

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

GEORGIA ASSOCIATION OF)
PROFESSIONAL PROCESS SERVERS;)
DEBORAH DUCHON;)
LATHAN NICHOLS;) CIVIL ACTION
AMOS HIGHSMITH; and) FILE NO.: 2013-CV-237446
RODNEY J. McCLELLAN,)
)
Petitioners,)
)
v.)
)
THEODORE JACKSON, as Sheriff of Fulton)
County; NEIL WARREN, as Sheriff of Cobb)
County; BUTCH CONWAY, as Sheriff of Gwinnett)
County; THOMAS BROWN, as Sheriff of DeKalb)
County; VICTOR HILL, as Sheriff of Clayton)
County; DUANE PIPER, as Sheriff of Forsyth)
County; and GARY GULLEDGE, as Sheriff of)
Paulding County,)
)
Respondents.

RESPONDENT SHERIFFS' BRIEF IN OPPOSITION TO PETITIONERS'
MOTION FOR SUMMARY JUDGMENT

COME NOW, the above-named Respondent Sheriffs, and submit their Brief in Opposition to Petitioners' Motion for Summary Judgment, showing this Honorable Court as follows:

I. INTRODUCTION

The seven Respondent sheriffs named in this action have individually exercised their statutorily conferred discretion¹ not to allow certified statewide process servers to serve process

¹ O.C.G.A. § 9-11-4.1(a) provides that an individual who is certified as a statewide process server is entitled to serve process for any court 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. § 9-11-4.1 (a).

in their respective jurisdictions for a number of informed and well-articulated reasons. Petitioners, unhappy with the General Assembly's conferral of discretion on Georgia sheriffs, bring this action for declaratory, mandamus and/or injunctive relief, accusing the Sheriffs of engaging in a civil conspiracy and asking the Court to judicially rewrite the statute so as to eliminate the sheriffs' prominent role.

As a preliminary matter, Petitioners fail to make the necessary factual showing to establish their standing in this action. Thereafter, Petitioners ignore the plain language of the statute – which gives Georgia sheriffs clear discretion to deny certified process servers authorization to serve in their counties – and launch a frivolous attack on O.C.G.A. § 9-11-4.1 through inapplicable case law and inadmissible/irrelevant evidence. Throughout, Petitioners lob allegations of a “conspiracy,” simply because the individual sheriffs exercise their discretion in a similar fashion. For the reasons expounded upon herein, Respondent sheriffs respectfully submit that Petitioners' Motion for Summary Judgment must be denied.

I. STATEMENT OF FACTS

In support of their Response in Opposition to Petitioners' Motion for Summary Judgment, Respondents incorporate by reference their Response to Petitioners' Statement of Theories of Recovery and Material Undisputed Facts.

II. ARGUMENTS & CITATIONS OF AUTHORITY

A. SUMMARY JUDGMENT STANDARD

Summary judgment is warranted, under O.C.G.A. § 9-11-56, “when any material fact is undisputed, as shown by the pleadings and record evidence, and this fact entitles the moving party to judgment as a matter of law.” *City of Douglas v. Hudson*, 315 Ga. App. 20, 726 S.E.2d 496 (2012), quoting *Strength v. Lovett*, 311 Ga. App. 35, 39, 714 S.E.2d 723 (2011). “To

prevail on a motion for summary judgment, the moving party must *show* that there is no genuine dispute as to a specific material fact and that this specific fact is enough, regardless of any other facts in the case, to entitle the moving party to judgment as a matter of law.” *Id.* “If the moving party discharges this burden, the non-moving party “cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.” *Lau’s Corp., Inc. v. Haskins*, 261 Ga. 491, 491, 405 S.E.2d 474 (1991).

B. PETITIONERS FAIL TO MEET THEIR BURDEN OF ESTABLISHING NO GENUINE ISSUE OF MATERIAL FACT ENTITLING THEM TO DECLARATORY, INJUNCTIVE AND/OR MANDAMUS RELIEF.

According to Ga. Unif. Super. Ct. R. 6.5, “[u]pon any motion for summary judgment... there shall be annexed to the notice of motion a separate, short and concise statement... of *each of the material facts as to which the moving party contends there is no genuine issue to be tried.*” (Ga. Unif. Super.Ct. R. 6.5) (emphasis added). In support of their Motion for Summary Judgment, Petitioners provide five (5) generalized “Material Facts” which are insufficient “to entitle [Petitioners] to judgment as a matter of law.” *City of Douglas*, 315 Ga. App. at 20. Accordingly, Petitioners’ request for declaratory, injunctive, and/or mandamus relief on summary judgment should be denied.

1. Declaratory Judgment

Petitioners seek a series of declarations from the Court, relating to O.C.G.A. § 9-11-4.1. (See Petition, ¶¶ 61, 62, 82). Georgia’s Declaratory Judgment Act gives superior courts the power to declare rights and other legal relations of any *interested party* in “*cases of actual controversy*” where “it appears to the court that the ends of justice require that the declaration should be made.” O.C.G.A. § 9-4-2(a), (b). “The words ‘actual controversy’ mean a justiciable controversy where there are interested parties asserting adverse claims on an accrued set of

facts.” *Cramer v. Cnty. of Spalding*, 261 Ga. 570, 572, 409 S.E.2d 30 (1991). “For a controversy to justify the making of a declaration, it must include a right claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute.” *Leitch v. Fleming*, 291 Ga. 669, 670, 732 S.E.2d 401, 403 (2012) (emphasis added). According to the Georgia Court of Appeals, to obtain declaratory relief, “a plaintiff must demonstrate facts or circumstances whereby [he] is in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the court might reasonably jeopardize [his] interest.” *Patterson v. State*, 242 Ga. App. 131, 132, 528 S.E.2d 884, 885 (2000).

