

IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

ATLANTA HUMANE SOCIETY,)
)
SOCIETY OF PREVENTION OF CRUELTY)
TO ANIMALS, INC., and)
)
BILL GARRETT,) Case No. 01-A-13269-1
)
Plaintiffs,)
)
v.)
)
KATHI MILLS,)
)
Defendant.)
_____)

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW, Defendant KATHI MILLS, through undersigned counsel, and requests summary judgment in her favor. In support of this motion, Defendant states as follows:

I. Introduction and Statement of Facts

Beginning in November of 2001, the WSB television (Channel 2) news department broadcast a series of “Whistleblower 2” reports concerning the inadequate performances of the Atlanta Humane Society, its Executive Director, Bill Garrett (“Mr. Garrett”), and Fulton County Animal Control. Exhibit A¹. The reports were extremely critical of the Humane Society’s and Fulton County Animal Control’s nearly total failure to assist authorities in the prosecution of animal cruelty cases, and their poor record for adopting out pets. The reports highlighted the entities’ ineffective history and pointed out that the Atlanta Humane Society, which operates the Fulton County Animal Shelter, has amassed enormous resources during this time. The television

¹ Exhibit A is a VHS videocassette containing the WSB television reports at issue in this case.

exposés confronted Executive Director Mr. Garrett for an explanation of the organizations' failure to assist in the prosecution of animal cruelty cases.

Defendant Kathi Mills ("Ms. Mills"), a professional Internet web site developer, is a pet rescuer and animal rights advocate who watched the WSB Whistleblower reports. Ms. Mills operates an Internet web site called "Kitty Village" to find homes for cats. Ms. Mills has volunteered with Gwinnett County Animal Control, the Humane Association of Georgia, and numerous other animal welfare organizations. Ms. Mills also participates in a members-only, Internet-based animal welfare discussion group called Atlanta Rescue. The purpose of the discussion group is explained as follows:

The SPOT Atlanta Rescue list is a group of Atlanta area dog and cat rescuers who are actively working on projects that will reduce the number of dogs and cats killed in Atlanta area shelters.

This list is used in order to post information about SPOT - Stopping Pet Overpopulation Together, to post messages about dogs and cats in need of rescue at Atlanta area animal shelters and also to post messages about animals in dire need of rescue due to abuse, homelessness, etc. Postings may also be made about topics of interest to animal rescuers in Atlanta. However, postings about animals that are out of state, national petitions, fundraisers for rescue groups, pets lost from the general public and animals that are already safe in a rescue program should not be made.

Subscribers should live in the Atlanta vicinity and should want to become or already be involved in animal welfare, in animal rescue or in SPOT. This group is not for people who want to adopt a dog or cat. We suggest you contact a local shelter or rescue group if you would like to adopt a pet.

See <http://groups.yahoo.com/group/atlantarescue/>.

On November 1, 2001, after watching the first WSB Whistleblower report which was critical of the Atlanta Humane Society, its Executive Director, Bill Garrett, and Fulton County Animal Control, Ms. Mills posted her opinions and commentary of the report to the Atlanta Rescue discussion group. The message, which is attached as Exhibit B, is a summary of the

November 1, 2001 WSB Whistleblower report with a couple of sentences of Ms. Mills' opinion. On November 7, 2001, Ms. Mills posted another message to the Atlanta Rescue discussion group. Exhibit C. Ms. Mills' November 7, 2002 message to the members-only group offers her opinions about the Humane Association of Georgia, Fulton County Animal Control, the Atlanta Humane Society, and Mr. Garrett.

Within the next month or so the WSB news department broadcast more reports critical of the Atlanta Humane Society, its Executive Director, Mr. Garrett, and Fulton County Animal Control. Exhibit A.

