IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and PHILLIP EVANS,	)	
Plaintiffs,	)	Civil Action No.:
v.	)	2014-CV-253810
THE ATLANTA BOTANICAL GARDEN, INC.,	)	
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Georgia Supreme Court reversed this Court's dismissal of Plaintiffs' complaint on procedural grounds. Plaintiffs, however, are still unable to get past the same fundamental problem that has plagued them since they filed this lawsuit: the statute at issue does not say what they claim it does. Its plain language coupled with long-standing Georgia Supreme Court precedent make it clear that The Atlanta Botanical Garden, Inc. (the "Garden") is a lessee of private property and may lawfully exclude or eject persons in possession of a gun from the botanical garden.

Indeed, although Justice Hunstein wrote the order reversing this Court's order, she queried whether the botanical garden is private property because 1) it is leased to the Garden, a private entity, and 2) the Garden has control over the property that

it leases from the City of Atlanta. Likely, she had in mind longstanding Georgia case law, which provides that property becomes private property when it is leased by a government entity to a private entity that then takes control of the property. This logic is also consistent with the plain reading of O.C.G.A. § 16-11-127(c), which provides that "persons in legal control of private property through a lease . . . shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property . . . ." Finally, her logic is likewise supported by the legislative history of O.C.G.A. § 16-11-127(c) and the fact that Plaintiffs' interpretation of the statute would lead to wide ranging, improper consequences.

The evidence agreed upon by the parties establishes that the Garden controls the botanical garden through a lease. Plaintiffs' claims fail as a matter of law, and their motion for summary judgment should be denied.

II. ARGUMENT AND CITATIONS OF AUTHORITY

Plaintiffs moving for summary judgment "must demonstrate that there is no genuine issue of material fact [as to every element of his or her claims] and that the undisputed facts, viewed in the light most favorable to the [defendant], warrant judgment [in the plaintiff's favor] as a matter of law." *BAC Home Loans Servicing, L.P. v. Wedereit*, 297 Ga. 313, 316, 773 S.E.2d 711 (2015) (quoting *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991)); *see also* OCGA § 9–11–56(c).

Plaintiffs have wholly failed to establish that they are entitled to judgment as a matter of law on either their declaratory or injunctive relief claim. On the contrary, the facts before the Court show that the Garden is entitled to lawfully exclude or eject persons in possession of a gun under O.C.G.A. § 16-11-127(c). This conclusion is supported by a literal reading of the statute, binding Georgia Supreme Court precedent, the statute's legislative history, and the variety of negative consequences that would otherwise result from Plaintiffs' proffered interpretation of the statute. In addition, Plaintiffs' declaratory and injunctive relief claims seek relief on behalf of a class of people, but Plaintiffs have not even attempted to prove the requirements of O.C.G.A. § 9-11-23. Plaintiffs' motion for summary judgment on both claims should therefore be denied. And Plaintiffs' motion for summary judgment on their injunctive relief claim should be denied because Plaintiffs have failed to carry their burden specific to injunctive relief under Georgia law.

A. A literal reading of the statute and Supreme Court precedent demands a finding that the Garden may exclude or eject individuals carrying a gun.

The Garden may exclude or eject persons in possession of a gun because the botanical garden property, leased from the City of Atlanta, is private property under Georgia law. Plaintiffs concede that O.C.G.A. § 16-11-127(c) expressly allows "lessees of 'private' property" to exclude people carrying guns from their property. Pls.' Br. at 6. Plaintiffs contend, however, that the Garden is not a lessee of private

property because it leased its land from the City of Atlanta. Plaintiffs are wrong. The Garden is in control of private property through a private leasehold interest.

While no court has addressed the specific language in the statute at issue, the Georgia Supreme Court has previously held that, when the City of Atlanta conveys a leasehold estate to a private lessee – as the Plaintiffs concede was done in this case – the lessee holds the property as a private owner. *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 131 S.E.2d 768 (1963), involved an issue of taxation on land the City of Atlanta leased to Delta Airlines. Delta sought to avoid paying *ad valorem* taxes on land that it leased from the City, arguing that "the property it leased from the City of Atlanta [was] public property" and therefore exempt from taxation. *Id.* at 13. In concluding that the airline could be forced to pay *ad valorem* taxes on the property, the Court held that "public property" becomes "private property" when the City of Atlanta leases it to a private entity. The Court explained:

> A leasehold is an estate in land less than the fee; it is severed from the fee and classified for tax purposes as realty. Code Ann. § 92–114. When the City of Atlanta conveyed to the Delta Corporation a leasehold estate in the land here involved, it completely disposed of a distinct estate in its land for a valuable consideration, and Delta acquired it and ***holds it as a private owner***. When any estate in public property is disposed of, it loses its identity of being public property and is subject to taxes while in private ownership just as any other privately owned property. Private property becomes public property when it passes into public ownership; and ***public property becomes private property when it passes into private ownership***.

