IN THE COURT OF APPEALS

STATE OF GEORGIA

GEORGIACARRY.ORG, INC., TAI TOSON, EDWARD WARREN, JEFFREY HUONG, JOHN LYNCH, MICHAEL NYDEN, AND JAMES CHRENCIK,	)	
PLAINTIFFS-APPELLANTS,	)	CASE NO. A09A0307
v.	)	
CITY OF ATLANTA, GEORGIA, CITY OF ROSWELL, GEORGIA AND CITY OF SANDY SPRINGS, GEORGIA,	)	
DEFENDANTS-APPELLEES.	)	

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION, INC.

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SOUTHEASTERN LEGAL FOUNDATION, INC.

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BRIEF OF *AMICUS CURIAE*

SOUTHEASTERN LEGAL FOUNDATION, INC.

I. INTRODUCTION

GeorgiaCarry.org, Inc. and several individuals filed the instant suit against several Georgia cities. The subject of the suit was the cities' ordinances that restricted the carrying and possession of firearms when state law and the Georgia State Constitution preempted such ordinances.

Prior to filing suit, by and through their counsel, plaintiffs made multiple contacts with the defendant cities about the illegal ordinances. Contact included a written warning that plaintiffs would file suit if the defendants did not rescind the illegal ordinances. The cities refused, and plaintiffs filed a suit in equity to enforce state law.

Because defendants acted in bad faith and were stubbornly litigious in their refusal to rescind the local ordinances, plaintiffs sought attorney's fees and litigation expenses under O.C.G.A. § 13-6-11. Some of the defendant cities opposed the claim for reimbursement of attorney's fees and litigation expenses under O.C.G.A. § 36-33-5, the State's municipal *ante litem* statute. As noted

above, the cities were warned plaintiffs would file suit and that counsel represented them.

Thus, the issue of whether O.C.G.A. § 36-33-5 prevents a trial court from awarding attorney's fees and litigation expenses when an equity plaintiff has challenged illegal government action can and should be considered by this Court. The Court should consider this important issue because, as the present law stands, public interest groups, similarly situated entities or individuals are denied reimbursement of attorney's fees and litigation expenses if they do not follow O.C.G.A. § 36-33-5 to the letter. A public interest group, similarly situated entity or individual is not required to file an *ante litem* notice prior to filing an equity action; however, the same group, entity or individual must file an *ante litem* notice if they seek reimbursement of attorney's fees and litigation expenses for bad faith or stubbornly litigious conduct. The present law yields unreasonable outcomes, and only functions to protect city governments who act in bad faith or are stubbornly litigious. Denying reimbursement of attorney's fees and litigation expenses in this situation discourages public interest litigation and runs counter to public policy supporting equity suits challenging illegal government action. A limited exception to the blanket application of O.C.G.A. § 36-33-5 will solve this problem, and will

allow public interest groups, similarly situated entities or individuals to continue to advocate for the public interest without risking scarce financial resources.

This brief of *amicus curiae,* the Southeastern Legal Foundation, Inc. ("SLF"), is filed pursuant to Court of Appeals Rule 23 in the above-styled matter to clarify whether the *ante litem* requirement contained in O.C.G.A. § 36-33-5 should continue to apply to claims for attorney's fees and litigation expenses where only equitable relief is sought. In clarifying this point, the Court would necessarily reexamine the scope of its decision in Dover v. City of Jackson, 246 Ga. App. 524, 541 S.E.2d 92 (2000).

II. STATEMENT OF INTEREST

Founded in 1976, SLF is a non-profit public interest organization that shares and promotes the public interest in the proper construction and enforcement of the laws and Constitution of the state of Georgia and of the United States. SLF is a constitutional public interest law firm and policy center that advocates for constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before Georgia and United States Courts.

