

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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.)	

BRIEF IN SUPPORT OF RESPONDENT SHERIFFS'
MOTION FOR SUMMARY JUDGMENT

COME NOW, the above-named Respondent Sheriffs, who submit their Brief in Support of their Motion for Summary Judgment which is filed contemporaneously herewith.

I. INTRODUCTION

The issue before this Court is a straightforward question of statutory interpretation:

Georgia sheriffs are required to accept, process and determine whether an applicant has met qualifications/criteria for certification as a statewide process server under O.C.G.A. § 9-11-4.1. Once certified, an individual is entitled to serve process for any court in the state, but only if “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). Under the plain language of the statute, if a sheriff, being informed by his/her experience, training and interests in public safety, exercises his/her discretion not to allow any certified process servers (who are not otherwise court-appointed) to serve process in his/her county, does such a discretionary decision on the part of the sheriff contravene the statute?

That is the overarching question that subsumes all Petitioners’ claims of constitutional infirmities

related to the statute (i.e., denial of due process, improper delegation of legislative authority, and vagueness), as well as Petitioner's claims for attorney's fees.¹

Petitioners assert that Respondents, acting pursuant to statute, somehow trammled upon their due process rights and suggest Respondents must promulgate an objective approval process for certified process servers, including notice and a hearing in the event a server is not permitted to serve process in a particular county. (Petition, ¶¶ 53, 54). To the contrary, O.C.G.A. § 9-11-4.1 contains a clear statement of legislative intent, does not violate the Petitioners' rights to due process, does not infringe upon Petitioners' property or liberty interests, and does not violate separation of powers under Georgia's Constitution.

The Respondent sheriffs have articulated legitimate reasons for choosing not to allow certified process servers to serve in their counties, believing their trained deputies are better equipped to deal with the safety concerns related to serving parties with undesired court papers, and are uncomfortable with the lack of control they maintain over persons certified under O.C.G.A. § 9-11-4.1. Moreover, the Petitioners are, or could be, permitted to serve process in the Respondent sheriffs' jurisdictions via court-appointment; as such, they have no injury needing relief through this action. Declaratory, injunctive, and/or mandamus relief are not appropriate.

II. STATEMENT OF FACTS

In support of their Motion for Summary Judgment, Respondents incorporate by reference their Statement of Theories of Recovery and Statement of Material Facts filed contemporaneously herewith.

¹ Petitioners have abandoned their claim in Count Seven for lost revenue damages. (Deposition of Paul Tamaroff, p. 71).

III. ARGUMENT & CITATIONS TO AUTHORITY

A. THIS CASE SHOULD BE HELD IN ABEYANCE UNTIL THE GENERAL ASSEMBLY DETERMINES WHETHER THE STATUTE AT ISSUE WILL BE REPEALED AS OF JULY 1, 2015.

This lawsuit turns upon the meaning and constitutionality of O.C.G.A. § 9-11-4.1, which contains an extraordinary sunset provision mandating the repeal of the Code section effective July 1, 2015, unless continued in effect by the General Assembly prior to that date. O.C.G.A. § 9-11-4.1(k). As a result of this sunset provision, unless the General Assembly decides during the next legislative session to continue O.C.G.A. § 9-11-4.1 beyond July 1, 2015, the statute will cease to exist as of that date, rendering this lawsuit moot. *Collins v. Lombard Corp.*, 270 Ga. 120, 121-122(1), 508 S.E. 2d 653 (1998) (“[A] case is moot when its resolution would amount to the determination of an abstract question not arising upon *existing* facts or rights, and... mootness is a mandatory ground for dismissal.” (emphasis added)). Because Petitioners’ claims for relief are solely predicated on the interpretation and constitutionality of O.C.G.A. § 9-11-4.1, it is in the interest of judicial economy and efficiency for the Court to hold this matter in abeyance until such time as the fate of O.C.G.A. § 9-11-4.1 is determined during the 2015 legislative session. Nonetheless, Respondents will substantively address Petitioners’ various claims in the following sections.

B. STANDARDS OF RELIEF.

Because Petitioners seek mandamus, declaratory, and/or injunctive relief, a preliminary discussion of each standard is warranted.

1. *Writ of Mandamus*

Petitioners seek a writ of mandamus without explicitly asking the Court to compel Respondent sheriffs to carry out any specific duties (*see* Petition, ¶¶ 64, 67, 68, 85).

