#24989-rev & rem-JKM
2009 SD 63

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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BRAD OLSON, DUANE ALM, MICHAEL MILLER, LINDA BURDETTE, RUSSELL GALL, MERRITT STEGMEIER, TOMMY SVATOS, TERRY SVATOS, DEBBRA J. HOUSEMAN, JOHN BROOKS, MADELINE FAST HORSE, KAREN SLUNECKA, DAWN REDDEN, TERRY AESOPH, HEATHER BODE, and GRADY HEITMANN, Plaintiffs and Appellants,

v.

MARTY GUINDON, Auditor General, Department of Legislative Audit of the State of South Dakota, M. MICHAEL ROUNDS, Governor, State of South Dakota, LAWRENCE LONG, Attorney General, State of South Dakota, and the STATE OF SOUTH DAKOTA, Defendants and Appellees,

v.

SOUTH DAKOTA COALITION OF SCHOOLS, Intervenor and Appellant.

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APPEAL FROM THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * *

HONORABLE LORI S. WILBUR
Judge

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ARGUED ON JANUARY 14, 2009

OPINION FILED **07/22/09**

#24989

MEIERHENRY, Justice

[¶1.] The issue in this appeal is whether school districts have standing to seek a declaratory judgment against Auditor General Marty Guindon, Governor M. Michael Rounds, and Attorney General Lawrence Long (state officials) on the question of the constitutionality of K-12 public school funding in South Dakota. The circuit court determined that school districts did not have standing and granted summary judgment in favor of Guindon, Rounds, and Long. We reverse and remand.

Procedural History

[¶2.] School district board members from Aberdeen, Andes Central, and Faulkton Area school districts[1] (school districts) filed the initial complaint for declaratory relief. The South Dakota Coalition of Schools (Coalition) joined the action as an intervenor. Formed in 1988 as the South Dakota Coalition of Small Schools, the Coalition is currently governed by a nine member board of school superintendents who work to advance the interests of member school districts. The Coalition is funded by dues paid by member school districts. In 2003, the Coalition was incorporated as a non-profit corporation. The Coalition employs attorneys to lobby the legislature and also employs expert-consultants and attorneys to represent the member school districts. The Coalition is a member of an organization that

1. The school district board members of the three districts involved in the instant suit include: Brad Olson, Duane Alm, Michael Miller, Linda Burdette, Russell Gall, Merritt Stegmeier, Tommy Svatos, Terry Svatos, Debbra Houseman, John Brooks, Madeline Fast Horse, Karen Slunecka, Dawn Redden, Terry Aesoph, Heather Bode, and Grady Heitmann.

pursuant to SDCL 15-6-56(b). The state officials claimed that the school districts did not have standing to sue the state officials. The school districts claimed that they did have standing to seek a declaratory judgment action; or alternatively, if they did not have standing, they had authority to expend school district monies to finance the litigation through the Coalition.

[¶4.] The circuit court ruled in favor of the state officials and entered a judgment declaring that the school districts lacked standing and did not have authority to finance the litigation. The school districts and the Coalition appeal the issue of whether the school districts have standing to seek a judgment declaring the system of funding K-12 public education unconstitutional; or alternatively, whether the school districts can finance the lawsuit in the absence of standing. We hold that the school districts have standing. Standing is recognized here in the limited context of a declaratory judgment action and stems from provisions in the South Dakota Constitution.

[¶5.] The trial court denied standing based, in part, on prior cases decided by this Court. Edgemont Sch. Dist. 23-1 v. South Dakota Dep't of Revenue, 1999 SD 48, 593 NW2d 36; Agar Sch. Dist. No. 58-1 v. McGee, 527 NW2d 282 (SD 1995). In those cases, we held that the school districts did not have standing to challenge tax levies and distributions. In both cases, we determined that the districts were not the real parties in interest. In *Agar School District*, the district challenged the legality of an increased tax levy and its distribution to other school districts. 527 NW2d at 284. The case did not involve a constitutional challenge of any sort only a dispute over statutes. We determined that the district did not have standing

Standing under the South Dakota Constitution

[¶7.] Pursuant to the constitutional mandate "to establish and maintain a general and uniform system of public schools," the South Dakota Legislature delegates to local school districts the authority to organize for the purpose of operating schools. *See* SD Const art VIII, §1 (enabling legislation set forth in SDCL 13-5-1). In addition, the legislature gives local school boards "general charge, direction and management of the schools of the district and control and care of all property belonging to it." SDCL 13-8-39.

