of Educ*., 836 S.W.2d, 943 (Mo. banc 1992). For this reason, the legal analysis in the following brief that pertains to the federal constitution is also applicable to the Missouri constitution. Federal constitutional review in general is disfavored where there is an independent and adequate state law ground of decision. *Harris v. Reed*, 489 U.S. 255, 262 (1989). Accordingly, any holding should be made under both constitutions.

I.

The trial court erred in holding that the Act violated the Due Process Clause of the United States and Missouri Constitutions because it does not burden any protected liberty or property interest in that Missouri's child abuse registry system places no burden on employment, adoption, or foster parenting.

Paul v. Davis, 424 U.S. 693 (1976);

Mathews v. Eldridge, 424 U.S. 319 (1976);

Board of Regents v. Roth, 408 U.S. 564 (1972);

Valmonte v. Bain, 18 F.3d 992 (2nd Cir. 1994).

II.

The trial judge erred in declaring the Act unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because any person potentially deprived of a property or liberty interest is afforded notice and an opportunity to be heard in that an administrative finding of probable cause to suspect abuse or neglect is preceded by an investigation, and followed by multiple levels of administrative hearings, culminating in a full trial de novo on the merits.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985);

Moore v. Board of Educ., 836 S.W.2d 943 (Mo. banc 1992);

Paul v. Davis, 424 U.S. 693 (1976);

Williams v. State of Mo. Dept. of Social Services,

978 S.W.2d 491 (Mo. App. S.D. 1998).

III.

The trial court erred in declaring the Act unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because a statutory provision is not unconstitutionally vague if it conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices in that Chapter 210.101 provides a clear definition of "abuse."

Cocktail Fortune, Inc. v. Supervisor of Liquor Control,

994 S.W.2d 955 (Mo. banc 1999);

State v. Schlieermacher, 924 S.W.2d 269 (Mo. banc 1996);

State v. Allen, 905 S.W.2d 874 (Mo.banc 1995);

Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. banc 1985).

IV.

The trial court erred in declaring the Act unconstitutional under the open courts provisions of the Missouri Constitution because that Act does not represent any bar or limitation to a right to recovery for a recognized right–a necessary prerequisite to a constitutional violation--in that petitioners do not make a claim for recovery for personal injuries for which they have suffered any bar or impediment and presented no evidence of any such injury.

Etling v. Westport Heating & Cooling Services, Inc.

92 S.W.3d 771 (Mo. 2003);

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000).

V.

The trial court erred in ordering the division to pay the petitioners' costs because in the absence of statutory authority, costs may not be assessed against the state in state court in that the Division is an agency of the state and §§210.110 to 210.165 do not provide for the award of costs against the state.

Lipic v. Missouri Dept. of Social Svcs.,

93 S.W.3d 839 (Mo. Ct. App. E.D. 2002);

Doe. v. Missouri Dept. of Social Svcs.,

71 S.W.3d 648 (Mo. Ct. App. E.D. 2002).

ARGUMENT

I.

The trial court erred in holding that the Act violated the Due Process Clause of the United States and Missouri Constitutions because it does not burden any protected liberty or property interest in that Missouri's child abuse registry system places no burden on employment, adoption, or foster parenting.

Introduction

The trial court declared facially unconstitutional the entirety of Chapter 210 RSMo. According to the Judgment, Order, and Decree, the Act places a burden on the right to seek employment generally in the child care field, and places an impediment on the ability of persons on the registry to adopt children or to become foster parents. All three of these findings are in error.

The operative facts are few, simple, and not in dispute: Missouri's statutory child protection laws include a child abuse and neglect hotline, on which complaints are recorded and investigated by DFS. When a hotline report is made, an investigator is assigned to consider the available evidence and to make a finding as to whether there is probable cause to suspect child abuse or neglect. If the

investigator concludes that probable cause exists, the name of the person alleged to have abuse or neglected a child is entered in the Central Registry (Registry). The alleged perpetrator is notified in writing of the finding, and informed of their rights to review of the decision.

Pursuant to § 210.150, all Registry information is to remain confidential, and is disclosed only to limited classes of persons and entities as set forth in subdivision 2 of that section. These include law enforcement officials and child care facilities and placing agencies. No such information is available to the general public and no such information is generally disseminated. Certain employers who deal with children are required by Missouri law to run background checks on employees, and that such checks include an inquiry to the Central Registry. § 210.150. Missouri law does not further order any employer to take action with respect to any employee or applicant for employment if their name is found in the registry, nor does Missouri law require that an alleged perpetrator disclose the existence of their name in the Registry. Finally, Missouri law does not preclude anyone from seeking to become or becoming a foster parent, nor is there any statutory prohibition from seeking to adopt children because an applicant's name appears in the Registry.

Petitioners here complain that placing their names in the Registry infringes on their liberty and property interests and, accordingly, claim rights to due process for such alleged infringements. Though petitioners, and the trial court below, focused the great majority of attention on the process afforded by Missouri law, the issue does not arise unless the law infringes a protectible interest. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976).[1]

A. No substantive right to liberty or property is implicated in Missouri's child abuse and neglect system's maintenance of a registry of names, nor does Missouri law burden the right to seek or maintain employment.

The lower court held that the placement of names in the Central Registry in a manner in which such names were available to certain employers prior to a full hearing on the merits resulted in an infringement on the petitioners' substantive rights. But the appearance of the petitioners names on the registry implicates no liberty or property interests. And because Missouri law places no burden on

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[1] Missouri analyzes its Due Process Clause similarly to the U.S. Supreme Court's analysis of the federal Due Process Clause. See e.g. *Moore v. Board of Educ.*, 836 S.W.2d 943, 947 (Mo. banc 1992).

employment, no liberty or property interests related to employment are implicated either.

1. The appearance of names in the Central Registry does not implicate any substantive due process right, even if the Registry imposes a stigma on the individual.

The fact that a person's name is in the child abuse and neglect registry is not, by itself, unconstitutional–even when disclosed to another a person. As the U.S. Supreme Court recognized in *Paul v. Davis*, 424 U.S. 693 (1976), reputation alone, apart from some more tangible interests such as employment, is neither "liberty" nor "property" and does not invoke the procedural protection of the Due Process Clause. *Id.* at 701-702. An individual is not guaranteed to be free of injury wherever the State may be characterized as a tortfeasor, even when that injury is to a person's reputation. *Id*. This is tantamount to saying that the ill effects, if any, of having one's name in the Registry is not by itself constitutionally significant.