Id. at 16 (emphasis added). This simple proposition – that public property is converted into private property when leased to a private entity – has been the governing law in Georgia for more than 50 years and remains good law in Georgia. *See Douglas Cty. v. Anneewakee,* 179 Ga. App. 270, 271, 346 S.E.2d 368 (1986) (citing the *Coleman* decision and noting its holding: when ***publicly*** owned property is leased to a ***private*** enterprise, the leasehold estate, having been severed from the fee, takes on the ***private*** status of the lessee).

Plaintiffs offer no reason that the Georgia Supreme Court's opinion in *Coleman* should not control here. *Coleman* has not been overruled or limited and remains controlling law. The sole case cited by the Plaintiffs is totally inapplicable. *Department of Transportation v. City of Atlanta*, 255 Ga. 124, 125, 337 S.E.2d 327 (1985), involved questions about the City's eminent domain rights – not whether public property becomes private property when leased to a private citizen. In *Department of Transportation,* the Atlanta City Council deeded portions of four public parks to the Georgia Department of Transportation ("DOT") – a public entity. The DOT then filed a petition to condemn certain interests in the parks that the City had ***retained***. *Id*. at 125-26. The Supreme Court rejected the DOT's efforts, finding that the DOT was not authorized to pursue a condemnation procedure "against public, municipal property." *Id.* at 133. The land at issue in the *Department of Transportation* opinion was undeniably public: an interest that the City of Atlanta

retained in land it deeded to the Georgia DOT, another public entity. For that reason, the court found that the interest that the City retained could not be taken by eminent domain.

Here, of course, public municipal property is not at issue. Rather, this case involves City property that became private property when the City leased the land to the Garden. The *Department of Transportation* opinion did not involve the situation before this court and its discussion of public property is not relevant.[1] Accordingly, under binding precedent from the Georgia Supreme Court, the Garden is an entity "in legal control of private property" and may exclude or eject individuals carrying a gun.

B. Legislative history supports the Garden's ability to exclude or eject individuals carrying a gun.

Plaintiffs ask this Court to consider the legislative history that led to the 2014 Amendments to O.C.G.A. § 16-11-127(c). Pls. Br. at 6. As a threshold matter, legislative history is irrelevant as the proper application of the statute is clear from its plain language. *See Deal v. Coleman*, 294 Ga. 170, 172, 751 S.E.2d 337 (2013)

[1] Plaintiffs cite language from the *Department of Transportation* opinion finding "that the term 'private property' found in OCGA § 32-3-4 does not include property owned by a government or a governmental entity." (Pls.' Br. at 7). This case, of course, does not involve O.C.G.A. § 32-3-4, and the *Department of Transportation* court, again, did not consider a lease of property owned by a government to a private entity as this case does. Indeed, this case involves the status of property that a government entity leases to a private entity. A definition in a condemnation statute about property "owned" by the government is simply irrelevant.

("When we consider the meaning of a statute, we must presume that the General Assembly meant what it said and said what it meant."). "[P]ersons in legal control of private property through a lease . . . shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property . . . ." O.C.G.A. § 16-11-127(c). As explained above, the botanical garden is private property following its lease from the City to the Garden.

But, Plaintiffs' reliance on legislative history from the 2014 amendments also ignores more recent legislative history. Earlier this year, the Georgia House of Representatives passed House Bill 1060 ("H.B. 1060"),[2] which proposed the following amendment to O.C.G.A. § 16-11-127(c):

[2] A true and correct copy of H.B. 1060 is attached to the accompanying Affidavit of David Carpenter as Exhibit "A."

SECTION 3.

Said part is further amended by adding two new paragraphs to subsection (a), by revising subsection (c), and by revising paragraph (2) of subsection (e) of Code Section 16-11-127, relating to carrying weapons in unauthorized locations, as follows:

"(3.1) 'Leased government property' means real property that is owned by a government entity but of which an individual or entity which is not a government entity is the lessee, licensee, or renter."

