STATE OF MICHIGAN
IN THE COURT OF APPEALS

CASE NO. 329418

LOWER COURT CASE NO. 15-104373-CZ

MICHIGAN OPEN CARRY, INC., and
KENNETH HERMAN

Plaintiff-Appellees,

v.

CLIO AREA SCHOOLS, FLETCHER
SPEARS, III, and KATRINA MITCHELL,

Defendants-Appellants.

On Appeal from the Genesee County Circuit Court

APPELLANTS' BRIEF ON APPEAL

Oral Argument Requested

Proof of Service

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STATEMENT OF JURISDICTION

MCL 600.308 states that "final judgments" from the circuit court, court of claims, and recorder's court "shall be appealable as a matter of right." Pursuant to MCR 7.203(A), the court has jurisdiction of an appeal of right filed by an aggrieved party from a "final judgment or final order of the circuit court or court of claims, as defined in MCR 7.202(6)." MCR 7.202(6)(a) provides that a "'final judgment' or 'final order' means, (a) [i]n a civil case,(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. . . ." A declaratory judgment has the force and effect of, and is reviewable as, a final judgment. MCR 2.605(E).

RELATED CASES

This case is nearly identical to *Michigan Gun Owners, Inv v Ann Arbor Public Schools*, # 329632, which was appealed on October 12, 2015. In that case, the Washtenaw County Circuit Court held that public schools do have the legal authority to regulate the possession of firearms at school.

ISSUE PRESENTED

The issue presented—both legal and practical—is whether a public school district has the lawful authority to regulate the possession of firearms in school buildings?

INTRODUCTION

Plaintiffs—open carry gun advocates—filed a lawsuit seeking a declaratory judgment that would allow them to openly carry guns in schools operated by the Clio Area School District.[1] Plaintiffs argue that the School District is preempted by state law from regulating firearms. Defendants contend that state law allows school districts to regulate the possession of guns on school property. Furthermore, the School District believes that Plaintiffs' conduct is incompatible with the School District's basic responsibility to provide for the safety of students, parents, and faculty. Defendants filed its motion for summary disposition, which the trial court denied. The lower court granted Plaintiffs' request for declaratory relief holding that state law preempts the School District from regulating the possession of firearms in the classroom. The result being: persons can openly carry guns in public school buildings. The lower court committed reversible error for several reasons.

First, MCL 123.1102 expressly provides that a "local unit of government" cannot regulate the possession of firearms. However, MCL 123.1101(a) defines the phrase "local unit of government" as meaning *only* "a city, village, township, or county," **but not a public school district**. As such, the legislature did not preempt

[1] It should be noted that there is no statute specifically allowing for the open carry of guns in schools. Plaintiffs believe that this supposed "right" derives from legislative silence.

school districts from regulating the possession of firearms; rather, it chose not to preempt school districts by not including them in MCL 123.1101(a). Second, the Revised School Code expressly authorizes the School District to make policies to safeguard students—including policies related to firearms. *See* MCL 380.11a. Third, this Court has specifically rejected the argument that state law preempts a school district's regulation of firearms on school property. *See Davis v Hillsdale Community School District*, 226 Mich App 375; 573 NW2d 77 (1997). Lastly, schools—with compulsory attendance—have a duty to safeguard pupils. As a practical matter, if a person with a gun enters a school building, the Administrators must declare a "lock down." In such instance, *all* education stops. Students, staff and parents are terrified. The potential of a lethal confrontation is also created when public safety officers respond and confront the armed individual. The prohibition of openly displayed firearms in schools is part-and-parcel of the School District's ability to provide a safe learning environment for all students.

For the reasons stated below, this Court should reverse the lower court's declaratory judgment in favor of Plaintiffs and remand to the lower court for entry of a judgment in favor of Defendants. The issue to be resolved in this case is both legal and practical. If a principal sees an individual approach or enter a school with a gun, what is he to do? The administrator or, for that matter, any parent or faculty member, will declare a lockdown, call the police and seek to protect the students.

In such case, education stops, the children are frightened, and a dangerous confrontation with authority may ensue. Guns are not allowed in State or Federal Court buildings or in various government agencies.[2] It defies common sense that Court employees who have armed officers within the building are afforded more protection than defenseless children attending school.