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.”) In the case of a discretionary duty, mandamus will only lie where there has been a “gross abuse” of that discretion. O.C.G.A. §§ 9-6-20 & 9-6-21; *R.A.F. v. Robinson*, 286 Ga. 644, 646, 690 S.E.2d 372, 374 (2010). “[A] public official's exercise of discretion will not be disturbed by a mandamus order unless the official's actions were arbitrary, capricious, and unreasonable.” *Burke Cnty. v. Askin*, 291 Ga. 697, 700-01, 732 S.E.2d 416, 419 (2012).

As a general rule, mandamus relief is not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act. *Id.*; *see also, Hilton Const. Co., Inc. v. Rockdale Cnty. Bd. of Ed.*, 245 Ga. 533, 540, 266 S.E.2d 157, 162 (1980) (“Mandamus is not the proper remedy to compel the undoing of acts already done or the correction of wrongs already perpetrated, and this is so, even though the action taken was clearly illegal”). Moreover, once the public duty has occurred, the “prayer that mandamus be issued compelling [a public officer] to perform that public duty is moot.” *R.A.F.*, 286 Ga. at 646.

For reasons further discussed herein, Petitioners are not entitled to any of the mandamus relief sought in their Petition.

2. *Declaratory Judgment*

Petitioners request that the Court declare that (1) the statutory grant of discretion to Respondents permitting them to determine whether certified process servers may serve process in their jurisdictions is unconstitutional (Petition, ¶ 61); (2) to satisfy due process requirements, O.C.G.A. § 9-11-4.1(a) and (h) must be interpreted as requiring sheriffs to promulgate objective criteria for determining whether certified process servers may serve process in their jurisdictions and to provide notice and the opportunity to be heard before such permission is denied (Petition, ¶ 62); and (3) sheriffs cannot bar certified process servers from serving process in their jurisdictions if the process originated in another jurisdiction (Petition, ¶ 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). A justiciable controversy exists "[w]here a concrete issue is present, and there is a definite assertion of legal rights, and a positive legal duty with respect thereto, which are denied by the adverse party." *Higdon v. City of Senoia*, 273 Ga. 83, 85, 538 S.E.2d 39, 42 (2000).

To warrant a declaratory judgment, a controversy cannot be merely “hypothetical, abstract, academic or moot,” *Burton v. Composite State Bd. of Med. Examiners*, 245 Ga. App. 587, 588, 538 S.E.2d 501, 502 (2000). A declaration must “not be rendered based on a possible or probable future contingency” because such a ruling would be “an erroneous advisory opinion.” *Burton*, 245 Ga. App. at 588. Nor should declaratory relief be entertained when “the rights of the parties have already accrued and no facts or circumstances are alleged which show that an adjudication of the plaintiffs’ rights is necessary in order to relieve the plaintiffs from the risk of taking any future undirected action incident to their rights...”*Milton Frank Allen Publications, Inc. v. Georgia Ass’n of Petroleum Retailers, Inc.*, 219 Ga. 665, 671, 135 S.E.2d 330, 335 (1964). After all, “[t]he object of the declaratory judgment is to permit determination of a controversy *before* obligations are repudiated or rights are violated...” *Id.*; *see also, Richardson v. Phillips*, 302 Ga. App. 305, 309-10, 690 S.E.2d 918, 921 (2010) (the purpose of a declaratory judgment is to permit one who is walking in the dark to ascertain where he is and where he is going, and to turn on the light *before* he steps rather than after he has stepped in a hole).

For reasons further discussed herein, Petitioners are not entitled to any of the declarations sought in their Petition.

3. *Injunctive Relief*

Petitioners make one claim for injunctive relief: “Petitioners demand judgment... [for] temporary, preliminary and permanent injunctive relief barring 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 O.C.G.A. § 9-5-1, “[e]quity, by a writ of injunction, may restrain proceedings in another or the same court, a threatened or existing tort, or any other act of a private individual or corporation which is illegal or contrary to equity and good conscience and for which no adequate remedy is provided at law.” O.C.G.A. § 9-5-8 further states, “[t]he granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case. This power shall be prudently and cautiously exercised and, except in *clear* and *urgent* cases, should not be resorted to” (emphasis added). *See Smith v. DeKalb Cnty.*, 288 Ga. App. 574, 576, 654 S.E.2d 469, 471 (2007) (Entry 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).

In asking that the Court “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), Petitioners are actually asking the Court to compel Georgia Sheriffs to engage in a case-by-case determination regarding whether to allow certified process servers to serve in their counties. This request for compulsion is also sought in Petitioners’ demand for mandamus relief. Even if it were not, Petitioners do not show 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. Consequently, Petitioners’ request for injunctive relief should also be denied.

