IN THE SUPREME COURT OF GEORGIA

GEORGIACARRY.ORG, INC. AND IZIAH SMITH, Appellants,	)	
v.	)	Case No. S15A1901
HARRY B. JAMES III, Appellee	)	

Reply Brief of Appellants

Appellants state the following as their Reply Brief of Appellants.

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Response to Appellee's Statement of Facts

Appellee Harry B. James III ("James") did not respond to GCO's and Smith's statement of facts. Instead, he made his own statement of facts. GCO and Smith dispute several of these assertions of fact:

1. James asserts that Smith applied for a Georgia weapons carry license ("GWL") to "the Probate Court of Richmond County, Georgia." This assertion is both factually incorrect and legally impossible. Smith clearly alleged in his Verified Complaint that he applied to James, the ***Judge*** of the Probate Court, not the Probate Court ***itself.*** R8. In some contexts, this may be a distinction without a difference, but in the context of this case, it matters. Under O.C.G.A. § 16-11-129, GWLs are issued by the judge of the probate court. Nowhere in that Code section does the probate court itself do anything. The distinction is important because the judge is not acting in a judicial capacity when he issues licenses. *Comer v. Ross*, 100 Ga. 652, 28 S.E. 387 (1897).
2. James asserts that the clerk that waited on Smith, Theodore Jackson was the marriage license clerk when Jackson waited on Smith. This assertion is true, but it implies that Jackson may have had limited familiarity with GWL applications. To be clear, Jackson waited on GWL applicants 75% of the time, daily. R90-91.

3. James asserts that Jackson had been working for James for 3 or 4 months at the time of Smith's application. In fact, Jackson been working for James for six months. R89.
4. James next asserts, "No one had applied for a temporary gun license since 1999 until Mr. Smith applied in 2014)." Jackson testified that in the six months that he took GWL applications on a daily basis (in 2013), he had had multiple people request temporary GWLs. It was not that no one asked for them. James just did not issue them. R91.
5. James asserts that Smith does not know whether Smith lives in South Carolina or Georgia. Smith alleged in his Verified Complaint that he is a resident of Richmond County, Georgia. R8.
6. James asserts that he told Smith that Smith could not have a temporary GWL because there was a problem with Smith's criminal record. In fact, James did not even wait on Smith when Smith applied for a temporary, and James had no knowledge at the time that Smith applied of anything that would prohibit Smith from obtaining a temporary. R10.
7. James asserts that Smith already had a GWL at the time Smith commenced this action. The record only reflects that James had issued Smith a GWL, but it does not indicate whether James had given the license to Smith.

The disputes of facts illustrated above serve only to underscore the fact that it was inappropriate for the trial court to grant James' motion for summary judgment.

Argument

1 – Judge Brown Should Have Recused Himself

James argues that Judge Brown was not required to recuse himself because Smith's and GCO's motion for recusal was not timely filed nor supported by affidavit. James fails to address, however, this Court's precedence in cases such as the present one:

> Simply stated, the public must believe in the absolute integrity and impartiality of its judges. Consequently, ***even without a showing of actual bias, prejudice or unfairness, and regardless of the merits or timeliness of a Motion to Recuse***, this Commission concludes that it is inappropriate for any trial court judge to preside in any action wherein one of the parties holds a judicial office on the same or any other court which sits in the same circuit.

Smith v. Guest Pond Club, Inc., 277 Ga. 143, 146 (2003), *quoting* Judicial Qualifications Commission, Opinion 220 [emphasis supplied]. It is undisputed that James holds a judicial office on another court in the same judicial circuit as the Superior Court of Richmond County. It was therefore mandatory for Judge Brown, a judge of the Superior Court of Richmond County, to recuse himself. In *Smith*, this Court not only reversed and vacated a judge's orders that were entered in a case where a party was another judge from the same

circuit, but ***the Court declared all such orders void***. Following this precedent, Judge Brown's order granting summary judgment to James must be vacated and the case must be remanded for assignment to a judge in a different judicial circuit.

