IN THE SUPREME COURT OF GEORGIA

KEVIN GARY ROBERTS,	)	
	)	APPEAL NO.
Plaintiff/Appellant,	)	
vs.	)	S23A0631
	)	
JUDGE CLARENCE CUTHPERT, JR.,	)	
Individually and as Judge of the	)	
Rockdale County Probate Court,	)	
	)	
Defendant/Appellee.	)	

BRIEF OF APPELLEE JUDGE CLARENCE CUTHPERT

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INTRODUCTION

This case arises from Plaintiff's mandamus action against Appellee Judge Clarence Cuthpert, who was the elected Rockdale County Probate Court Judge. Judge Cuthpert denied Plaintiff's application for a Georgia Weapon License (GWL). Plaintiff sought a writ of mandamus to compel Judge Cuthpert to issue him a GWL. Eventually the Superior Court of Rockdale County granted Appellant's mandamus petition, but denied Plaintiff's motion for attorney's fees and expenses. For the reasons discussed herein, the Court should affirm the Superior Court's order denying the fees and expenses motion.

PART I: FACTS

Following denial of his weapon license application, Plaintiff filed the present mandamus action. Plaintiff sued Judge Cuthpert "Individually and as Judge of the Rockdale County Probate Court." R-4. After some discovery and briefing, the Rockdale County Superior Court granted a writ of mandamus. R-318.

Plaintiff then moved for attorney's fees and expenses under OCGA § 16-11-129(j). R-327. Plaintiff sought attorney's fees and expenses in the amount of $20,265.47. R-395-97. Judge Cuthpert opposed the motion on various grounds, including judicial immunity and due to the unconstitutionality of imposing the fees and expenses of a disgruntled litigant upon a judge for his ruling in the

litigant's case. R-356 *et seq*. The trial court denied Plaintiff's motion, holding that judicial immunity bars a fees and expense award against a judge and, alternatively, that OCGA § 16-11-129 (j) violates the separation of powers doctrine to the extent that it imposes fees or expenses against a judge for a judicial act. R-411-419. This appeal followed.

II. ARGUMENT AND CITATION TO AUTHORITIES

The trial court correctly denied Plaintiff's fees and costs motion based on judicial immunity and the separation of powers doctrine. This Court should affirm.

1. THE TRIAL COURT CORRECTLY HELD THAT JUDICIAL IMMUNITY BARS AN AWARD OF ATTORNEY'S FEES AND EXPENSES AGAINST A PROBATE JUDGE

"Since the seventeenth century, common law has immunized judges from suit for judicial acts within the jurisdiction of the court." *Dykes v. Hosemann*, 776 F.2d 942, 945 (11th Cir. 1985). "Judicial immunity shields judicial officers from liability in civil actions based on acts performed in their judicial capacity that are not undertaken in the complete absence of all jurisdiction. This broad immunity, normally applied to judges, also applies to officers appointed by the court if their role is simply 'an extension of the court.' " *Considine v. Murphy*, 297 Ga. 164, 169 (3) n.4, 773 SE2d 176 (2015) (citations omitted)

"[I]t is ultra-important in our democracy to preserve the doctrine of judicial immunity to enable our judges to exercise within their lawful jurisdiction untrammeled determination without apprehension of subsequent damage suits." *Hill v. Bartlett*, 126 Ga. App. 833, 840, 192 S.E.2d 427, 432 (1972).

> The public policy underlying this doctrine is obvious. Without such immunity, all judges' decisions could be collaterally attacked in suits brought against them and the finality of judicial decisions would be impaired. Further, without judicial immunity, there would certainly be a chilling effect upon the independent decision making role of the judiciary and upon the willingness of qualified individuals to serve in judicial positions.

Rivello v. Cooper City, 322 So. 2d 602, 607-08 (Fla. Dist. Ct. App. 1975).

This case presents an apt example, where Plaintiff sought damages (in the form of attorney's fees and expenses) on account of Judge Cuthpert's exercise of judgment that Plaintiff was unqualified for a weapon license. Even if Judge Cuthpert's ruling in hindsight is viewed as erroneous, damages for such an error "would cause our judicial system to deteriorate to a sad state, for every mistake of law would subject the trial judge to civil liability. Errors are inherent in every judicial system… ." *Lamb v. Sims*, 153 Ga. App. 556, 557, 265 S.E.2d 879, 881 (1980) (holding that judicial immunity barred claim against judge who erred in entering default judgment).