The U.S. Supreme Court's jurisprudence on this issue is well summarized in the Court's discussion in *Paul v. Davis.* There, the Court considered the parameters of the substantive due process claims of liberty and property when injury to reputation is alleged to have occurred at the hands of state actors, leading to a damaging "stigma." What *Paul* makes clear is that government imposed stigma, even when it could potentially lead to the loss of a job or an impaired

opportunity to seek employment, states no more than a claim for defamation which is not actionable under the Fourteenth Amendment.

The facts of *Paul* are well-known as it is a staple case in Due Process jurisprudence: The plaintiff, a news photographer, was reprimanded on his job after his employer saw his name on a flyer issued by the police department that listed the names of persons "known to be active" shoplifters. *Paul*, 424 U.S. at 695. Plaintiff had been arrested for, but not convicted of shoplifting. After a verbal reprimand, the plaintiff sued claiming that the flyer portraying him as an "active shoplifter" deprived him of liberty interests in entering business establishments without fear of suspicion and apprehension, and in seeking future employment.[2]

This is in contrast to a similar case in which an individual's name was placed on a roster of people known to have a drinking problem, and store owners were **directed** not to sell liquor to anyone on the list. In fact, the statute at issue made it a misdemeanor to sell or give liquor to a person on the list. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Plainly, this is the "something more" that is required under *Paul*. The law does not simply inform and stigmatize:

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[2]Like the Petitioners in this case, the plaintiff in *Paul* did not actually lose a job.

> [Governmental action taken in [*Constantineau*] deprived the individual of a right previously held under state law the right to purchase or obtain liquor in common with the rest of the citizenry. **"Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards**. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

Paul, 424 U.S. at 708-709 (emphasis supplied).

Contrasting the facts of *Constantineau* with *Paul*, it becomes plain that the case at bar is lacking a showing of any way in which Missouri law itself burdens any claimed rights of Petitioners. In *Constantineau*, the plaintiff made no showing of a federal right to purchase liquor–but did show that he was able to do that under state law just like everyone else. The statute in that case changed that status by

directly forbidding others to sell him liquor. In *Paul*, though, the Court found mere defamation for which there is no constitutional protection. Interestingly, the "conduct" at issue in *Paul* appears even more severe than the placement of a name on the Registry. The degree of "stigma" was much more widespread: The flyer issued by the police department was (1) published to every business owner in the community; (2) with an invitation to watch those individuals (depicted by a "mug shot" in the flyer); (3) included an offer to provide more detailed information upon written request; and (4) imputed criminal behavior for which that particular plaintiff had not been tried or convicted.

Even with these features of the government imposed stigma, that Court declined to extend the plaintiff Due Process Clause protection: The Court first observed that the information in the flyer, and the assumed results flowing from it (suspicion, apprehension, and **impairment to employment opportunities**), is a "classical claim for defamation[.]" *Paul*, 424 U.S. at 697. Considering whether this also presents a federal claim under the Due Process Clause, the Court said this:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a

> violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

Id. at 698-699.

Analyzing the decision of the court of appeals, the Court rejected two bases for finding a federal claim–both of which are asserted by Petitioners in the case at bar: (1) That the Due Process Clause makes actionable many claims previously arising only under state tort law; and (2) that a government-inflicted stigma to a person's reputation is different than other harms by the government that are not actionable under the Fourteenth Amendment. *Id.* at 699.

With respect to the notion that the Due Process Clause provides a remedy for state actor torts, the Court was clear: "[S]uch a reading would make of the Fourteenth Amendment a font of tort law[,]" *Id*. at 700, and forbade that result.

The second basis on which the Court rejected the plaintiff's claim is the most applicable to the case at bar. The notion that a government imposed "stigma" rises above state defamation law to become a federal constitutional tort was flatly rejected by that Court. There is no justification for granting defamation a special

protection under the "liberty" or "property" terms in the Fourteenth Amendment. *Id.* at 701.

That a government imposed stigma does not rise to the level of a constitutional violation is not altered by consideration of the severity of the stigma. Again, *Paul* considered that prior Supreme Court cases that involved "drastic" effects of stigma did not support the notion the "reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' within the meaning of the Fourteenth Amendment. *Id.*

In an order that detailed the facts of Petitioners' displeasure with being on the Registry, the trial court below, based on the evidence, merely characterized a circumstance where their reputation may have been injured or slighted, and then went on to describe some possible effects of that alleged injury. Holding that this implicated liberty and/or property rights, the trial court below simply applied a rule specifically rejected by the U.S. Supreme Court in *Paul*.[3]

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[3]A state court construing federal constitutional provisions more broadly than the Supreme Court of the United States would be prohibited by the Supremacy Clause. U.S. Const. Art. VI cl. 2; *Cooper v. Aaron*, 358 U.S. 1, 18 (1058).

In summary, the U.S. Supreme Court emphasized the proposition that damage to reputation and the effects of that damage, including impairment to finding a job or running a business, is not a constitutional wrong. This is not to say that the fact that a person's name is in the Central Registry does not create a stigma or some form of embarrassment. Indeed, almost the entirety of the testimony of the various petitioners was directed at explaining their reluctance to even attempt employment or child-related activities because of *their own* desire to avoid disclosure of embarrassing facts. This is testimonial support for the proposition that the dissemination of the fact that a person's name is in the child abuse/neglect registry may create a stigma that can be damaging to that person's reputation. See, e.g., *Valmonte v. Bain*, 18 F.3d 992, 1000 (2nd Cir. 1994) ("Since [perpetrator] states that she will be applying for child care positions, her status [on the registry] will automatically be disclosed to her potential employers. Under *Brandt*, that dissemination satisfies the 'stigma' requirement.").

But a state-imposed or created stigma is not sufficient to implicate the Due Process Clause. *Paul*, 424 U.S. at 709. Unless the law itself imposes a burden on employment, the Due Process Clause is not implicated. This is often referred to as the "stigma-plus" analysis. In the context of the case at bar, the question is

whether, assuming there is a state-imposed stigma, Missouri law burdens the right to seek employment. For the following reasons, it is plain that it does not.

2. Missouri's registry-checking requirements do not impose a burden on present or future employment.

The various petitioners object that their right to obtain or maintain employment and pursue their careers are hindered by Missouri's Central Registry laws. It is true that the right to seek and maintain employment has been recognized as a liberty interest. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 573-574 (1972); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), and *Willner v. Committee on Character*, 373 U.S. 96 (1963). But no provision of Missouri law actually places a burden on employment itself, nor does any provision prohibit an employer from hiring a Registry entrant or mandate their discharge.

