

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY MICHAEL SELMAN,)
KATHLEEN CHAPMAN, JEFF SILVER,)
and TERRY JACKSON,)
Plaintiffs,) CIVIL ACTION
v.) FILE NO. 1:02-CV-2325-CC
COBB COUNTY SCHOOL DISTRICT)
and COBB COUNTY BOARD OF)
EDUCATION,)
Defendants.)

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR DISCOVERY AND
SCHEDULING ORDER**

Plaintiffs do not seek a “do over”; we seek to do things right in order to avoid a second remand and a third trial. The Court of Appeals has declared that “[k]nowledge of the particular facts and specific circumstances is essential to a determination” here, and therefore that it will not “decide this case based on less than a complete record on appeal or fewer than all the facts.” *Selman v. Cobb County School Dist.*, 449 F.3d 1320, 1323, 1338 (11th Cir. 2006). Plaintiffs take the court at its word: We have proposed a discovery plan that will provide the additional evidence necessary to build “a complete and accurate record,” allowing this Court to address and resolve the “factual issues” that the Eleventh Circuit identified as essential to this case but thus far lacking in evidentiary support. *See id.* at 1334-37.

Defendants, on the other hand, continue to advocate a gap-filling approach, despite this Court’s determination at the July 31 status conference that no such procedure would satisfy the Eleventh Circuit’s mandate. They cavalierly dismiss the appellate court’s painstaking assessment of unresolved and unclear factual issues that will be “essential to a full consideration of the arguments of both parties.” *Id.* at 1334. And they obstinately maintain that the Eleventh Circuit remanded simply to have this Court plug a few holes in the record, and that it did not intend for this Court to explore factual issues that were “previously ignored.” *Opp.* at 3.

Defendants are wrong. Recognizing that “the issues presented by this case are ones of substantial public importance,” the Eleventh Circuit was unwilling to make a ruling based on anything less than a searching review of a complete record and a detailed set of findings and conclusions. *See Selman*, 449 F.3d at 1334. To say that plaintiffs had the opportunity to conduct additional discovery and present more evidence in the original proceedings, and that they therefore should be denied that opportunity now, is to miss the whole point of the Eleventh Circuit’s ruling. This case raises important constitutional issues affecting schoolchildren across the country; and the whole nation is watching. It is simply too important — in the Eleventh Circuit’s view, and in ours — to let Defendants’ desire not to be bothered with more discovery or a more systematic presentation of all the evidence result in an incomplete or ill-considered appellate ruling on the merits. Thus, the Circuit directed this Court to do whatever it thinks appropriate to produce a record and findings worthy of a case of this magnitude — up to and including starting with an “entirely clean slate.” *Id.* Defendants’ discovery plan cannot be squared with the Eleventh Circuit’s admonitions.

A. Events Leading to the Sticker’s Adoption.

Defendants do not take seriously the Eleventh Circuit’s criticism that the record fails to show all the events leading up to their adoption of the disclaimer in March

2002. They instead attempt to portray the Court of Appeals as concerned principally — if not exclusively — with the Rogers petition. Opp. at 6. To be sure, the Eleventh Circuit *is* interested in Rogers and her petition (and in testimony clarifying what Rogers did and when). But only four of the appellate court’s eighteen questions are limited to addressing Rogers or the petition. *See Selman*, 449 F.3d at 1335-36 (questions 3, 10, 11, 12). The remaining fourteen point to wide-ranging factual inquiries that the Court of Appeals expects this Court to conduct, including inquiries into (a) all the communications between the Board and community members before the Board adopted the disclaimer, (b) all the sources for the idea to implement a disclaimer policy, (c) all the influences on the disclaimer’s text, and (d) all the details about the March 13 board meeting. *See id.* What is more, the panel specifically characterized the eighteen questions as a “nonexclusive” list, instructing this Court to “include findings on any other factual issues that it deems relevant to the case.” *Id.* at 1334, 1338.

Defendants contend that these matters were “fully explored in discovery and at trial” (Opp. at 6); but plainly, not in enough detail (if at all) to satisfy the Eleventh Circuit. While Defendants do not specifically respond to Plaintiffs’ request to take depositions and obtain documents from those who actually worked on drafting the

disclaimer's language, for example, they point to board-member Searcy's trial testimony that the Board asked its attorney to draft the language (Opp. at 6) — as though that were enough to satisfy the Eleventh Circuit.¹ If Defendants were correct, the Eleventh Circuit would have already had everything it thought it needed, so it would not have posed any additional questions about the sticker. But the appellate court still wants to know: “Did the board ask its attorney to draft the language of the sticker in response to a petition? Did the language come from the Board's attorney? Did the attorney draw that language from any petition or letter? If so, what? Did anyone propose that language for a religious purpose?” *Selman*, 449 F.3d at 1335. If passing references to the fact that the Board asked its attorneys to prepare the language were not enough to satisfy the Eleventh Circuit in the first appeal, they will not be enough to satisfy it in a second.² And unless this Court is willing to have the second

¹ Regarding the drafting, Searcy testified that “[m]y best recollection is our attorney said that they've been requested to prepare language,” and she said that “members of the board” had made that request; but she could not even recall which board members did so. Trial Trans. 191:16-192:1. Two other board members also testified at trial that the Board had asked its attorney to draft the disclaimer's language. *See* Trial Trans. 377:22-25, 384:6-8 (Plenge testimony); 419:14-19 (Johnston testimony). But no one explained how the language was selected.