Out of necessity, public interest groups operating in Georgia focus vigorous attention on judicial matters that influence the ability to prevent illegal or unconstitutional government action. Public interest groups are concerned with legal impediments that negatively affect the economic feasibility of pursuing equitable remedies on behalf of the public interest. Allowing an *ante litem* statute, which is concerned with promoting the settlement of tort claims against a municipality, to prevent the reimbursement of attorney's fees and litigation expenses when equitable relief is sought to stop illegal government action, is one of those impediments that harms the public interest.

III. ARGUMENT

A. The thirty-day waiting period mandated by O.C.G.A. § 36-33-5 disproportionately affects actions which seek primarily equitable relief.

Residents or taxpayers of a municipality are entitled to seek an equitable remedy enjoining a municipality from enforcing an ordinance. Bagby v. Bowen, 180 Ga. 214, 178 S.E. 439 (1935). Additionally, preliminary or temporary injunctions can enjoin a municipality from acting until a decision is reached on the merits of the litigation. Eastman Kodak Co. v. Fotomat Corp., 317 F. Supp. 304

(N.D. Ga. 1969). However, the waiting period requirement contained in O.C.G.A. § 36-33-5 delays this opportunity for immediate relief, disproportionately affecting litigants seeking equitable rather than monetary relief. If a municipality is acting unlawfully, it is not in the public interest to delay an injunction that could halt the conduct in question. O.C.G.A. § 36-33-5 serves as a significant deterrent for those seeking to challenge a municipality's actions while also reasonably requesting reimbursement of attorney's fees and litigation expenses when acting for the public good.

Although the benefit provided under O.C.G.A. § 36-33-5 to municipalities sued for injunctive relief is minimal, the cost to public interest groups, similarly situated entities or individuals seeking such relief is great. In many cases where a litigant seeks equitable relief, time is a valuable commodity, and any period of delay may determine the extent of the damage to the public good. This is not the case where a true legal remedy is requested based on injury to person or property.

The plaintiffs in this case sought to enjoin the enforcement of several illegal ordinances. Unlike most cases involving personal injury or injury to property, the instant case alleged an ongoing illegal practice, which could continue throughout the litigation. The possibility of continuing harm is present in cases like the instant

matter, and litigants in such actions are therefore more likely to be concerned about the impact of O.C.G.A. § 36-33-5's statutory waiting period.

Litigants in equitable actions seek immediate relief, whereas, tort litigants seek monetary damages. Because the harm alleged in suits seeking injunctive relief is irreparable and ongoing, litigants immediately seek to enjoin illegal conduct. In an action seeking equitable relief against a municipality, the statutory waiting period dangerously postpones such relief, while shielding official bad faith and stubbornly litigious conduct on the part of cities.

B. Requiring compliance with O.C.G.A. § 36-33-5 where equitable relief, attorney's fees and litigation expenses are sought results in an application that is adverse to the public interest.

In Thompson v. City of Atlanta, 219 Ga. 190 (1963), the Georgia Supreme Court held that claims for equitable relief were not subject to the *ante litem* notice requirement found in O.C.G.A. § 36-33-5 because they did not seek money damages. Subsequently, this Court determined that claims for attorney's fees and litigation expenses themselves constituted money damages, and held that even actions which otherwise seek only equitable relief are subject to O.C.G.A. § 36-33-5 on accompanying claims for attorney's fees and litigation expenses. Dover at

526. The Dover decision, however, makes for discordant application of O.C.G.A. § 36-33-5.

Dover involved a challenge to a city zoning ordinance. By the time the case reached this Court, the sole issue remaining for determination was an injunctive relief claim asserting that the ordinance was unconstitutional. All damage claims had been withdrawn or dismissed before the case reached the Court of Appeals.

