In the Supreme Court of Georgia

GEORGIACARRY.ORG, INC.,
JAMES CHRENCIK,
MICHAEL NYDEN,
AND
JEFFREY HUONG,
Appellants

v.

CITY OF ATLANTA,
CITY OF ROSWELL,
AND
CITY OF SANDY SPRINGS,
Appellees

No. S08A1911

On Direct Appeal of an Order of the Superior Court of Fulton County, Georgia

Brief of Appellants

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Type of Case and Statement on Jurisdiction

This is a direct appeal of three judgments of the Superior Court of Fulton County, Georgia. This Court, and not the Court of Appeals, has jurisdiction over this case because it is a case in equity and because it involves questions of the constitutionality of statutes and ordinances. *See* Ga. Const., Art. 6, §6, ¶¶ 2-3.

Judgments Appealed

Appellants appeal three separate judgments (one each for the three remaining defendants in the case) entered by the trial court on May 29, 2008[1]. R. 454-459. The trial court made each judgment a final judgment as to the subject defendant/appellee pursuant to O.C.G.A. § 9-11-54(b). R. 455, 457, 459. The judgment regarding the City of Atlanta granted Appellants' motion for summary judgment against Atlanta, implicitly dismissing the remaining claims (because it was a final judgment) that were not included in Appellants' (partial) motion for summary judgment. R. 458-459. Appellants are appealing the dismissal of those remaining claims that never were heard.

[1] The judgments were rendered and filed by the trial court on May 19, 2008. R. 454-459. Appellants filed case disposition forms for all three judgments on May 29, 2008. R. 460-462. Pursuant to O.C.G.A. § 9-11-58(b), the judgments were not "entered" until the case disposition forms were filed. Appellants filed their notice of appeal on May 29, 2008. R. 1.

The judgments regarding the City of Roswell and the City of Sandy Springs granted the defendant cities' motions for summary judgment and denied Appellants' motion for summary judgment. R. 454-457. Appellants are appealing the denial of their motions for summary judgment against Roswell and Sandy Springs and the grant of Roswell's and Sandy Springs' motions for summary judgment against Appellants.

Statement of the Case

This is a state law preemption case. Each Appellee enacted one or more ordinances attempting to regulate the carry or possession of firearms [R. 123, 258] in spite of a clearly worded express preemption statute barring Appellees from regulating the carry or possession of firearms "in any manner." *See* O.C.G.A. § 16-11-173(b). After multiple polite requests failed,[2] Appellants GeorgiaCarry.Org, Inc. and several individual members of GeorgiaCarry.Org, Inc. (collectively referred to as "GCO") commenced this case in August 2007 in the Superior Court of Fulton County against Fulton County and several municipalities within Fulton County.[3] R. 4-20.

[2] The record below shows attempts to obtain a repeal of the preempted statutes without litigation as early as 2005. R. 383.

[3] The original defendants were Fulton County, Atlanta, East Point, Milton, Roswell, Sandy Springs, and Union City. All Defendants but Atlanta, Roswell, and Sandy Springs settled prior to the hearing on the motions for summary judgment, with each local government repealing their special, local law on the same subject as the Georgia Firearms and Weapons Act.

Each individual Appellant (and hundreds more GeorgiaCarry.Org members) have licenses to carry firearms issued by the state, but each defendant had an ordinance (in violation of state law) banning the carrying of firearms in defendants' parks. R. 123, 258; Tr. 18, 27, 50. Because O.C.G.A. § 16-11-173(b) prohibits counties and cities from regulating the carrying of firearms "in any manner," and because defendants deprived GeorgiaCarry.Org's members of their property interests in their licenses to carry firearms, GCO sought declaratory and injunctive relief and attorney's fees under both state and federal law. Prior to the entry of the judgments that are the subject of this appeal, all defendants except Appellees repealed their ordinances at issue and settled with GCO.

