IN THE SUPREME COURT OF GEORGIA

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

Reply Brief of Appellant

Appellant states the following as his Reply 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 CONTENTS 2
TABLE OF AUTHORITIES 3
Argument 4
Fee-shifting and Damages are not the Same ***4***
Judicial Immunity Does Not Apply in Official Capacity Cases ***5***
O.C.G.A. § 16-11-129(j) Operates to Waive Sovereign Immunity ***7***
Issuing GWLs is Not a Judicial Function ***8***
Constitutionality of O.C.G.A. § 16-11-129(j) ***11***
CONCLUSION 13
CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

Bellamy v. Rumer, 305 Ga. 638, 827 S.E.2d 269 (2019). 8
Board of Commissioners of Dougherty County v. Saba, 598 S.E.2d 437, 441-442, 278 Ga. 176 (2004) 7
Brown v. Johnson, 251 Ga. 436, 306 S.E.2d 655 (1983). 8
Camden County v. Sweatt, No. S23A0837 (Opinion dated February 7, 2023) 7
City of College Park v. Clayton County, 306 Ga. 301, 314, 830 S.E.2d 179 (2019) 6
Hise v. Bordeaux, 364 Ga.App. 138, 874 S.E.2d 175 (2022) 10
Jaakkola v. Doren, 261 S.E.2d 701, 244 Ga. 530 (1979) 7
Judicial Counsel v. Brown and Gallo, LLC, 288 Ga. 294, 702 S.E.2d 894 (2010) 13
King v. Emerson, 2 Ir.R. 377 (1913) 6
Layer v. Barrow County, 297 Ga. 871, 778 S.E.2d 156, 158 (2015) 7
Lovett v. Sandersville R.R., 199 Ga. 238, 33 S.E.2d 905 (1945) 12
Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) 12
Pulliam v. Allen, 466 U.S. 522, 543, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) 5, 10, 11
Williamson v. Department of Human Resources, 572 S.E.2d 678, 258 Ga.App. 113, 115 (2002) 9
Withers v. Schroeder, 304 Ga. 394, 397, 819 S.E.2d 49 (2018) 10

Statutes

42 U.S.C. §§ 1983 and 1988 10
O.C.G.A. § 16-11-129 ..... passim

Constitutional Provisions

Ga.Const. Art. IX, § 1, ¶ III 6

Argument

Fee-shifting and Damages are not the Same

Roberts noted in his opening brief that he is not seeking damages, but instead is seeking an award of statutorily-shifted expenses of litigation – costs and fees. Cuthpert refers to this argument as "a difference in terminology" and a "resort to word games." Cuthpert Brief at 11. While Cuthpert may not agree with the Supreme Court of the United States, it was that Court that drew the distinction. *Pulliam v. Allen*, 466 U.S. 522, 543, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984) (Rejecting argument that damages and attorney's fees are the same thing, even if functionally equivalent). The *Pulliam* Court observed that the common law doctrine of judicial immunity had long-standing exceptions. For example, the Court of King's Bench exercised direct (i.e., appellate) review of inferior courts, but also used prerogative writs (e.g., mandamus and prohibition) to control those courts. 466 U.S. at 535. Even in the 20th Century, when judicial immunity was well-established, the Court issued a writ of prohibition against a magistrate (acting in a judicial capacity) and ordered the magistrate to pay costs to the prevailing

party. *Id., citing King v. Emerson*, 2 Ir.R. 377 (1913). Thus, shifting costs in suits against judges is not novel.

Judicial Immunity Does Not Apply in Official Capacity Cases

Roberts also argued in his opening Brief that he was not seeking costs and fees against Cuthpert personally, but in Cuthpert's official capacity. Cuthpert counters that Roberts also sued Cuthpert in Cuthpert's individual capacity. That is true, but the mandamus relief was against Cuthpert in his official capacity and it follows that the fee-shifting also is against Cuthpert's official capacity.

In the Amended Complaint (the operative complaint in this case), Roberts sought a writ of mandamus against "Defendant in his official capacity." R., p. 21, ¶ 42. Roberts also sought declaratory relief against Cuthpert "in both his official and individual capacities," but the mandamus was brought against Cuthpert in his official capacity. *Id.*, ¶¶ 43-44.

A mandamus action is properly brought against an official in his official capacity. *City of College Park v. Clayton County*, 306 Ga. 301, 314, 830 S.E.2d 179 (2019) (mandamus is a claim against officials in their official capacities). Cuthpert argues that mandamus is against officers in their individual capacities, citing mid-20th Century cases as support. Cuthpert Brief at 15.

