EDWARD SISSON
6626 Hillandale Road, Bethesda, MD 20815
(301) 986-8836
sissoed@hotmail.com

DRAFT June 13, 2006, 12:08 AM eastern standard time

Re: *Eleventh Circuit Decision in Selman v. Cobb County School District.*

Dear _____:

I am a lawyer who has participated in the current "evolution" debate on the side of those who question the majority view on the theory of evolution. I do not currently represent any person. However, I have some personal views on the recent decision of the Eleventh Circuit Court of Appeals in the case *Selman v. Cobb County School District*. You may find these views of interest.

The **first** issue of concern relates to the possibility that the trial court will assess not the *actual* effect on *actual* people in Cobb County of the *actual* sequence of events that led to adoption of the Sticker, but will instead assess the *potential* effect knowledge of the sequence of events *could* have had on *hypothetical* individuals, had those hypothetical individuals been exposed to information they could, perhaps, have learned of but that, in reality, they never were exposed to.

On page 20 of the *Selman* decision, the Appellate Court describes the key finding of the trial court. The trial court found that "in light of the sequence of events that led to the Sticker's adoption, the Sticker communicates to those who endorse evolution that they are political outsiders, while the Sticker communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders." This finding relates to the "effects" prong of the constitutional analysis. Thus, according to the trial court, the Sticker has an "effect" only on those persons to whom it "communicates" a message in the form of knowledge of the sequence of events that led to its adoption, *i.e.*, on those persons *who actually knew* the actual sequence of events that led to its adoption on March 28, 2002.

The key inquiry thus is, what message actually was communicated, when was it communicated, and which actual individuals received the communication?

Not all persons who were (or are) aware of the "sequence of events" are relevant to the case – only those persons with standing to complain are relevant. These are the people allegedly injured by the action who have standing to sue. The "relevant public" is limited to persons who are parents with children in Cobb County schools (or in certain instances the children themselves), since only they have standing to seek redress in this court. And only those members of that public who claim injury are relevant. Thus the relevant public is Cobb County parents (or children) "who endorse evolution." (I note that there is a question of how could children who have not yet been taught evolution be characterized as "endorsing" it, since their endorsement would by definition be despite not yet having been taught any scientific reasons to endorse it). The relevant inquiry must be, what did those particular persons actually and accurately know, prior to the

filing of the lawsuit, about the actual sequence of events that led to the March 28, 2002 adoption of the Sticker?

The Court of Appeals says that the trial court record doesn't establish what was the actual sequence of events that led to the Sticker's adoption, and moreover, says that most of the record dates from times *after* the adoption of the Sticker. The Court of Appeals remands so that the trial court can more accurately describe what the actual sequence of events was.

There is a fundamental problem with the Appellate Court's procedure, however, because it overlooks the possibility that if the sequence of events that led to the Sticker's adoption wasn't clear at trial, it may be that the sequence of events was never known *by any members of the relevant public*, and is not *now* known by anyone. That ignorance may be the reason why the trial court record is so confused on that very issue.

If the actual sequence of events *was not known* by any member of the relevant public prior to the filing of the lawsuit, then the actual sequence of events *cannot have had an unconstitutional effect* on any member of the relevant public. The fact that the trial court may be able *now* to reconstruct what the sequence of events was at the time is irrelevant, because what matters is the relevant public's accurate knowledge at the time of the Sticker's adoption, or what the relevant public learned thereafter up until filing the lawsuit. Thus the relevant factual inquiry should be what did "those [parents with children in Cobb County] who endorse evolution" know about the actual, real "sequence of events" that occurred prior to the date of the Sticker's adoption, March 28, 2002. The trial court ought not merely establish a sequence of events that the public *could* have known about; it must establish what sequence of event the relevant public *actually* knew about prior to filing the lawsuit.

I am concerned that the trial court is now going to construct a narrative of the sequence of events that members of the relevant public *could* have known about, had they had access to *all* the communications between the school board and the public that occurred before March 28, 2002 (plus the public advocacy of pro-evolution zealots after March 28, 2002). But if the relevant public could not actually have had access to private communications, absent the lawsuit itself, then those communications should be excluded from consideration under the "effects" prong. For purposes of evaluating the "effects" of an action by a public government body, only the material available to the public at the time, and thus able to *cause* the unconstitutional effect, should be admitted. The discovery process of a lawsuit ought not become a mechanism whereby a plaintiff can amass confidential communications that the public would not otherwise have had access to, and then use that information to cause an effect on the public that otherwise would never have been caused by the action of the governmental body itself.

There is another potential danger in the trial court's procedure. It may be that publicity efforts by supporters of evolution initiated *after* adoption of the Sticker, but prior to filing the lawsuit, created a mis-impression among members of the relevant public about the actual sequence of events leading up to March 28, 2002. If supporters of

evolution instigated a press campaign *after* the adoption of the Sticker that created an erroneous impression in the minds of the relevant public concerning what the actual sequence of events was *before* the adoption of the Sticker – if what happened here was that activists for evolution whipped up public controversy by creating a false impression of what happened prior to March 28, 2002 – plaintiffs should not be allowed to obtain a judgment by selling the Court on that false impression.