The primary issue for the Court's determination was whether the plaintiffs below were required to file an *ante litem* notice under O.C.G.A. § 36-33-5 to maintain a claim for attorney's fees and litigation expenses. The trial court found on summary judgment that because plaintiffs had not notified the city under O.C.G.A. § 36-33-5 that they intended to seek attorney's fees and litigation expenses, they were precluded from asking for this relief under O.C.G.A. §13-6-11.[1] This Court agreed, finding that attorney's fees and litigation expenses were

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[1] O.C.G.A. § 13-6-11 states:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly

money damages. The case was then remanded to the trial court to determine the constitutionality of the ordinance.[2]

O.C.G.A. § 36-33-5 allows municipalities to adjust claims brought against the public treasury. This statute also requires prompt presentation of claims to preserve evidence, to abate nuisances effectively, and to serve as an additional

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litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

[2] Despite the fact that expenses of litigation under O.C.G.A. § 13-6-11 may not be available against a city if the requisite notice under O.C.G.A. § 36-33-5 is not filed, a plaintiff may still be able to recover attorney's fees and litigation expenses under O.C.G.A. § 9-15-14 if the defendant city asserted a defense that was devoid of "any justiciable issue of law or fact," or if the defense "lacked substantial justification." However, the party making the motion under O.C.G.A. § 9-15-14 must follow its requirements scrupulously. *See* Glass v. Glover, 241 Ga. App. 838, 528 S.E.2d 262 (2000) and Panhandle Fire Prot., Inc. v. Batson Cook Co., 288 Ga. App. 194, 653 S.E. 2d 802 (2007).

statute of limitation. City of Gainesville v. Moss, 108 Ga. App. 713, 134 S.E.2d 547 (1963), overruled on other grounds, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488 (1994). Revealing the statute's true function and nature, the language denotes claims contemplated for settlement would sound in tort.

O.C.G.A. § 36-33-5(b) requires that the notice provided to the municipality must include the "time, date, and extent of the injury, as nearly as practicable." Subsection (b) also requires that the plaintiff provide notice to a city within six (6) months of the occurrence of the event giving rise to the claim. Although providing such information is relatively simple in cases involving personal injury or injury to property, the task becomes imprecise in the case of constitutional injury and allegations of bad faith and stubbornly litigious behavior associated with that injury. Where litigants challenge a municipal ordinance on constitutional grounds, the time, date and extent of injury are difficult to quantify. O.C.G.A. § 36-33-5(b) (2008). In addition, Subsection (b) specifies that the notice include information about "the negligence which caused the injury." In many cases seeking only injunctive relief accompanied by a claim for reimbursement of attorney's fees and

litigation expenses because of bad faith or stubbornly litigious behavior, as in this case, there is no claim of negligence.[3]

The lack of congruency between O.C.G.A. § 36-33-5 and instances such as the present case far exceeds mere impracticality. O.C.G.A § 36-33-5(b) (2008). Requiring an *ante litem* notice as a condition precedent for claims for reimbursement of attorney's fees and litigation expenses, because the claims are equated with money damages, undermines a litigant's ability to dispense with filing *any* notice when seeking equitable relief. This arbitrary requirement slows down the process where bad faith and stubbornly litigious behavior have been alleged. Moreover, the requirement is contradicted by the equitable maxim, "Equity regards substance rather than form." N. Fetter, Handbook of Equity Jurisprudence 23-24 (1895).

In the instant case, the underlying claims arose from the enactment of unlawful ordinances. Requiring an arbitrary limitation on challenging such

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[3] Moreover, a claim for bad faith is more akin to an intentional tort than one of negligence, and entities are presumed to intend those acts they voluntarily undertake—such as passing an ordinance.

ordinances is adverse to the public interest and impossible to apply evenly and fairly. The ordinances involved prevented the plaintiffs from exercising the right to keep and bear arms specified by the Georgia State Constitution. Even though there was a violation of this right, the denial did not give rise to a specific "event" from which time is measured as referenced by O.C.G.A. § 36-33-5(b). Thus, there is no clear answer as to what date the claim for reimbursement of attorney's fees and litigation expenses arose.

C. A limited exception to the requirements of O.C.G.A. § 36-33-5 should be made available to public interest groups, similarly situated entities or individuals when a city's bad faith and stubbornly litigious conduct justifies a claim under O.C.G.A. § 13-6-11, and the result of the suit is a benefit to the public.

