IN THE SUPREME COURT OF GEORGIA

KEVIN GARY ROBERTS, Appellant,	)	
v.	)	Case No. S23A0631
CLARENCE CUTHPERT, JR., JUDGE Appellee	)	

Brief of Appellant

Appellant states the following as his opening Brief.

John R. Monroe
John Monroe Law, P.C.
Attorney for Appellant
156 Robert Jones Road
Dawsonville, GA 30534
State Bar No. 516193
678 362 7650
jrm@johnmonroelaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Part One – Statement of Facts and Proceedings Below

A – Introduction

Appellant Kevin Gary Roberts ("Roberts") appeals the denial of his motion for attorney's fees and costs after he obtained a writ of mandamus against Appellee Clarence Cuthpert, Jr., the (former) Judge of the Probate Court of Rockdale County ("Cuthpert").[1] Roberts obtained a writ pursuant to O.C.G.A. § 16-11-129(j) to compel issuance to him of a Georgia weapons carry license ("GWL").[2] Roberts then filed a motion for costs and fees and the trial court denied the motion, both on judicial immunity grounds and by finding the fee-shifting provision of O.C.G.A. § 16-11-129(j) unconstitutional.

[1] During the pendency of this case, Cuthpert left office and has been succeeded as the judge of the Probate Court of Rockdale County by Gary Washington ("Washington"). Washington therefore is substituted for Cuthpert by operation of law. O.C.G.A. § 9-11-25(d)(1). Because this appeal only concerns the claims against Cuthpert in Cuthpert's official capacity, the only appellee in this appeal is Washington. To avoid confusion, Roberts will refer to the Appellee in this case as Cuthpert because the case was docketed in that name.

[2] The propriety of the issuance of the writ is not before this Court.

B – Proceedings Below

Roberts applied to Cuthpert for a GWL on April 26, 2019. R., p. 318.[3] On May 8, 2019, Cuthpert entered an order denying Roberts' application. *Id.* On May 13, 2019, Roberts requested a hearing before Cuthpert. R., p. 319. After the hearing, Cuthpert entered a second order (on July 26, 2019), again denying Roberts' application.

Roberts commenced this action on July 31, 2019, seeking *inter alia* a writ of mandamus to compel Cuthpert to issue a GWL to Roberts. R., p. 4. On January 21, 2022, the trial court entered an order granting summary judgment to Roberts including a writ of mandamus to issue a GWL to Roberts.[4] R., p. 318. On January 25, 2022, Roberts filed a motion for costs and attorney's fees, pursuant to O.C.G.A. § 16-11-129(j). On February 1, 2022, Cuthpert filed a motion to vacate the writ, on the grounds that Washington had by then taken office and the writ had been issued against Cuthpert. R., p. 337. On December 7, 2022, the trial court entered an order denying the motion to vacate (finding that Washington had been properly substituted

[3] The record shows a previous GWL application that also was denied, but that application is not the subject of this litigation and has no bearing on it.
[4] Cuthpert did not file a cross appeal, so the action of the trial court in issuing the writ is not part of this appeal.

as a party for Cuthpert) and denying motion for costs and fees. R., p. 411. Roberts filed a notice of appeal on December 15, 2022. R., p. 1.

C - Preservation of Issues on Appeal

Roberts preserved the issues for appeal by obtaining the trial court's order denying his motion for costs and fees. Roberts filed his notice of appeal within the time required by law, so his appeal is timely.

D – Statement of Material Facts

There are no material facts other than the proceedings below, as this case only concerns the denial of the motion for costs and fees.

Part Two – Enumerations of Error

A. The trial court erred by ruling that costs and fees are barred by the doctrine of judicial immunity.

B. The trial court erred by ruling that O.C.G.A. § 16-11-129(j) is unconstitutional.

Statement on Jurisdiction

The denial of the motion for costs and fees was a final judgment and is directly appealable. O.C.G.A. § 5-6-34(a)(1). This Court has exclusive jurisdiction of the appeal because it involves the construction of the Constitution of the State of Georgia and the constitutionality of a law has been drawn into question. Ga.Const.

