IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2010-CA-00042

MARK AND LAURA FAILS — APPELLANTS

VERSUS

JEFFERSON DAVIS COUNTY PUBLIC SCHOOL BOARD — APPELLEE

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. Hon. R.I. Prichard, III, Jefferson Davis County Circuit Court Judge
2. Nathaniel A. Armistad, Esq., attorney for Jefferson Davis County School Board
3. James A. Keith, Esq., attorney for Jefferson Davis County School Board
4. Reginald Jones, Esq., attorney for Jefferson Davis County School Board
5. Alexander Ignatiev, Esq., attorney for Mark and Laura Fails

Alexander Ignatiev, Esq.
Attorney for Appellants Mark and Laura Fails

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STATEMENT OF THE CASE

This matter arises from an appeal to the Circuit Court of Jefferson Davis County from the decision of the Jefferson Davis County Public School Board revoking the transfer of Courtney Fails from the Bassfield schools to the Sumrall schools in the Lamar County Public School district.

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

The Failses appealed the decision of the Jefferson Davis County Public School Board to the Circuit Court of Jefferson Davis County. The Circuit Court held that the decision of the Conservator to deny the school board the opportunity to vote on the Failses's request was not arbitrary and capricious, but was in fact within the powers of the Conservator. The Failses timely appealed this decision to the Supreme Court of Mississippi.

STATEMENT OF FACTS

Courtney Fails, along with her brother Joseph, had been transferred to the Sumrall schools of the Lamar County School district in 2003. R. 62-3. Joseph graduated from the Sumrall schools, and Courtney was attending the Sumrall schools when the Jefferson Davis County Public School Board ("the Board") had a meeting on August 13, 2007. *Id.* In that meeting, a resolution was passed by the Board purporting to prevent inter-district transfers thenceforth. *Id.* The Board was quorate on that day, and it properly voted on the manner and published it in its minutes. R. 61, 64.

From August 13, 2007, until the summer of 2008, the Board permitted students who had been legally transferred to another school district pursuant to Mississippi Code

Annotated Sections 37-15-29 and 37-15-31. Among these students was Courtney Fails, the daughter of Mark and Laura Fails. R. 62-3, R. 65.

In the summer of 2008, the Superintendent of Education for the Board, Ike Haynes, caused an announcement to be published in the local newspaper informing the parents of Jefferson Davis County Schools ("JDCS") students that all transfers were revoked, and no further transfers would be authorized. R. 65.

Mark Fails applied to the Board for a hearing to appeal the revocation of transfer pursuant to Mississippi Code Annotated Section 37-15-17, asking that the school board clarify its policy. R. 12-15, 62-3. Mark was permitted to address the Board at their regular meeting of October 13, 2008. *Id.* At this hearing Mark presented evidence that the school board had not intended to revoke existing transfers, but only to prevent future transfers. R. 13.

Billy Boleware had, in connection with Mark's request, sought an opinion from the Attorney General of the State of Mississippi as to whether such revocation is possible. R. 11. Mark Fails presented his appeal to the Board, and asked them to vote to clarify that no prior transfers were revoked. R. 15. Glenn Swan ("the Conservator"), invoking his power as the conservator of the school district, prevented the school board from voting, including Donald Milloy, who had voted against the policy and had left his mother's wake to be present on October 13, 2008, to vote in support of Mark Fails. R. 61, 64, 67-72, 83-5

Mark and Laura Fails timely appealed the decision of the Board to the Circuit Court, which held that the Conservator acted within his authority and the revocation of

transfer was not arbitrary and capricious. R. 101-6The Failses then perfected their appeal to the Mississippi Supreme Court.

SUMMARY OF THE ARGUMENT

The Circuit Court of Jefferson Davis County erred as a matter of law in three ways when it dismissed the Failses's appeal. First, the Court erred when it held that the Board had the authority to enact a policy that barred transfers from the school district and revoked existing transfers. Second, the Court erred when it held that the Conservator had the authority to bar the Board from voting on the Failses's request. Third, the Court erred when it held that the Board had the authority to revoke existing transfers.

