

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
Saad, C.J., and Talbot and Fort Hood, JJ.

DANIEL ADAIR, a Taxpayer of the  
FITZGERALD PUBLIC SCHOOLS, and  
FITZGERALD PUBLIC SCHOOLS, a  
Michigan municipal corporation, *et al.*,

Supreme Court Case No.: 137424

Plaintiffs-Appellants,

Court of Appeals Case No.: 230858  
(On Second Remand)

v

STATE OF MICHIGAN, DEPARTMENT OF  
EDUCATION; DEPARTMENT OF  
MANAGEMENT AND BUDGET; AND  
MARK A. MURRAY, TREASURER OF THE  
STATE OF MICHIGAN,

Defendants-Appellees.

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REPLY BRIEF ON APPEAL – APPELLANTS

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THIS MATTER INVOLVES A RULING THAT  
A MICHIGAN STATUTE OR OTHER STATE  
GOVERNMENTAL ACTION IS INVALID.

ORAL ARGUMENT REQUESTED

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## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
STATEMENT OF MATERIAL PROCEEDINGS AND FACTS .....	1
ARGUMENT.....	4
I. THE SCHOOL DISTRICTS' SUIT WAS SUSTAINED AND THEY ARE ENTITLED TO RECOVER THEIR COSTS, INCLUDING REASONABLE ATTORNEY FEES, PURSUANT TO CONST 1963, ART. 9, § 32.....	4
RELIEF REQUESTED.....	9



## INDEX OF AUTHORITIES

### Cases - Michigan

Adair v State, 250 Mich App 691; 651 NW2d 393 (2002).....	2, 6
Adair v State of Michigan, 467 Mich 920; 654 NW2d 318 (2002).....	2, 6, 7
Adair v Michigan, 470 Mich 105; 680 NW2d 386 (2004).....	3, 7
Adair v State Dep't of Educ, 267 Mich App 583; 705 NW2d 541 (2005).....	3
Adair v State of Michigan, 474 Mich 1073; 712 NW2d 702 (2006).....	3
Adair v State of Michigan, 279 Mich App 507; 760 NW2d 544 (2008).....	3
Smith v Khouri, DDS, et al, 481 Mich 519; 751 NW2d 472 (2008).....	9

### Constitutional Provisions - Michigan

Const 1963, art 9, § 29.....	1, 2, 4, 5
Const 1963, art 9, § 32.....	passim

### Court Rules - Michigan

MCR 2.116(C)(7).....	2, 6, 7
MCR 2.116(C)(8).....	2, 6
MCR 2.116(C)(10).....	2, 6



## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The School Districts rely on the Statement of Material Proceedings and Facts included within their previously filed brief on appeal. Certain representations that are a part of the State's counter-statement of proceedings and facts require comment, however, to the extent that they create misimpressions of what is contained in the record.

### **A. The Context of the Parties' Efforts in These Proceedings.**

On page 2 of the State's brief on appeal, the State asserts that the School Districts' suit was in the main rejected in the proceedings below. Specifically, the State stresses:

Plaintiffs' suit alleged claims that the State committed 21 *Headlee Amendment* violations.

From this, the State argues that only one of the twenty-one claims survived and, therefore, the bulk of the efforts below, and thus costs incurred, were unavailing. This is not accurate: the bulk of the efforts during the nine years that this case has been pending have concerned the single issue previously remanded for trial by this Court and, by far, the vast majority of costs incurred have arisen from those efforts and are not related to the twenty-one claims referenced in this argument.

The State's reference to twenty-one alleged *Headlee Amendment* violations is apparently based on a tabulation of the allegations contained in the School Districts' complaint. The original complaint was filed on November 15, 2000. A First Amended Complaint, which simply included additional parties plaintiff, was filed on January 2, 2001. The School Districts' Second Amended Complaint was filed on April 16, 2001 and included three separate counts.<sup>1</sup> (109a-supp through 119a-supp). Within those three counts were allegations of several separate state laws that imposed unfunded mandates in violation of Const 1963, art 9, § 29 of the

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<sup>1</sup> References to documents that were included within Appellants' Appendix filed with this Court on May 27, 2009 will be denoted as (\_\_\_a). The two documents that have been made a part of Appellants' Supplemental Appendix, filed together with this reply brief, will be referenced as (\_\_\_a-supp).

