No. 89PA22 DISTRICT THREE-A

SUPREME COURT OF NORTH CAROLINA

****

ERIC STEVEN FEARRINGTON,
CRAIG D. MALMROSE,

Plaintiffs-Appellees,

v.

CITY OF GREENVILLE, PITT COUNTY BOARD OF EDUCATION,

Defendants-Appellants.

From the Court of Appeals
No. 20-87

From Pitt County
No. 19 CVS 1217

****

DEFENDANT-APPELLANT CITY OF GREENVILLE'S REPLY BRIEF

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DEFENDANT-APPELLANT CITY OF GREENVILLE'S REPLY BRIEF

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ARGUMENT

I. Standard of Review

North Carolina appellate courts review *de novo* the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Farmer v. Troy Univ.*, 382 N.C. 366, 369, 879 S.E.2d 124, 127 (2022). "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 659 (2016) (internal quotations omitted).

A. The Court of Appeals applied the incorrect standard of review.

Defendant-Appellant City of Greenville ("the City") joins Defendant Pitt

County Board of Education ("the Board") in its argument that the Court of Appeals erred in incorrectly applying the summary judgment standard. BOE Br. p. 8-10. The Court of Appeals was confined to considering "whether the trial court properly allowed the motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim." *Shoffner Indus., Inc. v. W.B. Lloyd Const. Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 54 (1979).

II. The Red Light Camera Enforcement Program and Interlocal Agreement do not violate Article IX, Section 7 of the North Carolina Constitution.

Plaintiffs' characterization of the Red Light Camera Enforcement Program ("RLCEP") and Interlocal Agreement as an "elaborate diversion of funds" is inaccurate. The record in this case is clear that Defendant-Appellant City of Greenville and Defendant Pitt County Board of Education have fully complied with the requirements of the Fines and Forfeitures Clause contained in Article IX, Section 7 of the North Carolina Constitution and with N.C.G.S. § 115C-437.

Session Law 2016-64 directly authorizes the City and the Board to voluntarily enter into an Interlocal Agreement that provides for cost-sharing and reimbursement; and that is exactly what the City and the Board did. R. P. 20-26. In this Agreement, the City and the Board determined that the RLCEP would facilitate the reduction in traffic collisions and resulting injury and property loss and would also result in increased revenue to the Board. R. P. 20. The text of the Agreement recognizes that it is authorized by S.L. 2016-64, and that the aims of the RLCEP would be best facilitated by cost-sharing and reimbursement. *Id.* The Agreement also

states that the City shall pay the Board the clear proceeds of the revenue from the RLCEP, with not more than 10% of the clear proceeds deducted for (1) the costs of materials and postage directly related to the printing and mailing of the first and second notices sent to the owner and, if necessary, the driver of the vehicle, and (2) the cost of computer services directly related to the production and mailing of the notices. *Id.* at 21.

Plaintiffs ignore the role of S.L. 2016-64 and the Interlocal Agreement in asserting that the Board receives less than 90% of the clear proceeds from the RLCEP. Pl. Br. p. 11. Plaintiffs' argument that the Board only receives 71.66% of the clear proceeds from the RLCEP conflates the two separate and distinct transactions that the City and the Board engage in into a single transaction, resulting in a distorted view of the program as a whole.

Plaintiffs' contention that the Board cannot separately contract with the City for reimbursement and coverage of the RLCEP costs following the City's transmission of the clear proceeds from the program to the Board is not supported by any case law and is directly contradicted by the General Assembly's passage of S.L. 2016-64. Despite Plaintiffs' framing of the issue, the City does not argue that S.L. 2016-64 "allows [it] to deduct enforcement costs and exceed the 10% cap on deductions," Pl. Br. p. 14, but that is not what the City has done with the RLCEP. The City makes no deductions to the proceeds that it remits to the Board from the RLCEP.

