NO. 04-1144, Consol. 05-0145 & 05-0148

In the Supreme Court of Texas

SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF EDUCATION, *ET AL.*,

Appellants,

v.

WEST ORANGE-COVE C.I.S.D, *ET AL.*, ALVARADO I.S.D., *ET AL.*, and EDGEWOOD I.S.D., *ET AL.*,

Appellees.

On direct appeal from the 250th Judicial District Court of Travis County, Texas

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EDGEWOOD APPELLEES' MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Edgewood I.S.D., *et al.*, Appellees, file this Motion for Rehearing and ask the Court to reconsider and withdraw its judgment concerning Edgewood Appellees' Article VII, Section I facilities efficiency claim and remand the case to the district court for further proceedings.

ISSUE PRESENTED

Issue 1: Whether after establishing a new standard for an Article VII, Section 1 facilities efficiency claim requiring Edgewood Appellees to show "similar need," the Court should have vacated the trial court judgment and remanded the case to the trial court for further proceedings on that issue.

ARGUMENT

I. Because the Supreme Court established a new efficiency standard for facilities requiring Edgewood Appellees to show "similar need," the Court should have remanded the case to the trial court for further proceedings on that issue.

In this Court's latest opinion, it required for the first time that Edgewood Appellees should have presented evidence of similar facility needs in districts other than the Edgewood Districts in order to prove their claim that facilities funding is inefficient and in violation of Article VII, § 1 of the Texas Constitution. *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, 2005 Tex. LEXIS 868, at *118 (Tex. Sup. Ct. Nov. 22, 2005) ("*West Orange-Cove II*"). Despite the overwhelming evidence of the glaring deficiencies in the Edgewood districts' facilities found by the district court,[1] this Court accepted State Appellants' new contention that evidence of "facilities needs vary widely depending on the size and location of schools, construction expenses, and other variables" and found that "such evidence [of similar need in other districts] is necessary and lacking." *Id.* At trial, Edgewood Appellees did not present direct evidence of "similar needs" of other school districts (as defined in *West Orange-Cove II*) and the district court did not consider or demand such evidence because the Supreme Court has never required it in order to prove an Article VII, section 1 efficiency claim.

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[1] As the Court noted, because of the vastly insufficient funds made available to property-poor districts for facilities, children in these districts are subjected to substandard learning environments that include: overcrowded schools and classrooms, aging buildings, inadequate libraries, inadequate and unsafe science labs, and inadequate heating, air conditioning and ventilation-- among others. *West Orange-Cove II*, 2005 LEXIS 878, at *39. During oral arguments, the Court itself acknowledged the "striking shortcomings on facilities." http://www.supreme.courts.state.tx.us/oralarguments/audio_2005h.asp#04-1144, J. Brister at 1:32.

In its most recent opinion, this Court upheld many of its well-established standards concerning efficiency. For instance, this Court reiterated its mandate from *Edgewood I* that "children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds." *Id.* at *4-5 (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) ("*Edgewood I*")). As this Court recognized, for a system to be constitutionally efficient, the State must provide all districts with "substantially equal access to similar revenues per pupil at similar levels of tax effort" to provide an adequate education. *Id.* at *114 (citing *West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 566 (Tex. 2003); quoting *Edgewood I*, 777 S.W.2d at 397). The Court also acknowledged that the constitutional requirement of efficiency applies to both instruction and facilities. *Id.* at *113 (citing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 726 (Tex. 1995). These standards never previously required evidence of "similar needs" of other districts.

When the Supreme Court sets new standards of evidence required to render judgment on a claim, the Court recognizes that justice serves all parties by vacating the judgment and remanding the issue back to the trial court for further proceedings. *See* TEX. R. APP. P. 60.2(f) (Supreme Court may vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law); *see also* TEX. R. APP. P. 60.3 ("When reversing the court of appeals' judgment, the Supreme Court may, in the interest of justice, remand the case to the trial court even if a rendition of judgement is otherwise appropriate."); TEX. R. APP. P. 60.2(d) (Supreme Court may reverse and remand to the trial court for further proceedings). For example, in *Murray v. San Jacinto Agency, Inc.*, the plaintiff did not present evidence at trial of due diligence in the service of process because the plaintiff served the defendant well within the then-current statute of limitations. 800 S.W.2d 826 (Tex. 1990). When the Supreme Court

modified the law by essentially shortening the statute of limitations in its opinion, the Court remanded the case to the trial court in the interest of justice, so the plaintiff could present evidence of "due diligence." *Id.* at 830; *see also In re Jane Doe 2*, 19 S.W.3d 278, 290 (Tex. 2000) (remand appropriate where new standards were developed in parental notification case). Likewise, in this case, because the Court developed a new standard calling for the presentation of "similar needs," Edgewood Appellees should be given an opportunity to present additional evidence to the district court concerning "similar needs" and the district court should have an opportunity to weigh that evidence in rendering its judgment on the efficiency of facilities financing under Article VII, Section 1.

