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No. 113267-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON,
By His Next Friends and Guardians, *et al.*,

Plaintiffs-Appellees

vs.

STATE OF KANSAS;
RON ESTES, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS
KANSAS STATE TREASURER; AND
JIM CLARK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE
KANSAS DEPARTMENT OF ADMINISTRATION,
Defendants-Appellants.

**BRIEF OF APPELLANT, JIM CLARK
EQUITY**

Appeal from the District Court of Shawnee County, Kansas
Three-Judge Panel, School Finance
Honorable Franklin R. Theis, Judge
Honorable Robert J. Fleming, Judge
Honorable Jack L. Burr, Judge (Retired)

Case No. 10-CV-1569

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I. NATURE OF THE CASE

On June 26, 2015, the Three-Judge Panel appointed to hear school finance litigation, found that 2015 House Substitute for Senate Bill 7 violated Article 6, Section 6(b) of the Kansas Constitution both with regard to its adequacy of funding and in its change of, and its embedding of, inequities in the provision of capital outlay state aid and supplemental general state aid. Pursuant to the Supreme Court's July 24, 2015, Order, the parties were directed to first address issues related to whether the State has cured the inequities initially found by the Panel and affirmed by the Supreme Court.

II. ISSUES ON APPEAL

- a. Should judgment be entered in the State's favor, as a matter of law, because the Plaintiffs have not proven and cannot prove that the presumptively valid school finance system violates Article 6 of the Kansas Constitution, particularly from the outdated evidence submitted at trial?
- b. Do the School District Finance and Quality Performance Act (SDFQPA) and now the Classroom Learning Assuring Student Success Act (CLASS) and appropriations to "make suitable provision for finance of the educational interests of the state" bear a presumption of constitutionality, a presumption that cannot be overcome by the Panel's substitution of its findings of fact in place of the Legislature's presumed findings which support the Act and the Legislature's appropriations?
- c. Did the Panel err by applying the wrong standard for review of Legislative actions, thereby refusing to give any deference and substituting its judgment for that of the Legislature in violation of the Separation of Powers Doctrine?
- d. Did the Panel err by failing to consider all sources of revenue provided to Kansas schools in determining whether the State has made "suitable provision for the finance of the educational interests of the state?"
- e. Did the Panel err by applying a bright-line for Article 6 compliance based upon mistaken legal conclusions that: (1) Article 6 of the Kansas Constitution creates a guarantee to successful completion of an education satisfying the *Rose* goals/standards to almost each, if not each, student as opposed to requiring legislation reasonably calculated to afford the

opportunity for each student to receive an education that meets or exceeds the goal/standards set out in *Rose* and as presently codified in K.S.A. 2014 Supp. 72-1127; and/or (2) outdated studies aimed at estimating the cost to comply with the then federal requirement under the No Child Left Behind Act, and/or historical funding levels approved in *Montoy* state the floor for adequate funding, as opposed to the test set out by the Supreme Court in *Gannon*?

- f. Did the Panel err by relying on opinion testimony which was predicated upon witnesses' improper legal interpretations concerning the State's obligations under Article 6 of the Kansas Constitution?
- g. Did the Panel err by ignoring uncontroverted facts, including the following evidence: Billions of tax dollars will be spent on K-12 education; the Legislature has arranged funding for this year's K-12 public education that will provide Kansas schools with record levels of funding overall and per student, the highest levels of revenue in history; the Legislature has given even more flexibility in how the funds are spent; the State has adopted and is implementing nationally recognized, rigorous academic standards, including revised accountability measures approved by the federal government; Kansas K-12 education is among the best in the country according to all objective standards, and all of our schools are accredited; and there is no evidence, no information whatsoever, that local school districts cannot provide the opportunity to each and every student to receive the minimal educational floor outlined by the *Rose* goals/standards adopted in both *Gannon* and by the Legislature?
- h. Did the Panel err by essentially applying a rule of no tolerance to less state capital outlay and Local Option Budget (LOB) aid than it ordered before the first *Gannon* appeal, rather than the test adopted by the Supreme Court in *Gannon*?
- i. Is there substantial competent evidence to support the Panel's purported findings of fact on the adequacy and/or equity of present school finance systems?
- j. Did the Panel exceed its jurisdiction under the Supreme Court's mandate and remand by finding 2014 changes to weightings in SDFQPA's formula violated the equity requirements in Article 6 of the Kansas Constitution?
- k. Did the Panel exceed its jurisdiction under the Supreme Court's mandate and remand by finding the CLASS unconstitutional?
- l. Did the Panel err by refusing to allow the State to conduct limited discovery and refusing to allow the State to present additional evidence?