James argues against recusal by citing to a previous case in which a GWL applicant whose application was denied sued the judge of the probate court in mandamus, *Hill v. Clarke,* 310 Ga.App. (2011). In *Hill*, the record of the Court of Appeals reveals that the applicant filed a motion for recusal. Several judges in the Circuit recused themselves pursuant to the motion. The judge who ultimately handled the case, who also was from the same circuit, refused to recuse herself. In the end, the applicant won his case. It is not clear, then, what James' point is. The applicant in *Hill* filed a motion for recusal, which was refused, but the applicant won his case. There was nothing for him to appeal, because he received the relief that he requested and to which he was entitled. The probate judge in that case did not appeal. No court, therefore, reviewed the denial of the recusal motion. It cannot be said that an appellate court condoned the failure to recuse.

If James is interested in citing cases similar to the present one, where an appellate court reviewed the case but did not pass on the issue of recusal, this Court has seen at least two. In both *Perry v. Ferguson,* 292 Ga. 666 (2013) and

Hertz v. Bennett, 294 Ga. 62 (2013), this Court reviewed the grant or denial of mandamus against a probate judge who had denied a GWL application. In both cases, the applicants who sued in mandamus filed motions for recusal. In both cases, the motions for recusal had been granted and the decisions appealed had been made by judges from circuits other than those of the probate judges. R130.

James next claims, erroneously, that "the Appellant has filed cases in the Federal District of North Georgia, seeking relief against judicial officers in that district (circuit) which were ruled on by judges of the same district, without recusal." James' Brief, p. 4. Apparently as intended authority for this argument, James points to *Camp v. Cason,* No. 1:06-CV-1586 (N.D. Ga.).

James does not identify which "Appellant" he is referring to. Neither GCO nor Smith, however, were parties to the *Camp* case cited by James. Despite James claim of multiple "cases," he only gives the one (false) example. GCO and Smith both deny filing any claims in federal court as described by James.

Perhaps more importantly, however, is that GCO's and Smith's recusal argument is based on Georgia law and specifically the regulation of trial level judicial officers of this state. This Court has no authority to regulate the conduct of judicial officers of the United States, especially Article III (of the

Constitution of the United States) judges, who are appointed by the President with advice and consent of the Senate and who serve for life ("during good behavior.") There simply is no application of Georgia recusal rules to federal district court judges.

James next argues that, despite the clear precedent of this Court, the rule requiring recusal should be based on where an appeal lies, and not on judicial circuits That is, he argues, because a decision of the Probate Court of Richmond County is appealable to the Court of Appeals and not the Superior Court of Richmond County, superior court judges should not be required to recuse themselves when sitting in judgment of probate court judges. Logically then (applying James' argument) superior court judges would not be required to recuse themselves when sitting in judgment of their fellow superior court judges or of state court judges, either.

James' proposal would turn the current rules on its head. The purpose of "avoid[ing] even the appearance of impropriety"[1] certainly would not be served by permitting judges of perhaps adjoining offices and courtrooms to sit in judgment of each other.

James rounds out his argument by asserting that this Court could never sit in judgment of any judges in the state, because this Court's "circuit"

[1] Canon Two of the Judicial Code of Conduct; *Wilson v. McNeely*, 295 Ga.App. 41 (2008).

consists of the entire state. James' argument is flawed for multiple reasons, not the least of which is that the judicial circuits of this state are defined. O.C.G.A. § 15-6-1. This Court does not have a "circuit." Thus, James proposes a different rule from the one currently in place and then proceeds to attack the applicability of his own proposed rule.

Moreover, the application of the present rule clearly is aimed at judges who are likely to be perceived by the public as working together or having a close working relationship. Thus, the judges within a single judicial circuit might be thought of as having physically close offices, attending many events together, etc. That relationship is much less likely to exist between justices of this Court and judges of the trial level courts throughout the state.

Finally, James asserts that GCO and Smith waited to see if they received an unfavorable result before raising the issue of recusal. The facts simply do not bear this out. The Verified Complaint was filed February 18, 2014 and James' Answer ***and counterclaims*** were filed on March 13, 2014. The Motion for Recusal was filed April 24, 2014. No "unfavorable result" was ordered until March 17, 2015, when Judge Brown granted James' Motion for Summary Judgment. GCO and Smith waited a brief but reasonable amount of time after filing their Verified Complaint to see if Judge Brown would recuse himself *sua sponte.* They then filed a Motion for Recusal, ***before the trial court had***

taken any action or issued any orders. The subsequent denial of the Motion for Recusal was not ripe for appeal until the case had terminated. There is no basis for accusing GCO and Smith of gaming the system.

