

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
BRIEF IN RESPONSE TO PLAINTIFF'S SUMMARY JUDGMENT
MOTION AND IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT MOTION, EXHIBITS,
STATEMENT OF MATERIAL FACTS AS TO WHICH THERE ARE NO
GENUINE ISSUES TO BE TRIED
AND THEORIES OF RECOVERY**

COBB COUNTY ATTORNEY'S OFFICE
Attorneys for Defendant

H. WILLIAM ROWLING, JR.
Sr. Associate County Attorney
Georgia Bar No. 617225

DEBORAH L. DANCE
Assistant County Attorney
Georgia Bar No. 203765

100 Cherokee Street, Suite 595
Marietta, GA 30090
770-528-4000, Facsimile 770-528-4010

TABLE OF CONTENTS

MOTION FOR SUMMARY JUDGMENT

BRIEF IN RESPONSE TO PLAINTIFF’S SUMMARY JUDGMENT MOTION
AND IN SUPPORT OF DEFENDANTS’ SUMMARY JUDGMENT MOTION

I. INTRODUCTION..... 1

 A. FACTUAL OVERVIEW..... 2

 B. RELIEF SOUGHT..... 2

 C. ISSUE PRESENTED..... 3

II. STATEMENT OF FACTS 3

III. ARGUMENT & CITATIONS TO AUTHORITY..... 11

 A. Judge Dodd is absolutely immune..... 11

 B. Plaintiff’s claims are moot, and this court lacks jurisdiction 12

 C. Judge Dodd issued Plaintiff’s firearms license in compliance with
statutory mandates..... 13

 1. *Provisions of O.C.G.A. § 16-11-129* 13

 2. *Application of Statutory Language* 16

 D. Temporary Firearms Licenses are issued to renewal applicants..... 18

 E. Plaintiff is not entitled to any of his requested relief..... 22

IV. CONCLUSION 23

CERTIFICATE OF SERVICE

EXHIBITS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE ARE NO
GENUINE ISSUES TO BE TRIED

THEORIES OF RECOVERY

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*

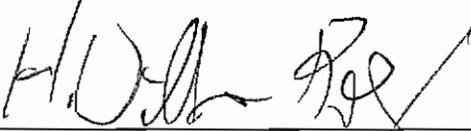
CIVIL ACTION
FILE NO: 06-1-8834-33

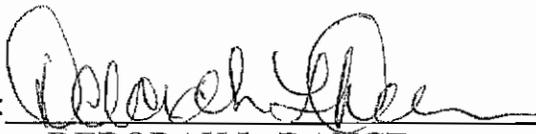
MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant David A. Dodd and respectfully moves this Honorable Court pursuant to O.C.G.A. §9-11-56(b) for entry of a judgment in his favor on the allegations of Plaintiff's Complaint. As grounds for the motion, Defendant shows that there exists no genuine issues of material fact to be tried and that he is entitled to a judgment as a matter of law. In making this motion, Defendant relies upon all pleadings, affidavits and deposition testimony filed in this case.

This 20th day of June, 2007.

COBB COUNTY ATTORNEY'S OFFICE

By: 
H. WILLIAM ROWLING, JR.
Sr. Associate County Attorney
State Bar No. 617225

By: 
DEBORAH L. DANCE
Assistant County Attorney
State Bar No. 203765

Attorneys for Defendant

100 Cherokee Street, Suite 595
Marietta, Georgia 30090
770-528-4000, Facsimile: 770-528-4010

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

**DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S
SUMMARY JUDGMENT MOTION AND
IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION**

I. INTRODUCTION.

Plaintiff Michael Menkus brings this State law action against David Dodd, Judge of Probate Court, seeking relief regarding the issuance of Georgia Firearms Licenses, even though the temporary and permanent licenses in question were issued on October 31, 2006 and January 23, 2007 respectively. Judge Dodd's conduct under the circumstances was reasonable and justified, and the licenses were issued in a manner consistent with state and federal law. Based upon the undisputed facts before the Court, Judge Dodd is entitled to summary judgment on all of Plaintiff's claims for the very reason that Plaintiff is not entitled to summary judgment. Contemporaneously with the filing of this brief, Judge Dodd has filed a

Motion for Summary Judgment as to all of Plaintiff's claims. In brief, Judge Dodd's conduct compels a judgment in his favor as a matter of law.

A. FACTUAL OVERVIEW.

On October 17, 2006, Plaintiff applied for a five (5) year renewal firearms license. Judge Dodd was out of town during Plaintiff's application and had no contact with Plaintiff. At the time of application, Plaintiff was not immediately issued a Temporary Firearms License ("TFL"). Ten days later, on October 27, 2006, Plaintiff filed suit, seeking mandamus to compel Judge Dodd to issue him a TFL. Shortly after Judge Dodd's review of the application, a TFL was issued to Plaintiff on October 31, 2006. Judge Dodd included a statement on the TFL consistent with his interpretation of state and federal laws. Judge Dodd also issued Plaintiff a GFL on January 23, 2007, after receiving the results of the statutorily required background checks.

B. RELIEF SOUGHT.

Plaintiff requested a writ of mandamus and declaratory and injunctive relief, because Judge Dodd: (1) did not issue a Georgia Firearms License ("GFL") within sixty (60) days, (2) did not immediately issue a temporary license at the time of Plaintiff's renewal application, and (3) included allegedly improper language on the temporary license when it was issued. In addition to equitable relief, Plaintiff seeks costs for bringing and maintaining this action.

C. ISSUE PRESENTED.

Can this court grant Plaintiff injunctive or monetary relief against Judge Dodd (who is absolutely immune from liability), who, after completing a mandated investigative process, issued Plaintiff his requested firearms license(s), albeit not within sixty (60) days? The answer is “no.” Not only is Judge Dodd entitled to immunity, but Plaintiff’s claims are moot, and there is no pending case or controversy such that this Court has authority to grant any relief against Judge Dodd. Moreover, as recently as last month, the Georgia Court of Appeals held that the sixty (60) day limitation period “is implicitly extended by the statute itself when necessary to accommodate any delays that reasonably may be attributed to the investigative process.” *Moore v. Cranford*, 2007 WL 1518911, -- Ga. App. -- (May 25, 2007).

II. STATEMENT OF FACTS.

On October 17, 2006 Plaintiff filed an application seeking a renewal of his license to carry a pistol or revolver. A copy of Plaintiff’s application is attached hereto as Exhibit “B.” Under Georgia law, Judge David Dodd, as judge of the Probate Court, oversees the issuance of the license. Pursuant to Georgia law, Judge Dodd is prohibited from issuing licenses to persons with certain criminal histories, which will be set forth more fully below.