C. O.C.G.A. § 9-11-4.1 HAS VESTED CLEAR DISCRETION IN SHERIFFS TO DETERMINE WHETHER CERTIFIED PROCESS SERVERS MAY SERVE PROCESS IN THEIR RESPECTIVE COUNTIES AND SAID DISCRETION IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners and Respondents fundamentally disagree as to the scope of discretion afforded Georgia sheriffs under O.C.G.A. § 9-11-4.1, leading Petitioners to claim the statute is unconstitutionally vague. (Petition, Count Three). Despite the clear language of the statute, Petitioners claim Respondents “have a clear legal duty to... permit all certified process servers, absent demonstrable just cause to the contrary, to serve civil process within their respective jurisdictions, as was contemplated and intended by the General Assembly in O.C.G.A. § 9-11-4.1.” (Petition, ¶ 19). While the statute’s language, on its face, reveals the frivolity of Petitioners’ interpretation, a brief recount of the statute’s legislative history guts Petitioners’ unsupported claims as to the General Assembly’s intent.

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 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. In the instant litigation, there are no pending issues related to the performance of this duty, as currently all Respondent sheriffs are complying with this statutory requirement. (Petition, ¶¶ 36, 50; *see also*, Section I, *supra*).

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.*”² 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).

In the instant case, consistent with the italicized statutory language, sheriffs are permitted to determine the appropriateness of certified process service within their respective jurisdictions. The statute places no restrictions upon their discretion and no obligation that they promulgate rules or regulations to determine whether an individual statewide process server should be

²Notably, 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.

permitted to serve process in a particular county. Nor does the statute include any language regarding “demonstrable just cause”. (Petition, ¶ 19). After independent consideration, each Respondent sheriff has decided that he will not authorize such activities in his county. (Petition, ¶ 36; Exhibits 2 and 3 to the Petition). The sheriffs’ actions are warranted, since the statutory language clearly contemplates their authority to allow such process servers, *collectively*, to work in their counties or not.

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

Even if the statute was not unambiguous on its face, the legislative history of O.C.G.A. § 9-11-4.1, as delineated in Paragraphs 5 through 13 of Respondents’ Statement of Material Facts, 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.³ 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),

³ 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.

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

3. *O.C.G.A. 9-11-4.1 is not unconstitutionally vague.*

“To withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to those to whom the statute is directed and its provisions must enable them to determine the legislative intent.” *Bell v. Austin*, 278 Ga. 844, 847, 607 S.E.2d 569, 574 (2005) (quotation omitted). Stated differently, a law is unconstitutionally vague if persons of common intelligence must guess at its meaning and differ as to its application. *Prof'l Standards Comm'n v. Alberson*, 273 Ga. App. 1, 8, 614 S.E.2d 132 (2005).

The essence of Petitioners' argument is that the statute is vague if the sheriff's interpretation of the statute is correct, i.e., if the statute confers absolute discretion upon sheriffs. (Petition, ¶ 72). However, as shown above, the statute and its words are perfectly clear. A sheriff may allow all certified process servers to operate in his or her jurisdiction or prohibit all of them from operating therein. Although a certified process server does not necessarily know which, if any, sheriffs will adopt a policy permitting private process service, that fact alone does not render the statute vague. In fact, the statutory language places applicants on notice that not all sheriffs are obligated to allow them to serve process in their counties. For these reasons, O.C.G.A. § 9-11-4.1 is not void for vagueness and Petitioners are not entitled to any relief requested.

Given the statutory discretion vested in Respondents, mandamus simply will not lie, absent a gross abuse of that discretion. O.C.G.A. § 9-6-21(a); *Tamaroff v. Cowen*, 270 Ga. 415, 511 S.E.2d 159 (1999). As demonstrated in the following section, no such gross abuse has occurred in this case.

D. RESPONDENTS HAVE NOT ABUSED THEIR DISCRETION UNDER O.C.G.A. § 9-11-4.1 IN DENYING CERTIFIED PROCESS SERVERS PERMISSION TO SERVE PROCESS IN THEIR RESPECTIVE COUNTIES.

It would be improper for the Court to issue a writ of mandamus in this action because Respondent sheriffs have not 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.*, 291 Ga. at 700-01. To the contrary, Respondents have articulated a number of public safety and other considerations leading to their policy decisions not to allow certified process servers to work in their jurisdictions.