In *Hill v. Clarke*, 310 Ga. App. 799, 800, 714 S.E.2d 385, 387 (2011), the

Court of Appeals "question[ed] whether the statutory attorney fees provision [OCGA § 16-11-129 (j)] may be applied ... in light of the doctrine of judicial immunity." However, *Hill* did not reach that issue because it was never raised in the trial court. *Hill* explained:

> "[j]udicial officers have been shielded from civil actions for acts done in their judicial character from the earliest dawn of jurisprudence down to the latest reported cases." (Citations and punctuation omitted.) *West End Warehouses v. Dunlap*, 141 Ga.App. 333, 233 S.E.2d 284 (1977). See also *Earl v. Mills*, 275 Ga. 503, 504(1), 570 S.E.2d 282 (2002) (affirming the dismissal of the portion of a complaint for damages against a judge since judicial immunity applied).
>
> [T]his immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. *Smith v. Hancock*, 150 Ga.App. 80, 81, 256 S.E.2d 627 (1979)(Citation and punctuation omitted.)

Hill, 310 Ga. App. at 801.

Here, the trial court reached the issue of judicial immunity and denied Plaintiff's costs and fees motion based on that doctrine. As discussed extensively below, Plaintiff provides no basis for reversal and the trial court should be affirmed.

A. Money Ordered to Flow From One Person to Another is Damaging, No Matter What Lable Is Used

Plaintiff first argues he is seeking "costs and fees" in the amount of

$20,265.47, rather than "damages" in the amount of $20,265.47. He claims this difference in terminology gets him around judicial immunity.

If judicial immunity can be flouted by resort to word games then the doctrine is far less robust than the courts have made it out to be, and in fact it is largely worthless. The fact is that a judgment requiring a judge to pay money to a disgruntled litigant, on account of the judge's decision, fundamentally requires the defendant judge to transfer money from the judge to the disgruntled litigant. That reality persists regardless of any label ("damages" or "fees" or "costs" or any other term) or stated rationale for the order to pay.

Judicial immunity protects judges from even the possibility of having to pay disgruntled litigants due to judicial decisions. The point is to protect the integrity of the judicial process and to protect judges from making decisions based on extraneous factors, like whether they might have to pay a disgruntled litigant $20,265.47 if a different judge(s) later disagrees with the ruling. Without that protection, able judges would be in far shorter supply, and the serving judges willing to risk financial harm would have to make rulings with an eye toward protecting themselves. That is no way to run a judicial system.

As the courts of England and this nation have held for centuries, exposing judges to monetary liability for their judicial rulings is a sure way to undermine

and perhaps ruin the integrity of the judicial system. Indeed, even if the threat only gave rise to a *perception* that judicial integrity is undermined, that is reason enough to end the threat decisively. See Ga. Code Jud. Conduct, Commentary to Rule 1.2 ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a *perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." (emphasis supplied)).

Judicial immunity normally is held to perform the function of protecting judicial integrity, and Plaintiff's labeling trick (*i.e.*, claiming there is a difference between damages and a fees award) provides no good reason to deviate from that crucial doctrine.

B. Plaintiff Did Not Sue Judge Cuthpert in His "Official Capacity", Never Sought to Add Rockdale County as a Defendant, and the Proper Mandamus Defendant is Judge Cuthpert Rather Than Rockdale County

Next, Plaintiff forfeits any claim that Judge Cuthpert can be personally liable for any fees and costs judgment. *Plaintiff's Brief* at 13. That is probably a sufficient ground to moot this appeal, given that Rockdale County was never a defendant and Plaintiff claims only Rockdale County would be liable to pay his fees and costs under OCGA § 16-11-129 (j). Plaintiff's arguments are considered in turn.

i. Plaintiff Did Not Sue Judge Cuthpert in His Official Capacity, and He Did Not Sue Rockdale County

Plaintiff argues that he sought relief against Judge Cuthpert only in his "official capacity," which Plaintiff claims is the same thing as suing Rockdale County. One need only look at the style of the Complaint to recognize that Plaintiff's new argument is baseless.

