PART ONE

I. INTRODUCTION AND PROCEEDINGS BELOW

This case resulted from the admitted conspiracy of the Appellee Sheriffs, acting in concert with all but two of the other 159 Georgia Sheriffs and the Georgia Sheriff's Association (the "Association"), to nullify O.C.G.A. ' 9-11-4.1 (the "Statute"), which was passed by the General Assembly in 2010, and to thwart the intention of the General Assembly to establish a uniform, statewide licensing process for private process servers in Georgia by implementing a wholesale ban on such servers. Appellants are all process servers who have obtained statewide certification under the Statute but were denied the right to use such certification to work by Appellees.

This is a case of incredible public importance involving Appellants' and those represented by them the right to work in the profession for which the State of Georgia has deemed them to be wholly qualified. If left to stand, the trial court's ruling renders the Statute meaningless because it precludes those process servers who paid for statewide certification, passed rigorous statewide certification standards, and actually obtained statewide certification under the Statute (hereinafter, "Certified Servers") from using that same statewide certification to

work in Georgia. The statewide certification would be in reality nothing more than a worthless piece of paper and the Sheriffs would be allowed to eviscerate a statewide licensure statute that was implemented by the General Assembly. Georgia law offers no justification for this harsh result; to the contrary, Georgia law mandates reversal of the trial court's decision in its entirety because the law precludes a court from construing the Statute in a manner that renders it meaningless or in a manner is unconstitutional.

In the case below, Appellants sought a declaratory judgment in the form of a judicial construction of the Statute that would fully effectuate its purpose and intent as well as injunctive relief to prevent Appellees from perverting the language of the Statute to meet their wrongful ends. (R 15-34). This has long been a recognized basis for declaratory relief under Georgia law. Appellants requested a declaration that Appellees' purported construction of the Statute, under which the Sheriffs have unbridled discretion to deny Certified Servers the right to serve process in a Sheriff's jurisdiction, is unlawful in that such an interpretation renders the Statute meaningless in violation of Georgia law and that such a construction would render the Statute unconstitutional as an unauthorized and unguided delegation of legislative power to the Sheriffs.

In addition, Appellants sought the issuance of a writ of mandamus to remedy the Appellees' gross abuse of the limited discretion afforded them in their role in the certification process. (R 15-34). The writ of mandamus would require Sheriffs to permit a Certified Server to work in a county if they have met the statutory qualifications for certification, as amplified by the implementing rules and regulations approved by the Judicial Council of Georgia ("JCG"), which along with the Statute provide the only guidelines pertaining to the administration of the Statute. (R 640-644). Appellants have no other adequate remedy at law to achieve this result. Alternatively, Appellants requested the issuance of a writ of mandamus to compel Appellees to employ objective standards in the exercise of any discretion provided for by the Statute.

In discovery and throughout their pleadings, Appellees brazenly admitted to the scheme to render the Statute meaningless immediately upon its passage and urged the trial court to accept that the Sheriffs had the authority to deprive the Statute of any meaning. After discovery for this matter concluded, the parties filed cross-motions for summary judgment under O.C.G.A. § 9-11-56, and the trial court heard oral argument on the motions on November 7, 2014. The Court then issued

its Final Order of February 17, 2015 ("Order"), denying Appellants' motion for summary judgment while at the same time granting Appellees' cross-motion.

The Order does not address Appellants' valid contentions that the Sheriffs' interpretation of the Statute causes it to be a meaningless nullity or that it creates a constitutionally impermissible delegation of legislative authority to the Sheriffs. Instead, without any substantive discussion of the pertinent legal issues, the trial court accepted Appellees' interpretation of the Statute and granted Appellees the complete relief sought in their motion based on that interpretation.

In doing so, the trial court overstepped its authority at summary judgment by failing to construe all material facts and inferences in favor of Appellants. It also ignored long-standing Georgia precedent that Appellants had established a viable cause of action for declaratory relief, injunctive relief, and mandamus under the facts of this case. As shown herein, the Order must be reversed for these reasons.

II. RELEVANT FACTS

A. The Certification Process under the Statute

The objective qualifications for statewide certification as a process server are set forth in O.C.G.A. § 9-11-4.1(b)(1)(A)-(E). They include the completion of a 12-hour course of instruction, passing a test administered by the Administrative

Office of the Courts to ensure competency, posting of a surety bond, possessing U.S. citizenship and passing a criminal background check. *Id.* Absent "good cause," all persons satisfying these criteria are legally entitled to statewide certification as process servers. O.C.G.A. §9-11-4.1(a).