[¶8.] The South Dakota Constitution creates and defines the system of public schools. SD Const art VIII, §1 mandates the establishment of a "general and uniform system of public schools" as follows:

> The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.

SD Const art VIII, §1. The South Dakota Constitution specifies four sources of funding that go to the local school districts for public education. The first source is the interest from a permanent trust fund, whose principal derives from the sale of public school lands acquired from the United States government, property escheated to the State, gifts and donations, and other property "acquired for public schools." SD Const art VIII, §2. The constitutional provision provides for the permanent trust fund as follows:

> All proceeds of the sale of public lands that have heretofore been or may hereafter be given by the United States for the use of public schools in the state; all such per centum as may be

distributing to the real owners of the fund whatever of such moneys have been received by it . . . ." *Id.*[3]

[¶11.] In 1896 in *State v. Ruth*, this Court for the first time addressed the issue of sovereign immunity for state constitutional officials. 9 SD 84, 68 NW 189 (1896). While ascertaining that sovereign immunity did exist for discretionary tasks, the Court painstakingly distinguished the State's legal status pertaining to the school trust funds found in Article VIII. *Id.* at 190. In regard to the school trust funds, the State's legal status was that of a trustee not that of a sovereign:

> The state appears in this action in its capacity of trustee, and must be treated as a natural person, acting in the same capacity; regard being had to the character of the trust, and the spirit of the constitutional provisions relating thereto. The rules which regulate ordinary trustees will need to be so applied as to secure and promote the ends contemplated by the constitution. It is the duty of each branch of the state government to regard the sacred character of this important trust, and to insist upon the utmost fidelity in its management.

Id. These earlier constitutional decisions have been subsequently viewed as particularly persuasive because those cases were decided by Justices who had been members of the Constitutional Convention of 1885 that drafted Article VIII. *See*

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3. This doctrine first surfaced in the Constitutional Debates of 1885. The following was proposed by two delegates concerning what would become Article VIII.

> Mr. Edgerton: "I would have the school fund beyond all possible control of the elections of the future state; if there is any fund that should [b]e sacredly set apart beyond a possibility of its being used for such purposes, it is the school fund." At p. 500.
>
> Mr. Kanouse: "The parties who hold this [school] fund, hold it nominally as a sacred trust and against the possibility of its being used for political purposes." At pp. 515-516.

Id. at 853 (emphasis added).

[¶14.] The Constitution establishes a second education funding source from "[t]he proceeds of all fines collected from violations of state laws[.]" SD Const art VIII, §3. The county treasurers collect the fines and distribute them "among and between all of the several public schools incorporated in such county in proportion to the number of children in each, of school age, as may be fixed by law." *Id.* The Constitution also provides two other funding sources for public education – general taxation and local taxation. Article VIII, section 15 requires the legislature to "make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state." SD Const art VIII, §15.

[¶15.] The funding sources established by the Constitution go to the local school districts for the sole purpose of educating the children of South Dakota. Local school districts are the core of the entire K-12 educational system. The districts are beneficiaries of the permanent trust fund and designated recipients of the fines and taxes earmarked for education. Their position as beneficiaries and designated recipients is established by the South Dakota Constitution. Without adequate funding, the school districts claim they are unable to fulfill their mandate of educating the children of South Dakota. It is undisputed that public education is of utmost importance to the state and its citizens. South Dakota's Constitution requires the legislature "to establish and maintain a general and uniform system of public schools . . . and to adopt all suitable means to secure to the people the

Conclusion

[¶17.] Thus, we hold that in the narrow context of seeking a declaratory ruling on the constitutionality of K-12 public school funding that the districts have standing. Because we determine that the school districts have standing to sue the state officials at this stage of the proceeding, it follows that the school districts also have authority to expend funds to support the litigation.

[¶18.] We reverse and remand.

[¶19.] GILBERTSON, Chief Justice, concurs with a writing and SABERS, Retired Justice, concurs.

[¶20.] KONENKAMP and ZINTER, Justices, concur in result.

GILBERTSON, Chief Justice (concurring).