On December 21, 2001, the Atlanta Human Society, the Society for the Prevention of Cruelty to Animals, Inc. and Mr. Garrett filed their Complaint in this case against Ms. Mills, alleging that the following statements, quoted from Ms. Mills' November 1, 2001 and November 7, 2002 posts to the Atlanta Rescue discussion group, defamed them:

- (1) “. . . Mr. Kill is also the figurehead president of the Humane Association of Georgia . . .” Exhibit C.
- (2) “I am personally withdrawing my support from that group until they get a leader who does not delight in slaughtering pets for fun and profit.” Exhibit C.
- (3) “I am pretty sure that Fulton County pays the Atlanta House of Slaughter on a per-animal basis. So what would be the best way to maximize profits under this system?
 - (1) Kill the animals in three days or less (legally shown to be less in some cases)
 - (2) Refuse to spay or neuter the animals to make sure a new crop keep coming in [sic].
 - (3) Refuse to hold animals for either cruelty investigations or for rescue groups [sic]
 - (4) Overcrowd the kennels at the non-public facility. Exhibit C.

- (4) “Bill Garrett is not worthy to lick the dog or cat poop off our shoes. He is evil and it is time for the Atlanta rescue community to unite in ending his long and tragic career not only at AHS, but in every pet-related capacity.” Exhibit C.
- (5) “It would be more effective for us to target AHS’ corporate sponsors than the government good ol’ boys. We need to let them know that by subsidizing one of the largest and most disreputable pet slaughter houses in the Southeast, they are alienating the rest of the Atlanta welfare community.” Exhibit C.
- (6) “But it seems to me that he doesn’t bother because they’re just going to be killed in three days anyway.” Exhibit B.

Defendant Mills now requests that this Court grant her summary judgment in the case this based upon the following:

- (1) The Atlanta Humane Society is a governmental entity and is absolutely barred from prosecuting a cause of action for defamation.
- (2) Ms. Mills’ comments are not defamatory.
- (3) Ms. Mills’ statements are figurative hyperbole belonging to a proud tradition of critical commentary and are protected by the First Amendment.
- (4) Each of Ms. Mills’ Comments are either true or were not published with actual malice.

II. Argument and Citation of Authority

A. The Context of Ms. Mills’ Comments and the Profound American Commitment to Protecting Criticism of Government and Government Officials.

1. Ms. Mills’ Comments Concern Important Matters of Public Concern and Must Be Judged Based Upon the Context in Which They Were Published.

As an initial matter, it is important to explain the context within which Ms. Mills’ comments at issue in this case were made. Ms. Mills’ comments consist of factual summaries and commentary concerning the November 1, 2001 WSB television investigative report which was critical of the operation of the Atlanta Humane Society, its Executive Director Mr. Garrett,

and Fulton County Animal Control. The rights of animals are an important and highly controversial topic. The topic was recently the subject of a front-page article of the opinion (“@issue”) section of the Sunday, August 25, 2002 edition of the Atlanta Journal-Constitution.

Exhibit D². This article highlights, among others, the following significant items:

- Thirty-seven states have made certain forms of cruelty to animals a felony; four such laws were enacted this year alone. Georgia's took effect in 2000 and resulted in its first conviction last year, when an Atlanta teenager pleaded guilty to dousing a dog with gasoline and setting it on fire.
- Western religion has traditionally denied that animals have souls, but a plurality of Americans now apparently disagree. Forty-three percent say pets go to heaven, compared with 40 percent who say they don't and 17 percent who don't know, according to a 2001 ABCNews/Beliefnet poll
- In the '80s and '90s, protectionists' protests made fur-wearing controversial and pressured many companies into lessening or halting product testing on animals. With stricter federal controls, the number of animals used in research experiments also declined. Every Western country but the U.S. has stopped experimenting on chimpanzees, for example, and the practice is increasingly rare here.
- Philosophers, who pretty much ignored the subject until the 1970s, have churned out innumerable books and articles weighing ethical issues relating to animals. These in turn have inspired political and personal action for "animal liberation," as Princeton professor Peter Singer's seminal 1975 book was titled.
- Law schools have taken up the issue as well, with more than two dozen in the United States now offering animal-law courses. (Eric Sundquist, Exhibit D).

