IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES CAMP, Plaintiff, v. BETTY B. CASON in her official capacity as Probate Judge for Carroll County, Georgia and BILL HITCHENS in his official capacity as the Commissioner of the Georgia Department of Public Safety, Defendants.	)	CIVIL ACTION FILE NO. 1:06-CV-1586-CAP

PLAINTIFF'S REPLY TO DEFENDANT CASON IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. Defendant Cason Does Not Challenge the Merits

Cason has not challenged the merits of Plaintiff's case. She makes no attempt to rebut the evidence of her violations of Sections 7(a) and 7(b) of the Privacy Act. She does not even claim that she complied with the Georgia Weapons and Firearms Act. Instead, Cason relies ***entirely*** on repeating her claims of mootness based on arguments that have already been rejected.

II. Cason's Mootness Claims Already Have Been Rejected

On March 23, 2007, the Eleventh Circuit Court of Appeals ruled that this case was not moot, that "there is a sufficient imminence of future harm," and that Camp "has a concrete,

legally cognizable interest" in this case, in spite of the fact that Cason issued Camp a firearms license. Astonishingly, Cason's present claim of mootness is based in part on the fact that she issued Camp a firearms license. In addition, her brief is premised almost entirely on events that occurred before ***this*** Court ruled on Cason's Motion to Dismiss (a motion based on mootness) ***and which she already argued to the Court in conjunction with that Motion***. In support of her Motion to Dismiss last summer, Cason argued that she "did issue Plaintiff a temporary GFL" [Doc. 16, p. 3] and that as "the Social Security Number is no longer required, the relief sought by Plaintiff is moot." Doc. 16, p. 5. That argument was rejected by the Court of Appeals [Doc. 75], and subsequently the decision of the Court of Appeals was adopted as the judgment of this Court. Doc. 77.

Cason claims she has deleted Plaintiff's employment information from her records. Like Hitchens' eleventh hour change in GFL application forms, Cason's last minute deletion of Plaintiff's employment information does not moot the case. The Eleventh Circuit found that Plaintiff has "sufficient imminence of future harm" [Doc. 75, p. 9], because he will have to apply for a GFL again in four years. Plaintiff's entitlement to

additional relief against such future harm is discussed more fully below in Part III.

III. There Still Is Relief to Be Granted

Cason's argument that there is no more relief for the Court to grant Plaintiff was specifically rejected by the Court of Appeals. Cason makes a bare assertion, without even support in her affidavit, that her past violations will not be repeated. "Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon [the party asserting mootness]." *United States v. Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203, 89 S.Ct. 361 (1968). This is especially true for Cason, who continues to insist: 1) that employment information is pertinent to eligibility [Joint Preliminary Report - Doc. 23, p.3; Answer – Doc. 79, ¶ 45]; 2) that the public interest is in requiring SSNs and employment information [Answer - Doc. 79, ¶ 33]; and 3) that failure to comply with Section 7(b) of the Privacy Act does not infringe upon Plaintiff's federal rights [Answer – Doc. 79, ¶ 24].

"Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be adverted by the issuing of an injunction." Bourgeois v. Peters, 387 F.3d 1303, 1309 (11th Cir. 2004) (citation

omitted). Cason has argued for almost a year that her conduct is lawful, and she continued to violate the Privacy Act during this case. There is no evidence before the court that Cason has any intention of complying with federal and state law.

IV. Response to Statement of Facts

Cason now disputes the fact that she refused to process Plaintiff's GFL application without his SSN. Doc. 84, ¶ 12. She does not directly refute this fact as required by L.R. 56.1(B)(2)(a)(2)(i), but she refers to the Affidavit of Jean Thornhill [Doc. 85, ¶ 6] which nowhere directly affirms that the processing of Plaintiff's GFL application was ***not*** refused. Moreover, Plaintiff's counsel asked Cason to process Plaintiff's application without his SSN [Doc. 1, Exh. A], and ***she refused to do so in a written response*** [Doc. 1, Exh. B]. Cason objects [Doc. 84, ¶ 14] to her own written response as not material, but it establishes that she refused to process Plaintiff's GFL application without his SSN in violation of the Privacy Act. While Cason may wish at this point that she had processed Plaintiff's GFL application as requested, she hardly can say her own written refusal to do so is immaterial.