The complaint, drafted by Plaintiff's counsel, says that the lawsuit is against Judge Cutherpt "**Individually** and as Judge of the Rockdale County Probate Court." R-4 (emphasis supplied). There is no hint that Plaintiff is suing Rockdale County, which in any event would have been improper and made no sense. Rockdale County does not control the Probate Court.

A writ of mandamus to Rockdale County could never properly produce action by the Probate Court. Moreover, Rockdale County is not liable for any act or omission of the Probate Court. *Stegeman v. Georgia*, 290 F. App'x 320, 322-23 (11th Cir. 2008) (holding that probate court judge sued in an official capacity is a state official under Ga. Const. art. VI, § 1, ¶ 1 (vesting judicial power of the state in, inter alia, probate courts), and entitled to Eleventh Amendment protection). The County is legally separated from the rulings of the local Probate Court, and *vice versa*.

The fact is that, had Plaintiff sought to make Rockdale County a defendant, then he was obligated to say so in his complaint and then have process served upon Rockdale County so that Rockdale County could defend its interests in the case. Plaintiff cannot now claim that Rockdale County is liable for any monetary judgment when Plaintiff never bothered to sue Rockdale County.

ii. Mandamus Actions for Judicial Decisions Lie Only Against the Judge, Not a Government Entity

The basic premise of Plaintiff's argument is that a mandamus action against a judge is really an action against a government entity. Georgia law says the opposite, and the issue was decided in Judge Cuthpert's favor in *GeorgiaCarry.Org, Inc. v. Bordeaux*, 352 Ga. App. 399, 404, 834 S.E.2d 896, 901 (2019). There the plaintiffs sued the probate judge individually. The Court of Appeals ruled that the mandamus remedy under OCGA § 16-11-129 gave rise to an action against the judge individually.

That is consistent with longstanding Georgia law. Where a litigant seeks a writ of mandamus against a judge for a judicial act, "the writ of mandamus is personal and issues to the individual to compel performance, and it does not reach the office but is directed against the officer to compel him to perform the required legal duty. 34 Am. Jur. 812, § 7; *Bryant v. Mitchell*, 195 Ga. 135 (23 S. E. 2d 410); *McCallum v. Bryan*, 213 Ga. 669 (100 S. E. 2d 916)." *Bulloch Cty. v.*

Ritzert, 213 Ga. 818, 818-19, 102 S.E.2d 40, 41 (1958). Simply put, Judge Cuthpert individually was the only proper defendant in this mandamus action. There was never a legitimate mandamus action against any government entity, much less Rockdale County. *Ritzert*, 213 Ga. at 818-19.

Judge Cuthpert acknowledges *City of Coll. Park v. Clayton Cty.*, 306 Ga. 301, 314, 830 S.E.2d 179, 188 (2019), which says "[m]andamus, ... is by definition a claim against officials in their official capacities. OCGA § 9-6-20."[1] For that point *City of Coll. Park* relies upon OCGA § 9-6-20 and a footnote in *SJN Props., LLC v. Fulton Cty. Bd. of Assessors*, 296 Ga. 793, 770 S.E.2d 832 (2015), which says that mandamus is not subject to sovereign immunity and "[w]ere we to hold otherwise, mandamus actions, which by their very nature may be sought only against public officials, would be categorically precluded by sovereign immunity." *Id*. at 799 n. 6. Critically, *City of Coll. Park* and *SJN Props., LLC* were lawsuits against public entities, not judges.

Laying aside mandamus cases against government entities, the fact is that where an individual officer (like a judge) has a clear legal duty, a writ of mandamus must be directed personally to the judge to compel that judge to carry

[1] OCGA § 9-6-20 has no definition, but it relates to "official duties." What the author in *City of Coll. Park* likely meant is that mandamus only lies against a person who holds public office, in that person's role as a public officer, to make them perform an "official duty" of that position. That does not tell us the proper capacity in which the officer must be sued in a mandamus action.

out that duty. See *Brown v. Johnson*, 251 Ga. 436, 436, 306 S.E.2d 655, 656 (1983) (mandamus action against individual judge to enforce OCGA §15-6-21).

Any possible conflict between *City of Coll. Park, SJN Props., LLC* and mandamus cases against public officers can be harmonized easily. First, *City of Coll. Park* and *SJN Props., LLC* obviously do not overrule older cases without saying so. Second, *City of Coll. Park* and *SJN Props., LLC* are not mandamus actions against judges or any other particular officials. The Court's mandamus cases are consistent because mandamus can be issued to compel action by individuals *or* entities, depending on who (or what) has the "clear legal duty."

