

IN THE SUPREME COURT
STATE OF GEORGIA

CASE NO: S16A0112

COLUMBUS, GEORGIA, et al.,
APPELLANTS,

v.

GREGORY D. COUNTRYMAN, S.R. individually and as Elected Marshal of
Muscogee County, and VIVIAN BISHOP, individually and as Elected Clerk of the
Municipal Court of Columbus, Georgia,

APPELLEES.

REPLY BRIEF OF APPELLANTS

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COME NOW, the Appellants and file this their Reply Brief to the Appellee Brief filed, showing this Court as follows:

The proper application of sovereign, legislative, and official immunity to the remaining claims of the Appellees is not prevented by any argument made in this appeal, or in the Trial Court's brief Order denying in part the Appellant's Motion to Dismiss. Instead, the Appellees have ignored the complete absence of any rights upon which the equitable relief sought could be granted and have misconstrued the law, the Charter and the nature of the relief sought in their pleadings. The issues of this case are entirely legal and are not dependent upon the facts as pled. Appellants have brought this direct appeal to ensure the immediate issues of immunity are properly addressed, because they are entitled not to stand trial, in equity or otherwise.¹ The purpose of immunity is not limited to the protection of the public purse, it also protects the government, and its officers,

¹ This direct appeal was filed in the Supreme Court due to the equitable nature of the claims involved and the immunity issues present - to ensure the Appellants were not subjected to continued litigation unnecessarily. The collateral order doctrine allows this direct appeal. Liberty Cnty. School Dist. v. Halliburton, 328 Ga.App. 422, 425-426 (2014)(denial of motion to dismiss and rejection of immunity meet criteria established for direct appeal under the collateral order doctrine). No law has been cited to contradict the availability of this direct appeal through the collateral order doctrine, although the Appellees argue that this appeal should have been filed in the Court of Appeals. However, that is not fatal to this appeal. Both parties agree the Court of Appeals could hear the matter upon a transfer, if the Supreme Court declines to exercise its appellate jurisdiction over this case.

from having to expend resources to defend legal actions. Southern LNG, Inc. v. MacGinnitie, 290 Ga. 204 (2011)(recognizing immunity prevents the lawsuit rather than merely providing a defense to the same).²

The Trial Court was mistaken when it failed to dismiss the following limited equitable claims, namely: (1) the declaratory judgment sought against the Defendants, and (2) the injunctive relief requested of the named Defendants in their individual capacities. (R-1-570). (R-1-570-571; R-1-273, ¶¶100-104; R-1-273-274, ¶¶105-108).³ Appellees have requested equitable relief to:

- declare past budgetary actions void and a budget ordinance unconstitutional;
- require more funding and greater rights to Plaintiffs' offices in the budget process; and,
- to excuse and prevent any threat of either civil or criminal action due to their misuse of the CCG credit cards.⁴

² Appellees have continued to ignore the mootness of their claims, since the only equitable relief sought in this lawsuit arises from the FY2015, which ended on June 30, 2015. (R-1-59). The relief sought is now moot. Appellees dismissed the only claim based on the current FY2016 budget when they dismissed their mandamus claims. (R-1-373; R-1-375).

³ Despite having denied this claim in their appellate brief, the Appellee Marshal and Appellee Clerk have also sought to impose personal liability upon the individual Appellants for their attorneys' fees and expenses in bringing these claims. (R-1-273; R-1-272, ¶¶96-99).

⁴ Appellees have not addressed the fact that this relief is unavailable, as a matter of law. *See* O.C.G.A. §9-5-3(equity will not lie to prevent criminal prosecution).

(R-1-202-203, ¶86, ¶90, ¶91; R-1-270-271, ¶86, ¶90, ¶91). In its review of the Appellees' claims, the Trial Court failed to recognize: (1) the limitations of Appellees' rights, which should not be enforced through equity, and (2) the application of immunity, which should have been fatal to those claims in any event. Having reviewed the Appellee Brief, there is no argument presented to dispute these contentions or to deny that complete dismissal is warranted.

A. Sovereign Immunity Does Apply to Bar the Appellees' Declaratory Judgment Claims.

Neither the Marshal or the Clerk has pled, or asserted in any filings, a waiver of sovereign immunity that would allow them to pursue their declaratory judgment claims. Instead, they argue sovereign immunity simply doesn't apply, which is contrary to the precedent of this Court and the immunity expressly afforded to the Appellants in the Georgia Constitution. *See* GA. CONST. Art. 1, §2, ¶IX(e)(Absent an express act of the General Assembly stating otherwise, sovereign immunity applies to the local governments); *and* Dekalb County Sch. Dist. v. Gold, 318 Ga.App. 633, 637(1)(a)(2012), *as cited in* SJN Props. L.L.C. v. Fulton Cnty. Bd. of Assessors, 296 Ga. 793, 810 (2015)(Court recognized there is no blanket waiver of

sovereign immunity for declaratory relief claims, acknowledging each claim must be expressly authorized by law to proceed past immunity).⁵