1. A narrowly defined exception is a reasonable alternative to the blanket construction in Dover.

This Court should reconsider its application of the *ante litem* notice requirements of O.C.G.A. § 36-33-5 to claims for reimbursement of attorney's fees and litigation expenses under O.C.G.A. § 13-6-11 associated with requests for declaratory and injunctive relief against cities. O.C.G.A. § 36-33-5 does not apply

to actions which seek only equitable relief. The rationale is that a claimant is not seeking monetary relief, so there is no claim on the public fisc. Even though a claim based on bad faith or stubborn litigiousness may go against the public treasury, a narrow exception would permit such claims to go forward when the overall benefit is in the public's interest.

Two points underscore this assertion. First, in the instant case, the plaintiffs, a public interest group suing with interested parties, sought declaratory relief against several cities that had enacted ordinances preempted by a state law of general application and the Georgia State Constitution. The illegality of the cities' ordinances was apparent without any notice. Plaintiffs' counsel made numerous contacts with the cities, pointing out that the ordinances were illegal. After plaintiffs contacted the cities, the municipal defendants were on notice of the nature and extent of the deficiencies of their ordinances. Further, the cities were on notice that plaintiffs were represented by counsel. There was no surprise to the defendants when the complaint contained a claim for attorney's fees and litigation expenses for bad faith and stubborn litigiousness under O.C.G.A. § 13-6-11. In fact, the cities had been put on notice because plaintiffs substantially complied with O.C.G.A. § 36-33-5. The standard required under the statute is substantial

compliance. City of E. Point v. Christian, 40 Ga. App. 633, 151 S.E. 42 (1929); Carruthers v. City of Hawkinsville, 171 Ga. 313, 155 S.E. 520 (1930), answer conformed to , 42 Ga. App. 476, 156 S.E. 634 (1931); Mayor of Savannah v. Helmken, 43 Ga. App. 84, 158 S.E. 64 (1931); City of Rome v. Stone, 46 Ga. App. 259, 167 S.E. 325 (1933); Olmstead v. Mayor of Savannah, 57 Ga. App. 815, 196 S.E. 923 (1938); City of Dalton v. Joyce, 70 Ga. App. 557, 29 S.E.2d 112 (1944); City of Atlanta v. Frank, 120 Ga. App. 273, 170 S.E.2d 265 (1969); City of Columbus v. Preston, 155 Ga. App. 379, 270 S.E.2d 909 (1980) From the tenor, volume, gravity and frequency of communications by plaintiffs' counsel, the municipal defendants had substantial and constructive notice that plaintiffs would seek attorney's fees and litigation expenses.

Even without the ample notice present in this case, as noted above, when a city acts in a manner which supports a claim for bad faith and stubborn litigiousness under O.C.G.A. § 13-6-11, such actions are apparent without notice from potential plaintiffs. The need for an exception is underscored by the fact that when a municipality adopts an illegal ordinance, formal notice of an illegal act should not be required. In such a case, the exception would allow the public interest plaintiff to proceed with a claim under O.C.G.A. § 13-6-11 due to a city's

unconstitutional actions that harm the public. **Likewise, a city should not be allowed later to claim immunity for its bad official actions under a statute designed to protect the public treasury.** Allowing such an exception under these circumstances would also comport the current law with the exception that does not require *ante litem* notice before filing a suit for declaratory relief against a municipality.

A similar exception is recognized in Alabama. An attorney's fee claim is permitted when an attorney, while representing a private party, renders a public benefit while litigating. This is known as the "common fund" or "common benefit" exception to the general rule that parties bear their own costs. Specifically,

> [A]ttorney fees may be awarded where the plaintiff's efforts are successful in creating a fund out of which the fees may be paid, *or when the efforts of the plaintiff's attorneys render a public service or result in a benefit to the general public in addition to serving the interests of the plaintiff.*

Legal Environmental Assistance Foundation, Inc. v. Alabama Department of Environmental Management, 883 So. 2d 198, 203 (2003) (emphasis in original).

