**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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|---|---|---|
| GEORGIACARRY.ORG, INC., | ) | |
| TAI TOSON, | ) | |
| EDWARD WARREN, | ) | |
| JEFFREY HUONG, | ) | |
| JOHN LYNCH, | ) | |
| MICHAEL NYDEN, and | ) | |
| JAMES CHRENCIK | ) | |
| Plaintiffs, | ) | |
| | ) | Civil Action No. 2007 CV 138552 |
| v. | ) | |
| | ) | |
| FULTON COUNTY, GEORGIA, | ) | |
| CITY OF ATLANTA, GEORGIA, | ) | |
| CITY OF EAST POINT, GEORGIA, | ) | |
| CITY OF ROSWELL, GEORGIA, | ) | |
| and | ) | |
| CITY OF SANDY SPRINGS, GEORGIA, | ) | |
| Defendants | ) | |

**PLAINTIFFS' RESPONSE TO ROSWELL'S AND**
**SANDY SPRINGS' MOTIONS FOR SUMMARY JUDGMENT**

## Introduction

Roswell and Sandy Springs were the only Defendants that filed Motions to Dismiss Plaintiffs' cases against them pursuant to the Court's Preliminary Scheduling Order. Plaintiffs responded to those Motions, and neither Defendant replied. The Motions were heard on April 4, 2008, and this Court converted the Motions to Motions for Summary Judgment to be heard on May 9, 2008. O.C.G.A. § 9-11-12(b) permits Plaintiffs to file evidence in response to such a converted motion. Plaintiffs file this Response to those converted Motions for Summary Judgment.

Both Defendants claim that they have or will be amending their ordinances to repeal the sections regulating the carrying of firearms. Each city, however, has replaced the old preemption ordinance with a new preempted ordinance. Because their proposed new ordinances continue to

regulate the carrying of firearms, the new ordinances are invalid. In addition, Sandy Springs attacks Plaintiffs' standing to sue, and Roswell claims immunity from claims for litigation expenses. Plaintiffs will show below why Defendants are wrong on both counts.

**Argument**

Plaintiffs' Claims are Not Moot

Each Defendant claims, without proper filing with the Court[1], that it has repealed its ordinance banning the carrying of firearms in parks and replaced it with an ordinance banning the carrying of firearms to a public gathering. This matter has been fully briefed by Plaintiffs in their Reply to Defendants in Support of Plaintiffs' Motion for Summary Judgment, filed contemporaneously with this Brief. Plaintiffs will not burden the Court by repeating those arguments here, but rather incorporate those arguments by reference. Suffice it to say that Defendants are preempted from regulating the carrying of firearms "in any manner," and their revised ordinances do nothing to moot this case.

At the hearing on its Motion to Dismiss (now this Motion for Summary Judgment), Roswell mistakenly advised this Court that this case is "only about attorney's fees." That simply is not true. Plaintiffs continue to oppose vigorously Defendants' illegal ordinances, the eradication of which is their primary objective. It is unfortunate that Plaintiffs have to resort to litigation at all to accomplish that objective when the law so clearly is on Plaintiffs' side, let

[1] Neither Defendant has filed any affidavits or Rule 6.5 Statements to support its Motion for Summary Judgment, despite clear direction from the Court to do so. In addition, neither Defendant has filed a statement of theories of recovery. Plaintiffs are filing, contemporaneously with this Response, supporting documents in opposition to Plaintiffs' Motions. Plaintiffs are not filing a Rule 6.5 Statement of Genuine Issue of Facts because Plaintiffs do not believe there is an issue of fact to be tried. Rather, Defendants are not entitled to judgment as a matter of law on the facts before the Court.

alone that some Defendants' stubborn litigiousness and causing Plaintiffs' unnecessary delay and expense force Plaintiffs to have to seek expenses of litigation.