It is no coincidence that the Atlanta Human Society is Atlanta's oldest non-religious charitable institution. Plaintiff's Complaint, Paragraph 1(a)(ii). Clearly, animals are a very important topic to Americans. Obviously, peoples' opinions vary dramatically concerning the extent to which

² The documents attached as Exhibit D are all articles published in the Sunday, August 25, 2002 edition of the Atlanta Journal-Constitution. The articles have been printed from the Journal-Constitution Internet site for formatting reasons, but the text and photographs are identical to those published in the print edition.

humans should be concerned about the rights of animals; this is precisely why free and open public discussion, in the uniquely American manner, is essential to the debate.

On November 1, 2001, WSB television took part in the debate over the treatment of animals. WSB's first broadcast reported on the funding of the AHS and Fulton County Animal Control and comments from three former employees regarding animal cruelty investigations, 24-hour services, the failure to operate of a pet ambulance, and both organizations' poor adoption records. The November 1, 2001 report began with the following introduction: "The Atlanta Human Society suggests it play a major role in combating animal cruelty – no way say our taxpayers." The essential message was that Fulton County residents are entitled to more for their money from AHS and Fulton County Animal Control. Mr. Garrett was given a chance to explain the organizations poor records several times but gave conflicting explanations. One former employee explained that she asked Mr. Garrett why they do not investigate animal cruelty cases and he explained that they do not investigate such cases because they lose money each time they do so. Several more reports followed on WSB and on other local television news programs. Eventually members of the public even addressed Fulton County in an attempt to have an organization other than the AHS administer Fulton County Animal Control. Exhibit A. WSB's report addressed Plaintiffs' failures and the public was outraged.

Defendant Kathi Mills has a long history of participation in animal welfare organizations. As mentioned above, Ms. Mills operates an Internet web site called "Kitty Village" to find homes for cats, and has volunteered with Gwinnett County Animal Control, the Humane Association of Georgia, and numerous other animal welfare organizations. After watching the WSB news reports which were so critical of the Atlanta Humane Society, its Executive Director Bill Garrett, and Fulton County Animal Control, Ms. Mills posted a summary and her comments

to the members-only, Internet-based animal welfare discussion group called Atlanta Rescue. Exhibit B.

It is important to note that Ms. Mills' November 1 and 7, 2001 postings to the Atlanta Rescue discussion group were published to a very limited audience and were excerpted out of context in Plaintiffs' Complaint. Ms. Mills' one page November 1, 2001 email consists almost exclusively of a summary of that evening's WSB report:

For those of you who missed it, I saw tonight's Whistleblower 2 report on the AHS (Atlanta House of Slaughter). Here is a summary of what I can remember.

Tonight's report was on AHS' failure to follow up on cruelty cases.

Ms. Mills highlights, in the four subsequent paragraphs, that in the report a former AHS employee detailed the organizations' negligent prosecution of animal cruelty cases and that Executive Director Mr. Garrett gave conflicting explanations of AHS' history of assisting authorities with animal cruelty prosecutions. Ms. Mills also writes six sentences of commentary within this one page, single-spaced, email. Exhibit B. Ms. Mills' half-page November 7, 2001 message to the Atlanta Rescue discussion group consists mainly Ms. Mills' opinions about how and why the Humane Association of Georgia, Fulton County Animal Control, and the Atlanta Humane Society are ineffectively operated:

Keep in mind that Mr. Kill is also the figurehead president of the Humane Association of Georgia, the group that's trying to get the spay/neuter license plate. I am personally withdrawing my support from that group until they get a leader who does not delight in slaughtering pets for fun and profit.

. . . Bill Garrett is not worthy to lick the dog or cat poop off our shoes. Exhibit C.

Both of Ms. Mill's messages – factual summary, commentary, and opinions – were focused squarely on the topic of animal welfare – a topic of intense concern to the public.

2. The Profound American Commitment to Protecting Criticism of Government and Government Officials.

The right to freedom of expression concerning matters of public interest is protected by the First Amendment of the United States Constitution. The protections afforded by the First Amendment were “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Id. New York Times Co.*, quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931). **“It is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”** *Id. New York Times Co.*, quoting *Bridges v. California*, 314 U.S. 252, 270 (1941). It is within this context – our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials – that Kathi Mills’ statements concerning Plaintiffs should be evaluated. *Id. New York Times Co.*, at 270.