The General Assembly delegated the responsibility of establishing rules and regulations to govern the statewide Certified Process Server Program (the "Rules") to the JCG, acting through the Administrative Office of the Courts ("AOC"). *Id.* The JCG promulgated those Rules in early 2011, and the Rules were made effective by the Administrative Office of the Courts on May 31, 2012. (R 70). The laudable intent of the Statute is stated explicitly in the Rules. (R 72). Article One of the Rules provides the purpose of certification program is ". . . to permit civil process to be served in the State of Georgia by persons deemed by the Sheriffs of any county in Georgia **to have met the criteria to be certified to serve process** in addition to Sheriffs, marshals and permanent process servers." (R 72) (emphasis supplied).

Certification constitutes a license to work statewide as a private process server. However, before a Certified Server can work in a particular county, they are required to file a written "Notice of Intent" to serve civil process with the

Sheriff of that county. (R 73-76). It is Appellees' and other Sheriffs' duty to actually certify the applicants as qualified to serve process upon the presentation of a completed application evidencing they have met all the requirements for certification under the Statute and the implementing Rules. The Rules provide that a "Sheriff retains the **discretion to permit or deny a certified process server** to operate within the county of (his) jurisdiction." (R 73-74). (Emphasis added.)

Neither the Statute nor the Rules establish qualifications or standards for a Sheriff to consider when exercising his or her discretion apart those listed in the Statute and Rules to permit or deny the Certified Server the right to serve process within that Sheriff's county. (R 75-76). Moreover, neither Appellees nor any other Sheriff has promulgated any objective criteria to govern the exercise of their discretion in this regard since they have publicly stated that they will not approve any Certified Server to work in their County, regardless of their qualifications, under any circumstances. (R 609-616).

B. The Sheriffs' effectively conspired to nullify the Statute & render it meaningless

Despite the clearly articulated intent of the Statute to allow Certified Servers who have met the criteria of the Statute to serve process statewide, Appellees admitted they "have not … approved such certified process servers to actually

serve process within their respective counties." (R 702, ¶14). Instead, Appellees openly admit that they intend to prevent Certified Servers from ever serving process state-wide in Georgia. (R 610-620; R 1479; R 1319-21; R 1651, 1654, 1681). Indeed the Association, acting on behalf of Appellees and its other member Sheriffs, posted this notice on its website shortly after the Statute became law in 2010:

*****ATTENTION PROCESS SERVERS*****

> The Sheriffs of Georgia have agreed to oppose any further expansion of "certified process servers." All Sheriffs will exercise their authority under the current law and **PROHIBIT ALL** certified process servers from serving process in every county.
> * This message is provided to you as a courtesy, so potential applicants can make a better informed financial decision regarding the certification process.

(R 984, Exhibit 6). The Association went so far as to admit that its Sheriff members "**will never allow the law to go into practical effect** unless a court forces them to do so." (R 1049-51, 1061-63).

The conspiracy has worked. The number of Certified Servers who have been able to actually use their supposed statewide certification obtained pursuant to the Statute on a statewide basis is zero. As a result of the Sheriff's conspiracy, at the time the case was filed, Georgia's "statewide" certification process was ignored in

157 of 159 counties. (R 1070). Every single notice of intent to serve filed by a Certified Server with an Appellee was summarily denied without any consideration of the individual qualifications of each Certified Server in furtherance of their conspiracy to nullify the Statute. (R 1074). Appellees and other Sheriffs acting with them successfully implemented a statewide blanket ban on Certified Servers despite the fact that the Certified Servers have satisfied all the requirements for statewide certification as enumerated in the Statute passed by the General Assembly and the enabling Rules.

Appellees admitted to participating in the blanket ban on Certified Servers advocated by the Association. (R 609-15). Each Appellee contended that they believe, as Sheriffs, they have the unlimited, sole discretion to bar Certified Servers without having to consider the Certified Servers' qualifications to serve process as established by the Statute. Appellants rely on the recommendation of their Association that they have the authority to exercise their supposed discretion in such an unfettered manner. *Id.* Appellants contend that Statute authorizes the Sheriffs to nullify the Statute because of O.C.G.A. § 9-11-14.1(a), which reads: Certified Servers "shall be entitled to serve in such capacity for any court of the state, anywhere in the state, provided the sheriff of the county for which process is

to be served allows such servers to serve process in such county." O.C.G.A. § 9-11-14.1(a).

PART TWO- ENUMERATION OF ERRORS

1. The trial court erred in finding that Appellants failed to serve a copy of their petition on the attorney general.

2. The trial court erred in finding that O.C.G.A. ' 9-11-4.1(a) gives the Sheriffs absolute discretion to permit or deny Certified Servers to serve process in their respective county without rendering the statute meaningless or unconstitutional.