“[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; Gulledge Deposition, pp. 18-19).⁴ Cobb County Sheriff Neil Warren also expressed concern over the potential for violence where non-uniformed private process servers attempt to serve process.⁵ 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 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.⁶

Many Respondents were apprehensive of the inadequate accountability and oversight available to ensure appropriate behavior by certified process servers.⁷ While O.C.G.A. § 9-11-4.1 authorizes sheriffs to decide for themselves whether certified process servers will be allowed to

⁴ 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.

⁵ “... 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).

⁶ “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).

⁷ *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.

serve process in their counties, should they do so, the law does not grant sheriffs direct or indirect control over the process servers. For a sheriff to attempt to address inappropriate behavior and seek revocation of a process server's certification, he or she would be required to bring a "complaint", i.e. a lawsuit, in Superior Court. O.C.G.A. § 9-11-4.1 (c).⁸ 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.⁹

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.¹⁰ 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

E. 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.

Petitioners seeks a declaration that providing sheriffs with authority to determine whether certified statewide process servers are allowed to serve process in their jurisdictions effectively nullifies the certification process and, therefore, amounts to an unconstitutional delegation of legislative authority to the sheriffs. (Petition, ¶¶ 57-58). However, 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). “While the constitution declares that the three departments of government shall be separate and distinct, this separation is not, and cannot, from the nature of things... be total.” *Mayor &c. City of Americus v. Perry*, 114 Ga. 871(4), 40 S.E. 1004, 1008 (1902).

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.¹¹ 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).

¹¹Respondents show that the certification process has not been “nullified” by granting discretion to individual sheriffs since a few have permitted certified process servers to operate within their counties. (See Deposition of Sheriff Gullede, p. 27). Just as the Legislature intended the statute to operate, a small number of Georgia sheriffs have considered the needs of their individual counties and found it desirable to permit certified process servers to conduct service in their jurisdictions.

Because the presence of certified process servers “impacts” the sheriffs of this state, the statute does not constitute an impermissible delegation of legislative authority. *See Ward v. City of Cairo*, 276 Ga. 391, 393, 583 S.E.2d 821, 823 (2003) (noting that “[t]he separation of powers doctrine is sufficiently flexible to permit practical arrangements in a complex government,” the Georgia Supreme Court held that the statute permitting Chief Judges to enter into probation services contracts, provided that the county governing authority approved the contract, did not constitute an impermissible delegation of judicial authority to the county governing authority because the contract would invariably “impact” the governing authority).

Because 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 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.

F. BECAUSE CERTIFIED PROCESS SERVERS HAVE NO VESTED PROPERTY OR LIBERTY INTERESTS PROTECTED BY DUE PROCESS, RESPONDENT SHERIFFS NEED NOT PROVIDE SERVERS WITH NOTICE AND A HEARING BEFORE DENYING PERMISSION TO SERVE PROCESS IN THE SHERIFFS’ RESPECTIVE COUNTIES.

Petitioners seek declarations that, to satisfy their alleged due process rights, sheriffs are required to promulgate and publish objective criteria for allowing or prohibiting certified process servers from actually serving process, are required to approve (absent specified just cause) requests from certified process servers to actually serve process, and are required (upon denial of

requests) to provide notice and a hearing to the “would-be” certified process server (Petition, ¶ 62, Counts Two and Four). Because Petitioners have no constitutionally protected property or liberty interest, such a declaration regarding their due process rights would be improper.

“To establish a violation of procedural due process, a party must show that it has been deprived of a constitutionally protected property interest; through state action; and the procedure for doing so was constitutionally inadequate.” *A.A.A. Always Open Bail Bonds, Inc. v. DeKalb Cnty., Georgia*, 129 F. App'x 522, 523 (11th Cir. 2005). In *A.A.A. Always Open*, the Eleventh Circuit noted that a mere “unilateral expectation” is insufficient to create a protected property interest. *Id.* at 523. Rather, protected property interests “inure to already acquired benefits.” *Id.* at 524. The Eleventh Circuit also discussed the effect that governmental discretion has upon purported property rights, noting that the existence of such a right may be dependent upon the discretion of a decision maker and that Georgia sheriffs have “broad statutory discretion which is plainly evident in Georgia statutes.” *Id.*; *see also, New York State Nat. Org. for Women v. Pataki*, 261 F.3d 156, 164 (2d Cir. 2001)(“Where . . . a purported property interest is contingent on the exercise of executive discretion, no legitimate claim of entitlement exists.”).

