

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

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

**PLAINTIFFS’ BRIEF IN OPPOSITION TO DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

As an initial matter, Plaintiffs observe that Defendant has failed to comply with the Uniform Superior Court rules for motions for summary judgment. Defendant’s motion is not accompanied by Theories of Recovery or a separate statement of facts. The brief is, however, prefaced with a statement of facts. These facts are not supported by references to the record. While it is common practice to support facts with references to the record, the rules do not appear to have that requirement. Plaintiffs will therefore respond to each of these facts in a separate document.

Defendant advances his motion on three arguments: 1) that issuance of temporary Georgia weapons carry licenses (“GWLs”) is discretionary; 2) that the dispute over issuance of temporary GWLs is moot; and 3) that Defendant enjoys judicial immunity from this suit. Plaintiffs will address each argument in turn.

**Argument**

1. *Issuance of GWLs Is Not Discretionary*

Defendant argues that his issuance of temporary GWLs is discretionary and not mandatory, and that he therefore cannot be subject to mandamus for the discretionary act. Defendant advances no authority for his hypothesis.

It is clear from case law that issuance of GWLs is mandatory. *Moore v. Cranford*, 285 Ga.App. 666, 647 S.E.2d 295 (2007) (“The use of the term ‘shall’ means that the probate judge has no discretion....”) The Code Section at issue says:

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.

O.C.G.A. § 16-11-129(i)(2) [Emphasis supplied]. Because the legislature used the word “shall,” it made clear its intentions that issuance of a temporary GWL to qualified applicants is mandatory and not discretionary. See also Attorney General Opinion U89-21 (“The judge of the probate court ... has no discretion to exercise, but must issue the permit unless provided with information indicating the disqualification of the applicant.”)

Defendant argues that there was a question about Plaintiff Smith’s qualifications, but it is undisputed that any such question did not arise until *after* Defendant’s office refused to issue Smith a temporary GWL. In the Verified Complaint, Plaintiffs alleged, in Paragraph 11, “Also 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.” Defendant admitted in his Answer that Defendant “personally did not know of any fact which would make the plaintiff ineligible for a license renewal....”

Theodore Jackson, the clerk in Defendant’s office that waited on Smith, deposed that he did not have any involvement in evaluating Smith’s background:

Q. Does that mean that you didn't have any involvement in evaluating Mr. Smith's background check?

A. Oh, no. No.

Deposition of Theodore Jackson, p. 28, ll. 22-25.

Yet it was Jackson who told Smith that Smith could not have a temporary GWL, because "I went a step further and found out that we didn't do temporary licenses." *Id.*, p. 9, l. 25-p. 10, l. 2. It was not until "later on," that Jackson learned that Smith might have an eligibility issue, but that Defendant's office already had information about the disposition of the potential ineligibility:

Later on I did see that he had a charge from Columbia County. But we already, I guess, had the disposition already from the last time he applied.

*Id.*, p. 29, l. 23 – p. 30, l. 1.

It is therefore clear that, at the time of Smith's application, Defendant's office refused to issue Smith a temporary GWL, not because of anything in Smith's background, but because "we didn't do temporary licenses."

This notion is supported by the testimony of several clerks in Defendant's office. Felicia Bray, Chief Clerk of the Probate Court, testified that the probate judge before Defendant did not issue temporary GWLs and that policy continued under Defendant until after Smith raised the issue. Depo. of Felicia Bray, p. 14, ll. 17-23.

Deputy Chief Clerk Joy Daniels testified that Defendant did not issue temporary GWLs and did not start to do so until after Smith made an issue of it. Depo. of Joy Daniels, p. 10, ll. 2-9.

Another clerk Sandra Blount, testified that Defendant and his predecessors had not issued temporary GWLs for at least 25 years, and did not begin to do so until after July of 2014, 6 months after Smith requested one. Depo. of Sandra Blount, p. 10, l. 21 – p. 11, l. 15.

And yet another clerk, Vanessa Wingfield, testified that at the time Smith applied, Defendant's office did not issue temporary GWLs. Depo. of Vanessa Wingfield, p. 11, ll. 23-25.

2. *Mootness of Temporaries Is Irrelevant*

Defendant next argues that the issue of temporary GWLs is moot because Defendant (at least now) issues them. Plaintiffs accept the fact that Defendant now issues temporary GWLs. In fact, they acknowledged as much in their own motion for summary judgment. As such, it no longer is necessary for this Court to issue a writ of mandamus against Defendant. The case itself is not moot, however, because Plaintiffs are entitled to costs and attorney's fees as the prevailing parties, pursuant to O.C.G.A. § 16-11-129(j). Defendant did not address this issue in his motion, so Plaintiffs need not elaborate on it here. For a more detailed discussion of costs and fees, please see Plaintiffs' motion for summary judgment.

3. *Defendant Does Not Have Immunity*

Finally, Defendant asserts that he is entitled to judicial immunity. Plaintiffs discussed this issue at some length in their own motion for summary judgment, but they will address it to some degree here as well. The overriding reason Defendant is not entitled to judicial immunity is that the processing and issuing of GWLs is not a judicial function. Even Defendant acknowledges that immunity only applies to judicial acts. Defendant's Brief, p. 2. For a discussion of why issuing GWLs is not a judicial function, please see Plaintiffs' brief in support of their own motion for summary judgment.

Defendant erroneously cites to *Hill v. Clarke*, 310 Ga.App. 799 (2011) as authority for that judges are immune "from damages." This is wrong for multiple reasons. First, the Court did not find that judges are immune. Instead, the Court reversed a denial of attorney's fees in a

GWL mandamus case, but instructed the trial court to consider the issue of judicial immunity on remand. What Defendant fails to tell this Court is that on remand, after taking into account the Court of Appeals' instructions to consider the issue of judicial immunity, the Superior Court of Gwinnett County entered a judgment against the probate judge of Gwinnett County in the amount of \$20,545.20. Clearly, immunity did not stand in the way of that judgment. A copy of the Gwinnett County Superior Court's judgment is being filed contemporaneously for the Court's convenience.

For another example of attorney's fees and costs being assessed against a probate judge pursuant to O.C.G.A. § 16-11-129(j), Plaintiffs are contemporaneously filing a judgment of the Superior Court of Clayton County against the judge of the Probate Court of Clayton County in the amount of \$32,920. Again, judicial immunity did not prevent that judgment.

Second, it should be pointed out that Plaintiffs are not seeking a damage award against Defendant. The costs and attorney's fees that Plaintiffs are seeking are not damages. Defendant may be confusing costs and fees pursuant to O.C.G.A. § 16-11-129(j) with an award of attorney's fees as a sanction for wrongdoing, such as pursuant to O.C.G.A. § 13-6-11, in which costs of litigation (including attorney's fees) are explicitly made an element of damages.

### **Conclusion**

For the foregoing reasons, Defendant's motion for summary judgment must be denied.

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**CERTIFICATE OF SERVICE**

I certify that on January 8, 2015, I served a copy of the foregoing via U.S. Mail upon:

Robert W. Hunter III  
266 Greene Street  
Augusta, GA 30901

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John R. Monroe