The only court to fully address the details of this issue is one relied upon by both parties below. In a 1994 Second Circuit case, the court concluded that a registry disclosure statute requiring an employer to state in writing its reasons for hiring an abuse perpetrator satisfies this additional burden requirement. *Valmonte v. Bane*, 18 F.3d 992, 1001 (2nd Cir. 1994). A comparison of this case, and the state statutes at issue, with the case at bar is illuminating.

In *Valmonte,* a New York statute required a check of the registry much like Missouri's provisions. But if a person's name appears and the potential employer wishes to hire the individual, the potential employer may **only** hire the applicant if the employer "'maintains a written record...of the specific reasons why such person was **determined** to be appropriate' for working in the child or health care field." *Id.*, at 996 (citations omitted; emphasis supplied). In other words, the employer is taxed an additional burden just to hire a person–a requirement that shows a very different intent on the part of the New York legislature:

> Upon notification by the department or by a child care resource and referral program in accordance with subdivision six of this section that any person who has applied to a licensing agency for a license, certificate or permit or who seeks to become an employee of a provider agency ... is the subject of an indicated report the licensing or provider agency shall determine on the basis of information it has available whether to approve such application or retain the employee or hire the consultant or use the volunteer or permit an employee of another person, corporation, partnership or association to have access to the children cared for by the provider agency, provided, however, that *if such application is approved*, or such employee is retained ...

by such agency the licensing or *provider agency shall maintain a written record, as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate* to receive a foster care or adoption placement or to provide day care services, to be the director of a camp subject to the provisions of article thirteen-A, thirteen-B or thirteen-C of the public health law, to be employed, to be retained as an employee, to be hired as a consultant, used as a volunteer or to have access to the children cared for by the agency.

NY SOC SERV § 424-a(2)(a) (emphasis supplied).

The Second Circuit's analysis of this issue, following *Paul v. Davis*, is quite clear: The negative effects from defamation or injury to reputation are not cognizable under the Due Process Clause. "These would normally include the impact that defamation might have on job prospects[.] *Valmonte*, 18 F.3d at 1001. Distinguishing their plaintiff's case from the general rule (and which also distinguishes petitioners in the case at bar), the Second Circuit stated that the New York law went well beyond injuring her reputation. The plaintiff alleged that she would not be hired because her inclusion on the list forced a potential employer to explain why she *should* be hired. *Id.* Moreover, she alleged generally that

employers simply would not hire her. The *Valmonte* court summarized this issue quite succinctly:

> This is not just the intangible deleterious effect that flows from a bad reputation. Rather, it is a specific deprivation of her opportunity to seek employment caused by a statutory impediment established by the state. *Valmonte is not going to be refused employment because of her reputation; she will be refused employment simply because her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her.*

Id.

A rapid reading of the *Valmonte* decision might lead to the very erroneous conclusion that the statutory impediment to employment is merely the requirement that potential employers check the registry prior to hire. The Second Circuit went to lengths to analyze the alleged facts under the standards set forth in Supreme Court cases. The appearance of a name in their registry might satisfy the stigma requirement, but the portion that brings the case within substantive protections is different. The court set out its holding in this regard as follows:

> [T]he fact that the defamation occurs precisely in conjunction with an individual's attempt to attain employment within the child care field,

> **and** is coupled with a statutory impediment mandating that employers justify hiring the individual, is enough to compel a finding that there is a liberty interest implicated. ... In this case, we find that the requirement that puts burdens on employers wishing to hire individuals on the list results in a change of that individual's status significant enough to satisfy the "plus" requirement of the "stigma plus" test.

Valmonte, 18 F.3d at 1002 (emphasis supplied).

Another feature of the statutes involved in *Valmonte* is that, according to the court's analysis, New York's law had a purpose "to ensure that individuals on the Central Register do not become or stay employed or licensed in positions that allow substantial contact with children unless the employer is aware of their status. *Valmonte* 18 F.3d at 1001. This expressed intent is similar to the opinions in perhaps the only other two cases to take a close look at this issue. In *Dupuy v. McDonald*, 141 F. Supp. 2d 1090 (N.D. Il. 2001), Illinois law permitted notices of "Presumptive Unsuitability" to be sent to employers. *Id*. at 1134. That court found this to show an intent by the state to exclude the perpetrator from employment in child care. *Id.* In *Cavarretta v. Dept. of Children and Family Serivces*, 660 N.E.2d 250 (Il. App. 1996), the court confronted a statutory scheme that expressly provided for revocation of refusal of a license who is on the registry

as well as for the failure to sever connections with such a person. *Id.* at 254. The other cases cited below by petitioners largely address only the process that is due without extensive discussion of the state statutes at issue.

Missouri law stands in stark contrast to these cases and to the concerns expressed by those courts. Missouri law simply requires certain employers to check the Registry; it imposes no other requirements and no other burdens.[4] In fact, Missouri law does not prohibit the hiring of an individual prior to a check of the registry. Petitioner cannot claim that Missouri law requires an employer to do something about or to a person whose name is on the registry that is distinct from the treatment of others. Missouri law applies to all, and the burden is similar to all.

3. There is no constitutional right to adopt children or to seek to become adoptive parents.

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[4]The burden of checking the registry is a burden placed on a narrow class of employers and petitioners have no standing to challenge the constitutionality of such a burden, nor have they. This burden is placed on all such employers and applies, obviously, regardless of whether a potential employee is found on the registry.

The claim of the petitioners that Chapter 210 infringes their right to become adoptive parents can be dismissed outright. There is no right, federal or otherwise, to adopt or to seek adoption, or to become a foster parent. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816 (1977); *Lofton v. Secretary of the Dept. of Children and Family Services*, 358 F.3d 804, 811-812 (11th Cir. 2004); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir.1995). Missouri law grants no such right, and there is no provision that disqualifies any person on the Registry from applying for consideration as an adoptive parent. Neither the petitioners nor the trial court below identified any such substantive right. Accordingly, the desire of any petitioner to adopt or to become a foster parent does not touch upon any protected right.

Even if such a right existed, the evidence before the trial court, and the record on this appeal, preserves only the testimony of the petitioners that they "believe" that their desire to adopt or to become foster parents is foreclosed. In other words, petitioners have shown no legal impediment nor have they provided evidence that such an impediment exists independent of the law. Therefore, petitioner have failed in showing that the Act is unconstitutional with respect to these interests.

