IN THE SUPREME COURT OF GEORGIA

GEORGIA ASSOCIATION OF PROFESSIONAL PROCESS SERVERS; et al.,	)	
Petitioners/Appellants,	)	
v.	)	CASE NO.: S17A1079
THEODORE JACKSON, as Sheriff of Fulton County, et al;	)	
Respondents/Appellees.	)	

RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLEES

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I. APPELLEES' BLANKET BAN ON CERTIFIED SERVERS IS AN ARBITRARY, CAPRICIOUS AND UNREASONABLE EXERCISE OF THEIR DISCRETION AND, THUS, IT SUPPORTS APPELLANTS' MANDAMUS CLAIM.

The Appellee Sheriffs' unabashed position is clearly articulated in their most recent Supplemental Brief to the Honorable Supreme Court. The Sheriffs contend that there "are no restrictions on their discretion" apart from due process and equal protection determinations. (Supplemental Brief p. 4, 7.) Appellees take this position while admitting that under Georgia law, a writ of mandamus will lie to remedy public officials' gross abuse of discretion that has occurred in the context of state action that is arbitrary, capricious and unreasonable. *Id.* at 2. Instead of citing evidence that they have not acted in an unreasonable, arbitrary or capricious manner, Appellees make the circular argument that because their discretion is unlimited, they are allowed to make an "all-or-nothing policy determination" without being required to justify the supposed policy. Under Appellees' theory, the Sheriffs are allowed to make that all-or-nothing decision affecting the livelihood of a class of people who have obtained statewide licensure in an arbitrary, capricious and unreasonable manner with impunity. That flies in the face of more than a century of Georgia law.

Simply referring to an exercise of statutorily conferred discretion as a "policy determination" does not insulate the state action from the prohibition

against arbitrary, capricious and unreasonable acts by public officials. Rather, the Court must look at the ostensible rationale for the decision. When examining whether a course of action by a public official was arbitrary, the Georgia courts rely on the Standard Dictionary definition of the term, finding that arbitrary "**means, fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic**." *Tanner Med. Ctr., Inc. v. Vest Newnan, LLC*, 337 Ga. App. 884, 889, 789 S.E.2d 258, 262 (Emphasis added)(2016); *Northeast Georgia Med. Ctr., Inc. v. Winder HMA, Inc.*, 303 Ga. App. 50, 58, 693 S.E.2d 110, 116 (2010) (Emphasis added) ; *Sawyer v. Reheis*, 213 Ga. App. 727, 730, 445 S.E.2d 837, 840 (1994) (Emphasis added) (citing *Central of Ga. R. Co. v. Mote,* 131 Ga. 166, 176(8), 178, 62 S.E. 164 (1908)).

Because the Appellants alleged that the Sheriffs' implemented blanket ban on Certified Servers was an arbitrary and capricious action, the trial court was required to determine whether there was a rational basis for the decision at issue. *Northeast Georgia Med. Ctr., Inc. v. Winder HMA, Inc.*, 303 Ga. App. 50, 58, 693 S.E.2d 110, 116 (2010); *Dep't of Cmty. Health, Div. of Health Planning v. Gwinnett Hosp. Sys., Inc.*, 262 Ga. App. 879, 982, 586 S.E.2d 762, 766 (2003). A decision lacking any evidentiary or legal support is without question arbitrary.

Segars v. Cleland, 255 Ga. App. 293, 294–95, 564 S.E.2d 874, 877 (2002). The Sheriffs never articulated a rational basis that is supported by facts or evidence for their action beyond their dislike of the statute, and they have not done so in their Supplemental Brief.

Here, the sworn testimony of the Sheriffs establishes that their decision to immediately join in a statewide conspiracy to ban Certified Servers from using the certification that the General Assembly created in order to facilitate service of process for Georgia citizens in Georgia Courts is the paradigm of arbitrary state action. In their Supplemental Brief, Appellees raise the same bogus and unsupported "policy considerations" that were debunked by the trial court below.

For example, former DeKalb County Sheriff Thomas E. Brown testified that "I voted along with [the other Sheriffs], but, quite frankly, I could have cared less…. I really didn't care." (R1237-1239; Brown Dep. p. 20-22.) He admitted that he simply "followed the lead" of the Sheriff's Association in banning Certified Servers from working in DeKalb County. (R1266; Brown Dep. p. 49.) Appellees' Supplemental Brief does not attempt to justify Brown's actions. Appellees claim that Sheriff Hill banned Certified Servers from working in Clayton County due to the "potential for violence" and apprehension over inadequate oversight. (Supplemental Brief p. 8-9.) Appellees ignore, however, that Hill testified that he was unaware of any violent incident or other altercation with the approximately 80

private process servers approved by judges to serve in Clayton County at any time during his tenure as Sheriff, while there admittedly had been such issues with deputy sheriffs under his supervision. (R1537-1539; Hill Dep. p. 9-11.) They also ignore Hill's testimony that he had "not really" reviewed O.C.G.A. § 9-11-4.1 before making the "policy determination" that there was insufficient training, oversight or accountability for Certified Servers. (R1560; Hill Dep. p. 32.)

