No. 89PA22 DISTRICT 3A

SUPREME COURT OF NORTH CAROLINA

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ERIC STEVEN FEARRINGTON, AND CRAIG D. MALMROSE, Plaintiffs, v. CITY OF GREENVILLE AND PITT COUNTY BOARD OF EDUCATION, Defendants.	)	From the Court of Appeals No. COA20-877 From Pitt County 19 CVS 1217

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DEFENDANT PITT COUNTY BOARD OF EDUCATION'S REPLY BRIEF

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To the Honorable Supreme Court of North Carolina:

The Fines and Forfeitures Clause of the North Carolina Constitution guarantees funding to maintain public schools. That is the purpose of this provision. The Fines and Forfeitures Clause was *not* intended to dictate how city councils, law enforcement agencies, or boards of education perform their functions, nor was it included in the Constitution in order to dictate that fines have to be imposed and collected the same way. There are plenty of other constitutional and legal restrictions on these government entities, but the Fines and Forfeitures Clause simply requires that the clear proceeds of fines be directed to the public schools — which in Pitt County is the Pitt County Board of Education (the "Board"). Plaintiff's position is contrary to the intentions of the drafters of this constitutional provision, contrary to case law, and contrary to basic common sense.

The red-light camera program in Greenville is a new way of collecting and remitting fines. These fines are for violation of a specific civil statute (not a criminal statute) and are appealable through a statutorily required administrative hearing. N.C. Gen. Stat. § 160A-300.1. Under this specific program, authorized by the Legislature through Session Law 2016-64 (the "Local Act"), the City and the Board may enter into an interlocal agreement (the "Interlocal Agreement") to implement the program. The City is able to operate red light cameras, and the Board recoups millions of dollars that it

would not have otherwise received for its use in maintaining public schools. The Interlocal Agreement, and the underlying authorizing statute and ordinance, fulfill and implement the purpose of Article IX, Section 7 of the North Carolina Constitution: to put money into the hands of the local board of education.

To hold that the Interlocal Agreement authorized by the Local Act is unconstitutional based upon the theory advanced by Plaintiffs would conflict with the very purpose of Article IX, Section 7 and inhibit the ability of local governments to increase funds to maintain free public schools.

Plaintiffs do not like the arrangement. They are well within their rights to voice their opposition and vote for new representation in the City Council, the Board of Education, and the General Assembly. But they are wrong to twist intergovernmental cooperation between the Board and the City to implement the red-light camera program and to increase funds available for public schools into some kind of nefarious constitutional violation. Plaintiffs are even more wrong in the remedy that they seek: to profit from a constitutional provision designed exclusively to benefit school children and the local boards of education.

The Board has previously debunked the arguments of Plaintiffs in its opening brief, and those arguments need not be repeated here, except — in response to Plaintiffs' latest arguments — to review for the Court three key

elements: (1) the Complaint in this matter (to clarify what is actually before the Court); (2) the historical reasons for the Fines and Forfeitures Clause (which are to support public schools, not some vague prohibition on generating revenue); and (3) the remedy sought by Plaintiffs (as compared to the remedy available to taxpayers).

I. Reviewing the Complaint: Plaintiffs Fail to State a Claim against the Pitt County Board of Education under the Fines and Forfeitures Clause.

This Court has held that the Fines and Forfeitures Clause serves two functions: "(1) To set apart the property and revenue specified therein for the support of the public-school system; and (2) to prevent the diversion of public-school property and revenue from their intended use to other purposes." *Shore v. Edmisten*, 290 N.C. 628, 633, 227 S.E.2d 553, 558 (1976) (quoting *Boney v. Bd. of Trustees of Kinston Graded Sch.*, 229 N.C. 136, 140, 48 S.E.2d 56, 59 (1948)). Plaintiffs' Complaint unsuccessfully attempts to allege infringement of the former. Plaintiffs also argue the latter, though they did not plead that theory in the Complaint or support it by competent evidence.

A. Plaintiffs' allegations that the City did not faithfully appropriate fines to the Board under the Interlocal Agreement are without merit.

