

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

MICHAEL J. MENKUS,	)	
Plaintiff,	)	
	)	Civil Action No. 061-08834-33
vs.	)	
	)	
DAVID A. DODD,	)	
Judge of the Cobb	)	
County Probate Court ,	)	
	)	
Defendant	)	

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Plaintiff submits the following as his Plaintiff’s Brief in Support of Motion for Summary Judgment:

**Introduction**

Plaintiff applied to Defendant, the Judge of the Cobb County Probate Court, for a renewal Georgia Firearms License. At the time of his application, Plaintiff also applied for a temporary renewal license. Without justification, Defendant refused to issue Plaintiff a temporary renewal license and did not issue Plaintiff’s five year renewal firearms license within the time required by law. Puzzled by Plaintiff’s failure to comply with Georgia law, Plaintiff sued.

After Plaintiff initiated this action and the issuance of a mandamus nisi against Defendant, Defendant issued Plaintiff a temporary renewal license. The temporary renewal license does not comply with Georgia’s statutory requirements, however, as Defendant failed to issue Plaintiff a temporary renewal license that complies with the law. Plaintiff seeks a writ of mandamus, declaratory relief, and injunctive relief. Because there are no issues of material fact, Plaintiff is entitled to judgment as a matter of law.

## **Factual Background**

Defendant is the Judge of the Cobb County Probate Court. Answer, ¶ 2. Among his other duties, Defendant is responsible, pursuant to O.C.G.A. § 16-11-129, for receiving and processing applications for Georgia Firearms Licenses (“GFLs”) from residents of Cobb County. A person who carries a valid GFL is exempt from the criminal prohibitions against 1) carrying a concealed firearm;<sup>1</sup> 2) some state and federal felony provisions regarding carrying a firearm in a school safety zone;<sup>2</sup> and 3) carrying a pistol without a license.<sup>3</sup>

On October 17, 2006, Plaintiff applied to Defendant for a five year renewal firearms license, pursuant to O.C.G.A. § 16-11-129, and a temporary renewal license, pursuant to O.C.G.A. § 16-11-129(i). Answer, ¶¶ 3-4. There were less than 90 days remaining prior to the expiration of Plaintiff’s then-current license, which expired on December 19, 2006. First Affidavit of Michael Menkus, ¶ 3, Answer, ¶ 14. The clerk processing Plaintiff’s application told Plaintiff that Defendant had been refusing to issue temporary renewal GFLs for more than three months, because of a purported change in law that took effect July 1, 2006.<sup>4</sup> Answer, ¶ 5. Plaintiff politely challenged the clerk on this point, informing her that the law regarding temporary renewal GFLs, subsection O.C.G.A. § 16-11-129(i), had not changed in the slightest. Menkus Aff., ¶ 4. The clerk referred Plaintiff to the Clerk of the Cobb County Probate Court, Charles Evans, but Evans repeated Defendant’s policy of refusing to comply with the clear

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<sup>1</sup> O.C.G.A. § 16-11-126

<sup>2</sup> O.C.G.A. § 16-11-127.1(c)(7), 18 U.S.C. § 922(q)(2)(B)(ii)

<sup>3</sup> O.C.G.A. § 16-11-128

<sup>4</sup> It was revealed later that the court had an erroneous belief that HB 1032, which took effect on July 1, 2006, changed the licensing statute’s subsection (i), relating to the mandatory issuance of temporary renewal licenses. For this court’s convenience, a copy of HB 1032 is attached, and, as can readily be seen, HB 1032 preserved subsection (i) intact and inviolate.

mandates of O.C.G.A. § 16-11-129(i) requiring that Defendant issue Plaintiff a temporary renewal license. Answer, ¶¶ 6, 8.

After additional unsuccessful attempts were made by telephone and in writing to encourage Defendant to comply with Georgia law and issue Plaintiff a temporary renewal license (Answer, ¶¶ 10-12), Plaintiff commenced this action on October 27, 2006 for a writ of mandamus to *compel* Defendant to issue the temporary renewal license. The Court issued a Mandamus *Nisi* against Defendant the same day. Service of the Summons, Complaint, and Mandamus *Nisi* was made on Defendant on October 30, 2006, and the very next day Defendant issued Plaintiff a document entitled “Temporary Firearms License.”<sup>5</sup>

The Temporary License bears the following words, “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 Licensees. **No check on the National Instant Background Check System<sup>6</sup> 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.”**

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<sup>5</sup> This document is not a proper temporary renewal GFL, pursuant to O.C.G.A. § 16-11-129(i), so it is referred to in this Brief as the Temporary License, to distinguish it from an otherwise valid and proper temporary renewal GFL.