II.

The trial judge erred in declaring the Act unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because any person potentially deprived of a property or liberty interest is afforded notice and an opportunity to be heard in that an administrative finding of probable cause to suspect abuse or neglect is preceded by an investigation, and followed by multiple levels of administrative hearings, culminating in a full trial de novo on the merits.

Assuming that the petitioners have suffered a deprivation of their liberty or property interests, the next question is whether the Missouri statutes in question and the procedures granted to the petitioners in this case were constitutionally sufficient. As the United States Supreme Court has held, "once it is determined that the Due Process Clause applies 'the question remains what process is due."[5] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481(1972)). Here, the petitioners received all the process that they were constitutionally due.

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[5] The process that is due is analyzed similarly to federal Constitutional law. See e.g., *Moore v. Board of Educ.*, 836 S.W.2d 943, 947 (Mo. banc 1992).

The statutory procedures are simple: Following a report of child abuse/neglect, an investigator, pursuant to statute, investigated the available evidence and concluded that there was probable cause to believe that child abuse or neglect had occurred. This conclusion was reached only after affording each petitioner the opportunity to be heard by the investigator, an invitation declined by the petitioners. A review was conducted within 30 days, and petitioners sought further review, pursuant to statute, by the Child Abuse and Neglect Review Board, a statutory body separate and distinct from the Department of Social Services. § 210.153. At this hearing, each petitioner was afforded the opportunity to be heard and to present evidence in person and in writing. Pursuant to statute, petitioners sought and received a full trial on the merits in the Cole County Circuit Court, a proceeding in which they prevailed. The constitution requires nothing more.

The United States Supreme Court has repeatedly held that the due process clause does not mandate a particular type of process to be followed in every situation. The Court has held instead that "due process … is a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S. 113, 114-115 (1990). "Thus, procedures adequate to determine a welfare claim may not suffice to try a felony charge." *Bell v. Burson*, 402 U.S. 535, 540 (1971).

The U.S. Supreme Court has established a three-part test to answer the question of what process is due. A court must consider (1) the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation through existing procedures; and (3) the government's interest and burdens imposed by additional process. *Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976). In applying this test the Supreme Court has held that, in general, due process requires "some kind of hearing before the State deprives a person of liberty or property." *Zinermon*, 494 U.S. at 115. [emphasis in original]. In other cases, however, the court has determined that "a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation satisfies due process." *Id.* Unfortunately, the trial court's Order and Judgment does not contain any citation to authority or other legal analysis to show how it balanced the competing interests in arriving at its decision.

Because one of the considerations involves an assessment of the risk of an erroneous decision, it is also unfortunate that the petitioners declined to speak with the investigator prior to the probable cause determination. This deprived the investigator of any opportunity to consider perhaps the best source of exculpatory

evidence.[6] And though petitioners offered evidence of a claimed high percentage of probable cause findings that were later overturned by the CANRB, petitioners did no more than to present that bare statistic. Such a statistic did not include the effect of new evidence presented to the CANRB, nor was there any consideration of the effect of cases reviewed where the alleged perpetrators refused to even deny the allegations. For all of these reasons, petitioners have failed to call into question the accuracy of the investigative procedures and, thus, provide no substance for an analysis of the risk of error.

A. The *Matthews v. Eldridge* 3-Part Test

1. The private interest that will be affected by the governmental action.

The trial court found that the inclusion of the Plaintiff's names on the list affected their ability to adopt children, to become foster parents, and to pursue their chosen occupations in the child care field. But, as discussed earlier, there was

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[6]Moreover, the effect of invoking a right against self-incrimination permits an adverse inference by the fact-finder. See, e.g., Johnson v. Missouri Bd. of Nursing Adm'rs, 130 S.W.3d 619, 629 (Mo. App. W.D. 2004).

no evidence introduced at trial that any of the petitioners had applied for a foster care license or had been denied permission to adopt a child. Nor was their any evidence that any petitioner was denied employment or the opportunity to seek employment. When combined with the complete absence of a statutory burden on employment, there is no "private interest" to consider from a constitutional standpoint.

Considering, for the sake of argument, that the petitioners' "desire" not to have their names on the registry is a sufficient interest, the importance of that interest is rather minimal: The fact is that the petitioners here obtained and won a full adversarial trial on the merits. So the issue is whether they should have had such a proceeding sooner. As there was no loss identified by the petitioners, and no provision of law that would result in a clear loss of a recognized right, insisting on faster "process" in the form of a full trial is not supported. An alleged perpetrator can immediately request a review of a probable cause decision. § 210.152.3. The county director is required to perform a review of all materials within 15 days of such a request. 12 CSR 40-31.025(2)(B). This is followed by the review by the CANRB. § 210.152.3; 12 CSR 40-31.025(2)(C). So any alleged infringement of a private interest is a very limited one: The petitioners must claim a significant infringement of their protected rights from the time their names are

placed in the Registry to, at most, a hearing before the CANRB. In this case, the petitioners were notified of a probable cause finding on August 1, 2001. L.F. p. 31, ¶4; Tr. p. 155, l. 19. The petitioners appeared before the CANRB on July 10 of 2002. L.F. p. 32, ¶7. Thus, in this particular case, the entire time period in which any right might be infringed was 11 months.[7] There has been no showing of a private interest that has any constitutional dimension.

2. The risk of erroneous deprivation through existing procedures.

Petitioners advanced three primary arguments in support of their contention that existing procedures are not fair. First, they point to the rate at which probable cause findings are reversed at the CANRB hearings. Then they object to Missouri's use of a "probable cause" investigative standard rather than a "preponderance of the evidence" standard. Finally, petitioners object that Missouri law prohibits compelling the testimony of the alleged victim or the reporter of the

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[7]Petitioners presented no evidence on the progress of the case during this 11-month period. Thus, this period of time would include any requests for continuance made by petitioners and all other delays occasioned by the circumstances of the petitioners. In other words, there was no showing at the trial court level that the 11-month period was a feature of Missouri law or practice.

abuse. Again, the "risk" that is at issue in this case is of an erroneous decision made during the period a person's name is on the Registry prior to their hearing before the CANRB–a very limited period of time.

a. There was no showing that the reversal rate bears on the validity of the initial procedures.