The crux of the claim in Plaintiffs' Complaint is that the City violated the Fines and Forfeitures Clause because the Board "receives less than 90% of

civil penalty assessments" from the red-light camera program.[1] (R pp 8-9). This claim is defective as a matter of law, fact, and common sense.

N.C. Gen. Stat. § 115C-437, relied on by Plaintiffs as the basis for their claim, discusses only allocation of revenue, not expenses. The statute only requires that "[r]evenues accruing to the local school administrative unit by virtue of Article IX, § 7 of the Constitution . . . shall be remitted to the school finance officer . . . ." (emphasis added). So long as the City transmitted, forwarded, or sent the clear proceeds of the red-light camera program to the Board, it complied with the Fines and Forfeitures Clause. *See Hollowell v. Life Ins. Co. of Va.*, 126 N.C. 398, 35 S.E. 616, 617 (1900) (defining the term "remit").

Plaintiffs' own allegations show that is precisely what occurred here. The Interlocal Agreement makes clear that at least 90% of the fines are remitted to the Board. (R p 21). Even the evidence attached to Plaintiffs' response briefs shows that "100% of every $100.00 civil penalty deposited into the City's bank account by THE CONTRACTOR is deposited into the Board's bank account by the City." (Appellees' Br. App. 22 (Affidavit of Ann Wall ¶ 18)). Thus, Plaintiffs' claim fails.

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[1] Plaintiffs do not allege that there is some kind of corruption at work, that the tax is regressive, that the company hired by the City is overpaid, or that the Board lacked authority to enter the Interlocal Agreement — just that less than 90% of the fines were being remitted to the Board.

Plaintiffs' efforts to analogize this to *Shavitz* and *Cauble III* are unavailing. In those cases, the cities refused to pay their local school boards revenue owed under the Fines and Forfeitures Clause. They claimed that revenue was wholly outside the scope of the Fines and Forfeitures Clause and deducted municipal enforcement costs before transmitting the revenue to the school boards (all without the school boards' consent). *See, e.g.*, *Cauble v. City of Asheville ("Cauble III")*, 314 N.C. 598, 605–06, 336 S.E.2d 59, 64 (1985); *Cauble v. City of Asheville ("Cauble II")*, 301 N.C. 340, 345, 271 S.E.2d 258, 261 (1980); *Shavitz v. City of High Point*, 177 N.C. App. 465, 482, 630 S.E.2d 4, 16 (2006). Here, the City actually paid the Board the revenue it was owed pursuant to the Interlocal Agreement that both local governments voluntarily entered, then the Board voluntarily agreed to subsequently share some of the costs of the program.

The faithful appropriation of the clear proceeds from the City to the Board is dispositive of the only claim that Plaintiffs actually alleged, which is the City did not pay the Board enough money. (R p 8).

B. Plaintiffs' unpleaded, unsupported theory that the red-light camera program substantially diverted resources from maintaining public schools is also meritless.

Faced with a defective claim, Plaintiffs have expanded their argument beyond the allegations in the Complaint. Specifically, they argue that the Board's cost-sharing agreement violates the Fines and Forfeitures Clause

because the funds are not being used to maintain public schools. Plaintiffs' extraordinary argument should be rejected by the Court, as it is inconsistent with the Fines and Forfeitures Clause and undermines the ability of public schools to operate.

The Fines and Forfeitures Clause has never been read to place restrictions on a board of education's authority to determine how to allocate its resources; the Clause is violated if there is a "substantial diversion" of school property. *Boney*, 229 N.C. at 141, 48 S.E.2d at 60. A "substantial diversion" is one that results in a loss of resources for public education in substance rather than form (i.e., a net loss of resources). *See id.* (holding the Fines and Forfeitures Clause is not violated where "the supposed diversion of the school property is apparent rather than real"); *cf. In re Advisory Opinion to Governor*, 223 N.C. 845, 851, 28 S.E.2d 567, 571 (1944) (explaining that a constitutional inhibition or prohibition "usually extends no farther than the reason on which it is founded").