Judge Dodd became Judge of the Cobb County Probate Court on January 1, 1985 and has held that position continuously to the present date. (Affidavit of Judge David Dodd (Exhibit A) at ¶ 1). One of Judge Dodd's duties as Judge of the Probate Court is to handle the issuance of licenses to carry pistols or revolvers. (Exhibit A at ¶ 1). Pursuant to O.C.G.A. § 16-11-129(b), there are certain individuals whom Georgia law prohibits Judge Dodd from issuing a license to, including:

- (1) Any person who is prohibited from possessing firearms pursuant to 18 U.S.C. Section 922;
 - (1.1) Any person under 21 years of age;
- (2) Any person who is a fugitive from justice or against whom proceedings are pending for any felony, forcible misdemeanor, or violation of O.C.G.A. §§ 16-11-126 [carrying a concealed weapon], 16-11-127 [carrying deadly weapons at public gatherings], or 16-11-128 [carrying pistol without license] until such time as the proceedings are adjudicated;
- (3) Any person who has been convicted of a felony by a court of this state or any other state or by a court of the United States, including its territories, possessions, and dominions [];
- (4) Any individual who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within five years of the date of his application. [];
- (5)(A) Any person who has been convicted of the provisions of paragraph (3) of this subsection notwithstanding, who has been convicted of an offense arising out of the unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug.
 - (B) [definitional section].
- (6) Any person not lawfully present in the United States.

Judge Dodd and his office have always sought to comply with the ultimate and true intent of the statute, which is to prevent certain individuals from obtaining a license to carry a pistol or revolver. (Exhibit A at ¶ 2).

Judge Dodd is required by Georgia law to cause a first time applicant and a renewal applicant's set of fingerprints to be forwarded to the GCIC for a search of the FBI's records on that individual and to obtain a report on that search of the records from the FBI. (Exhibit A at ¶ 3; O.C.G.A. § 16-11-129). The FBI report often contains criminal histories from other states which the GCIC report often does not contain. Thus, to prevent certain applicants with certain criminal histories from obtaining a license, Judge Dodd cannot issue a license until he has received and analyzed the FBI report. Otherwise, Judge Dodd runs the risk of issuing a license to a person with a dangerous criminal history and who is prohibited by O.C.G.A. § 16-11-129 from obtaining a license. (Exhibit A at ¶ 3). For example, if Judge Dodd were to issue a license prior to receiving the FBI report and the applicant to whom he issued the license has been convicted of murder, aggravated assault or any other dangerous crime, then that applicant subsequently commits a crime with the firearm being carried pursuant to the license he issued, a tragedy would have occurred which might have otherwise been avoided. (Exhibit A at ¶ 3).

To cause searches of an applicant's criminal history to be performed effectively, upon completion of the application for the license by the applicant, Judge Dodd has the applicant obtain a set of fingerprints from the Cobb County Sheriff's Office ("CCSO"). (Exhibit A at ¶ 4). The CCSO ensures that the fingerprints are properly sent to the GCIC for a search of the FBI records as required by statute. (Exhibit A at ¶ 4). It is important to note that the GCIC forwards the information to the FBI for the FBI to perform a search of its records. (Exhibit A at ¶ 4). The report from the FBI and the report from the GCIC are very similar; however, the report from the FBI typically contains a more comprehensive criminal history from other states. (Exhibit A at ¶ 4). The FBI then prepares a report which it sends directly to Judge Dodd. (Exhibit A at ¶ 4).

Consistent with the mandate of O.C.G.A. § 16-11-129 that the appropriate "law enforcement agency in the county" oversee the issuance of the fingerprints to the GCIC and the search of the GCIC records, it has always been the practice of the Cobb County Probate Court and Judge Dodd to allow the Sheriff's Office to conduct the required records search, as the process can be accomplished more efficiently. (Exhibit A at ¶ 5).

Commonly, Judge Dodd does not receive the required report and background check information for a period of two (2) months or longer after the fingerprints are forwarded. (Exhibit A at ¶ 5). Judge Dodd is unaware of any

authority which would allow him to order the FBI to return the required report in a shorter time period. (Exhibit A at ¶ 5). (“We know of no authority by which a probate court can order the [FBI] to return a [] background check within 50 days.” *Moore v. Cranford*, 2007 WL 1518911 (Ga.App.))

Because Judge Dodd cannot issue an applicant a license until he has determined that all of the qualifications of O.C.G.A. § 16-11-129 have been met (i.e., that the applicant does not have any of the prohibited criminal history), and because he almost always never receives the report from the FBI until over 60 days after the date of the application with his office, Judge Dodd is not able in every scenario to issue licenses within the 60 day time period demanded by Plaintiff. (Exhibit A at ¶ 3, 14).

On October 17, 2006, Judge Dodd’s office initially received Plaintiff’s application for a license. (Exhibit A at ¶ 6). Ten (10) days later, Plaintiff filed the instant action in this Court. (Complaint). As with all of the applicants, Plaintiff was required to be fingerprinted with the information provided to the CCSO. On or about January 22, 2007 Judge Dodd received final notice from the FBI that his office may proceed with comparing its background check with information with the state background check information. (Exhibit A at ¶ 6). On January 23, 2007, Judge Dodd’s office mailed Plaintiff his license. (Exhibit A at ¶ 6).

Judge Dodd and the Probate Court do not have a GCIC terminal available for their use. (Exhibit A at ¶ 4). Judge Dodd is dependent on the state and federal law enforcement agencies returning their required reports in a timely manner for the issuance of GFLs. (Exhibit A at ¶ 4). Issuing firearms licenses is but one of a multitude of duties and tasks which Judge Dodd and his office perform.

At the time Plaintiff filed his renewal application on October 17, 2006, he also sought a TFL pursuant to O.C.G.A. § 16-11-129(i)(1). At the time Plaintiff made his application, Judge Dodd was out of the office. (Exhibit A at ¶ 6). Plaintiff was not issued a TFL when he applied for the GFL.

Judge Dodd's specific job responsibilities when issuing firearms licenses includes the interpreting the inherent conflicts and interplay between federal and state law, an area of law which appears arcane at times. (Exhibit A at ¶ 7). Nonetheless, Judge Dodd is compelled to make a reasoned decision that complies with both federal and state law. During the 2006 legislative session, the Georgia Legislature had made numerous changes to the statute, and Judge Dodd was evaluating their impact, if any, on the TFL component of the statute. (Exhibit A at ¶ 7; Ga. L. 2006, p. 264, § 1/ HB 1032). Judge Dodd was also in the process of reviewing the federal firearms licensing requirements regarding background checks that were being impacted by the Georgia statutory changes. (Exhibit A at ¶ 7). Upon Judge Dodd's return to his office, after a review of Plaintiff's application,

correspondence from his counsel and an examination of the changes made to the statute and interplay with the federal firearms requirements, Judge Dodd issued a TFL to Plaintiff on October 31, 2006. (Exhibit A at ¶ 7; Exhibit 3 to Plaintiff's Brief in Support of Motion for Summary Judgment). The TFL issued to Plaintiff met the mandates of O.C.G.A. § 16-11-129(i)(3, 4, and 5). (Exhibit A at ¶ 8; Attachment 1 to Exhibit A). The statute lists mandatory information which must be contained in the TFL. O.C.G.A. § 16-11-129(i)(3). Plaintiff's TFL contains the required information. (Exhibit A at ¶ 8).