² Nor are Defendants' citations to Johnston's and Tippins' original depositions any more helpful. *See* Johnston Depo., June 30, 2003, at 8:6-18
(continued...)

trial become a discovery safari — rather than the organized, streamlined presentation that Plaintiffs intend and that this Court has a right to expect — the only practicable way to develop the record evidence that the Court of Appeals seeks is to permit Plaintiffs pretrial discovery against the lawyers who actually had a hand in drafting and approving the sticker, and to depose or redepose the board members and superintendent about their role in that process.³

To take another example, although board members testified repeatedly at trial and in their depositions that they had received and conducted hundreds if not thousands of communications with parents, community members, and other interested parties

² (...continued)

(testifying that the Board asked its attorney if “there was any language” that would address concerns about the textbook, and that the attorney “recommended some language”); Tippins Depo., June 25, 2003, at 77:8-78:12 (testifying that “our attorney drafted the statement”).

³ Because Fred Sanderson was the School District’s chief academic officer at the time that the District adopted the disclaimer policy, Plaintiffs reasonably expect that he, too, may have additional evidence to contribute about the textbook-selection process and about what went into drafting the disclaimer. And because Sanderson was never deposed or called to testify at trial, Defendants cannot reasonably claim that requiring him to sit for a deposition now would be unreasonably burdensome or duplicative.

regarding the proposed disclaimer,⁴ precious little information has surfaced about those communications. Board members have offered only generic statements that some people complained to them that the textbook failed to address theories of the origin of life as alternatives to evolution, and that other people expressed concern over any Board action that might undermine the teaching of evolution. In particular, there was little or no testimony regarding the details of specific communications to specific board members, when those communications occurred, whether or how the board members responded, or whether the board members considered any of the communications in deciding to adopt the disclaimer. Indeed, despite claiming to have received thousand of communications, the board members identified by name only a handful of individuals — notably, Marjorie Rogers and Leon Combs (a professor associated with the intelligent-design movement whom Plaintiffs have asked to depose). Because the

⁴ See, e.g., Trial Trans. at 193:43194:11 (Searcy testifying that “I have a bookshelf and that bookshelf is full of people that were bound and determined to educate me to their point of view on every side of the spectrum,” and that “I have literally thousands of e-mails, phone calls, letters from people” regarding the proposed disclaimer); 304:10-13 (Tippins testifying that he had received a “considerable amount” of information from the public, including from intelligent-design proponents); 417:2-16 (Johnston testifying that the Board received letters and e-mails from parents and from “people all over the country,” including “books, videotapes, [and] all kinds of things” from the Discovery Institute); see also, e.g., Johnston Depo. at 21:11-21 (testifying that the Board “got reams and reams and reams of paper from people” complaining about the textbook early on in the adoption process).

Eleventh Circuit wants a far more detailed record of what actually affected the Board's deliberations and final decision (*see Selman*, 449 F. Supp. 2d at 1335-37), and again, because we do not think that this Court will find it helpful to be subjected to evidence-gathering expeditions at trial, brief depositions or redepositions of the board members and the then-superintendent are a relatively minor burden likely to yield a major benefit to this Court in meeting the Eleventh Circuit's mandate.

B. Expert Testimony.

In opposing plaintiffs' request for expert evidence, Defendants again miss the import of the Eleventh Circuit's opinion. If a dictionary definition had been enough to show what the sticker means to a reasonable student, the Eleventh Circuit could have consulted *Webster's* on its own. But the panel had something else in mind — and with good reason: Because, in Establishment Clause cases, “factual context is everything” (*Selman*, 499 F.3d at 1338), the meaning of the sticker's language depends not just on what the word “theory” means in isolation, but on the totality of the sticker's language, its historical pedigree within the context of the creationist movement's attempts to infiltrate the public schools, and its meaning to students in the classroom in conjunction with the rest of their science instruction.⁵ The Eleventh Circuit did not

⁵ Defendants' reliance on *Hancock v. American Steel & Wire Co.*, 203 F.2d 737 (C.C.P.A. 1953), and *Integrated Health Professionals, Inc. v. Pharmacists Mutual* (continued...)

criticize this Court for having considered those issues in the original decision; rather, it asked this Court to determine on remand whether Dr. Miller was qualified to speak as an expert on the subject. Having posed that question, the court must have contemplated the possibility that the answer would be “yes.” But in all events, what Plaintiffs intend Dr. Miller’s expert testimony to cover will principally be the relationship between the message of the disclaimer and the actual status of evolution within the scientific community, and the relationship between the sticker language and the presentation of evolution in Dr. Miller’s textbook.