Both the Supreme Court of Georgia and the Eleventh Circuit have determined that there is no reason to differentiate between an alleged property interest and an alleged liberty interest in terms of analysis. *Joiner v. Glenn*, 288 Ga. 208, 702 S.E.2d 194 (2010), *Cotton v. Jackson*, 216 F.3d 1328, 1330-1331 n. 1 (11th Cir. 2000). As with the alleged property interest asserted by Petitioners, any liberty interest to pursue the “common occupations of life” cannot be inchoate, amount to a mere expectancy, or be dependent upon a government official’s discretion. *See A.A.A. Always Open Bail Bonds, Inc.*, *supra*.

Until a sheriff determines that certified process servers will be permitted to operate within his or her county, the process server has, at best, only a unilateral expectation. As such, Petitioners cannot show that they have been deprived of a constitutionally protected property (or liberty) interest, and the Court should decline to issue a declaratory judgment as to their non-existent due process rights.

G. FINDING THE STATUTE UNCONSTITUTIONAL WOULD REQUIRE IT TO BE STRICKEN IN ITS ENTIRETY.

As previously discussed, Petitioners purport to challenge the constitutionality of O.C.G.A. § 9-11-4.1 on the grounds that it is unconstitutionally vague and constitutes an impermissible delegation of legislative authority. (Petition, Counts One and Two). Assuming *arguendo* that court were to find any portion of the statute unconstitutional, the entire statute would fall since the conferral of discretion on each of the State's 159 sheriffs is an integral aspect of the statutory scheme. *Gwinnett Cnty. Sch. Dist. v. Cox*, 289 Ga. 265, 276, 710 S.E.2d 773, 782 (2011); *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975); *Murphy v. State*, 233 Ga. 681, 212 S.E.2d 839 (1975); *Fortson v. Weeks*, 232 Ga. 472, 208 S.E.2d 68 (1974); *Elliott v. State*, 91 Ga. 694, 17 S.E. 1004 (1893).

When a statute is challenged as running afoul of the constitution, the following legal analysis is triggered:

When a statute cannot be sustained as a whole, the courts will uphold it in part, when it is reasonably certain that to do so will correspond with the main purpose which the legislature sought to accomplish by its enactment, if, after the objectionable part is stricken, enough remains to accomplish that purpose. But if the objectionable part is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it.

Elliott, 91 Ga. at 696. Stated differently, the issue becomes whether the unconstitutional and valid portions of a statute are “mutually dependent upon each other.” *Carter v. Carter Coal Co.*, 298 U.S. 238, 313, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) (cited in *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363, 254 S.E.2d 315 (1979)). The issue is whether the statute minus the unconstitutional provision corresponds with and is true to the legislature’s intent. *State v. Jackson*, 269 Ga. 308, 312, 496 S.E.2d 912, 916-17 (1998).

An examination of the statute 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.¹² 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, or give effect to that purpose.’” *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275, 637 S.E.2d 659, 662 (2006)(quoting *Jackson*, 269 Ga., 312).

Judicially eliminating an entity the General Assembly intended to have a significant role in the process is not a result the Georgia Supreme Court countenances. *See City Council of Augusta*, 254 S.E.2d at 320(holding it would be inappropriate to “re-write the statute to eliminate

¹² In 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, 320. Thus, the General Assembly will include 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.

city participation” in a statute that contemplated city participation in a county tax).¹³ “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 is an invalidation of the statute in its entirety.

Thereafter, it would be illogical for mandamus relief to compel compliance with an unconstitutional statute. *See Local 574, Int'l Ass'n of Firefighters, AFL-CIO v. Floyd*, 225 Ga. 625, 628, 170 S.E.2d 394, 396 (1969)(“Since the Union’s complaint is based upon rights asserted under Georgia Laws 1968, page 2953, and since we have ruled that this law is unconstitutional, the trial court correctly dismissed the complaint and denied the mandamus absolute.”).

H. ANY DECLARATION WITH RESPECT TO “GEOGRAPHIC SCOPE” WOULD AMOUNT TO AN IMPERMISSIBLE ADVISORY OPINION.

In casting their claim in Count Five for declaratory relief, Petitioners assert they are in a position of uncertainty as to the “geographic scope” of the sheriffs’ discretion under O.C.C.A. § 9-11-4.1(a). Petitioners specifically request that the court declare that sheriffs in counties other than the county in which the process is issued may not bar certified process servers from serving process that originated in another county. (Petition, ¶¶ 80-82).¹⁴

¹³ Significantly, Petitioners, themselves, recognize that a declaration of unconstitutionality renders the statute null and void: “the statute would be void due to vagueness...” (Petition, ¶ 59).