Petitioners failed to present anything to the court below on this issue other than bare statistics as to the allegedly high percentage of cases overturned by the CANRB. But that percentage shows that the CANRB review process works. The principal reason should be apparent: additional evidence.

At the CANRB as well as the circuit court, petitioners are permitted to present their own evidence. § 210.153. At the CANRB review, testimony cannot be compelled, but petitioners could appear in person or submit materials in writing. *Id*. At the level of the CANRB, there is no statutory provision that limits what the alleged perpetrator may submit, whether in writing or in person. §§ 210.152.3; 210.153.4. In other words, the case before the CANRB might well be a different case than the one before the investigators.

Relief is not just available at the CANRB. It is also available at the circuit court, which hears the case *de novo* and is not simply a limited review. Just as at the CANRB hearings, petitioners have a fresh opportunity to protect their interests.

The procedures to protect petitioners here are similar to those at issue in *Matthews,* where the U.S. Supreme Court underscored the plain fact that

> statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence[.]

Matthews, 424 U.S. at 346-347.

Assuming, though, that petitioners at the very least denied the allegations or, at best, presented evidence of non-culpability, the question of the risk of an erroneous decision still must revert back to a consideration of the importance of the right that is alleged to be infringed. This is simply a matter of logic. For example, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the plaintiff was a welfare recipient who depended on government benefits for survival. Naturally, that Court concluded that the risk of erroneous deprivation was very serious, and this was one case in which the Court held that due process required a pre-termination hearing. In contrast, the plaintiff in *Matthews* was an applicant for disability benefits. Such benefits are important, but the Court correctly observed that such benefits are not dependent on need: An applicant qualifies if they are unable to work according to certain criteria

regardless of their monetary support, etc. That Court found that process was due, but a pretermination hearing was not.

It strains credulity to conclude, as petitioners here would urge, that the possibility that they may be, at most, inconvenienced in possible future job searches in a limited field, and in the relatively short time span between the close of the investigation and the hearing before the CANRB, is a greater potential deprivation than the receipt of benefits for a condition that prevents a person from working generally.

b. Missouri's standard of proof to make the threshold finding to place a name in the registry is sufficiently high to guard against erroneous findings of child abuse/neglect.

The petitioners' only substantive challenge to the statute is that the "probable cause" standard for a determination as to whether child abuse and neglect occurred is too low to be constitutionally adequate. According to petitioners, such a low standard will result in names being erroneously placed in the Registry.

This particular point is rendered moot by the 2004 amendments to Chapter 210 that changed the standard from "probable cause" to "preponderance." H.B. 1453 (2003). But even if the amendment had not been made, the "probable cause" standard is sufficient to guard against an unreasonably high risk of an erroneous

decision. And there is simply no authority that supports the petitioners' claim that probable cause is an inadequate standard for the placement of a name in the Registry.

House Bill 1453 specifically changed the standard for the investigative findings from "probable cause" to "preponderance of the evidence." This change also affects later review of the initial finding such that the CANRB considers the evidence under a preponderance standard as well. Since the petitioners won their case on the merits, there would be no reason to remand the case for a consideration under the new standard. To the extent that the trial court held that Chapter 210 was unconstitutional on its face because of the probable cause standard, that finding is now moot. To the extent that the trial court held that Chapter 210 was unconstitutional as applied to these petitioners, such a finding is also moot both from the amendment to the statute and the fact that the petitioners prevailed in their hearing.

c. The availability of the victim or reporter of abuse to testify does not increase the risk of an erroneous decision.

Finally, it is true that Missouri law does not permit a suspected perpetrator to compel the testimony of the victim or the reporter of the abuse. § 210.152.5. However, at a trial *de novo*, the court is to decide the case anew on the **evidence**

before the court. *See Williams*, 978 S.W.2d at 494. It appears that the right claimed here is one of confrontation similar to that in the criminal context. But there is no Sixth Amendment right of confrontation in a civil proceeding. *Krieg v. Director of Revenue*, 39 S.W.3d 574, 576 (Mo. App. E.D. 2001). Further, Chapter 210 does not direct the trial judge to accept as true the allegations of the victim or the reporter. And because the circuit court trial is *de novo* and therefore more than a mere review, petitioners have failed to show how this feature of Chapter 210 affects their rights in any way.

3. The government's interest.

The third and final consideration in the *Mathews v. Eldridge* balancing test is the Government's interest. It is well settled that the state has a compelling interest in protecting the welfare of children who may be subject to abuse, even against a parent's liberty interest in being free to raise children without government intervention. *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987). State legislatures have "broad power to enact laws to protect the general health, welfare and safety." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-424 (1952). This Court has held that the states "have been given deference in adopting reasonable summary procedures when acting under their police power." *State ex re. Williams v. Marsh*, 626 S.W.2d 223, 231(Mo. 1982) (citing *Mackey v.*

Montrym, 443 U.S. 1, 17 (1979). Legislation protecting vulnerable populations of people who cannot protect themselves such as children, the infirm, and the elderly are a legitimate exercise of a State's police powers. *Stiffelman v. Abrams,* 655 S.W.2d 522, 528 (Mo. banc 1983).

This Court has noted that the problem of child abuse had "reached epidemic proportions" in the State of Missouri. *State ex rel. D.M. v. Hoester,* 681 S.W.2d 449, 452 (Mo. banc 1984).

a. The protection of children from abuse and neglect.

Missouri has two distinct interests at stake in child abuse and neglect cases. The first is the protection of the child from further abuse and neglect by investigating cases of abuse and neglect, making certain that information about the cases get to the persons and agencies who are responsible for protecting the child and providing appropriate legal procedures to protect the child victim in the future. This interest is civil and administrative, not punitive. In Missouri this interest is addressed by the child abuse and neglect hotline reporting system under § 210.109 et seq, the Juvenile court system under Chapter 211, and other civil remedies and procedures for the handling of child custody cases under Chapters 210 (paternity cases), 452 (divorce), 453 (adoption) and 455 (adult abuse and orders of child protection).

The second interest is the punishment of perpetrators and to deter prospective perpetrators from committing offenses in the future. This interest is criminal and punitive in nature and is addressed by the criminal code, Chapters 565 (crimes against persons), 566 (sexual offenses), 568 (crimes against the family), etc.