Having failed to plead, present, argue or establish a waiver of sovereign immunity before proceeding upon the declaratory relief claims, the Marshal and the Clerk cannot avoid the dismissal of those claims. *See Banks v. Happoldt*, 271 Ga.App. 146, 148 (2004)(Sovereign immunity does not have to be established by the party seeking its protection, rather the party seeking to benefit from the waiver of sovereign immunity has the burden). There is no statutory or constitutional provision in this case that expressly provides the Appellee Marshal or Appellee Clerk a right to seek declaratory relief against the Appellants. None of the governing budgetary statutes or Charter provisions provide any rights for these locally elected officials to be separate or independent of the budget process, and none provide them with the right to a specific budget or paid-for counsel of their own choosing.⁶

⁵ In its Order on the Motion to Dismiss, the Trial Court acknowledged this Court's ruling in *SJN Props, supra*, but simply held it was inapplicable, without further reasoning or discussion particular to the claims in this case. (R-1-570). Neither the Appellees, nor the Trial Court, have ever suggested the Appellees could establish a waiver of sovereign immunity. (R-1-210-225; R-1-571).

⁶ *See* O.C.G.A. §36-81-4(c)(contemplates the budgets proposed by executive officers as the "initial budgetary policy-making function"); Charter §7-401(2)(requiring Mayor to submit proposed budget); Charter §7-401(4)(c) (requiring Mayor to propose detailed expenditures for each "office"); Charter §8-105(directing elected officials participate in initial budgetary policy making

Despite being elected officials, Plaintiffs are not constitutional officers. (T-3-19, Hearing transcript, November 24, 2014, 19:13-14). Their Offices do not operate independently of the Defendant Columbus, Georgia. *Id.* The Offices of the Municipal Court are dependent upon the appropriations determined by the legislative arm of the Defendant CCG, the Columbus Council, during its annual budget process. (R-1-234). Under both Georgia law and the Charter, the local governing authority is vested with complete, original and exclusive jurisdiction over its funds. *See* GA. CONST. Art.IX, §2, ¶1(a)(local governing authority has the power to adopt reasonable ordinances and rules to govern its affairs and property); O.C.G.A. §36-5-22.1(a)(1)(local governing authority has original and exclusive jurisdiction to control and maintain its property). Contrary to the suggestion of the Appellees in their Brief, those powers do not end once their local office budgets are appropriated. (Appellee Brief, pg. 17). Appellants are charged with the responsibility to ensure all taxpayer funds are budgeted, accounted, settled, and expended for appropriate governmental purposes. *See* O.C.G.A. §36-5-22.1(a)(7)(local governing authority has power to examine and account for expenditure of its funds). The Marshal and the Clerk have failed to identify an express right to seek declaratory relief against the CCG and other Appellants, so

process by submission of “budget requests” to the executive branch, not “budgets”, and allowing officials hearings on the “budget requests”).

that the Trial Court was required to recognize the bar of sovereign immunity upon these claims. Gold, *supra* at 637, as cited in SJN, *supra* at 800.

B. The Trial Court failed to address legislative immunity, which provides absolute immunity for the injunctive relief claims against the named Defendants in their individual capacities.

Appellees' own pleadings demonstrate the application of legislative immunity was required, as they seek to enjoin the Appellants from performing official, legislative duties in a particular manner and complain of actions taken, or not taken, in the FY2015 budget process. (R-1-271, ¶91).⁷ The Marshal and the Clerk allege their budget requests were not appropriately considered in either the formulation of the Mayor's Recommended Budget, or in the final budget adopted by Council for FY2015. (R-1-265-271, ¶59-64, ¶70-74, ¶91). Each of these allegations concerns legislative actions, and the Trial Court should have reviewed the Appellants' requests for legislative immunity. Contrary to the suggestion of the Appellees, this defense was repeatedly presented and argued to the Trial Court. (Appellee Brief, pg. 18, stating, incorrectly, that the Trial Court declined to consider legislative immunity due to the failure of Appellants' counsel to argue the

⁷ Appellees offer no explanation of how their suit against these Defendants in their individual capacities could provide injunctive relief or require them to perform official functions of their offices. Instead, they misconstrue the relief sought, claiming now they are not allowed to perform the duties of their positions, which is not a basis of relief in their Second Amended Complaint. (R-1-280,281).

point). Appellants requested the specific application of legislative immunity in the very first filing made with the Court, in the Fourth Defense of their Consolidated Answer to Plaintiff's Complaint. (R-1-56-58). Legislative immunity was subsequently referenced, argued and used as a basis for dismissal in each of their filings in support of their Motion to Dismiss, as well as in oral argument before the Trial Court in the hearing held on the dismissal motions.⁸

