

IN THE COURT OF APPEALS
STATE OF GEORGIA

KATHI MILLS,)
)
 Appellant,)
)
 VS.) Case No. A03A2481
)
 ATLANTA HUMANE SOCIETY and)
 Society for Prevention of)
 Cruelty to Animals, Inc., and)
 BILL GARRETT,)
)
 Appellees.)

APPELLANT KATHI MILLS' REPLY BRIEF

Introduction

This brief is filed in response to the brief of Appellees Atlanta Humane Society and Bill Garrett filed September 8, 2003, in Appellant's cross-appeal. Briefing has been extensive in this case because, in addition to the appeal and cross-appeal, this Court required the parties to address the additional issue of supplementing the record with the videotape that the lower court initially failed to transmit. Accordingly, in an effort to avoid redundancy, Appellant relies on all of the statements of fact and arguments made in her earlier briefs in this cross-appeal as well as the main appeal and the brief on the videotape issue.

This reply will only address factual issues newly raised in Appelllles' brief that are taken so out of context as to become mischaracterizations of Appellant's statements. In addition, Appellant will provide rebuttal legal argument.

I. Factual Reply

Appellant does not dispute making the statements at issue in this case, but disagrees that they are defamatory, lacked basis in fact, required verification, or were motivated by malice.

On pages 5 and 6 of their brief, Appellees list seven statements, most pulled out of context from Appellant's deposition, that they contend show that the comments at issue in this case are not hyperbole and that Appellant Mills meant what she wrote. Appellant does not dispute that she meant what she wrote, but denies that the seven statements listed in this brief show that the comments that gave rise to this case were not hyperbole or otherwise protected speech.

The first statement listed in Appellees' brief on page 5 is regarding the Humane Society engaging in deceit. Note that none of the allegedly defamatory statements at issue in this case have anything to do with an allegation of deceit and that this

statement is contained only in the deposition. Thus, it is not one of the alleged defamatory statements.

The context of the deceit statement in the deposition is as a response to a question by Appellees' counsel asking why Appellant believed the contents of the Whistleblower 2 television report were true and did not require independent verification before she commented on them. R-652-54. Appellant responded that she had not, prior to the program, been aware that the Humane Society had claimed to have a 24-hour veterinary clinic and ambulance service. R-653-54. However, Appellant said she believed that the Humane Society's adoption figures were bloated and that the Humane Society had incorrectly told persons that they were a no-kill shelter based on statements a dozen people had made to her over the years that she has been finding homes for cats. R-653. Thus, the deceit to which Appellant is referring is in regard to an allegation that AHS misled persons into believing they operated a no-kill shelter and that allegation provided a basis for her belief that the television broadcast was accurate. R-653-55.

Thus, in context, this statement goes to establish a good-faith basis for Appellant's commentary about the television broadcast.

Statements two through four on pages 5 and 6 of Appellees' brief have to do with Appellant's continuing to stand behind several of the statements at issue in this case and are not disputed.

Statement 5 on page 6 of the brief regarding "speculation," "no basis in fact" and conjecture is not placed in any context. Those terms were used in response to questioning about the third allegedly defamatory statement set out in the complaint in which Appellant said she was "pretty sure that Fulton County pays the Atlanta House of Slaughter on a per-animal basis," and then sets out hypothetical ways to "maximize profits" under such a system. R-725-26.

In the deposition, Appellant admits that she speculated that Fulton County paid according to the number of animals impounded, had no specific basis for that statement, and that the ensuing hypothetical regarding maximizing profits was her conjecture. R-725-26.

These remarks were exaggerated and non-literal commentary highlighting what Appellant believes was the poor job Appellees were doing running an organization that killed thousands of animals year on behalf of Fulton County. Whether there was a factual inaccuracy in Appellant's statement of the formula by which the Atlanta Humane Society received its funding from Fulton County is immaterial and is not defamatory.

Statement 6 on page 6 of the brief regarding Appellant's agreement that she conducted no investigation of the facts upon which she based her statement is also not placed in the deposition's context. It occurred during a discussion of Appellant's disbelief that 80 percent of the animals brought to the shelter were so sick or injured as to require euthanasia, as has already been pointed out to this Court on page 12 of Mills' appellee brief. R-725-27.