With respect to noncriminal objectives, the state has a clear and compelling interest in making an early, initial determination based on available information and placing available information into the Central Registry on an expedited basis. In child abuse and neglect cases the state clearly has an urgent interest in having an expedited process and only sufficient due process procedures before the name of an alleged perpetrator is included in the Central Registry than the ordinary governmental employer because the state has a compelling interest in protecting vulnerable children who cannot protect themselves from child abuse and neglect. It goes without saying that child abuse and neglect cases sometimes involve cases in which a child may be at risk of serious injury or death or cases where the child is being subjected to serious neglect or other emotional trauma. § 210.145.4.

Many cases of child abuse and/or neglect involve situations that may require a concurrent, criminal investigation, and the law requires that the Division cooperate with law enforcement officials in the investigation of cases. §210.145.3, 210.145.4, 210.145.9. The provisions of Chapter 210 show a comprehensive system of

investigation and prevention that directly relate to, and are narrowly tailored to, the legitimate interests of the government in protecting children. In conducting investigations of alleged abuse and neglect, the Division is required to cooperate and to share information with law enforcement agencies, physicians providing care, treatment or forensic analysis of injuries, division staff responsible for making certain that the child is protected, juvenile officers responsible for bringing actions in juvenile court to protect the child, the child's parents or guardian, the alleged perpetrator, the prosecutor who may be involved in prosecuting a crime, and the courts that may be handling the prosecution of the crime or the protection of the children. It is an appropriate function for the legislature to create a central registry so that all persons and agencies involved in such an investigation will have access to relevant information regarding a case. *See* §210.150.2.

The trial court's holding here is that the minimum process due an alleged perpetrator would convert the swift protections afforded by the current system into the slow and meticulous procedures afforded to a person whose very fundamental rights are to be drastically curtailed–the criminal defendant. The trial court underscored the fact that a person's name can go on the registry when they have not been convicted of a crime, and detailed a long list of procedures that should be afforded such a person before placing their name on the list. This, effectively,

mandates the full range of adversarial proceedings prior to placing a name in the Central Registry–the result of which would be to reduce the urgency of remedying child abuse to a level at which children would be placed in great risk. The trial court here would require that an alleged perpetrator be given a full, adversarial, evidentiary hearing with a "neutral" decision maker, testimony under oath, the right to compel the appearance of witnesses and to cross examine witnesses and other procedures before the Division is permitted to disseminate information to the narrow group of child care related organizations listed in the statute. To require the Division to do more than give the alleged perpetrator notice of the charges and an opportunity to respond orally in writing as an initial check against erroneous decision making constitutes an unwarranted and unreasonable intrusion into the government's compelling interest in quickly and effectively investigating cases of child abuse and neglect and disseminating available information.

The petitioners argue and the trial court found that the Constitution requires the state to withhold probable cause findings of child abuse from the very narrow group of people who have the most significant interest in seeing this information for the purpose of protecting children. Petitioners have cited no case finding that the Due Process Clause compelled a government actor to withhold relevant information – much less a case requiring the government to withhold relevant information

because a probable cause standard was utilized in the assessment of the information as opposed to a preponderance of the evidence standard. To suggest that the Constitution requires the government to conceal information necessary to protect children would be humorous were it not for the fact that it is the reality of the trial court's order and is currently the law of this state.

The carefully constructed and narrowly tailored nature of the Central Registry process shows that Missouri has appropriately balanced the interests of the individual perpetrator with those of the government and the children it seeks to protect.

b. The Missouri system is narrowly tailored.

Chapter 210 does not permit the wholesale disclosure of the identities of alleged perpetrators of child abuse and neglect to *all* prospective employers. §210.150.2. There are, in fact, only a limited number of instances where identifying information regarding an alleged perpetrator may be released to a prospective employer under the law being attacked in this case.

The first instance is provided for in §210.150.2(8) where certain classes of employers may request a check of the Central Registry to determine if there are any probable cause findings of child abuse or neglect. The only employers who are entitled to request such a records check are employers who play a significant role

providing care for and supervision of children, such as schools, child care facilities, and child placing agencies. The law also permits recognized agencies that provide training or make recommendations for employment or voluntary positions that involve the provision of care and services to children to request a records check. *Id*. The request must be made in writing and responded to in writing in the manner provided by law. The state has a compelling interest in disseminating available information to such employers so that the employers of people caring for children can take reasonable steps to insure that the children in their care are safe. When balancing the interests in this case, the risk of an erroneous finding of child abuse cannot outweigh the interest of the state in providing relevant information for the protection of children from abuse or neglect. Requiring a full-blown evidentiary hearing under such circumstances constitutes an unwarranted intrusion on the ability of the State to protect vulnerable children from abuse or neglect, and to narrowly disseminate information relevant to that task.

The second instance where information from the Central Registry may be disseminated to prospective employers is under § 210.150.2(9) RSMo. That section permits a parent or legal guardian to request a check of the Central Registry for the name of the person or institution that the parent or guardian is considering as a service provider for their children. The same interests are implicated here as are

implicated under § 210.150.2(8) discussed above. Parents and legal guardians have a compelling interest in knowing whether there is probable cause that the child care provider actually abused or neglected a child. The State of Missouri, in its role as *parens patriae* has a compelling interest in making certain that the parents and guardians have that information so that they can make informed decisions regarding child care and safety. Requiring a full blown evidentiary hearing before the name is entered in the Central Registry would constitute an unwarranted intrusion on the ability of the State to provide relevant information to those who seek it and thereby protect vulnerable children from abuse or neglect.

The third instance where information from the central registry may be disseminated, to prospective employers, is under §210.150.2(11) where the law permits the disclosure of information from the Central Registry to "any state agency acting pursuant to statutes regarding a license of any person, institution, or agency which provides care for or services to children." Again, the same considerations apply. State agencies licensing persons or institutions to care for or provide services to children have a compelling interest in knowing whether there is probable cause to believe that child abuse or neglect was committed by the proposed licensee. Requiring a full blown evidentiary hearing before notice is given under such circumstances constitutes an unwarranted intrusion on the ability of the

State to provide relevant information to those who seek it and thereby protect vulnerable children from abuse or neglect.

The law that the trial court found to be unconstitutional is, in summary, carefully balanced, where only individuals and entities that have an immediate and compelling interest in obtaining information regarding a case of suspected child abuse and/or neglect and the identity of the alleged perpetrator are permitted to have access to the information. The interest of the alleged perpetrator in not having his identity disclosed to such a limited number of individuals before he is given a more formalized hearing is outweighed by the compelling interest the State has in effectively and efficiently investigating child abuse cases and insuring that children in the state are protected. This does not offend due process.