Plaintiffs' Claims Are Not Subject to *Ante Litem* Notice Requirements

Roswell mistakenly believes that Plaintiffs' claims are subject to the *ante litem* notice requirements of O.C.G.A. § 36-33-5.[2] A reading of the statute and case law make clear that this is not the case. O.C.G.A. § 36-33-5 states, in pertinent part:

> (a) No person, firm, or corporation having ***a claim for money damages*** against a municipal corporation ***on account of injuries to person or property*** shall bring any action against the municipal corporation for such injuries, without first giving notice as provided in subsection (b) of this Code section.
>
> (b) Within six months of the happening of the event upon which a claim against a municipal corporation is predicated, the person, firm, or corporation having the claim shall present the claim in writing to the governing authority of the municipal corporation for ***adjustment, stating the time, place, and extent of the injury***, as nearly as practicable, and the ***negligence*** which caused the injury. No action shall be entertained by the courts against the municipal corporation until the cause of action therein has first been presented to the governing authority ***for adjustment***.
>
> (c) Upon the presentation of such claim, the governing authority shall consider and act upon the claim within 30 days from the presentation; and the action of the governing authority, unless it results in the settlement thereof, shall in no sense be a bar to an action therefore in the courts.

[emphasis supplied].

[2] East Point and Sandy Springs attempt to raise the same defense in their Responses to Plaintiffs' Motion for Summary Judgment (in spite of the fact that Plaintiffs did not raise the issue of attorney fees in their motion), but they are barred from doing so. In the Court's December 5, 2007 Preliminary Scheduling Order, the Court required East Point and Sandy Springs to raise all immunity defenses by January 30, 2008. East Point filed no motions supporting any defenses. Sandy Springs filed a Motion to Dismiss (the instant Motion that the Court converted to one for Summary Judgment), but failed to raise any immunity defenses. The *ante litem* notice statute is a sovereign immunity statute. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942). If the Court nevertheless considers Sandy Springs' and East Point's raising of this issue, the arguments in this Brief against Roswell's position apply equally well to East Point and Sandy Springs. Fulton County likewise raised this issue on an untimely basis, but overlooks the fact that the *ante litem* notice statute applies to municipalities and not counties.

The emphasized language illustrates why Plaintiffs' claims cannot be subject to this statute. Plaintiffs do not have any "claims for money damages on account of injuries to person or property." Plaintiffs are seeking declaratory and injunctive relief, with claims for expenses of litigation incident to their primary relief. Claims for expenses of litigation under O.C.G.A. § 13-6-11 are not money damages "on account of injuries to person or property." Plaintiffs allege no personal injury. They do allege that Defendants have deprived them of a property interest, but they are not seeking damages on account of the deprivation of their property. They seek only declaratory and injunctive relief on account of that deprivation.

To emphasize the inapplicability of the *ante litem* notice statute to this case, Plaintiffs point out that the statute also requires that notices contain information regarding the "time, place, and extent of the injury," and the "negligence which caused the injury." Cleary, the statute contemplates damages for unintentional torts and similar injuries. Expenses of litigation are not susceptible of a description of the "time, place, and extent of the injury." They occur over time throughout the course of litigation. They are not the result of negligence. Because O.C.G.A. § 36-33-5 is in derogation of the common law, it must be construed strictly against the municipality. *Maryon v. City of Atlanta,* 149 Ga. 35, 99, S.E. 116 (1919). Moreover, it is well settled that claims in equity are not subject to O.C.G.A. § 36-33-5. *Ehlers v. City of Decatur,* 614 F.2d 54 (5th Cir. 1980).