"(5) 'Private property' means real property that is not owned or controlled by any government entity; provided, however, that such term shall not mean leased government property."

"(c) A license holder or person recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) or prohibited by subsection (e) of this Code section; provided, however, that ~~private property owners~~ the owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on ~~their~~ such private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in subsection (e) of this Code section and Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages."

The clear intent of this new language would have been to define the Garden's property as "leased government property" and to prevent the Garden from excluding gun owners. Clearly, the House of Representatives did not believe that the current version of O.C.G.A. § 16-11-127(c) went far enough to prohibit entities (like the Garden) who lease property from the government from excluding people carrying guns and wanted to expand the statute to prevent those entities from doing so. In

other words, the House wanted to effectuate Plaintiffs' proposed application of the statute. After all, if the existing statute were sufficient to prevent lessees of government property from excluding gun owners, there would be no reason to amend the statute. The Senate Committee on Judiciary, however, offered a substitute to H.B. 1060 that completely removed the House's proposed language.[3] The Georgia Senate had the opportunity to effectuate Plaintiffs' interpretation of O.C.G.A. § 16-11-127(c) but chose not to do so. The Governor then vetoed the modified Bill on May 3, 2016.[4]

Plaintiffs now ask the Court to do what the General Assembly itself did not do. "It is elementary that in all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly." *Spectera Inc. v. Wilson*, 294 Ga. 23, 26, 749 S.E.2d 704 (2013). By striking the proposed language in H.B. 1060, the Senate (and the General Assembly) rejected a prohibition on entities like the Garden, which control private property through a lease from the government, from being able to exclude or eject individuals carrying a gun. The Court should rule

[3] A true and correct copy of the Senate Committee on Judiciary's substitute is attached to the accompanying Affidavit of David Carpenter as Exhibit "B."

[4] Governor Deal's veto had nothing to do with the proposed language affecting the Garden that the Senate had removed. At the time of the veto, he explained that his veto stemmed from "concerns about the change of policy . . . relating to the carrying of a weapon or long gun into a place of worship." *See* https://gov.georgia.gov/press-releases/2016-05-03/deal-issues-2016-veto-statements.

consistently with that General Assembly's intention and deny Plaintiffs' motion for summary judgment.

C. Adopting Plaintiffs' interpretation of the statute would lead to wide ranging and improper consequences.

The Plaintiffs' interpretation of the statute would have substantial and absurd consequences that the legislature could not have intended. First and foremost, a declaration that land leased from a government entity to a private entity is public land would gut the state's *ad valorem* tax revenue. *See Clayton Cty. Bd. of Tax*, 164 Ga. App. 864, 298 S.E.2d 544 (1982). Large Atlanta businesses under leases on MARTA land, for example, would be exempt from paying taxes.

In addition, entities like the Garden would be precluded from exercising basic legal rights. For example, O.C.G.A. § 51-9-1 provides, "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." Adopting Plaintiffs' definition of "private property" might prevent the Garden from acting as any other owner of private property, with no redress for trespass or tortious interference with its property. It would also arguably leave the Garden unable to raise any claim of criminal trespass, which cannot be brought in the case of an intrusion onto public land. *See Miller v. Smith & Smith Land Surveyors, P.C.*, 194 Ga. App. 474, 391 S.E.2d 20 (1990) ("[I]t is plain that no trespass of any kind occurred. Miller's own testimony shows that all of the actions she complains of here

took place on a public road and not on her property."). This result would similarly impact, for example, properties leased by MARTA to private developers for the construction of office and apartment buildings or the many office buildings that are technically owned by local development authorities (governmental entities) but are leased back to the "real owners" for long periods of time.

Finally, the Plaintiffs' suggested interpretation creates an impossibly confusing situation for lawful gun owners who want to know where they can or cannot carry their guns in Georgia. It is illogical to think that the General Assembly wanted gun owners to have to research title issues in order to know where they can carry their weapons. Under the Garden's interpretation of the statute, that task is unnecessary. Consistent with the plain language of the statute, gun owners will know that they may be excluded or ejected by private entities who, like the Garden, control membership and admission of property. Compl. ¶¶ 18, 22. And this allays Plaintiffs' stated worry that the Garden's view of the statute could allow the state to "[r]egulat[e] the possession or carrying of firearms . . . via lease" (Pls.' Br. at 8), positing that the government could start leasing all of its land in some hidden way in order to stop people from carrying guns. Aside from the fact that this fear is completely unfounded and makes little sense, it is assuaged by the fact that lessees who simply manage public property (as opposed to control it like the Garden) may not have the same right to exclude or eject gun owners. Plaintiffs' construction of

O.C.G.A. § 16-11-127(c) results in a number of consequences that could not have been the General Assembly's goal and, therefore, should be rejected. *Spectera*, 294 Ga. at 26.