GCO's (partial) motions for summary judgment against all three Appellees, and Roswell's and Sandy Springs' cross motions for summary judgment against GCO, were heard on May 9, 2008[4]. The trial court granted GCO's motion against Atlanta but denied GCO's motions against Roswell and Sandy Springs, finding GCO's claims against those two cities to be moot. Tr. 54. The trial court granted Roswell's and Sandy Springs' motions against GCO. *Id.*

[4] Atlanta did not file a motion for summary judgment.

GCO's motion for summary judgment against Atlanta dealt only with GCO's state law claims for declaratory and injunctive relief, and not GCO's still pending federal civil rights claims and their claims for attorney's fees. R. 264. The federal civil rights claims and attorney's fee claims were mentioned neither in the briefs nor at the hearing on the motions for summary judgment. After the hearing on the motions, GCO and the City of Atlanta came to agreement on the text of a proposed order capturing the intent of the trial court and submitted the proposed order to the trial court. R. 458. The agreed proposal for an order was not a final order, since there were other claims pending against the City of Atlanta. The trial court unexpectedly modified the jointly proposed order by making it a final judgment, thus effectively dismissing GCO's remaining claims against Atlanta *sua sponte.* R. 459. GCO appeals the portion of the order making it a final judgment.

Prior to filing their motions, Roswell and Sandy Springs, in a manifest display of recalcitrant resolution, both amended their ordinances in an attempt to continue special, local regulation of the carry and possession of firearms. Each municipality replaced the language banning carrying firearms ***in parks*** with language banning carrying firearms ***to public gatherings*** [R. 278, 334] and argued that these modifications made GCO's

claims moot.[5] Roswell and Sandy Springs also argued that GCO's claims for attorney's fees could not prevail because of an alleged failure to follow the requirements of the *ante litem* notice statute, O.C.G.A. § 36-33-5. GCO argued that applying the statute as urged by Roswell and Sandy Springs would make the statute unconstitutional (as applied to GCO). The trial court denied GCO's motions and granted Roswell's and Sandy Springs' motions, thereby dismissing all of GCO's claims. The trial court also made these two orders final judgments (with all parties' consent). GCO appeals the denial of their motions and the grant of Roswell's and Sandy Springs' motions and the denial of costs against Roswell.

Enumeration of Errors

1. The trial court erred in making its order against Atlanta a final judgment, thereby implicitly dismissing *sua sponte* GCO's remaining claims against Atlanta.
2. The trial court erred in denying GCO's motions for summary judgment against Roswell and Sandy Springs and in granting Roswell's and Sandy Springs' motions against GCO.

[5] This new "public gatherings" language, ostensibly making it a violation of city ordinances to carry a firearm to a public gathering anywhere in the city, was placed inexplicably in the ordinances concerning ***park regulations***.

As noted above, this Court, and not the Court of Appeals, has exclusive jurisdiction over this appeal, for two reasons. First, GCO brought this case in equity, seeking declaratory and injunctive relief against the Appellees. Article 6, § 6, ¶3 of the Georgia Constitution vests exclusive jurisdiction over appeals of equity cases to this Court. *Wyche v. Bank,* 160 Ga. 258, 259, 127 S.E. 741 (1925) ("The Supreme Court, under the constitution, has exclusive jurisdiction of equity cases.").

Second, GCO raised as an issue below, and is appealing in this Court, an as-applied challenge to the constitutionality of the *ante litem* notice statute, as well as the constitutionality of the revised ordinances of Roswell and Sandy Springs. R. 367. Under Ga. Const. Art. 6, §6, ¶2, "The Supreme Court shall … exercise exclusive appellate jurisdiction in … all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question…."

Argument and Citation of Authority

1. Additional Background

GeorgiaCarry.Org, Inc. is a non-profit Georgia corporation dedicated to protecting the rights of its members to keep and bear arms. R. 6. It came to GCO's attention that several counties and cities around the state had ordinances purporting to ban the carrying of firearms in their parks. R. 7.

Because it was obvious that such ordinances were preempted expressly and by implication by several constitutional and statutory provisions (most notably O.C.G.A. § 16-11-173(b)[6]), GCO has been contacting these cities and counties throughout Georgia and asking them to repeal their preempted ordinances.