After all, if plaintiffs or their ideological allies, through their own press campaign, actively *create* the effect they then point to as the "effect" that renders a government act unconstitutional, and the court then grounds its judgment of unconstitutionality on that plaintiff-manufactured effect, then persons opposed to a government action can through their own efforts make it unconstitutional – effectively manufacturing the unconstitutionality of an act – in order to get a court to suppress it. Courts ought vigilantly to seek out and avoid such manipulation of the judicial process. For purposes of evaluating the "effects" prong under the constitutional test, the court should weed-out effects which have their genesis not in the publicity promulgated by the governmental body itself, but in the publicity efforts of those whose avowed aim is to get the government act declared unconstitutional. Otherwise, the effects test is effectively rendered a nullity – it becomes a test that a party skilled in public relations, and aided by a friendly media, can manipulate post-hoc.

Plaintiffs at the original trial bore the burden of proving the relevant public's actual state of awareness of the actual sequence of events at the relevant time. Post-hoc incendiary publicity by evolution advocates ought not be admissible evidence. Plaintiffs ought not now be allowed to supplement the record they failed to make at trial with material they or the ideological allies manufactured after March 28, 2002.

There is a **second** profound problem in the Appellate decision. The Appellate Court appears to accept that it is appropriate to analyze the "effect" of the Sticker by itself, divorced from its essential context, namely, in the context of the adoption by the School Board for the first time of a textbook teaching evolution, without removing the evolution material. To ignore the School Board's inclusion of pro-evolution material in the curriculum as part of the "sequence of events" leading to the Sticker would be like looking at the war between the U.S. and Japan War 1941-1945 but omitting the Japanese attack on Pearl Harbor. Including the evolution material in the teaching curriculum sent exactly the opposite message from the message condemned by the trial court: namely, it sent the message that those who *endorse* evolution are now the political *in*siders, and those who *doubt* evolution are now the political *out*siders. The trial court must analyze the *entire* sequence of events, including the inclusion of the evolution material for the first time in the curriculum, to determine the "effect" of the Sticker. After all, the inclusion of the pro-evolution material is the reason the dispute arose in the first place. Plaintiffs are attempting implicitly to take this part of the sequence of events off the table, as if the inclusion of the pro-evolution material were a constitutional requirement whose effect should be ignored. So far, in the United States, it is not.

If it is clear from the record that the Sticker was merely a sop offered to a now-

disfavored minority (the record already shows this is in fact what happened), then the entire "sequence of events" cannot reasonably "communicate to those who endorse evolution that they are political outsiders" as the trial court held. Instead, it can only communicate to them that they do not *yet* have such an overwhelming political majority as to be able to exclude the view of the dissenters altogether from the curriculum. The fact that all available textbooks teach evolution, and that the Cobb County school board chose the most hard-line pro-evolution text, and chose to include that evolution material in the curriculum, clearly communicates to those who endorse evolution that they have become the dominant political *in*siders, and the Sticker merely shows that they do not have absolute monopoly control – yet.

It is deeply disturbing that the trial court felt that failure to give the pro-evolution side absolute monopoly control was equal to sending a message to the pro-evolution side that they are "political *out*siders." Nonsense. Denying someone monopoly control of an issue is not the same as declaring that person a political outsider on that issue. That the trial court could judge such a record to have such an effect bespeaks an extreme bias.

Moreover, even if the trial court found that supporters of evolution actually felt that the entire sequence of events made them feel like political *out*siders, the court should reject their subjective feelings as irrational, and thus not a proper basis for a finding of an unconstitutional effect. No reasonable fact-finder could find that the *entire* sequence of events here communicates the message "you are a political outsider" to a hypothetical "reasonable person" who is a supporter of evolution. No amount of overheated pro-evolution activist rhetoric ought to disguise the fact that the entirety of what the Cobb County School Board did in March, 2002, was a political win for the pro-evolution side in Cobb County, and proved that they were not political outsiders – they were at least equal to their opponents, and in fact, they were now the political insiders.

A **third** fundamental problem with the Appellate decision is that it appears to accept an implicit assumption that "those who endorse evolution" do so because they have made a rational, independent evaluation of the scientific data offered as evidence for its truth. But if, in fact, they endorse evolution because they have chosen to give unquestioning deference to science experts, it may be appropriate to treat their position as simply another religious position, rather than being a position divorced from religion. This may affect the application of the constitutional test, if it appears that the plaintiffs are in effect trying to support their own religious views by suppressing the Sticker. The court should take evidence as to the reasons why, prior to filing the lawsuit, the particular individual plaintiffs "endorsed" evolution, rather than simply presume that their reasons for endorsing evolution were grounded in their science education. Surely plaintiffs who did not experience formal academic instruction in evolution should be questioned as to why they endorsed evolution prior to filing the lawsuit.

Best Wishes,

Edward Sisson