Plaintiffs' argument that S.L. 2016-64 should be read to only allow the City

and the Board to enter into an agreement to deduct up to 10% of the proceeds from the RLCEP as collection costs is belied by logic and general principles of statutory construction, *see* Pl. Br. p. 13-14. The City is already authorized by N.C.G.S. § 115C-437 to deduct up to 10% of the clear proceeds of the penalties collected through a red light program for collection costs. Applying Plaintiff's interpretation would therefore render S.L. 2016-64 meaningless. It is well settled that courts should not construe legislation in a manner which would render it superfluous. *See e.g. State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous."); *Schroeder v. City of Wilmington*, 282 N.C. App. 558, 570, 872 S.E.2d 58, 66 (2022) (rejecting the plaintiffs' reading of a statute where their interpretation would render its provisions redundant). The General Assembly specifically authorized the City and the Board to enter into an independent agreement, and S.L. 2016-64 does not specify that the reimbursement funds be taken from the penalty proceeds remitted to the Board. As discussed by the Board in its opening brief, it has the authority to manage its resources, such as its general fund, and that authority includes using those resources to voluntarily enter into the Interlocal Agreement that is at issue. BOE Br. p. 15.

The holding of the Court of Appeals that "the interlocal agreement between Greenville and the Board does not meet the minimum requirement of Article IX, Section 7 or N.C. Gen. Stat. § 115C-437" was in error. *See Fearrington v. City of Greenville*, 282 N.C. App. 218, 236, 871 S.E.2d 366, 380 (N.C. Ct. App. March 15,

2022). The Fines and Forfeiture Clause applies only to the City's initial provision of the clear proceeds to the Board. It simply does not regulate the Board's own expenditure of funds to the City. Here, the City complied with the Fines and Forfeiture Clause when it provided the clear proceeds to the Board. A proper application of the Fines and Forfeiture Clause ends there. The Interlocal Agreement was not needed to authorize the City to provide the clear proceeds to the Board, as this is already required. In essence, the Interlocal Agreement serves only to authorize the second transaction, wherein the Board provides funds to the City to help fund the program. The Fines and Forfeiture Clause simply does not apply to money spent by the Board, and, as stated previously, the Board does not even have to use the funds received by the City to fund the program. The Court of Appeals erred by analyzing the Interlocal Agreement and S.L. 2016-64 under the Fines and Forfeiture Clause, and by holding that the Board was restricted by that Clause in its own use of funds.

Plaintiffs have failed to provide support to their argument that the RLCEP violates the Fines and Forfeiture Clause, and it is clear that the City and the Board acted in accordance with the North Carolina Constitution and with binding acts of the General Assembly in entering into the Interlocal Agreement.

A. *Shavitz* and *Cauble* do not negate the applicability of S.L. 2016-64.

Plaintiffs' reliance on *Shavitz v. City of High Point* and *Cauble v. City of Asheville* to support their claim is misplaced. Plaintiffs assert that "[t]he only difference between" the facts of *Shavitz* and this case is that in *Shavitz* the defendant City of High Point deduced enforcement costs before it gave its board of education

the proceeds from its red light program, rather than after. Pl. Br. at 15. Plaintiffs misstate the facts of *Shavitz* and underplay the other significant factual differences between *Shavitz* and this case.

Contrary to Plaintiffs' argument, in *Shavitz*, the defendant City of High Point dispersed *none* of the proceeds from its red light program to the Guilford County Board of Education. *Shavitz v. City of High Point*, 177 N.C. App. 465, 471, 630 S.E.2d 4, 11-12 (2006). High Point did not deduct enforcement costs and then distribute the remainder to the Board of Education. In fact, one of the defendant's primary arguments was that Article IX, Section 7 did not apply to its red light program at all. *Id.* at 473, 630 S.E.2d at 16.