3. Summary Judgment is the Proper Vehicle for Resolving this Case.

The historic United States Supreme Court opinion *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) held that a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. “[A] Court ruling on a motion for summary judgment [in such a 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 . . . **[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).

B. Ms. Mills’ is Entitled to Summary Judgment Because Her Comments are Constitutionally Protected Criticism of a Public Entity and a Public Official.

1. The Atlanta Humane Society is a Governmental Entity and is Absolutely Barred from Prosecuting a Cause of Action for Defamation.

The Georgia Supreme Court unequivocally makes clear that “governments and governmental entities cannot maintain an action for libel.” *Cox Enterprises, Inc. v. Carroll City/County Hospital Authority*, 247 Ga. 39 (1981). The Court explained that, “[c]riticism of government is at the very center of the constitutionally protected area of free discussion,” and that “[n]o case has been found allowing a government to recover for libel.” *Id.* “For Good reason, **‘no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.’**” *Id.* “The few cases which have considered this point have unanimously concluded that a governmental entity, by reason of its nature as a governmental entity, cannot maintain an action for defamation in its own right, **even if the defendant maliciously publishes the defamatory statements, knowing them to be false, and with intent to injure.**” *Id.*

The Atlanta Humane Society is a public entity because it is funded by taxpayers and it performs essential public and governmental functions. The Atlanta Humane Society is a public

actor for purposes of its management of Fulton County Animal Control because it has controlled and administered the essential public governmental functions relating to animal control under a contract with Fulton County for more than twenty years. *See* February 3, 1982 Contract between Fulton County and the AHS, Exhibit E. Pursuant to this contract, Fulton County ‘appoint[s] and delegate[s]’ to the AHS the “management and control” of establishing the County animal control facility, administration of Rabies Control and County leash law – all of which are essential public health services. *Id.* The AHS is further authorized under the contract to “act as agent for Fulton County to issue dog licenses, and to collect dog license fees and impoundment as levied by the city and the County[.]” *Id.* at ¶ 8. It is undisputed, even admitted, that the AHS has performed these delegated functions under the contract. *See* Exhibit F, December 17, 2001 letter from AHS Executive Director Mr. Garrett to the Fulton County Board of Commissioners (stating that the AHS has provided “vital services” during its “public/private partnership” with Fulton County). By performing Fulton County’s public animal and health control functions, the AHS has become a public entity with response to those duties. *Cox Enterprises, Inc. v. Carroll City/County Hospital Authority*, 247 Ga. 39 (1981) (“Quasi-governmental” hospital authority is deemed to exercise “public and essential government functions” and cannot maintain action for libel); *Capuano v. Outles Co.*, 579 A.2d 469, 473 (R.I. 1990) (Garbage collection contractor activities regarding toxic waste is deemed public.).

Even the State Attorney General’s Office has itself recognized the AHS as a public entity for purposes of the Georgia Open Records Act. In a letter from the Attorney General’s Office to the AHS, the Office stated:

Certainly it is true that the Humane Society derives “substantial revenue” from governmental sources and performs a public function when it investigates reports of animal cruelty, and even if it does not meet the test of one-third funding from

government sources, its records relating to animal cruelty are nevertheless subject to the Open Records Act.

See Exhibit G, January 24, 2002 letter from Kathryn L. Allen, Senior Assistant Attorney General for the State of Georgia, to Bill Garrett, AHS Executive Director.

In reaching this conclusion, the Attorney General's Office relied in part on the fact that Florida has reached the same conclusion about its SPCA organizations, *citing Putnam County Humane Society, Inc. v. Woodward*, 740 So.2d 1238 (Fla. Dist. Ct. App. 1999) (Where humane society uses statutory authority to investigate animal abuses it acts as agent for the state); and further stated that the AHS "concedes that it is a partner with a public agency in investigating animal cruelty cases" and it is thus "inconceivable" that the AHS can claim to be immune from public scrutiny. Exhibit G. In *Putnam County*, the Humane Society exercised investigative power over animal cruelty cases under governmental authority. The court stated that:

Where the Society has used its statutory authority to investigate acts of animal abuse and has used this authority, further, to seize animals, it has acted as an agent of the state. The investigation of a criminal act pursuant to authority to do so granted by the legislature is the performance of a public function. To hold that the Public Records Act is not applicable to this type of investigation would improperly result in the avoidance of disclosure through a delegation to a private entity that would otherwise be an agency responsibility.