3. If the trial court's interpretation of O.C.G.A. ' 9-11-4.1(a) is correct, the trial court erred by failing to blue pencil the Statute to harmonize all parts of the Statute to avoid the Statute being unconstitutional.

4. The trial court erred in finding that Appellants did not have a sufficient basis to maintain a declaratory judgment or to support a claim for injunctive relief.

5. The trial court erred in granting summary judgment on Appellants' mandamus claim based on the purported existence other available legal remedies and its mistaken interpretation of O.C.G.A. ' 9-11-4.1(a).

6. The trial court erred in failing to consider appellants' due process claim as a basis for the issuance of a writ of mandamus.

7. The trial court erred in refusing to award Appellants their attorneys' fees incurred in the action below.

PART THREE- ARUGMENT AND CITATION TO AUTHORITIES

I. STANDARD OF REVIEW

Summary judgment is proper only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56(c). A *de novo* standard of review applies to an appeal from a grant of summary judgment on a claim for a declaratory judgment, and the Court of Appeals views the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. *In re Estate of Wallace*, 284 Ga. App. 772, 772, 645 S.E.2d 19, 20 (2007); *BTH Holdings, Inc. v. BET USA, Inc.*, 239 Ga. App. 759, 759, 521 S.E.2d 670, 671 (1999).

II. APPELLANTS SERVED THE ATTORNEY GENERAL WITH A COPY OF ITS PETITION IN THE PROCEEDING BELOW

Although the issue was not raised by Appellees in their motion for summary or in in response to Appellants' motion for summary judgement, the trial court denied Appellants' motion and Appellees' motion was granted with respect to the declaratory relief claim on the grounds that Appellants "failed to serve a copy of their petition challenging the constitutionality of a state statute on the Attorney General, as required by O.C.G.A. § 9-4-7(c)." (Order, p. 6).

This holding is factually inaccurate and must be reversed. Appellants served Attorney General Sam Olens with a copy of the Petition for Mandamus, Declaratory Judgment and Injunctive Relief via Certified Mail, Receipt No. 7021 3050 0001 9526 7516, on October 23, 2013, within two weeks of filing the Petition. A true and correct copy of the certified enclosure letter and the USPS Tracking Order showing delivery of the letter to the Attorney General at 5:01 p.m. on October 25, 2013, was delivered to the trial court on February 17, 2015, with a request that the trial court withdraw the Order with respect to this particular issue.

Importantly, O.C.G.A. § 9-4-7(c), on which the trial court relied, does not mandate that service be made on the Attorney General by any particular means or within a particular time period. *Daniel v. Amicalola Elec. Membership Corp.*, 289 Ga. 437, 440, 711 S.E.2d 709, 713 (2011). Equally important, "[t]here is no requirement that notice of service [on the Attorney General] be filed in the record." *Id.* As such, Appellants complied with the relevant statute. There simply was no basis for the Court to reach the opposite conclusion without it being raised by either party to the action.

The trial court's *sua sponte* ruling that Appellants failed to adhere to O.C.G.A. § 9-4-7(c) was in error, as there are no facts in the record showing that

the Attorney General was not served with the petition. The trial court's Order must be overruled to the extent it erroneously found otherwise.

III. THE TRIAL COURT'S FINDING THAT THE STATUTE GIVES THE SHERIFFS UNFETTERED AUTHORITY TO NULLIFY IT IS CONTRARY TO GEORGIA LAW.

A. The Court's ruling renders the Statute meaningless in violation of Georgia law.

The trial court ignored and otherwise failed to address applicable Georgia law when it ruled without substantive discussion that O.C.G.A. 9-11-4.1(a) gives the Sheriffs the absolute discretion to make an initial determination as to whether to allow Certified Servers to work in their respective counties without regard to that Certified Server's individual qualifications. (*See* Order, p. 5).[1] Appellees' and the trial court's the position in this regard is based on the false premise that the General Assembly ceded Sheriffs absolute veto power over the Statute's server certification process. That result is nonsensical as it is equivalent to allowing

[1] The trial court also impermissibly ignored or failed to address the legislative history of O.C.G.A. § 9-11-4.1 which strongly contradicts Appellees contention that the statute gives them unfettered discretion to reject all Certified Servers. (R 845-49).

Appellees and other Sheriffs the ability to turn a statutorily established certification process into a meaningless sham and Appellants' statewide certifications earned under the Statute into licenses with no practical effect, which admittedly happened.