Each inter-district student transfer request must be considered on an individual basis. Although the Board may deny each transfer request, they are required to hear each request before denying it. Therefore, the policy enacted by the Board is in derogation of the statutory and common law of the state of Mississippi, violates the United States Constitution, and operates to deprive the residents of Jefferson Davis County of a republican form of government.

The Conservator does not replace the Board. The Circuit Court erred when it held that the Conservator's broad abilities to maintain the fiscal health and administration of a school district also overrides the authority of the Board as a legislative body. The appropriate use of the Conservator's ability is to overrule those decisions of the Board that are imprudent according to the Conservator's opinion. To deny the Board the ability to vote on the Failses's request is to make the Conservator a legislative body himself, removing him from the Executive Branch function he serves, and acting to deprive the Board of its legislative authority.

Student transfer decisions are final and can only be appealed to the Circuit Court

of the county wherein the district is found. No statutory authority exists for the proposition that student transfers are annual contracts between school boards. Student transfers are a statutory right conveyed by the legislature of the state of Mississippi upon the parents of a student. To make transfers alienable without notice to the parents and without a hearing deprives the English language and the statutory scheme for transfers of all sense. For the Circuit Court to rely upon the errant reasoning of the Attorney General equating the transfer of a student to the improper renewal of an unexpired oil lease by county board of supervisors that had been voted out of office turns students into commodities rather than persons.

ARGUMENT

The Circuit Court was called upon to decide whether the decision of the Conservator was arbitrary and capricious, or an abuse of discretion, such that it must be reversed, or whether it is supported by substantial evidence and thus must be sustained. *Pascagoula Municipal Separate School District v. Barton*, 776 So. 2D 683, 684-5 (¶5) (Miss. 2001). This Court is bound to that same deferential standard, except when the actions of the Board and Conservator are beyond their power to make or violate a statutory or constitutional right of the Failses. *Miss. Dept. of Envir. Quality v. Weems*, 653 So. 2D 266, 274 (Miss. 1995) (internal citations omitted). When an administrative board misconstrues the law, this Court reviews those decsisions *de novo*. *ABC Manufacturing v. Doyle*, 749 So. 2D 43 (¶10) (Miss. 1999).

I. The Circuit Court erred as a matter of law when it held that the Conservator's authority is congruent with that of the School Board.

The duties of conservators of school districts are set out in two statutes: Miss. Code Ann. § 37-9-18 and § 37-17-6, depending on how the conservator was appointed and for what purpose he was appointed. The Circuit Court and the Board contend that the Conservator was appointed pursuant to Miss. Code Ann. § 37-17-6. Nowhere in these statutes is the Conservator empowered to bar the school board from voting pursuant to statute. Instead, he is empowered to overrule the school board once it has acted to preserve the fisc of the school district. The Conservator is not empowered to determine whether students are transferred or not.

Glenn Swan was an interim conservator appointed under Miss. Code Ann. § 37-

17-6 (14), and his powers are limited. He was manifestly NOT appointed to replace the school board, a differently empowered conservator whose powers and competency are defined in Miss. Code Ann. § 37-17-6 (15). If the entire school board had resigned, and he was retained to replace them, then he would indeed have had the power that the Board arrogates to him. Miss. Code Ann. § 37-17-6 (15). The case law of the State of Mississippi is silent in interpreting the statutory powers of the Conservator; the Failses respectfully ask that this Court rely upon the plain language of the statute and its clearly stated intent. *Expressio unius, exclusio alterius*, as the sage said, and as our common law has upheld.

II. The Circuit Court erred as a matter of law when it held the Board and the Conservator had the authority to revoke a transfer.