[¶21.] I join in the Court's opinion but wish to add a few points. Before us is the question of the standing of certain school districts within South Dakota to commence a declaratory judgment action against the State. A substantial portion of oral argument before this Court focused directly upon the relief the school districts were seeking in that underlying proceeding.

[¶22.] During oral arguments, the school districts stated, "[w]e are seeking declaratory relief. We are not seeking any kind of a specific amount of appropriation from the State." Further, "[t]he school funding litigation does not ask for a dollar, and it asks for no relief other than declaratory relief, and attempts to enforce declaratory relief if certain statutes have to be enjoined as unconstitutional."

[¶26.] To arrive at its result of limited standing by the school districts, the Court properly applies the public trust theory to resolve this issue. In its interpretation of article VIII of the South Dakota Constitution, the Court's historical analysis begins with the Constitutional Convention of 1885, which "framed the issues for debate in the 1889 Constitutional Convention and the constitution produced in 1885 was the genesis of the constitution adopted in 1889." Chief Justice David Gilbertson & David S. Barari, *Indexing the South Dakota Constitutional Conventions: A 21st Century Solution to a 125 Year Old Problem,* 53 SD Law Rev 260, 261 (2008) (citing *In re* Opinion of the Judges, 61 SD 107, 246 NW 295, 295 (1933); Schomer v. Scott, 65 SD 353, 274 NW 556, 562-63 (1937); Green v. Siegel, Barnett & Schutz, 1996 SD 146, ¶17 n8, 557 NW2d 396, 401 n8). Our case law since 1889, as cited by the Court, strongly supports standing in this limited case. It is clear from the Court's analysis that this trust theory is limited to article VIII and no case law since 1889 suggests it applies to any subdivisions of government other than the schools.

[¶27.] I cannot join in the concept of standing through what is declared to be "a public interest exception." Until today, such a doctrine has been unknown to our South Dakota Constitution or its interpretative scholarship. Moreover, it is a nebulous term without specific definition. We are not provided with a workable definition of what this term means; instead, we are told in general terms what it is not. Thus, should this exception be adopted, in future cases, what constitutes an issue of "great public importance" will be what three members of this Court conclude it to be. "The Court's inability to formulate a 'judicially discernible standard'

general rule. The question of standing under the public interest exception is a question of first impression in this jurisdiction. Until today, we have applied the general rule disallowing standing to school districts as governmental subdivisions, but we have also acknowledged the exceptions. *Id.*

[¶30.] A limited exception is justified in this case for three reasons. First, local school districts have a unique constitutional role in both providing and financing K-12 education under article VIII of the South Dakota Constitution. Second, on appeal, the school districts have narrowed the relief they seek in the underlying litigation to that of pure declaratory relief to determine the meaning of the parties' constitutional obligations.[5] Finally, all parties agree that this is an important public interest question. Under these circumstances, we should now adopt a limited standing exception for schools when they seek pure declaratory relief to determine the meaning of the constitutional provision under which they must provide a public education.[6]

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5. At oral argument, counsel for the school districts stated that in the underlying litigation, the plaintiffs are "seeking an interpretation of article VIII, what does it mean that . . . the State is to adopt all suitable means to provide an education? Are the school districts entitled to have sufficient funds to provide an adequate education? What does an adequate education mean?"

6. Although the State relies on authorities finding no standing for governmental subdivisions, those authorities are distinguishable as they either apply to other governmental subdivisions having no specific constitutional duty with respect to the issue in litigation, or the recognized standing exceptions are inapplicable or not discussed. *See e.g.* Denver Ass'n for Retarded Children, Inc. v. Sch. Dist. No. 1 in City and County of Denver, 188 Colo 310, 535 P2d 200 (1975); Lobato v. State, __P3d __, 2008 WL 194019 (ColoApp 2008); Bd. of Supervisors of Linn County v. Dep't of Revenue, 263 NW2d 227 (Iowa 1978); East Jackson Pub. Sch. v. State, 133 MichApp 132, 348 NW2d 303 (1984);

(continued . . .)

adequate education. Therefore, as the Washington Supreme Court concluded, the interest of the schools is sufficiently within the zone of interest recognized by Washington's analogous education clause to afford standing.