Appellees also point to Sheriff Conway's interrogatory response that service of civil process "has the potential to devolve into violent encounters." (Supplemental Brief p. 7.) But they again ignore his actual sworn testimony that public safety was not one of his considerations in banning Certified Servers without any consideration of their individual qualifications and experience. (R1320-1321; Conway Dep. p. 15-16.)

> Q. Do you also consider public safety concerns, that being that certified process servers would have a greater chance of a violent encounter or an encounter that would be dangerous, than deputy sheriffs doing the same work?
>
> A. Not in making my decision.
>
> Q. You don't consider that?
>
> A. No.

(R1342; Conway Dep. p. 37.) Appellees ignore that Conway testified that he was aware of only one complaint against judicially appointed process servers in Gwinnett County. (R1330; Conway Dep. p. 25.) And they similarly ignore his

testimony that he has no rational basis to believe that Certified Servers would be subject to a higher rate of complaints than deputy sheriffs. (R1333, 1341; Conway Dep. p. 28, 36.)

Appellees also rely heavily on Sheriff Gulledge's alleged "safety concerns" when it relates to Certified Servers serving process in Paulding County. (Supplemental Brief p. 7-8.) But once again they ignore his actual testimony. Sheriff Gulledge testified that he is unaware of any complaints against private process servers working under judicial appointment in Paulding County. (R1497-1498; Gulledge Dep. p. 31-32.) He admitted there was no rational basis for his decision.

> Q. So there's no objective basis for your belief that private process server would do a bad job?
>
> A. That would be correct.

(R1497-1498; Gulledge Dep. p. 31-32.)

In their Supplemental Brief, Appellees also attempt to manufacture a legitimate reason for Sheriff Jackson's refusal to allow Certified Servers in Fulton County. They cite Jackson's testimony and claim that he made a rational decision to preclude Certified Servers based on concerns about background vetting of them. (Supplemental Brief p. 9.) What they ignore from this testimony is that Sheriff Jackson was not testifying about his particular concerns; he was merely parroting what the Sheriffs' Association told him.

> Q. And [the Sheriff's Association] recommended you not approve any of them?
>
> A. Well, the way they stated it is if you approve one, you approve all. And since you have no control over all of them, then there were some liability issues that we considered.
>
> Q. Well, what was the liability?
>
> A. That if a process server had identification from a sheriff's office and acted accordingly and did something, say, unprofessional -- I won't use the term illegal -- that it could be, the sheriff's office could be liable for their actions since they approved them.

(R1402-1403; Jackson Dep. P. 20-21.) It is readily apparent that Sheriff Jackson also was just following the lead of the Sheriff's Association without any independent rationale of his own to justify his ostensible exercise of his discretion.

In order for government action not to be arbitrary and capricious, there must be some rational basis for the action. The only alternative would be elected officials like the Sheriffs wielding nearly unlimited power. Again, Appellees clamor that they have made "policy determinations." But policy decisions are like any other government action. Policies cannot be arbitrary. A hallmark of arbitrariness under Georgia law is an elected official acting in a "tyrannical" or "despotic" manner. *Tanner Med. Ctr., Inc.*, 337 Ga. App. at 889; *Northeast*

Georgia Med. Ctr., Inc., 303 Ga. App. at 58; *Sawyer*, 213 Ga. App. at 730.[1]

Here, we have at least 157 Sheriffs admittedly acting this way. As Sheriff Gulledge so aptly put it:

> Q. Are you a higher authority than the Georgia General Assembly in Paulding County?
>
> A. In Paulding County, I would say yes.

(R1495; Gulledge Dep. p. 29.) It is difficult to imagine a more despotic position displayed by a public official.