- m. Did the Panel err by failing to require amended pleadings, other due process and a trial before it ruled on the constitutionality of the CLASS?
- n. Is this case, in its current posture, justiciable and properly before the courts?
- o. Was the Panel's remedy of "temporary restraining order" proper?
- p. Was the Panel's alternate remedy of selectively invalidating and rewriting duly-enacted legislation proper?

III. STATEMENT OF FACTS (Regarding Defendant Jim Clark)

In its March 13, 2015, Order, the Panel *sua sponte* directed Plaintiffs to join as an additional Defendant the Kansas Director of Accounts and Reports in his/her official and individual capacity as a contingently necessary party to assure the availability of relief, or for the enforcement of its orders (R. Vol. 128, pp. 19-20).

Following a hearing on May 7 and May 8, 2015, Defendant, Jim Clark, filed a Brief with the Panel on May 15, 2015 (R. Vol. 134, p. 1397). In his Brief, Defendant Clark advised the Panel that pursuant to the provisions of subsection (c) of K.S.A. 75-3702j, there is no longer a Division of Accounts and Reports within the Department of Administration (R. Vol. 134, p. 1398). The Department of Administration has been reorganized and the former financial and accounting duties of the Director of Accounts and Reports were transferred to other officers of the Department of Administration who report directly to the Secretary of Administration (R. Vol. 134, pp. 1398-1399).

Defendant Clark also requested the Panel remove him from the action in his individual capacity (R. Vol. 134, p. 1400). In its June 26, 2015, Order, the Panel dismissed Secretary Clark in his individual capacity effective July 1, 2015 (R. Vol. 136, p. 1502). Jim Clark has now retired from the position of Secretary of the Kansas

Department of Administration (R. Vol. 134, p. 1399). He was replaced by Sarah L. Shipman on July 24, 2015, who is serving in the position of Acting Secretary of Administration until confirmed by the Kansas Senate.

In its June 26, 2015, Memorandum Opinion and Order, the Panel ordered the Kansas Secretary of Administration to honor certifications and encumbrances made by the Kansas State Board of Education of any balance of capital outlay state aid due for fiscal year 2015 as directed by K.S.A. 2014 Supp. 72-8814(c), K.S.A. 2014 Supp. 72-8814(d), and section 7(j) of 2014 Senate Substitute for House Bill No. 2506. The State Board of Education was directed to immediately, on or before July 1, 2015, prepare these certifications. The Panel further ordered the Kansas Secretary of Administration to make such transfers and payments consistent with the certifications (R. Vol. 136, p. 1488). By Order dated June 30, 2015, the Supreme Court stayed the Panel's Memorandum Opinion and Order of June 26, 2015, until the Supreme Court's further order or issuance of its mandate.

The Panel labeled its Order to the Kansas Secretary of Administration a temporary restraining order (R. Vol. 136, p. 1496). No notice was given to the Secretary of Administration prior to the issuance of this temporary restraining order. None of the requirements of K.S.A. 60-903, regarding the issuance of a temporary restraining order without notice were provided to the Secretary of Administration, to include the date of its entry and expiration. No Motion for a temporary injunction was set for hearing as is required for a temporary restraining order issued without notice, nor was the temporary restraining order served upon the Secretary of Administration as required by K.S.A. 60-903(d).