Applying this standard, Plaintiffs' own allegations show that their arguments are meritless. As admitted by Plaintiffs, the Board received $100 per traffic citation (i.e., 100% of the fine). This payment satisfied the requirements of Article IX, Section 7. The money, once received, was then spent by the Board. Among the uses of the money was to pay $31.85 per traffic citation to the City to implement the red-light camera program. (R p 8). The

public schools of Pitt County can only gain resources under the program, as the Board's financial obligation can never exceed the revenue generated under the Interlocal Agreement. (R p 22; *see also* R p 36). Indeed, Plaintiffs concede that in the absence of the red-light camera program, the Board would receive $0.00. (Appellees' Br. 16). Together, these facts show the program only serves to increase resources to be spent on education, not divert them, and therefore it fits within the mandate of the Fines and Forfeitures Clause. *See Boney*, 229 N.C. at 141–42, 48 S.E.2d at 60–61.

Without citation to any law or facts, Plaintiffs argue that the Board's cost-sharing arrangement does not serve an educational purpose. However, the Court rejected that very view in *Boney,* where it insisted that the proper analysis turns on what public schools received in return for a conveyance. *Id.* at 142, 48 S.E.2d at 61 ("[T]he Kinston Graded Schools are exchanging a practically unimproved $8,500 tract of land for the right to the substantial use of a $150,000 stadium"). Here, the Board receives millions of dollars in return for its participation in the red-light camera program; the program does not divert resources from public schools but increases them. To put it another way: the Board spends $31.85 per citation in order to get $100 per citation; the Board spends money to generate revenue that is used to educate children.

Additionally, the North Carolina Constitution explicitly authorizes the Board to "use local revenues to add to or supplement any public school or post-

secondary school program." N.C. Const. art. IX, § 2(2). Reading the Fines and Forfeitures Clause *in pari materia* with N.C. Const. Art. IX, § 2(2), the Fines and Forfeitures Clause does not prohibit the Board's decision to enter the Interlocal Agreement. The Board added to and supplemented the general fund of Pitt County Board of Education ($68.15 per citation where it otherwise would have $0). (*See* R p 8). The general fund in turn pays for public school programs across the district. *See* N.C. Gen. Stat. § 115C-426(e). The Board spent money to secure additional funding for public education, which maintains public schools.[2]

Because Plaintiffs have failed to allege a substantial diversion of resources from the public schools of Pitt County, Plaintiffs' eleventh-hour reliance upon an unpleaded, unsupported theory should be rejected.

II. Reviewing the Historical Purposes of the Fines and Forfeitures Clause: Plaintiffs' vague policy considerations are irrelevant to the Fines and Forfeitures Clause Claim.

Plaintiffs assert, without any basis or citation for such assertion, that the Fines and Forfeitures Clause "protects citizens from policing for profit."

[2] For the Court to hold otherwise is a slippery slope, inviting limitless litigation over school budgets and whether school expenditures serve an "educational purpose." If Plaintiffs' theory were given any credence then anyone could sue any local board of education over any line item in every budget every year. *See Matter of Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 100–01, 405 S.E.2d 125, 133 (1991).

The Court should reject this red herring, which injects numerous policy arguments that have no place in the constitutional analysis at hand.

The Fines and Forfeitures Clause explicitly contemplates that public schools will "profit" from imposition of fines. In fact, that is the entire point of the Clause: To put money into the hands of the local boards of education. N.C. Const. Art. IX, § 7(a); *see also New Hanover Cnty. Bd. of Educ. v. Stein*, 374 N.C. 102, 126, 840 S.E.2d 194, 211 (2020) (Newby, J., dissenting) (noting fines and penalties inure to the benefit of public schools). The Fines and Forfeitures Clause "was designed in its entirety" to (1) set aside revenue for public schools, and (2) prevent substantial diversion of public-school property from its intended use. *Shore*, 290 N.C. at 633, 227 S.E.2d at 558; *Boney*, 229 N.C. at 140, 48 S.E.2d at 59. It does not protect citizens from paying fines or penalties duly authorized by the State (here, fines from running red lights). *See* N.C. Gen. Stat. § 160A-300.1(c).[3]