Petitioners GAPPS, Duchon, Nichols, Highsmith, and McClellan have made no showing that they are proper parties to challenge the constitutionality of O.C.G.A. § 9-11-4.1. Neither Petitioners’ Motion for Summary Judgment nor their Statement of Material Facts reference the Petitioners individually or state what injury any has allegedly suffered at the hands of any Respondent sheriffs.² At a bare minimum, for Petitioners to establish their stance as “interested parties” to this action, they would need to show which of them, if any, actually sought authorization to serve process in Respondents’ specific counties and the approval or denial received by each. O.C.G.A. § 9-4-2(a), (b); *Cramer*, 261 Ga., 572. Rather than providing factual support, Petitioners’ Statement of Material Facts includes the broad unsworn pronouncement that “Respondents regularly certify applicants who meet the objective requirements for certification as a private process server... [but] then refuse to permit the very same Certified Servers... from working in their County.” (Petitioner’s Material Fact, 3).

² Petitioners have not submitted testimony by affidavit or otherwise, setting forth facts which would be admissible in evidence in support of their standing. *See* O.C.G.A. 9-11-56(e).

Likewise, Petitioners do not show the future uncertainty or insecurity each faces unless provided guidance by the Court. To the contrary, Petitioners' Brief confirms their complete absence of any uncertainty with respect to the Respondent Sheriffs' position. (*See* Petitioners' Brief, pp. 6-12, citing Respondents' testimony as to why they do not allow non-court appointed process servers in their respective jurisdictions.) Assuming each Petitioner is, in fact, a statewide certified process server under O.C.G.A. § 9-11-4.1, Petitioners clearly know they are not and will not be permitted to serve process in the Respondent Sheriffs' counties unless the Respondents change their policies at a future date. Because Petitioners fail to show that they need further direction from the Court to avoid jeopardizing any of their interests, Petitioners' request for declaratory relief should be denied. *Patterson*, 242 Ga. App. at 132.

2. *Injunctive Relief*

In addition to declaratory relief, Petitioners seek "corresponding injunctive relief" (Petitioners' Motion for Summary Judgment, p. 1). Specifically, Petitioners ask the Court to "bar[] Georgia Sheriffs from adhering to a blanket rule refusing to permit service of process by certified process servers [sic] within respective jurisdictions." (Petition, ¶ 88).

According to the Georgia Court of Appeals, "[e]ntry of a permanent injunction is appropriate in clear and urgent cases where there is a vital necessity to prevent a party from being damaged and left without an adequate remedy at law." *Smith v. DeKalb Cnty.*, 288 Ga. App. 574, 576, 654 S.E.2d 469, 471 (2007). Petitioners' Statement of Material Facts make no evidentiary showing that this is a "clear and urgent case[] where there is a vital necessity to prevent [them] from being damaged and left without an adequate remedy at law." *Smith*, 288 Ga. App. at 576. For example, not one Petitioner presents testimony that s/he was denied the right to serve in any county. Further, no Petitioner presents testimony that s/he has been stopped from

securing judicial or other authority to serve process. (*See* Section D, *supra*). Consequently, Petitioners' request for injunctive relief should also be denied.

3. *Writ of Mandamus*

Lastly, Petitioners' Motion for Summary Judgment seeks a "Writ of Mandamus to enforce O.C.G.A. § 9-11-4.1 and remedy Respondents' ongoing conspiracy to nullify said statute and thereby violate the Georgia Constitution." (Petitioners' Motion for Summary Judgment, p. 1). In Georgia, a citizen has a right to file a petition for mandamus in superior court to compel a public official to perform a duty required by law where there is no other adequate legal remedy. *See Ford Motor Co. v. Lawrence*, 279 Ga. 284, 285, 612 S.E.2d 301, 303 (2005) ("Writs of mandamus... are extraordinary remedies available in limited circumstances to compel action... on the part of a public officer when there is no other adequate legal remedy.) "[T]o use mandamus to enforce a private right," as in this case, "[Petitioners] must show a pecuniary loss not compensable in damages." *Brissey v. Ellison*, 272 Ga. 38, 39, 526 S.E.2d 851, 852 (2000), citing O.C.G.A. § 9-6-25.

Petitioners offer no testimony showing they individually suffered pecuniary damage as a result of Respondent Sheriffs' policy decisions not to allow certified process servers to serve in their counties, much less any pecuniary damage "not compensable in damages." O.C.G.A. § 9-6-25. Moreover, Respondents have testified that authorization by the sheriffs is not necessary in order to serve process in their counties, since O.C.G.A. § 9-11-4(c) allows for the appointment of permanent process servers by the courts.³ Petitioners fail to meet their evidentiary burden as to mandamus relief as well.

³ *See* Deposition of Sheriff Brown, p. 27; Deposition of Sheriff Jackson, p. 35; Deposition of Sheriff Conway, p. 13; Deposition of Sheriff Warren, p. 28.

C. PETITIONERS IGNORE THE PLAIN LANGUAGE OF THE STATUTE AND INTERPRET O.C.G.A. § 9-11-4.1 IN A MANNER CONTRARY TO LEGISLATIVE INTENT.

Given the paucity of argument in Petitioners' Brief concerning the *actual words* of O.C.G.A. § 9-11-4.1, it is evident that Petitioners recognize the weakness in their position as to the legislation's actual meaning.⁴ Respondents rely on the plain and unambiguous language of the statute and, for further support, the legislative history of O.C.G.A. § 9-11-4.1 (as is the proper course of statutory interpretation); whereas, Petitioners rely on inadmissible hearsay of House Judiciary Chairman Wendall Willard and irrelevant testimony of Cherokee County Sheriff Roger Garrison to "support" their interpretation of O.C.G.A. § 9-11-4.1.⁵

1. Plain language of O.C.G.A. 9-11-4.1.

Statutory construction requires a search for legislative intent, *In re D.H.*, 285 Ga. 51, 673 S.E.2d 191 (2009), and "courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." O.C.G.A. § 1-3-1(a). In interpreting statutes, "the ordinary signification shall be applied to all words, except words connected with a particular trade or subject matter." O.C.G.A. § 1-3-1(b). It is

⁴ Indeed, Petitioners fail to address at all the following language: "Such certified process server shall be entitled to serve in such capacity for any court of the state, anywhere in the state, *provided that 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. § 9-11-4.1 (a) (emphasis added).

