IN THE COURT OF APPEALS OF GEORGIA

PHILLIP EVANS, Appellant, v. GWINNETT COUNTY PUBLIC SCHOOLS, Appellee	)))))))))	Case No. A16A0245

Reply Brief of Appellant

Appellant Phillip Evans states the following as his Reply Brief.

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Summary of Argument

The trial court dismissed Evans' claims on three grounds, and three grounds only. The state law claims were dismissed on the grounds that a party may not seek declaratory judgment pertaining to a criminal law and on the grounds that the School District enjoys sovereign immunity. The federal constitutional claim was dismissed on the ground that a threat of arrest cannot give rise to a 4th Amendment violation. The trial court never reached the merits of Evans' claims, even though the School District's counsel drafted the dismissal order. Likewise, the School District never argued for dismissal on the merits and never addressed the legislative bills in question. Now, for the first time on appeal, the School district is asking this Court to rule on the merits of the case.

1. – The School District Has Abandoned or Conceded that Declaratory Judgment is Not Precluded

The trial court ruled, "A declaratory judgment action is an improper mechanism to test whether a proposed plan of action violates a criminal statute." Evans argued in his opening Brief why this is not an accurate statement of the law, and the School District chose not to argue against that point. That issue is therefore conceded by the School District and reversal on that point alone is warranted.

2. Sovereign Immunity Has Been Waived

In a single paragraph of its order dismissing the case, the trial court said, "Plaintiff has failed to plead any valid waiver of sovereign immunity for his claims…. Therefore, all of these claims are barred and this Court lacks subject matter jurisdiction to consider them." The trial court did not cite authority for the proposition that a plaintiff is required to ***plead*** a waiver of sovereign immunity. Indeed, Georgia is a notice pleading state, and a plaintiff is not required to plead such details at all. *Marshall v. McIntosh County,* 327 Ga.App. 416, 423 (2014) ("It is well established that a plaintiff is not required to plead in the complaint facts sufficient to set out each element of a cause of action so long as it puts the opposing party on reasonable notice of the issues that must be defended against.") The School District echoes this misconception in its Brief at page 8 ("Appellant's Complaint fails to identify an applicable waiver of … sovereign immunity….") The School District apparently lost sight of the fact that "It must be remembered that the objective of the Civil Practice Act is to avoid technicalities and to require only a short and plain statement of the claim that will give the defendant fair notice of what the claim is and a general indication of the type of litigation involved…." *Marshall, Id.*

The School District does not argue that it did not have fair notice of the claims involved. It instead implies that Evans was required to anticipate the issues that the School District might raise and address them *a priori* in his Complaint. The School District cites no authority for this proposition.

The School District apparently concedes that its sovereign immunity has been waived by the current version of O.C.G.A. § 16-11-173, because it argues only that that Code section was not in place when this action was commenced. Thus, the School District asks this Court to affirm dismissal of the state law claims, requiring Evans to refile the same claims again now that there is clear waiver of sovereign immunity.[1] The School District does not address how elevating this form over substance conserves judicial resources – it obviously does not. It would be different if, after this case were finally adjudicated, a pertinent statutory change took place. But here, the statutory change took place while the case was pending.

3. There is an Actual Controversy

For the first time on appeal, the School District argues that there is no "actual controversy" that would support a declaratory judgment action. The

[1] The trial court dismissed Evans' claims without prejudice, so Evans is free to refile.

School District bases this conclusion on its fiat that Evans is wrong in his interpretation of the law regarding weapons at schools. At the risk of stating the obvious, that is the controversy. Evans believes the law permits him to carry certain weapons at schools, and the School District insists that it does not.

4. There is No Irreconcilable Conflict Between HB 60 and HB 826

Again for the first time on appeal, the School District argues the actual merits of the case. The School District describes HB 60 and HB 826 at only a very high level, without the necessary analysis of the actual pertinent language in the bills. Evans will show here why the School District's approach is flawed.