Despite having been placed on notice of the request for legislative immunity through a number of filings and oral argument, the Trial Court failed to mention, much less discuss, its application to these claims in its Order, which was no more than a cursory denial of the Motion to Dismiss. (R-1-571). The Appellees made no substantive response to contest the application of legislative immunity in the Trial Court and continue to avoid any real discussion of this issue on appeal. (R-1-210-225;).⁹ However, legislative immunity is absolute and applies to all decisions and

⁸ Legislative immunity was requested in the Defendants' first Brief in Support of their Motion to Dismiss, (R-1-159), as well as in the Reply Brief in Support of the Motion to Dismiss, where the first argument section was entitled: "Plaintiffs' Complaint should be dismissed as the Defendants' actions complained of are protected by the doctrines of sovereign, official and legislative immunity." (R-1-229,230). Similarly, legislative immunity was argued at the dismissal hearing, and it was again asserted in Defendants' Renewed Motion to Dismiss, filed after Plaintiffs filed their Second Amended Complaint. (R-T3-6; R-1-288) Appellees cannot show this issue was not properly raised before the Trial Court.

⁹ Similarly, the Appellee's citation to the case of Griffies v. Coweta County, is misplaced. In that case, this Court was presented with the denial of an expenditure made by a constitutional officer after her budget was set. Griffies, 272 Ga. 506 (2000). No legislative decision was at issue or discussed. Here, the Marshal and

actions taken in the formulation, recommendation and finalization of the CCG budget. Bogan v. Scott-Harris, 523 U.S. 44, 55(1998)(Supreme Court confirmed the budget process of a city was legislative, even with regards to the actions of the mayor introducing and signing the budget ordinance into law, so that absolute legislative immunity applied).

Appellees do not contest that budgeting is an inherently legislative function, nor have they disputed that absolute immunity should be afforded to actions taken within the “sphere of legislative activity”. *See* Woods v. Gamel, 132, F.3d. 1417, 1419 (11th Cir. 1998), *and* O.C.G.A. §36-81-4(c)(provides that proposed budgets of a county executive or mayor are considered to be an “initial budgetary policy-making function”); *and* Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998)(Supreme Court confirmed the tasks of introducing and signing of the budget ordinance into law by a mayor were legislative, so that legislative immunity applied). The blanket of legislative immunity covers even those actions which Plaintiffs claim are ultra vires or done with ill-will towards them. Whipple v. City of Cordele, 231 Ga. App.

the Clerk, who are not constitutional officers, contest their roles in the budget process and the amount of funding appropriated to their Offices. Legislative immunity, which was not mentioned due to the lack of any complaints related to legislative activities in Griffies. Accordingly, immunity wholly applies to the budget allegations at issue. *See* Woods v. Gamel, *supra* at 1419 (absolutely immunity is afforded in the budget process, which is by its nature a legislative function).

274 (1988).¹⁰ The Trial Court failed to review the application of legislative immunity, which should have dispensed with the claims against the individual Appellants entirely.

CONCLUSION

Essentially, the Brief of the Appellees has not provided any argument in this appeal to support the Trial Court's denial of immunity to the Appellants. A review of their pleadings, and the Trial Court's Order, demonstrates a lack of consideration of the threshold immunity issues, which should have prevented all of the equitable claims from proceeding forward. For all of the reasons stated above, and in the prior filings, the Appellants respectfully request this Court review the Trial Court's Order on their Motion to Dismiss and reverse the Trial Court's partial denial of that Motion.

¹⁰ Appellees' constant references to the "ultra-vires" conduct and "ill-will" of the Appellants are unsubstantiated by any facts alleged in their own pleadings, which are simple, conclusory allegations. Most importantly, however, these allegations would only be relevant in consideration of the official immunity asserted by the named Defendants in their individual capacities for relief from the claims not associated with the legislative budget process. (Appellant Brief, pg. 26). In this case, the only claim outside the budget process is the injunctive relief sought against the individual Defendants for the denial of the Marshal and the Clerk's requests to be provided outside counsel. Since they are not constitutional officers, they are not entitled to taxpayer-funded counsel under O.C.G.A. §45-9-21(e), and thereby no equitable relief is available. Jennings v. McIntosh Cnty Bd. of Comm'rs, 276 Ga. 842, 845 (2003). The consideration of official immunity, which certainly would apply, is not even necessary to warrant dismissal of these claims.

Respectfully submitted this 13th day of November, 2015.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Plaintiffs/
Appellees in the foregoing matter a copy of the **REPLY BRIEF OF
APPELLANTS** through the electronic service of email, which is the manner of
service agreed upon by the following counsel of record:

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This 13th day of November, 2015.

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