V. The Cases Cason Cites Are Inapposite

The cases cited by Cason in support of mootness can be distinguished easily from the case at bar. In *Coral Sprints Street Systems, Inc. v. City of Sunrise,* 371 F.3d 1320 (11th Cir. 2004), the challenged ordinance was repealed ***before*** the lawsuit was filed and only 16 days after plaintiff's counsel wrote a letter requesting the repeal. *Id*. at 1333. In the present case, it is undisputed that both Defendants refused to comply with the law prior to the filing of Camp's lawsuit.

In *Jews for Jesus v. Hillsborough County Aviation Authority*, 162 F.3d 627 (11th Cir. 1998), also cited in Cason's brief, the defendant abandoned the challenged practice one month after the filing of the lawsuit, but, more importantly, the court had a record before it of three years compliance with the law. *Id*. at 629. There is no such record in the case against Cason. In fact, she has not even submitted evidence, 10 months into the case and following two appeals to the Eleventh Circuit, that she intends to abide by the Federal Privacy Act or the Georgia Firearms and Weapons Act. Instead, she argues mootness based on the revised application form from last summer and her issuance of a license to Camp, events the Eleventh Circuit Court of Appeals has already ruled do not render the case moot. It is

undeniable that Cason would have been quite happy to have had the case declared moot and continue ignoring the federal Privacy Act requirements, as that is what she has argued throughout the duration of the litigation, including her most recent brief.

In *Christian Coalition of Alabama v. Cole,* 355 F.3d 1288 (11th Cir. 2004), the challenged opinion was withdrawn 22 days after the United States Supreme Court issued an opinion that a similar rule in another state was unconstitutional. The statement withdrawing the opinion cited the Supreme Court decision. *Id*. at 1290. Contrast that with the current case, in which Defendants had ample warning that their conduct was illegal because of a recent Privacy Act case in this Circuit with strikingly similar facts, right down to attempted modifications of the form, s*ee Schweir v. Cox*, 439 F.3d 1285 (11Th Cir. 2006); 340 F.3d 1284 (11th Cir. 2003); and 412 F. Supp.2d 1266 (N.D. Ga. 2005), but assiduously proceeded with the offensive conduct ***anyway***.

In *Crown Media LLC v. Gwinnett County, Georgia,* 380 F.3d 1317 (11th Cir. 2004), cited by Cason, the case was not moot even though Gwinnett abandoned the challenged practice ***four months before the case was filed***. *Id*. at 1322-1323.

In Cason's final case, *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055 (1997), the plaintiff won in district court, but resigned the day after the defendant filed a notice of appeal. *Id.* The present case has no similar voluntary relinquishment by Camp.

VI. Attorney's Fees

Cason contends that 42 U.S.C. § 1988(b) does not authorize an award of fees against a judicial officer for an act or omission taken ***in such officer's judicial capacity.*** Because she did not raise this argument when Plaintiff filed a Motion for Attorney's Fees last year [Doc. 51], this is Plaintiff's first opportunity to address the argument before this Court. Cason offers no discussion of whether her acts were "taken in [a] judicial capacity." It is clear under both federal and state law that they were not.

This Court already ruled that Plaintiff is a "prevailing party" with respect to Cason. Doc. 63, p. 4. The only task before the Court, therefore, is to determine if Cason's sole defense to fees has merit. Her defense simply assumes, without discussion, that she was acting in a judicial capacity. This oversight is astonishing in light of the fact that Plaintiff already argued before the Eleventh Circuit, during the second

appeal in this case, that processing and issuing GFLs is ***not*** an act taken in a judicial capacity.