This approach explains the Court's mandamus cases. Sometimes a city may have a "clear legal duty" and in that case mandamus may issue against the city or an "official capacity" city officer, which is the same thing as suing the city. On the other hand, a particular public official may be charged with a legal duty, in which case mandamus may issue against that particular official rather than his government employer. See *Bellamy v. Rumer*, 305 Ga. 638, 640, 827 S.E.2d 269, 270 (2019) (mandamus action against specific judge under OCGA §15-6-21).

Accordingly, the proper mandamus defendant is determined by who or what has the "clear legal duty" in the particular mandamus case. Where does the law place the duty? Here, any duty would have to arise from OCGA § 16-11-129. That

statute places GWL duties upon the "judge of the probate court." *Id*. Under the statute that duty is personal to the particular judge who handles the GWL application. Consequently, the only proper mandamus defendant under OCGA § 16-11-129 is the "judge of the probate court." OCGA § 16-11-129.

It follows that the proper mandamus defendant under OCGA § 16-11-129 is the "probate judge," not the "Probate Court" or any other government entity said to employ the judge. Consequently, a writ of mandamus issued under OCGA § 16-11-129 (j) can only be issued to a judge. It is not an available remedy against a government entity, and it never claims to be.

C. OCGA § 16-11-129 (j) Does Not Create a Sovereign Immunity Waiver

Building on his erroneous claim that the real mandamus defendant is Rockdale County, Plaintiff relies upon OCGA § 16-11-129 (j) to argue that Rockdale County's sovereign immunity is waived for attorney's fees and expenses. As argued in § II below, OCGA § 16-11-129 (j) is unconstitutional to the extent it imposes monetary liability for a judicial decision. It violates the separation of powers doctrine, no matter who or what the statute supposedly allows damages against. As such it could never be a valid sovereign immunity waiver.

Beyond that, the statute does not even claim to waive sovereign immunity.

> [W]here the plain language of a statute does not provide for a specific waiver of sovereign immunity and the extent of the waiver, the courts do not have the power to imply a waiver. *Sustainable Coast*, 294 Ga. at 603 (2). And "statutes providing for a waiver of sovereign immunity are in derogation of the common law and thus are to be strictly construed against a finding of waiver." (Citation and punctuation omitted.) *Bd. of Regents of the Univ. System of Ga. v. One Sixty Over Ninety*, LLC, 351 Ga. App. 133, 138 (1) (830 SE2d 503) (2019).

Ga. Lottery Corp. v. Patel, 353 Ga. App. 320, 322, 836 S.E.2d 634, 636 (2019).

Here, OCGA § 16-11-129 (j) "does not contain an express waiver of sovereign immunity. The words "waive" and "sovereign immunity" do not appear anywhere in the text of the statute, and the statute does not contain any other language that expressly denotes a waiver." *Ga. Lottery Corp*., 353 Ga. App. at 322. In *GeorgiaCarry.Org, Inc. v. Bordeaux*, 352 Ga. App. 399, 403, 834 S.E.2d 896, 900 (2019), the Court of Appeals affirmed that sovereign immunity barred a declaratory judgment action against a probate judge sued under OCGA § 16-11-129 in an "official capacity." It follows that the Court of Appeals found no sovereign immunity waiver for the "official capacity" claim, under the specific statute at the heart of this case.

Likewise, in *GeorgiaCarry.Org, Inc. v. Bordeaux* the plaintiffs also sued the probate judge individually. The Court of Appeals ruled that OCGA § 16-11-129 (j) gave rise to a mandamus action against the judge individually. *Id.* at 404. That in turn indicates that OCGA § 16-11-129 (j) was never intended to waive

sovereign immunity, because the statute does not even contemplate a claim against an entity to which sovereign immunity would apply.

D. Ruling on Weapon Licenses Is a Judicial Function, and the General Assembly Lacks Authority to Delegate Nonjudicial Functions to Probate Judges

Plaintiff next tries to get around judicial immunity by arguing that deciding on a GWL is not a judicial function. This issue was decided against Plaintiff in *Hise v. Bordeaux*, 364 Ga. App. 138, 143, 874 S.E.2d 175, 181 (2022), which is a sufficient basis to reject Plaintiff's argument. Aside from the analysis in *Hise*, other grounds show that a Probate Court judge's ruling on a GWL is a judicial function.