Additionally, in *Shavitz*, the Guilford County Board of Education was the entity litigating the claim for violation of Article IX, Section, not an individual. *Id.* at 473, 630 S.E.2d at 14.[1] This makes sense as it is the Board, not the individual who runs a red light, that is entitled to proceeds from the penalty issued for the red light violation. In contrast, here, it is the individuals who ran red lights who are bringing a constitutional challenge, and they have also sued the entity who is actually entitled to the proceeds—the Pitt County Board of Education. R. P. 2. In this case, unlike in *Shavitz*, the Board agrees with the City that they received the clear proceeds, and has maintained that there are no violations of the Fines and Forfeiture Clause in

[1] While not binding on this Court, it is relevant to note that, prior to the case being remanded to state court, the United States District Court for the Middle District of North Carolina determined that Mr. Shavitz did not personally have standing under North Carolina law to bring a claim for violation of Article IX, Section 7 of the North Carolina Constitution. *Shavitz v. City of High Point*, 270 F.Supp.2d 702, 725 (M.D.N.C. 2003).

this case.

Perhaps most importantly, Plaintiffs ignore the role that S.L. 2016-64 plays in differentiating this case from *Shavitz*. The court in *Shavitz* recognized that, because Article IX, Section 7 of the North Carolina Constitution is not self-executing, "**the General Assembly** may 'specify how the provisions' goals are to be implemented.'" *Shavitz,* 177 N.C. App. at 482, 630 S.E.2d at 35 (2006) (quoting *NCSBA v. Moore*, 359 N.C. 474, 512, 614 S.E.2d 504, 527 (2005) (emphasis added). The court further noted that, at the time, there existed special legislation for the City of Concord and Wake County that provided a different definition of clear proceeds, specifically, "the funds remaining after paying for the lease, lease purchase or purchase of the traffic control photographic system; paying a contractor for operating the system; and paying any administrative costs incurred by the municipality related to the use of the system." *Id*. at 483, 630 S.E.2d at 37. However, because no such legislation applied to the City of High Point, the court was bound by the definition of clear proceeds in N.C.G.S. § 115C-437. *Id.* The City of High Point did not have the benefit of explicit authorization from the General Assembly to enter into an Interlocal Agreement that included provisions on cost-sharing and reimbursement from the Guilford County Board of Education. In contrast, the City of Greenville does have such authorization. S.L. 2016-64.

Despite Plaintiffs' implications to the contrary, "the General Assembly's actions . . . in implementing Article IX, Section 7" are presumed constitutional "unless the statutory scheme runs counter to the plain language and purpose behind

Article IX, Section 7." *Id*. at 484, 630 S.E.2d at 39 (quoting *Moore*, 359 N.C. at 512, 614 S.E.2d at 527). It is clearly established that the General Assembly has the authority to implement legislation specific to municipalities, such as S.L. 2016-64, to help facilitate the purpose of Article IX, Section 7. S.L. 2016-64 does not redefine what "clear proceeds" means; however, S.L. 2016-64 does allow for cost-sharing and reimbursement, which is exactly what the Interlocal Agreement between the City and the Board does.

Similarly, this Court's holding in *Cauble v. City of Asheville* does not impact the constitutionality of the RLCEP. The *Cauble* line of cases held that the monetary penalties collected for violations of the City of Asheville's parking ordinances were subject to Article IX, Section 7 and therefore the clear proceeds from those penalties were owed to the Buncombe County Board of Education and defined what "clear proceeds" means. *See Cauble v. City of Asheville*, 45 N.C. App. 152, 263 S.E.2d 8 (1980); *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E.2d 258 (1980); *Cauble v. City of Asheville*, 314 N.C. 598, 336 S.E.2d 59 (1985). The City has never contested that its transmission of the clear proceeds from its RLCEP is subject to Article IX, Section 7, and it does not challenge what "clear proceeds" means. This is because, in the first transaction, **the entirety** of the proceeds from the RLCEP are remitted to the Board of Education. Then, in the second transaction, as authorized by the General Assembly, the City and the Board have a legislatively authorized cost-sharing and reimbursement agreement, completely separate from the transmission of the clear proceeds from the RLCEP.