Roswell points to *Dover v. City of Jackson,* 246 Ga. App. 524, 541, S.E.2d 92 (2000), as authority for the proposition that an *ante litem* notice is required for expenses of litigation (under O.C.G.A. § 36-33-5) associated with an equitable claim. *Dover* can be distinguished from the case at bar, however, because the plaintiff in *Dover* ***originally sought damages for injury to property***. Dover was a nuisance case. In other words, the case fell squarely within the scope of

O.C.G.A. § 36-33-5, but the plaintiff failed to provide any *ante litem* notice and wait the required 30 days before filing his lawsuit. When the matter of the lack of an *ante litem* notice came up, the only claims remaining were equitable ones and expenses of litigation. The Court of Appeals ruled that an *ante litem* notice was required under those circumstances. In the instant case, however, no damages claim for injury to persons or property ever was filed.

If the Court determines that *Dover* does apply and Plaintiffs' *ante litem* notices are insufficient (Plaintiffs' notices are discussed below), then Plaintiffs submit that O.C.G.A. § 36-33-5 is unconstitutional as applied to Plaintiffs. This argument will be discussed below as well.

Plaintiffs' *Ante Litem* Notices Are Legally Sufficient

While Plaintiffs maintain that *ante litem* notices are not necessary for Plaintiffs' claims, Plaintiffs did serve all Defendants with notices in an abundance of caution. Affidavit of John Monroe, ¶ 5. If the Court determines that O.C.G.A. § 36-33-5 does apply to this case, then Plaintiffs' notices are sufficient for the purposes of satisfying the statute.

Each Defendant was served with a detailed letter at least 30 days before this case was commenced. *Id.* The letters were substantially identical, describing Plaintiffs' dispute with Defendants' ordinances and the legal justification for their preemption, and concluding with notice that Plaintiffs would commence legal action if the ordinances were not repealed. *Id.* None of the letters mentioned expenses of litigation, but Plaintiffs had no notice at that point that Defendants would be stubbornly litigious or cause Plaintiffs unnecessary trouble or expense. No plaintiff ever could know *a priori* that a defendant will be stubbornly litigious or cause the plaintiff unnecessary trouble or expense. It is impossible, therefore, for a plaintiff to provide an *ante litem* notice for expenses of litigation *before commencing litigation*. It is likewise

impossible for a plaintiff to know *a priori* the dates on which a defendant will be stubbornly litigious or how much the expenses of litigation will be.

Plaintiffs provided Defendants all the information they could. Plaintiffs' letters clearly laid out the legal basis for Plaintiffs' claims that the ordinances were preempted. Defendants were fairly put on notice that Plaintiffs would commence litigation if the ordinances were not repealed.

Moreover, Defendants were fairly put on notice that any abusive litigation tactics could result in damages. Plaintiffs had no more obligation to point this out to Defendants than Plaintiffs had an obligation to tell Defendants that they could be held in contempt for disobeying court orders, or that they will be liable for taxable costs when they lose the case. Such occurrences are the natural outcomes of being involved in litigation.

All that is required under O.C.G.A. §36-33-5 is "substantial compliance." *City of Columbus v. Barngrover*, 250 Ga. App. 589, 598, 552 S.E.2d 536, 543 (2001). The *Barngrover* Court determined that the city's receipt of a letter from plaintiffs describing the nuisance on plaintiffs' property put the city on notice, and the city could have investigated. In the instant case, Defendants were put on notice by Plaintiffs' letters, and they could have acted to repeal their ordinances (indeed, Defendants Milton and Union City both did so, and a third city, John's Creek, repealed its ordinance after receiving Plaintiffs' letter and before the complaint was filed). Defendants knew they would be sued by Plaintiffs, and knew they could be held liable for expenses of litigation if they were stubbornly litigious or caused Plaintiffs unnecessary trouble or expense.