FACTS

1. THE PARTIES

Plaintiff Michigan Open Carry, Inc. is an entity whose stated purpose is "[t]o educate and desensitize the public and members of the law enforcement community about the legality of the open carry of a handgun in public." Plaintiff Michigan Open Carry's "methods" include "informal gatherings in public places throughout the state while open carrying our handguns." For several years now, Plaintiff Michigan Open Carry has publicized its goal to file a lawsuit against a public school district because Plaintiff believes that guns should be allowed in schools and because most schools prohibit the possession of weapons on school property.

Plaintiff, Kenneth Herman, has a child attending school at Edgerton

[2] Other governmental bodies regulate the possession of firearms. For example, pursuant to Administrative Order 2001-1, the Supreme Court has prohibited all "weapons . . . in any courtroom, office, or other space used for official court business. . . ." Like courts, the legislature has not expressly limited a school district's right to regulate firearms. To the contrary, MCL 28.425o(l) expressly prohibits concealed weapons inside schools.

Elementary School. He has stated his belief that it is legal and acceptable to carry firearms into an elementary school, irrespective of the resulting panic and disruption of the educational environment for hundreds of children.

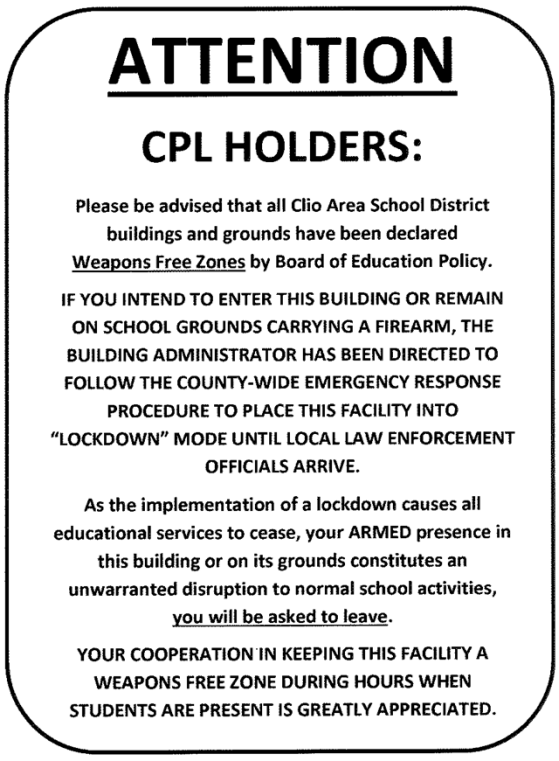
Defendant Clio Area Schools is a Michigan Public School District authorized by the Michigan legislature to make policies pursuant to the Revised School Code. *See, e.g.,* MCL 380.1 *et seq.* Defendant Fletcher Spears is the Superintendent of Clio Area Schools. Defendant Katrina Mitchell is the Principal of Edgerton Elementary School.

2. **CLIO AREA SCHOOLS' POLICY REGARDING FIREARMS**

Clio Area Schools' Board of Education has promulgated Policy 7217, which provides:

> The Board of Education prohibits visitors from possessing, storing, making, or using a weapon in any setting that is under the control and supervision of the Board for the purpose of school activities approved and authorized by the Board including, but not limited to, property leased, owned, or contracted for by the Board, a school-sponsored event, or in a Board-owned vehicle.

Under the Policy, "[t]he term 'weapon' . . . include[s], but [is] not limited to, firearms, guns of any type, including air and gas-powered guns, (whether loaded or unloaded), knives, razors, clubs, electric weapons, metallic knuckles, martial arts weapons, ammunition, and explosives." The School District posts the following signs on its doors regarding its weapons policy:



Likewise, the Michigan Department of Education has determined that, if a firearm is observed at school, it is an emergency situation similar to a tornado or earthquake and a lockdown is necessary.[3]

3. **HISTORY OF SHOOTINGS AT SCHOOLS**

As a Nation, we have endured too many tragic shootings at public schools. By way of partial example, 12 students were murdered at Columbine High School in 1999. In 2007, 32 students were murdered at Virginia Tech. In 2012, 20 children and six adults were murdered at Sandy Hook Elementary School. And, closer to

[3] *http://www.michigan.gov/documents/safeschools/MI_Ready_Schools_Emergency_Planning_Toolkit_370277_7.pdf*(last accessed on 10/23/2015.)

home, a six-year-old student was fatally shot in an elementary school in Genesee County in 2000.