First, OCGA § 16-11-129 commits GWL adjudications to probate judges, and "[u]nder the separation of powers, nonjudicial functions may not be imposed on a constitutional court." *Bentley v. Chastain*, 242 Ga. 348, 351, 249 S.E.2d 38, 40 (1978). The Probate Court is a constitutional court. Ga. Const. of 1983, Art. VI, § 1, ¶1. It follows that the GWL function of the Probate Court must be a judicial function. Otherwise, delegation of that responsibility to probate judges violates the separation of powers doctrine.

Second, and consistent with the analysis in *Hise*, "the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself,

i.e., whether it is a function normally performed by a judge, and ... whether [parties] dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 1107–08 (1978). Here, only a Probate Judge acting as such can rule on a GWL application. And, where "it was only because [the judge] served in that position that [a party] … submitted the petition to him for his approval," judicial immunity applies. *Stump*, 435 U.S. at 362. Here, the only reason that Judge Cuthpert had any role in Plaintiff's GWL application is that Judge Cuthpert was the Judge of the Rockdale County Probate Court, and Plaintiff submitted the application to him as such. Judicial immunity therefore attached to this GWL ruling.

Third, the General Assembly committed GWL evaluation t*o judges* rather than clerical or executive officials.[2] That policy decision indicates that evaluation of a GWL permit is not merely clerical. A judge can deny a GWL where "facts establishing ineligibility have been reported or … the judge determines such applicant has not met all the qualifications, is not of good moral character, or has failed to comply with any of the requirements contained in this Code section." OCGA § 16-11-129(d)(4). A ruling on a GWL often requires evaluation and judgment, which plainly is judicial in nature.

[2] As Plaintiff points out, some states commit firearm license processing to police agencies. The General Assembly chose to commit weapon permitting to judges, indicating a preference for judicial evaluation.

This case is an apt example. If the decision in this case was an easy one, the Superior Court would not have required over a year to make a decision on the merit of the mandamus issue. Likewise, appellate cases arising from GWL decisions reveal that weapon license decisions can be complex, and often require significanlty more evaluation and judgment than clerical rubber-stamping. See *Bell v. Hargrove*, 313 Ga. 30, 35, 867 S.E.2d 101, 105 (2021) (reversing trial court and Court of Appeals and ruling on previously unsettled questions relating to weapon license evaluation); *Hertz v. Bennett*, 294 Ga. 62, 64, 751 S.E.2d 90, 92 (2013) (holding that applicant was disqualified based on certain criminal history, that other criminal issues would not disqualify him, and sustaining statute against Second Amendment challenge).

Fourth, judicial immunity is quite broad. Even undertakings that do not seem to require judgment can still come within the ambit of judicial immunity. In *Withers v. Schroeder*, 304 Ga. 394, 398, 819 S.E.2d 49, 53 (2018), judicial immunity applied to "the court's making a report" to the Department of Driver Services. And in *Spann v. Davis*, 355 Ga. App. 673, 676, 845 S.E.2d 415, *reversed on other ground*, 866 S.E.2d 371 (Ga. 2021), the Court of Appeals affirmed quasi-judicial immunity for "Clerks [who] fail[ed] to report the cancellation of the FTA warrant to the interested government agency." Mere

reporting duties may be protected by judicial immunity. *A fortiori*, so is a Probate Court Judge's evaluation and ruling on a GWL application.

Against this backdrop, Plaintiff asserts that GWLs are ministerial only. His primary authority is *Comer v. Ross*, 100 Ga. 652, 28 S.E. 387 (1897), where the Court held that "fixing the amount of extra compensation to be allowed a temporary administrator, granting an order for same, and discharging him from the trust, were in no sense executive, ministerial, or clerical functions." *Id.* Obviously *Comer* says nothing about whether a probate judge acts in a judicial capacity when he evaluates and rules upon a GWL application. *Comer* held that the judge's actions were judicial. Aside from that, GWLs did not exist in 1897 when *Comer* was decided. *Comer* does not support Plaintiff's position.

Nor does *Carroll v. Wright*, 131 Ga. 728 (1908), which over a cenury ago generally recounted certain administrative functions of ordinaries (*e.g.*, issuing marriage licenses), and had nothing to do with weapon licensing rulings.