Whether a judge is acting in a judicial capacity is not dependent on the mere fact that the act was performed by a judge, as not every act performed by a judge is judicial. Rather, the question turns on the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978). This holding is determinative of the issue in this case, because Camp did ***not*** "deal with [Cason] in [her] judicial capacity," nor is issuing a license "a function normally performed by a judge."

The fact that a judge was performing an act prescribed by law is not determinative. This Circuit has upheld as appropriate an award of attorney's fees against a judge performing an act prescribed to him. *Glassroth v. Moore,* 347 F.3d 916 (11th Cir. 2003). Rather, the Supreme Court's *Stump* test determines whether the act is taken in a judicial capacity. This test has been restated by the former Fifth Circuit and adopted by this Circuit as a four-part test of whether: 1) the precise act complained of is a normal judicial function; 2) the

events involved occurred in the judge's chambers or in open court; 3) the controversy centered around a case then pending before the judge; and 4) the confrontation arose directly and immediately out of a visit to the judge in his judicial capacity. *See*, *e.g.*, *Sibley v. Lando,* 437 F.3d 1067, 1070 (11th Cir. 2005); *Scott v. Hayes,* 719 F.2d 1562, 1565 (11th Cir. 1983); and *Harper v. Merckle,* 638 F.2d 848, 858 (5th Cir. 1981). Cason fails on all four parts of this test.

(i) Issuing Firearms Licenses Is Not A Normal Judicial Function

Issuing firearms licenses is not a function performed by a judge in any state in the nation except Georgia. Of the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[1] and North Carolina[2]), the state Department of Safety (Tennessee[3]), the State Department of Agriculture (Florida[4]), and the State Law Enforcement Division (South Carolina[5]). In fact, of the 47 states that issue licenses to carry concealed firearms,[6] only Georgia, New York, and New

[1] Alabama Code 13A-11-75
[2] North Carolina Statutes 14-415
[3] Tennessee Code 39-17-1351
[4] Florida Statutes 790.06
[5] South Carolina Code 23-31-215
[6] Vermont does not issue licenses but does not prohibit carrying a concealed firearm without a license. Wisconsin and Illinois are the only two states in the nation that prohibit carrying

Jersey have provisions for judges to be involved at all in the licensing process, but only Georgia requires that applicants apply for licenses from a judge. It is quite clear that the issuance of any kind of license, whether a plumber's license or a firearms license, is not normally performed by a judge.

None of the trappings of a judicial function are present in issuance of GFLs by probate judges in Georgia. GFL applications are not adversarial proceedings. The probate judge does not hold an adversarial hearing, open a docket, take evidence, or issue any opinions, findings of facts, conclusions of law, orders, or judgments. The GFL, when signed by a judge, does not have the effect of a court order and is not enforceable by the contempt powers of the court.

(ii) The Events Involved Occurred Neither in the Judges Chambers Nor in Open Court

Applying the second prong of the four-part test, the events involved in the instant case did not take place in Cason's chambers or in open court. Camp applied for his GFL at the clerk's counter. Doc. 39 (Affidavit), ¶ 2.

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concealed firearms entirely, and, therefore, neither has a licensing system for the carrying of concealed firearms.

(iii) There Was No "Case" Pending

The third prong, whether the controversy involved a case pending before the judge, also fails. There was no case pending before Cason.

(iv) Camp Did Not Visit Cason in Her Judicial Capacity

The final prong, whether the confrontation arose immediately out of a visit to the judge in her judicial capacity, is not met. Camp did not meet Cason, who was out of town. Doc. 39, ¶ 2.

Thus, Cason can not pass any single part of the four part test used in this Circuit to determine whether a judge is acting in a judicial capacity.

It may also be instructive to examine Georgia law to determine if the act of processing GFL applications is a judicial or ministerial function. The GFL statute itself, O.C.G.A. § 16-11-129, does not confer any discretion upon probate judges.[7] This is one of the main distinctions between a

[7] It may be helpful to refer to Georgia Attorney General Opinion U89-21, in which the Attorney General responded to the Probate Judge of Liberty County's query, "What discretion does the probate judge have in issuing or denying a firearms permit?" with "Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit." The Attorney General noted that the sole exception was that the

"shall issue" state like Georgia and a "may issue" state like New Jersey. In Georgia, a probate judge is required to issue a license to all eligible applicants.