Art. VI, § VI, ¶ II(1). The constitutionality of O.C.G.A. § 16-11-129(j) was called into question by Cuthpert. R., p. 358. The trial court declared that O.C.G.A. § 16-11-129(j) is unconstitutional. R., p. 419 ("Thus, this Court **FINDS** that the portion of O.C.G.A. § 16-11-129(j) providing for attorney's fees and costs against a judge of a probate court is unconstitutional as it violates the separation of powers doctrine.") [Emphasis in original].

Part Three – Argument and Citations of Authority

Standard of Review

The appellate court reviews *de novo* conclusions of law made by the trial court. *Robinson v. State*, 670 S.E.2d 837, 295 Ga.App. 136 (2008).

Summary of Argument

The trial court erroneously concluded that judicial immunity bars an award of costs and fees in the context of mandamus for GWL applications and it erroneously ruled O.C.G.A. § 16-11-129(j) unconstitutional.

Argument

Until recently, Georgia law generally prohibited carrying a weapon (as defined in O.C.G.A. § 16-11-125.1) without a GWL[5]. A Georgia resident desiring to obtain a GWL submits an application to the judge of the probate court of his county of residence. O.C.G.A. § 16-11-129(a). Upon receipt of an application the probate judge is required by statute to direct a local law enforcement agency to obtain a criminal background check on the applicant. O.C.G.A. § 16-11-129(d)(1). The law enforcement agency is in turn required to report on the applicant's criminal history within 20 days. O.C.G.A. § 16-11-129(d)(4). The probate judge then has 10 days after receipt of the report to "issue such applicant a license … ***unless*** facts ***establishing*** ineligibility have been reported or unless 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." *Id.* [emphasis supplied].

[5] In 2022, the General Assembly passed a bill (SB 319) that repealed the requirement to have a GWL to carry a weapon and replaced it with a requirement that a person be ***eligible*** for a GWL. The Governor signed the bill on April 12, 2022 and it became effective the same day. A GWL serves other purposes beyond the scope of this Brief, such as reciprocity with other states and the availability of alternatives to the "NICS" check when purchasing firearms.

In order to deny an application, the probate judge must "make an affirmative factual determination that the applicant does not qualify for the license." *Bell v. Hargrove*, 313 Ga.30, 34, 867 S.E.2d 101, 104 (2021). The "default" condition is that the probate judge must grant the license, and there are only two exceptions to this rule (i.e., the applicant has not met all the qualifications or the applicant is not of good moral character). *Id.* Mere speculation or uncertainty about an applicant's qualifications for a weapons carry license cannot support a determination that an applicant is ineligible or disqualified from obtaining a license. *Id.*, 867 S.E.2d at 105. An applicant who is wrongly denied a GWL is entitled to a writ of mandamus directing the probate judge to issue the applicant a license. *Id.*, 867 S.E.2d at 108.

The statute provides a remedy for an applicant who does not receive a GWL:

> When an eligible applicant fails to receive a license… within the time period required by this Code section and the application … has been properly filed, the applicant may bring an action in mandamus or other legal proceeding…. When an applicant is otherwise denied a license … and contends that he or she is qualified to be issued a license…the applicant may bring an action in mandamus or other legal proceeding in order to obtain such license…. If such applicant is the prevailing party, ***he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees***.

O.C.G.A. § 16-11-129(j). [Emphasis supplied]. Bringing an action in mandamus or other relief in order to obtain a GWL is a "statutory right." *Bell*, 867 S.E.2d at 103.