Headlee Amendment. These are apparently the allegations about which much is made in the State's opposing brief.

On May 18, 2001, the State filed a motion for summary disposition with the Court of Appeals pursuant to MCR 2.116(C)(7), (8) and (10). In *Adair v State*, 250 Mich App 691; 651 NW2d 393 (2002) (4a-16a), the Court of Appeals granted the State's (C)(7) motion, finding that, with one exception, the claims were barred by principles of *res judicata* or release. The one claim that the Court of Appeals found was not subject to dismissal under MCR 2.116(C)(7) was the School Districts' claim concerning the Center for Educational Performance and Information ("CEPI"). The Court granted summary disposition in favor of the State with respect to this claim pursuant to MCR 2.116(C)(10). (16a).

The School Districts filed an application for leave to appeal to this Court. In *Adair v State of Michigan*, 467 Mich 920; 654 NW2d 318 (2002) this Court issued an order in which it granted the application, limited to the follow issues:

- (1) Whether *res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997) [*Durant I*];
- (2) Whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8); and
- (3) Whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release. (120a-supp).

Notably, the Court did not identify any issue to be considered on appeal that dealt with the underlying content of the allegations in the complaint that activities and services required by state law were being unfunded in violation of Const 1963, art 9, § 29 of the Headlee Amendment, apart from the CEPI issue referenced in issue (3), above.



In *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004) (17a-30a) the Court found in favor of the State on the *res judicata* and release issues. (22a and 24a). The Court reversed the Court of Appeals, however, on the “recordkeeping claim” or CEPI issue (27a) and remanded to the Court of Appeals “for further proceedings consistent with this opinion.” (29a-30a).

During the subsequent proceedings before the Court of Appeals and this Court *no* part of the legal and factual arguments presented even indirectly concerned the individual subjects of the several counts of the School Districts’ Second Amended Complaint, *i.e.* the “21 *Headlee* Amendment violations.” *Adair v State Dep’t of Educ*, 267 Mich App 583; 705 NW2d 541 (2005) (31a-38a); *Adair v State of Michigan*, 474 Mich 1073; 712 NW2d 702 (2006) (39a-40a); *Adair v State of Michigan*, 279 Mich App 507; 760 NW2d 544 (2008). (90a-99a).

The point is that the supposed twenty-one separate alleged *Headlee* Amendment violations ceased to be topical in any sense in this case beyond May of 2001, when the State filed its motion for summary disposition.

**B. The Costs For The Mandates Were Shown At Trial.**

On page 8 of its brief on appeal, the State represents:

The Special Master concluded that . . . (2) despite not showing actual costs of the alleged mandates . . .

As was fully discussed in the School Districts’ brief on appeal in the companion case to this appeal (Supreme Court Case No. 137453), the School Districts did, indeed, prove that substantial and “actual costs” were being incurred as a result of the CEPI mandates that were not being reimbursed by the State. These proofs were accepted by the Special Master and the Court of Appeals, based on their conclusions that the School Districts made a sufficient

showing at trial that the schools had incurred substantial costs in meeting CEPI mandates that were not funded by the State, contrary to Const 1963, art 9, § 29 of the Headlee Amendment.