> [I]t is clear the District has standing to challenge the constitutionality of the school financing system. The interests of the District are not theoretical; they involve actual financial constraints imposed upon the District by the challenged system itself. In short, the interests sought to be protected by the District are within the zone of interest either regulated by the challenged regulations and legislation or by [the Washington Constitution's analogous education clauses.] Under these circumstances it would be unreasonable to deny standing to the District which, far from being a nominal party, stands at the very vortex of the entire financing system.

Seattle Sch. Dist. No. 1, 90 Wash2d at 493-94, 585 P2d at 82.[7]

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7. Although I agree with the Washington court's view of school standing in light of the school districts' constitutional obligation to provide education, I would not adopt the Washington court's view of standing for other governmental entities. The State's authorities from other jurisdictions overwhelmingly demonstrate that, absent the constitutional zone of interest that state constitutions provide to schools, other governmental entities, as creatures of the legislature, have no standing. South Dakota has adopted this view. For example, we have stated that:

> Counties and other municipal corporations are, of course, the creatures of the Legislature; they exist by reason of statutes enacted within the power of the Legislature, and we see no sound basis upon which a ministerial (or, for that matter, any other) office may question the laws of its being. The creature is not greater than its creator, and may not question that power which brought it into existence and set the bounds of its capacities.

Edgemont Sch. Dist., 1999 SD 48, ¶15, 593 NW2d at 40 (quoting Bd. of Supervisors of Linn County, 263 NW2d at 232 (quoting C. Hewitt & Sons Co. v. Keller, 223 Iowa 1372, 275 NW 94, 97 (1937))).

importance, I agree with the previously cited authorities holding that schools have standing to seek declaratory relief under the public interest exception. It must, however, be emphasized that such standing should only be recognized at this stage of the proceeding, and then only for the limited question of interpreting and determining the meaning of the education clauses and statutes.[9] To this extent, I concur in result.

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9. In the underlying litigation, the circuit court dismissed all claims except those seeking declaratory relief. That litigation has not been finalized and it is not known if the dismissed claims may be the subject of an appeal. In any event, in light of the Schools' appellate limitation on their request for relief, *see supra* note 5, it should be understood that today's decision is no authority for the proposition that public schools have standing to take the often utilized step of also seeking enforcement of a declaratory ruling, which might, for example, include a request for monetary or other affirmative relief against the State. *See* Dan Nelson Auto., Inc. v. Viken, 2005 SD 109, ¶¶30-31, 706 NW2d 239, 251-52 (restating that declaratory relief is unavailable to governmental subdivisions seeking monetary relief from the state treasury).

For the same reason, today's decision should not be understood to mean that school districts have standing to seek the other relief they initially sought in the underlying litigation; namely,

> That the [circuit] court issue appropriate writs of mandamus, writs of prohibition, and/or interim and permanent injunctive relief to bring defendants into compliance with article VIII of the South Dakota Constitution, to prohibit the defendants from administering, enforcing and/or funding those provisions of the public school financing system that are unconstitutional, and to remedy the continuing violation of plaintiffs' constitutional education rights; and
>
> That the court retain jurisdiction and maintain judicial oversight to assure that the Legislative and Executive departments act appropriately to correct the constitutional inadequacies of the public school finance system that presently exists in South Dakota.

Third Amended Complaint, 83.

[¶37.] Consequently, article VIII, section 15 -- the focus of the underlying litigation -- does not provide school districts with any direct or express right to any trust fund, and it certainly does not provide school districts with trust rights in the funds they seek: future increased appropriations. After all, the Legislature could, as it did in 1996 after the last school funding litigation, completely repeal and adopt a new method of funding K-12 education. *See* 1996 Session Laws ch 69, "An Act to revise and repeal certain provisions relating to state aid to education." Therefore, although *Schelle v. Foss*, 76 SD 620, 83 NW2d 847 (1957) and *State v. Ruth*, 9 SD 84, 68 NW 189 (1896) support the theory that school districts would be injured parties with standing if the trust funds in article VIII, sections 2 and 3 were not being used in accordance with constitutional requirements, that is not the allegation in the underlying litigation. For that reason, school district standing based on a trust beneficiary's "rights" to trust funds has no application in this case.[11]

[¶38.] KONENKAMP, Justice, joins this special writing.

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11. There is one limited exception. To the extent the underlying plaintiffs allege inappropriate use of the article XII, section 6 Education Enhancement Trust Fund, the majority's trustee beneficiary theory could apply. That does not, however, appear to be the *focus* of the underlying litigation.