Most have agreed to do so when confronted with the state law, but a few have not. The first to refuse was Coweta County, which GCO sued in early 2007 for declaratory and injunctive relief. Without explanation, the Coweta County trial court ruled against GCO and granted Coweta County's motion for summary judgment. The Court of Appeals reversed, holding:

> In construing [O.C.G.A. § 16-11-173], we are mindful of the "golden rule" of statutory construction, which requires that we follow the literal language of the statute unless doing so "produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." And the plain language of the statute expressly precludes a county from regulating "in any manner the carrying of firearms." Under these circumstances, the preemption is express, and the trial court erred in concluding otherwise.

GeorgiaCarry.Org, Inc. v. Coweta County, 288 Ga. App. 748, 655 S.E.2d 346 (2007) (punctuation omitted).

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[6] O.C.G.A. § 16-11-173(b)(1) states: No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms components.

As a part of these efforts, GCO wrote to Appellees over the course of several years, asking them to repeal their ordinances. R. 7-8. They refused, so GCO commenced the instant case. Because the law was so clear that Appellees' ordinances were preempted, GCO sought attorney's fees for Appellees' stubborn litigiousness and causing GCO unnecessary trouble and expense. This is especially true for Atlanta, which obstinately refused to make any modifications to its ordinance at all, even in the face of the *Coweta County* opinion that so clearly precluded any possibility of a viable defense. At the hearing, Atlanta failed to make any legal or factual argument pertaining to its preempted ordinance that Atlanta could have possibly believed the trial court would accept.

2. The Trial Court Erred in Making its Order Against Atlanta a Final Judgment

At the hearing on GCO's Motion for Summary Judgment against Atlanta, the trial court correctly concluded that it was bound to follow the holding of *Coweta County* and granted Appellants' Motion. Tr. 46. As directed by the trial court, GCO's counsel drafted an order to that effect, obtained the consent of Atlanta's counsel as to the form of the order, and submitted it for the judge's signature. R. 458-459.

Without notice to the parties, the trial court made a handwritten modification to the order indicating that it was a final judgment. R. 459. This modification had the effect of dismissing, *sua sponte* and without notice, GCO's remaining claims, which included federal civil rights claims and claims for attorney's fees. The trial court provided no explanation in the order for its dismissal of GCO's remaining claims, and dismissal of them was not discussed during the hearing on GCO's Motion (or any other time). In fact, GCO's counsel specifically noted on the record at the conclusion of the hearing of the motions for summary judgment that outstanding issues remained against Atlanta, and asked the Court to grant GCO's longstanding motion for an ***interlocutory*** injunction. Tr. 56. GCO's and Atlanta's counsel had a colloquy with the trial court regarding the ***interlocutory*** injunction, and clearly agreed to an ***interlocutory*** injunction that would not address certain aspects of the permanent injunction sought in GCO's amended complaint. Tr. 56-58.

A plaintiff is entitled to notice that the merits of his case will be adjudicated, and a court has no authority to dismiss the case *sua sponte* in the absence of such notice. *Aycock v. Calk*, 222 Ga. App. 763, 764 (1996), citing *Famble v. State Farm Ins. Co.*, 204 Ga. App. 332, 336 (1992). Here, Atlanta did not file a motion for summary judgment or any other dispositive

motion. The trial court did not give GCO any notice that the remainder of its claims might be dismissed[7], and no reasons were provided for doing so. The other claims have never been discussed in a motion or at a hearing. In sum, the claims have never been "heard" in a court of law. The dismissal of the claims was, therefore, improper.

While it is not necessary for this Court to rule on the merits of GCO's remaining claims against Atlanta, it may be helpful to show this Court that they have merit. GCO's remaining claims are two-fold.

First, GCO claims that it is entitled to an award of attorney's fees against Atlanta, pursuant to O.C.G.A. § 13-6-11, for Atlanta's stubborn litigiousness and causing GCO unnecessary trouble and expense. Atlanta's defense in this case was virtually non-existent, yet Atlanta still required GCO to go through the motions of obtaining a judicial determination of what was a foregone conclusion: Atlanta's ordinance was preempted by state law.