In the present case, Roberts was denied a GWL and contended that he was qualified to be issued one. He therefore brought an action in mandamus pursuant to O.C.G.A. § 16-11-129(j). He ultimately received a writ of mandamus. R., p. 326 ("Defendant is directed to issue a weapons carry license to Plaintiff within ten (10) days of entry of this Order.") There can be no doubt that Roberts was the "applicant" and was the "prevailing party." On the face of the statute, then, Roberts is "entitled to recover his … costs … including reasonable attorney's fees."

Nevertheless, the trial court denied Roberts' motion for costs and fees on two grounds. First, the trial court ruled that judicial immunity bars an award of costs and fees may not be awarded against a probate judge. Second, even though the trial court decided the issue of costs and fees without the need to reach the constitutional question, the trial court declared unconstitutional the fee-shifting provisions of O.C.G.A. § 16-11-129(j) and struck the final sentence of that Code

section (i.e., the final sentence in the block quote on the previous page).[6] Roberts will discuss each issue in turn.

Judicial Immunity

Summary of the Argument: Judicial immunity does not apply in this case because a) this case does not involve damages; b) the fees and costs are being sought against Cuthpert only in his official capacity; c) judicial immunity does not apply to fee-shifting, even against judges in their individual capacities; and d) processing GWL applications is not a judicial function.

The doctrine of judicial immunity dates to old English law. *Withers v. Schroeder*, 304 Ga. 394, 819 S.E.2d 49 (Ga. 2018). The doctrine "shields judges from being held civilly liable for damages…." *Hise v. Bordeaux*, 364 Ga.App. 138, 874 S.E.2d 175 (Ga.App. 2022). "[T]he rationale for this doctrine is quite logically that if judges were personally liable for erroneous judicial decisions, the resulting avalanche of suits … would provide powerful incentives for judges to

[6] It is not clear to Roberts what the legal significance is of the trial court's "striking" a portion of the statute. Roberts does not understand the action to be an actual amendment to the statute, which surely is something the tial court would have no authority to do.

avoid rendering decisions likely to provoke such suits." *Withers*, 304 Ga.App. at 142.

The doctrine of judicial immunity does not apply to the present case for multiple reasons that will be discussed below. As an initial matter, judicial immunity only applies to damages. Roberts is only seeking an award of costs and fees against as part of the fee-shifting provisions of O.C.G.A. § 16-11-129(j). He is not seeking any damages against Cuthpert.

Perhaps more importantly, though, Roberts is seeking costs and fees against Cuthpert ***in Cuthpert's official capacity.*** An official-capacity suit is tantamount to a claim against the government that employs the official. *Board of Commissioners of Glynn County v. Johnson,* 311 Ga.App. 867, 717 S.E.2d 272 (2011) ("A suit against members of a county board of commissioners in their official capacities is tantamount to a suit against the county itself.") As such, the claim for costs and fees against Cuthpert in his official capacity is a claim against Cuthpert's employer, Rockdale County, for costs and fees. *Houlian v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949) (Ordinaries [now probate judges] are paid out of county treasury). Cuthpert, then, has no worries about being personally liable for the costs and fees – the county treasury would be responsible for any such awards.

Likewise, there is no risk that Cuthpert would tailor his ruling to a concern about costs and fees – he isn't going to have to pay them.

Even if Roberts were seeking attorney's fees and costs against Cuthpert personally, judicial immunity does not apply when a judge 1) commits an act that is not judicial in nature; or 2) acts in the complete absence of all jurisdiction. *Withers,* 304 Ga. at 397. The relevant inquiry is in the nature and function of the act, not the act itself. *Id.* Judicial immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches. *Forrester v. White,* 484 U.S. 219, 227, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) [emphasis in original]. A court should look at whether the act was one normally performed by judges and whether the plaintiff was dealing with the judge in the judge's "judicial capacity." *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Judicial immunity is an affirmative defense that must be raised and does not go to the court's subject matter jurisdiction. *Spann v. Davis*, 312 Ga. 843, 866 S.E.2d 371 (2021). Judicial immunity is waivable. *Id.*