⁵ Rather than rely on the actual words of the statute, Petitioners extract language from the preamble to the Rules of the Judicial Council, that they claim amounts to the Council's interpretation of the statute. (Petitioners' Brief in Support, p. 4). Petitioners on page 5 of their brief refer the Court to Article 2, Section D. 2 of the Rules, but fail to give it any effect. The provision states: "The Sheriff of each county shall accept certification applications as outlined within the law and these rules. *A Sheriff retains the discretion to permit or deny a certified process server to operate within the county of jurisdiction.*" (emphasis added). Far from supporting Petitioner's position, the rules of the Judicial Council actually affirm the interpretation of the statute that the Respondents have adhered to all along.

axiomatic that courts examine statutory language when attempting to ascertain the legislature's intent and refrain from looking beyond the statutory text if the enactment is "plain and unambiguous." *Chase v. State*, 285 Ga. 693, 699, 681 S.E.2d 116, 118 (2009); *accord*, *Early v. Early*, 269 Ga. 415, 416, 499 S.E.2d 329, 330 (1998).

Under the law at issue, Georgia sheriffs are required to review applications of individuals seeking to become certified statewide process servers. To be entitled to serve as a statewide process server under the authority of O.C.G.A. § 9-11-4.1, an individual who has not otherwise been appointed by courts to serve process must first meet specified certification requirements under subsections (a) and (b) of the statute. Petitioners' Brief raises no allegation of any issues related to the performance of this review on the part of Respondent sheriffs, as all Respondents are complying with this statutory requirement. (*See* Petitioners' Brief, generally; Petition, ¶¶ 36, 50).

After being certified, the individual "shall be entitled to serve in such capacity for any court of the state, anywhere within the state, *provided that the sheriff of the county for which process is to be served allows such servers to serve process in such county.*"⁶ O.C.G.A. § 9-11-4.1 (a) (emphasis added). Under O.C.G.A. § 9-11-4.1(h)(1), "prior to the first time that a certified process server serves process in any county he or she shall file with the sheriff of the county a written notice... of his or her intent to serve process in that county. Such notice shall only be accepted by a sheriff *who allows certified process servers to serve process in his or her county*" (emphasis added).

⁶ Notably, the statute does not say, "...provided that the sheriff of the county for which process is to be served allows that server to serve process in such county." As evidenced by the use of the collective term "such servers", instead of an individual term, such as "that server" or "him or her", the Legislature intended for sheriffs to make an all-or-nothing determination regarding whether they would allow certified process servers to serve in their jurisdictions.

Contrary to Petitioners' assertions, O.C.G.A. § 9-11-4.1 places no restraints upon the sheriffs' discretion and no obligation that sheriffs promulgate rules or regulations to determine whether an individual statewide process server should be permitted to serve process in a particular county.

2. Legislative history of O.C.G.A. 9-11-4.1

Even if the statute were not unambiguous on its face, the legislative history of O.C.G.A. § 9-11-4.1 reveals the true intention of the General Assembly. Legislative bills permitting process servers to serve anywhere in Georgia, without restrictions and without specifying a role for sheriffs, have been introduced in the Legislature on several occasions but have not passed.⁷ For instance, HB 284 (which did not pass during the 2012-2013 Session of the General Assembly) would have completely removed the sheriffs' involvement in the certification process and the sheriffs' authority to decide whether to permit certified process servers to operate in their counties. (Tamaroff Deposition, Exhibit 4, p. 48). Had the General Assembly intended to restrict the sheriffs' discretion, essentially reducing sheriffs to a rubber-stamping role, or to require sheriffs to approve all certified process servers "absent demonstrable just cause" (Petition, ¶ 19), the legislators would have included (or removed) the appropriate provisions. *See Swan v. State*, 29 Ga. 616 (1860) (If the General Assembly had intended a particular form of proceeding, it would have said so). The General Assembly affirmatively conferred substantive authority upon

⁷ On three occasions legislative sponsors unsuccessfully attempted to place responsibility for certifying process servers and administering the statute with the Administrative Office of the Courts with no geographical restrictions on the ability to serve process. (See HB 705, HB 545 and HB 284, Exhibits 1, 2 and 5, attached to Respondents' Notice of Filing Certified Public Records and Affidavits).

the sheriffs and did not intend that the discretion created thereby be removed or altered by judicial interpretation.

3. *Chairman Willard's Open Letter and Sheriff Garrison's Affidavit are inadmissible and irrelevant.*

In *Albany Surgical, P.C. v. Dep't of Cmty. Health*, 257 Ga. App. 636, 572 S.E.2d 638 (2002), the Court of Appeals held that: "No one, not even a legislator, is competent to testify concerning the legislative intent or motive . . ." in the passage of legislation. In *Fulton Cnty. v. Dangerfield*, 260 Ga. 665, 398 S.E.2d 14 (1990), the Supreme Court, quoting *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 18 S.E. 981 (1893), stated the following:

While the opinion of a member of the legislature which passed an act, or that of the comptroller-general, as to its meaning and purpose, might possibly often be valuable and instructive in construing the act and arriving at the legislative intent, it cannot be seriously contended that courts can properly resort to sources of this kind in ascertaining the legislative will as expressed in a statute. These gentlemen might differ as to what an act did mean, which would only increase, rather than relieve, any difficulty a court might have in construing the law.

Fulton Cnty., 260 Ga. at 667. See also *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997) ("Judicial inquiry into legislative motives or purposes is a hazardous matter, for what motivates one legislator to make a comment about a law is not necessarily what motivates fellow legislators to enact the law," quoting *U. S. v. O'Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682, 20 L. Ed. 2d 672 (1968).

Instead of relying on the words of the law or genuine legislative history of the statute, Petitioners claim that the legislative intent behind the requirement in O.C.G.A. § 9-11-4.1(h) can be established by the hearsay evidence of House Judiciary Chairman Wendall Willard, who recounted his interpretation of the Georgia Sheriffs Association's interactions with the General Assembly with respect to passage of the Act in an open letter to his legislative colleagues. (Ex.

15 to Deposition of Terry Norris). (See Petitioner's Brief, pp. 14-15). Petitioners also proffer the affidavit of Cherokee County Sheriff Roger Garrison, one of the only sheriffs in Georgia permitting certified process servers to serve process in his county, who offers his personal interpretation of the statutory scheme. (See Petitioners' Motion for Summary Judgment, Exhibit "2").