It is important to keep in mind the purpose of the *ante litem* notice statute, which is "to enable the city authorities to examine into the alleged injuries and determine whether the claim

shall be adjusted ***without suit***…. It is necessary only that the city shall be put on notice of the general character of the complaint, and, in a general way, of the time, place and extent of the injury." *Maryon v. City of Atlanta,* 149 Ga. 35, 36, 99 S.E. 116 (1919). In addition, the statute "contains no specific requirement that the amount of the claim be set out, the requirement of the statute is satisfied by a statement of the facts upon which the claim is based. The addition of the amount is unnecessary, and, if set forth, mere surplusage." *Id.* Finally, "[T]here are decisions which construe the statute with draconic strictness…. [T]he courts have often been too technical, and have converted into a trap and pitfall … a statute which was merely designed to require a person injured to furnish the municipal corporation with such information that its proper officers might make such inspection as would enable them to decide whether the corporation ought fairly to pay the damages or defend the action therefor." *Id.*, 149 Ga. at 37 (citing 5 Thompson on Negligence, § 6328).

It is not necessary to specify causes of action or types of relief requested in an *ante litem* notice, and the notice may be amended. In *East Point v. Christian,* 40 Ga. App. 633, 635, 151 S.E. 42, 45 (1929), East Point complained that the plaintiff's *ante litem* notice did not state that plaintiff would seek damages "for companionship, and the loss of society, for different items of doctor's bills, and things of that sort," but these items were included in an amended notice. The Court of Appeals determined this to be sufficient, saying, "This act does not contemplate that the notice shall be drawn with all the technical niceties necessary in framing a declaration. The purpose of the law was simply to give to the municipality notice that the citizen or property owner has a grievance against it." *Id.*

Here, Plaintiffs did give Defendants notice that they had grievances against Defendants. They even gave an amended *ante litem* notice. On December 31, 2007, Plaintiffs sent a letter to

all Defendants, advising them that the judgment of the Court of Appeals in *GeorgiaCarry.Org, Inc. v. Coweta County,* 288 Ga. App. 748 (2007) was final, and saying, "[T]his letter constitutes any necessary ante-litem notice of Plaintiffs' intentions to seek attorney's fees and non-taxable costs for Defendants' stubborn litigiousness and causing unnecessary delays and expenses in this case when faced with the legal certainty that their Ordinances are invalid." Affidavit of John Monroe, ¶ 6. Defendants had ample notice of Plaintiffs' claims, and ample opportunity to determine whether they wanted to "adjust" the claims. They cannot seriously assert that they may be as stubbornly litigious as they care to be, with impunity. Plaintiffs provided well more than 30 days' notice to each Defendant before commencing litigation, and promptly amended their *ante litem* notices as permitted by *East Point v. Christian.*

Finally, in tremendously overabundant caution, Plaintiffs have served yet another *ante litem* notice on Roswell. Because Plaintiffs were caused additional unnecessary trouble and expense in recent weeks by Roswell, Plaintiffs have served Roswell with another notice, specifying some events and dollar amounts associated with Plaintiffs' damages. Affidavit of John Monroe, ¶ 7.

O.C.G.A. § 36-33-5 Is Unconstitutional As Applied to Plaintiffs

If the Court determines that O.C.G.A. § 36-33-5 applies to Plaintiffs in this case, and further finds that the *ante litem* notices provided by Plaintiffs are insufficient, then the statute is unconstitutional as applied to Plaintiffs. Article I, Section 1, Paragraph 2 of the Georgia Constitution requires that "No person shall be denied the equal protection of the laws." If the *ante litem* notice statute is applied as Defendants urge, Plaintiffs will have been denied equal protection.

The two classes at issue in Plaintiffs' equal protection claim are those plaintiffs that sue municipalities for damages and include expenses of litigation in their *ante litem* notices and those plaintiffs (such as Plaintiffs in the instant case) that sue municipalities for equitable relief and have no way of providing the information required by O.C.G.A. § 36-33-5. It is clear that plaintiffs that sue municipalities for damages (and that serve proper *ante litem* notices for such damages) are permitted to add claims for litigation expenses. If the Court adopts Roswell's theory, it will be clear that plaintiffs that sue municipalities for equitable relief only may not add claims for litigation expenses (even if they serve *ante litem* notices for their equitable claims). The former class is permitted to seek expenses of litigation, and the latter class is not. There is no rational basis for this classification.

