

GeorgiaCarry.Org, Inc., Shane Montgomery, and)
William Theodore Moore, III,)
)
Plaintiffs,)
)
v.)
)
Thomas C. Bordeaux, Jr., Individually and as)
Judge of the Chatham County Probate Court,)
)
Defendant.)



) Civil Action No. SPCV18-00523-BA

MOTION FOR PROTECTIVE ORDER

COMES NOW, Thomas C. Bordeaux, Jr., Individually and as Judge of the Chatham County Probate Court, and files the within Motion for Protective Order pursuant to O.C.G.A. § 9-11-26(c), as follows:

Movant is, and at all times referenced, has been, the duly-elected Probate Judge of Chatham County, Georgia. Movant was served with a notice to take his deposition by the Plaintiffs in the above-styled action. Please see Exhibit "A", attached.

The deposition notice would require Judge Bordeaux to appear for his deposition on July 27, 2018, at the instance of the Plaintiffs at the County Attorney's Office, 124 Bull Street, Savannah, Georgia.

The matter before the Court arises out of allegations by the Plaintiffs that Judge Bordeaux, individually and in his official capacity, has failed to issue carry permits for guns properly.

This allegation relates specifically to the performance by Judge Bordeaux as to his

official duties as Probate Judge of Chatham County.¹

It is clear that questions in the deposition will be directed toward Judge Bordeaux in his capacity as the Probate Court Judge of Chatham County in regard to the performance of his official duties in that capacity.

In *Heiskell v. Roberts*, 295 Ga. 795 (764 S.E.2d 368)(2014), the Supreme Court reiterated the long-standing rule in Georgia that "Judges are 'immune' from liability in civil actions for acts performed in their judicial capacity." See also, *Earl v. Mills*, 275 Ga. 503, 504 (570 S.E.2d 282)(2002). As stated by the Court in *Heiskell*, supra, "This doctrine of judicial immunity, which the Supreme Court of the United States has said 'is old as the law' is essential to the impartial administration of justice."

The Court in *Heiskell*, supra, went on to further quote from decisions of the U. S. Supreme Court to the effect that "judicial immunity is overcome in only two situations: 'First, a judge is not immune from liability for non-judicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.'"

Stated slightly differently, "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' [Cit.]" Stump v. Sparkman, 435 U. S. 349, 356 (98 SC 1099, 55 LE2d 331, 339) (1978); Barlow v. Yenkosky, 146 Ga. App. 872 (247 SE2d 519)(1978).

¹ As outlined in the Motion to Dismiss this matter, Thomas Bordeaux as an individual has no authority to act or not act whatsoever.

As cited above, Plaintiffs would have to allege that Judge Bordeaux has acted in the clear absence of all jurisdiction. As Plaintiffs have filed a pleading to compel Judge Bordeaux to act, there is no logical way he can be acting in clear absence of all jurisdiction. Additionally, to the extent Plaintiff seeks to ask the Probate Judge on how he ruled or his interruption of law, that is not a proper subject matter under Georgia Law. Any information held by Judge Bordeaux is not subject to disclosure nor can it be compelled by deposition. The references to Judge Bordeaux in the Complaint in the above action stem entirely from his official duties as the Probate Judge of Chatham County.

One of the stated purposes of sovereign immunity and official immunity has been to allow the government to go about the business of governing without the harassment of lawsuits which would unnecessarily impede the process of governing through a requirement of responding to discovery, appearing at depositions, and the like. e.g., *Thomas v. Hospital Authority of Clark County*. 264 Ga. 40 (1994). As such, the burden of proving a waiver of sovereign immunity lies with the party seeking to establish the waiver. *id.*

In regard to how this immunity relates to the taking of the deposition of a sitting judge has been the topic of more than one federal decision. In *Prakell v. State of Indiana*, 2013 WL 3287691 (S.D. Ind.), the circumstances under which a party to civil litigation may take the deposition of a sitting judge is addressed. Therein it was stated that because there is no federal standard by which to evaluate the propriety of requests to depose sitting judges and justices, the Court would find it "prudent to use the standard for deposing opposing attorneys as a starting point. Thus, Plaintiffs must show that: '1. no other means exist to obtain the information [other] than to depose (the judge or justice), ... ; 2. the information sought is relevant and non-privileged;

and, 3. The information is crucial to the preparation of the case." *Sherman v. American Motors Com.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *Prakell v. State of Indiana*, 2013 Westlaw 3287691 (S.D. Ind.)