Applying these further principles to the present case, it is apparent that judicial immunity does not apply. The function to be "protected" and "served" in

the present case is the processing of GWL applications. Processing license applications is not normally performed by judges. The "normally performed by a judge" test of *Stump* only reaches what judges do generally, not under the specific law in question. The *Stump* court noted, "State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors…." 435 U.S. at 362. On the other hand, it could be said, "State judges with general jurisdiction ***almost never*** are called upon in their official capacity to issue licenses related to carrying weapons." In the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[7] and North Carolina[8]), the state Department of Safety (Tennessee[9]), the state Department of Agriculture (Florida[10]), and the state Law Enforcement Division (South Carolina[11]). In fact, of the 49 states that issue licenses to carry concealed firearms,[12] only New York and New Jersey have provisions for judges to

[7] Alabama Code 13A-11-75
[8] North Carolina Statutes 14-415
[9] Tennessee Code 39-17-1351
[10] Florida Statues 790.06
[11] South Carolina Code 23-31-215
[12] Vermont does not issue licenses, but does not prohibit carrying a concealed firearm.

be involved at all in the licensing process. No state besides Georgia actually requires that applicants apply to a judge for a license. It simply cannot be said that issuing such licenses is "normally performed by a judge."

Moreover, even if there otherwise would be judicial immunity, it has been waived by the General Assembly. It is well-established that when the General Assembly creates a right of action against a government entity, in the process it waives sovereign immunity. *Williamson v. Department of Human Resources,* 572 S.E.2d 678, 681, 258 Ga.App. 113 (Ga.App. 2002). Sovereign immunity is a matter of both common law and constitutional law. Ga.Const. Art. I, § II, ¶ IX. Judicial immunity solely is a matter of common law.

The General Assembly can, and does, sometimes abrogate the common law. *See, e.g., Heard v. Newspapers, Inc.,* 383 S.E.2d 553, 554 259 Ga. 458 (1989), *citing Wooten v. Ford,* 46 Ga.App. 50, 155 S.E. 449 (1932) ("Statutes in derogation of the common law are construed strictly.") By providing for fee-shifting in GWL mandamus cases, the General Assembly abrogated the common law and waived any possibility of judicial immunity in such cases.

The Supreme Court of the United States has previously considered, and decided, that judicial immunity does not bar fee-shifting provisions. In *Pulliam v.*

Allen, 466 U.S. 522, 543, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984), the Court ruled that judicial immunity does not bar prospective relief against judges, even judges acting in their judicial capacities, for claims under the Civil Rights Act, 42 U.S.C. § 1983) ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.") In considering the fee-shifting provisions of the Civil Rights Act, 42 U.S.C. § 1988, the Court said, "Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988."

In *Pulliam*, a judge was sued under 42 U.S.C. § 1983 because she was routinely ordering bail on non-jailable offenses. An injunction was entered against her to prevent her from continuing the practice, and the plaintiffs were awarded costs and attorney's fees under § 1988. The Court reasoned that Congress made no exceptions for judges and clearly intended that attorney's fees could be awarded against judges, even for acts that were part of a judicial function (such as setting bail).[13]

[13] Congress later added a provision to 42 U.S.C. § 1988 specifying that fee-shifting only applies to judges in certain circumstances, but the Georgia General Assembly has never done so for O.C.G.A. § 16-11-129(j).

Likewise in O.C.G.A. § 16-11-129(j), the General Assembly made clear that costs, including attorney's fees, could be awarded against probate judges. The General Assembly obviously knew that a probate judge would be a likely defendant in a suit pursuant to that Code section, but nonetheless made a provision for fee-shifting. Attorney's fees may therefore be awarded against probate judges, whether for judicial functions or not.