It is entirely understandable that—in light of the above events—the presence of firearms in an elementary school causes panic, disrupts students' education, and may result in serious injury or loss of life. If a tragedy occurred because a school knowingly allowed a person with a weapon to enter its hallways without taking protective action, hindsight would call into question the School District's complacency.

4. **THE LOWER COURT'S OPINION AND RELATED LITIGATION**

On August 10, 2015, the lower court ruled upon Defendants' Motion for Summary Disposition. The lower court did not issue a written opinion; rather, it ruled from the bench. The transcript is attached as **Exhibit A**. The trial court agreed that school districts have "plenary power regarding maintaining order and discipline in schools." (*Id* at 16)(citing *Davis vs. Hillsdale Community School District*.) The lower court, however, held that this did not extend to regulating firearms. The lower court reasoned that *Capital Area District Library v Michigan Open Carry, Inc*, 298 Mich App 220 (2013), preempts school districts from regulating the possession of firearms. Defendants appeal.

STANDARD OF REVIEW

This Court reviews orders granting or denying a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003); *Koenig v City of South Haven,* 460 Mich 667, 674; 587 NW2d 99 (1999).

MCR 2.116(C)(8) provides that summary disposition is proper when the opposing party has failed to state a claim upon which relief can be granted. If the trial court determines that, as a matter of law, the defendant owed no duty to the plaintiff, summary disposition is properly granted in the defendant's favor under MCR 2.116(C)(8). *Dykema v Gus Macker*, 196 Mich App 6; 492 NW2d 472 (1992). Only the pleadings may be considered when the motion is based on subrule (C)(8). MCR 2.116(G)(5).

A suit for declaratory judgment is a judicial procedure in which a court renders an opinion on a question of law. *Health Cent v Commissioner of Ins*, 152 Mich App 336, 347, 393 NW2d 625 (1986). Declaratory judgments enable parties involved in an actual controversy to obtain adjudication of their rights before actual injuries or losses have occurred. *Detroit Base Coalition for Human Rights of Handicapped v Director, Dep't of Soc Servs*, 431 Mich 172, 428 NW2d 335 (1988).

A declaratory judgment has the force and effect of, and is reviewable as, a final judgment. MCR 2.605(E). Pursuant to MCR 2.605(A), any Michigan court of

record may declare the rights and other legal relations of an interested party seeking a declaratory judgment if it involves a case of actual controversy within the court's jurisdiction. The determination to make a declaration is ordinarily a matter entrusted to the sound discretion of the trial court, provided an actual controversy exists within the subject-matter jurisdiction of the court. *Allstate Ins Co v Hayes*, 442 Mich 56, 499 NW2d 743 (1993); *City of Lake Angelus v Michigan Aeronautics Comm'n*, 260 Mich App 371, 377 n7, 676 NW2d 642 (2004).

LAW AND ANALYSIS

1. THERE IS NO SECOND AMENDMENT RIGHT TO CARRY GUNS IN A SCHOOL BUILDING

As a threshold issue, there is no constitutional right to possess firearms in certain buildings—such as courts and public schools. The Supreme Court has unequivocally stated that the right to carry and bear arms under the Second Amendment is not unlimited. *District of Columbia v Heller,* 554 US 570, 626-627, 128 S Ct 2783, 171 L Ed 2d 637 (2008). Specifically, the Supreme Court stated in *Heller* that

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [*Id*](emphasis added)

Notably, the Supreme Court clarified in an accompanying footnote that in providing these examples: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id* at 627 n. 26, 128 S Ct 2783. The Michigan Court of Appeals has cited *Heller* approvingly in this regard. *See People v Deroche*, 299 Mich App 301, 306-07, 829 NW2d 891, 895 (2013).