2 – Summary Judgment Should Not Have Been Granted

James argues that the trial court was required to hold a hearing on his Motion for Summary Judgment. This is true, but only in the sense that the trial court was required to give GCO and Smith an opportunity to respond to the Motion. Oral hearings on motions for summary judgment are not required. *Ferguson v. Miller,* 160 Ga.App. 436 (1981); *Brown v. Shiver,* 183 Ga.App. 207 (1987).

James' point is not quite clear. GCO and Smith are not arguing that a hearing was not required, nor are they complaining that a hearing was held. They responded to James' motion for summary judgment. That is, they were "heard." Their complaint is that the trial court granted James' summary judgment motion despite the presence of disputed facts and without an appropriate explanation of the reasons for granting the motion.

The disputed facts are stark. James claims that he never had a policy of refusing to issue temporary licenses. In contrast, Smith swore in his Verified Complaint that James told Smith that James had never issued a temporary license and never intended to. R9. In addition, Jackson (James' clerk) testified

that James' policy was not to issue temporary licenses. R90. Another of James' clerks, Sandra Blount, testified that in her 25 years of working for the Richmond County probate judges, they never issued temporary licenses until July 2014 (i.e., six months after Smith applied in the present case). R139.

Whether James refused to issue temporary licenses until after GCO and Smith filed the present case is highly material to the case. Because there appears to be a genuine dispute of this material fact, it is not possible to grant summary judgment. The trial court made no explanation of why the existence of a genuine dispute of material fact did not preclude summary judgment. Indeed, the record implies summary judgment was granted solely on who physically appeared at the hearing, without regard to the merits. A "hearing" date for summary judgment purposes is merely notice to the respondent that the matter will be heard and taken under advisement as of a certain day. *Ferguson.*

3 – The Case is Not Moot

James argues that the case is moot because he issued Smith a license. The issue, however, is not whether James issued Smith a five-year license. This case never has been about the issuance of five-year licenses. The case is about James' refusal to issue temporary licenses.

By definition, the non-issuance of temporary licenses is a short-termed issue. An applicant only may obtain a temporary license during a 120-day

window that opens once every five years. O.C.G.A. § 16-11-129(i). It is self-evident, therefore, that a case in mandamus to require issuance of a temporary license is almost certain not to be resolved before the issuance of the temporary license is no longer relevant. The mootness doctrine therefore does not apply because of the well-known exception for issues that are capable of repetition yet evading review. The present case is a perfect example.

An applicant only can apply for a temporary license in conjunction with the application for renewal of a regular five-year license. And, the temporary only can be sought if the license being renewed will expire within the next 90 days or did expire within the previous 30 days. *Id.* The law further requires a five-year license to be issued within 45 days. O.C.G.A. § 16-11-129(d).[2] Thus, an applicant who is eligible for a license and who applies for both a renewal five-year license and a temporary license no longer is concerned about the denial of a temporary license after he receives a five-year license. If he is wrongfully denied a five-year license, the lack of a temporary license is overshadowed by the lack of a five-year license, and the issuance of a five-year license obviates the need for a temporary license.

[2] The 45 days may be obtained by adding the maximum interval for each step of the process (five days to request background check, 16-11-129(d(1)(A) and (1)(B)(2); 30 days for return of the background check, 16-11-129(B)(4); and 10 days for the probate judge to issue the license, 16-11-129(B)(4).

The present case presents an issue of a probate judge who refuses, in all cases, ever to issue temporary licenses. Thus, an applicant for a renewal license is denied a temporary license every five years. His quest for temporary licenses is not moot because he can expect to suffer the same wrong over and over again on a five-year cycle. The Eleventh Circuit has ruled that the five-year life cycle of a GWL results in an exception to the mootness doctrine after a license is issued, because the applicant will have to re-apply every five years. *Camp v. Cason,* 220 Fed.Appx. 976, 981 (11th Circuit 2007).

CONCLUSION

Appellants have shown that Judge Brown was required by binding precedent to recuse himself, and that all orders issued in this case by Brown are void. For that reason alone, this Court should vacate the judgment of the trial court with instructions that all judges of the Augusta Judicial Circuit, including Judge Brown, must recuse themselves.

If this Court does not do so, this Court should reverse the judgment of the trial court and remand for further proceedings.

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CERTIFICATE OF SERVICE

I certify that on October 27, 2015, I served a copy of the foregoing via U.S. Mail upon:

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