The TFL also contains the following language added by Judge Dodd:

NOTICE TO FEDERAL FIREARMS LICENSEES:

O.C.G.A. 16-11-129(i) does not direct the judge of the probate court to conduct a criminal background check for the issuance of Temporary Firearms Licenses. **No check on the National Instant Criminal Background Check System has been conducted on this individual for issuance of the Temporary Firearms License. This Temporary License is not intended to create an exception to the required background check at the time of transfer.**

(Exhibit A to First Affidavit of Michael Menkus)(Emphasis in original). Judge Dodd added language to the TFL in an effort to cover the gap created by inconsistent provisions of O.C.G.A. 16-11-129 and the conflict between Georgia law and federal law. (Exhibit A at ¶ 9). O.C.G.A. 16-11-129 (d) mandates that the court conduct certain background checks on the applicant for license applications and requests for license renewals in order for the court to ensure that the applicant is not a prohibited person pursuant to O.C.G.A. 16-11-129 (b). This requirement

for a background check on all applicants conflicts with the language in O.C.G.A. 16-11-129 (i) which has been interpreted to be an instant issue of a renewal license without any background check. (Exhibit A at ¶ 9). In addition, Judge Dodd believes that the issuance of a firearms license without conducting a check on the National Instant Background Check appears to be in violation of 18 U.S.C. 922, by issuing a firearm license to someone who may be federally prohibited from possessing a firearm. (Exhibit A at ¶ 10).

Furthermore, Judge Dodd was aware that the July 1, 2006 Bureau of Alcohol, Tobacco, Firearms and Explosives Open Letter to all Georgia federal firearms licensees states that the “Georgia Concealed Weapons Permit” (CWP) qualified as an alternative to a NICS check pursuant to an allowed exception in the Brady Law pursuant to 18 U.S.C. 922 (t)(3). (Exhibit A at ¶ 11; Exhibit 3 to Plaintiff’s Brief). However, the open letter does not state that the TFL qualifies for the waiver of the NICS check. The TFL does not comply with 18 U.S.C. 922 (t)(3) because, since there is no background check conducted on the applicant, it cannot be verified that the holder of the license is prohibited by federal or state law to possess a firearm. (Exhibit A at ¶ 11). Thus, Judge Dodd’s inclusion of the notation on the TFL is a result of his interpretations of his duties to follow both state and federal law in the issuing of Georgia firearms licenses. (Exhibit A at ¶ 11). Judge Dodd believes his decision to approve the immediate issuance of TFLs

with the instructive language fully complies with his obligations under the law. (Exhibit A at ¶ 12).

Additional details and facts are set forth in Defendant's Statement of Material Facts as to Which There Are No Genuine Issue to be Tried, which Defendant adopts and incorporates by reference as if fully set forth herein.

III. ARGUMENT & CITATIONS OF AUTHORITY.

In the present case, the undisputed evidence available from discovery shows Judge Dodd, and not Plaintiff, is entitled to judgment as a matter of law. Plaintiff's claim pursues the following theories: (1) Judge Dodd did not issue Plaintiff his five (5) year Georgia Firearms License in a timely fashion; and (2) Judge Dodd did not comply with the law in the issuance of the TFL.

However, Plaintiff's attempt to attach liability does not survive applicable legal scrutiny. Judge Dodd's theories for summary judgment are as follows: (A) Judge Dodd is absolutely immune; (B) Plaintiff's claims are moot, and this court lacks jurisdiction; (C) Judge Dodd properly acted within his discretion in issuing the five (5) year Georgia Firearms License beyond the sixty (60) day statutory directive; (D) Judge Dodd issues TFLs to renewal applicants in a lawful manner; and (E) Plaintiff is not entitled to any of the relief he seeks.

A. Judge Dodd is absolutely immune.

Georgia courts "have consistently held that judges are immune from liability

in civil actions for acts performed in their judicial capacity.” *Robinson v. Becker*, 265 Ga. App. 692, 694 (2004); *Maddox v. Prescott*, 214 Ga.App. 810, 812 (1994). “It is ultra important in our democracy to preserve the doctrine of judicial immunity to enable our judges to exercise within their lawful jurisdiction untrammelled determination without apprehension of subsequent damage suits.” *Maddox*, 214 Ga. App. at 813. O.C.G.A. §16-11-129 specifically provides that one of the duties of probate judges is to issue licenses to carry pistols or revolvers. To the extent Plaintiff is seeking any monetary damages from Judge Dodd, Judge Dodd is clearly protected by the doctrine of immunity for performing his judicial duties.

B. Plaintiff’s claims are moot, and this court lacks jurisdiction.

Plaintiff brought his action to compel Judge Dodd to issue him his temporary and permanent firearms license. Because the requested relief has been accomplished, Plaintiff’s claims are **moot**. Because Plaintiff has already received all the equitable relief sought, and “there is no actual or justiciable controversy [remaining] between adverse parties,” the court lacks jurisdiction to grant any equitable relief. *Farm & Home Life Ins. Co. v. Skelton*, 235 Ga. App. 507, 508 (1998). See *Smith v. Board of Commissioners of Macon County*, 229 Ga. 689 (1972) (“where a single act sought to be enjoined has been accomplished,” the court should deny injunctive relief.)

C. Judge Dodd issued Plaintiff's firearms license in compliance with statutory mandates.

An action for mandamus can only be brought against a public officer to compel the performance of a "clear legal right." Where the act in question is discretionary, mandamus is not available. *Clear Vision CATV Services v. Mayor of Jesup*, 225 Ga. 757 (1969). As set forth below, the 60-day time limitation contained in the statute is clearly discretionary, such that mandamus shall not lie.

1. Provisions of O.C.G.A. § 16-11-129.

The granting of firearms licenses in Georgia is controlled by O.C.G.A. § 16-11-129. A thorough reading of the statute makes it clear that its purpose is to prevent the issuance of licenses to persons who do not qualify, while creating a procedure which fosters expeditious licensing of those who do qualify. The Legislature has given the responsibility of issuing firearms licenses to Probate Court judges. *Id.* In essence, Probate Court judges sit as gatekeepers in determining the eligibility of individuals who apply for firearms licenses.

Critically, the Court of Appeals of Georgia recently issued a decision regarding this statute and the timeliness of the issuance of firearms licenses. In *Moore v. Cranford*, a panel of the Court affirmed the award of summary judgment

to Coweta County Probate Court Judge Cranford who issued a firearms license outside the 60 days identified in the statute. The Court reasoned:

The Code’s background check provisions are a crucial component of the licensing scheme, considering that possessing a firearms license exempts the holder from criminal sanctions for carrying a concealed firearm in public and carrying a firearm in a school safety zone. [cits omitted]. Because carrying a concealed firearm is considered dangerous enough to be criminalized, the Code expressly provides that the probate court “shall not” issue firearms licenses to: [specifically enumerated individuals which may be identified through background checks].

Moore, at 2. Pursuant to O.C.G.A. § 16-11-129(b), no license shall be granted to:

- (1) Any person who is prohibited from possessing firearms pursuant to 18 U.S.C. Section 922;
- (1.1) Any person under 21 years of age;
- (2) Any person who is a fugitive from justice or against whom proceedings are pending for any felony, forcible misdemeanor, or violation of O.C.G.A. §§ 16-11-126 [carrying a concealed weapon], 16-11-127 [carrying deadly weapons at public gatherings], or 16-11-128 [carrying pistol without license] until such time as the proceedings are adjudicated;
- (3) Any person who has been convicted of a felony by a court of this state or any other state or by a court of the United States, including its territories, possessions, and dominions [];
- (4) Any individual who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within five years of the date of his application. [];
- (5)(A) Any person who has been convicted of the provisions of paragraph (3) of this subsection notwithstanding, who has been convicted of an offense arising out of the unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug.
 - (B) [definitional section].
- (6) Any person not lawfully present in the United States.