2. **THE MICHIGAN LEGISLATURE HAS GRANTED SCHOOL DISTRICT'S THE ABILITY TO MAKE SCHOOLS "GUN FREE ZONES"**

The lower court committed reversible error when it held that school districts could not prohibit firearms at school. Plaintiff cited and relied upon MCL 123.1101(a), MCL 123.1102, and the Court of Appeals Opinion in *Capital Area District Library v Michigan Open Carry, Inc*, 298 Mich App 220 (2013). *See* (Complaint at ¶ 20.) The first statute Plaintiff relies upon—MCL 123.1102—provides:

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, *except as otherwise provided by federal law or a law of this state*.

The second statute Plaintiff relies upon—MCL 123.1101(a)—defines the phrase "local unit of government" as meaning "a city, village, township, or county," **but not a public school district**. As is plain, the legislature made the deliberate

decision to not include school districts within this definition, and that decision has meaning.

Statutory interpretation is a question of law, which this court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). As the Michigan Supreme Court has repeatedly instructed, the fundamental obligation when interpreting statutes is "to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). And, beyond the necessity for legal citation, if the statute is unambiguous, judicial construction is neither required nor permitted. In other words, "**[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.**" *Id* (emphasis added)*; see also Paige v City of Sterling Heights*, 476 Mich 495 (2006). Furthermore, the maxim of *expression unius est exclusion alterius* provides that the express inclusion of one thing excludes similar things that were not mentioned.

The trial court committed reversible error when it, in essence, rewrote MCL 123.1101(a) to included school districts. The above statutes expressly apply only to cities, villages, townships, and counties. The legislature did not include "school district" in the above definition. The *CADL* case—which the trial court relied upon—addressed whether a city and county could create a library that could

regulate firearms. As MCL 123.1101(a) defined the phrase "local unit of government" as meaning "a city, village, township, or county," the Court of Appeals properly held that a city and county could not create an entity that could regulate guns when neither entity had the authority to do so pursuant to MCL 123.1101a. That same logic does not apply to school districts because school districts are educational institutions and are not created by cities, townships, villages or counties, nor are school districts listed in MCL 123.1101(a).

The lower court also misapplied MCL 123.1102, because this statute expressly provides that "local units of government" can regulate possession of firearms if authorized by state law. In this instance, the Michigan legislature has authorized Clio Area Schools to enact Policies to safeguard school children. Specifically, the Revised School Code, MCL 380.11a(3)(b), expressly obligates school districts to "Provid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while enroute to or from school or a school sponsored activity." The School Code then clarifies that a school district "may exercise a power implied or incident to a power expressly stated in this act" and "may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district." Additionally, both the Michigan and Federal legislatures have declared that school districts are generally "gun free

zones." *See, e.g.,* 18 USC 922(q)(2)(A) and MCL 750.237a(4).

In the library case relied upon by Plaintiff, the library only had statutory authority to "[a]dopt bylaws and regulations ... governing the board and the district library." School Districts, however, have a very specific statutory mandate to "[p]rovid[e] for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity." MCL 123.1102(emphasis added.) This is exactly what Clio Area Schools has done in this case.

Based on the above, Clio Area Schools has acted within its express statutory authority when it "provided for the safety and welfare" of students by determining that guns should not be in its schools. The School District has been entrusted with educating and caring for the pupils in its charge, and it has done just that.

3. **PLAINTIFF'S PREEMPTION ARGUMENT ALSO LACKS MERIT**

Plaintiff has argued—both in its Complaint and on its advocacy webpage—that the Michigan Court of Appeals decision in *Capital Area District Library v Michigan Open Carry* established the rule that local governmental entities are preempted from regulating firearms in any manner. This is untrue.

First, the Court of Appeals carefully explained that local units of government can regulate firearms to the extent "otherwise provided by federal or state law." *Id.* As discussed above, the Revised School Code expressly authorizes

school districts to enact policies to safeguard students and carefully instructed that school districts can exercise any "power implied or incident to a power expressly stated in this act." As such, the School District fits within the exception articulated by the Court of Appeals in *Capital Area District Library*.