But the most recent pronouncement of this Court on a given point of law is controlling. *Jaakkola v. Doren,* 261 S.E.2d 701, 244 Ga. 530 (1979). It is therefore the current state of the law in Georgia that a mandamus claim must be brought against a defendant in his official capacity. As recently as this year, this Court considered a case involving mandamus against a probate judge in his official capacity. *Camden County v. Sweatt*, No. S23A0837 (Opinion dated February 7, 2023). This Court did not question that the judge should have been sued in his individual capacity.

Cuthpert argues that even if Roberts sued him in his official capacity, that such suit is not a suit against his employer, Rockdale County. But the Constitution and caselaw show the opposite to be true. First, Ga.Const. Art. IX, § 1, ¶ III provides that there are four constitutional county officers: the clerk of superior court, the judge of the probate court, the sheriff, and a tax official. This Court concurs. *Board of Commissioners of Dougherty County v. Saba,* 598 S.E.2d 437, 441-442, 278 Ga. 176 (2004) (Describing those four officials as "county officers"). Finally, this Court has stated that "a suit against a county officer in her official capacity *is* a suit against the county itself…." *Layer v. Barrow County,* 297 Ga. 871, 778 S.E.2d 156, 158 (2015) [emphasis in original].

Thus, Roberts properly brought a mandamus action against Cuthpert in Cuthpert's official capacity, and such suit was a suit against the county itself. As contrary authority, Cuthpert cites *Brown v. Johnson*, 251 Ga. 436, 306 S.E.2d 655 (1983). *Brown*, however, was merely an original proceeding filed in this Court for mandamus against a superior court judge. This Court dismissed the petition because it should have been brought in superior court in the first instance. *Brown* says nothing about whether the petition should have been brought against the judge in his official or individual capacity.

Cuthpert also cites to *Bellamy v. Rumer*, 305 Ga. 638, 827 S.E.2d 269 (2019). *Bellamy* involved a petition for mandamus against a superior court judge, but, again, the issue of whether the petition was (or should have been) directed at the judge in his individual or official capacities was not discussed. *Bellamy* does not help Cuthpert any more than *Brown* does.

O.C.G.A. § 16-11-129(j) Operates to Waive Sovereign Immunity

Cuthpert next argues that O.C.G.A. § 16-11-129(j) does not provide a waiver of sovereign immunity, because that statute does not use the words "waive" and "sovereign immunity." The Court of Appeals has consistently rejected the idea that a statute must say "waive" and "sovereign immunity" in order to effect a

waiver. *See, e.g., Williamson v. Department of Human Resources,* 572 S.E.2d 678, 258 Ga.App. 113, 115 (2002) ("Where legislative act creates a right of action against the state which can result in a money judgment against the state treasury, and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act *must* be considered a waiver of the state's sovereign immunity to the extent of the right of action – or the legislative act would have no meaning.") [emphasis in original].

Issuing GWLs is Not a Judicial Function

Cuthpert argues that issuing GWLs must be a judicial function because, after all, the legislature delegated the responsibility of doing so to probate judges. Cuthpert ignores, however, the long history of non-judicial functions being assigned to probate judges. Cuthpert also overlooks that he is a probate ***judge*** and not a probate ***court.*** He might have a better argument if issuing GWLs were a function of the probate court, but it is not. Everywhere in O.C.G.A. § 16-11-129 where the legislature spoke of issuance of GWLs, the statute only mentions "the judge of the probate court." No tasks are assigned to the probate court itself.

Cuthpert claims that the decision to issue a writ of mandamus against him in this case was not an easy one because it took over a year to decide (and therefore it

must have been a difficult decision). He overlooks that this case arose shortly before the COVID epidemic and that ***many*** cases took a long time to resolve. In any event, the length of time it takes a court to resolve a case cannot be used as a yardstick to determine if the underlying issue was a judicial function.

Finally, Cuthpert claims that because the legislature assigned the task of issuing GWLs to judges, it must be a judicial function. This was the reasoning of the Court of Appeals in *Hise v. Bordeaux*, 364 Ga.App. 138, 874 S.E.2d 175 (2022). But that reasoning overlooks *Withers v. Schroeder*, 304 Ga. 394, 397, 819 S.E.2d 49 (2018), which held that it is the function of the act, not the act itself, that determines if an act is a judicial one. In the case of GWLs, the function of the act of issuing GWLs is like any other license-issuing inquiry. And license issuance is not generally a judicial function.