<sup>6</sup> As the term “Instant” in the title suggests, this background check is an *instantaneous* electronic check. In spite of this, there was nothing “Instant” about Defendant’s check of this system. Plaintiff applied on October 17, 2006, but nobody bothered to perform this “Instant” check until the following *year*. [March 27, 2007 letter from William Rowling, Defendant’ attorney, to John Monroe, page 2, Response to Interrogatory #5, supplementing Defendant’s Response to Plaintiff’s First Discovery Requests.] This is in spite of the fact that O.C.G.A. § 16-11-129(d)(4) clearly gives the local law enforcement agency a time period of only 50 days to perform its checks and make “an appropriate report” to the judge, or simply return the license application and license form to the judge if no derogatory information is discovered within that time period. *See* O.C.G.A. § 16-11-129(d)(4) (“no report shall be required”).

[emphasis in original]. Menkus Aff., ¶ 5 (and copy of the Temporary License attached thereto as Exhibit A). This document fails to comply with the clear dictates of O.C.G.A. § 16-11-129(i).

## **Discussion**

### **I. Grounds for Summary Judgment**

"To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991). "The movant has the original burden of making this showing. Once the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." *Kelly v. Pierce Roofing Co.*, 220 Ga. App. 391, 392- 393, 469 S.E.2d 469 (1996). "In rebutting this prima facie case, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in O.C.G.A. § 9-11-56 must set forth specific facts showing that there is a genuine issue for trial." *Entertainment Sales Co. v. SNK, Inc.*, 232 Ga. App. 669-670, 502 S.E.2d 263 (1998).

### **II. Defendant Violated the Statute Pertaining to Temporary Renewal GFLs**

O.C.G.A. § 16-11-129(i) (1) provides, "Any person who holds a license under this Code section to carry a pistol or revolver may, at the time he applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he then holds or if his previous license has expired within the last 30 days." At the time of his application on October 17, 2006, there were less than 90 days remaining before expiration of Plaintiff's GFL. Answer, ¶ 14.

O.C.G.A. § 16-11-129(i)(2) ***requires*** that the judge issue the temporary renewal license upon request. “Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge ***shall at the time of application*** issue a temporary renewal license to the applicant.” Defendant ***admits*** that he did not know, nor was he made aware of, any fact which would have made Plaintiff ineligible for a five-year renewal license<sup>7</sup>, so Plaintiff was ***entitled*** to receive a temporary renewal license. There is nothing discretionary about the dictates of the statute relating to temporary renewal licenses. Nevertheless, Defendant simply refused to issue it to Plaintiff, either at the time of application or at any time prior to the filing of this lawsuit, in spite of several oral, and later written, requests going through several levels including the Defendant himself. After service of a summons, complaint, and Mandamus *Nisi* upon him, Defendant finally capitulated and issued Plaintiff the Temporary License barely three days before he was scheduled to appear before this Court and explain why he wrongfully refused to comply with the clear dictates of O.C.G.A. § 16-11-129(i).

When Defendant did finally issue the Temporary License, however, it was severely flawed, in that it contained the notation described above. This notation renders the license invalid for one of the purposes for which the five year license is valid. O.C.G.A. § 16-11-129(i) provides the form of the temporary renewal license, and further provides that during its 90 day life, it is valid for all of the same purposes as a full five year renewal license. *See* O.C.G.A. § 16-11-129(i)(4). Clearly, Defendant’s purpose in making the unauthorized notation is to prevent

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<sup>7</sup> March 27, 2007 letter from William Rowling, Defendant’ attorney, to John Monroe, page 3, Response to Interrogatory #7, supplementing Defendant’s Response to Plaintiff’s First Discovery Requests.

use of the Temporary License as “an exception to the required background check” for someone purchasing a firearm from a Federal Firearm Licensee. This purpose is not stated in the public policy of this state, and nothing in the statute authorizes Defendant to make this notation. Indeed, as noted above, the notation blatantly violates the statute, which provides that the license is valid for all the same purposes as the five year renewal license.