B. The Process that is Due.

Neither the federal nor the state due process clauses require a full evidentiary hearing before an administrative agency takes an initial action that may have an impact on a person's liberty or property interests, especially the kind of limited and temporary impact involved here. The U.S. Supreme Court has noted that there is only one Supreme Court case, *Goldberg v. Kelly*, 397 U.S. 254 (1970), that specifically required a full adversarial, evidentiary hearing prior to adverse governmental action, and that case applies only to the termination of certain types

of government welfare benefits. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). There are many cases in which the Supreme Court has held that due process is satisfied by a simple, summary procedure where the agency gives the alleged perpetrator notice of the allegations against him and an opportunity to respond orally or in writing without a full evidentiary hearing, coupled with more extensive, post deprivation procedures given at a later date. *Barry v. Barchi,* 443 U.S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story.")

In this case the trial court found that it was the possible disclosure of the name in the Central Registry to prospective employers without a prior evidentiary hearing that constituted the due process violation. In the case of governmental action that itself deprives a person of an interest in his or her employment the United States Supreme Court has held that "some form" of predetermination hearing is required. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985). The initial hearing that due process requires, however, is not a full blown evidentiary hearing. Due process is satisfied if the initial hearing is only "an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-546.

The standard adopted in *Loudermill* is exceeded by the language underlying the "probable cause" standard imposed by the legislature in 210.110(10) for including a person's name in the Central Registry. The Supreme Court further held as follows:

> The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement[.] ...The tenured public employee[8] is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story[.] … To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546.

Here, the name of the alleged perpetrator is entered into the Central Registry at the time that the investigator makes a probable cause determination. Before that determination is made the DFS policy and procedure requires the investigator to

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[8]The case at bar does not involve "tenured" employees, and there has been no claim that any petitioner has a property interest in their job.

notify the alleged perpetrator of the allegations against him and to give the perpetrator an opportunity to respond to the allegations. This notice and opportunity to be heard is all that due process requires before the agency can take action, assuming there is an established liberty or property interest at stake.

In this case it is undisputed that the investigator followed that procedure. With the exception of petitioner Sharpe, the petitioners declined to cooperate with the investigator, and even Sharpe's cooperation with the investigation was minimal. The fact that the petitioners chose not to present their side of the story to the investigator before their names were entered in the Central Registry does not mean that they were denied due process of law because the due process clause only requires that they be given reasonable notice and an *opportunity* to be heard before the action is taken. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). Thus, a party may waive this right by voluntarily absenting themselves from the proceeding. *Moore v. Board of Educ.,* 836 S.W.2d 943, 947 (Mo. banc 1992) (citing *Birdwell v. Hazelwood School Dist.,* 491 F.2d 490, 494 (8th Cir. 1974). The petitioners were given that opportunity to respond, but declined to do so.

C. Post-Decision Review.

After a name is entered in the Central Registry the alleged perpetrator has the right to request administrative review. Agency policy permits the review to be conducted by the local Circuit manager or county director who can uphold or overturn the agency's initial finding. 13 C.S.R. 40-31.025(2)(B). Any alleged perpetrator who is aggrieved by the decision of the Division is then entitled to an administrative review by the CANRB, an entity separate from the Division. § 210.153.3. The members of the CANRB are appointed by the Governor with the advice and consent of the Senate. § 210.153.2. The procedure for the selection of members of the Board insure that decisions are made independently from the determination made by the Division. The petitioners did not introduce a scintilla of evidence to show that any member of the CANRB sitting on the cases before the bar was anything other than an unbiased, neutral decision maker. There is simply nothing in the record to support a contrary finding and the trial judge did not make a finding of fact that the CANRB was not a neutral decision maker.

At the CANRB hearing the alleged perpetrator has the right to appear in person or to submit written statements in lieu of personal appearance and the right to be represented by counsel. §210.153.4(2). The alleged perpetrator may also call witnesses. §210.153.4(3). It is true that there is no process available to subpoena witnesses to appear at the CANRB hearing, that testimony is not given under oath,

that cross examination is not permitted, and that the rules of evidence are not observed. But this does not constitute a violation of due process. The decisions of the CANRB are accorded no deference at the trial *de novo* (as compared with the standard of judicial review of the decisions of the Administrative Hearing Commission and other contested case decisions of administrative tribunals under Chapter 536).

At the trial *de novo* the alleged perpetrator is accorded the full range of process due under the law in civil proceedings. At this *de novo* trial, on the merits, the trial court is not bound by the agency's determination, satisfying any due process hearing requirement. *Williams v. State of Mo. Dept. of Social Services*, 978 S.W.2d 491 (Mo. App. S.D. 1998). The agency has the burden of proof, unlike actions for judicial review under Chapter 536. *Id.*

* * *

The trial court erred in finding the child abuse and neglect investigation and review system to be unconstitutional under the *Mathews* balancing test. The petitioners in this case had an administrative review by internal agency personnel, by the independent CANRB, and then a full adversarial trial before a circuit court judge, that they won on the merits. Any due process interest petitioners had was fully complied with.

III.

The trial court erred in declaring the Act unconstitutional under the Due Process Clause of the United States and Missouri Constitutions because a statutory provision is not unconstitutionally vague if it conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices in that Chapter 210.101 provides a clear definition of "abuse."

The trial court found that the definition of "abuse" in the child abuse reporting system was unconstitutionally vague as applied to the petitioners. L.F. p. 166, ¶12. The trial court did not support its conclusion with any legal analysis or citation to any legal authority. The trial court's decision on this point is erroneous.

While it is a basic principle of due process that a statute is void for vagueness if its prohibitions are not clearly defined, judicial tolerance for civil laws is much greater than in the criminal context. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999); Doe v. Missouri Department of Social Services, 71 S.W.3d 648, 651 (Mo. App. E.D. 2002). This Court has held that the test for analyzing whether a statute is unconstitutionally vague is:

> Whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. However, neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague.

Cocktail Fortune, 994 S.W.2d at 957.

When determining whether a term in a statute is unconstitutionally vague this Court has also held that:

> Due process requires no more than the statute convey a sufficiently definite warning … when measured by common understanding and practices. … A word or phrase is not unconstitutionally vague because of some ambiguity.

State v. Schlieermacher, 924 S.W.2d 269, 275 (Mo. banc 1996).