B. Plaintiffs' policy arguments do not negate the constitutionality of the RLCEP or the Interlocal Agreement.

Plaintiffs' arguments dedicated to a critique of "policing for profit" are a red herring with no relevance to the legal issues in this case. There is no prohibition in our General Statutes or in our Constitution on a city's utilization of an outside vendor to facilitate the running of a RLCEP. Plaintiffs may not like this structure, but Plaintiffs' personal preferences have no bearing on the RLCEP or Interlocal Agreement's constitutionality. Most importantly, Plaintiffs are in no way impacted by whether the City implements the RLCEP with the use of an outside vendor or not. What Plaintiffs are impacted by in this case is their own actions in violating N.C.G.S. § 20-158(b)(2) and Part II, Title 10, Chapter 2, § 283 of Greenville City Code (2016) by running a red light.

III. Plaintiffs do not have standing to challenge how the RLCEP funds are distributed after a penalty is paid.

Plaintiffs' standing argument ignores the relevant analysis. Plaintiffs' entire lawsuit in this matter is about the apportionment of the proceeds from the RLCEP *after* their penalties are paid. R. P. 8-9. Plaintiffs side-step this in their argument and focus on their alleged injury in having to pay the penalty for their actions in running the red light in the first place. Pl. Br. pp. 18.

In asserting that they have taxpayer standing, Plaintiffs conflate a tax with a civil penalty. Black's Law Dictionary defines a "tax" as "[a] charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." *Tax*, Black's Law Dictionary (11th ed. 2019) (emphasis added). A

"penalty" is defined as "[p]unishment imposed on a wrongdoer, in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). *Penalty*, Black's Law Dictionary (11th ed. 2019). A "civil penalty" is "[a] fine assessed for a violation of a statute or regulation." *Civil Penalty*, Black's Law Dictionary (11th ed. 2019). The difference between a "tax" and "penalty" is clear, just as the difference between a "taxpayer" and the payer of a penalty is clear for standing purposes.

A tax is a charge, typically in the form of money, imposed by the government **specifically for the purpose** of yielding public revenue. A civil penalty is a form of monetary punishment for the violation of a law. A civil penalty is **not** a method of public revenue funding. While there may be statutory, or constitutional, restrictions on how penalty funds are distributed post collection, civil penalties are not issued for the purpose of raising public funds for schools, roads, infrastructure repairs, or other public resources.

Plaintiffs do not, and cannot, direct this Court to a single case that holds that an individual who runs a red light has taxpayer standing to challenge the apportionment of the civil penalty they pay as a result of their violation. That is because an individual cannot have taxpayer standing to challenge a penalty because a penalty is not a tax. Taxes are exacted by the government specifically to fund public services. If the money is not being used for those services, then the individual who paid those taxes with the expectation that they would be used properly is able to

challenge the misappropriation. *See Munger v. State*, 202 N.C. App. 404, 411, 689 S.E.2d 230, 236 (2010).

In contrast, a penalty such as the one paid by Plaintiffs for their own actions is not exacted to fund any public services. A penalty is a punishment independent of where the money eventually goes. Wrongdoers, such as Plaintiffs, have to pay the penalty regardless of how the money is ultimately used. Plaintiffs have failed to demonstrate that a taxpayer standing analysis is applicable to their claims.

Plaintiffs also assert that the RLCEP is a "but-for cause" of their having to pay a penalty, therefore they have demonstrated injury. Pl. Br. pp. 18. Plaintiffs ignore the fact that it was their own violation of the law that was a but-for cause of their having to pay a penalty. The absence of the RLCEP would not make it legal for Plaintiffs to run a red light, and they would still be subject to consequences under North Carolina law for doing so. *See* N.C.G.S. § 20-158(b). While Plaintiffs may wish to advocate for the right to run a red light with no criminal or civil repercussions, this is not the proper vehicle through which to attempt such a change in the law.