D. The City of Atlanta's ability to "lease a right" is immaterial.

Plaintiffs argue that the City of Atlanta could not have conveyed upon the Garden the right to exclude gun owners because "a property owner cannot assign a right by contract . . . that he does not possess in the first place." (Pls.' Br. at 7). The Garden does not argue – and has never argued – that it can exclude or eject individuals carrying a gun because that right has somehow been passed on from the City of Atlanta. The Garden acknowledges that the City of Atlanta is precluded from regulating the carry of weapons on ***public property***, except as permitted by statute. As discussed in detail above, however, the botanical garden is private property by virtue of the fact that the City of Atlanta leased it to the Garden, a private legal entity that now controls the property. The Garden's right to exclude or eject individuals carrying guns is wholly independent from any rights the City of Atlanta may have and does not result from a "transfer" of that right from the City. (Pls.' Br. at 8). State law – specifically O.C.G.A. § 16-11-127(c) – grants the Garden the right to exclude gun owners.

E. Plaintiffs' claims for declaratory and injunctive relief are improperly broad.

Although Plaintiffs only indicate that Mr. Evans and other unidentified GeorgiaCarry.org, Inc. members "desire to carry weapons while they are at the gardens," (Compl. ¶¶ 33-34), they seek broad, sweeping declaratory and injunctive relief that the Garden "may not ban the carrying of weapons at the botanical gardens by ***people*** with" Georgia weapons carry licenses ("GWLs") and that the Garden be prohibited "from causing the arrest or prosecution of ***people*** with GWLs for carrying weapons at the botanical gardens." Compl. ¶¶ 38-39 (emphasis added). In doing so, these Plaintiffs purport to represent a class of individuals with GWLs who carry weapons at the botanical garden. In order to obtain an injunction or declaratory judgment for the benefit of an entire class of individuals, however, Plaintiffs must prove that the Garden "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." O.C.G.A. § 9-11-23(b)(2). They must also prove:

> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class;
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

> (4) The representative parties will fairly and adequately protect the interests of the class.

O.C.G.A. 9-11-23(a). Plaintiffs have not even attempted to make a showing. Plaintiffs' motion for summary judgment should therefore be denied.[5]

F. Plaintiffs' request for an injunction is improper.

Plaintiffs improperly request an injunction "prohibiting Defendant from causing the arrest or prosecution of people with GWLs for carrying weapons at the botanical gardens." Pls.' Complaint at ¶ 39. This request runs contrary to Georgia law as it incorrectly conflates an injunction with the purpose of a declaratory judgment – to declare the correct interpretation of a law, which is what Plaintiffs seek here. Georgia appellate courts have taken this position recently, and on multiple occasions. *See, e.g., Burton v. Glynn County,* 297 Ga. 544, 550, 776 S.E.2d 179 (2015) (citing *Wiggins v. Bd. of Commrs.*, 258 Ga. App. 666, 668, 574 S.E.2d 874 (2002)) ("Thus, an order simply delineating what the applicable legal authority requires or prohibits is a declaratory judgment. Such an order is not converted into

[5] At a minimum, their relief should be limited to Mr. Evans and GeorgiaCarry.Org, Inc. members who desire to visit the botanical garden, but this highlights another problem with their claims. It is practically impossible for the Garden to comply with Plaintiffs' requested relief. In determining whether to allow a party to enter the botanical garden, the Garden will have to conduct a full investigation to determine whether the individual is a GWL holder and whether he or she is a member of GeorgiaCarry.org, Inc. Even without proof of a license or membership, the Garden will have to rely on the word of the individual or potentially face a contempt of court charge, yet another consequence that the General Assembly could not have anticipated here.

an injunction merely because it directs a party to comply with the law so construed.").

