STATE OF INDIANA

COUNTY OF LAKE

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
HAMMOND, INDIANA

CITY OF GARY, INDIANA,
Plaintiff,
v.
GLOCK CORP., et al,
Defendants,
STATE OF INDIANA,
Intervenor.

CASE NO. 45D01-1211-CT-233

Filed in Open Court
August 12, 2024
CLERK LAKE SUPERIOR COURT
MW

ORDER DENYING MOTIONS TO DISMISS

The plaintiff appears by Attorney Philip Bangle, Attorney Christopher Wilson and Attorney Richard Shevitz; the defendant Colt's Manufacturing Company, LLC appear by Attorney Michael Rice; the defendants Sturm Ruger Company, Inc. and Smith & Wesson Corp appear by Attorney James Vogts, Attorney Kevin Steele and Attorney Terry Austgen; the defendants Glock, Inc. and Beemiller, Inc. d/b/a High Point Firearms appear by Attorney Scott Allan; the defendant Taurus International Manufacturing, Inc. appears by Attorney John Weeks; the defendant Phoenix Arms appears by Attorney April Geltmaker; the defendant Blythe's Sports Shope, Inc. appears by Attorney John Hughes; the defendant Cash Indiana appears by Attorney Michael Deppe; the defendant Ameripawn of Lake Station, Inc. appears by Attorney Paul Chael; the defendants Westforth Sports, Jacks Loan and South County appear by Attorney Timothy Rudd; and intervenor State of Indiana appears by Attorney James Barta for hearing on the defendants Smith & Wesson Corp.'s, Sturm, Ruger & Company, Inc.'s, Colt's Manufacturing Company, LLC's, Beretta U.S.A Corp.'s, Phoenix Arms's, Glock, Inc.'s Beemiller, Inc. d/b/a Hi-Point Firearms's, Browning Arms Corp.'s and Taurus International Manufacturing, Inc.'s, Jack's Loan Office, Inc.'s, Blythe Sports Shop, Inc. and Ameripawn of LakeStation, Inc.'s Motions for Judgment on the Pleadings pursuant to Trial Rule 12 (C) of the Indiana Rules of Trial Procedure of the plaintiff City of Gary's First Amended Complaint.

These motions were brought about by the enactment and signing into law of IC 34-12-3.5 which provides:

> Chapter 3.5. Legal Actions by a Political Subdivision Against a Firearm or Ammunition Manufacturer, Trade Association, Seller, or Dealer
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> Sec. 1. This chapter applies to an action or suit filed by a political subdivision before, after, or on August 27, 1999.
>
> Sec. 2. The following definitions apply throughout this chapter:
> (1) "Ammunition" has the meaning set forth in IC 35-47-1-2.5.
> (2) "Firearm" has the meaning set forth in 18 U.S.C. 921(a)(3).
> (3) "Political subdivision" has the meaning set forth in IC 34-6-2-110.
> (4) "Trade association" means a corporation, unincorporated association, federation, business league, professional organization, or business organization that meets all of the following requirements:
> (A) The entity is not organized or operated for profit.
> (B) No part of the net earnings of the entity inures to the benefit of a private shareholder or individual.
> (C) The entity is an organization:
> (i) described in 26 U.S.C. 501(c)(6); and
> (ii) exempt from taxation under 26 U.S.C. 501(a).
> (D) Two (2) or more members of the entity are manufacturers or dealers in firearms or ammunition.
>
> Sec. 3. (a) Notwithstanding IC 34-12-3 or any other law, only the state of Indiana may bring or maintain an action by or on behalf of a political subdivision against a firearm or ammunition manufacturer, trade association, seller, or dealer, concerning the:
> (1) design;
> (2) manufacture;
> (3) import;

(4) export;
(5) distribution;
(6) advertising;
(7) marketing;
(8) sale; or
(9) criminal, unlawful, or unintentional use;

of a firearm, ammunition, or a component part of a firearm or ammunition.

(b) Except as provided in subsection (c), notwithstanding IC 34-12-3 or any other law, a political subdivision may not independently bring or maintain an action described in subsection (a).