In sum, Plaintiff offers no legitimate ground to reverse the trial court's holding that a probate judge's ruling on a GWL is a judicial function covered by judicial immunity. As *Hise v. Bordeaux* and the trial court correctly found, it is.

E. The General Assembly Cannot and Did Not Abrogate Judicial Immunity in OCGA § 16-11-129 (j)

Last, Plaintiff engages in a confused discussion about how the General

Assembly can waive sovereign immunity, and also (he says) judicial immunity. For this proposition Plaintiff relies almost solely upon *Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970 (1984), a 5-4 decision that was bad enough for Congress to overrule. Pub. L. No. 104-317, 110 Stat. 3847 (1996) (codified as amended at 42 U.S.C.S. § 1983). *Pulliam* is not binding, was decided under federal statutes that are not at issue here, was abrogated by statute, and frankly the dissenters had far better arguments. The *Pulliam* majority gave short shrift to federalism and judicial independence, clearly elephants in the room for that decision. When the majority view on a delicate decision turns on a single judge's vote, the matter is hardly settled beyond dispute.

All that said, perhaps the General Assembly has authority to abrogate judge-made immunities. If that is what the General Assembly intended to do in the fee-shifting provision of OCGA § 16-11-129 (j), it is strange that it did not say so. Abrogation of judicial immunity would be a matter of grave constitutional proportion.

Consequently, the normal expection would be for the General Assembly and the Governor to carefully weigh the impact of legislation that dramatically alters existing constitutional and prudential norms by imposing substantial financial liability on judges. There is no indication that this type of careful

consideration was undertaken, which undercuts Plaintiff's abrogation theory.

At any rate, if the General Assembly intended to abrogate judicial immunity and the Governor did too, it is of little practical consequence here. That is because Georgia's constitution enshrines the separation of powers doctrine, which prohibits monetary awards against judges for judicial decisions. As discussed next, Georgia's constitution trumps any attempt by the General Assembly to influence the outcome of judicial decisions by providing for monetary penalties against judges for their judicial decisions. As the trial court correctly held, OCGA § 16-11-129 (j) is unconstitutional to the extent that it makes judges liable for the fees and costs of opposing parties in mandamus cases.

2. THE TRIAL COURT CORRECTLY HELD THAT THE STATUTE'S FEE-SHIFTING PROVISION AGAINST A JUDGE VIOLATES THE SEPARATION OF POWERS DOCTRINE

A. The Court Should Reach the Constitutionality of OCGA § 16-11-129 (j)

Plaintiff asserts that the Court need not reach the constitutionality of OCGA § 16-11-129 (j) if judicial immunity is a sufficient basis to affirm the trial court. The Court has embraced the prudential doctrine that constitutional rulings should be avoided where the case can be decided on other grounds. See *In the Interest of C.C.*, 314 Ga. 446, 451, 877 S.E.2d 555, 561 (2022). Because the Court's judicial immunity ruling is unknown at this point, Judge Cuthpert explains below why

OCGA § 16-11-129 (j) violates the separation of powers doctrine.

B. The Trial Court Correctly Found OCGA § 16-11-129 (j) Violates the Separation of Powers Doctrine

By imposing potential financial liability upon a judge for a judicial decision, OCGA § 16-11-129 (j) unconstitutionally interferes with judicial independence. A judge who must worry about whether he will have to pay a disgruntled litigant is more likely to decide a matter in a way that eliminates his potential financial exposure. That is an affront to the separation of powers doctrine.

Georgia's Constitution enshrines judicial independence under the separation of powers provision, providing:

> Separation of legislative, judicial, and executive powers. The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

Georgia Const. of 1983, Art. 1, § II, Paragraph III.[3]

"[T]he doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced." *Etkind v. Suarez*, 271 Ga. 352, 353, 519 S.E.2d 210, 212 (1999).

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[3] "The Georgia Constitution, unlike the United States Constitution, contains an express provision requiring the separation of powers." *Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 56 n.17, 849 S.E.2d 441, 459 (2020).

> "As a principle flowing from the separation of powers doctrine, the inherent judicial power . . . arms the judicial branch with authority to prevent another branch from invading its province." *McCorkle v. Judges &c. of Chatham County*, 260 Ga. 315, 316 (392 S.E.2d 707) (1990). Accordingly, **the proper exercise of such judicial authority may not be limited by the legislative branch**. *Grimsley v. Twiggs County*, 249 Ga. 632, 633-634 (292 S.E.2d 675) (1982).