When litigation confers a benefit on the public, the foregoing exception recognizes that attorney's fees are warranted. Compelling reasons exist to reimburse plaintiffs who protect the public good when bad faith or stubbornly litigious municipal action makes filing an equitable action necessary. This Court should allow this limited exception, despite its earlier holding in Dover that broadly defined attorney's fees and litigation expenses as money damages.

Redefining attorney's fees and litigation expenses as reimbursement rather than money damages when premised on a city's bad faith or stubbornly litigious conduct is justified when the value of the litigation to the public out weighs the cost to public funds. For example, reimbursing a public interest plaintiff for her attorney's fees and litigation expenses is justified when the result of plaintiff's expenditures is the cessation of unconstitutional municipal action. Moreover, attorney's fees and litigation expenses are logically seen as reimbursement when there are no accompanying claims for legal relief because the basis of the suit was the public wrong committed by the municipality, not a wrong committed against a private person.

2. A limited exception to the statute requiring an *ante litem* notice for reimbursement of attorney's fees and litigation expenses would meet the purposes of O.C.G.A. § 36-33-5.

Even though a plaintiff does not have to provide *ante litem* notice before commencing an equitable action, the purposes of O.C.G.A. § 36-33-5 are not met by requiring a public interest group, similarly situated entity or individual to send a specific notice regarding a claim for attorney's fees thirty (30) days prior to filing for equitable relief. As noted before, many times equitable relief depends on speed to be effective. Requiring a party seeking equitable or injunctive relief to adhere to O.C.G.A. § 36-33-5, which pertains to legal relief, in order to protect a claim for reimbursement of attorney's fees and litigation expenses against a city acting in bad faith or being stubbornly litigious is contradictory. Further, the requirement neuters the important components of speed and efficiency. Thus, if the purposes of requiring an *ante litem* notice are not served, then the requirements should be waived as a limited exception.

Overall, O.C.G.A. § 36-33-5 is designed to serve four purposes. Those purposes are:

> (1) to afford the officials of an offending city opportunity to investigate the complaint at a time when the evidence relative thereto is calculated to be more readily available; (2) to afford them opportunity, if the complaint relates to a continuing nuisance, to take proper steps to abate it before the effects thereof become great or far-reaching; (3) to bar a claimant's right of recovery for any and all claims arising by reasons of matters that may have transpired or existed giving rise to a cause of action on dates more than six months prior to the giving of the required *ante litem* notice; and (4) to afford the city an opportunity to negotiate a settlement of such claims as it may determine to be meritorious before litigation is commenced, thus protecting the interests of the general public by reducing the exposure of the funds in the city treasury to depletion from growing claims for damages.

City of Gainesville v. Moss, 108 Ga. App. 713, 134 S.E.2d 547 (1963), overruled on other grounds, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488 (1994); Robinette v. Johnston, 637 F. Supp. 922 (M.D. Ga. 1986).

Requiring notice to make evidence more readily available to a city investigating a claim is more applicable to situations where evidence can disappear or become compromised over time, as in cases involving personal injury or property. In an equitable challenge over whether an ordinance is illegal or unconstitutional, there is not the same emphasis on the preservation of facts because there are almost no facts to collect. This is so even if there is a claim of bad faith or stubborn litigiousness. In this case, the cities possessed compelling evidence from the plaintiffs that their actions were illegal. Plaintiffs had regular contact with city officials and requested that they comply with state law. In addition, the instant case is not of a type where there is concern about physical or property damage flowing from an unabated nuisance.

Treating the *ante litem* requirement as a statute of limitation should not apply when there is a constitutional challenge. If O.C.G.A. § 36-33-5 were strictly applied here, there are unintended results in relation to claims of bad faith or stubborn litigiousness. For example, even though city officials may have acted in bad faith, the argument could be made that if an action challenging the adoption of an ordinance was not brought within six (6) months of the adoption, then no claim

for bad faith could ever be asserted. This was not the intention of the General Assembly in enacting O.C.G.A. § 36-33-5.