If issuing GWLs were a judicial function, then logically a denial of an application would result in an appeal, rather than an original action in mandamus. But the General Assembly established the mandamus process for such cases. The Court of Appeals rejected a probate judge's challenge to a writ of mandamus against him pursuant to O.C.G.A. § 16-11-129(j) for denying a GWL application. *Bordeaux v. Hise*, 355 Ga.App. 688, 845 S.E.2d 408 (2020). The Court had no qualms with a probate judge being a mandamus defendant in such a suit. Finally, this Court has reversed denial of mandamus in a GWL licensing case. *Bell v. Hargrove*, 313 Ga. 30, 867 S.E.2d 101 (2021).

This Court decided over 120 years ago that probate judges' issuing licenses is a ministerial function and not a judicial one:

> The ordinary 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 section occasion. In admitting a will to probate, he acts as a judicial officer; the subject-matter being one over which the court of ordinary has jurisdiction, and he being by law its presiding judge. ***In issuing a marriage license, he for the moment becomes a ministerial officer.***

Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897). [Emphasis supplied].

Fifteen years after *Comer*, this Court observed, "The justices of the inferior courts always performed certain ministerial acts…. The inferior court and its justices were the predecessors of the court of ordinary, and during the long period of their existence the Legislature frequently imposed on them certain duties that were not strictly of a judicial character…. The justices of that court were recognized by all three departments of the government for many years as lawfully and constitutionally exercising certain administrative functions." *Carroll v. Wright*, 131 Ga. 728, 63 S.E. 260, 264 (1908).

There is no principled reason for believing that issuing a GWL is not also a ministerial/administrative function. *Carroll* was decided just two years before the General Assembly created the GWL requirement (it was often at the time called a "pistol toter's permit), and delegated the task of processing GWL applications to

the county ordinaries. Ga.L. 1910, p. 134, §§ 2, 3. The General Assembly is presumed to know the state of the law at the time it enacts a statute, and to make those statutes in reference to existing law. *Williams v. State*, 299 Ga. 632, 791 S.E.2d 55 (2016). Thus, when the General Assembly assigned county ordinaries the task of processing GWL applications, the General Assembly presumedly knew it was assigning the ordinaries another administrative task.

Moreover, there is a long history in this state of delegating licensing to probate judges and their staff and imposing tort liability on judges for incorrect licensing decisions. Under the Constitution of 1798, Art. III, § VI, "The powers of a court of ordinary … shall be vested in the inferior courts … and such clerk [of the inferior court] person may grant marriage licenses." With the ratification of the Constitution of 1861, the power to grant marriage licenses was vested in the ordinary himself (acting as his own clerk). Ga. Const. 1861, Art. IV, § III, ¶ 5.

Just two years later, in the Code of 1863, § 1661, the General Assembly established a penalty against the ordinary for wrongly issuing a marriage license. The Code of 1867 provided, "[A]ny Ordinary who [improperly issues a marriage license] shall forfeit the sum of five hundred dollars for every such act, to be recovered at the suit of the Clerk of Superior Court…." Code of 1867, § 1704.

That statute remained essentially the same until 1939, when the General Assembly provided for a private right of action against the ordinary by the mother or father of the bride instead of by the clerk of superior court. Ga.L. 1939, p. 219. That change also included recovery of attorney's fees from the $500 statutory damages. *Id.* Today, the provision is codified at O.C.G.A. § 19-3-45, and still provides for the recovery of $500 from a probate judge that issues a marriage license without making the proper inquiries.

This Court and the Court of Appeals in more than one case considered various issues regarding the tort of wrongful issuance of a marriage license. *National Surety Corp. v. Gatlin,* 192 Ga. 293, 15 S.E.2d 180 (1941); *Maryland Cas. Co. v. Teele,* 70 Ga.App. 259, 28 S.E.2d 193 (1943). In both cases, there was an appeal of a judgment against an Ordinary and his or her surety on a suit for wrongfully issuing a marriage license to an underage girl. And in neither case did the appellants raise the issue of judicial immunity, no doubt because it was well-established that issuing marriage licenses was not a judicial function.