In the *Wiggins* case, by way of example, a director of a county community development office brought a complaint for injunctive relief against the county board of commissioners, seeking temporary and permanent relief requiring the board to comply with the Open Records Act. *Wiggins*, 258 Ga. App. at 666. The superior court issued a temporary and permanent injunction against the board, requiring it to comply with all provisions of the Open Records Act. The Court of Appeals, however, concluded that the superior court erred in granting Wiggins injunctive relief against the Board from "future violations" of the Open Records Act, "in effect, requiring the Board to obey the law, a duty which it already had and as to which relief in equity is generally unavailable." *Id*. at 668.[6] Here, Plaintiffs seek precisely the same improper injunction – requiring the Garden to obey the law as Plaintiffs interpret it, an obligation the Garden would have regardless of any injunction if a declaratory judgment is granted by this Court in Plaintiffs' favor. Their attempt to convert a declaratory judgment into an injunction is improper and should be rejected.

[6] The Court of Appeals in *Wiggins* identified two grounds for rejecting the plaintiff's claim for injunctive relief: 1) it sought to require the Board to obey a duty under the law that it had and was aware of and 2) courts of equity should "take no part in the administration of the criminal law." *Wiggins*, 258 Ga. App. at 668. While the Supreme Court rejected the Garden's argument on the second point, the Garden now proceeds on the ground that Plaintiffs are seeking an injunction that improperly seeks to force the Garden to simply follow the law.

Plaintiffs also incorrectly contend that they are entitled to injunctive relief because they will suffer irreparable harm if they are denied the "right to carry weapons on publically owned land with a GWL without regulation by anyone other than the General Assembly." Pls.' Br. at 9. According to Plaintiffs, this "right" is an intangible right equivalent to free speech and the loss of such a right amounts to irreparable harm. Plaintiffs can cite to no authority equating Georgia's criminal statutes related to gun possession on private property to First Amendment protections under the U.S. Constitution. In Georgia, it "is the well established principle that 'Injunction is an extraordinary process. . . ; being so, it should never be granted except where there is grave danger of impending injury to person or property rights." *Residential Devs., Inc. v. Mann*, 225 Ga. 393, 398, 169 S.E.2d 305 (1969). Plaintiffs have not met this burden.

Finally, Plaintiffs' claim for injunctive relief should be denied because it goes much further than is permissible and, again, leads to improper consequences that the General Assembly could not have intended. It is a maxim of Georgia law that "[a]n injunction should not '"impose on defendant any greater restriction (burden) than is necessary to protect plaintiff from the injury of which he complains."'" *Bruce v. Wallis*, 274 Ga. 529, 531, 556 S.E.2d 124 (2001) (quoting *Dawson v. Wade*, 257 Ga. 552, 554, 361 S.E.2d 181 (1987). Along those lines, an injunction "should be so clear and certain in its terms that defendant may readily know what he is restrained

from doing . . . ." *Patten v. Miller*, 190 Ga. 105, 122, 8 S.E.2d 776 (1940). An injunction "should contain a description of the particular things or acts concerning which the defendant is enjoined, in order that there be no opportunity for misapprehension." *Id.* In short, an injunction must specifically state what is prohibited, and it must be the least restrictive necessary to protect the plaintiff.

Plaintiffs' requested injunction does not fit within these legally required boundaries. Plaintiffs seek to enjoin the Garden "from causing the arrest or prosecution of people with GWLs for carrying weapons at the botanical gardens." Compl. 39. But it is unclear how far this requested injunction reaches. Can the Garden call the police if a person with a GWL who is carrying a gun threatens an individual? Can it call the police if a person with a GWL who is carrying a gun becomes intoxicated and refuses to leave?[7] Plaintiffs' claim for injunctive relief goes much further than is necessary to protect them from the injury of which they complain. It is also rife with the opportunity for misapprehension, unclear, and vague. Plaintiffs have failed to meet their burden in requesting injunctive relief, and their motion for summary judgment on their injunctive relief claim should therefore be denied.

[7] Along those lines, how far does the Plaintiffs' requested declaratory relief extend? Is the Garden precluded from banning individuals with GWLs who are intoxicated or threatening to harm others?

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be denied.

This 12th day of August, 2016.

/s/ Michael L. Brown
Michael L. Brown
Georgia Bar No. 088875
David B. Carpenter
Georgia Bar No. 292101
Alston & Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309
Phone: 404-881-7000
Fax: 404-253-8180

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document on counsel of record via the Court's e-filing system and via United States First Class Mail, postage prepaid, at the following address:

John R. Monroe
9640 Coleman Road
Roswell, GA 30075

This 12th day of August, 2016.

/s/ David B. Carpenter
David B. Carpenter