As far as offering the cities the opportunity to settle any claim for reimbursement of attorney's fees, the instant claim is not a "claim" in the traditional sense, where the value is determined by objective criteria such as medical records or expert opinion. Thus, there is no ability for conventional adjustment of its value. Moreover, before the plaintiffs filed this suit, the cities knew or should have known that the ordinances adopted were contrary to state law and the Georgia State Constitution. City officials might have easily remedied the violations by rescinding the ordinances. Furthermore, the cities knew plaintiffs were represented by legal counsel, who participated in the ordinance discussions over many months. Thus, any argument that the cities were without the time to consider the claims under the notice period of O.C.G.A. § 36-33-5 is specious.

The Court may be concerned that the issue of the applicability of O.C.G.A. § 36-33-5 was not directly addressed by the trial court. However, if this Court reverses the trial court's actions and allows the claims on appeal to go forward, the attorney's fee and litigation expenses issue will be unresolved. It is an important issue because it directly affects public interest groups, similarly situated entities or

individuals who are dedicated to ferreting out illegal government action. Because of the blanket application of O.C.G.A. § 36-33-5, these groups are disadvantaged when dealing with cities. Such an application eliminates the ability of public interest groups, similarly situated entities or individuals to recoup scarce financial resources spent in pursuit of the public good. If the public interest groups, similarly situated entities or individuals prove the merits of their case, the law ought not prevent them from receiving reimbursement for an important policy effort undertaken on behalf of the public. Although it is an important public policy goal to protect the public fisc, it is equally important for those resources to support the removal of impediments to constitutional government.

IV. CONCLUSION

Applying O.C.G.A. § 36-33-5 to actions seeking equitable relief and reimbursement of attorney's fees and litigation expenses based on bad faith and stubborn litigiousness is neither in the public interest nor a harmonious application of the statutory language. Adding a limited exception to the *ante litem* requirement for cases in which a public interest group, similarly situated entity or individual seeks both equitable relief and reimbursement of attorney's fees and litigation expenses under O.C.G.A. § 13-6-11 does not hinder a city's ability to settle claims.

Further, it is unlikely to burden municipalities with unnecessary expenses. Applying O.C.G.A.§ 36-33-5's *ante litem* requirement to equitable relief cases in which reimbursement of attorney's fees and litigation expenses is sought does not provide benefit to the public, nor does it further the statute's purpose of allowing cities to adjust negligence claims.

Although public benefit from the statute's current application in the instant case is speculative, damage to the public interest is demonstrable. Citizens have a vital interest in efforts intended to halt the unlawful actions of municipal governments. Applying O.C.G.A. § 36-33-5 to cases seeking equitable relief and reimbursement of attorney's fees and litigation expenses based on bad faith and stubborn litigiousness endangers this interest by delaying relief. The application not only burdens the litigants, but the public, as well. If plaintiffs are required by issues and circumstances to act swiftly, the only entities protected by O.C.G.A. § 36-33-5 are the municipal governments that act in bad faith or are stubbornly litigious. Such is the law's present state under the Court's previous decision in Dover.

For the foregoing reasons, a limited exception allowing public interest groups, similarly situated entities or individuals to apply for attorney's fees and

litigation expenses as reimbursement under O.C.G.A. § 13-6-11 when official bad faith action is present serves the public interest.

Southeastern Legal Foundation urges this Court to reconsider its holding in Dover v. City of Jackson that all attorney's fees and litigation expenses under O.C.G.A. § 13-6-11 are monetary damages. Further, in actions undertaken on behalf of the public interest, SLF urges the Court to create a limited exception to the *ante litem* requirement for actions in equity where reimbursement of attorney's fees and litigation expenses is the only monetary relief sought.

Respectfully submitted this the 1st day of October, 2008.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has served a true copy of the foregoing Brief of *Amicus Curiae* Southeastern Legal Foundation, Inc. upon the following persons by placing said copy in the United States Mail, first-class postage paid and addressed as follows:

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This 1st day of October, 2008.

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