IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and IZIAH SMITH, Plaintiff,	)	
v.	)	Civil Action No. 2014-RCCV-92
HARRY B. JAMES III, individually and in his official capacity as Judge of the Probate Court of Richmond County, Defendant	)	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs commenced this action in mandamus when Defendant, the sitting judge of the Probate Court of Richmond County, refused to issue temporary renewal weapons carry licenses pursuant to O.C.G.A. § 16-11-129. Defendant has now begun to issue such temporary licenses as required by law. It therefore is no longer necessary for this Court to order Defendant to do so. All that remains is to consider the issue of costs and attorney's fees.

Argument

O.C.G.A. § 16-11-129(i) provides a process for a holder of a Georgia weapons carry license ("GWL") that is expiring within 90 days (or recently expired) to apply for a temporary renewal license at the time of application for a "regular" renewal license. O.C.G.A. § 16-11-129(i)(2) provides:

> Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge shall at the time of application issue a temporary renewal license to the applicant.

Plaintiff Smith applied for a renewal GWL on January 6, 2014. Verified Complaint, ¶ 6[1]. At the time of his application, Smith's then-current GWL had fewer than 90 days remaining on it. *Id.*, ¶ 10. At the time of Smith's application, Defendant did not know and was not made aware of any fact which would make Smith ineligible for a five-year renewal GWL. *Id.*, ¶11. Defendant's staff refused to issue a temporary renewal GWL to Smith at the time of Smith's application. *Id.*, ¶8; Deposition of Theodore Jackson, pp. 9-14. In fact, at the time of Smith's application, Defendant's office had not issued a temporary renewal GWL for more than 10 years. Jackson Depo., p. 13, l. 25-p. 14, l. 1. Applicants did ask for them, but not as often as once per day. *Id.*, p. 32, ll. 4-5. If applicants did ask, Defendant's office told them that Defendant's office did not issue temporaries. *Id.*, p. 32, ll. 8-9.

On January 13, 2014, Plaintiffs' counsel wrote Defendant, pointing out the statutory requirements to issue temporary licenses, and asking Defendant to issue them. Deposition of Harry James, p. 46, l. 17 – p. 47, l. 8. Defendant never responded to that letter. *Id.*, p. 47, l. 17.

Defendant's office has now begun issuing temporary licenses. Jackson Depo., p. 31, ll. 4-5.

I. Issuance of Temporary Renewal GWLs Is Mandatory

The issuance of temporary renewal GWLs to eligible applicants is mandatory. *Moore v. Cranford,* 285 Ga. App. 666, 647 S.E.2d 295 (2007), *abrogated by statute on other grounds* ("The use of the term 'shall' means that the probate judge has no discretion…."); Op. Atty. Gen. U89-21 ("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"). It

[1] Because the Complaint was verified, it serves as an affidavit.

therefore is a clear entitlement for an eligible renewal applicant to receive one. Defendant had no discretion not to issue them, and he was violating a ministerial duty to issue them when he refused to do so.

II. Actions in Mandamus Are Specifically Authorized and Attorney's Fees Are Awarded

Moreover, O.C.G.A. § 16-11-129(j) specifically authorizes private rights of action in mandamus or otherwise for people who are wrongly denied a GWL:

> When an eligible applicant fails to receive a … temporary renewal license … within the time period required by this Code section … the applicant may bring an action in mandamus or other legal proceeding…."

In addition:

> If such applicant is the prevailing party, he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees.

Id.

It therefore was appropriate for Smith to commence this action in mandamus. Smith is a member of GeorgiaCarry.Og, Inc. ("GCO"). Verified Complaint, ¶ 4. GCO has other members in Richmond County who were affected by Defendant's policy of not issuing temporary GWLS. *Id.,* ¶ 17. It therefore was appropriate for GCO to join this action on behalf of its other members. The Supreme Court recently affirmed a superior court's issuance of a writ of mandamus to a probate judge to compel issuance of a GWL in *Ferguson v. Perry,* 740 S.E.2d 598 (Ga. 2013).