To this point, the Michigan Court of Appeals has affirmatively held that the legislature did NOT preempt the ability of school district's to create appropriate weapons policies. In *Davis v Hillsdale Community School District*, 226 Mich App 375; 573 NW2d 77 (1997), the plaintiff specifically argued that a local school district was preempted from enacting weapon policies because state law had preempted the field. In soundly rejecting this argument, the Court of Appeals held that, "**in this area, preemption simply does not apply; a school board's reasonable exercise of its powers is permissible unless it actually conflicts with an express statutory provision.**" *Id* at n 5 (emphasis added.) The Court then described the school board's authority in this regard as **"plenary."** As such, Plaintiff's argument that the School District's Policy is preempted is inaccurate and the lower court committed reversible error.

If there is any conflict between *CADL* and *Davis*, the *Davis* case must prevail. MCR 7.215(J)(1) decrees that a panel of the Court of Appeals must follow "the rule of law established by a prior published decision of the Court of Appeals . . . that has not been reversed or modified by the Supreme Court." Thus, panels of

the Michigan Court of Appeals are supposed to be governed by a "first out" rule; a later panel must follow the rule of law promulgated in an earlier published decision. *Vandokelaar v Kid's Kourt, LLC*, 290 Mich App 187, 194; 800 NW2d 760 (2010). As the *Davis* case squarely addressed the issue of firearms in schools—and held that schools have plenary power—*Davis* controls *CADL* because it was decided first.

4. Regulating Firearms at School is Synonymous With Educating Students and Preventing Disruption

Public school districts are statutorily required to educate students. *See,* e.g., MCL 380.1(3). Given this important goal, courts have allowed school districts to limit and restrict even the most fundamental rights. This is apparent in many contexts.

In the context of searches and seizures, schools have far more leeway than the government outside of schools. *See New Jersey v TLO*, 469 US 325 (1985). In the context of freedom of speech, while it would be improper for a governmental entity to require approval of newspaper articles before publishing, courts have consistently upheld pre-approval requirements in school distribution policies. *Muller v Jefferson Lighthouse Sch,* 98 F3d 1530, 1543 (7 Cir 1996); *Paye v Gibraltar Sch Dist,* (ED Mich No. 90-70444, August 6, 1991, *unpublished*)(Judge DeMascio held that, "the First Amendment is implicated only when the decision to censor a school-sponsored publication or other student expression has no valid

educational purpose" and that its "reasonable for the school administration to conduct a pre-publication review.") Again, as the Supreme Court held in *District of Columbia v Heller,* 554 US 570, 626-627, 128 S Ct 2783, 171 L Ed 2d 637 (2008), governmental entities can prohibit firearms in schools and courts without infringing upon the Second Amendment.

In the context of firearms, school districts are forced to initiate "lockdowns" when guns are present on campus. This disrupts the educational environment; education stops and fear and apprehension take hold. For this reason, schools are allowed to regulate the possession of firearms because it is integral to their obligation to educate students in a safe environment free from the prospect of confrontations between armed individuals.

In this context, schools are much like courts. In 2001, the Michigan Supreme Court issued Administrative Order 2001-1, which provides:

> The issue of courthouse safety is important not only to the judicial employees of this state, but also to all those who are summoned to Michigan courtrooms or who visit for professional or personal reasons. Accordingly, the Supreme Court today issues the following declaration regarding the presence of weapons in court facilities. It is ordered that weapons are not permitted in any courtroom, office, or other space used for official court business or by judicial employees unless the chief judge or other person designated by the chief judge has given prior approval consistent with the court's written policy. Each court is directed to submit a written policy conforming with this order to the State Court Administrator for approval, as soon as is practicable. In developing a policy, courts are encouraged to collaborate with other entities in shared facilities and, where

> appropriate, to work with local funding units. Such a policy may be part of a general security program or it may be a separate plan.

This Order was enacted despite the fact that the statute that prohibits firearms in courts carries with it the same CPL exception that exists in the Weapon Free School Zone law. It is reasonable to assume that of all of the governmental bodies in existence, the Supreme Court would be the least likely to issue an Order that is illegal. Schools share far more in common with courts than with libraries, township buildings, or county clerks' offices. Neither courts nor school districts are defined as local unit[s] of government" pursuant to MCL 123.1101(a)—because schools and courts are unique.

CONCLUSION

Defendant School District and its administrators ask that this Court recognize the need to protect students while they are at school by affirming the legality of the School District's ban on weapons in school buildings and during school activities.

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