Prior to July 1, 2014, a "school safety zone" was defined to include "in or on any real property owned or leased to any public or private elementary school…." O.C.G.A. § 16-11-127.1(a)(1) (2013). A "weapon" was defined to mean "any pistol, revolver…." O.C.G.A. § 16-11-127.1(a)(2) (2013). It was unlawful "for any person to carry to or to possess … while within a school safety zone … any weapon…." O.C.G.A. § 16-11-127.1(b)(1) (2013). Violations by Georgia Weapons Carry License ("GWL") holders are misdemeanors and by non GWL holders are felonies. O.C.G.A. § 16-11-127.1(b)(2) (2013). There was an

exception for GWL holders "when such person carries or picks up a student at a school building…." O.C.G.A. § 16-11-127.1(c)(7) (2013).

It is clear, therefore, that prior to July 1, 2014, it was a misdemeanor for Evans, a GWL holder, to carry a handgun in schools, except when he was carrying or picking up his children. The *status quo ante* changed, however, with Act 575[2]. The changes from Act 575 are described below.

Act 575 made some definitional changes, though they do not directly drive the result of this case. In the interest of completeness, though, they will be presented here. First, Act 575 changes the definition of "school safety zone" to be "real property or building owned by or leased to any school…." This change is not substantive compared to the former definition, because "school" is defined to mean a "public or private … institution instructing children at any level, pre-kindergarten through twelfth grade." Act 575, Section 1-1, Lines 42-48.

[2] Evans acknowledges that the 2014 version of the O.C.G.A. has been published, so one might naturally look to those volumes to glean the changes from the 2014 session. That methodology presumes, however, that the Code Revision Commission accurately and faithfully implemented the acts of the General Assembly. Plaintiff posits that it did not, and in fact that failure no doubt contributes to the present controversy. For that reason, it is necessary to work from the actual act of the General Assembly, Act 575, and not the 2014 Code volumes.

Next, Act 575 deletes the definition of weapon. Section 1-1, Lines 49-60. This change also does not drive the outcome of the present case, because the crime definition has been changed to say, "it shall be unlawful for any person to carry to or to possess …while within a school safety zone … any firearm…." Section 1-1, Lines 61-65. So, the definitional changes and the description of the crime remain substantively the same: it generally is a crime to carry a firearm in a school.

The part of Act 575 that makes all the difference for the present case is a modification to the exception described above as part of the *status quo ante.* Act 575 renumbered O.C.G.A. § 16-11-127.1(c)(7) to be 16-11-127.1(c)(6). Section 1-1, Line 108. The substantive change is that the exception no longer just applies when carrying or a picking up a student. Now, the exception states that Code section 16-11-127.1 does not apply to a GWL holder "***when he or she is within a school safety zone***…." [Emphasis supplied]. That is, it no longer is a crime for a GWL holder to carry a firearm in a school safety zone, which is defined to include all schools.

The issue, as raised by the School District, is the continuing effect of Act 575 considering the passage of Act. 604. The School District insists that Act 604 repealed Act 575, by implication, apparently in its entirety. That is, the School

District would have this Court rule that the General Assembly passed HB 826 unanimously in the House of Representatives and nearly unanimously in the Senate[3], knowing full well it also was passing another bill that would undo all of HB 826. The School District thus assumes the General Assembly fully intended to waste its time by overwhelmingly passing a bill it was planning to repeal.