Since the first imposition of the recovery against the probate judge, that provision has survived six more constitutions (1865, 1868, 1877, 1945, 1976, and 1983), and during that time, this Court ruled in *Comer* that issuing marriage

licenses is a ministerial act and in *Carroll* that ordinaries performed many administrative functions. There was no reason for the legislature to believe anything other than that judicial immunity had no application to the tort recovery against probate judges in the case of wrongful marriage license issuance, because judicial immunity only applies to judicial acts.

The fee-shifting provisions of O.C.G.A. § 16-11-129(j) were passed in 2008. Ga.L. 2008, p. 1199 § 6 (House Bill 89). Multiple superior courts around the state have awarded costs and fees to successful GWL applicant-litigants. R208, R213. Again, there is no reason to believe issuing GWLs, like issuing marriage licenses, is anything other than a ministerial function to which judicial immunity does not apply.

The Constitutionality of O.C.G.A. § 16-11-129(j)

Summary of the Argument: If this Court affirms on the judicial immunity issue, it should vacate the trial court's ruling on the constitutionality of the statute. On the other hand, if this Court reverses on the judicial immunity issue, this Court should review that issue as well. It was raised and ruled upon in the trial court.

The trial court ruled part of O.C.G.A. § 16-11-129(j) unconstitutional, even though the trial court already had determined that fees were barred by the doctrine of judicial immunity. It was therefore unnecessary for the trial court to reach the constitutional issue to decide the case. For that reason, the trial court should not have considered the issue. *Turner v. Marable-Pirkle, Inc.*, 233 S.E.2d 773, 238 Ga. 517 (1977) (Court should not reach a constitutional issue if the case can be decided on statutory construction).

The trial court's conclusion that the fee-shifting provision of O.C.G.A. § 16-11-129(j) is unconstitutional was based on the separation of powers doctrine found in the Georgia Constitution. The trial court relied on *Wallace v. Wallace,* 225 Ga. 102 (1969), for the proposition that the legislature cannot encroach upon the "the authority to perform any function reasonably necessary to effectuate [the judicial branch's] jurisdiction, improve the administration of justice, and protect the judiciary as an independent department of the government." R., p. 418. While this is an accurate statement of the law, the trial court did not correctly apply it to the present case.

This Court interprets a constitutional provision by its original public meaning. *Elliott v. State,* 305 Ga. 179, 182, 824 S.E.2d 265 (2019). And, this

Court "generally presume[s] that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary." *Id.*, 305 Ga. at 183. Moreover, when a statute respecting the judiciary has been applied in a particular manner over a long period of time without opposition by groups of judges, that is an indication that the application in question is considered constitution. *Gilbert v. Thomas*, 3 Ga. 575, 579 (1847). Finally, constitutional provisions cannot be read in isolation, but must be read in context, including "the broader context in which that text was enacted, including other law – constitutional, statutory, decisional, and common law alike…." *Elliott*, 305 Ga. at 187. This Brief will therefore explore the separation of powers doctrine according to its first appearance in a Georgia Constitution and by interpretations it was given along the way, as well as statutes that were passed in that context.

Separation of powers is a longstanding feature of Georgia's Constitutions. The Constitution of 1777 began with that feature, where Art. I provided, "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." In the

Constitution of 1798, Art. I, § I, provided, "The legislative, executive, and judiciary departments of government shall be distinct … and no person … being of one of these departments shall exercise any power properly belonging to either of the others…." Though different words were used, it is not clear that the people in 1798 meant to make a change from 1777. Nevertheless, under the Constitution of 1798, Art. III, § VI, "The powers of a court of ordinary … shall be vested in the inferior courts … and such clerk [of the inferior court] person may grant marriage licenses."