The Circuit Court relied heavily upon the advisory opinion issued by the Attorney General in connection with this case and requested by Boleware. MS AG Op. 2008-00449 Boleware (Sept. 10, 2008). The Attorney General's opinion is persuasive, but not binding on a court considering the same question of law. *Blackwell v. Bd. Of Animal Health*, 784 So. 2D 996, 1000 (¶9) (Miss. 2001). The Attorney General incorrectly characterizes the transfer of a child pursuant to Mississippi Code Annotated Sections 37-15-29 and 37-15-31 as a contract. There is no support for this position; in fact, the word contract is never mentioned in *Barton*. The statutes do not create a contract; rather, they create a civil right to a transfer, under certain circumstances. *Barton*, 776 So. 2D at 683 (¶23) (Miss. 2001). While this is not expressly stated, it is self-evident from the language used by the Court in *Barton*:

> The only valid reason the District offered as to why Gentry Barton has not been transferred to Beach Elementary was the lack of available space. The circuit court correctly found that such a reason for denial of a transfer request was based on substantial evidence and was not arbitrary and capricious. We agree with the circuit court that Gentry's transfer request should be granted as soon as a slot becomes available. The District's refusal of the request under those circumstances would be arbitrary and capricious.

Finally, there is no statutory authority permitting a revocation of a properly legislated transfer. The statute states that the legislative actions of the two boards in transfering a student "shall be final." Miss. Code Ann. § 37-15-31. The Attorney General dismisses the statutory language, suggesting that this merely permits the creation of a contractual transfer right. Nothing could be further from the truth, and there is no support in the common law of the state for this position.

The Attorney General supports his outlandish claim that the statue creates a transfer contract by comparing the language of the statute to the right of the county board of supervisors to re-let contracts for oil rights. *Humble Oil & Refining Co., et al, v. State et al*, 206 Miss. 847 (1949). The transfer of a child between school districts is not the same as mineral leases on section 16 land. One cannot make a bulldozer a ham sandwich simply by saying that someone with enough money can buy either.

The Attorney General misconstrued the holding in *Humble Oil*. In *Humble Oil*, the Adams County Board of Supervisors approved an oil lease to Humble under the existing statutory authority, which required ratification by the County Superintendent of Education. *Humble Oil*, 206 Miss. At 853-4. That lease was an anticipatory renewal, which was impermissible under statute, and further was invalid because it purported to renew a lease after the existing Board of Supervisors was no longer in office. *Id.* at 855.

It is not that the existing lease bound a successive board, as the Attorney General erroneously states in his opinion; rather, it is that the Adams County Board of Supervisors improperly acted to renew a lease that had not expired, and which would not have expired until after the new Board of Supervisors took office. The Supreme Court specifically warns against the Attorney General's interpretation of *Humble Oil*: "Our view here is not to be confused with contracts effective during term of one board, and performance starting during the term of office of said board, but extending over into the term of office of a successor board. Here the terms of office of the members of the board and of the county superintendent of education expired December 31, 1947, yet they attempted to make a contract go into effect during the term of their successors, preempting the latter from the right and duty to attend to the matter themselves." *Id.*

The Supreme Court goes further, giving lie to the Attorney General's opinion, with the following language: "A board of supervisors may not, by contract, preclude itself or its successors in office from the right and the duty to exercise the power given it by a statute whenever, in its judgment or discretion, it is deemed necessary to exercise a clearly granted power." *Id.* at 856.

Finally, the Attorney General appears to conflate a county board of supervisors' authority to lease section 16 land in the code of 1942 with the authority of the county school board, an entirely different legislative body, to transfer students under a law which permits no revocation, and which does not establish a contractual relationship.

III. The Circuit Court erred as a matter of law when it specifically ignored express statutory language stating that the grant of a student transfer request under

Mississippi Code Annotated Section 37-15-31 is final.