The trial court may grant a motion for judgment on the pleadings if a review of the pleadings establishes that no material issue of fact exists and the movant is entitled to judgment as a matter of law, *Schuman v. Kobets*, 698 N.E.2d 375, 377-78 (Ind. Ct. App. 1998); *Matter of Paternity of R.C.*, 587 N.E.2d 153, 155-156 (Ind. Ct. App. 1992). A motion for judgment on the pleadings tests the sufficiency of the complaint to state a redressable claim, not the facts to support it, *South Eastern Indiana Natural Gas v. Ingram*, 617 N.E.2d 943, 946 (Ind. Ct. App. 1993). The test to be applied is whether the allegations of the complaint, taken as true and in the light most favorable to the nonmovant and with every intendment regarded in his favor, sufficiently state a redressable claim, *Id.* at 946-47. The party moving for judgment on the pleadings admits for purposes of the motion all facts well pleaded and the untruth of any of his own allegations which have been denied, *Mirka v. Fairfield of America, Inc.*, 627 N.E.2d 449, 450 (Ind. Ct. App. 1994), *trans. denied.* The Court can also consider facts that are subject to judicial notice, *Anderson v. Anderson*, 399 N.E.2d 391, 406 (Ind. Ct. App, 1979). When the pleadings present no material issues of fact, and the facts shown by the pleadings clearly entitle a party to judgment, the entry of judgment on the pleadings is appropriate. *id.*

The Manufacturers assert that, under IC 34-12-3.5, no material fact exists that not only does the Indiana Attorney General have sole authority

to bring the action that Gary has filed, but also that Gary, a political subdivision, is prohibited from bringing such an action. The Manufacturers maintain that dismissal pursuant to Trial Rule 12(C) is appropriate.

Gary asserts that the statute is unconstitutional special legislation that does not have general application but is directed solely toward the elimination of this particular case: Even though the statute is not expressly retroactive, the naming of the specific date upon which the original case was filed singles out this specific case. Further, Gary asserts that the firearms industry is not entitled to special protection and that there is no reason that political subdivisions shouldn't be permitted to sue gun manufacturers. Finally, the statute, Gary argues, unconstitutionally violates separation of powers by interfering with the Court's function and usurping its jurisdiction.

The Intervenor State of Indiana asserts that IC 34-12-3.5 is constitutional.

Constitutionality of IC 34-12-3.5

The standard of review for alleged violations of the Indiana Constitution is well established:

> Every statute stands clothed with the presumption of constitutionality until clearly overcome by a contrary showing. The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion, *State Bd. Of Tax Comm'rs v. Town of St. John,* 702 N.E.2d 1034, 1037 (Ind. 1998), *citations omitted; Hitch v. State,* 51 N.E.3d 216, 225 (Ind. 2016), *Jensen v. State,* 905 N.E.2d 384, 391 (Ind. 2009), *Wallace v. State,* 905 N.E.2d 371, 378

(Ind. 2009), *Lake County Clerk's Office v. Smith,* 766 N.E.2d 707, 766 (Ind. 2002).

The journey of the analysis of the constitutionality of IC 34-12-3.5 begins nearly two hundred years ago when the Indiana General Assembly passed the Mammoth Internal Improvement Act. The law went into effect in 1836 upon the signature of Governor Noah Noble. The law added $10 million (some $337 million in today's dollars) to capitalize on cutting-edge transportation technology: canals. The rationale of the General Assembly was that the United States population was moving westward, and the revenue gained from the use of the canal system by those westward bound would retire the debt and benefit the state financially for years to come. Unfortunately, two events intervened. First, another cutting-edge transportation technology became available that far outdid the mule named Sal and her fifteen miles (or years) on the Erie Canal: railroads which all but took away all transportation business from the canals. Second, the financial Panic of 1837 eviscerated Indiana's economy. The result was a near total bankruptcy for the state. This, in turn, brought about a new constitution for the state in 1851 which codified the fear and surprise at the financial disaster and resulted in an almost fanatical devotion to never going into debt again. Even though amended over the years, Article 10, Section 5 still provides:

> **(a)** No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.

Article 13, Section 1 of the Indiana Constitution limits the amount of debt that a municipal corporation may incur.

This almost religious devotion to limiting debt has resulted over the years in laws enacted by the General Assembly that demonstrate an unwillingness to trust any entity outside of state government with financial restraint. If a municipality wishes to sell bonds for capital

improvements, it must obtain approval from the state. A state agency, the Indiana Department of Local Government Finance[1], under IC 36-9-16-14 is tasked with this function.