Even if there were judicial immunity, it was abrogated by the General Assembly when it passed O.C.G.A. § 16-11-129(j) and that code section's fee-shifting provision. Roberts cites to *Pulliam,* where the Supreme Court said that 42 U.S.C. §§ 1983 and 1988 applied to judges as much as to other officials, and it was not up to the Court to second-guess Congress's policy decisions. Cuthpert counters however, that Congress later chose to restrict those federal statutes'

applicability to judges, calling *Pulliam* "bad enough for Congress to overrule" and arguing "frankly the dissenters had far better arguments."

Cuthpert is happy to cite to Supreme Court precedents on judicial immunity when they suit his purpose, but when they do not, he is quick to say they are "not binding" and "decided under federal statutes that are not at issue here." Cuthpert misses the point. Judicial immunity is a common-law creation that can be abrogated by the relevant legislative body. The Supreme Court ruled in *Pulliam* that Congress did so with §§ 1983 and 1988, even without explicitly saying that it was doing so. Likewise, the General Assembly did so in O.C.G.A. § 16-11-129(j), again without explicitly saying it was doing so.

Cuthpert counters that "it is strange that [the General Assembly] did not say so" because "Abrogation of judicial immunity would be a matter of grave constitutional concern." Cuthpert does not elaborate on this argument, nor does he attempt to cite to any constitutional underpinnings for judicial immunity. And Cuthpert acknowledges elsewhere in his Brief that judicial immunity is a creation of common law. Finally, Cuthpert argues that abrogation of judicial immunity is "of little practical consequence here … because Georgia's constitution …prohibits monetary awards against judges for judicial decisions."

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

Cuthpert asserts that O.C.G.A. § 16-11-129(j) "unconstitutionally interferes with judicial independence" by "imposing financial liability upon a judge for a judicial decision." While the legal basis for this argument is distinct from Cuthpert's judicial immunity argument, it relies on some of the same assumptions. It assumes that O.C.G.A. § 16-11-129(j) shifts fees to judges in the judges' individual capacities and that denying a GWL application is a "judicial decision." These issues were discussed above and need not be re-hashed here.

Cuthpert cites to several cases, none of which help his argument. In *Lovett v. Sandersville R.R.*, 199 Ga. 238, 33 S.E.2d 905 (1945), this Court explicitly said that the case did not present a constitutional question, but found that the legislature could legitimately set time limits on arguments in superior court cases.

Curiously, Cuthpert also cites to a U.S. Supreme Court opinion (*Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989)) on the federal constitutional separation of powers doctrine to interpret the Georgia constitution. But he provides no argument to support the notion that the explicit Georgia constitutional separation of powers provision means the same thing as the unstated

separation of powers doctrine in our national Constitution. Roberts has not found an opinion of this Court saying so.

Lastly, Cuthpert cites to *Judicial Counsel v. Brown and Gallo, LLC*, 288 Ga. 294, 702 S.E.2d 894 (2010). That case is more helpful to Roberts' position than it is to Cuthpert's. This Court noted in *Judicial Counsel* that the judicial power is constitutionally vested in the courts of this state and that the judicial power "includes the authority to perform any function reasonably necessary to effectuate its jurisdiction, improve the administration of justice, and protect the judiciary as an independent department of government." 288 Ga. at 298. Cuthpert never argues, however, how processing GWL applications is an inherent function of the judiciary, necessary to effectuate the judiciary's jurisdiction, improve the administration of justice, or protect the judiciary as an independent department of government.

Perhaps the most straightforward way to evaluate whether processing GWL applications is inherently a judicial function is to consider the ramifications of the General Assembly moving that function from probate judges to an executive branch office. If, for example, the legislature changed O.C.G.A. § 16-11-129 in its entirely so that GWL applications were processed by the county sheriffs instead of

the probate judges, would the legislature be encroaching on the "judicial power" in such a way that it would violate the separation of powers? Unless the answer to that question is "yes," then it is difficult to come to the conclusion that processing GWL applications is a judicial power that is protected by the separation of powers provision in the Constitution.

On the other hand, if the sheriffs were put in charge of presiding over DUI trials, the judiciary would be right to object. Unlike processing license applications, presiding over criminal trials ***is*** an inherently judicial function. The difference is obvious: Presiding over criminal trials is an inherently judicial power; processing license applications (unrelated to the justice system such as licenses to practice law) is not. As noted in Roberts' opening brief, four of the five states bordering Georgia have law enforcement officials/agencies issue licenses to carry weapons.

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 May 1, 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