¹⁴ By way of example, Petitioners would contend that a sheriff in Henry County has no authority to prevent a certified process server who is authorized to serve papers in Troup County from actually serving Troup County papers in Henry County.

Petitioners do not allege that any Respondent sheriff prevented or thwarted anyone from actually serving civil papers in the sheriff's county that originated in another county, and there is no allegation in the petition of any such specific occurrence. (*See* Petition, generally). Therefore, the "geographic scope" issue raised in Count Five is purely "hypothetical, abstract, and academic." *Burton*, 245 Ga. App. at 588. Because Petitioners' claim presents, at best, a question of academic interest and not a justiciable controversy, any declaratory opinion of the court would constitute an improper advisory opinion. *Effingham Cnty. Bd. of Comm'rs v. Effingham Cnty. Indus. Dev. Auth.*, 286 Ga. App. 748, 750, 650 S.E.2d 274, 277 (2007) (vacating trial court's judgment given the absence of a justiciable controversy).

Furthermore, since O.C.G.A. § 9-11-4.1 clearly affords Georgia sheriffs discretion to bar certified process servers from serving process in their respective jurisdictions, there is no uncertainty or question as to the boundaries of the sheriffs' geographical authority. Finally, because the undisputed evidence cannot establish that any of the Respondent sheriffs prevented or thwarted anyone from serving civil papers under the hypothetical scenario presented, none of the named sheriffs can be said to have an interest in the "geographic scope" controversy adverse or antagonistic to that of the Petitioners. *See Pilgrim v. First Nat. Bank of Rome*, 235 Ga. 172, 174, 219 S.E.2d 135, 137 (1975) ("failure to name an adverse party or parties with an antagonistic interest is fatal to justiciability in an action for declaratory relief").

Petitioners claim on this ground must fail, since they have improperly asked the Court to address the abstract meaning of a statute and to address a "possible future contingency" by way of a declaratory judgment. *Burton*, 245 Ga. App. at 588.

I. SHERIFFS HILL AND PIPER ARE ENTITLED TO SUMMARY JUDGMENT AS TO PETITIONERS' COUNT SIX CLAIM FOR MANDAMUS.

Petitioners have singled out Sheriffs Hill and Piper with regard to the Count Six mandamus claim by alleging that they have purportedly refused to accept, consider, process and approve a single application for state-wide certification pursuant to O.C.G.A. § 9-11-4.1. (Petition, ¶¶ 35, 84, 85). The undisputed record evidence in this case demonstrates these allegations are false; there is no genuine issue of material fact as to these claims; and summary judgment should be granted in favor of Sheriffs Hill and Piper as to this mandamus claim.

1. Petitioners' claim for mandamus relief is moot.

Petitioners' claim for mandamus relief against Sheriffs Hill and Piper should be denied as moot because, undisputedly, all of the individual Petitioners have already been approved for state-wide certification as process servers under O.C.G.A. § 9-11-4.1. (James T. Norris Deposition, p. 85, l. 16 to p. 86, l. 14, Exhs. 13 and 14). As a result, any writ of mandamus issued against Sheriffs Hill and Piper in this case concerning acceptance, processing and approval of any applications for state-wide certification regarding any individuals (including but not limited to Petitioners or any non-party) who have already had their respective applications accepted, processed and approved would truly be an exercise in futility that would not accomplish anything or change the status of Petitioners. For this reason alone, Petitioners' Count Six mandamus claim should be denied as moot, and summary judgment on said claim should be granted in favor of Sheriffs Hill and Piper.

2. There is no competent evidence demonstrating that Sheriffs Hill or Piper have refused to accept and process applications for state-wide certification.

The Count Six mandamus claim also fails because Petitioners cannot establish that Sheriffs Hill or Piper have refused to or are currently refusing to follow O.C.G.A. § 9-11-4.1(b) in accepting, reviewing and processing applications for state-wide certification in accordance with the statute. Both sheriffs (who have only held office since January 1, 2013) have testified that they are aware of the statute requiring them to accept and process complete applications for state-wide certification that are submitted to them, but that they have not received any such applications since taking office. (Hill Deposition, p. 32, ll. 9-13; Piper Deposition, p. 19, l. 3; p. 47, ll. 3-4; Piper Aff., ¶¶ 3-6; Hill Aff., ¶¶ 4-10). Petitioners do not have any competent evidence demonstrating that Sheriffs Hill and/or Piper actually received or were aware of any applications for state-wide certification since the January 1, 2013 commencement of their respective terms of office, that either sheriff refused to accept and process any applications for state-wide certification, or that either sheriff authorized any subordinates, who are not final decision-makers, to refuse any applications for state-wide certification.