At the outset of the case, Atlanta had the benefit of multiple legal authorities weighing heavily in favor of preemption of Atlanta's ordinance. These authorities are discussed at some length in Plaintiffs' Brief in support of their Motion for Summary Judgment, but summarized here they are 1) the

[7] GCO's motion for summary judgment against Atlanta clearly stated that it was for certain counts of the Verified Amended Complaint only and not for all of GCO's claims against Atlanta. R. 264.

unanimous opinion of the Court of Appeals in *Coweta County;* 2) the express preemption statute itself, O.C.G.A. § 16-11-173; 3) implied preemption of all local laws pertaining to firearms, by virtue of the state's comprehensive regulatory scheme for firearms; 4) earlier appellate opinions, including one interpreting O.C.G.A. § 16-11-173 and finding complete implied and express preemption against Atlanta, *Sturm Ruger & Co. v. Atlanta,* 253 Ga. App. 713 (2002); 5) Attorney General Opinion U98-6, summarizing the preemption statute and opining that regulation outside the specific exceptions was preempted; and 6) the Georgia Constitution (Art. 1, § 1, ¶ 8) authorizing only the General Assembly to regulate firearms. Atlanta made no substantial argument even attempting to distinguish its situation from any of these half dozen categories of legal authority.

"Under O.C.G.A. § 13-6-11, the amount of the award of attorney fees as damages is a jury question that cannot be decided on summary judgment…. Questions … under O.C.G.A. § 13-6-11 are generally questions for the jury to decide…." *American Medical Transport Group, Inc. v. Glo-An, Inc.,* 235 Ga. App. 464, 466, 509 S.E.2d 738, 741 (1998). It was improper, therefore, for the trial court to decide, implicitly, that GCO had no valid claim for attorney's fees.

Second, GCO claims that Atlanta violated its federal civil rights. GCO pleaded in its Verified Amended Complaint that GeorgiaCarry.Org members had Georgia firearms licenses issued by the State, that those licenses allowed the members to carry firearms anywhere in the state not prohibited by state law, and that Atlanta's ordinance deprived them of their property interest in their licenses without due process of law, in violation of the 14th Amendment to the Constitution of the United States. If a violation of the 14th Amendment is found, a distinct claim for attorney's fees would arise under 42 U.S.C. § 1988.

GCO is entitled to have these additional claims heard. It received no notice that the claims would be subject to dismissal, and Atlanta never asked the trial court to dismiss them.

3. The Trial Court Erred in Denying Appellants' Motions for Summary Judgment Against Roswell and Sandy Springs and in Granting Roswell's and Sandy Springs' Motions Against GCO.

3.A. The Case is Not Moot

When an area of the law is preempted by state law, whether that preemption is express or implied, then local governments may not pass local, special laws on the same subject matter as the state law. *Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga. App. 713, 718 (2002) ("The practical effect of the

preemption doctrine is to preclude all other local or special laws on the same subject."). Roswell and Sandy Springs both amended their ordinances to repeal the local, special laws making it unlawful to carry a firearm in a city park and replaced them with local, special laws making it unlawful to carry a firearm in a "public gathering." They convinced the trial court that these new ordinances were not a ***regulation*** of carrying firearms, but merely a ***notice*** regarding state law, as if it is a believable supposition that a Georgia citizen should look to the parks ordinances in each Georgia municipality to discover whether the cities' police officers might ***actually enforce*** Georgia weapons law.

The specious arguments made by Roswell and Sandy Springs do not fit well with either the language of the new ordinances at issue or the intentions of the municipalities in passing the new local regulations of firearms. The trial court ignored the ***express written intentions*** of Sandy Springs and the oral representations of Sandy Springs' counsel in open court confirming those express written intentions. In his memorandum to the Mayor and Council of Sandy Springs, Sandy Springs' attorney encouraged them to "make it unlawful" to carry a firearm to a public gathering by

enacting the ordinance he drafted[8]. They took his advice. R. 334. At oral argument before the trial court, Sandy Springs' counsel ***admitted*** (indeed, insisted) that the purpose of the ordinance was to create a new offense and not merely to be advisory in nature ("It's a state violation or an ordinance violation"). Tr. 30. It was plain error for the trial court to ignore the stated purpose and meaning of the ordinance. There is no evidence in the record that the ordinance is merely advisory, rather than creating a local regulation pertaining to the carry and possession of firearms. Instead, Sandy Springs' counsel specifically stated the purpose was to create a separate, enforceable ordinance, justified by the fact that cities commonly have ordinances prohibiting the same conduct as state statutes. Tr., 30.