The School District's view of the facts is, of course, absurd. In reality, the legislative process of gives and takes with difficult and often competing policy choices commonly results in multiple bills in the same session touching on the same subject matter. Fortunately, this is not a novel situation and we have clear direction how to handle it. "[R]epeals by implication are not favored, and … it is only when a statute and a previous statute are clearly repugnant that a repeal by

[3] The General Assembly web site reports for HB 826 House Vote # 594 on February 25, 2014 of 170-0 and Senate Vote # 749 on March 20, 2014 of 44-2. http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/826. By contrast, the same web site reports for House Bill 60's final version Senate vote # 701 on March 18, 2014 of 37-18 and House Vote #882 on March 20, 2014 of 112-58. http://www.legis.ga.gov/Legislation/en-US/display/20132014/HB/60. Thus, the House voted for HB 60 after HB 826 and the Senate voted for HB 826 after HB 60 (as indicted by the later vote number, albeit on the same day).

implication will result." *Concerned Citizens of Willacoochee v. City of Williacoochee,* 285 Ga. 625 (2009). Furthermore:

> The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; it is presumed that such acts are imbed with the same spirit and actuated by the same policy, and they are to be construed together as parts of the same act…. It is the duty of courts, whenever possible, to construe acts passed by the same Legislature, and approved at the same time, so as to make both valid and binding, and to give effect to all the terms of both, so as to make them capable of enforcement. *Inter-city Coach Lines, Inc. v. Harrison,* 172 Ga. 390, 157 S.E. 673, 676 (1931).

The School District gives only a brief mention of this principle, instead jumping eagerly to the unsupported conclusion that the two bills are irreconcilably conflicted. As grounds for this position, the School District relies on *Rutter v. Rutter,* 294 Ga. 1 (2013). In *Rutter,* there also were two bills passed during the same session. The similarities to the present case end there. In *Rutter,* the later bill contained language "striking" a certain Code section and "inserting in its place a new Code section." Thus, the later bill was written so as to completely substitute

new language for old language. In such a situation, obviously, the old language does not survive.

In contrast, in the present case, neither HB 60 nor HB 826 contained the "strike and replace" type language present in the two bills in *Rutter*. Instead, each bill used the more common device of deleting and inserting individual words from current Code sections, leaving the bulk of the current Code in place. That is, words to be deleted from the current Code are shown in the bill as strikethrough text and words to be inserted into the Code are shown as underlined text. Thus, "The ~~fast~~ quick brown fox jumped over the ~~sleeping~~ lazy dog" would show that current Code reads "The fast brown fox jumped over the sleeping dog" and the word "fast" and "sleeping" are being delete in favor of "quick" and "lazy."

Using this mechanism, the legislature is not adopting the remaining words that are just "carried forward." These carried forward words are shown in the bill only for context and ease of understandability. This concept is embodied in O.C.G.A. § 28-9-5(b), which states, in pertinent part, "[L]anguage carried forward unchanged in one amendatory Act shall not be read as conflicting with changed language contained in another Act passed during the same session."

All this discussion comes to a head when the language of HB 826 and HB 60 are considered. Lines 108-115 of HB 826 say[4]:

> ~~(7)~~(6) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, ~~when such person carries or picks up a student at a school building, school function, or school property~~ when he or she is within a school safety zone or on a bus or other transportation furnished by ~~the~~ a school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Cod Section 43-389-10 when he or she has any ~~weapon~~ firearm legally kept within a vehicle when such vehicle is parked ~~at such school property~~ within a school safety zone or is in transit through a designated school safety zone;

Lines 290-297 of HB 60 say:

> (7) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student ~~at a school building,~~ within a school safety zone, at a school function, ~~or school property~~ or on a bus or other transportation furnished by ~~the~~ a school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10 when he or she has any weapon legally kept within a vehicle when such vehicle is parked ~~at such school property~~ within a school safety zone or is in transit through a designated school safety zone;

[4] The controversy in this case is over paragraphs in the two bills contained in a list of exceptions to the general prohibition of carrying a weapon or firearm in a school safety zone.

A few observations are easily made about the two paragraphs from the two bills. First, they have different paragraph numbers. HB 826 renumbered existing Code Section 16-11-127.1(c)(7) to be 16-11-127.1(c)(6). If this Court follows convention and "implements" the earlier bill (HB 826) before overlaying it with the latter bill (HB 60), two different paragraphs will be implemented with slightly different language.