The inquiry into the transfer of a student by means of the statutory process is an individual one. *Barton*, 776 So. 2D at 686 (¶12), Miss. Code Ann. § 37-15-15. To that extent, the resolution of August 13, 2007, of the JDCPSB is invalid and contrary to law and the Constitution, inasmuch as it sets a blanket policy to deny all requested transfer without permitting the mandated hearing by those parents requesting relief. This destroys the sacred right of citizens to petition their representatives.

The Failses submit that the Attorney General's opinion, is not binding on this court, and further is in direct conflict with the common and statutory law of Mississippi, as enshrined in Mississippi Code Annotated Sections 37-15-29 and 37-15-31, and *Pascagoula Municipal Separate School District v. Barton*, supra. Accordingly, this Court and the Circuit Court are free to disregard the opinion of the Attorney General.

The transfer of Courtney Fails, requested and completed in 2003, is final, and not subject to further administrative review; that is, the school districts cannot untransfer her. Second, the resolution passed on August 13, 2007, by the JDCPSB is illegal, and unconstitutional to the extent that it violates the right of parents to seek the transfer of their children to another school district, and impairs the right to petition a legislative body. Third, Glenn Swan exceeded his authority as the conservator of the Jefferson Davis County School District by prevent the school board from voting on the Fails's appeal. Fourth, the Attorney General's opinion as requested by Billy Boleware is erroneous as a matter of law, and should not be relied upon either by the Court or by the school board, since it clearly misstates the ruling of the Mississippi Supreme Court in the

sole case it uses for authority supporting its opinion. Fifth, there is no authority for the school board to revoke Courtney Fails's transfer to the Lamar County School District, which had been legally obtained according to the statute, and approved by both sitting school boards at the time of its request.

This Court should reverse and render the decision of the Circuit Court dismissing the Failses's appeal, and affirm the established right of Courtney Fails to attend the Lamar County Schools without further interference by the Jefferson Davis County Public School Board.

CONCLUSION

This case is not merely about the right of the Failses to transfer their daughter, Courtney, to the Lamar County School District. It is a matter of an erroneous understanding of Mississippi law, fostered by the Superintendent and Conservator of the Jefferson Davis County Schools, and abetted by the erroneous opinion of the Attorney General. Either statutes mean what they mean, or they do not mean anything at all. Either the case law of the Mississippi Supreme Court means what it means, or it does not mean anything at all.

The Conservator had no authority to prevent the school board from voting on Mark Fails's petition on October 13, 2008. The Attorney General's opinion erroneously mischaracterized the ruling of the Supreme Court, which it relied upon as it sole authority for opining that transfering a child between school districts pursuant to statute is not final, but merely creates a renewable contract. And the Failses have had their civil rights trampled by the efforts of Ike Haynes and Glenn Swan to prop up the Jefferson Davis

County Schools by preventing the legal transfer of students in contravention of state law. This Court should invalidate the actions of the Conservator and the Superintendent, and restore the transfer of Courtney Fails to the Lamar County Schools.

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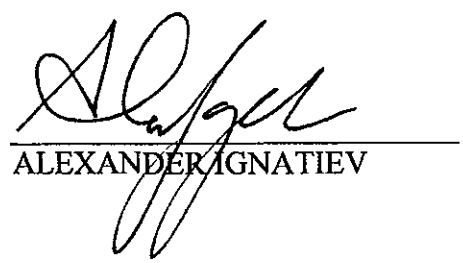
CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellants, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi, Ms. Kathy Gillis, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 27th day of May, A.D. 2010.



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I, Alexander Ignatiev, attorney for Appellants, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the Appellants to the following:

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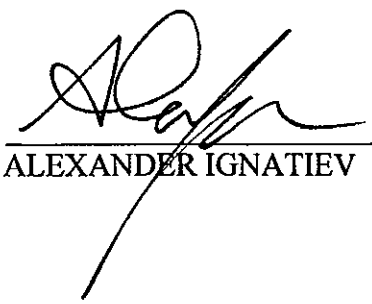
THIS the 27th day of May, A.D. 2010.



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