III. Plaintiffs Are Entitled to An Award of Costs and Fees

A plaintiff in a mandamus case is considered to have "prevailed" if he obtains the relief sought, even if he obtains such relief from the defendant without court intervention. *Robinson v. Glass,* 302 Ga. 742, 691 S.E.2d 620 (2010) ("[Plaintiff] 'prevailed' because he obtained the relief sought, even though it was provided without the necessity of a writ of mandamus from the

trial court….") In *Robinson,* the plaintiff sought a writ of mandamus against the clerk of the superior court because the clerk neglected her statutory duty to file a record on appeal. The clerk raised defenses in response to the petition, but ultimately filed the record on appeal before the trial court heard the mandamus petition. The trial court thereafter entered an award of attorney's fees against the clerk. The Court of Appeals affirmed, finding that the clerk "unnecessarily expanded the proceedings by forcing [plaintiff] to expend costs and attorney's fees as a direct result of [the clerk's] office's failure to follow the law, and by raising meritless defenses in her answer to the mandamus petition." *Id.*

Robinson is quite similar to the present case. Defendant not only failed to follow the law, but refused to respond to Plaintiffs' counsel's letter. Defendant unnecessarily protracted this litigation, and compounded the situation by raising frivolous counterclaims (apparently attempting to intimidate Plaintiffs). Because Plaintiffs have obtained the relief sought (Defendant now issues temporaries), they are the "prevailing parties." Pursuant to O.C.G.A. § 16-11-129(j).

Defendant may raise the issue of whether attorney's fees can be awarded against him, a judicial officer. *See, e.g., Hill v. Clarke,* 310 Ga.App. 799, 714 S.E.2d 385 (2011), *physical precedent only.* In *Hill,* a GWL applicant successfully obtained a writ of mandamus against a probate judge who wrongfully had denied the application. The applicant moved for attorney's fees pursuant to O.C.G.A. § 16-11-129(j). The trial court denied the motion, ruling that "the equities" did not favor an award of fees in that case. The applicant appealed the denial.

On appeal, the Court of Appeals reversed. The Court ruled that an award of fees is mandatory under O.C.G.A. § 16-11-129(j) ("[T]he trial court's discretion to deny the award is

eliminated.") The Court of Appeals *sua sponte,* however, raised the question of judicial immunity. It directed the trial court to consider the issue of judicial immunity, even though the probate judge in that case had not raised the issue. Naturally, therefore, a probate judge such as Defendant would read *Hill* and believe he should raise the issue.

Judicial immunity does not apply, however, for several reason. First, the General Assembly specifically authorized attorney's fees in these mandamus cases against probate judges. More fundamentally, in *Hill,* the Court noted "judicial officers have been shielded from civil actions for acts done in their judicial character from the earliest dawn of jurisprudence down to the last reported cases." *Id.,* FN 3. The Court further noted, however, "[A] judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity." *Id.*

It is clear that Defendant was not acting in a judicial capacity when he refused to issue Smith a temporary renewal GWL. A judicial act is one that is "normally performed by a judge" when the plaintiff "dealt with the judge in his judicial capacity." Stump v. Sparkman, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978).

The issuance of licenses, especially licenses to carry weapons, is not "normally performed by a judge." In the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[2] and North Carolina[3]), the state Department of Safety (Tennessee[4]), the state Department of Agriculture (Florida[5]), and the state Law Enforcement

[2] Alabama Code 13A-11-75
[3] North Carolina Statutes 14-415
[4] Tennessee Code 39-17-1351
[5] Florida Statues 790.06

Division (South Carolina[6]). In fact, of the 49 states that issue licenses to carry concealed firearms,[7] only New York and New Jersey have provisions for judges to be involved at all in the licensing process. No state besides Georgia actually requires that applicants apply to a judge for a license.

The act of issuing a license is ***ministerial*** and not judicial. When what we now call a probate judge was referred to as the "county ordinary," the Supreme Court of Georgia noted that issuing licenses by probate judges is ***not*** a judicial act:

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

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied]. The *Comer* case was decided some 13 years before the General Assembly created a licensing requirement and assigned the task of issuing GWLs to the probate judges ("ordinaries"). 1910 Ga.L. 134. Presumably, the General Assembly knew from *Comer* that it was assigning yet another ministerial task to the probate judges.