Beyond this, however, it is clear that the two paragraphs have much more in common than the School District would lead the Court to believe. In fact, the paragraphs are so similar that one can take all the language changes from paragraph (c)(6) in HB 826 and all the language changes from paragraph (c)(7) in HB 60 and end up with a cogent, meaningful English paragraph:

> A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, ~~when such person carries or picks up a student at a school building, school function, or school property~~ when he or she is within a school safety zone or at a on a bus or other transportation furnished by ~~the~~ a school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Cod Section 43-389-10 when he or she has any ~~weapon~~ firearm legally kept within a vehicle when such vehicle is parked ~~at such school property~~ within a school safety zone or is in transit through a designated school safety zone;

Given that it is the duty of the Court, whenever possible, to construe the bills together and give effect to all their words, whenever possible, it is difficult to abide by the School District's suggestion that HB 826 should be relegated to the waste basket. The words of HB 826 easily can be given effect. Every word change in both bills is incorporated into the above paragraph, and the result makes perfect sense. The School District merely dislikes the result, so it treats HB 826 as though it never were enacted.

Of course, only if the Court concludes that the bills are irreconcilably conflicted is the issue of repeal by implication even considered. In such an event, the legal fiction is that the first bill is passed and then the next bill is passed immediately afterwards. The changes to the Code from the first bill would have to be implemented, followed by the changes to the Code from the second bill.

Engaging in this exercise still will result in the language shown above. The only way to achieve the School District's desired result is to pretend that HB 826 never existed. It would be judicial activism of the highest order to cast a blind eye to an entire act of the legislature, especially an act that was passed unanimously in one house and nearly unanimously in the other. Yet this is exactly what the School District is asking this Court to do.

One device the School District uses to achieve its goal is to describe to the Court the meaning of the resultant language in the individual bills without displaying the strikethrough and underline fonts. This method makes reconciling the bills more difficult, and gives the false and misleading impression that the legislature used the "strike and replace" law-making process, rather than the word-by-word editing process that actually was used in this instance. The School District can cite no instance in which a court has engaged in such wholesale re-writing of legislation that it urges here. It simply is not done.

5. HB 90 Is Unconstitutional and Cannot Have Mooted this Case

The School District next argues (again, for the first time on appeal) that HB 90 from the 2015 legislative session mooted this case. HB 90 is the "code revision" bill. A code revision bill commonly is enacted each session to address editing errors in the Code as published. Included in HB 90 was a provision purporting to "reenact" the Code as published. Therefore, the School District's argument goes, the Code as (erroneously) published by the Code Revision Commission (i.e., by omitting HB 826) was "reenacted."

The School District has failed to consider the effect of the "one topic, one bill" provision of the state Constitution on HB 90. Art. III, § V, Par. III. One of

the purposes of the one topic, one bill provision is to prevent "omnibus" bills. *Camp v. Metropolitan Atlanta Rapid Transit Authority,* 229 Ga. 35, 38 (1972). The provision stands as a bar to any legislation which embodies more than one subject matter. *Fields v. Arnall,* 199 Ga. 491 (1945).

HB 90 is the epitome of "omnibus" bills. It purports to reenact the ***entire Code.*** By definition, then, it deals with every subject matter contained in the Code. It simply cannot be said to apply to a single subject matter. The Supreme Court has ruled that a single bill that attempted to affect the charters of two separate municipalities was unconstitutional. *Schneider v. City of Folkston,* 207 Ga. 434 (1950). A bill that touches every subject matter of law cannot stand.

CONCLUSION

Evans has shown that the trial court should not have dismissed his claims. He therefore asks this Court to reverse the judgment of the trial court and remand this case for further proceedings.

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CERTIFICATE OF SERVICE

I certify that on October 21, 2015, I served a copy of the foregoing via U.S. Mail upon:

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