The powers and duties of probate judges are listed in O.C.G.A. § 15-9-30. In addition to issuing GFLs, probate judges also issue marriage licenses (for which certain eligibility requirements must be met, just as for GFLs). O.C.G.A. § 15-9-30(b)(7). Probate judges also are charged with "performing such other judicial ***and ministerial*** functions as may be provided by law." O.C.G.A. § 15-9-30(b)(11) (emphasis supplied).

By specifically stating that probate judges are to perform "judicial ***and*** ministerial functions," Georgia's General Assembly has declared that not every act performed by a probate judge is to be considered judicial. The Georgia statute is consistent with the Supreme Court's holding in *Stump* that the nature of the activity itself is what must be examined:

> The ordinary,[8] under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer.... In

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probate judge had the discretion to issue a GFL to an applicant who had been hospitalized at a mental hospital or drug or alcohol treatment center.

[8] Until fairly recently, probate judges in Georgia were called "county ordinaries."

> issuing a marriage license, he for the moment becomes a ministerial officer.

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). Accordingly, the Georgia Supreme Court and the statute declare, like the U.S. Supreme Court, that the nature of the act determines whether the act is judicial, and the Georgia Supreme Court has declared that the issuance of a license is a ministerial, and not a judicial, act. The similarities between issuing firearms and marriage licenses are obvious. They both involve processing applications from applicants, determining whether the applicants are legally qualified for the license, and issuing the license only to those who are qualified under the law to receive the license.

The task for the Court is to "draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Forrester v. White,* 484 U.S. 219 227, 108 S.Ct. 538, 544 (1988). Judicial acts are those that are "part of [a court's] function of resolving disputes between parties." *Rodriguez v. Weprin,* 116 F.3d 62, 66 (2d Cir. 1997) (holding that control of a docket is a judicial act). Acts taken in a judicial capacity include "asking questions at oral arguments and issuing a decision in the form of a written opinion . . ." *Sibley v. Lando*, 437 F.3d 1067, 1071 (11th Cir. 2005).

> Clearly, the paradigmatic judicial act is the resolution of a dispute between parties who have invoked the jurisdiction of the court. ***We have indicated that any time an action taken by a judge is not an adjudication between parties, it is less likely that the act is a judicial one***. We have been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decision making is not directly involved."

Cameron v. Seitz, 38 F.3d 264, 271 (6th Cir. 1994) (emphasis added).

Issuing licenses is not a judicial act, under either federal or state law. It is no more judicial than is the issuance of a marriage license, which Georgia law expressly holds to be ministerial. Cason was not acting in a judicial capacity, and, therefore, Cason's sole defense to Plaintiff's claim for attorney's fees should be rejected.

CONCLUSION

Defendant Cason does not argue against the merits of Plaintiff's Motion for Summary Judgment. She has no defense to the fact that she violated Section 7(a) of the Privacy Act by requiring Plaintiff's SSN and Section 7(b) of the Privacy Act by failing to give Plaintiff the proper warning. She offers no defense to the fact that she violated the Georgia Weapons and Firearms Act by requiring Plaintiff to disclose his nonpertinent employment information. She defends herself solely on the same

claims of mootness she raised ten months ago, which have been rejected. The Eleventh Circuit declared that Plaintiff's claims are not moot. There is no genuine issue of material fact, and Plaintiff is entitled to judgment as a matter of law.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Plaintiff's Reply to Defendant Cason in Support of Plaintiff's Motion for Summary Judgment was prepared using Courier New 12 point, a font and point selection approved in LR 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2007, I electronically filed the foregoing Plaintiff's Reply to Defendant Cason in Support of Plaintiff's Motion for Summary Judgment with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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