Roswell's revised ordinance is virtually ***identical*** to Co-Appellee Sandy Springs' revised ordinance, which states, "Pursuant to O.C.G.A. § 16-11-127, ***it is unlawful to carry a firearm to a public gathering, as defined in O.C.G.A. § 16-11-127, within the City***." Sandy Springs' Ordinance Chapter 8, Article 2, Section 4, Subsection (g). [Emphasis supplied]. R. 334. Roswell's revised Ordinance states, "The following activities are prohibited

[8] Sandy Springs' Counsel wrote the Mayor and Council, "In order to comply with the Court of Appeals' decision, the City has the option of … 3) revising the ordinance to make it a "discharge" of firearm prohibition as opposed to a "possession" of firearm prohibition and making it unlawful to carry a firearm to a "public gathering" as that term is defined in O.C.G.A. § 16-11-127. The City Attorney recommends the third option." R. 386-387.

in all City of Roswell public parks including the Roswell Trail System: … b) … Pursuant to O.C.G.A. § 16-11-127, ***it is unlawful to carry a firearm to a public gathering within the City***."[9] Roswell Ordinance 14.2.4. [Emphasis supplied]. R. 278. The operative language is identical except that Sandy Springs' has the additional phrase "as defined in O.C.G.A. § 16-11-127" in its ordinance.

The trial court concluded correctly that both the Roswell and Sandy Springs ordinances have the same meaning, but the trial court erred in determining what that meaning is. There is nothing in the record (other than Roswell's own self-serving arguments) to indicate the meaning of Roswell's ordinance. As noted above, the record is clear that the Sandy Springs ordinance was intended to create a new local violation, to wit: carrying a firearm to a public gathering. This is clearly a local, special regulation pertaining to the carrying of a firearm, which is something Sandy Springs may not regulate "in any manner." Roswell, a co-defendant in this case, adopted virtually identical language. There is no real reason to believe that Roswell's nearly identical ordinance has a different meaning. There simply is no justification for Roswell's position that its ordinance means one thing,

[9] This odd placement of a "notice" of state law, applicable city-wide, in a public parks ordinance, leads one to the inescapable conclusion that Roswell intended to continue its local, special regulation of firearms in parks.

and Sandy Springs' ordinance, just across the Chattahoochee River, means something else. Both ordinances clearly regulate carrying and possession of firearms and are therefore preempted.

Defendants' arguments that the revised ordinances seek to regulate conduct that is ***also*** unlawful under state law are not helpful to their position. *See* O.C.G.A. § 16-11-127 prohibiting carrying a firearm to a public gathering; *Sturm, Ruger & Co. v. City of Atlanta,* 253 Ga. App. 713 (2002) ("The legislature made no exclusion for [ordinances regulating] 'unlawful conduct.'"). *Id.* at 721. The preemption doctrine dictates that cities may not have local, special laws "***on the same subject***." *Id.* at 718 ("preclude[s] all other local or special laws") (emphasis added).

Roswell and Sandy Springs are expressly preempted from regulating the carrying of firearms "in ***any*** manner." O.C.G.A. § 16-11-173; *Coweta County,* 288 Ga. App. at 748. This is equally true whether the cities pass a ban on firearms, attempt to sue the manufacturers of firearms, or attempt to pass local, special laws on the same subject as state law. Roswell and Sandy Springs continue to regulate carrying firearms (in any manner) by enacting ordinances prohibiting the carrying of firearms to public gatherings. Their ordinances are preempted even though the conduct they prohibit also is prohibited by state law.