A short discussion of the federal background check requirements is necessary to explain Defendant’s purpose in violating O.C.G.A. § 16-11-129(i) by first refusing to issue the temporary renewal license, and then in making this unauthorized notation. Under 18 U.S.C. § 922(t)(1) and 27 C.F.R. § 478.102(a), a Federal Firearms Licensee is required to run a background check using the National Instant Criminal Background Check System, or “NICS,” on any person who desires to purchase a firearm. There is an exception, however, for prospective purchasers that have certain state-issued gun permits. The characteristics the permits must have, codified in 18 U.S.C. § 922(t)(2) and 27 C.F.R. § 478.102(d), are not complex. But, in an effort to resolve doubts among Federal Firearms Licensees in various states as to whether each state’s permit qualifies, the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”), the agency responsible for promulgating Title 27 of the Code of Federal Regulations, maintains a list of which states’ permits qualify as an alternative to the NICS check. BATFE determined that Georgia’s license currently qualifies, even with subsection (i) intact in its current form.

#### ***A Brief History of the Georgia Firearms License’s Exemption From NICS***

Georgia’s firearms License qualified as an alternative to the NICS check when NICS was put into production in 1998. A copy of an Open Letter to Georgia Federal Firearms Licensees

from the BATFE in 1998, advising Georgia Federal Firearms Licensees of this fact, is attached as Exhibit 1. Later, while conducting reviews of state laws pertaining to issuance of firearms licenses, BATFE determined that Georgia Firearms Licenses should not qualify as an alternative to the NICS check. A copy of the October 17, 2005 Open Letter to Georgia Federal Firearms Licensees, notifying them that GFLs no longer qualified, is attached as Exhibit 2..

In response to the October 2005 determination by the BATFE, the Georgia General Assembly, in the next legislative session, modified the statute governing issuance of a Georgia Firearms License in order to address the concerns raised by the BATFE.<sup>8</sup> The amendments to O.C.G.A. § 16-11-129 took effect on July 1, 2006, and none of the modifications touched on the temporary renewal license provisions. A copy of the bill (HB 1032) that modified the statute is attached as Exhibit 4. As a result of the amendments contained in HB 1032, the BATFE determined on the very same day that the law took effect that Georgia Firearms Licenses once again qualify as an alternative to the NICS check. A copy of the July 1, 2006 Open Letter to Georgia Federal Firearms Licensees, notifying them that Georgia Firearms Licenses once again qualify as an alternative to the NICS check, is attached as Exhibit 3. This is the current status of the BATFE determination as of the day of this writing.

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<sup>8</sup> The General Assembly added a NICS check (instantaneous) to the background checks of the applicant, and declared that such checks would take place at least once every five years. The modified law also disqualified those not eligible to possess weapons under federal law. These two changes were all that was necessary to regain the exemption from NICS check at point of purchase, but the Georgia General Assembly went far beyond these minimal requirements, imposing fingerprinting and redundant background checks through GCIC and NCIC (neither of which reveals as much as a NICS check) at renewal time. It is worth noting that fingerprinting is not a requirement to meet the NICS exemption. Indeed, two states are exempt from NICS with no fingerprinting, ever. Those two states are Montana and Kentucky.

As a result of this ruling by the BATFE, interpreting its own regulations and the federal statute it is empowered to enforce, a Georgia Firearms License holder is not required to undergo a NICS check when purchasing a firearm from a gun dealer. Instead, the purchaser need only show an ID and the Georgia Firearms License (and complete the necessary paperwork).

*Why This History is Relevant to Plaintiff's case*

This brings us back to the Temporary License Defendant issued to Plaintiff and the significance of the unauthorized notation Defendant placed upon it. Despite the fact that the BATFE has determined that, as a matter of federal law, Georgia Firearms Licenses are valid alternative to NICS checks, Defendant has determined on his own that he does not believe the Temporary License should be used for that purpose, in direct contravention of a state statute. As a result, in addition to flouting a federal agency's determination, Defendant is violating state law. O.C.G.A. § 16-11-129(i)(4) provides that a temporary renewal license "shall be valid *in the same manner* and *for the same purposes* as a five-year license [i.e., the regular Georgia Firearms License]." (emphasis added). Moreover, O.C.G.A. § 16-11-129(i)(3) directs that "Such temporary renewal license shall be *in the form of a paper receipt indicating* the date on which the court received the renewal application and shall show the name, address, sex, age, and race of the applicant, and that the temporary renewal license expires 90 days from the date of issue." (emphasis added). Defendant failed to follow this form. By issuing the Temporary License but adding the notation that the Temporary License "is not intended to create an exception to the [NICS check]," Defendant issued Plaintiff something that is *not* valid in the same manner and for same purposes as a five-year license and which does not conform to the form required by statute.