Fathers Are Parents Too v. Hunstein, 202 Ga. App. 716, 717, 415 S.E.2d 322, 323 (1992) (emphasis supplied; internal alterations omitted). "The inherent power is not a sword but a shield." *McCorkle*, 260 Ga. at 316.

The Georgia Constitution's separation of powers provision "invests those officials charged with the duty of administering justice according to law with all necessary authority ... to maintain the dignity and **independence of the courts**." *Lovett v. Sandersville R.R.*, 199 Ga. 238, 33 S.E.2d 905 (1945) (emphasis supplied). The Constitution forbids a law "that **undermine[s] the authority and independence** of ... another coordinate Branch." *Mistretta v. United States*, 488 U.S. 361, 382, 109 S. Ct. 647 (1989). Similarly, "the Constitution prohibits one branch from encroaching on the central prerogatives of another." *Miller v. French*, 530 U.S. 327, 341, 120 S. Ct. 2246 (2000) (citation and internal quotation marks omitted); *Judicial Council v. Brown & Gallo, LLC*, 288 Ga. 294, 298, 702 S.E.2d 894, 898 (2010) (The "constitutional separation of powers prohibits the legislative branch from encroaching upon the inherent powers of the judicial branch of

government … .").

As the United States Supreme Court stated long ago, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). Subjecting judges to financial liability for their judicial decisions "**would destroy that independence without which no judiciary can be either respectable or useful**." *Id.*

The centuries-old exemption of judges "from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." *Bradley*, 80 U.S. at 347.

The bottom line is that the separation of powers doctrine prohibits the General Assembly from enacting a law that diminishes judicial independence. And "[w]hat the executive branch cannot do directly, it cannot do indirectly." *Perdue v. Baker*, 277 Ga. 1, 14, 586 S.E.2d 606, 616 (2003).

By subjecting probate judges to financial liability for their judicial decisions

on GWLs, OCGA § 16-11-129 (j) strikes at the very heart of judicial independence. It provides a powerful incentive to act in a manner that avoids risk of personal financial damage, regardless of what the judge views as the right decision. Therefore, OCGA § 16-11-129 (j) violates Art. 1, § II, Paragraph III of the Georgia Constitution, which codifies the separation of powers doctrine. The trial court correctly held that the fee-shifting provision of the statute is unconstitutional and cannot be enforced.

This is so regardless whether the opposing party's attorney's fees and expenses are imposed upon a judge personally or in an "official capacity." The latter imposes a judgment against a constitutional court—a local embodiment of a co-equal branch of government whose budget the General Assembly has no authority to subject to damages from persons aggrieved by a decision of the Probate Court.

It is inconceivable that a Superior Court or an appellate court would tolerate a law that subjects the judges of *those courts*—or the budgets of such courts—to significant financial liability for decisions made in cases adjudicated by their judges. There is no principled reason to afford Probate Court judges any less protection, and Plaintiff provides none. The Georgia Constitution demands such protection, and this Court is bound by the Constitution. The trial court's ruling is

firmly grounded in well-settled constitutional doctrine, soundly reasoned and should be affirmed.

C. Plaintiff's Historical Argument Is Unsound

Plaintiff provides his rendition of the history of the office of the ordinary, which originally was responsible for a multitude of duties that Plaintiff asserts were nonjudicial. Most of these functions were later assigned to county commissions. The upshot of Plaintiff's historical story is that the separation of powers doctrine, as presently conceived, was not applied to probate judges or their historical ancestors in a consistent manner.

There are a number of flaws with Plaintiff's argument, even if his historical rendition is entirely accurate. The first and most glaring problem is that the function involved here--ruling on a Georgia weapon license--has been held to be a judicial function. *Hise v. Bordeaux*, 364 Ga. App. 138, 143, 874 S.E.2d 175, 181 (2022). That point is hardly debatable, as detailed above. So, whatever view is taken about historical assignment of *non*judicial functions to ordinaries, the present case concerns a clearly *judicial function*. Plaintiff offers no dispute to the key doctrine that legislative interference with the independence of judicial decisions violates the separation of powers doctrine.