First time and renewal applicants for a license are required to fill out an application, the form of which is provided by the Department of Public Safety. O.C.G.A. § 16-11-129(a). The application seeks certain information about the applicant, to include the applicant's criminal history. Pursuant to O.C.G.A. § 16-11-129(c), "following the completion of the application for a license or the renewal of a license, the judge of the probate court shall require the applicant to proceed to an appropriate law enforcement agency in the county with the completed application" and that law enforcement agency shall then capture the fingerprints of the applicant. O.C.G.A. § 16-11-129(c). "For both the license application and the request for license renewals, the judge of the probate court shall direct the law enforcement agency to request a fingerprint-based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and returning appropriate report to the judge of the probate court." O.C.G.A. § 16-11-129(d)(1). "Requests for both license applications and requests for license renewals, the judge of the probate court shall also direct the law enforcement agency to conduct a background check using the Federal Bureau of Investigations National Instant Criminal Background Check system (NICBC) and return an appropriate report to the probate judge." O.C.G.A. § 16-11-129(d)(2).

“Each law enforcement agency, upon receiving such applications and obtaining such fingerprints, shall promptly conduct a thorough search of its records and records to which it has access, and shall notify the judge of the probate court within 50 days, by telephone and in writing, of any findings relating to the applicant which may bear on his eligibility for a license under the terms of this Code Section.” O.C.G.A. § 16-11-129(d)(4). “Not later than 60 days after the date of the application the judge of the probate court shall issue the applicant a license to carry any pistol or revolver *if* no facts establishing ineligibility have been reported and *if* the Judge determines that the applicant has met all of the qualifications, is of good moral character, and has complied with the requirements contained in this Code Section.” (Emphasis supplied.) (O.C.G.A. § 16-11-129(d)(4); Exhibit A at ¶ 14).

2. Application of Statutory Language.

Clearly, O.C.G.A. § 16-11-129 is intended to prohibit and prevent persons convicted of certain crimes or with charges pending against them for those crimes from obtaining a license to carry a pistol or revolver. Under the statute, Judge Dodd is prohibited from issuing a license to carry a pistol or revolver to persons convicted of such crimes or with such criminal histories. The law requires Judge Dodd to cause a search of the FBI records on the applicant and to obtain a report of

that search to analyze an applicant's criminal history to ensure that a license is not issued to a person with a criminal history prohibited by O.C.G.A. § 16-11-129.

O.C.G.A. § 16-11-129 requires Judge Dodd to seek an "appropriate local law enforcement agency" to obtain the report from the FBI and to perform a search of the GCIC. Judge Dodd submits that he and his office have always sought to comply with the ultimate and true intent of the statute, which is to prevent certain individuals from obtaining a license to carry a pistol or revolver. (Exhibit A at ¶ 2).

By the plain language of O.C.G.A. § 16-11-129, Judge Dodd is only authorized to issue a license not later than 60 days after the date of the application **if** "no facts establishing ineligibility have been reported **and if** [Judge Dodd] determines the applicant has met all the qualifications, is of good moral character and has complied with all the requirements [of O.C.G.A. § 16-11-129]." (Emphasis supplied). The FBI report often contains criminal histories from other states which the GCIC report often does not contain. (Exhibit A at ¶ 4). Thus, to prevent certain applicants with certain criminal histories from obtaining a license, Judge Dodd cannot issue a license until he has received and analyzed the FBI report. Otherwise, Judge Dodd runs the risk of issuing a license to a person with a dangerous criminal history and who is prohibited by O.C.G.A. § 16-11-129 from obtaining a license. For example, if Judge Dodd were to issue a license prior to

receiving the FBI report and the applicant to whom he issued the license has been convicted of murder, aggravated assault or any other dangerous crime, then that applicant subsequently commits a crime with the firearm being carried pursuant to the license he issued, a tragedy would have occurred which might have otherwise been avoided. (Exhibit A at ¶ 3).

While there is sparse case law on this topic, the Georgia Court of Appeals recently affirmed summary judgment granted to the Coweta probate court judge in an almost similar action regarding the 60 day time line to issue firearms licenses brought by instant plaintiff's counsel. *Moore*. The *Moore* court acknowledged that "between these two mandates (criminal background check requirements prior to the issuance of a license and 60 day time deadline) lies a quandary." *Id.* at 3. However, the Court concluded, "[b]ecause the probate court may only issue a license if no disqualifying or derogatory information was discovered as a result of [the] background checks, the 60-day period is implicitly extended by the statute itself when necessary to accommodate any delays that reasonably may be attributed to the investigative process." *Id.* at 5. A contrary ruling would defy the statute and, as of May 25, 2007, would ignore precedent.

D. Temporary firearms licenses are lawfully issued to renewal applicants.

The TFL issued to Plaintiff met the mandates of O.C.G.A. § 16-11-129(i)(3, 4, and 5). (Exhibit A at ¶ 15; Attachment 1 to Exhibit A). The statute lists

mandatory information which must be contained in the TFL. O.C.G.A. § 16-11-129(i)(3).¹ Plaintiff's TFL contains the required information. (Exhibit A at ¶ 16). However, the statute does not limit the information that may be contained on the TFL. O.C.G.A. § 16-11-129(i)(3).

Judge Dodd added the language below to the TFL in an effort to cover the gap created by inconsistent provisions of O.C.G.A. 16-11-129 and the conflict between Georgia law and federal law. (Exhibit A at ¶ 9).

NOTICE TO FEDERAL FIREARMS LICENSEES:

O.C.G.A. 16-11-129(i) does not direct the judge of the probate court to conduct a criminal background check for the issuance of Temporary Firearms Licenses. **No check on the National Instant Criminal Background Check System has been conducted on this individual for issuance of the Temporary Firearms License. This Temporary License is not intended to create an exception to the required background check at the time of transfer.**

(Exhibit A to First Affidavit of Michael Menkus)(Emphasis in original). The notation is factual and informative. But, more importantly, it is not prohibited by any statutory language.