Given that Roswell and Sandy Springs both went from one blatantly illegal ordinance to another blatantly illegal ordinance, it is obvious that the case is not moot. A claim is not moot if it is capable of repetition yet evading review. *Collins v. Lombard Corp.,* 270 Ga. 120, 121(1998). In the case at bar, both Roswell and Sandy Springs have modified one illegal ordinance regulating carrying firearms in parks into another illegal ordinance regulating carrying firearms to public gatherings. The recalcitrant Appellees have established that they intend steadfastly to continue to regulate the carrying of firearms in some manner. If they can escape the jurisdiction of the courts by modifying their illegal ordinances into other, equally unlawful ordinances every time they are challenged, and thereby moot the case, a court never will be allowed to address the issue. Appellees would be free to enact serial changes to their ordinances, frustrating Appellants and defying the jurisdiction of the courts.

"[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course ***simply to deprive the court of jurisdiction***." *National Advertising Company v. City of Miami,* 402 F.3d 1329, 1333 (11th Cir 2005) [emphasis supplied]. In the case at bar, Roswell and Sandy Springs have signaled their continued interest in regulating the carrying of firearms by enacting new ordinances regulating

such carry. If they truly intended to comply with the law and moot the case, they would have repealed their illegal ordinances without enacting new ones.

3.B. The Application of the *Ante Litem* Notice Statute to Appellants is Unconstitutional

The trial court granted Roswell's motion for summary judgment in its entirety, including Roswell's argument that GCO was required to provide, and failed to provide, an *ante litem* notice for GCO's claim for litigation expenses under O.C.G.A. § 13-6-11. GCO will show that the trial court's application of the *ante litem* notice statute, O.C.G.A. § 36-33-5, to GCO is unconstitutional.

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]. GCO's claims against Roswell were primarily equitable in nature, but GCO also requested expenses of litigation on account of Roswell's stubborn litigiousness and causing GCO unnecessary delay.

Only in the latter claim did GCO arguably seek "money damages." Such money damages were not, however, "on account of injury to person or property." Nor was it possible for GCO to know, in advance, "the time, place, and extent of the injury" related to such damages, as attorney's fees by definition only accrue as the litigation proceeds. *See, e.g., Yates v. Paving & Grading Co. v. Bryan County*, 265 Ga. App. 578, 583 (2004), noting that a party cannot know in advance that an attorney's fees will be appropriate in a given case. Likewise, it would have been impossible for Roswell to "adjust" the damages, as no amount was known to either party and any attempt to adjust the claim, or accept an adjustment, would have been purely conjectural regarding future events. Despite the obvious inapplicability of the words of the statute to GCO's claims against Roswell, the trial court granted Roswell's motion.

This apparent application of the statute to GCO is an unconstitutional denial of equal protection and due process to GCO. Article I, Section 1, Paragraph 2 of the Georgia Constitution requires that "No person shall be denied the equal protection of the laws." The two classes at issue (both with claims against municipalities) are 1) plaintiffs (such as GCO) that have equity-only claims, plus a claim for litigation expenses under O.C.G.A. § 13-6-11, and 2) plaintiffs that have other damages claims in addition to their 13-6-11 claim.

The first class cannot provide an *ante litem* notice in compliance with the statute. In a generic equity case, no *ante litem* notice is required. *Ehlers v. City of Decatur,* 614 F.2d 54, 55 (5th Cir. 1980) (footnote 3) ("A litigant seeking injunctive relief is not bound by the requirements of the statute"). This of course makes sense, because there are no claims for damages and nothing to adjust. In order for members of the first class (such as GCO) to provide an *ante litem* notice, they would have to include in their notice information that they do not possess (time, place, and extent of injury; nature of negligence). There simply is no way for a plaintiff to know, at the outset of a case, the time, place, and extent of the "injury," because there is no injury in the sense of an occurrence such as an automobile accident.

Likewise, there is no "negligence" in a claim for litigation expenses. It is a violation of substantive due process to require GCO to do what it cannot do.

