IN THE COURT OF APPEALS OF GEORGIA

CRAIG MOORE, Appellant, v. MARY T. CRANFORD, Judge of the Coweta County Probate Court, Appellee	)	Appeal No. A07A0316

APPELLANT'S REPLY BRIEF

Appellant Craig Moore submits the following Reply Brief.

Introduction

Appellee's response brief may be summed up with this statement: *a literal reading of the statute requires me to do things differently from the way I have done them in Coweta County for 32 years*. Appellee does not follow the requirements of the Georgia Firearms and Weapons Act, she never has, and she does not intend to start now. Instead, she substitutes her own policy judgment for that of the General Assembly.

Georgia law requires Appellee to issue Georgia firearms licenses ("GFLs") to eligible applicants within 60 days from the date of application. It requires Appellee to ***request*** certain background information on GFL applicants from a ***local*** law

enforcement agency. This information includes a check of the FBI's National ***Instant*** Background Check System. The local agency is required to report to Appellee within 50 days if it finds derogatory information on a GFL applicant. Appellee thus has at least a 10-day statutory window in which she can determine whether to issue a GFL.

Instead of following the procedure in the statute, Appellee has decided to ***obtain*** reports directly from ***state*** and ***federal*** law enforcement agencies. She is prepared to ***wait indefinitely*** for those reports, effectively denying a GFL to the applicant in the meantime. In the case at bar, this resulted in the Appellant waiting 125 days by the time he filed his lawsuit, which is more than twice the length of time allowed in the statute. Appellee cannot even argue that she "substantially" complied with the 60 day time period in the statute. She simply decided that her process is superior to the one mandated by the General Assembly, and she urges this Court to adopt her process and to discard the Georgia Firearms and Weapons Act.

As reason for the delay in processing Appellant's application, Appellee argued she was waiting for a background check from the FBI. Appellee asserted in her appellate brief,

however, that she requests a National ***Instant*** Background Check System ("NICS") report on GFL applicants from the local law enforcement agency. The NICS is the system run by the FBI to do instant background checks on prospective gun purchasers (and required for GFLs). By claiming that she gets the ***instant*** report containing out-of-state and federal criminal histories, Appellee's argument that she must wait for a report from the FBI before issuing a GFL, so as to have access to out of state criminal histories, falls flat.

Argument

1. The Law Requires Issuance of a GFL Without Waiting for an FBI Report

O.C.G.A. § 16-11-129(d)(4) says, in pertinent part:

> Not later than 60 days after the date of the application the judge of the probate court ***shall issue*** the applicant a license or renewal license to carry any pistol or revolver 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 contained in this Code section.

(emphasis supplied). Appellant, dissatisfied with the words adopted by the General Assembly, substitutes for "shall issue," that she "is **only** authorized to issue a license" (emphasis in original) after she receives the FBI fingerprint based background check. Brief of Appellee, p. 15. Re-writing the statute using Appellee's own words belies the fallacy of her argument:

> Not later than 60 days after the date of the application the judge of the probate court ~~shall~~ is only authorized to issue the applicant a license or renewal license to carry any pistol or revolver if no facts establishing ineligibility have been reported by the FBI and if the judge determines the applicant has met all the qualifications, is of good moral character, and has complied with all the requirements contained in this Code section.

The sentence as reworded above, the way Appellee would have it, means essentially the same thing whether the phrase "Not later than 60 days after the date of the application" is present or not. Thus, Appellee has rendered the phrase "Not later than 60 days after the date of the application" as mere surplusage, contrary to rules of statutory interpretation in Georgia. "The

rules of statutory construction require that we construe a statute according to its terms, give words their plain and ordinary meaning, and ***avoid a construction that makes some language mere surplusage***." In re J.K., 278 Ga. App. 564, 572, 626 S.E.2d 529, 534 (2006). (emphasis supplied). This Court should not adopt an interpretation that effectively erases the 60 day requirement from the statute, which is why the trial court's ruling should be reversed.

Appellant explained in his initial Brief that the word "shall" (issue) contained in the statute is a "word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission." Termnet Merchant Services, Inc. v. Phillips, 277 Ga. 342, 344, 588 S.E.2d 745, 747 (2003). Appellee did not dispute this argument. Instead, she ignored it.

Appellee's desire to ignore the 60-day "shall issue" requirement is a product of her desire to wait for a report from the FBI before issuing a GFL. Brief of Appellee, p. 15. She asserts that must wait for an FBI report because "the FBI report often contains criminal histories from other states which the [Georgia Crime Information Center] report often does not

contain." Id. This specious argument is completely undercut by Appellee's ***own*** argument on appeal that she requests the NICS check from local law enforcement and therefore has instantaneous information regarding any out of state records pertaining to an applicant. Brief of Appellee, p. 18 (Appellant's assertion that Appellee refuses to request the NICS check from local law enforcement "is blatantly untrue"). By so arguing, she ***admits*** that she has in hand any reports of out of state convictions for "murder, aggravated assault, or any other dangerous crime." (Appellee's Brief, p. 15). This admission guts the majority of Appellee's brief, because her concerns regarding ignorance of an applicant's out of state criminal records are clearly illusory once she requests the instantaneous federal NICS check.