Therefore, in addition to the late issuance, the Temporary License is not a proper temporary renewal license as described and mandated in O.C.G.A. § 16-11-129(i).

Defendant thus violated both the time of issuance prescribed in the statute, “shall issue at the time of application,” and the form of the temporary renewal license prescribed in the statute. This violation of the form prescribed by the General Assembly resulted in the temporary license not being valid in the same manner and for the same purposes as a five-year license.

In addition, Defendant failed to comply with the law by refusing to timely issue Plaintiff his five year license.

**III. Defendant Violated the Law Requiring Him to Issue Plaintiff’s Five Year License “Not Later Than 60 Days after the Date of Application”**

As noted above, Plaintiff applied on October 17, 2006. The sixty day period provided by law expired on December 17, 2006. Defendant did not issue Plaintiff’s GFL until January 23, 2007, some 98 days after the date of application and 38 days after the time period required by statute had expired. As with the other facts contained in this motion, this is undisputed.

**III(A). The Law Mandates that Defendant Must Issue Not Later than 60 Days After the Date of Application**

O.C.G.A. § 16-11-129(d)(4) provides, “Not later than 60 days after the date of application,” Defendant “shall issue” Plaintiff’s five year license. A brief discussion of the procedure set out in the statute is necessary at this point.

The statute provides for certain background checks to be performed on an applicant. These checks are to be performed by the local law enforcement agency, and, if anything negative is discovered, the local law enforcement agency is required to report its findings to the probate

judge. The background checks are provided in O.C.G.A. § 16-11-129(d)(1) and (2), both of which direct the probate court to request that the local law enforcement agency (which, in this case was the Cobb County Sheriff's Department) run the background check and return "an appropriate report" to the judge. There is nothing in the statute stating what constitutes "an appropriate report," but the statute quite clearly states that no report is required unless the check turns up negative information. "When no derogatory information is found bearing upon the applicant's eligibility, *a report shall not be required.*" O.C.G.A. § 16-11-129(d)(4) (emphasis added). Rather, in that circumstance the local law enforcement agency is to return the applicant's application form and blank firearms license form with the fingerprint thereon to the judge. *Id.* The local law enforcement agency is to complete its work within 50 days, subsection 129(d)(4), leaving Defendant an additional ten days to issue the firearms license to Plaintiff.

The structure of the statute is very simple, and this Court will note that it does not permit any discretion on the part of the probate court judge and does not even permit the judge to deny the license unless negative information is reported that bears on the eligibility of the applicant. As noted above, however, when no derogatory information is discovered, a report to the judge shall not be required. The judge "shall issue" the applicant a license "[n]ot later than 60 days after the date of application," which Defendant refused to do. There is absolutely nothing in the statute authorizing Defendant to wait beyond 60 days to issue the firearms license.

#### **IV. Defendant's Defenses**

Defendant raised several affirmative defenses in his Answer that have simply no application to this case. Defendant asserted that the Complaint fails to state a claim, but in discovery admitted that the only basis for this defense is that the Defendant believes he had

defenses to the claim. March 27, 2007 letter from William Rowling, Defendant' attorney, to John Monroe, page 1, Response to Interrogatory #1, supplementing Defendant's Response to Plaintiff's First Discovery Requests. This is of course no basis at all for such a defense, as failure to state a claim must be measured only by the allegations in the Complaint.

Defendant also raised the defense of judicial immunity, but no damages are being sought from Defendant and the statutes and case law make it clear that even judges are proper defendants in mandamus actions when they are acting in a ministerial or administrative rather than a judicial capacity. "[T]he writ of mandamus may issue to compel a due performance" of "[a]ll official duties." O.C.G.A. § 9-6-20. A court carries out administrative acts when the law has prescribed and defined the duty to be performed with such precision and certainty as to leave no room for the exercise of judgment or discretion." *Henderson v. McVay*, 269 Ga. 7, 7-8, 494 S.E.2d 653, 654 (1998).

Georgia law makes clear that the act of processing GFL applications is a ministerial function. The GFL statute itself, O.C.G.A. § 16-11-129, does not appear to confer any discretion upon probate judges.<sup>9</sup> This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. In Georgia, a probate judge is required to issue a license to all applicants, except for an applicant with a disqualifying characteristic.