Thus, early in the State's history, what would normally be considered executive functions (issuing licenses) were being assigned to officials in the judicial branch. With the ratification of the Constitution of 1861, the power to grant marriage licenses was vested in the ordinary himself (acting as his own clerk). Ga. Const. 1861, Art. IV, § III, ¶ 5. The separation of powers provision remained, "The Legislative, Executive, and Judicial departments shall be distinct…." No person or collection of persons, being of one department, shall exercise any power properly attached to either of the others…." *Id.*, Art. II, I, ¶ 1.

Moving to the Constitution of 1877, there was still a separation of powers provision substantially identical to the one from 1861. Ga.Const of 1877, Art. I, §

I, ¶ XXIII. In the same constitution, the powers of the ordinary were greatly expanded, to include "such powers in relation to roads, bridges, ferries, public buildings, paupers, County officers, county funds, county taxes, and other county matters as may be conferred on them by law."[14] Ga.Const. of 1877, Art. VI , § VI, ¶ II.

At times in our state's history, the county ordinary was given authority for many executive functions, including issuing other licenses. *Carroll*, 63 S.E. at 264-265 (Noting that ordinaries granted tavern licenses in 1791, levied certain taxes in 1796, granted marriage licenses and perform wedding ceremonies in 1799, and appointed flour inspectors in 1814). As this Court observed in *Carroll*, "[T]he justices of the inferior court were not so exclusively judicial officers that certain administrative duties could not be required of them." 63 S.E. at 265.

This Court recounted in *Carroll* the history of the office of county ordinary, how the ordinary was given many different administrative/executive duties over

[14] It is little wonder the Supreme Court of the United States observed, "The general principles contained in the [Georgia] Constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory, for even in the [Georgia] Constitution itself we may trace repeated departures from the theoretical doctrine that the legislative, executive, and judicial powers should be kept separate and distinct." *Cooper v. Telfair*, 4 U.S. 14, 19 (1800).

the years, and observing, "[T]he issuing of marriage licenses is not essentially and absolutely a judicial act….") *Id.*

It was under the Constitution of 1877 that the General Assembly first imposed the requirement to have a GWL (pistol toter's permit) in order to carry a firearm in public. Ga.L. 1910, p. 134. Thus, the General Assembly was operating under its power to assign to the ordinaries "other county matters as may be conferred on them by law." Ga. Const. of 1877, Art. VI, § VI, ¶ II. And this Court ruled that the authority of the General Assembly to prescribe the powers of the ordinary necessarily included authority to increase or diminish such powers. *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969). In *Bleckley*, this Court ruled the General Assembly could create a county commission, effectively eliminating the bulk of the county executive powers previously bestowed on the county ordinaries.

By the ratification of the current Constitution and the creation of a county commission for every county, the broad executive powers of the probate judges over county matters had been eliminated. The current Constitution lists ***no*** powers or duties of the probate judge or probate court. But it does provide that the General Assembly has to power "to make all laws not inconsistent with this Constitution,

and not repugnant to the Constitution of the United States…." Ga.Const. Art. III, § 6, ¶ 1. This Court has recognized that the power of the General Assembly to make laws is "absolutely unrestricted" as long as it does not violate the state or federal constitutions. Because the current Constitution does not bestow any authority/jurisdiction on the probate judges or probate courts, those judges only have such duties as are assigned to them by the General Assembly.

The present Constitution's separation of powers provision is, "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 function of either of the others except as herein provided." Ga. Const. Art. I, § II, ¶ III. This wording is consistent with the provisions of the previous constitutions, and does not evoke an intention of the people to change the meaning.

It does not appear that the separation of powers provisions that appeared in any of the 10 constitutions in which they have appeared have different meanings. And during the tenures of those constitutions, the separation of powers provisions have lived peacefully alongside the issuance of licenses by probate judges and torts against those judges for wrongfully carrying out licensing duties.