Again, the trial court recognized the irrational nature of the Sheriffs' purported reasons for banning Certified Servers in their counties, finding that "**[t]he Sheriffs' Public Safety concerns were imaginary, or at best, hypothetical …. Everything else involved vague, generalized concerns**." (Order, p. 4, n. 6; R 8.) All of the supposed policy justifications in Appellees' Supplemental Brief were raised before the trial court and discredited there. But the trial court erred when it failed to take the final step to determine whether the lack

[1] Further evidence of the arbitrary, capricious and irrational basis for the Sheriffs' "policy determinations" is their unlawful prohibition of Certified Servers serving process on persons residing in counties that are not the county for which the papers are filed. Whatever decision is made by a sheriff of the county for which the papers are filed can have no legal effect on Certified Servers serving persons residing in counties other than the county in which the papers are filed. The statute is completely silent on this issue. This silence lends itself only to the decision that Sheriffs have no authority over Certified Servers who are serving persons in counties other than the county in which the papers are filed. Thus, the Court should specifically find that Sheriffs have no such authority. Assuming, arguendo, that Sheriffs have any authority to prohibit service by Certified Servers in the county for which the papers are filed, such authority ends at the county line. And, since the statute clearly fails to give any authority over Certified Servers in the counties where papers are not filed, there will always be Certified Servers serving process in all Georgia counties. The Legislature's grant of such authority to Certified Servers is unencumbered by any limiting language in the statute, and clearly raises the bar for rational policy decisions made by Sheriffs of counties in which the papers are filed.

of a rational basis for the Sheriff's blanket ban on Certified Servers demonstrated that the conspiracy was in fact a gross abuse of discretion by the Sheriffs. At a minimum, this case should be returned to the trial court for such a determination.

II. O.C.G.A. § 9-11-4.1 is Not a Local Option Statute.

In their Supplemental Brief, Appellees cite to multiple local option statutes for the proposition that there is nothing unique under Georgia law about the Sheriff's supposed unfettered discretion to effectively nullify the statewide certification program established by O.C.G.A. § 9-11-4.1. The statutory scheme developed for the creation of the Certified Server programs, however, differs vastly from those local option laws.

The statutory schemes developed under O.C.G.A. § 36-62-4 and O.C.G.A. § 31-7-72 are not analogous to the Certified Server program established by O.C.G.A. § 9-11-4.1. Those statutes involve the ability of the highest level of county or municipal governments to activate development or hospital authorities within their counties by following specific, defined steps. Under those statutes, the local authorities contemplated by the statutes do not come into existence and cannot act until the appropriate governing body follows the proper procedure to declare that there is a need for the authority to function. O.C.G.A. § 36-62-4(c) ("No authority shall transact any business or exercise any powers under this chapter until the governing body of the county or municipal corporation, **by proper resolution**,

declares that there is a need for an authority to function in the county or municipal corporation") (emphasis added); O.C.G.A. § 31-7-72(a) ("No authority created under this Code section shall transact any business or exercise any powers under this Code section until the governing body of the area of operation shall, **by proper resolution**, declare that there is need for an authority to function in such county or municipal corporation") (emphasis added). By requiring that the authorities be established by a proper resolution, the statutes also place constraints upon the local governments' exercise of the discretion given to them under the statutes.

Similarly, O.C.G.A. § 42-8-101 is not analogous to the system established by the Certified Server Statute. O.C.G.A. § 42-8-101 allows counties to contract with private parties for probation services at the request of the chief judge of any court in the county. Like the development and hospital authorities above, this statute allows the county to bring something into existence that was not there before the county acted. The statutes do not create the specific county authorities or contractual arrangements. They give the county a means to do so.

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

bond, U.S. citizenship and a criminal background check. Absent "good cause," all persons satisfying these criteria are legally entitled to state certification as a Certified Server. O.C.G.A. §9-11-4.1(a). It is the Sheriffs' duty to then certify the applicants as qualified and authorized to serve process as Certified Servers upon the presentation of a completed application evidencing they have met all the requirements for certification under O.C.G.A. § 9-11-4.1 and the implementing rules.

As such, unlike the general discretion given to the highest level of county or municipal authority to establish specific authorities or hire probation companies under the local option statutes, the procedure for becoming a Certified Server is established in totality by O.C.G.A. § 9-11-4.1. Certification is akin to licensure. And certification is mandatory under the Statute. "A sheriff . . . **shall review** the application, test score, criminal record check, and such other information or documentation as required by that sheriff and determine whether **the applicant shall be approved for certification and authorized to act as a process server** . . . ." O.C.G.A. 9-11-4.1(b)(2) (Emphasis added). Certification and authorization are one step. The Certified Server is automatically authorized to serve upon certification. They have just been denied that right by the Sheriffs with no rational justification or the denial. That is the gross abuse of discretion that must be corrected by the issuance of a writ of mandamus.

III. CONCLUSION

For the foregoing reasons, and those set forth more fully Appellants' Brief, Appellants respectfully request that the Court reverse the trial court's Order as requested by Appellants.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

This will certify that on this date I served a copy of the within and foregoing **APPELLANTS' RESPONSE TO SUPPLEMENTAL BRIEF OF APPELLEES** on all parties to this matter by depositing a true copy of same in the U.S. Mail proper postage prepaid, addressed to counsel of record as follows:

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