The second problem with Plaintiff's argument is that it relies solely upon a

claimed historical status quo, rather than a favorable precedent on the relevant legal point. Even if the fee-shifting provision in OCGA § 16-11-129 (j) fits within a long line of historical practice (it does not), legal history periodically features constitutional rulings that run contrary to historical practice. See, *e.g.*, *Brown v. Board of Education of Topeka, Kan.*, 347 U.S. 483 (1954). Historical practice may deserve some deference, but it is insufficient to support unconstitutional legislation.

So, whereas Plaintiff argues for a historical understanding that nobody (until now) has recognized a separation of powers problem with legislation about probate courts, the logic of that argument is weak. The fee-shifting provision in OCGA § 16-11-129 (j) is an innovation, not part of a historical tradition. Indeed, nobody could raise a challenge until its enactment in 2008.

D. Plaintiff's Reliance Upon the Marriage License Damages Statute is Mistaken

Plaintiff tries to support the fee-shifting provision of OCGA § 16-11-129 (j) by analogy to OCGA § 19-3-45, which permits a lawsuit against a probate judge for wrongful issuance of a marriage license. Plaintiff argues that because the General Assembly delegated issuance of *marriage licenses* to probate judges, and OCGA § 19-3-45 provides for $500 in damages for errantly issuing a marriage license, the fee-shifting provision in OCGA § 16-11-129 (j) does not violate the

separation of powers doctrine. The flaws in this argument are almost too obvious to explain, but here they are.

First, this is not a marriage license case, and for present purposes it is of no consequence what happense in marriage license cases. Second, it is entirely possible that OCGA § 19-3-45 is just as unconstitutional as OCGA § 16-11-129 (j). Two wrongs don't make a right. It appears nobody has ever challenged the constitutionality of OCGA § 19-3-45, perhaps because the amount in controvery is never more than $500 plus court costs. Of course this case provides no occasion for any ruling on OCGA § 19-3-45.

Third, OCGA § 19-3-45 appears to be a leftover from an age when suing over wrongful issuance of a marriage license made sense to someone. If lawsuits under OCGA § 19-3-45 still happen, they must be quite a novelty and everyone but the clerk likely loses money. Fourth, and contrary to Plaintiff's suggestion, attorney's fees under OCGA § 19-3-45 are *part of* the $500 damages award, not a separate "sky is the limit" fee-shifting provision like the one in OCGA § 16-11-129 (j). See OCGA § 19-3-45 ("From the [$500] recovery a reasonable attorney's fee, to be fixed by the presiding judge trying the case, shall be paid to the attorney representing the person bringing the action.").

The small amount in controversy in a wrongful marriage license case

probably explains why nobody appears ever to have bothered to challenge the constitutionality of OCGA § 19-3-45. In fact an appeal from any judgment under OCGA § 19-3-45 would be discretionary, further limiting the availability and practicality of a constitutional challenge. See OCGA § 5-6-35(a)(6). The bottom line is that OCGA § 19-3-45 provides no basis for reversing the trial court's holding that the fee-shifting provision of OCGA § 16-11-129 (j) violates the separation of powers doctrine.

Plaintiff provides no serious defense for the constitutionality of OCGA § 16-11-129 (j), which strongly indicates that the trial court's ruling should be affirmed.

CONCLUSION

The trial court properly denied Appellant's fees and expenses motion. Appellant's arguments are meritless and the trial court's order should be affirmed on the grounds detailed in this Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **BRIEF OF APPELLEE** upon all parties electronically, through the Court's electronic service system and separately via electronic mail addressed as follows:

John Monroe, Counsel for Plaintiff

156 Robert Jones Road Dawsonville, GA 30534

jrm@johnmonroelaw.com

I certify that there is a prior agreement with Mr. Monroe (counsel for Plaintiff) to allow documents in a .pdf format sent via email to suffice for service.

This April 17, 2023.

/s/ *Jason Waymire*_____
JASON C. WAYMIRE

SUPREME COURT OF GEORGIA
Case No. S23A0631

March 30, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

KEVIN GARY ROBERTS v. CLARENCE CUTHPERT, JR., JUDGE.

Your request for an extension of time to file the brief of appellee in the above case is granted until April 17, 2023.

A copy of this order **MUST** be attached as an exhibit to the document for which the appellee received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.


, Clerk