Chairman Willard's arguments with the Georgia Sheriffs Association and Sheriff Garrison's personal view of the meaning of the law are simply inadmissible and irrelevant.⁸ Neither Chairman Willard's Open Letter nor Sheriff Garrison's Affidavit should be considered by the Court. O.C.G.A. § 9-11-56 (e); *Matthews v. Wilson*, 119 Ga. App. 708, 168 S.E.2d 864 (1969).

D. RESPONDENT SHERIFFS' INDIVIDUAL POLICY DECISIONS NOT TO ALLOW CERTIFIED PROCESS SERVERS TO SERVE IN THEIR RESPECTIVE COUNTIES DOES NOT CONSTITUTE ABUSE OF DISCRETION.

Even if Petitioners had presented evidence of standing, a writ of mandamus will not lie because Respondent sheriffs had no affirmative duty under the statute to permit Petitioners to serve in their counties, and Petitioners have not presented competent evidence that Respondent Sheriffs grossly abused their discretion under O.C.G.A. § 9-11-4.1 or acted arbitrarily, capriciously or unreasonably in restricting certified process servers from serving process in their counties. *Burke Cnty. v. Askin*, 291 Ga. 697, 700-01, 732 S.E.2d 416 (2012). Petitioners absurdly claim: "Respondents have not alleged, much less proven, any legitimate reason to prohibit all Certified Servers from working in their County [*sic*]." (Petitioner's Brief, p. 26). To the contrary,

⁸ In this regard, it should be noted that there are a total of 159 Sheriffs in Georgia, many of whom would not agree with either Chairman Willard or Sheriff Garrison's interpretation. (See Deposition of James T. Norris, p. 83).

Respondents have testified under oath to a number of public safety and other considerations leading to their policy decisions.

“[T]he service of civil process... has the potential to devolve into violent encounters. In respondent’s judgment, service of civil process should generally be performed by law enforcement persons who have been specially trained to perform that function” stated Gwinnett County Sheriff Conway in response to Petitioners’ First Interrogatory No. 7. Likewise, Paulding County Sheriff Gullede observed that a variety of criminal complaints may arise when a non-uniformed individual attempts to serve process; therefore, the sheriff believes that it is safer for process to be served by a uniformed deputy, who has engaged in extensive training and knows how to deal with people, protect himself/herself, and protect the public. (Gullede Response to Interrogatory No. 8; Gullede Deposition, pp. 18-19).⁹ Cobb County Sheriff Neil Warren also expressed concern over the potential for violence where non-uniformed private process servers attempt to serve process.¹⁰ Clayton County Sheriff Victor Hill observed that since some people get so “emotional” when they are served with papers there is a potential for violence, particularly in situations such as evictions. Sheriff Hill testified that deputy sheriffs are sufficiently trained and equipped to deal with those situations. (Hill Deposition, pp. 10; 12). Fulton County Sheriff Theodore Jackson testified that some rural sheriffs were having trouble with bounty hunters coming into their counties to serve process, requiring the redeployment of deputies from regular assignments. (Jackson Deposition, p. 18). Sheriff Jackson was also

⁹ Training received by Sheriffs’ deputies is far more extensive than the one-hour of personal safety training received by applicants for certification. *See, e.g.* O.C.G.A. §§ 35-8-8 and 35-8-21.

¹⁰ “... I’ve been in this business for, like I say, almost 40 years. It’s getting worse out there. When individuals show up at someone’s house and that individual is not sure that there’s a law enforcement officer dressed in uniform, there’s a lot of potential there for a lot of folks to get hurt.” (Deposition of Sheriff Warren, p. 18).

concerned that the background vetting for certified process servers was not adequate, particularly when compared to that required of P.O.S.T. certified deputies.¹¹

Many Respondents were apprehensive about the inadequate accountability and oversight available to ensure appropriate behavior by certified process servers.¹² While O.C.G.A. § 9-11-4.1 authorizes sheriffs to decide for themselves whether certified process servers will be allowed to serve process in their counties, should they do so, the law does not grant sheriffs direct or indirect control over the process servers. Shockingly, a sheriff who permits certified process servers to operate in his or her jurisdiction has no more control over rogue certified servers than the general public possesses as the only recourse afforded to both sheriffs and “member[s] of the public is filing a suit in Superior Court. O.C.G.A. § 9-11-4.1 (c).¹³ Similarly, several sheriffs expressed concern that, if they permitted process servers in their jurisdiction, members of the public could seek to hold them legally responsible for the misbehavior of the process servers they allowed to work within their counties.¹⁴

¹¹ “We check them [deputies] out completely with psychological evaluations and polygraphs, background checks. You don’t have the same authority over process servers.” (Deposition of Sheriff Jackson, p. 21). “If I’m going to be responsible for them out servicing process and they shouldn’t be out there, I want to be assured that the right people are going out there and that they are fully qualified.” (Deposition of Sheriff Jackson, p. 29).

¹² *See, e.g.* Sheriff Conway’s response to Petitioners’ Interrogatory No. 8 (b); Deposition of Sheriff Conway, pp. 20, 21; Deposition of Sheriff Hill, pp. 31, 34; Deposition of Sheriff Warren, pp. 19, 29.

¹³ To the extent that Petitioners argue that the statute represents a cost savings for the counties, this court should not countenance such an argument unless Petitioners account for the costs sheriffs will incur retaining counsel to defend potential lawsuits.

¹⁴ *See* Sheriff Conway’s Response to Petitioners’ Interrogatory No. 7(c). *See also*, Deposition of Sheriff Warren, pp. 19, 29 (“I don’t want to be responsible for someone that does not work for me; that I know how they can handle themselves in dealing with a controversy when you’re trying to deliver process to get somebody moved out of the house or whatever. It’s dangerous. It’s very dangerous.”); Deposition of Sheriff Jackson, p. 28-29.