Similarly, when a case is tried on a wrong legal theory, this Court has remanded the case back to trial in the interest of justice. *See, e.g., Morrow v. Shotwell*, 477 S.W.2d 538, 541-42 (Tex. 1972)[2]; *see also Boyles v. Kerr*, 855 S.W.2d 593, 693 (Tex. 1993) (the Court recognized the importance of remanding a case where the losing party may have presented her case in reliance on controlling precedent that was subsequently overruled) (citing *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (remand in the interest of justice was appropriate where defendant requested jury issues in reliance on precedent no longer controlling)). The Court further found that remand is "even more appropriate where we have also subsequently given formal recognition to a cause of action which might be applicable to the facts of this case." *Boyles*, 855 S.W.2d at 693. Therefore, Edgewood Appellees urge the Court to remand the case

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[2] Citing *American Title Insurance Company v. Byrd*, 384 S.W.2d 683 (Tex. 1964); *City of San Antonio v. Pigeonhole Parking of Texas*, 158 Tex. 318, 311 S.W.2d 218 (1958); *Hicks v. Matthews*, 153 Tex. 177, 266 S.W.2d 846 (1954); *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792 (1951); *Morrison v. Farmer*, 147 Tex. 122, 213 S.W.2d 813 (1948); *United Gas Corporation v. Shepherd Laundries Co.*, 144 Tex. 164, 189 S.W.2d 485 (1945); *King v. Hill*, 141 Tex. 294, 172 S.W.2d 298 (1943); *Buzard v. First Nat. Bank of Greenville*, Texas, 67 Tex. 83, 2 S.W. 54 (1886); *Waldo v. Galveston H. & S.A. Ry.*, 50 S.W.2d 274 (Tex.Com.App. 1932).

to the district court, because Edgewood Appellees relied on then-controlling precedent to develop and present their argument.

A remand allows not only justice to be preserved, but also avoids the re-litigation of these issues and serves the interest of judicial economy. The parties presented thousands of exhibits to the district court, conducted numerous depositions, and presented substantial evidence in a trial that lasted almost six weeks. No reason exists to require the districts to re-file litigation when a substantial record already exists and the parties can submit additional evidence on the issue of "similar need."

Furthermore, the importance of this case far outweighs other cases that the Court has remanded because hundreds of thousands of Texas children face the prospect being forced to learn in deficient facilities. The State will continue to neglect their needs and the taxpayers living in those districts will continue to pay substantially higher taxes for a mere adequate education, in violation of the Texas Constitution. Therefore, in the interests of justice, Edgewood Appellees request the Court to remand the case back to the trial court.

After considering evidence of "similar need" in providing an adequate education, the trial court can then determine whether property-poor districts have substantially similar access to similar revenue at similar tax effort for those needs. As this Court held, the Texas school finance system must be both qualitatively efficient and financially efficient. *West Orange-Cove II*, 2005 Tex. LEXIS 868 at *5 (citing *Edgewood IV*, 917 S.W.2d at 729-30). Simply because State Appellants have provided a constitutionally *adequate* framework, districts must still have financially efficient access to revenue in order to deliver an "adequate education" to their students. *See id.* Certainly this Court cannot say that an efficient system for financing facilities– one that by its very own admission "conveys the meaning of effective or productive results"--

prevents property-poor districts from building classrooms for their increasing student populations or from repairing deteriorating classrooms and that to address such deficiencies would be a form of enrichment. *See id. at* *4-5. And although the debate may continue with respect to "how much money matters" regarding instructional costs, there is no question that the classrooms themselves can be built with anything but money and access to those funds for a general diffusion of knowledge must be provided in an efficient manner. *See id.*

CONCLUSION

After five sessions, the Legislature has scarcely uttered a whisper about the facility needs for hundreds of thousands of Texas schoolchildren-- mostly of whom are poor and/or minority-- and Edgewood Appellees urge this Court to provide the districts with a fair opportunity in presenting their constitutional claims under the new standard. For the reasons set forth above, Edgewood Appellees respectfully request that the Court grant this motion for rehearing, withdraw its prior opinion and judgment concerning its Article VII, Section 1 facilities efficiency claim, issue an opinion and judgment vacating the district court's judgment concerning facilities and remanding the issue of facilities to the trial court for further proceedings. Edgewood Appellees also request any other relief to which they may be entitled.

Dated: December 6, 2005

Respectfully submitted,

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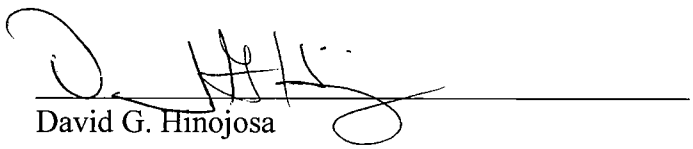
CERTIFICATE OF CONFERENCE

I certify that I have conferred with counsel regarding this Motion for Rehearing. Counsel for all parties indicated that they do not oppose this Motion, except for State Appellants who oppose this Motion.



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CERTIFICATE OF SERVICE

I certify that a true copy of this instrument was served on all counsel of record via electronic mail and certified mail, return-receipt on the 6th day of December, 2005.

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