Therefore, Sheriffs Hill and Piper are also entitled to summary judgment as to the Count Six mandamus claim based on the undisputed facts of record.

3. Petitioners are not entitled to mandamus based on alleged past illegal acts.

Even if the Court should determine that Petitioners' mandamus claims are not barred based on mootness or that Petitioners have presented with competent rebuttal evidence showing that Sheriffs Hill and Piper have refused to accept prior applications for state-wide certifications under O.C.G.A. § 9-11-4.1(b), Sheriffs Hill and Piper are still entitled to summary judgment

because the extraordinary writ of mandamus cannot be issued to compel the undoing of acts already done or the correction of wrongs already perpetrated, even if the past action was clearly illegal. *Hilton Const. Co., Inc.*, 245 Ga. at 540; *Wilson v. Sanders*, 222 Ga. 681, 685, 151 S.E.2d 703 (1966); *Brissey v. Ellison*, 272 Ga. 38, 39, 526 S.E.2d 851 (2000); *Hunter v. George*, 265 Ga. 573, 574, 458 S.E.2d 830, 831 (1995).

Petitioners' claims for mandamus relief concern the alleged past acts of Sheriffs Hill and Piper in refusing to accept and consider applications for state-wide certification rather than any allegations or competent evidence demonstrating that Sheriffs Hill and Piper are currently refusing to accept Petitioners' applications for state-wide certification.¹⁵ In the absence of any competent evidence (or even allegations) that Sheriffs Hill and Piper are *currently* not in compliance with O.C.G.A. § 9-11-4.1(b), Petitioners' claim seeking the extraordinary writ of mandamus based on purported unlawful acts alleged to have already been done must be dismissed as a matter of law. For this reason, as well as any of the above and foregoing reasons, Sheriffs Hill and Piper are entitled to the grant of summary judgment as to Petitioners' Count Six mandamus claim.

J. PETITIONERS ARE NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO O.C.G.A. § 13-6-11.

Petitioners seek attorney's fees pursuant to O.C.G.A. § 13-6-11. To be entitled to fees under that statute, one of the following three conditions must be present: (1) the defendant acted in bad faith; (2) the defendant has been stubbornly litigious; or (3) the defendant has caused

¹⁵ Both Sheriff Hill and Sheriff Piper have testified that, if they were to receive an application pursuant to O.C.G.A. § 9-11-4.1(b)(1) and such application was complete, they or their designees, would process and approve that application. (Piper Aff., ¶ 4; Hill Aff., ¶ 5).

Plaintiff unnecessary trouble and expense. *Altamaha Convalescent Ctr., Inc. v. Godwin*, 137 Ga. App. 394, 396, 224 S.E.2d 76, 78 (1976). Additionally, a party must have obtained an award of damages or other affirmative relief on its underlying claims to successfully claim attorney's fees. *Benchmark Builders, Inc. v. Schultz*, 289 Ga. 329, 330, 711 S.E.2d 639, 640 (2011). As shown above, Petitioners are not entitled to any relief in this case. Therefore, attorney's fees under O.C.G.A. § 13-6-11 are not permitted. However, attorney fees would not be appropriate even if Petitioners prevailed on one or more of their Counts.

1. Respondent sheriffs have not acted in bad faith.

As evidenced throughout this brief, Respondent sheriffs acted lawfully in exercising their legislatively conferred discretion to deny certified process servers the right to serve process in their counties (unless, of course, they are otherwise court-appointed). It was not the sheriffs' responsibility to question the constitutionality of the statute's plain language, as that duty is reserved for the judicial branch. *See* 1983 Ga. Const., Art. I, Sec. II, Par. III (“[t]he legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided”; *see also, Adams v. Georgia Dep’t of Corr.*, 274 Ga. 461, 462, 553 S.E.2d 798, 799-800 (2001) (“[t]he General Assembly enacts the laws. The judiciary interprets those laws and, when it is necessary to do so, determines the constitutionality of legislative enactments. Those in the executive branch... enforce the statutes passed by the General Assembly until such time as they are amended or held to be unconstitutional by the courts”). Petitioners cannot seriously contend in this lawsuit, which is partially based on the separation of

powers doctrine, that the Respondent sheriffs had the power to invade the province of the judiciary by anticipatorily adjudicating the constitutionality of O.C.G.A. § 9-11-4.1.