Plaintiffs seek to muddy the waters by conflating the City, the Board, and the traffic camera contractor hired by the City, all of which are differently situated with respect to the red-light camera program. There are two contractual relationships: the management agreement between the contractor

[3] Plaintiffs advanced a number of other theories in the courts below as to why paying their fines was unlawful, all of which were rejected and are not before this Court on appeal. *See Fearrington v. City of Greenville*, 282 N.C. App. 218, 228-35, 871 S.E.2d 366, 375-79 (2022).

and the City (R pp 27-45), and the Interlocal Agreement between the City and the Board (R pp 20-23).

The management agreement sets the amount owed by the City to the contractor; the City is free to negotiate contract prices with its contractors and this this is outside the Board's jurisdiction. (R p 36). Policy considerations such as how effective the red-light camera program is at deterring traffic violations, the for-profit status of a government contractor and "restraining revenue driven law enforcement" all pertain to the relationship between the City and the contractor, and are not relevant to the Fines and Forfeitures Clause analysis.

The second agreement, between the City and the Board, is explicitly authorized by state law to include provisions on cost-sharing and reimbursement freely and voluntarily agreed to between the City and Board. S.L. 2016-64 §§ 4-5.[4] For the reasons discussed more fully above, such arrangement is constitutional. *See* Section I, *supra*. The framers were focused on ensuring that resources are available for public school use, not on limiting other means of generating revenue for education. *See, e.g.*, *Hart v. State*, 368

[4] Plaintiffs argue that the Board paid the contractor for the red-light cameras and otherwise participated in setting up and operating the red-light cameras. The Board did no such thing, and there is nothing in the Complaint or anywhere else to support such an assertion. The Board made an agreement with the municipal government in its community that would generate revenue for schools.

N.C. 122, 774 S.E.2d 281 (2015) (discussing framers intent and holding the General Assembly had authority to promote education in a variety of ways, just as here); *Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890) (discussing the various constitutional provisions supporting public education and explaining: "It is thus the school funds, from whatever source they come, reach the beneficiaries.").

III. Reviewing the Remedy Sought: Plaintiffs cannot invoke taxpayer standing to exploit public rights for personal gain.

In allowing discretionary review, the Court asked the parties to brief the following issue presented:

> May Plaintiffs directly challenge the RLCEP under the North Carolina Constitution when they have been provided with an adequate state remedy to challenge their citations and where they are not the intended recipients of the proceeds?

As set out more fully in the Board's opening brief, the answer to this question is no, because (1) the direct constitutional claim in this case belongs to the Board, and (2) Plaintiffs are not seeking redress as taxpayers.

Rather than responding to either of the Board's points, Plaintiffs argue that the Board's argument is "unnecessarily complex." Plaintiffs then argue all that is required to assert taxpayer standing is "unlawful use of money Defendants obtained from them." Plaintiffs' oversimplification of taxpayer standing is not just incorrect but unprecedented.

As explained in the Board's opening brief, taxpayer suits are the public analogue to a shareholder derivative action against a private corporation designed to prevent unlawful diversion of corporate property. *Merrimon v. S. Paving & Const. Co.*, 142 N.C. 539, 55 S.E. 366, 367–68 (1906). As such, taxpayer suits and shareholder derivative lawsuits are subject to "the same limitations in regard to when, and under what circumstances, the suit may be brought." *Id.*

For example,

> a taxpayer cannot bring an action on behalf of a public agency or political subdivision where the proper authorities have not wrongfully neglected or refused to act, after a proper demand to do so, unless the circumstances are such as to indicate affirmatively that such a demand would be unavailing.

