

IN THE COURT OF APPEALS OF GEORGIA

GEORGIACARRY.ORG, INC., et.al.,)

Appellants,)

)

v.)

Case No. A19A0862

)

THOMAS C. BORDEAUX, JR.,)

)

Appellee)

**APPELLANT'S BRIEF IN OPPOSITION TO
MOTION FOR PENALTY**

Appellants GeorgiaCarry.Org, Inc., *et.al.*, (“GCO”) submit the following as their Brief in Opposition to Motion for Penalty pursuant to Rule 7(e).

GCO filed this appeal from the trial court’s dismissal of their case against Thomas Bordeaux, the judge of the Probate Court of Chatham County (“Bordeaux”). In their case below, GCO had sought mandamus and declaratory relief. Bordeaux has filed a Motion for a penalty not to exceed \$2,500 to be imposed against GCO and GCO’s attorneys for filing a frivolous appeal. As grounds for this Motion, Bordeaux says Appellant GeorgiaCarry.Org, Inc. “lacks standing to file an extraordinary writ and declaratory actions against a probate judge are barred by the doctrines of sovereign and judicial immunity.” Bordeaux continues, “As to

Appellants Moore and Montgomery ... [t]he Supreme Court has ruled two times since 2014 that a declaratory action such as that prosecuted by Appellants cannot stand.” GCO will show that Bordeaux has failed to demonstrate the present appeal is frivolous and that his motion should be denied.

Legal Standard

Rule 7(e)(2) provides that this Court may “impose a penalty not to exceed \$2,500 ... in any civil case in which there is a direct appeal ... determined to be frivolous.” An appeal is frivolous if an appellant could have no reasonable basis upon which to anticipate that this Court would reverse the trial court’s judgment. *Hardwick v. Williams*, 272 Ga.App. 680, 613 S.E.2d 215 (2005). The arguments of an appellant must be made unreasonably or in bad faith. *Griffiths v. Rowe Properties*, 271 Ga.App. 344, 609 S.E.2d 690 (2005). GCO will discuss this standard in turn against each of the issues raised by Bordeaux.

Standing of GeorgiaCarry.Org, Inc.

Bordeaux never directly addresses the standing of GeorgiaCarry.Org, Inc. in the present case. Instead, he cites to other cases where courts determined that GeorgiaCarry.Org, Inc. did not have standing and assumes, without meaningful argument, that GeorgiaCarry.Org, Inc. must not have standing in the present case,

either. GCO understands why Bordeaux is so eager to try to make such other rulings portable to this case, but his eagerness does not translate into GeorgiaCarry.Org, Inc.'s frivolousness. As already discussed in GCO's briefs, the other cases are inapposite.

In *GeorgiaCarry.Org, Inc. v. James*, 298 Ga. 420, 782 S.E.2d 284 (2016), GeorgiaCarry.Org, Inc. and one of its members sued a probate judge for refusing to issue temporary GWLs as required by O.C.G.A. § 16-11-129(i). Before the clerk of courts for the trial court received the mailed-in complaint, the probate judge issued the member a regular five-year GWL. The probate judge also began issuing temporary GWLs (albeit after the complaint was filed). These actions made the member's receipt of a temporary license moot, so there was no standing to pursue the case further. The Supreme Court did not address the question of whether GeorgiaCarry.Org, Inc. would have had standing if the probate judge had not taken the actions he took. In the present case, Bordeaux testified that his office is underfunded and he cannot meet the statutory deadlines for issuing GWLs. Because this condition persists, the case is not moot and standing remains in place.

In *GeorgiaCarry.Org, Inc. v. Allen*, 299 Ga. 716, 791 S.E.2d 800 (2016), GeorgiaCarry.Org, Inc. brought an action in the nature of *quo warranto* to question

the eligibility of members of the Code Revision Commission. The Supreme Court ruled that the office of Code Revision Commissioner was not germane to the purpose of GeorgiaCarry.Org, Inc. so GeorgiaCarry.Org, Inc. lacked organizational standing. The Supreme Court made no ruling on whether GeorgiaCarry.Org, Inc. would have standing in a different case, seeking a different remedy, against a different defendant, involving a different topic. Given that the topic of the present case (GWLs) most definitely is germane to GeorgiaCarry.Org, Inc.'s purpose, GeorgiaCarry.Org, Inc. has a reasonable expectation that this Court will reverse the trial and find that GeorgiaCarry.Org, Inc. has standing.

Sovereign Immunity

Bordeaux continues to believe that he has sovereign immunity in this case. Sovereign immunity could only apply, of course, to Bordeaux in his official capacity. It would never apply to Bordeaux in his individual capacity (Bordeaux mentions judicial immunity in his Motion, but not official immunity. For the sake of being thorough, however, both will be discussed below).

Ordinarily, Bordeaux would have sovereign immunity in his official capacity, but sovereign immunity has been waived. GCO has repeatedly asserted throughout this case that sovereign immunity has been waived, by virtue of O.C.G.A. § 16-11-

129(j) (providing for private right of action for GWL applicants). Despite many opportunities to do so, Bordeaux has never attempted to rebut GCO's position. Regardless of this Court's ultimate ruling on this issue, GCO certainly is reasonably justified in believing this Court will reverse the trial court, given Bordeaux's failure to attempt to argue that sovereign immunity has not been waived.

Judicial Immunity

Bordeaux also argues that he has judicial immunity. GCO provided an extensive discussion of judicial capacity in its merits briefs. That discussion undercuts the notion that judicial immunity applies, because Bordeaux is not acting in a judicial capacity when he processes GWL applications. More fundamentally, though, judicial immunity only applies in actions for damages. Despite the fact that GCO has raised this argument consistently and repeatedly, Bordeaux has again failed to address it at all. It is bedrock law that, as in this case where damages are not sought, judicial immunity does not apply. GCO has every reasonable expectation to believe this Court will reverse on this issue.

Official Immunity

Bordeaux does not raise official immunity in his Motion, but he has in other contexts in this case, so GCO will briefly address it here. Official Immunity only

applies in damages cases. The cases on which Bordeaux relies underscore this fact and in fact instruct future litigants to bring declaratory and injunctive cases against government officials. GCO did exactly that, so it reasonably believes this Court will reverse on that issue.

Declaratory Judgment Action

Bordeaux claims that the Supreme Court has ruled that declaratory judgment actions such as that filed by Moore and Montgomery cannot stand. He does not elaborate, but it appears he may be referring back to sovereign immunity and official immunity. For the reasons already discussed above, and in the merits briefs in this case, neither sovereign immunity nor official immunity apply to the present case.

Conclusion

GCO has shown that it has a reasonable expectation that this Court will reverse the trial court, and Bordeaux has failed to demonstrate that this case meets the standard for imposition of a penalty. Bordeaux's Motion must therefore be denied.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on January 4, 2019, I served a copy of the foregoing via U.S.

Mail upon:

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S:/John R. Monroe

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