Probate judges issue marriage licenses in addition to weapons carry licenses. O.C.G.A. § 15-9-30(b)(7). It would be difficult to explain why issuing a firearms license is a judicial function, when issuance of a marriage license is not. It is clear in O.C.G.A. § 15-9-30(b)(11) that probate judges "[p]erform such other judicial ***and ministerial*** functions as may be provided by law." (Emphasis supplied).

[6] South Carolina Code 23-31-215

[7] Vermont does not issue licenses, but does not prohibit carrying a concealed firearm.

The license statute itself, O.C.G.A. § 16-11-129, does not appear to confer any discretion upon the probate judges. This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. A probate judge is required to issue a license to all eligible applicants. *Moore v. Cranford*; Op.Atty.Gen. U89-21, *supra.*

Moreover, it must be kept in mind that the General Assembly made a provision for mandamus to obtain a GWL for an eligible applicant. Mandamus is intended to compel ***ministerial*** acts. It is not available to compel discretionary ones. *Duty Free Air & Ship Supply Co. v. City of Atlanta,* 282 Ga. 173, 174 (2007) ("It is axiomatic that mandamus is a remedy designed to compel the doing of ministerial acts. Mandamus is not an appropriate remedy to … compel the exercise of official discretion.")

The General Assembly is presumed to be aware of existing law when it enacts a new law. *United States Bank National Association v. Gordon*, 289 Ga. 12, 14 (2011). It is therefore safe to say that the General Assembly knew when it enacted the language providing for mandamus to compel issuance of a GWL that mandamus is available for ministerial functions and not discretionary ones. The General Assembly can thus be presumed to know that issuance of GWLs is a ministerial function (consistent with the Supreme Court's pronouncement in *Comer* that issuance of marriage licenses is a ministerial function).

Moreover, Defendant has delegated the GWL process to his staff. James Depo., p. 9. Clerks take applications, process them, run background checks, and even issue licenses. *Id.* Only when an application is denied (or recommended for denial by Defendant's staff) does Defendant review an application. *Id.* Assuming that Defendant is not unconstitutionally delegating his judicial authority, the only conclusion that can be drawn is that the processing of

weapons carry license applications is not a judicial function and Defendant has delegated the routine administration of this ministerial function to his staff.

Lastly, Defendant conducts, as required by statute, an investigation into the background of a GWL applicant. This investigation is done *ex parte,* and independently of any matters that may be presented to Defendant by an applicant. If Defendant were acting in a judicial capacity, it would be a violation of the Code of Judicial Conduct for Defendant to conduct such an investigation. Cannon 3B(7), Commentary ("Judges must not independently investigate facts in a case and must consider on the evidence presented.").

Even if the Court somehow concludes that Defendant's processing of a GWL application is a judicial function, judicial immunity still does not apply. Plaintiff did not sue Defendant for damages. Plaintiff sued in mandamus. It is well settled that the doctrine of judicial immunity does not apply for declaratory and injunctive relief. *Earl v. Mills,* 275 Ga. 503, 504 (2002). Moreover, the attorney's fees sought by Plaintiff are not an item of damages. This is distinguishable from a case for attorney's fees under O.C.G.A. § 13-6-11, in which attorney's fees ***are*** an item of damages (and explicitly called so). *Earl, Id.* Plaintiff is unable to find a case where Georgia courts have disallowed attorney's fees, under a public policy fee-shifting statute, on the grounds of judicial immunity.

Conclusion

Plaintiffs have shown that they are entitled to judgment and an award of attorney's fees. They therefore request an order awarding them fees in an amount to be determined at a hearing, unless Defendant consents to have the amount of the award to be determined on briefs only (and therefore save the additional expense of having a hearing).

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CERTIFICATE OF SERVICE

I certify that on November 21, 2014, I served a copy of the foregoing via U.S. Mail upon:

Robert W. Hunter III
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John R. Monroe