As discussed in Section B, *supra*, Respondents further expressed their views that, while the certification program might have some laudatory aspects, authorization by the sheriffs is not necessary since O.C.G.A. § 9-11-4(c) allows for the appointment of process servers by the courts, either for a particular case or as a “permanent process server.” In fact, the courts in a number of Respondents’ counties, if not all of them, are appointing permanent process servers.¹⁵ Given the Respondents’ concerns over public safety, training, background, lack of accountability and potential litigation, their decisions, in the exercise of conferred discretion to do so, are rational given the existing alternatives provided in O.C.G.A. § 9-11-4(c) and mandamus is an inappropriate remedy.

E. RESPONDENT SHERIFFS’ POLICY DECISIONS NOT TO ALLOW CERTIFIED PROCESS SERVERS TO SERVE IN THEIR RESPECTIVE COUNTIES DO NOT RENDER THE STATUTE A NULLITY.

Petitioners claim that Respondent Sheriffs’ interpretation that O.C.G.A. § 9-11-4.1 gives them discretion to allow or prohibit certified process servers from working in their jurisdictions “renders the statute meaningless.” (Petitioners’ Brief, p. 17). In the affidavit of Cherokee County Sheriff Roger Garrison, Sheriff Garrison admits, “I approve all notices of intent to serve process in Cherokee County that are submitted to me from private process servers who I determine to be properly and currently certified.” (Garrison Aff., ¶ 5). Based on Sheriff Garrison’s testimony, any process server duly certified under O.C.G.A. § 9-11-4.1 is permitted to serve process in Cherokee County. Clearly, the statute is not a nullity, despite the fact that only a few Georgia sheriffs have chosen to exercise their discretion in the manner selected by Sheriff Garrison.

¹⁵ See Deposition of Sheriff Brown, p. 27; Deposition of Sheriff Jackson, p. 35; Deposition of Sheriff Conway, p. 13; Deposition of Sheriff Warren, p. 28.

F. THE GRANTING OF STATUTORY DISCRETION TO SHERIFFS UNDER O.C.G.A. § 9-11-4.1 DOES NOT CONSTITUTE AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY.

“Enactments of the General Assembly are presumed to be constitutional and should be construed as valid wherever possible.” *Banks v. Georgia Power Co.*, 267 Ga. 602, 603, 481 S.E.2d 200, 203 (1997). Nonetheless, Petitioners claim that “[i]f the General Assembly actually intended to delegate legislative authority to non-legislative branch officers like the Sheriffs to determine where a state certified process server could work, such a delegation is unconstitutional unless “the Georgia Assembly has also provided sufficient guidelines for the delegate.” (Petitioners’ Brief, p. 27, citing *Dep’t of Transp. v. City of Atlanta*, 260 Ga. 699, 703, 398 S.E.2d 567 (1990). This contention is erroneous and the case law cited to support it inapposite.

1. O.C.G.A. § 9-11-4.1 is not an unconstitutional delegation of legislative authority.

Petitioners argue that it is “absurd to think that the General Assembly would establish a statutory statewide certification process for private process servers which cost each applicant \$700.00, but, in that same Statute, delegate to the Sheriffs unreviewable discretion to unconditionally nullify the certification process.” (Petitioners’ Brief, p. 19.) Assuming *arguendo* that sheriffs are “unconditionally nullify[ing] the certification process” by merely exercising the discretion conferred by statute, it is neither “absurd” nor unprecedented for the General Assembly to enact such a legislative scheme, as reflected by *Ward v. City of Cairo*, 276 Ga. 391, 393, 583 S.E.2d 821 (2003).

In *Ward*, the Georgia Supreme Court evaluated the legality of O.C.G.A. § 42-8-100(f)(1) in light of a separation of powers challenge. That statute permitted a Chief Judge to privatize probation services if the county governing authority conferred its approval. *Ward*, 276 Ga. at 393. The plaintiff claimed the General Assembly impermissibly delegated power to county

governing authorities. *Id.* Noting that “[t]he separation of powers doctrine is sufficiently flexible to permit practical arrangements in a complex government,” *id.* (citation omitted), the Court held that the statute did not constitute an impermissible delegation of authority to the county governing authority because the contract would invariably “impact[]” the county governing authority. *Id.*

The statutory scheme of O.C.G.A. § 9-11-4.1 depends upon each sheriff’s determination of what is best for his/her county. The Legislature, in anticipation of potential problems that might arise in various jurisdictions, has determined that local decisions are more appropriate to effectuate the overall statutory scheme. Hence, the General Assembly’s jurisdictional limitations on the authority of certified process servers is consistent with limitations placed on county sheriffs in the past. *See Hutcheson Mfg. Co. v. Chandler*, 29 Ga. App. 726, 116 S.E. 849 (1923) (sheriff’s authority to effectuate service limited to county boundaries).

The presence and activities of private statewide process servers who are generally unaccountable to individual sheriffs impacts the sheriffs and their jurisdictions, conferring discretion upon sheriffs to determine whether to permit private process servers in their respective jurisdictions. Such a scheme is not offensive to separation of powers principles, and O.C.G.A. § 9-11-4.1 does not constitute an impermissible delegation of legislative authority to the sheriffs. Instead, it represents a “practical arrangement[] in a complex government.” *Ward*, 276 Ga. at 393.

2. Respondent Sheriffs are not required or permitted to establish additional objective standards for individualized assessment of certified process servers under O.C.G.A. § 9-11-4.1.

As evidenced from the plain text of O.C.G.A. § 9-11-4.1, the statutory framework created by the General Assembly requires Sheriffs to make an “all-or-nothing” policy determination

concerning the appropriateness of private process service within their respective boundaries. Petitioners' fail to understand that, with regard to approval of certified process servers in Respondents' jurisdictions, the statute neither contemplates nor authorizes a sheriff to make individualized assessments. This fundamental misunderstanding (or intentional misreading) causes Petitioners to erroneously rely upon cases examining government action in the *quasi-judicial* sphere instead of the *policymaking* role contemplated by O.C.G.A. § 9-11-4.1.