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<sup>9</sup> It may be helpful to refer to Georgia Attorney General Opinion U89-21, in which the Attorney General responded to the Probate Judge of Liberty County's query, "What discretion does the probate judge have in issuing or denying a firearms permit?" with "Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit." The Attorney General noted that the sole exception was that the probate judge had the discretion to issue a GFL to an applicant who had been hospitalized at a mental hospital or drug or alcohol treatment center. Otherwise, Georgia's license is "shall issue."

The powers and duties of probate judges are listed in O.C.G.A. § 15-9-30. In addition to issuing GFLs, probate judges also issue marriage licenses (for which certain eligibility requirements must be met, just as for GFLs). O.C.G.A. § 15-9-30(b)(7). Probate judges also are charged with “performing such other judicial and *ministerial* functions as may be provided by law.” O.C.G.A. § 15-9-30(b)(11) (emphasis supplied). Clearly, by specifically stating that probate judges are to perform “judicial and ministerial functions,” Georgia’s General Assembly has declared that not every act performed by a probate judge is to be considered judicial.

The Georgia Supreme Court has held:

The ordinary,<sup>10</sup> under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer.... In issuing a marriage license, he for the moment becomes a ministerial officer.

*Comer v. Ross*, 100 Ga. 652, 28 S.E. 387 (1897). Accordingly, the Georgia Supreme Court and the statute declare that the nature of the act determines whether the act is judicial, and the Georgia Supreme Court has declared that the issuance of a license is a ministerial, and not a judicial, act. The similarities between issuing firearms and marriage licenses are obvious. They both involve processing applications from applicants, determining whether the applicants are legally qualified for the license, and issuing the license only to those who are qualified under the law to receive the license.

Finally, Defendant *admits* that he has no discretion in the matter of issuing firearms licenses. In a Notice for Reconsideration obtained from Defendant in discovery, Defendant advises GFL applicants whose applications have been denied that, “[I]f you are prohibited under

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<sup>10</sup> Until fairly recently, probate judges in Georgia were called “county ordinaries.”

federal and/or state law from receiving a firearms license, *the Court has no discretion* and must deny the license application.”

Defendant asserted sovereign immunity, but this is a mandamus action, which is personal to the Defendant. No sovereign is named as a defendant. Moreover, the defense of sovereign immunity does not apply when, as in this case, damages are not sought.

Defendant raised the defense of mootness, however, a case is not moot when it is capable of repetition yet evading review. The time period for issuance of a license is 60 days, and if a mootness argument is to prevail, no plaintiff could ever bring a case for timely issuance of his license if the case could be defeated on mootness grounds simply by issuing the license prior to Plaintiff obtaining a judgment. Defendant’s same argument was recently rejected by the Eleventh Circuit, which held that a Georgia Firearms License applicant demonstrates “sufficient imminence of future harm” because he has to “continually renew his license.” *Camp v. Cason*, Case No. 06-15404, Decided March 23, 2007, p.9 (11<sup>th</sup> Cir. 2007) (a copy of which is attached hereto as Exhibit 5 for this court’s convenience).

## **V. Relief Sought**

Defendant initially refused to issue Plaintiff a temporary renewal license at all. When he was faced with having to explain to this Court, in response to the Mandamus *Nisi*, why he would not follow the plain wording of O.C.G.A. § 16-11-129(i), requiring the issuance of temporary renewal GFLs, he hastily but belatedly issued the flawed Temporary License. The Temporary License, with its notation contradicting federal law and violating state law, is not a proper temporary renewal license.

Plaintiff is entitled to a writ of Mandamus, ordering Defendant to issue a proper temporary renewal license without the notation to Federal Firearms Licensees. Plaintiff also seeks a declaratory judgment that the notation is not proper and an injunction prohibiting Defendant from placing any similar notation on future temporary renewal licenses, including Plaintiff's, since he must renew with Defendant every five years. Instead, Defendant should follow the form prescribed by Georgia law and make the temporary renewal license valid in the same manner and for the same purposes as a five year license. Plaintiff also is entitled to a declaratory judgment that his license should have been issued "[n]ot later than 60 days after the date of application," i.e., not later than December 16, 2006 in this case, and an injunction requiring Defendant to issue future Georgia Firearms Licenses within 60 days as well.

**V. Conclusion**

Plaintiff has shown that there are no disputes of material fact and that he is entitled to judgment as a matter of law. Defendant blatantly violated O.C.G.A. § 16-11-129(i) by failing to issue a proper temporary renewal license as prescribed by the clear directions in the statute.

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