Under Georgia law, the Statute cannot be interpreted in a manner that renders its certification process a meaningless nullity as found by the trial court. "The construction of statutes must square with common sense { "pageset": "S45 and sound reasoning." *Tuten v. City of Brunswick*, 262 Ga. 399, 404(7)(a)(i) (1992). Georgia courts "must give a statute the construction that will effectuate the legislative intent and purpose" and construe the statute "to make all its parts harmonize and to give a sensible and intelligent effect to each part." *Rock v. Head*, 254 Ga. App. 382, 384 (2002). Georgia courts "do not construe statutes **to render any provision** meaningless." *State v. Luster*, 204 Ga. App. 156, 160 (1992) (emphasis added). *See also Central Georgia Power Co. v. Parnell*, 11 Ga.App. 779 (1912) ("Any other rule would practically nullify the statute and defeat the object sought to be accomplished by the General Assembly"). As such, Georgia courts do not interpret statutes in a manner that would "thwart the avowed purpose of the legislature," which here explicitly was to establish a state-wide certification process. *Id.*

This is a well-settled principle of statutory construction in Georgia. In *Williamson v. The State*, 295 Ga. 185, 186-88 (2014), the State urged an interpretation of O.C.G.A. § 17-7-170(b) that would allow courts to exclude terms where there were not enough jurors empaneled to hear the case when calculating the two terms during which a speedy trial request must be honored. *Id.* This argument was premised on the statutory provision which provided that the trial must take place within two terms "provided that at both court terms there were juries impaneled and qualified…." *Id.* The Supreme Court rejected this interpretation of the statute because it would require a defendant to wait for a trial to be held at the convenience of the State and thereby render the speedy trial statute meaningless. *Id.*

Georgia courts have reached similar conclusions under similar circumstances as those presented here. In *State v. Torres*, 290 Ga. App. 804, 806-07 (2008), the question before the Court was whether a police officer had to follow the specific procedures required by O.C.G.A. § 40–13–2.1(a) when making an arrest for failure to sign a traffic citation. The State argued for an interpretation that would give police officers the option of adhering to the statutorily mandated procedures on a case by case basis. *Id.* The court rejected this argument because it

permitted police officers to circumvent the statute in its entirety. *Id.* In rejecting the interpretation, the Court of Appeals found that "**[n]either police officers nor this Court can nullify a legitimate statute by interpreting it so that compliance with the same is optional.**" *Id.* at 806. (Emphasis added).

But the arguments rejected in both *Williamson* and *Torres* are exactly what the trial court's order has allowed to happen in this case. In addition to O.C.G.A. § 9-11-14.1(a), the Statute's provisions mandate that a Sheriff must approve any Certified Server who files a proper notice of intent to serve civil process within their County unless the Certified Server is no longer certified, or is otherwise unqualified because they have not met the qualifications set forth in the Statute and implementing Rules. O.C.G.A. § 9-11-14.1(b-c). Specifically, the Statute states "[a] sheriff . . . **shall review** the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether the applicant shall be approved for certification and **authorized to act as a process server** . . . ." O.C.G.A. 9-11-4.1(b)(2).

In short, under the Statute, Sheriffs have a statutory duty to review the statutory criteria and other legitimate considerations relevant to determining an applicant's qualifications and approve the Certified Server or not based on the

same. *See McFarland & Assoc. v. Hewatt,* 242 Ga.App. 454, 454, 529 S.E.2d 902 (2000) ("In its ordinary signification, 'shall' is a word of command, and the context ought to be very strongly persuasive before that word is softened into a mere permission.") (punctuation and footnote omitted); *State v. Henderson,* 263 Ga. 508, 510, 436 S.E.2d 209 (1993) (holding that "shall" is synonymous with "must," and represents a command).Under the plain language of the Statute, the Form Four Notice is strictly a notice of intent that is filed pursuant to O.C.G.A. § 9-11-4.1(h). But Appellees admittedly are not following this statutorily mandated process. Instead, they freely confess that they do not review the Notices at all because of the supposed discretion conferred by O.C.G.A. § 9-11-4.1(a) (See R 181-83; R 1753-55; R 1315-17; R 1649-51). The Appellee Sheriffs' articulated intent is that the Statute "**will never allow the law to go into practical effect** unless a court forces them to do so." (R 1049-51, 1061-63). This blasé attitude of the Sheriffs regarding their statutory duty demonstrates how the suggested interpretation of the Statute guts the entire certification process intended by the General Assembly.

If O.C.G.A. § 9-11-14.1(a) allows the Sheriffs to institute their blanket ban on Certified Servers as the trial court found, then that interpretation renders the