Over the years, this general distrust by the General Assembly of local government has given control to state agencies, without offending the Indiana Constitution, over traditionally local functions only tangentially connected to finance. Examples abound: IC 36-1-3-8 specifically prohibits local governments from exercising a plethora of powers. The Department of Child Services has taken control from individual counties the funding and administration of child welfare and the Indiana Department of Education has likewise done so with public schools. A political subdivision or school system which is "distressed" as defined by statute can be taken over and operated by the state. A patient cannot sue a health care provider for malpractice in the county in which they live or where the malpractice took place until their proposed lawsuit is submitted first to the Indiana Department of Insurance, an agency of state government. Even the courts are affected by these policies. Locally elected prosecuting attorneys and judges and magistrates appointed by judges are paid by the state, not the counties whose citizens they serve.

Given the history of the Indiana General Assembly in enacting laws that have, over the years, eliminated local control of so many governmental functions, it does not take a leap of faith or logic to grasp that a legislature that requires a local school corporation to obtain state approval before it can build a fieldhouse for its high school basketball team or provides that a patient cannot sue their doctor before submitting their complaint to a state agency, would enact a law that vests in a state agency the sole discretion to sue a gun manufacturer on behalf of a political subdivision.

IC 34-12-3.5 is not special legislation. A plain reading of the statute discloses that it has statewide application. It does not "...pertain[s] to and affect[s] a particular case, person, place, or thing..." exclusively, *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683, 689 (Ind. 2003). It does not merely

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[1] This entity was formerly known as the Local Tax Control Board, an appellation that seems more honest.

appear to be general in form, *City of Hammond v. Herman & Kittle Properties, Inc.*, 119 N.E.3d at 81. Its application is not theoretical, *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty.*, 849 N.E.2d 1131, 1136 (Ind. 2006), *State v. Hoovler*, 668 N.E.2d 1229, 1234 (Ind. 1996). The fact that the statute includes a specific date of three days before Gary filed its original lawsuit (perhaps not so "crafty," p.17, *Gary's Memorandum in Opposition*) discloses a motivation for the legislation, not a limitation as to its application. Notwithstanding any discussions among several legislators and the Attorney General about what they would like the statute to accomplish, and what was said among them,[2] the statute fits into the history of the Indiana General Assembly, to, once again, not trust local government, across the board, for well or for ill, with yet another one of its functions.

IC 34-12-3.5 does not single out gun manufacturers any more than the Indiana Medical Malpractice Act singles out health care providers for protection. These statutes seek to remedy an ill in Indiana that was perceived, rightfully or wrongfully, by the Indiana General Assembly, all within a constitutional framework.

Finally, there is no violation of the open courts provision of Ind. Cons. Article 1 Section 1 or of separation of powers. IC 34-12-3.5 does not interfere with the filing of a lawsuit by a political subdivision against a gun manufacturer, it furthers the public policy objective, well-settled in Indiana as seen above, of giving the state decision-making authority over what was once a local prerogative. This is constitutionally permissible, *Mellowitz v. Ball State University*, 221 N.E.3d 1214, 1221 (Ind. 2023). The judicial process for bringing an action against a gun manufacturer remains the same, *Mellowitz, id.; Church v. State*, 189 N.E.3d 580, 590 (Ind. 2022): Political subdivisions may still pursue their claims against a gun manufacturers. IC 34-12-3.5 now requires the Indiana Attorney General to bring them on their behalf.

Under the standard of review set forth above by the Indiana Supreme Court in *State Bd. Of Tax Comm'rs v. Town of St. John, id.* and its subsequent

[2] Laws are like sausages, it is better not to see them being made, *attributed (perhaps not correctly) to Otto von Bismarck.*

decisions following it, IC 34-12-3.5, though arguably flawed and bad policy, is constitutional.

Retroactive Application of IC 34-12-3.5

Notwithstanding Gary's concession that IC 34-12-3.5 is not expressly retroactive, in the context of this case it is retroactive: Its application to this case would effectively bar a lawsuit pending for many years from being pursued.