Having an applicant's entire criminal history in-hand leaves only one real issue on appeal: Whether Appellee may wait, however long it takes, for the return of a fingerprint-based background check when she already has an applicant's complete criminal history in hand. In the instant case, the question may be stated more precisely as whether she may wait more than twice as long as the statute allows to obtain yet another report showing the same criminal history.

The clear answer in the statute is "no." The statute itself states what reports shall be requested by Appellee from local law enforcement (see subsections 129(d)(1) and (d)(2)). Subsection (d)(4) provides, however, that local law enforcement has only **50 days** to notify the Appellee of its findings in response to the request. In addition, "When no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license or renewal license, **a report shall not be required**. The law enforcement agency shall return the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period." O.C.G.A. § 16-11-129(d)(4). As with the 60 day requirement, Appellee wishes to read these two sentences right out of the statute, rendering another portion of the statute as mere surplusage and of no effect. The record reveals, however, that Appellee received the application back from local law enforcement no later than December 14, 2005, the day after Appellant applied for a GFL. (R 53). Thus, the 125-day period during which Appellee waited could have been shortened to 1 day, the length of time it took for the local law enforcement agency to return the information to Appellee.

2. Appellant Considered Every Word in the Statute

On page 20 of Appellee's brief, she accuses Appellant of not taking the entire statute into consideration. This is particularly ironic given that Appellee nowhere argues to this Court what affect should be given to the language stating that the local law enforcement agency has only 50 days to report to the probate court and that "a report shall not be required" if no derogatory information is found. In any event, Appellant ***did*** take into consideration the language to which Appellee points on pages 20 and 21 of her brief. In fact, Appellant devoted three pages of his brief to addressing the language highlighted by Appellee. See Brief of Appellant, pp. 18-20.

Appellee did not address any of the points raised in Appellant's three-page discussion. In short, Appellant's argument was that Appellee must issue the GFL "if the judge determines the applicant has met all the qualifications," and she must issue it "[n]ot later than 60 days after the date of the application," thus giving effect to the entire sentence. If she determines that the applicant has not met the qualifications, then of course she is not to issue the license at all. Every phrase occurring in the last sentence of (d)(4)

("good moral character," "complied with the requirements," etc.) is modified by the 60 day requirement in the beginning of the same sentence. Appellant's interpretation of the sentence omits nothing but gives effect to every part of the statute. Appellee's argument completely erases the beginning of the sentence and a few other sentences besides.

Appellee admits, however, that Georgia law requires the ***local*** law enforcement agency "to conduct a background check using the Federal Bureau of Investigation's National ***Instant*** Criminal Background Check System and return an appropriate report to the probate judge." O.C.G.A. § 16-11-129(d)(2). (emphasis supplied). Thus, the benefits of the FBI's databases already are available to Appellee, on an instantaneous basis, through the reports provided by the local law enforcement agency to Appellee within 50 days. This allows her to fulfill her duty within 60 days. But the reports Appellee describes as "required" are <u>not</u> required "[w]hen no derogatory information is found on the applicant bearing on his or her eligibility to obtain a license." O.C.G.A. § 16-11-129(d)(4).

Appellee focuses on the fingerprint-based report from the FBI because of her fear that someone ineligible for a GFL (such

as a convicted felon) will use false identification, thus fraudulently obtaining a GFL, and then commit a crime with a firearm. Brief of Appellee, pp. 15, 19. Appellee overstates the potential value of a GFL to a recidivist felon. Although a GFL does permit the holder to buy a firearm within undergoing a NICS check at a gun store, this advantage is meaningless to someone with a false ID intent on committing crimes, because the exact same NICS check is performed at a gun store as is performed to obtain a GFL. See 18 U.S.C. § 922(t). Accordingly, the same hypothetical false ID that is used to obtain a GFL could already be used to obtain a firearm. The only documentation required to purchase a firearm is identification. 18 U.S.C § 922(t)(1)(C).

Appellee has not even tried to explain why someone intent on crime would present himself to governmental authorities with his fraudulent identification in order to obtain a GFL, so he can wait 60 days, and then go buy a gun, when he can walk into any gun store with the same false ID and buy a gun without any wait. More importantly, Appellee is unable to point to any portion of the statute authorizing her to wait beyond 60 days.

This is especially true when Appellee admits on appeal that she obtains instantaneous criminal histories on applicants.