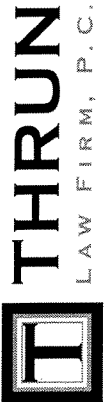
**ARGUMENT**

**I. THE SCHOOL DISTRICTS' SUIT WAS SUSTAINED AND THEY ARE ENTITLED TO RECOVER THEIR COSTS, INCLUDING REASONABLE ATTORNEY FEES, PURSUANT TO CONST 1963, ART. 9, § 32.**

In its brief on appeal, the State argues that in order for a taxpayer to be entitled to recover costs, pursuant to Const 1963, art 9, § 32, the taxpayer must be sustained on every aspect of his/her complaint. The State contends that the School Districts failed to succeed in sustaining their position as to twenty of their twenty-one claims; hence the School Districts are not entitled to recover their costs despite having fully prevailed on the single claim which this Court remanded for trial in its 2004 decision. The State argues that complete vindication of the taxpayers' position, as determined from their initial complaint, is necessary in order to satisfy the Headlee voters' intent for there to be *any* recovery of costs and attorney fees.

The State's argument does not, of course, consider the reality that the "taxpayers" referred to in § 32 of the Amendment are the very same people who voted to approve the Amendment. Moreover, to accept this argument, it must be assumed that the voters who elsewhere within the Headlee Amendment showed a very tangible intent to reign in state and local government in the use of taxpayer monies, even to go so far as to provide a unique judicial enforcement mechanism through § 32, would not condone a taxpayer's recovery of costs unless that taxpayer – *and fellow voter* – was completely successful in a suit brought under that section. In short, it strains credulity beyond the breaking point to assume that Michigan voters' had such intent.

Moreover, the assertion in the State's brief that the School Districts only succeeded on one of twenty-one separate claims is made totally out of the context of what actually occurred.



In order to properly consider this argument it is necessary to review the nearly nine years of proceedings in three separate phases:

**A. The First Phase (November 15, 2000 – April 23, 2002)**

The School Districts commenced suit on November 15, 2000 by filing a complaint with the Michigan Court of Appeals pursuant to Const 1963, art 9, § 32. Defendants filed an Answer and Affirmative Defenses on December 20, 2000. The School Districts filed a First Amended Complaint on January 2, 2001 for the purpose of including additional parties plaintiff.

On April 2, 2001 a scheduling conference was held by the Court of Appeals. The School Districts were given permission to file a Second Amended Complaint, and did so on April 16, 2001. (109a-supp through 119a-supp).

This Second Amended Complaint included three counts. In Count I, the School Districts alleged that the State had, without providing the funding required under Const 1963, art 9, § 29, increased the level of special education activities and services required to be provided by school districts in Michigan. (112a-supp through 114a-supp). Count II of the Second Amended Complaint alleged that the State, without providing the requisite funding, had increased the level of activities and services for school districts in Michigan by requiring them to provide increased minimum hours of pupil instruction. (114a-supp through 115a-supp). In Count III of the Second Amended Complaint, the School Districts identified a number of statutory provisions that had been enacted or amended after December 23, 1978, the effective date of the Headlee Amendment, which required increased activities and services of school districts for which the State had provided no reimbursement. (116a-supp through 118a-supp). In its brief on appeal, the State has combined the particulars identified in these three counts in asserting that the School Districts claimed twenty-one Headlee Amendment violations.

On May 18, 2001, the State filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). As mentioned above, in *Adair v State*, 250 Mich App 691; 651 NW2d 393 (2002) the Court of Appeals granted the State's (C)(7) motion, finding that, with one exception, the claims were barred by principles of *res judicata* or release. The one claim that the Court of Appeals found was not covered by the (C)(7) adjudication was the School Districts' claim concerning the CEPI claim. However, the court dismissed it on the basis that there was no genuine issue as to any material fact and the State was entitled to judgment as a matter of law. (16a).

For purposes of the instant argument it must be emphasized that the April 23, 2002 decision of the Court of Appeals ended the period during which the particularized allegations of the School Districts' Second Amended Complaint, the "21 *Headlee Amendment* violations," required any consideration or mention by either party. From that date forward, only the global issues of the applicability of *res judicata* and release, as well as the School Districts' separate CEPI claim, were the subject of later argument.