An analysis of the retroactive application of statutes begins with the Indiana Supreme Court decision in *Bourbon Mini-Mart v. Gast Fuel & Servs.*, 783 N.E.2d 253, 260 (Ind. 2003):

> The general rule is that unless there are strong and compelling reasons, statutes will not be applied retroactively. An exception to this general rule exists for remedial statutes, *i.e.* statutes intended to cure a defect or mischief that existed in a prior statute. Ultimately, however, whether or not a statute applies retroactively depends on the Legislature's intent. That is, when a remedial statute is involved, a court must construe it to "effect the evident purpose for which it was enacted[.] Accordingly, remedial statutes will be applied retroactively to carry out their legislative purpose unless to do so violates a vested right or constitutional guaranty, *citations omitted.*

The Indiana Court of Appeals followed this rationale in *Brown v. Bucher & Christian Consulting, Inc.*, 87 N.E.3d 22, 26 (Ind. Ct. App. 2017).

Just what is a remedial statute? *McDermott Int'l, Inc. v. Wilander* 498 U.S. 337, 349 (1990) held:

> There is the salutary principle that the statutory language "must be read in the light of the mischief to be corrected and the end to be attained, *citing Warner v. Goltra,* 293 U.S. 155, 158 (1934).

Does IC 34-12-3.5 fit the definition of a remedial statute? IC 34-12-3-3, effective August 26, 1999, provided:

> Except as provided in section 5(1) or 5(2) [IC 34-12-3-5(1) or IC 34-12-3-5(2)] of this chapter, a person may not bring or maintain an action against a firearms or ammunition manufacturer, trade association, or seller for:
>
> **(1)** recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the lawful:
>
> **(A)** design;
> **(B)** manufacture;
> **(C)** marketing; or
> **(D)** sale;
>
> of a firearm or ammunition for a firearm; or
>
> **(2)** recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.

A plain reading of IC 34-12-3-3 reveals a legislative intent to broadly bar actions against firearms manufacturers, trade associations or sellers. The prohibition included political subdivisions. However, the Indiana Court of Appeals in *City of Gary v. Smith & Wesson Corp.,* 126 N.E.3d 813 (Ind. Ct. App. 2019), held that, although IC 34-12-3-3 barred recovery of damages resulting from the criminal or unlawful misuse of a firearm by a third party and barred recovery for negligent design of firearms, it did not bar recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, unlawful conduct, 126 N.E.3d at 827-829.

It seems obvious that the Indiana General Assembly enacted IC 34-12-3.5 "...to cure a defect or mischief that existed in a prior statute," *Bourbon Mini-Mart, id.*, the "... prior statute..." being IC 34-12-3-3, the application of which *City of Gary v. Smith & Wesson Corp., id.* limited. It expanded prohibition of the recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the lawful:

(A) design;

(B) manufacture;
(C) marketing; or
(D) sale;
of a firearm or ammunition for a firearm

to any action concerning the:

(1) design;
(2) manufacture;
(3) import;
(4) export;
(5) distribution;
(6) advertising;
(7) marketing;
(8) sale; or
(9) criminal, unlawful, or unintentional use
of a firearm, ammunition, or a component part of a firearm or ammunition.

to eliminate the exceptions carved out of IC 34-12-3-3 by the Indiana Court of Appeals in *City of Gary v. Smith & Wesson Corp., id.*

IC 34-12-3.5 is a remedial statute. Its retroactive application to the substance of this lawsuit is permissible "...unless to do so violates a vested right or constitutional guaranty," *Bourbon Mini-Mart, id.* This lawsuit, in one form or another, has been pending for twenty-five years. The General Assembly can prospectively cure what it perceived as "...a prior defect or mischief...", *Bourbon Mini-Mart, id.,* by requiring that all future actions against gun manufacturers by political subdivisions be brought on their behalf by the Attorney General. It cannot end this lawsuit which the appellate courts of this state have found to be permitted by prior statute. To do so would violate years of vested rights and constitutional guarantees set forth so eloquently in Gary's Memorandum of Law. To avoid manifest injustice, the substance of this lawsuit must be taken to its conclusion.

Trial Rule 17

Although not raised by any of the parties in their Memoranda, IC 34-12-3.5 raises potential issues under Trial Rule 17(A) of the Indiana Rules of Trial Procedure. Trial Rule 17(A) provides:

> **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest.
>
> **(1)** An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought, but stating his relationship and the capacity in which he sues.
>
> **(2)** When a statute provides for an action by this state on the relation of another, the action may be brought in the name of the person for whose use or benefit the statute was intended.
>
> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced initially in the name of the real party in interest.