O.C.G.A. 16-11-129 (d) mandates that the court conduct certain background checks on the applicant for license applications and requests for license renewals

¹ Unlike the minimal form requirements of a TFL, the permanent firearms license form has numerous specific compulsory structural and content requirements. O.C.G.A. § 16-11-129(f). The requirements even speak to the type of card stock, size of license, the requirement for lamination, and other mandatory information which must be included on the card. *Id.*

so that the court may ensure that the applicant is not a prohibited person pursuant to O.C.G.A. 16-11-129 (b). Prior to the 2006 revisions, this requirement for a background check on all applicants conflicted with the language in O.C.G.A. 16-11-129 (i) which has been historically interpreted to be an instantaneous issuance of a renewal license without any background check. (Exhibit A at ¶ 9, 16). In addition, Judge Dodd believes that the issuance of a firearms license without conducting a check on the National Instant Background Check appears to be in violation of 18 U.S.C. 922 by issuing a firearm license to someone who may be federally prohibited from possessing a firearm. (Exhibit A at ¶ 10). Furthermore, the July 1, 2006 the Bureau of Alcohol, Tobacco, Firearms and Explosives Open Letter to all Georgia federal firearms licensees states that the “Georgia Concealed Weapons Permit” (CWP) qualified as an alternative to a NICS check pursuant to an allowed exception in the Brady Law pursuant to 18 U.S.C. 922 (t)(3). (Exhibit A at ¶ 11; Exhibit 3 to Plaintiff’s Brief). The open letter does not state that the TFL qualifies for the waiver of the NICS check. The TFL does not comply with 18 U.S.C. 922 (t)(3) because, since there is no background check conducted on the applicant, it cannot be verified that the holder of the license is prohibited by federal or state law to possess a firearm. (Exhibit A at ¶11). Judge Dodd’s inclusion of the notation on the TFL is a result of his reasonable interpretations of his duties to

follow both state and federal law in the issuing of Georgia firearms licenses. (Exhibit A at ¶ 11).

Like all citizens, Judge Dodd is required to follow the law. Judge Dodd's specific job responsibilities when issuing firearms licenses includes the interpreting the inherent conflicts and interplay between federal and state law. Judge Dodd acknowledges this area of law appears arcane at times. Nonetheless, Judge Dodd is compelled to make a reasoned decision that complies with both federal and state law. Judge Dodd believes his decision to approve the immediate issuance of TFLs with the instructive language fully complies with his obligations under the law. (Exhibit A at ¶ 17).

Otherwise, Judge Dodd would be left with two choices: (1) immediately issuing a TFL to any applicant without having analyzed the applicant's full criminal history; or (2) not issuing any temporary licenses until such time as he has received and analyzed the applicant's criminal history (which would operate to effectively eliminate the temporary licenses). Judge Dodd submits that it simply cannot be found that the intent of O.C.G.A. § 16-11-129 is to issue a temporary license without addressing the federal statutory requirements. Accordingly, Plaintiff is not entitled to the recovery he seeks and his motion for summary judgment should be denied. Furthermore, for these same reasons Judge Dodd is entitled to summary judgment on all of Plaintiff's claims.

E. Plaintiff is not entitled to any of his requested relief.

“The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case.” O.C.G.A. §9-5-8. “This power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to.” *Id.* “Petitions for a restraining order, injunction, receiver, or other extraordinary equitable relief shall be verified positively by the petitioner or supported by other satisfactory proofs.” O.C.G.A. § 9-10-110. The instant case simply does not present a “clear and urgent” case which would justify the issuance of an injunction. Plaintiff admits that he has been issued the license which he desires, and there are **no other parties** to this action claiming an entitlement to a license issued within 60 days who have not received that license. Moreover, there are no parties having received a TFL, claiming an entitlement or damages as a result of Judge Dodd’s informative language. Most importantly, Judge Dodd has not failed to comply with the requirements of O.C.G.A. § 16-11-129. As set forth above, Judge Dodd is prohibited from issuing licenses to persons with certain criminal histories, and Judge Dodd is ensuring that such persons are not issued permanent licenses and identifying the status of the background checks for the temporary licenses. The determination of an applicant’s criminal history is a condition precedent to the issuance of a license. As such, ordering Judge Dodd to begin issuing licenses **prior** to his receipt and analysis of

applicant's criminal history would be ordering Judge Dodd to violate O.C.G.A. §16-11-129 as was plainly concluded by the Court of Appeals in *Moore v. Cranford, supra*.

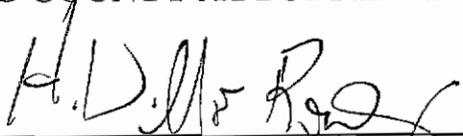
IV. CONCLUSION.

Judge Dodd has affirmatively shown that his actions were taken within the parameters of Georgia and Federal law. He has demonstrated the lawfulness and, quite frankly, the reasonableness of his conduct related to the issuance of the TFL and GFL. Plaintiff secured his temporary, and then his permanent license long ago, such that no equitable relief remains to be gained. As such, Judge Dodd is entitled to summary judgment. See *Lau's Corporation, Inc. v. Haskins*, 261 Ga. 491 (1991). For the foregoing reasons, the Court should grant complete summary judgment to Judge Dodd. The genesis of this case is not unlawful judicial conduct, but rather prudent, reasonable, and lawful decisions made by Probate Court Judge Dodd in the issuance of Georgia firearms licenses.

This 20th day of June, 2007.

COBB COUNTY ATTORNEY'S OFFICE

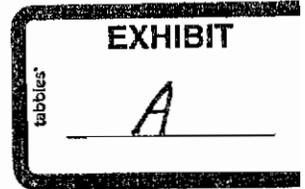
By: _____


H. WILLIAM ROWLING, JR.
Sr. Associate County Attorney
State Bar No. 617225
DEBORAH L. DANCE
Assistant County Attorney
State Bar No. 203765

Attorneys for Defendant

100 Cherokee Street, Suite 595
Marietta, GA 30090
770-528-4000 – Facsimile 770-528-4010

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA



MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

AFFIDAVIT OF DAVID A. DODD

Personally appeared before me the undersigned officer duly authorized by law to administer oaths, David A. Dodd, who after first being sworn, deposes and states under oaths as follows:

1.

I became Judge of the Cobb County Probate Court on January 1, 1985 and have held that position continuously to the present date. One of my duties as Judge of the Probate Court is to handle the issuance of licenses to carry pistols or revolvers. These licenses include Georgia Firearms Licenses ("GFL") and Temporary Firearms Licenses ("TFL").

2.

My office and I have always sought to comply with the ultimate and true intent of the O.C.G.A. § 16-11-129, which is to prevent certain individuals from

obtaining a license to carry a pistol or revolver while expeditiously providing a license to those applicants who qualify.

3.

I am required by Georgia law to cause a first time applicant and a renewal applicant's set of fingerprints to be forwarded to the GCIC for a search of the FBI's records on that individual and to obtain a report on that search of the records from the FBI. The FBI report often contains criminal histories from other states which the GCIC report often does not contain. Thus, to prevent certain applicants with certain criminal histories from obtaining a license, I cannot issue a license until I have received and analyzed the FBI report. Otherwise, I run the risk of issuing a license to a person with a dangerous criminal history and who is prohibited by O.C.G.A. § 16-11-129 from obtaining a license. For example, if I were to issue a license prior to receiving the FBI report and the applicant to whom I issued the license has been convicted of murder, aggravated assault or any other dangerous crime, then that applicant subsequently commits a crime with the firearm being carried pursuant to the license he issued, a tragedy would have occurred which might have otherwise been avoided.

4.

To cause searches of an applicant's criminal history to be performed effectively, upon completion of the application for the license by the applicant, I

have the applicant obtain a set of fingerprints from the Cobb County Sheriff's Office ("CCSO"). The Probate Court does not have a GCIC terminal available for our use. I am dependent on the state and federal law enforcement agencies returning their required reports in a timely manner for the issuance of GFLs. The CCSO ensures that the fingerprints are properly sent to the GCIC for a search of the FBI records as required by statute. The GCIC forwards the information to the FBI for the FBI to perform a search of its records. The report from the FBI and the report from the GCIC are very similar; however, the report from the FBI typically contains a more comprehensive criminal history from other states. The FBI then prepares a report which it sends directly to me.