In that the procedural requirements of a temporary restraining order, and the notice and opportunity to be heard required before a temporary injunction can issue were not provided, K.S.A. 60-905(a), the Secretary of Administration was not afforded the opportunity to advise the Panel of the effect of its June 26, 2015, Order on the State of Kansas. Essentially, on June 26, 2015, the Panel ordered the non-party Board of Education to certify and drop more than 200 vouchers totaling millions of dollars on the Department of Administration on or before July 1, 2015, after the State's books had already closed for the 2015 fiscal year. As the Court knows, the State runs on a budget and on a fiscal year basis. K.S.A. 75-3002. By the end of June, the money for the past fiscal year could have been spent or committed to purposes necessary to balance the budget for that fiscal year. The Panel could essentially be writing checks on someone else's bank account, and a nearly empty one at that. But for the stay, there was an order to pay out several million dollars at the very end of a fiscal year that could have precluded the Secretary of Administration from honoring other valid obligations.

Further, Defendant Jim Clark (Sarah Shipman) adopts and incorporates the Statement of Facts of Defendant State of Kansas as his/her own in this appeal.

IV. ARGUMENTS AND AUTHORITIES

The Panel Violated Due Process in its *Sua Sponte* Joinder of Additional Defendants Without Affording Them Due Process or Proceeding in a Procedurally Proper Manner

The standard of review of this issue is unlimited review, *Kansas East Conference of United Methodist Church, Inc. v. Bethany Medical Center, Inc.*, 266 Kan. 366, 969 P.2d 859 (1998). In that defendant Clark was not afforded a hearing on this issue there is no record to reference for this argument.

In one of several unprecedented and irregular moves, the Panel *sua sponte* and via email directed Plaintiffs to join several different state officials as Defendants. In the Entry of Judgment itself, the Panel once again *sua sponte* decided to join the Kansas State Board of Education as a party. The Panel also opined that service was accomplished by electronic delivery of the opinion on counsel for the State while citing nothing for the proposition that service could validly be accomplished in this manner. The Panel's injunctive relief orders exceeded anything requested in the Amended Petition or Pretrial Order; they exceeded what the parties were given notice was being contemplated; they exceeded what was before the Court on the Motion to Alter or Amend. The Panel's manner of proceeding via *sua sponte* violated due process.

When a trial court takes it upon itself to come up with a remedy, especially the drastic remedy of injunction, due process requires that those affected by the injunction receive notice and a hearing, which includes the "opportunity to be heard at a meaningful time and in a meaningful manner." *In re Marriage of Soden*, 251 Kan. 225, Syl. 4, 834 P.2d 358 (1992). This principle is illustrated in *Kansas East Conference of United Methodist Church, Inc. v. Bethany Medical Center, Inc.*, 266 Kan. 366, 969 P.2d 859 (1998). There, then district judge Stephen Hill granted an injunction against dissolution of the corporation at issue. However, as stated in this Court's opinion, no one had "petition[ed] for an injunction, the trial court did not advise the parties that it was contemplating imposing an injunction, and the trial court did not hear any evidence on the question. [The enjoined party] had neither notice nor opportunity to be heard before the injunction was imposed. The sum of these factors equals a denial of due process." *Id.*, at 379. On appeal, the Plaintiff tried to uphold Judge Hill's *sua sponte* order on

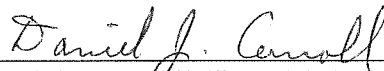
several grounds, including that the Defendant should have been aware that this was a possibility. The trial court had justified its actions on the ground that the injunction was a proper incident to declaratory relief. The Supreme Court rejected these arguments for reasons including that the declaratory judgment statute, K.S.A. 60-1703, requires a party desirous of gaining further relief to petition the court for such relief, including providing reasonable notice to other affected parties. *Id.*, at 382.

Further, Defendant Jim Clark (Sarah Shipman), in his/her official position as Secretary (Acting Secretary) of the Kansas Department of Administration, submits that his/her position in this appeal is aligned with the Defendant, State of Kansas. As a result, Defendant Clark (Shipman) adopts and incorporates the arguments and authorities of Defendant, State of Kansas as his/her own in this appeal.

V. CONCLUSION

For the reasons stated defendant Jim Clark respectfully requests the Court reverse the Memorandum Opinion and Order of the Panel dated June 26, 2015, regarding equity.

Respectfully submitted,


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CERTIFICATE OF SERVICE

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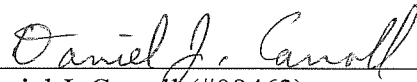
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