Did the enactment of IC 34-12-3.5 make the State of Indiana the real party in interest in this case, the "...true owner of the right sought to be enforced...," *Bowen v. Metro Bd. of Zoning Appeals* (1974), 161 Ind. App. 522, 317 N.E.2d 193, which is "... entitled to the fruits of the action...," *Cook v. City of Evansville* (1978), 178 Ind. App. 20, 381 N.E.2d 493; *Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995); *City of Kokomo v. Estate of Newton*, 136 N.E.3d 1172, 1177 (Ind. Ct. App. 2019)? Both *City of Kokomo, id.* and *Hammes, id.* state unequivocally that, under Trial Rule 17(A)(2), the substitution of a party to a lawsuit by the real party in interest relates back to the time of the original complaint. If, indeed, the State of Indiana is the

real party interest, its substitution relates back to the inception of this lawsuit and it, and not Gary, is the proper party to prosecute this lawsuit.[3]

The key question in determining whether or not the State of Indiana qualifies as the real party in interest in this case is its ownership of the right to be enforced and its entitlement to the fruits of this lawsuit. *City of Kokomo, id,* is instructive.

Audra Newton, the owner of contiguous parcels of real estate and The Kokomo Glass Shop, Inc. which conducted business on both parcels, passed away. About a year after her death, the City of Kokomo filed a condemnation action on one of the parcels. Appraisers were appointed and, as is typical, the City and the Estate disputed over the damages due the Estate as a result of the condemnation. The core issue was that Kokomo Glass could no longer do business as a result of the taking of the one parcel by the City. The parcel not taken was offered for sale and Kokomo Glass moved its business, claiming damages for relocation expenses and lost profits. The case went to a jury trial, the City moved for a directed verdict that the Estate was not entitled to the damages sustained by Kokomo Glass. The trial court denied the motion, the case went to the jury which awarded to the Estate as a part of the damages the relocation expenses and lost profits sustained by Kokomo Glass. An appeal ensued and the Court of Appeals reversed, finding that "...the Estate's attempt to conflate Kokomo Glass with the Estate... is not well-taken," *City of Kokomo, id.* at 1178. The Estate was not entitled these particular fruits of the case as they involved damages incurred not by it, but by Kokomo Glass.

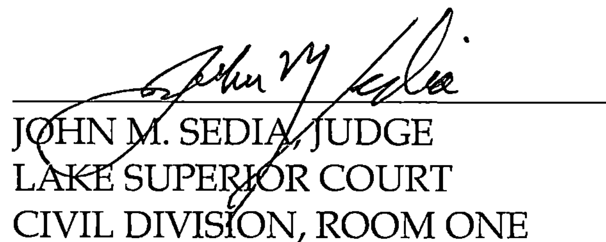
Gary made its decision to file and pursue this lawsuit on behalf of its residents against the defendants for damages sustained as a result of gun violence. Although the Court of Appeals has narrowed the scope of the claims, those remaining have been found to be legitimate. One cannot conflate the City of Gary with the State of Indiana just as the Estate of Audra Newton could not be conflated with Kokomo Glass. The "...true owner of the right sought to be enforced...", *Bowen, id.* and "... entitled to

[3] Given the "sausage making" described in detail in Gary's Memorandum, it is obvious that the State of Indiana would immediately file a Motion to Dismiss this lawsuit if it were to be found to be the real party in interest.

the fruits of the action…" is the City of Gary, Indiana and its residents and not the Attorney General of the State of Indiana.

IT IS THEREFORE ORDERED by the Court that all the Motions for Judgment on the Pleadings pursuant to Trial Rule 12 (C) of the Indiana Rules of Trial Procedure of the plaintiff City of Gary's First Amended Complaint filed by Smith & Wesson Corp., Sturm, Ruger & Company, Inc., Colt's Manufacturing Company LLC, Beretta U.S.A. Corp., Phoenix Arms, Glock, Inc., Beemiller, Inc. d/b/a Hi-Point Firearms, Browning Arms Corp, and Taurus International Manufacturing, Inc.; and by Jacks' Loan Office and by Blythe's Sports Shop, Inc. and Ameripawn of Lake Station, Inc., are denied.

Dated August 12, 2024



JOHN M. SEDIA, JUDGE
LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM ONE