Petitioners place great emphasis on two Georgia Supreme Court cases involving county commissions acting under quasi-judicial authority in deciding whether to grant license and permit applications. (*See* Petitioners' Brief, p. 21, citing *Arras v. Herrin*, 255 Ga. 11, 12, 334 S.E.2d 677 (1985) (county commission denied appellee's alcohol-beverage license)); (*See also* Petitioners' Brief, p. 22, citing *Fulton Cnty. v. Bartenfeld*, 257 Ga. 766, 363 S.E.2d 555 (1988) (county commission denied appellee's special-use zoning permit)). When a legislative scheme requires the government to make individualized assessments among applicants (such as the consideration of license and permit applications), government is deemed to be acting in a quasi-judicial capacity. *Jackson v. Spalding Cnty.*, 265 Ga. 792, 794, 462 S.E.2d 361 (1995); *Bentley v. Chastain*, 242 Ga. 348, 350-351, 249 S.E.2d 38 (1978). When acting in a quasi-judicial capacity, the government's power must be constrained by "objective" and "ascertainable" standards. *Arras*, 255 Ga. at 12.

However, the *Arras* and *Bartenfeld* holdings have no bearing on the instant case because the Respondent sheriffs do not act in a quasi-judicial capacity under O.C.G.A. § 9-11-4.1(a) and (h). As iterated in Respondents' Brief in Support of their Motion for Summary Judgment, under O.C.G.A. § 9-11-4.1, Georgia sheriffs are directed to decide as a matter of policy whether private process service will be allowed within their respective county boundaries. If Sheriffs decide that

policy question in the affirmative, there is no quasi-judicial power to exercise as all certified process services are allowed to operate within those boundaries as a matter of law upon sending notice to the Sheriff. O.C.G.A. § 9-11-4.1(h). Therefore, Petitioners' reliance on *Arras* and *Bartenfeld*, as well as other case law addressing the conferral of quasi-judicial authority, is unfounded.¹⁶

**G. PETITIONERS HAVE NO LIBERTY INTEREST PROTECTED BY
SUBTANTIVE DUE PROCESS CONSIDERATIONS.**

Petitioners' desire to serve process statewide is not in and of itself a civil or political right. *See Harrison v. Wigington*, 269 Ga. 388, 497 S.E.2d 568 (1998) (attainment of status of bail bondsperson is not civil or political right). Petitioners argue, however, that the Respondents' decisions not to permit certified process servers to serve process in their counties are based on "reasons that are utterly devoid of any legitimate underlying rationale or justification" and therefore constitute a violation of substantive due process. (Petitioners' Brief, p. 31, citing *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560 (11th Cir. 1988)). In making this statement, Petitioners blatantly ignore the copious testimony of the Respondent Sheriffs as to the rational bases for their decision. (*See* Section D, *supra*).

¹⁶ Petitioners also place misguided reliance on two (2) additional Georgia Supreme Court cases, both involving the Georgia Department of Transportation: *Department of Transp. v. Peach Hill Properties*, 278 Ga. 198, 599 S.E.2d 167 (2004), and *Department of Transp. v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990). (Petitioners' Brief, pp. 23, 27.) Under a proper reading, *Peach Hill Properties* stands for the premise that when government is conferred with quasi-judicial power, it cannot stubbornly refuse to exercise that power. *DOT v. City of Atlanta*, is also inapposite because it examined a legislative scheme that required a governmental agency to exercise quasi-judicial responsibilities. Since the legislative scheme codified in O.C.G.A. § 9-11-4.1 does not prescribe a quasi-judicial role for Sheriffs, Petitioners' insistence that the Sheriffs were obligated to enact objective and ascertainable standards through reliance on *Peach Hill Properties* and *DOT v. City of Atlanta* is flawed.

Given the Sheriffs' compelling reasons showing legitimate governmental interests in public safety and accountability, it cannot be concluded that Respondents have violated Petitioner's claimed liberty interests under the Fourteenth Amendment. *See Hitch v. Vasarhelyi*, 302 Ga. App. 381, 691 S.E.2d 286 (2010) (standard for substantive due process inquiry is whether law is rationally related to legitimate government purpose).

Petitioners erroneously claim that their substantive due process rights have been violated by Respondents' "wholesale ban prohibiting Certified Servers from plying their trade..." (Petitioners' Brief, pp. 30-31). As has been previously shown, however, there is no "wholesale ban" restricting Petitioners from serving process throughout the state (ie. Sheriff Garrison testified in Petitioners' behalf that individuals are permitted to serve process in Cherokee County; also, under court appointment, Petitioners may serve as permanent process servers in many, if not all, of the Respondent Sheriffs' counties.)

As was attempted in *Jordan v. Bd. of Pub. Safety*, 253 Ga. App. 339, 559 S.E.2d 94 (2002), Petitioners seek to assert a substantive due process right with respect to, as Petitioners put it, the "right to work." (Petitioner's Brief at p. 30). However, since Petitioners' asserted occupation is a creation of state law, not a substantive provision of the federal or state constitutions, any claim for a substantive due process violation must fail.¹⁷ Since the precondition to the existence of any right to serve process in any particular county has not occurred, (i.e., the Respondent Sheriffs have not decided to permit certified servers to operate within their counties under the current statutory and regulatory scheme), no liberty interest exists.

¹⁷ If any vested right should be determined to exist under the statutory scheme, the same may be rescinded, garnering only that protection afforded by procedural due process. *Jordan*, supra, 253 Ga. App. at 98, quoting *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994).

H. PETITIONERS HAVE NO PROPERTY INTEREST ENTITLED TO PROCEDURAL DUE PROCESS PROTECTIONS.

Without supporting authority, Petitioners claim that “[c]ertification constitutes a license to work statewide as a private process server.” (Petitioners’ Brief, p. 5). In fact, the certification does not constitute a license in and of itself. It merely signifies that the recipient has passed a criminal background test, attended 12 hours of classes, passed a written examination and obtained a bond. O.C.G.A. § 9-11-4.1 (b) (1) (A) through (D). The certification does not constitute permission to serve process in any county in Georgia. That permission, or license to serve process in the geographical confines of a particular county, does not arise until the certified server complies with O.C.G.A. § 9-11-4.1(h) by providing notice to the sheriff of a county “who allows certified process servers to serve process in his or her county.” While certified process servers may have met certain statutory criteria, their right to serve process within a particular county is entirely dependent upon whether the sheriff of that county has determined that such private process servers will be permitted to operate within his or her jurisdiction. *See ABC Home Health Servs., Inc. v. Georgia Dep’t of Med. Assistance*, 211 Ga. App. 461, 439 S.E.2d 696 (1993) (Home health care agency, although certified by Department of Human Resources as meeting federal health and safety standards for Medicaid providers, may not provide reimbursable services outside the geographical areas set forth in its license and certificate of need).