5.

Consistent with the mandate of O.C.G.A. § 16-11-129 that the appropriate "law enforcement agency in the county" oversee the issuance of the fingerprints to the GCIC and the search of the GCIC records, it has always been my practice and the practice of this Court to allow the Sheriff's Office to conduct the required records search, as the process can be accomplished more efficiently. Commonly, I do not receive the required report and background check information for a period of two (2) months or longer after the fingerprints are forwarded. I am unaware of any authority which would allow me to order the FBI to return the required report in a shorter time period.

6.

On October 17, 2006, my office initially received Mr. Menkus' application for a license. At the time Mr. Menkus filed his renewal application on October 17, 2006, he also sought a TFL pursuant to O.C.G.A. § 16-11-129(i)(1). At the time Mr. Menkus made his application, I was out of the office. Ten (10) days later, Mr. Menkus filed the instant action in this Court. As with all of the applicants, Mr. Menkus was required to be fingerprinted with the information provided to the CCSO. On or about January 22, 2007, my office received final notice from the FBI that my office may proceed with comparing its background check with information with the state background check information. On January 23, 2007, my office mailed Mr. Menkus his license.

7.

My specific job responsibilities when issuing firearms licenses includes the interpreting the inherent conflicts and interplay between federal and state law, an area of law which I admit appears arcane at times. My responsibility is to make a reasoned decision that complies with both federal and state law. During the 2006 legislative session, the Georgia Legislature had made numerous changes to the statute, and I was evaluating their impact, if any, on the TFL component of the statute when Mr. Menkus made his application. I was also in the process of reviewing the federal firearms licensing requirements regarding background

checks that were being impacted by the Georgia statutory changes. Upon my return to the office, after my review of Mr. Menkus' application, correspondence from his counsel and an examination of the changes made to the statute and interplay with the federal firearms requirements, I issued a TFL to Mr. Menkus on October 31, 2006.

8.

The TFL issued to Mr. Menkus met the mandates of O.C.G.A. § 16-11-129(i)(3, 4, and 5). (TFL Issued to Mr. Menkus (Attached as Attachment 1)). The statute lists mandatory information which must be contained in the TFL. O.C.G.A. § 16-11-129(i)(3). Mr. Menkus' TFL contains the required information.

9.

I included the language to the TFL in an effort to cover the gap created by inconsistent provisions of O.C.G.A. 16-11-129 and the conflict between Georgia law and federal law. O.C.G.A. 16-11-129 (d) mandates that the court conduct certain background checks on the applicant for license applications and requests for license renewals in order for the court to ensure that the applicant is not a prohibited person pursuant to O.C.G.A. 16-11-129 (b). This requirement for a background check on all applicants conflicts with the language in O.C.G.A. 16-11-129 (i) which has been interpreted to be an instant issue of a renewal license without any background check.

10.

In addition, I believe that the issuance of a firearms license without conducting a check on the National Instant Background Check appears to be in violation of 18 U.S.C. 922, by issuing a firearm license to someone who may be federally prohibited from possessing a firearm.

11.

I am also familiar with a July 1, 2006 Bureau of Alcohol, Tobacco, Firearms and Explosives Open Letter to all Georgia federal firearms licensees which states that the "Georgia Concealed Weapons Permit" (CWP) qualified as an alternative to a NICS check pursuant to an allowed exception in the Brady Law pursuant to 18 U.S.C. 922 (t)(3). The open letter does not state that the TFL qualifies for the waiver of the NICS check. In my opinion, the TFL does not comply with 18 U.S.C. 922 (t)(3) because, since there is no background check conducted on the applicant, it cannot be verified that the holder of the license is prohibited by federal or state law to possess a firearm. Thus, I included the notation on the TFL as a result of my interpretations of my duties to follow both state and federal law in the issuing of Georgia firearms licenses.

12.

I believe my decision to approve the immediate issuance of TFLs with the instructive language fully complies with my obligations under the law.

13.

O.C.G.A. § 16-11-129 requires Judges to seek an “appropriate local law enforcement agency” to obtain the report from the FBI and to perform a search of the GCIC.

14.

By the plain language of O.C.G.A. § 16-11-129, a judge is only authorized to issue a license not later than 60 days after the date of the application **if** “no facts establishing ineligibility have been reported **and if** [the judge] determines the applicant has met all the qualifications, is of good moral character and has complied with all the requirements [of O.C.G.A. § 16-11-129].” (Emphasis supplied).

15.

The TFL issued to Mr. Menkus met the mandates of O.C.G.A. § 16-11-129(i)(3, 4, and 5).

16.

The statute lists mandatory information which must be contained in the TFL. O.C.G.A. § 16-11-129(i)(3). Mr. Menkus’ TFL contains the required information. O.C.G.A. 16-11-129 (d) mandates that the court conduct certain background checks on the applicant for license applications and requests for license renewals so that the court may ensure that the applicant is not a prohibited person pursuant

to O.C.G.A. 16-11-129 (b). Prior to the 2006 revisions, this requirement for a background check on all applicants conflicted with the language in O.C.G.A. 16-11-129 (i) and has been historically interpreted to be an instantaneous issuance of a renewal license without any background check.

17.

I am required to follow the law. My specific job responsibilities when issuing firearms licenses includes the interpreting the inherent conflicts and interplay between federal and state law. I acknowledge this area of law appears arcane at times. I am nonetheless compelled to make a reasoned decision that complies with both federal and state law. I believe my decision to approve the immediate issuance of TFLs with the instructive language fully complies with my obligations under the law.

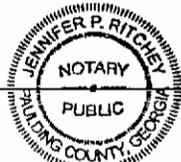
(REMAINDER OF PAGE LEFT BLANK INTENTIONALLY)

Further, Affiant sayeth naught.

David A. Dodd
David A. Dodd

Sworn to and subscribed before me
this 19th day of June, 2007.

J.P.
Notary Public



My Commission Expires
May 22, 2010

TEMPORARY FIREARMS LICENSE

COUNTY Cobb GEORGIA
NAME Michael Jay Mienkus
FIRST MIDDLE LAST

RESIDENCE ADDRESS [REDACTED]
[REDACTED]

DATE OF BIRTH [REDACTED] HEIGHT 5'10" WEIGHT 185
HAIR _____ RACE H SEX m EYES Blue

THIS FORM SHALL SERVE AS A TEMPORARY FIREARMS RENEWAL LICENSE FOR THE ABOVE NAMED INDIVIDUAL. FEE \$1.00

DATE ISSUED October 31, 2006

EXPIRES 90 DAYS FROM DATE OF ISSUE

SIGNATURE David A. Dodd
JUDGE, PROBATE COURT

NOTICE TO FEDERAL FIREARMS LICENSEES:
O.C.G.A. 16-11-129 (i) does not direct the judge of the probate court to conduct a criminal background check for the issuance of Temporary Firearms Licenses. No check on the National Instant Criminal Background Check System has been conducted on this individual for issuance of the Temporary Firearms License. This Temporary License is not intended to create an exception to the required background check at the time of transfer.