Statement 7 on page 6 of Appellees' brief, regarding the importance of what is true or not, was made in the context of counsel asking whether Appellant called the Humane Society to find out if the allegations in the WSB-TV report were true. Appellant responded that she did not because she already had an opinion corroborated by the report due to the differences

between the way the AHS operates as compared to rescue organizations. R-668-69. (The larger context of this discussion also is addressed on page 12 of Mills' appellee brief.) Again, this deposition discussion goes to establish a good-faith basis for Appellant's commentary about the television broadcast.

II. Argument and Citation of Authority

Although this case presents questions of first impression, the legal issues are fairly straightforward, notwithstanding Appellees' misunderstanding of defamation law¹ as well as the anti-SLAPP statute.

¹For example, Appellees state on page 10 of their brief, "No one responsibly contends that false statements are protected by any Constitutional guarantee of free speech," citing Schenk v. U.S., 249 U.S. 47 (1918). Schenk established the "clear and present danger" doctrine, creating a distinction between protected advocacy and unprotected incitement of violent or illegal conduct. Schenk has nothing to do with the issues raised in this litigation. Moreover, Appellees' assertion overlooks New York Times v. Sullivan, 376 U.S. 254 (1964) (holding false defamatory speech is protected under the First Amendment, absent a showing of actual malice) and its progeny.

Appellees assert on page 7 of their brief that Appellant is trying "to repeal defamation and establish a constitutional privilege to lie." However, if Appellees have a problem with the effect of the anti-SLAPP statute on defamation law, it is a dispute with the Georgia General Assembly, which enacted these provisions, not with Appellant who seeks to rely on them.

Appellees fail to grasp that there are both procedural and substantive aspects to the verification procedure set out in O.C.G.A. §9-11-11.1, and⁷ that in adopting the anti-SLAPP law, the Legislature also carved out a new conditional defamation privilege in O.C.G.A. §51-5-7 (4).

Thus, it is not enough for Appellees simply to parrot the language of the anti-SLAPP statute in their verifications. The trial Court has a duty under O.C.G.A. §9-11-11.1 (b) to determine whether the suit was filed for the purpose of suppressing a right of free speech or to petition government, or whether it was filed to harass, cause unnecessary delay or needless increase in the cost of litigation.

In this case, the trial court did not go behind the mechanical filing of verifications to examine the motives of the Appellees in bringing suit. Thus, the trial court did not make

the statutorily required determination as to whether the complaint was verified "in violation of this Code section." O.C.G.A. §9-11-11.1 (b).

In addition, O.C.G.A. §9-11-11.1 (b), requires that the complaint be dismissed if the statements were made in good faith and were privileged pursuant to O.C.G.A. §51-5-7 or if the statements were made "in good faith as part of an act in furtherance of the right of free speech or the right to petition the government for redress of grievances under the Constitution of the United States of America or the Constitution of the State of Georgia in connection with an issue of public interest or concern" pursuant to O.C.G.A. §51-5-7(4). O.C.G.A. §9-11-11.1 (b) also requires dismissal of the complaint if the claims are "interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition the government, or harass, or to cause unnecessary delay or needless increase in the cost of litigation" or, if the claims are not "well grounded in fact" or not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

As Appellant has already argued in her appellate brief, the statements at issue in this case clearly fall within the ambit of the anti-SLAPP statute and Appellees plainly are trying to use this litigation to chill her constitutional free-speech rights. Thus, the trial court was required by statute to strike the claims that were verified in violation of O.C.G.A. §9-11-11.1 (b). See, Hawks v. Hinely, 252 Ga. App. 510, 515 (2001) (holding statute requires claims be stricken if verification is omitted or is deficient and not remedied within the statutory 10-day period).

Moreover, simultaneous to the creation of the anti-SLAPP statute, the Georgia General Assembly carved out a new conditional defamation privilege in O.C.G.A. §51-5-7 (4) providing that “[s]tatements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1.”

As a result, Appellees must do more than simply establish that the statements are defamatory. With the statutory establishment of a conditional privilege, the burden is on the Appellees to show by clear and convincing evidence that the Appellant acted with "actual malice 'that is with knowledge that it was false or with reckless disregard of whether it was false or not.'" Davis v. Shavers, 225 Ga. App. 497, 500 (1997); See also, Dominy v. Shumpert, 235 Ga. App. 500, 506 (1998) (holding that the effect of a conditional privilege is to require Plaintiff to prove actual malice). (This requirement of showing actual malice is separate from the actual-malice requirement triggered by the trial court's finding that Appellee Bill Garrett is a limited purpose public figure.)