As for the other experts that Plaintiffs intend to call, there are two. The first will be an expert on science education, who will explain what conclusions high-school students would draw from the sticker, what misperceptions the sticker would engender

⁵ (...continued)

Insurance Co., 422 F. Supp. 2d 1223 (E.D. Wash. 2006), is misplaced. In *Hancock*, the court affirmed the denial of a trademark for a whirlwind emblem bearing the name “Tornado” because of a similar registered mark for an identical product named “Cyclone,” pointing to dictionary definitions of those terms to underscore why the public would likely confuse the products. 203 F.3d at 740. In *Integrated Health*, the court refused to allow an insurer to dissect the policy term “scope of employment” and cobble together the definitions of all the individual words because the phrase is an established term of art in agency law (422 F. Supp. 2d at 1228) — and one that we think expert testimony could also have illuminated. Neither court needed to consider the meaning of a disclaimer statement in light of the social, cultural, and religious history conferring meaning on it; and neither court needed to consider what such a statement would mean to a reasonable high-school student, when juxtaposed with an entire public-school science curriculum and textbook.

for the students about evolution and about science generally, and how the sticker would affect the teaching of evolution in class and the presentation of it in the textbook. The second will be an expert in the history of the creationist movement, who will testify about the historical context and the social meaning of the sticker's language from within that tradition, the historical and juridical events that led to the disclaimer-sticker strategy, and the institutions that have developed the strategy. Both experts will provide what Plaintiffs believe will be critical testimony for determining whether the School District here has sent a message of religious endorsement; and both will, therefore, speak directly to questions that the Court of Appeals asked. The Eleventh Circuit having been unsatisfied with this Court's previous reliance on case law and fact witnesses for its findings on those topics, Plaintiffs believe that the best — and perhaps only — way to satisfy the appellate court's demands will be for this Court to hear expert testimony, which the Court undeniably has discretion to do — the procedural bar in the first trial notwithstanding.⁶ Defendants here have the right to conduct

⁶ In attempting to distinguish *Bradley v. United States*, 866 F. 2d 120 (5th Cir. 1989), Defendants misread the Fifth Circuit's opinion as saying that the parties had agreed that expert evidence was necessary. *Opp.* at 9. What the Fifth Circuit actually said was that the parties had agreed that published guidelines embodied the applicable medical standard of care, and that one of the government's experts provided the "primary evidence" on how to interpret those guidelines and on how to apply them to the actions of the doctors in the case. *Bradley*, 866 F. 2d at 127. The other expert was the government's sole witness on causation — which had nothing
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discovery against Plaintiffs' proffered experts and to challenge the experts' qualifications if they wish; but they do not have the right to prevent this Court from hearing expert evidence if the Court deems it credible and useful for deciding the case in a way that will satisfy the Eleventh Circuit's expectations for a subsequent appeal.

Conclusion

In light of the clear import of the Eleventh Circuit's decision, this Court should exercise its discretion to permit the discovery that Plaintiffs seek. The proffered alternative — defendants' gap-filling plan — will only increase the prejudice to both parties and the burden on this Court by increasing the risk of a second remand and a third trial.

⁶ (...continued)

whatsoever to do with the guidelines. *Id.* What the Fifth Circuit did in *Bradley* was to specify procedures on remand to ensure that the plaintiffs would have a fair opportunity to prepare for a retrial involving defense experts — procedures that expressly included “any further appropriate discovery” to “allow the parties to prepare the presentation of their cases in light of the two experts' expected testimony.” *Id.* Similarly, the court held in *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996 (5th Cir. 1998), that because expert evidence that should have been procedurally barred at trial (for the same reason as in this case) was “unquestionably important,” the defendants would be permitted to present it on retrial. *Id.* at 1000-01. Plaintiffs do not contend that these cases stand “for the proposition that parties who violate the rules regarding expert disclosures automatically get a second bite at the apple upon remand.” *Opp.* at 9. But they do underscore that district courts have discretion to admit such evidence on retrial, and that it is entirely appropriate to do so, where, as here, the evidence is important to fair adjudication of the case.

Respectfully submitted,

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Dated: August 15, 2006

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I hereby certify that Plaintiffs' Reply in Support of Motion for Discovery and Scheduling Order was prepared in accordance with Local Rule 7.1D. The Reply was prepared using Times New Roman 14-point font, as authorized by Local Rule 5.1C.

/s/ Richard B. Katskee
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Dated: August 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2006, I caused to be served, by means of the court's electronic case filing system, Plaintiffs' Reply in Support of Motion for Discovery and Scheduling Order, on the following:

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