3. The Unofficial Opinion of the Attorney General is not Helpful

Appellee points to an unofficial opinion of the Attorney General from 1978 to support her position. Brief of Appellee, p. 23. As an initial matter, it should be observed that the bound volume of attorney general opinions from 1978 says, "Each 'unofficial opinion' bears the following notation: 'The views expressed herein are completely unofficial views of the writer only, and should be considered as information only.'" This Court describes such opinions as "advisory." Atlanta JS, Inc. v. Houston Foods, Inc., 237 Ga. App. 415, 417, 514 S.E.2d 216, 128 (1999). It also is settled law that attorney general opinions are not binding on appellate courts. State v. Durr, 274 Ga. App. 438, 442, 618 S.E.2d 117, 120 (2005).

The opinion itself is not helpful, as it lacks ***any*** meaningful legal analysis and fails to discuss the legal history or standards to be used in interpreting statutes in general or the word "shall" in particular. Instead, the opinion makes a broad policy pronouncement and ascribes it to the ostensible

intent of the legislature ("I believe the General Assembly ***felt***…") (emphasis supplied).

Finally, the unofficial opinion has no bearing on the facts of this case. The opinion says that probate judges must wait for the report from the local law enforcement agency (recall that the results of the background check are reported to the probate judge by the local law enforcement agency). Appellee does not contend that she was waiting on the report from the local law enforcement agency. Indeed, she admits she did not and does not ask for a report from the local agency. Instead, Appellee was waiting on a report directly from the FBI, which the statute did not authorize her to do.

3. Appellee is Not Immune from Taxation of Costs

Appellee insists that, should the trial court be reversed and Appellant ultimately prevail, she should not be liable for taxable costs in the trial court. She bases her contention on the doctrine of judicial immunity.[1]

[1] Ironically, Appellee cites her potential liability for ***damages*** if she follows the text of the licensing statute as worded, conveniently forgetting that she believes she is immune from paying taxable costs if she does not follow the statute. Brief of Appellee, p. 25.

Appellee fails to cite any authority for the proposition that she is immune from taxable costs. She cites only to authority regarding immunity from damage claims for her judicial acts. In her brief, she re-classifies taxable costs as "damages" to try to make her cited authority fit this case. Brief of Appellee, p. 27.

Damages and taxable costs are ***not*** the same. On multiple occasions, this Court has distinguished between damages and costs. See, e.g., King v. Loyd, 170 Ga. App. 638 (1984). More importantly, however, the doctrine of judicial immunity does not apply to Appellee when she issues (or fails to issue) a GFL. Judicial immunity applies only when a judge is acting in a judicial capacity. Wilson v. Moore, 275 Ga. App. 493, 494, 621 S.E.2d 507, 508 (2006). Issuing licenses is a ministerial function, not a judicial function. Appellee insists that because the law provides that issuing GFLs is one of her duties, it ***must*** be a judicial function. Brief of Appellee, p. 26. The law provides that issuance of marriage licenses is one of her duties, too (O.C.G.A. § 15-9-30(b)(7), and it is a duty that the Supreme Court has found to be ministerial. Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). It is worth pointing out that she

may issue licenses to marry ***only*** to qualified persons. The law requires her to perform "such other judicial ***and ministerial*** functions as may be provided by law." O.C.G.A. § 15-8-30(b)(11) (emphasis supplied). Thus, the argument that a ministerial function provided by statute is a judicial function must fail. Supreme Court precedent supports the conclusion that the issuance of licenses is a ministerial and not a judicial function.

CONCLUSION

This case is about whether a probate judge may substitute a personal policy for the public policy of the State of Georgia as expressed in the statute the General Assembly passed. Appellee's contention and the trial court's ruling are that, as a matter of policy, the probate judge is required to wait beyond 60 days for a certain report. In contrast, the statute as passed by the General Assembly states that "a report shall not be required" from law enforcement unless derogatory information relating to an applicant's eligibility is found.

Appellant Craig Moore has shown that Appellee is not required, as she believes, to wait for a report directly from the FBI before issuing a GFL. She has, by statute, all the

information she is supposed to receive within 50 days of application, and she simply is not permitted to wait any longer than 60 days to issue or deny the license (although she may revoke licenses at any time). The "shall issue" statutory language requiring issuance within 60 days is ***mandatory***. Appellee's argument that she may wait however long it takes for an FBI criminal history, when she already possesses the NICS criminal history showing federal and out of state records, violates the rules of statutory construction by rendering the 60 day requirement in the statute superfluous. This is especially true in the face of a statute stating explicitly that "a report shall ***not*** be required" unless derogatory information is found. Finally, Appellee is not immune from the taxation of costs. For the foregoing reasons, the judgment of the trial court should be reversed, and summary judgment should be granted in favor of Appellant.

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CERTIFICATE OF SERVICE

I certify that I have this day served Nathan T. Lee, Esq. with a copy of this Brief by mailing a copy first class mail postage prepaid to him at 10 Brown Street; Newnan, Georgia 30264.

Dated November 2, 2006

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