The Court also noted that Rule 26 of the Federal Rules of Civil Procedure authorizes "protective orders to limit or preclude discovery when there are less burdensome, inconvenient, or expensive sources or when the burden and expense for the movant outweighs the likely benefit for the non-movant."

The Court went on to also note that judges generally may not be compelled to testify as to their mental impressions or reasoning in rendering judicial decisions, and further, it was noted that "the privilege exists, in part, to further the principal that the Courts speak through their records." *id.*

The Court in *Prakell*, *supra*, thereupon reiterated that the burden is upon the party seeking to take the deposition to make an initial showing that the information sought would not be available from any other source, that it is relevant and essential to the case, and that it is non-privileged, as referenced above.

Further, the "deliberative process privilege" shields judges from being required to testify so as to divulge their mental impressions, thoughts and reasoning in making judicial determinations. It was noted that this protection not only applies to judges but also to the deliberative process of administrative bodies and board members as well. See, *United States v. Cross*, 708 F.2d 631 (Ca. 11, 1983).

In O.C.G.A. § 9-11-26(c), it is provided that, "The Court in which the action is pending may make any order which justice requires to protect a party or person from annoyance,

embarrassment, oppression, or undue burden or expense ". Such an Order may include requiring that the discovery not be had or that certain matters not be inquired into or that the scope of the discovery be limited to certain matters or certain methods.

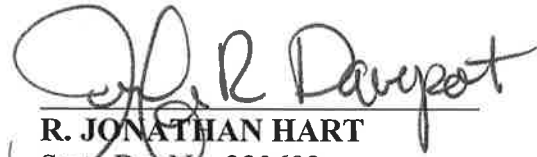
Based upon the above, movant seeks a protective order as follows:

1. An Order providing that the deposition of Judge Bordeaux scheduled for July 27, 2018, be vacated and not go forward, and that Judge Bordeaux shall not be deposed unless and until the Plaintiffs make an evidentiary showing before this Court that no other means exist to obtain the information sought other than through the deposition of Judge Bordeaux, that any other means of obtaining such information does not exist, that the information sought is relevant, non-privileged, and not the product of the deliberative process, and that the information is crucial to the preparation of Plaintiffs' case. Absent such showing by the Plaintiffs, the Court should Order that the Plaintiffs not be allowed to proceed in taking or scheduling any deposition of Judge Bordeaux.
2. The Court should direct that if any such deposition is allowed to be taken, that no question may properly be posed to the Judge which would reasonably require him to testify as to his mental processes in reaching his judicial decisions and so as to prevent any questioning in regard to his deliberative process in reaching conclusions drawn by him in performing his duties as Probate Judge.

WHEREFORE, Judge Thomas Bordeaux, requests that the Court enter a Protective Order, as referenced above, that the taking of the scheduled deposition be stayed pending the evidentiary hearing by this Court as referenced above, and that the deposition should not be allowed to go forward absent an evidentiary showing by the Plaintiffs establishing the applicable factors as set

forth above.

This 26th day of July, 2018.



R. JONATHAN HART

State Bar No. 333692

JENNIFER R. DAVENPORT

State Bar No. 330328

ATTORNEYS FOR DEFENDANT


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the parties in the foregoing action with a copy of this document by placing the same in the United States mail with sufficient postage affixed thereto to assure delivery and properly addressed to:

John R. Monroe, Esq.
John Monroe Law, P.C.
9640 Coleman Road
Roswell, GA 30075

This 26th day of July 2018.


Attorney for Defendant

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(912) 652-7881

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

GEORGIACARRY.ORG, INC.,)
SHANE MONTGOMERY, and WILLIAM)
THEODORE MOORE, III,)

Plaintiffs,)

v.)

THOMAS C. BORDEAUX, JR.,)
Individually and as Judge of)
the Chatham County Probate Court)

Defendant.)
_____)

Civil Action No. SPCV 18-00523-BA

NOTICE OF DEPOSITION

Please take notice that Plaintiffs will take the deposition of Defendant before a court reporter, who will stenographically record the deposition, on July 27, 2018, at 1 p.m., at the offices of the Chatham County Attorney.

This 11th day of July, 2018

/s/ John R. Monroe

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