Until a sheriff determines that he or she will permit certified process servers to operate within his county, such servers do not even enjoy a “unilateral expectation” that they might be permitted to serve process within the geographical confines of the sheriff’s jurisdiction. *A.A.A.*

Always Open Bail Bonds, Inc. v. DeKalb Cnty., Georgia, 129 F. App'x 522, 523 (11th Cir. 2005). Until that pre-condition occurs, no license, right or authorization to operate within that jurisdiction exists as a property interest subject to the Due Process protections of the Fourteenth Amendment. That pre-condition has not occurred for the counties involved in this lawsuit. *See also West v. Dooly County School District*, 316 Ga. App. 330, 729 S.E. 2d 469 (2012) (state law determines whether a person has a property interest in employment and defines the dimension of such interest; no property interest in mere anticipation of tenure); *Bank of Jackson Cnty. v. Cherry*, 980 F.2d 1354 (11th Cir. 1992) *on reh'g*, 980 F.2d 1362 (11th Cir. 1993) (no one has a right to do business with the government, and without such an entitlement, no protected property interest exists).¹⁸ Since any authority to serve process under O.C.G.A. § 9-11-4.1 is entirely dependent upon the authorization of each county's sheriff, until that authorization is made, no constitutionally cognizable right exists.

I. FINDING THE “CONTESTED PROVISION” OF O.C.G.A. § 9-11-4.1 UNCONSTITUTIONAL WOULD REQUIRE THE STATUTE BE STRICKEN IN ITS ENTIRETY.

Petitioners ask this Court to excise or “blue pencil” the “contested provision” of O.C.G.A. § 9-11-4.1, contained in subsections (a) and (h). They cite *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 404, 467 S.E.2d 875 (1996) for the proposition that Courts may, when a law cannot be upheld as a whole, sustain those parts which are not unconstitutional if those parts “correspond with the main purpose which the legislature sought to accomplish by its enactment, if, . . . enough remains to accomplish that purpose.” *Id.*

Petitioners do not, however, finish the drill, as they fail to point out that excision is only

¹⁸ A corollary proposition might be that no citizen has a right to do business for the government, and that because service of process is quintessentially a government function closely tied and essential to the operation of the Courts, there can be no property interest in such activity until created by operation of the law.

appropriate where the respective parts of the legislation are not “mutually dependent on one another.” *Id.*, quoting *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363-364, 254 S.E.2d 315 (1979). As the Supreme Court put it in *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 276, 658 S.E.2d 603 (2008), severance may be appropriate where the severed portions “are not mutually dependent on the remaining portions **and legislative intent is not compromised.**” (emphasis added).

An examination of O.C.G.A. § 9-11-4.1 mandates the following conclusions: the conferral of discretion upon sheriffs is an integral and inseparable component of the statute, and the General Assembly did not intend for the statute to be severed.¹⁹ As evidenced throughout the statute, specifically subsections (a), (f), and (h), the preeminent role of sheriffs in O.C.G.A § 9-11-4.1 constitutes “the heart of the Act, and their severance from the Act would ‘result in a statute that fails to correspond to the main legislative purpose...’” *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275, 637 S.E.2d 659, 662 (2006), quoting *State v. Jackson*, 269 Ga. 308, 312, 496 S.E.2d 912 (1998). Every one of the several bills introduced for consideration by the General Assembly that did not include language regarding the sheriffs’ discretion failed to pass. (See Respondents’ Statement of Material Facts as to Which There is No Genuine Issue to be Tried, ¶¶ 5-9, 11-12, and exhibits identified therein.) Judicially eliminating entities that the General Assembly intended to play a significant role in the process – such as Georgia sheriffs – is not a result the Georgia Supreme Court countenances. See *City Council of Augusta*, 254

¹⁹In the absence of a severability clause, the presumption is that the General Assembly intended the statute “to be an entirety” and not be severed. *City Council of Augusta*, 254 S.E.2d at 320. Thus, the General Assembly includes a severability clause when it desires to communicate to interpreting courts that a statute should remain in force and effect if one or more parts are declared unconstitutional. See Ga. Laws 2005, p. 1, § 14. Significantly, there is no such provision in O.C.G.A. § 9-11-4.1.

S.E.2d at 320 (it would be inappropriate to “rewrite the statute to eliminate city participation” in a statute that contemplated city participation in a county tax). “It is not the role of the courts... to legislate alternative procedures to replace those promulgated by the General Assembly that are deemed to be unconstitutional.” *Turner Cnty. v. City of Ashburn*, 293 Ga. 739, 749, 749 S.E.2d 685, 693 (2013). To the extent that O.C.G.A. § 9-11-4.1 is unconstitutional for any of the reasons pressed by Petitioners, the obvious and inexorable result will be the invalidation of the statute in its entirety.

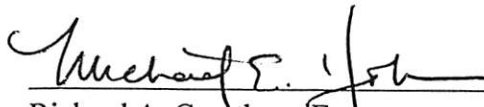
J. PETITIONERS’ ALLEGATIONS OF “CONSPIRACY” ARE MADE WITHOUT ANY FACTUAL FOUNDATION.

Petitioners’ ad nauseam use of the phrase “conspiracy” is without any factual foundation. Each sheriff has made an individual policy decision not to allow certified process servers to work in his respective county, as plainly permitted under the language of O.C.G.A. § 9-11-4.1. The fact that each sheriff is a member of the Georgia Sheriffs’ Association and that each sheriff reached the same conclusion regarding certified process servers, does not transform their individual decisions into an unlawful “conspiracy,” especially given the logical grounds on which their individual decisions were made. The word “conspiracy” – in the ordinary and legal meaning of the word – connotes a surreptitious “meeting of the minds” for illegal purposes. It is facially ridiculous for Petitioners to argue “gross abuse of discretion” and “unlawful acts” on the part of Respondent Sheriffs, when they acted in patent conformance with the discretion intentionally conferred upon them by the legislature.