The legislature is not required to define every shade and permutation of meaning in a term or phrase in a statute for the statute to pass constitutional muster. This point was clearly elucidated by this Court when it held that:

> It is, of course, virtually impossible for the legislature to employ the English language with sufficient precision to satisfy a mind intent on conjuring up hypothetical circumstances in which commonly understood words seem

> momentarily ambiguous. The Constitution, however, does not demand that the General Assembly use words that lie beyond the possibility of manipulation. Instead, the constitutional due process demand is met if the words used bear a meaning commonly understood by persons of ordinary intelligence.

State v. Allen, 905 S.W.2d 874, 877 (Mo.banc 1995).

The Legislature defined the term "abuse" in the child abuse and neglect reporting system as follows:

> Any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for the child's care, custody and control, except that discipline including spanking, administered in a reasonable manner, shall not be construed to be abuse.

§ 210.110(1) RSMo.

The trial court concluded, without any explanation, that the spanking exception in the final clause was unconstitutionally vague and somehow deprived the petitioners of "notice." But each term and phrase in that statute are terms and concepts that are commonly understood and used in everyday speech. The infliction of physical discomfort for the purposes of administering discipline is

readily distinguishable by people of ordinary intelligence from deliberate acts of injury. This Court has previously held that similar language in the definition of ‘abuse' in the Omnibus Nursing Home Act was not unconstitutionally vague. *Stiffelman v. Abrams*, 655 S.W.2d 522 (Mo. banc 1985). The provision in the law that excludes spanking from the definition of "abuse" when it is exercised "in a reasonable manner" does not render the statute unconstitutionally vague. Persons reasonably intent on conforming their conduct to the law would know that beating children with wooden boards repeatedly until their posteriors showed bruising, bleeding, and blood blisters violated the law. It would be an impossible and indeed absurd exercise for the legislature to draft a statute or rule of law that would specifically define the precise details of each and every prohibited act of "spanking" and it would be similarly absurd for a court to require the legislature to do so under the guise of due process analysis.

The trial court's finding that § 210.110(1) is unconstitutionally vague either as applied or on its face is erroneous and must be reversed.

IV.

The trial court erred in declaring the Act unconstitutional under the open courts provisions of the Missouri Constitution because that Act does not represent any bar or limitation to a right to recovery for a recognized right–a necessary prerequisite to a constitutional violation--in that petitioners do not make a claim for recovery for personal injuries for which they have suffered any bar or impediment and presented no evidence of any such injury.

The trial court held that Chapter 210 violated the open courts provisions of the Missouri Constitution. That provision is quite brief:

> That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

Missouri Const. Art. 1, § 14.

Statutes are presumed to be constitutional, and will not be invalidated unless it "clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied" therein." *Etling v. Westport Heating & Cooling Services, Inc*. 92 S.W.3d 771, 775 (Mo. 2003). The purpose of this

provision of the Missouri Constitution is to prohibit any law that unreasonably bars individuals from accessing the courts to enforce recognized causes of action for personal injury. *Id.* (citing, *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000)).

> Put most simply, article I, section 14 "prohibits any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." *Wheeler*, 941 S.W.2d at 515[.]

Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. 2000).

Most obviously, the case at bar is not an action for personal injury. In other words, there is no recognized right to recovery that Chapter 210 bars or limits. The petitioners here seek to have the statute itself declare unconstitutional and to have their names removed from the Central Registry. Neither the trial court below, nor the petitioners in their pleadings demonstrated the applicability of this provision of the Missouri Constitution, nor is there any indication of the basis on which the trial court found Chapter 210 unconstitutional on this basis. For all of these reasons, the trial court below was in error and should be reversed.

V.

The trial court erred in ordering the division to pay the petitioners' costs because in the absence of statutory authority, costs may not be assessed against the state in state court in that the Division is an agency of the state and §§210.110 to 210.165 do not provide for the award of costs against the state.

In its January 8, 2004, Order and Judgment, the Cole County Circuit Court ordered that costs were to be assessed against the Department of Social Services, Children's Division (the "Division"). The court was without the statutory authority to order costs paid by the Division and therefore misapplied the law. "Absent statutory authority, costs, including attorney fees, cannot be recovered from the State, its agencies, or its officials." *Lipic v. Missouri Dept. of Social Svcs*. 93 S.W.3d 839 (Mo. App. E.D. 2002). Quite simply, there is nothing contained in §210.152, or any other companion statute which provides the court with the authority to assess costs against the Division.

In the absence of statutory authority, Missouri courts adhere to the "American Rule" which states that litigants must bear the expense of their own attorney's fees. *Doe v. Missouri Dept. of Social Svcs*., 71 S.W.3d 648 (Mo. App. E.D. 2002).

Successful litigants may only be awarded their fees and/or costs where "they are provided for by statute or by contract, where very unusual circumstances exist so it may be said equity demands a balance of benefits, or where the attorney's fees are incurred because of involvement in collateral litigation." *Id.* at 652.

None of these exceptions apply. First, as previously stated, there is no statutory provision which authorizes the assessment of fees and/or costs against the Division in a §210.152 proceeding. Next, this was a *de novo* judicial review of a probable cause finding of abuse or neglect and not a contractual dispute. Therefore, the contract exception does not apply. Finally, the petition and subsequent case filed by the Respondents' would not be considered "unusual circumstances." Cases which are deemed to involve unusual circumstances are those cases which involve a common fund (such as a trust) or a case where the parties had to take "novel legal actions to achieve a result." *Lipic*, 93 S.W.3d at 843. It has been determined that *de novo* judicial reviews are not considered unusual circumstances nor do they involve novel legal actions:

> Unlike litigation involving a common fund, there is no need in this case to equitably balance any benefits. Moreover, there is nothing unusual or complicated about these proceedings: the Division and Lipic took the same legal actions other parties in this situation have taken to achieve this result.

Id. at 843. The petitioners in this matter took exactly the same action that any other party to these types of proceedings have taken when they filed a petition requesting that the court conduct a de novo judicial review as permitted by §210.152. And, even though the petitioners alleged and argued that the statutes were unconstitutional, that argument is available to any individual who files for *de novo* judicial review, or any other case for that matter. Because this case does not fit within any of these well-established exceptions nor is there is a statute authorizing the court to assess costs, the trial court exceeded its authority when it assessed petitioners' costs against the Division. Therefore, it is appropriate for this Court to overturn the trial court's order assessing costs against the Division.

CONCLUSION

Respondent respectfully asks this Court to reverse the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

The undersigned hereby certifies that on this 26th day of July, 2004, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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This undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 14,622 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
Assistant Attorney General