Plaintiffs Have Standing As Taxpayers

Sandy Springs raised the issue of Plaintiffs' standing to sue as taxpayers in its motion to dismiss (now a motion for summary judgment). No other Defendant raised a standing issue in a motion before January 30, 2008, the deadline to do so in the Court's Preliminary Scheduling Order. Therefore, all other Defendants have waived this issue. To the extent the Court considers any other Defendants' raising of this issue, Plaintiffs' arguments to Sandy Springs would apply equally to the other Defendants.

Plaintiffs have established that they are citizens and taxpayers of Defendants. Affidavit of Edward Stone, ¶ 3; Affidavit of Michael Nyden, ¶ 3; Affidavit of Jeffrey Huong, ¶ 3. It is well settled that citizen taxpayers have standing to sue a municipality to challenge the expenditure of funds, and Plaintiffs are seeking to have Defendants enjoined from spending public funds to enforce their illegal ordinances. *King v. Herron*, 241 Ga. 5, 6, 243 S.E.2d 36

(1978) ("We hold that a citizen or taxpayer of a municipality has standing to question the legality of the expenditure of public funds of the municipality….").

Sandy Springs concedes that a taxpayer may challenge the enforcement of an illegal ordinance. The City insists, however, that standing must be based on a claim that enactment of the ordinance was *ultra vires.* Despite the clear wording in the Amended Complaint [¶ 15] that Sandy Springs' ordinance is *ultra vires,* Sandy Springs somehow concludes that "Plaintiffs have alleged no facts showing that the enactment of the ordinances … were *ultra vires.*" Brief of Sandy Springs, p. 7.

Sandy Springs draws a distinction between an ordinance that is *ultra vires* and the enactment (of the ordinance) being *ultra vires*. Sandy Springs' distinction is misplaced. Sandy Springs relies on *Newsome v. City of Union Point,* 249 Ga. 434 (1982). In *Newsome,* the plaintiff sued the city for an ordinance that was within the power of the city to pass, but which was passed with procedural irregularities that arguably made the ordinance invalid. The Supreme Court defined *ultra vires* as "it must appear that the action taken was beyond the scope of the powers that have been expressly or impliedly conferred on the municipality." 249 Ga. 437. That is, the Supreme Court was drawing a distinction between an ordinance that the city never could pass, and one that it could pass but may have passed with legally insufficient process.

In the instant case, Plaintiffs are not attacking the process Sandy Springs used to enact the ordinance. Rather, Sandy Springs enacted an ordinance that it had no power, under any circumstances, to pass.[3] The ordinance was implicitly preempted by the comprehensive statutory

[3] Plaintiffs note that Sandy Springs cites to the history of the enactment of Union City's ordinance and claims that Union City's ordinance was not *ultra vires* at the time it was passed decades ago. Without arguing the validity of a defense Union City might have, *but see Sturm,*

framework in the Firearms and Weapons Act, and, in case there was any doubt, expressly preempted by O.C.G.A. § 16-11-173(b).

Equity Will Enjoin an Ordinance Where Injury to Property Occurs

Sandy Springs claims that Plaintiffs should not be entitled to an injunction because O.C.G.A. § 9-5-2 says that equity cannot interfere with criminal proceedings. Sandy Springs overlooks, however, that there are no criminal proceedings afoot and that Plaintiffs are not seeking to enjoin a court of law. Plaintiffs are seeking to enjoin executive action, not judicial action.

As Sandy Springs points out, the Supreme Court of Georgia has said that the purpose of O.C.G.A. § 9-5-2 is "based upon the principle that equity is intended to supplement, and not usurp, the functions of the courts of law." *Hodges v. State Revenue Commission*, 183 Ga. 832, 833 (1937). The principle is not violated in this case because Plaintiffs are not asking this Court to interfere with any court of law. Rather, Plaintiffs are asking this Court to enjoin illegal activity by Defendants.