Appellees have failed to meet these exacting standards. First, as argued in Appellant's appellate brief, the statements at issue are not defamatory. Second, even if the statements could be found to be defamatory, the Appellees have failed to provide clear and convincing evidence that Appellant knew that the statements were false or made the statements with reckless disregard of whether they were false or not.

As touched on earlier in this brief in the section addressing the factual issues, portions of Appellant's deposition that Appellees assert "make clear her defamatory statements are not hyperbole and that she meant what she wrote," instead establish a good-faith basis for her belief in the accuracy of the WSB-TV reports.

Furthermore, the only allegedly defamatory statement that Appellant admits was based on speculation—that the county paid on a per animal basis—arguably was abandoned by the Appellees at the hearing on the Motion for Summary Judgment, and was not among the three allegedly defamatory statements addressed in the trial court order.

Because Appellees have failed to show clear and convincing evidence of actual malice, summary judgment is appropriate.

"[A] Court ruling on a motion for summary judgment [in an actual-malice case] must be guided by the New York Times' 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists - that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." Barber v. Perdue, 194 Ga.App. 287, 288 (1989). "[W]here a

publication is protected by the New York Times immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case. . . [B]ecause of the importance of free speech, summary judgment is the 'rule,' and not the exception in defamation cases". Louis F. Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440, 448-449 (S.D. Ga. 1976).

Of the cases cited by Appellees in support of their assertion that summary judgment is not appropriate in a defamation case, only Douglas v. Maddox, 233 Ga. App. 744 (1998), involved the actual malice standard. In Douglas, an employer and three of its management employees brought a libel action against a labor union and several of its representatives after they were falsely accused in fliers with having been indicted. Id. The Court of Appeals reversed the grant of summary judgment to the defendants, finding that fact questions existed regarding the actual malice issue. Id. at 746.

Douglas is distinguishable from this case in part because there was no dispute in Douglas that there had been a false allegation of a crime and thus a defamation had occurred if the fliers were circulated with actual malice. In this case,

Appellant strongly disputes that any of her statements were defamatory, thus there is no necessity to reach the actual malice issue.

If the actual malice issue is reached in this case, Douglas is distinguishable because there was evidence in that case that the union organizer knew prior to the publication of the fliers that the proceedings pending against the plaintiffs were civil in nature, but he nonetheless used the word "indicted" knowing it would have a criminal meaning. Id. at 746.

In this case, there is no evidence that Appellant knew that any of the statements she made were false or that she made them with reckless disregard as to their falsity. The one statement that Appellant admits was speculative in nature, that the county paid on a per animal basis, arguably has been abandoned as a claim, and is not defamatory because it is very close to the actual method by which payment was calculated. (Garrett affidavit of 9-16-02, p. 3-4, states that "Fulton County reimburses the Atlanta Humane Society expenses for operating Fulton County Animal Control, per contract, as requested by Fulton County.")

"In determining whether a statement is false, defamation law overlooks minor inaccuracies and concentrates upon substantial truth. A statement is not considered false unless it would have a different effect on the mind of the viewer from that which the pleaded truth would have produced. Minor factual errors which do not go to the substance, the gist, the sting of a story do not render a communication false for defamation purposes." Swindall v. Cox Enterprises, 253 Ga. App. 235, 236 (2002).

Whether Fulton County paid on a per animal basis, or simply reimbursed the Atlanta Humane Society for its actual expenses of operating Fulton County Animal Control, would have no different effect on the mind of anyone reading Appellant's statement.

Conclusion

All of the evidence presented in this case shows that Appellant made statements in good faith on a matter of public concern. Appellant is precisely the type of citizen that the anti-SLAPP law was enacted to protect. Accordingly, Appellant asks this Court to find that Appellees' complaint must be dismissed under the anti-SLAPP statute and to return the case to the trial court for a determination of reasonable attorneys'

fees and expenses. However, if the Court finds that Appellees' complaint is viable under the anti-SLAPP statute, Appellant asks this Court to find that there she is entitled to summary judgment on Appellee Bill Garrett's defamation claims because there are no genuine issues of material fact remaining for trial.

Respectfully submitted this _____ day of September, 2003.

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Certificate of Service

I certify that I have served opposing counsel with a copy of the foregoing Reply Brief, by United States Mail, with sufficient postage, and addressed to the following address:

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