Assuming *arguendo* that a disingenuous interpretation of a statute could constitute requisite “bad faith” under O.C.G.A. § 13-6-11, not only is the sheriffs’ reading of the statute objectively reasonable, it is compelled by the statute’s plain language. *See* Section C, *supra*. It is a “well settled principle that public officials shall be presumed to have performed their duties and acted in good faith unless clearly proven otherwise.” *Richmond Cnty. Hosp. Auth. v. Richmond Cnty.*, 255 Ga. 183, 192, 336 S.E.2d 562, 569 (1985)(citations omitted). Nothing in the record would enable Petitioners to overcome that strong presumption in this case.

2. *Respondent sheriffs have not been stubbornly litigious.*

Because the source of Petitioner’s controversy is a statute enacted by the General Assembly, it is difficult to comprehend what steps the sheriffs could have taken to avoid this litigation (with the exception of interpreting O.C.G.A. § 9-11-4.1 in the erroneous manner that Petitioners are advocating). The reality is that Petitioners are challenging the statute, and the only recognized method for having a state statute declared unconstitutional is by filing a lawsuit and serving notice upon the Attorney General. O.C.G.A. § 9-4-7. Even if a consent order were a viable option, the same would have limited efficacy because only 7 of the 159 sheriffs in the State would be bound by it. Thus, Petitioners should not be heard to complain that this suit results from Respondents’ litigiousness when Petitioners clearly instituted the suit to address the constitutionality of a statute.

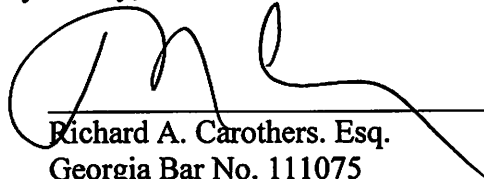
3. *Respondent sheriffs have not caused Petitioners unnecessary trouble and expense.*

As shown above, Petitioners filed this lawsuit seeking a declaration that O.C.G.A. § 9-11-4.1 is unconstitutional. Because the sheriffs are taking the most expedient route to securing a judicial ruling through the filing of this motion, they cannot be accused of taking steps to subject Petitioners to any unnecessary expense.

IV. CONCLUSION

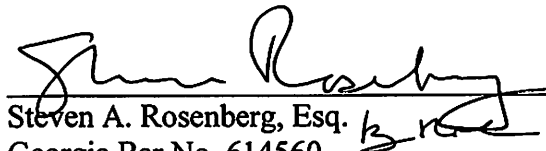
For the reasons stated above, Respondents request that this Court grant their Motion for Summary Judgment and deny Petitioners' requests for relief in their entirety.

Respectfully submitted, this ¹¹~~10~~th day of July, 2014.



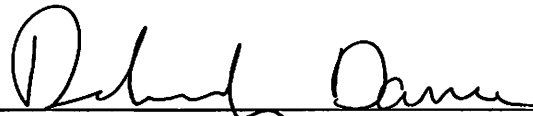
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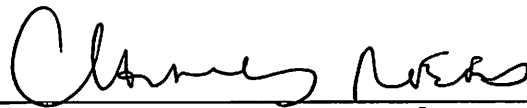
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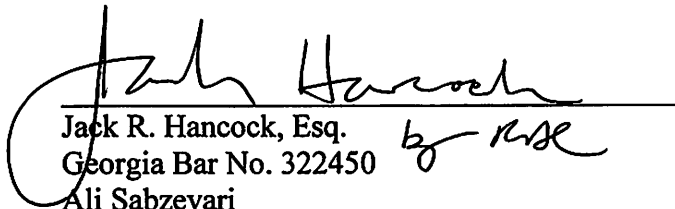
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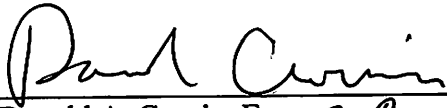
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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 **Brief in Support of Respondent Sheriffs' 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:

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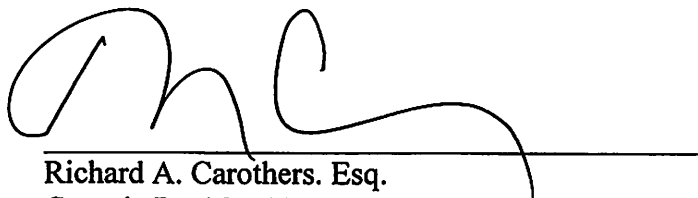
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