tabbies
B

APPLICATION FOR FIREARMS LICENSE

Cobb County, Georgia County Number 06-2793

Applicant's Name: Michael Jay Menkus
First Middle Last (or as registered with INS)

Date of Birth: [redacted] Sex: Male Race: White

Social Security No.: refuse to give Hair: Brown Height: 5'-9"

INS Alien/Admission No. Eyes: Blue Weight: 180

Place of Birth: Philadelphia PA
City State, Province or District Country

Residence/Street Address: [redacted]
County: Cobb 3006

Mailing Address if different: _____

Phone Numbers: Home ([redacted]) Work (_____)

Employed By: _____ How long? _____

Employer's Address: _____

1. Are you currently a United States Citizen?.....Yes No

If you have ever renounced your U.S. citizenship, attach a copy of the reversal of such renunciation.
If you are not a U.S. Citizen:

- you must show proof of name/address/date of birth/INS number/photo ID.
- Identify all countries of citizenship: _____
- Attach: (a) documentation of your lawful presence in the United States, and
(b) proof of residency in the State of Georgia for at least 90 days.

2. Are you a non-immigrant or non-resident alien?Yes No
If yes, attach proof that you fall within an exemption establishing your eligibility.

3. Have you ever been convicted of, pled guilty or *nolo contendere* to, or received first offender treatment for any offense involving the unlawful manufacture, distribution, possession or use of a controlled substance or dangerous drug?Yes No
If pardoned or rights restored, specify date(s) _____ and attach proof.

4. Have you ever been convicted of, pled guilty or *nolo contendere* to, or received first offender treatment for any crime involving domestic violence, violence towards a family member, child or significant other?Yes No
If pardoned or rights restored, specify date(s) _____ and attach proof.

5. Have you ever been convicted of, pled guilty or *nolo contendere* to, or received first offender treatment for any felony offense or any offense punishable by a term of imprisonment/probation over one year, or court-martial charge punishable by imprisonment over one year?..... Yes No
If pardoned or rights restored, specify date(s) _____ and attach proof.

6. Have you ever been convicted of, pled guilty or *nolo contendere* to, or received first offender treatment for any offense involving force or violence or a forcible misdemeanor? Yes No

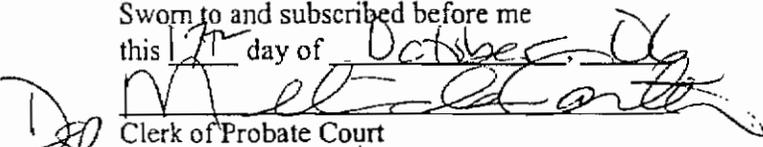
7. Have you ever been convicted of, or pled guilty or *nolo contendere* to, or received first offender treatment for carrying a concealed weapon, having a deadly weapon at a public gathering, carrying a pistol without a license or any other offense involving a weapon? Yes No

8. Are you subject to any pending charge or charges in any court including matters under indictment, accusation, on appeal, uncompleted first offender treatment or other court order? Yes No
 If yes, do the pending charges involve or arise out of any felony, any crime that is possibly punishable by imprisonment for over one year, or any misdemeanor involving force or violence, or any offense or conduct involving a weapon or any offense involving a controlled substance or other dangerous drug?..... Yes No
9. Have you left any state, or any foreign state, to avoid criminal prosecution, to avoid giving testimony in any criminal proceeding, or knowing that charges are pending against you?..... Yes No
10. Have you been the subject of any proceedings (including arrests, matters on appeal, under indictment or accusation, or cases which were *nolle prossed*) within the past five years for any offense arising out of the unlawful possession or use of a controlled substance or other dangerous drug, or found through a drug test to have used such a substance or drug unlawfully within the past year? Yes No
11. Do you use any controlled substance or illegal drug other than as prescribed by a licensed physician, or have you done so within the past year, or regularly used any such drug within the past five years? Yes No
12. Are you addicted to or have you lost self-control over any controlled substance or drug? Yes No
13. Are you, or have you ever been, subject to any court order (including but not limited to restraining orders, protective orders, peace bonds & good behavior bonds) restraining you from harassing, stalking, threatening, engaging in communication with, or refraining in any manner from contact with or coming in proximity to any person, individual, spouse, child or former or current intimate partner, parent or their property, residence or other location frequented by such person?... Yes No
 * If yes, attach a copy of the court order and any terminating or final disposition order.
14. Have you ever been dishonorably discharged from the U.S. Armed Forces, or separated from the U.S. Armed Forces under a dismissal adjudged by a general court-martial? Yes No
15. Have you ever been found by a civil or criminal court, board, commission or other lawful authority, as a result of subnormal intelligence, incompetency, mental illness, condition or disease, to be a danger to yourself or others, to lack the mental capacity to manage your own affairs, or to be incompetent to stand trial, insane, guilty but mentally ill, or not guilty for lack of mental responsibility? Yes No
16. Have you ever been ordered to receive inpatient or outpatient treatment at any treatment facility, mental health center, hospital, sanitarium, clinic or program for a mental condition, drug abuse, or alcohol abuse, by any court, board, or other authority in any civil, criminal or administrative proceeding? (If yes, attach a copy of the order) Yes No

I do swear and affirm under penalty of false swearing or perjury that the foregoing information is true and correct to the best of my knowledge and belief.



 APPLICANT'S SIGNATURE

Sworn to and subscribed before me
 this 17 day of October,

 Clerk of Probate Court

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE ARE NO GENUINE ISSUES TO BE TRIED**

COMES NOW Defendant and files this his Statement of Material Facts as to
Which There Are No Genuine Issues to be Tried and shows the Court as follows:

1.

Under Georgia law, Judge David Dodd, as judge of the Probate Court,
oversees the issuance of licenses to carry pistols or revolvers. (Exhibit A at ¶ 1).

2.

On October 17, 2006, the Cobb County Probate Court office received
Plaintiff's application seeking renewal of his Georgia Firearms License ("GFL") to
carry a pistol or revolver. (Exhibit A at ¶ 6; Complaint at ¶¶ 3, 4).

3.

At the time Plaintiff filed his renewal application on October 17, 2006, he also sought a Temporary Firearms License (“TFL”) pursuant to O.C.G.A. § 16-11-129(i)(1). (Exhibit A at ¶ 6).

4.

After a review of Plaintiff’s application, correspondence from his counsel and an examination of the changes made to the statute and interplay with the federal firearms requirements, Judge Dodd issued a TFL to Plaintiff on October 31, 2006. (Exhibit A at ¶ 7; Exhibit 3 to Plaintiff’s Brief in Support of Motion for Summary Judgment).

5.

The TFL issued to Plaintiff met the mandates of O.C.G.A. § 16-11-129(i)(3, 4, and 5). (Exhibit A at ¶ 8; Attachment 1 to Exhibit A).

6.

The statute lists mandatory information which must be contained in the TFL. O.C.G.A. § 16-11-129(i)(3). Plaintiff’s TFL contained the required information. (Exhibit A at ¶ 8).

7.

Judge Dodd also issued Plaintiff a GFL on January 23, 2007, after receiving the results of the statutorily required background checks. (Exhibit A at ¶ 6).