Moreover, contrary to Sandy Springs' claim, Plaintiffs have properly pleaded an exception to the rule of O.C.G.A. § 9-5-2. Sandy Springs acknowledges that the rule does not apply where there is "unlawfully taking [of] property" or "irreparable injury to the plaintiff." Brief of Sandy Springs, p. 4. Plaintiffs clearly have pleaded that they have a property interest in their firearms licenses and that Sandy Springs' illegal ordinance affects a taking of that property interest. Amended Complaint, ¶¶ 5-7.

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*Ruger*, "power . . . which the State may reclaim at its discretion," Plaintiffs note that three-year-old Sandy Springs, which did not exist prior to the enactment of the express preemption law, cannot avail itself of the same defense.

"As a general rule, courts of equity will not interfere with the administration of criminal justice, O.C.G.A. § 9-5-2, but there is an exception to this rule when injury to property is threatened, injunction will lie notwithstanding the fact that in the process a criminal prosecution is involved." *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 704, 386 S.E.2d 140, 143 (1989).

Plaintiffs have shown that they have Georgia Firearms Licenses ("GFLs") issued by the State of Georgia. Affidavit of Edward Stone, ¶ 3; Affidavit of Michael Nyden, ¶ 4; Affidavit of Jeffrey Huong, ¶ 4. GFLs permit their holders to carry firearms, openly or concealed, outside of their homes, automobiles, or places of business without being subject to arrest or prosecution for, among other things, carrying a concealed weapon in violation of O.C.G.A. § 16-11-126 and carrying a pistol without a license in violation of O.C.G.A. § 16-11-128. It is well settled that licenses issued by the state are property. *Cochran v. State Bar of Georgia*, 790 F. Supp. 1568 (N.D. Ga 1992) (law license is property); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971) (licenses are property interests).

Defendants' illegal ordinances infringe on Plaintiffs' property interests in their GFLs, by restricting the carrying of firearms when the state has commanded Defendants not to do so. Because Defendants' ordinances injure Plaintiffs' property, Plaintiffs have standing to seek equitable relief.

Finally, Sandy Springs makes no attempt to attack Plaintiffs' standing to bring their federal claims. Although Plaintiffs have dropped their Second Amendment claim, they still maintain that Defendants have deprived them of their property without due process, in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. Because the Supreme Court of the United

States has ruled (see *Burson*, cited above) that licenses are property interests, Plaintiffs have properly pled a federal claim for which they have standing.

Declaratory Judgment is Appropriate

Sandy Springs claims that declaratory relief is inappropriate because ***Union City*** has not enforced ***its*** ordinance against any Plaintiffs. Aside from the fact that Union City's actions are irrelevant to Sandy Springs, Sandy Springs loses sight of the fact that Plaintiffs have suffered, and are suffering, deprivation of their property rights in their firearms licenses because Sandy Springs illegally prohibits Plaintiffs from carrying firearms pursuant to their licenses. That is, Sandy Springs "seeks to punish conduct which the State, through its regulatory and statutory scheme, expressly allows and licenses." *Sturm, Ruger*, 253 Ga. App. at 719. It does not matter that Union City (or even Sandy Springs) has not prosecuted Plaintiffs. This prohibition diminishes the value of Plaintiffs' property interests in their licenses. Plaintiffs also note that Union City no longer is a party in this case.

**Conclusion**

Sandy Springs and Roswell continue to violate state law by regulating the carrying and possession of firearms, which is the exclusive province of the General Assembly (with three exceptions that are inapplicable here). Plaintiffs have shown that they have standing to sue, that they have complied with *ante litem* notice requirements (which do not apply in any event), and that they have validly pled federal claims. Defendants' Motions for Summary Judgment should be denied.

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