IV. CONCLUSION

For the foregoing reasons, Respondent Sheriffs respectfully request that Petitioners’ Motion for Summary Judgment be denied.

This the 13th day of August, 2014.



Richard A. Carothers, Esq.

Georgia Bar No. 111075

Michael E. Hobbs, Esq.

Georgia Bar No. 358200

Attorneys for Sheriff Butch Conway

Carothers & Mitchell, LLC

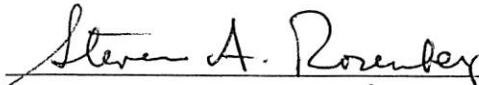
1809 Buford Highway

Buford, GA 30518

(770)932-3552

richard.carothers@carmitch.com

michael.hobbs@carmitch.com



Steven A. Rosenberg, Esq. *by meant with express permission*

Georgia Bar No. 614560

Attorneys for Sheriff Theodore Jackson

Office of the Fulton County Attorney

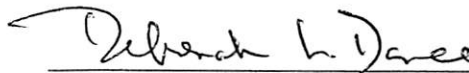
141 Pryor Street Southwest

Suite 4038

Atlanta, GA 30303

(404) 612-0246

steven.rosenberg@fultoncountyga.gov



Deborah L. Dance, Esq. *by meant with express permission*

Georgia Bar No. 203765

Lauren S. Bruce, Esq.

Georgia Bar No. 796642

Attorneys for Sheriff Neil Warren

Cobb County Attorney

100 Cherokee Street, Suite 350

Marietta, GA 30090

(770) 528-4000

deborah.dance@cobbcounty.org

lauren.bruce@cobbcounty.org

DeKalb County Law Department
1300 Commerce Drive, 5th Floor
Decatur, GA 30030
ecreed@dekalbcountyga.gov

Freeman Mathis & Gary, LLP
661 Forest Parkway, Suite E
Forest Park, Ga. 30297
(404) 335-7140
jhancock@fmglaw.com
asabzevari@fmglaw.com

Jarrard & Davis, LLP
105 Pilgrim Village Drive, Suite 200
Cumming, GA 30040
(678) 455-7150
kjarrard@jarrard-davis.com
krobin@jarrard-davis.com

O'Quinn & Cronin, LLC
103 Keys Ferry Street
McDonough, GA 30253
(770) 898-0333
donald@oqclaw.com
jacob@oqclaw.com

E. Charles Reed
E. Charles Reed, Jr., Esq. *by met with express permission*
Georgia Bar No. 597618
Attorney for Sheriff Thomas Brown

Jack R. Hancock
Jack R. Hancock, Esq. *by met with express permission*
Georgia Bar No. 322450
Ali Sabzevari
Georgia Bar No. 941527
Attorneys for Sheriff Victor Hill

Kenneth P. Robin
Ken E. Jarrard, Esq. *by met with express permission*
Georgia Bar No. 389550
Kenneth P. Robin, Esq. *permission*
Georgia Bar No. 609798
Attorneys for Sheriff Duane Piper

Donald A. Cronin
Donald A. Cronin, Esq. *by met with express permission*
Georgia Bar No. 197270
Jacob S. O'Neal, Esq.
Georgia Bar No. 877316
Attorneys for Sheriff Gary Gullede

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIA ASSOCIATION OF)
PROFESSIONAL PROCESS SERVERS;)
DEBORAH DUCHON; KRISTY BORDERS) CIVIL ACTION
ADAMS; WILLIAM LUTWACK)
and RODNEY J. McCLELLAN,) FILE NO.: 2013-CV-237446
)
Petitioners,)
)
v.)
)
THEODORE JACKSON, as Sheriff of Fulton)
County; NEIL WARREN, as Sheriff of Cobb)
County; BUTCH CONWAY, as Sheriff of Gwinnett)
County; THOMAS BROWN, as Sheriff of DeKalb)
County; VICTOR HILL, as Sheriff of Clayton)
County; DUANE PIPER, as Sheriff of Forsyth)
County; and GARY GULLEDGE, as Sheriff of)
Paulding County,)
)
Respondents.)

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **Respondent Sheriffs' Brief in Opposition to Petitioners' Motion for Summary Judgment**, by depositing a copy of same in the United States mail in a properly addressed envelope with adequate postage thereon to ensure delivery upon the following parties:

A. Lee Parks, Esq.
Harlan S. Miller, Esq.
Parks, Chesin & Walbert, P.C.
75 Fourteenth Street, 26th Floor
Atlanta, GA 30309

Steven A. Rosenberg, Esq.
Office of the Fulton County Attorney
141 Pryor Street Southwest
Suite 4038
Atlanta, GA 30303

Deborah L. Dance, Esq.
Cobb County Attorney
100 Cherokee Street
Suite 350
Marietta, GA 30090

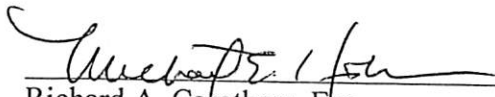
E. Charles Reed, Jr., Esq.
Senior Assistant County Attorney
1300 Commerce Drive, 5th Floor
Decatur, GA 30030

Jack R. Hancock, Esq.
Freeman Mathis & Gary, LLP
661 Forest Parkway, Suite E
Forest Park, Ga. 30297

Ken E. Jarrard, Esq.
Kenneth P. Robin, Esq.
Jarrard & Davis, LLP
105 Pilgrim Village Drive, Suite 200
Cumming, GA 30040

Donald A. Cronin, Esq.
O'Quinn & Cronin, LLC
103 Keys Ferry Street
McDonough, GA 30253

This 13th day of August, 2014.


Richard A. Carothers, Esq.
Georgia Bar No. 111075
Michael E. Hobbs, Esq.
Georgia Bar No. 358200
Attorneys for Sheriff Butch Conway

Carothers & Mitchell, LLC
1809 Buford Highway
Buford, GA 30518
(770) 932-3552
richard.carothers@carmitch.com
michael.hobbs@carmitch.com