The trial court acknowledged that the General Assembly intended to create a mechanism for the "state" to reimburse an applicant for a GWL who successfully challenges a GWL denial. But the trial court expressed confusion as to "the party responsible for paying any such award, i.e., county, department, or state." R., p. 418. The trial court said, "the statue [sic] fails to include other parties responsible for paying attorney's fees and costs." R., p. 419. The trial court implied, without explicitly stating, that fees and costs are not properly recoverable, as a matter of separation of powers, from probate judges personally. As a remedy for its confusion, the trial court ruled the fee-shifting provision unconstitutional. *Id.*

That brings us to the question, does the separation of powers doctrine preclude an award of attorney's fees? Under *Wallace*, the General Assembly may not take action that deprives the judiciary of "the authority to perform any function reasonably necessary to effectuate [the judicial branch's] jurisdiction, improve the administration of justice, and protect the judiciary as an independent department of the government."

The trial court did not identify what about the fee-shifting provisions of O.C.G.A. § 16-11-129(j) deprived the judiciary of the authority to perform any such functions. Indeed, it is difficult to conceive of any. The fee-shifting does not

directly impact any functions a probate judge might perform, regardless of whether those functions have anything to do with the judicial branch's jurisdiction, the administration of justice, or the judiciary as an independent department.

As noted earlier, there is a long history in this state of imposing forfeitures, tort recoveries, and fee-shifting against ordinaries/probate judges who err in processing license applications. The tort recovery against county ordinaries for wrongful marriage license issuance has been in effect since 1863. That was under the Constitution of 1861. And it has been in place for six more constitutions.

In the Code of 1863, § 1661, the General Assembly established a penalty against the ordinary for wrongly issuing a marriage license. The Code of 1867 provided, "[A]ny Ordinary who [improperly issues a marriage license] shall forfeit the sum of five hundred dollars for every such act, to be recovered at the suit of the Clerk of Superior Court…." Code of 1867, § 1704. That statute remained essentially the same until 1939, when the General Assembly provided for a private right of action against the ordinary by the mother or father of the bride instead of by the clerk of superior court. Ga.L. 1939, p. 219. That change also included recovery of attorney's fees from the $500 statutory damages. *Id.* Today, the provision is codified at O.C.G.A. § 19-3-45.

This Court stated in *Carroll*, "[A] uniform contemporaneous construction of a constitutional provision and a recognition by all three departments of government of such a construction as applicable to a particular officer will be given due weight in determining the constitutionality of an act in regard to his duties or functions." 63 S.E. at 264. There appears to have been widespread acceptance by Georgians of the concept of imposing liability on ordinaries/probate judges for improperly performing their ministerial tasks. While not dispositive, this widespread acceptance is instructive.

In the face of the longstanding existence of judicial immunity and the state constitutional separation of powers, the General Assembly enacted a tort with statutory damages against ordinaries/probate judges in 1863. That provision remained intact, and was expanded upon, through the Constitutions of 1865, 1868, 1877, 1945, 1976, and 1983 (the present Constitution). In 2008, the General Assembly imposed fee-shifting against probate judges who improperly perform their ministerial duty of issuing GWLs. Given the text and history involved, it is difficult to come to the conclusion that the current fee-shifting provision in O.C.G.A. § 16-11-129(j) is unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the trial court finding judicial immunity forecloses a fee award, and finding the fee shifting award unconstitutional, should be reversed.

S:/John R. Monroe
John R. Monroe
John Monroe Law, P.C.
Attorney for Appellant
156 Robert Jones Road
Dawsonville, GA 30534
678-362-7650
State Bar No. 516193
jrm@johnmonroelaw.com

CERTIFICATE OF SERVICE

I certify that on March 7, 2023, I served a copy of the foregoing via U.S. Mail upon:

Jayson Waymire
WILLIAMS, MORRIS, & WAYMIRE
4330 S LEE ST BLDG 400 STE A
BUFORD GA 30518-3072

S:/John R. Monroe
John R. Monroe