The second class has no problem providing an *ante litem* notice. The second class has some other claim for damages, and can use that claim for damages as the basis for information to be included in the notice. Because one class can comply with the statute and the other class cannot, the other class is being denied equal protection by being required to comply. Such a requirement is in effect a denial of the right to request litigation expenses under O.C.G.A. § 13-6-11. There is no rational basis for this distinction.

3.C. The *Ante Litem* Notice Statute Does not Apply to GCO

The Court of Appeals has held that a plaintiff bringing damages claims and equity claims, in addition to litigation expenses under O.C.G.A. § 13-6-11 must provide an *ante litem* notice even if the damages claims are later dropped. *Dover v. City of Jackson,* 246 Ga. App. 524, 541, S.E.2d 92 (2000). It must not be overlooked that the Plaintiff in Dover originally brought a claim for damages in nuisance that was defective because it was made without providing the required *ante litem* notice. *Dover* is no more than a restatement of the prior existing law that a plaintiff with a claim for damages independent of O.C.G.A. § 13-6-11 must provide a municipal defendant with an *ante litem* notice under O.C.G.A. § 36-33-5. *Dover* does

not, as Roswell apparently convinced the trial court, stand for the proposition that all plaintiffs in equity (the first class described above) must provide a municipal defendant with an *ante litem* notice in order to recover expenses of litigation under O.C.G.A. § 13-6-11.

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). A strict reading of the language of the statute makes it clear that it does not apply when there has not been "injury to person or property" and there is no allegation of "negligence" and nothing for the municipality to "adjust." To apply the statute to plaintiffs in GCO's position is to apply a cramped and illogical reading of the requirements.

As this Court has observed, "[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). The purpose of the statute is

not to erect technical procedure hurdles, but to decrease litigation by providing municipalities with an opportunity to adjust and potentially settle claims, thus encouraging the extra-judicial resolution of claims for money damages. *City of Gainesville v. Moss,* 108 Ga. App. 713 (1963), *overruled on other grounds.* In the case at bar, GCO corresponded with Roswell's attorney over a two-and-a-half year period about the illegal ordinances before commencing litigation. There is nothing more that GCO could have done to encourage Roswell to resolve the dispute over its preempted ordinance.

3.D. Sandy Springs Waived its Right to Object to Lack of *Ante Litem* Notice

In addition to the above arguments, which apply equally well to Sandy Springs as well as to Roswell, Sandy Springs waived its right even to object to lack of an *ante litem* notice.

In its Preliminary Scheduling Order dated December 5, 2007, the trial court required all defendants (including Sandy Springs) to raise any immunity defenses by motion by January 30, 2008. R. 181-182. Sandy Springs filed a timely Motion to Dismiss, but did not raise any immunity defenses in that Motion. O.C.G.A. § 36-33-5 is a sovereign immunity statute. *City of Atlanta v. Hudgins,* 193 Ga. 618, 19 S.E.2d 508 (1942). By

failing to include in its Motion to Dismiss (converted by the trial court to a motion for summary judgment) any complaints that GCO failed to abide by the *ante litem* notice statute, Sandy Springs waived that defense. Nevertheless, the trial court's judgment with respect to Sandy Springs precludes Appellants from seeking litigation expenses from Sandy Springs.

Conclusion

GCO has demonstrated that the trial court erred in making the judgment against Atlanta a final judgment, thereby precluding GCO from proving the rest of its case and seeking additional remedies sought against Atlanta. The judgment of the trial court must be reversed, to the extent it was made a final judgment, with instructions to proceed with the rest of GCO's case against Atlanta.

GCO further has demonstrated that the trial court erred in dismissing GCO's case against Roswell and Sandy Springs, who continue to regulate the carry and possession of firearms in some manner with local ordinances. Roswell's and Sandy Springs' motions for summary judgment should not have been granted, and GCO's motion for summary judgment against Roswell and Sandy Springs should have been granted. The judgment of the trial court in favor of Roswell and Sandy Springs must be vacated, with

instructions to grant GCO's motion for summary judgment against Roswell and Sandy Springs.

Dated August 14, 2008

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellant on August 14, 2008 via U.S. Mail upon:

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