**B. The Second Phase (May 14, 2002 through June 9, 2004)**

On May 14, 2002, the School Districts filed an Application for Leave to Appeal with this Court, commencing the "second phase" of these proceedings. In *Adair v State of Michigan*, 467 Mich 920; 654 NW2d 318 (2002) this Court issued an order in which it granted the application, limited to the following issues:

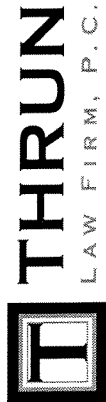
- (1) Whether *res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997) [*Durant I*];
- (2) Whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8); and

- (3) Whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release. (120a-supp).

In its decision in *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004) (17a-30a), this Court ultimately accepted the State's *res judicata* and release arguments as well founded. However, two things need to be considered in this regard that are relevant to the present question of whether the School Districts are entitled to recover costs under § 32 of the Amendment.

The decision of this Court in *Adair, supra*, by no means represents an exoneration of the State with regard to the School Districts' dismissed claims. A bar is simply that. The unstated but implied assertion in the opposing brief that the School Districts' claims were found to be groundless or frivolous is not supportable in the record. Indeed, the School Districts maintain that these very substantive violations of the requirements of the Constitution are continuing to occur today. They are simply not actionable or subject to being remedied under § 32 of the Amendment, based on this Court's earlier ruling.

Secondly, the additional implication that the dismissed claims represented separate considerations by the Court based on disparate legal bases for each individual claim is inaccurate. These claims were considered collectively by the Court of Appeals within the context of the State's (C)(7) motion for summary disposition. The Court gave no consideration to the merits of the individual claims set forth in the School Districts' complaint that were the subject of the motion. Thus, all of the elaborations by the State about the preponderance of the number of claims dismissed versus the one on which the School Districts were sustained, as argued in the State's opposing brief, merely disguise the simple reality that the number of the claims dismissed as a result of the motion for summary disposition are irrelevant to the question





at hand. While the single motion concededly involved considerable effort in the Court of Appeals and this Court, that effort pales in terms of the remaining efforts required to bring this case to the present point of disposition.

**C. The Third Phase (June 9, 2004 through the Present)**

This phase of this suit, consisting of over five years of very active litigation, has by far consumed the greatest amount of time and effort that has been expended by both the litigants and the courts in bringing this suit to its present state. The foregoing phases pale in comparison.

Following this Court's second remand to the Court of Appeals, that Court issued an Order dated April 18, 2006 appointing Wayne County Circuit Court Judge Pamela R. Harwood to serve as a Special Master. (41a). The parties engaged in extensive discovery, including the taking of some sixty (60) depositions. Judge Harwood conducted pretrial proceedings, heard and decided various motions, presided over ten (10) days of trial during which she heard testimony and received into evidence voluminous documentation, received extensive post-trial briefs submitted by the parties and heard closing arguments.

Therefore, in the context of what has actually occurred in order to bring this case to this point, the legal time and effort has been disproportionately dedicated to the "record-keeping" or CEPI claim that survived the State's May, 2001 motion for summary disposition. Those efforts have been entirely successful. In the parlance of § 32, the School Districts have sustained their suit and are therefore entitled to receive the costs incurred relative to the claim upon which they succeeded.

One further comment is in order. In their previously filed brief on appeal, the School Districts argued that the Court of Appeals erred in summarily denying their request for costs and attorney fees, without undertaking the multifactor analysis required by case law. The



School Districts cited, in particular, the decision of this Court in *Smith v Khouri, DDS, et al*, 481 Mich 519; 751 NW2d 472 (2008). The State, in its brief on appeal, does not even refer to the *Khouri* precedent.

**RELIEF REQUESTED**

For the reasons set forth above, this Court is respectfully asked to:

1. Reverse the decision of the Michigan Court of Appeals with respect to that Court's denial of the School Districts' request for costs and attorney fees pursuant to Const 1963, art 9, § 32; and
2. Remand this matter to the Michigan Court of Appeals with an instruction to hold an evidentiary hearing on the School Districts' request for costs and attorney fees pursuant to Const 1963, art 9, § 32.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Dennis R. Pollard", is written over a horizontal line.

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