Branch v. Bd. of Ed. Of Robeson Cnty., 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951). Plaintiffs do not allege that the Board wrongfully neglected or refused to act after a proper demand to do so. (*See* R pp 8-9). Likewise, Plaintiffs allege no facts that show such demand would have been "mere idle ceremony." *Branch*, 233 N.C. at 626; (*see* R pp 8-9). Plaintiffs simply ignored this procedural requirement essential to establishing taxpayer standing.

Similarly, Plaintiffs argue they have correctly asserted taxpayer standing because they are alleging misappropriation of funds and seeking declaratory judgment. However, Plaintiffs implicitly concede that they are not acting on behalf of the Board. In their view, the harm in this case is not where

their fines from the red-light camera program are being spent (which is the basis for a proper taxpayer standing claim), but the fact that they paid fines at all. (Appellees' Br. 20). This is reinforced by the Complaint: Plaintiffs actually are seeking a refund of their fines pursuant to a declaratory judgment. (R p 13).

Plaintiffs do not have standing to assert remedies unavailable to the Board. *See United Daughters of the Confederacy v. City of Winston-Salem by & through Joines*, 383 N.C. 612, 630–31, 651, 881 S.E.2d 32, 47–48, 60 (2022) (explaining taxpayer suits are brought "on behalf of" the local government); *Branch*, 233 N.C. at 625. And, as this Court has previously explained, "any judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional." *Shore*, 290 N.C. at 633, 227 S.E.2d at 558. Thus, under the Fines and Forfeitures Clause, a taxpayer only has standing to seek declaratory or injunctive relief directing payment of fines to public schools. *See, e.g.*, *Cauble II*, 301 N.C. at 345, 271 S.E.2d at 261 (directing payment of funds to public schools); *Shavitz*, 177 N.C. App. at 472, 486, 630 S.E.2d at 10, 19.

None of the authorities cited by Plaintiffs alter this analysis. In *Goldston v. State*, the Court sustained a taxpayer's declaratory judgment action preventing the diversion of $205,000.00 from the State's Trust Fund to the General Fund. *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006).

In *Cauble II*, a class of taxpayers obtained an order compelling the City of Asheville to pay fines to the County for disbursement to the public schools. *Cauble II*, 301 N.C. at 345. Neither of these cases stand for the proposition that taxpayers can obtain refunds under the Fines and Forfeitures Clause.

Plaintiffs reliance on *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 572, 853 S.E. S.E.2d 698, 710 (2021) is equally misplaced because the issue is not failure to assert "injury in fact" but rather failure to establish that Plaintiffs are bringing a claim on behalf of the local government. As the Court explained in *Comm. to Elect Dan Forest*, taxpayer standing exists to vindicate public rights. *Comm. to Elect Dan Forest*, 376 N.C. at 572–75. In this case, the "public right" at issue is the Fines and Forfeitures Clause, which guarantees funding for public schools. *See* N.C. Const. Art. IX, Sec. 7. This Court's precedents regarding taxpayer standing prevent Plaintiffs from converting a public right into personal gain. *See, e.g.*, *Shore*, 290 N.C. at 639.

In sum, the Court should reject Plaintiffs' effort to substitute an allegedly unconstitutional cost-sharing arrangement with a patently unconstitutional refund. Plaintiffs cannot claim to be acting "on behalf of" the Board to enforce the Fines and Forfeitures Clause while simultaneously attempting to raid the general fund of Pitt County Schools.

CONCLUSION

Plaintiffs are before this Court because they broke the law by running red lights, and now they want to use that misconduct to strip the local board of education of desperately needed funding. Plaintiffs' arguments are contrary to the purpose and language of the Fines and Forfeitures Clause, contrary to well-established case law, contrary to public policy, and contrary to basic common sense.

For these and the other reasons explained in this brief and the opening briefs of the City of Greenville and the Board of Education, the Board respectfully requests that this Court reverse the decision of the Court of Appeals and reinstate the order of the trial court dismissing the Complaint against the Board.

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

Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I, Elizabeth L. Troutman, hereby certify that a copy of the foregoing document was served upon the following by e-mail and was filed using the N.C. Appellate Court electronic filing system, as follows:

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This the 5th day of September 2023.

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