Even assuming, *arguendo*, that there was some error in the way that the RLCEP funds were apportioned, which the City categorically denies, remedying that error would not entitle Plaintiffs to the relief that they seek. Plaintiffs want back the money that they paid as a penalty for their own running of a red light. R. P. 12-13. However, the portion of the RLCEP that Plaintiffs' claim is founded on—distribution of the proceeds after payment by the offender—does not impact Plaintiffs' obligation to pay the penalty in the first place. Further, as alleged by Plaintiffs, it is the Board,

not Plaintiffs, that are entitled to the penalty proceeds. R. P. 8.

The cases relied on by Plaintiffs do not support their assertion of standing. *Goldston v. State* dealt specifically with taxpayer standing in relation to citizens' challenge to the use of highway **taxes**, not the apportionment of criminal or civil penalty funds. *Goldston*, 361 N.C. 26, 29, 637 S.E.2d 876, 879 (2006). *Cauble v. City of Asheville* is utterly silent on the issue of standing, much less taxpayer standing. *Cauble*, 314 N.C. 598, 336 S.E.2d 59 (1985). *Committee to Elect Dan Forest v. Employees PAC* addressed standing in connection with a statute that specifically created a cause of action for the plaintiff, a situation completely inapplicable to Plaintiffs'. *See Comm. to Elect Dan Forest*, 376 N.C. 558, 599, 853 S.E.2d 698, 727-28 (2021). None of these cases support Plaintiffs' proposition that they can violate the law, pay a penalty for doing so, and then challenge how the penalty funds are distributed.

Plaintiffs are not a beneficiary of or a party to the Interlocal Agreement between the City and the Pitt County Board of Education. They have not demonstrated that they have suffered any injury or that they are entitled to any special form of standing such as taxpayer standing. Because Plaintiffs do not have standing, their claim cannot survive.

IV. Plaintiffs improperly attempt to convert their claims into a facial constitutional challenge for the first time on appeal.

Throughout their responsive briefing Plaintiffs make thinly-veiled challenges to red light camera programs in general, and to S.L. 2016-64. *See* Pl. Br. P. 9, 16-18. These arguments are improper and not before the Court.

Plaintiffs contend that "[o]ur Constitution is not built on the shifting sands of the General Assembly's feelings" and that "the General Assembly's feeling is not law." Pl. Br. pp. 9. While the General Assembly's "feeling" is not law, S.L. 2016-64 and N.C.G.S. § 160A-300.1 **are** law. *See, e.g., Vaitovas v. City of Greenville*, 282 N.C. App. 393, 399, 871 S.E.2d 816, 819 (2022) (affirming a three-judge panel's decision that S.L. 2016-64 was not in violation of N.C Const. art II, § 24(1)(a), (3)). The City is allowed by statute to adopt ordinances for the civil enforcement of N.C.G.S. § 20-158 "by means of a traffic control photographic system." N.C.G.S. § 160A-300.1(c); Part II, Title 10, Chapter 2, Article X of Greenville City Code (2016). The City is authorized by the General Assembly to enter into an Interlocal Agreement with the Board of Education that may include provisions on cost-sharing and reimbursement to effectuate the purpose and intent of N.C.G.S. § 160A-300.1. S.L. 2016-64.

If Plaintiffs wanted to challenge the legislative enactments that authorize the RLCEP and the Interlocal Agreement, they could have done so through a facial constitutional challenge as provided for by the North Carolina Rules of Civil Procedure and our general statutes. *See* N.C.G.S. § 1A-1, Rule 42(b)(4); N.C.G.S. § 1-267.1. However, Plaintiffs chose instead to challenge the RLCEP "as applied" to them. R. pp 3. Plaintiffs may not now, on the second appeal in this case, smuggle in a facial constitutional challenge disguised as a supporting argument to their as-applied challenge.

CONCLUSION

For the foregoing reasons, and for the reasons set out in the City's opening brief, the City respectfully requests that the Court reverse the holding of the Court

of Appeals that the RLCEP and Interlocal Agreement violate Article IX, Section 7 of the North Carolina Constitution, and affirm the orders of the trial court.

Respectfully submitted, this the 5th day of September 2023.

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CERTIFICATE OF SERVICE

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