8.

Judge Dodd is required by Georgia law to cause a first time applicant and a renewal applicant's set of fingerprints to be forwarded to the GCIC for a search of the FBI's records on that individual and to obtain a report on that search of the records from the FBI. (Exhibit A at ¶ 3; O.C.G.A. § 16-11-129).

9.

Judge Dodd and the Probate Court do not have a GCIC terminal available for their use. (Exhibit A at ¶ 4). Judge Dodd is dependent on the state and federal law enforcement agencies returning their required reports in a timely manner for the issuance of GFLs. (Exhibit A at ¶ 4).

10.

Consistent with the mandate of O.C.G.A. § 16-11-129 that the appropriate "law enforcement agency in the county" oversee the issuance of the fingerprints to the GCIC and the search of the GCIC records, it has always been the practice of the Cobb County Probate Court and Judge Dodd to allow the Sheriff's Office to conduct the required records search, as the process can be accomplished more efficiently. (Exhibit A at ¶ 5).

11.

The CCSO ensures that the fingerprints are properly sent to the GCIC for a search of the FBI records as required by statute. (Exhibit A at ¶ 4).

12.

The report from the FBI and the report from the GCIC are very similar; however, the report from the FBI typically contains a more comprehensive criminal history from other states. (Exhibit A at ¶ 4).

13.

A fingerprint-based criminal background check from the FBI is required to issue a Georgia Firearms License. (O.C.G.A. § 16-11-129(d)(1); *Moore v. Cranford*, 2007 WL 1518911 (Ga.App. May 25, 2007).

14.

The FBI report often contains criminal histories from other states which the GCIC report often does not contain. Thus, to prevent certain applicants with certain criminal histories from obtaining a license, Judge Dodd cannot issue a license until he has received and analyzed the FBI report. (Exhibit A at ¶ 3).

15.

Commonly, Judge Dodd does not receive the required FBI report and background check information for a period of two (2) months or longer after the fingerprints are forwarded. (Exhibit A at ¶ 5).

16.

There is no authority which would allow the Probate Court to order the FBI to return the required report in a shorter time period. (Exhibit A at ¶ 5; O.C.G.A. § 16-11-129).

17.

Because Judge Dodd cannot issue an applicant a license until he has determined that all of the qualifications of O.C.G.A. § 16-11-129 have been met (i.e., that the applicant does not have any of the prohibited criminal history), and because he almost always never receives the report from the FBI until over 60 days after the date of the application with his office, Judge Dodd is not able in every scenario to issue licenses within the 60 day time period demanded by Plaintiff. (Exhibit A at ¶ 3, 14).

18.

O.C.G.A. 16-11-129 (d) mandates that the court conduct certain background checks on the applicant for license applications and requests for license renewals in order for the court to ensure that the applicant is not a prohibited person pursuant to O.C.G.A. 16-11-129 (b). This requirement for a background check on all applicants conflicts with the language in O.C.G.A. 16-11-129 (i) which has been interpreted to be an instant issue of a renewal license without any background check. (Exhibit A at ¶ 9; O.C.G.A. 16-11-129).

19.

During the 2006 legislative session, the Georgia Legislature had made numerous changes to the statute. (Exhibit A at ¶ 7); Ga. L. 2006, p. 264, § 1/HB 1032).

20.

On or about January 22, 2007 Judge Dodd received final notice from the FBI that his office may proceed with comparing its background check with information with the state background check information. (Exhibit A at ¶ 6).

21.

On January 23, 2007, Judge Dodd's office mailed Plaintiff his license. (Exhibit A at ¶ 6). The TFL also contains the following language added by Judge Dodd:

NOTICE TO FEDERAL FIREARMS LICENSEES:

O.C.G.A. 16-11-129(i) does not direct the judge of the probate court to conduct a criminal background check for the issuance of Temporary Firearms Licenses. **No check on the National Instant Criminal Background Check System has been conducted on this individual for issuance of the Temporary Firearms License. This Temporary License is not intended to create an exception to the required background check at the time of transfer.**

(Exhibit A to First Affidavit of Michael Menkus)(Emphasis in original).

22.

Judge Dodd's inclusion of the notation on the TFL is a result of his interpretations of his duties to follow both state and federal law in the issuing of

Georgia firearms licenses. (Exhibit A at ¶ 11).

23.

The issuance of a firearms license without conducting a check on the National Instant Background Check appears to be in violation of 18 U.S.C. 922, by issuing a firearm license to someone who may be federally prohibited from possessing a firearm. (Exhibit A at ¶ 10; O.C.G.A. 16-11-129; 18 U.S.C. § 922).

This 20th day of June, 2007.

COBB COUNTY ATTORNEY'S OFFICE

By: _____


H. WILLIAM ROWLING, JR.
Sr. Associate County Attorney
State Bar No. 617225
DEBORAH L. DANCE
Assistant County Attorney
State Bar No. 203765

Attorneys for Defendant

100 Cherokee Street, Suite 595
Marietta, Georgia 30090
770-528-4000, Facsimile: 770-528-4010

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

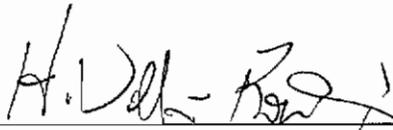
THEORIES OF RECOVERY

COMES NOW Defendant and files his Theories of Recovery and shows the
Court as follows:

1. Judge Dodd complied with Georgia law in issuing the Georgia Firearms License to Plaintiff.
2. Judge Dodd complied with Georgia law in issuing the Temporary Firearms License to Plaintiff.

This 20th day of June, 2007.

COBB COUNTY ATTORNEY'S OFFICE

By:  _____

H. WILLIAM ROWLING, JR.

Sr. Associate County Attorney

State Bar No. 617225

DEBORAH L. DANCE

Assistant County Attorney

State Bar No. 203765

Attorneys for Defendant

100 Cherokee Street, Suite 595
Marietta, Georgia 30090
770-528-4000, Facsimile: 770-528-4010

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

MICHAEL J. MENKUS,

Plaintiff,

v.

DAVID A. DODD, Judge of the
Cobb County Probate Court.

Defendant.

*
*
*
*
*
*
*
*
*

CIVIL ACTION
FILE NO: 06-1-8834-33

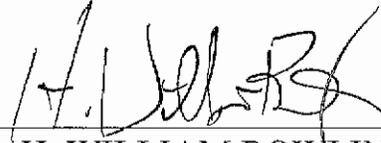
CERTIFICATE OF SERVICE

It is hereby certified that I have this day served a true and correct copy of Defendant's Motion for Summary Judgment, Brief in Response to Plaintiff's Summary Judgment Motion and in Support of Defendant's Summary Judgment Motion, Statement of Material Facts, Exhibits and Theories of Recovery by causing a copy of the same to be deposited in the mail with proper postage affixed thereto and addressed as follows:

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

This the 20th day of June, 2007.

By:



H. WILLIAM ROWLING, JR.
Sr. Associate County Attorney
State Bar No. 617225

Attorney for Defendant

100 Cherokee Street, Suite 595
Marietta, GA 30090
770-528-4000 – Facsimile 770-528-4010