720 So.2d at 1240.

The line between governmental operations and private enterprise is not always clear – concerned citizens now face great obstacles to understanding how the public's business is conducted. In 1967, then-Chief Justice Warren discussed this blending of power:

[P]ower has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are

nevertheless intimately involved in the resolution of important public questions . . .

Viewed in context, then, it is plain that although they are not subject to the restraints of the political process, “public figures,” like “public officials,” [and the complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government] often play an influential role in ordering society . . . Our citizenry has a legitimate and substantial interest in the conduct of such persons [and organizations].

Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-164 (1967) (Warren, C.J., concurring) (quoted with approval in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 336-337 (1974) and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988)0. Here, there is no doubt that the AHS has acted as an agent of the state by performing essential governmental duties. The AHS is no more able to prosecute a defamation suit than it is to evade public scrutiny under the Open Records Act on the basis that it is a “private” entity.

2. Ms. Mills’ Comments are Constitutionally Protected.

a. The New York Times Co. v. Sullivan Actual Malice Standard Applies Because Plaintiffs are Public Plaintiffs.

Ms. Mills’ comments concerning Plaintiffs must be analyzed under the *New York Times v. Sullivan* actual malice standard because they are public plaintiffs. As mentioned above, the Atlanta Humane Society is a public entity, but if this Court should find that the AHS may prosecute a defamation action, the *New York Times Co. v. Sullivan* actual malice standard applies. The same actual malice standard applies to Mr. Garrett because he is the Executive Director of a public entity. Because of their status as public plaintiffs, at the summary judgment stage, this Court must determine 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).

In a 1997 opinion, the Georgia Court of Appeals held, in affirming the Hon. David M. Fuller of Gwinnett County, sitting in the State Court of Clarke County, that the determination of “[w]hether an individual is a public official or figure is a mixed question of law and fact for the court’s determination” – and not a jury issue. *Purvis v. Ballantine et al.*, 226 Ga.App. 246, 249 (1997). In affirming Judge Fuller’s ruling, the Court of Appeals explained that “it is clear . . . that the ‘public official’ designation applies at the very least, to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.*, *Purvis*, at 249, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

In *Purvis*, the plaintiff, a retired county school superintendent, sued the defendants for making statements critical of the financial management of the school system during the Plaintiff’s superintendency. The Court of Appeals held that Purvis was a public official, noting that he was the school system’s chief executive and operating officer, he kept the public informed about the operation of the school system by appearing in the media, and he routinely made personnel, administrative, and budgetary decisions affecting the school system. The Court highlighted that “public officials are generally involved in the conduct of the government, that they are policymakers, and that they have greater access to the media than do private individuals. *Id.*

The findings made in *Ellerbee v. Mills*, 262 Ga. 516 (1992) and *Mathis v. Cannon*, 252 Ga.App. 282 (2001), that the plaintiffs in those cases were not public officials, contrast well with *Purvis*, and are instructive in making this determination in the case at bar. In *Ellerbee*, the plaintiff, a high school principal, sued a former teacher for libel concerning the principal’s performance. The Supreme Court of Georgia noted that a principal does not have the

relationship with government to warrant public official status because principals, in general, “are removed from the general conduct of government, and are not policymakers at the level intended by the *New York Times* designation of public official.” *Ellerbee*, at 262 Ga. 517. In *Mathis*, the plaintiff was an officer and director of a company whose subsidiary had contracted with Crisp County to haul waste products to a controversial disposal site. The plaintiff sued the defendant for posting messages on the Internet that were critical of the plaintiff. The Court of Appeals held that the plaintiff was not a public official or a public figure because he simply acted as a businessman looking out for his company’s well-being, and that there was no evidence that he sought to control the operation of the County waste management facility in question. *Mathis*, at 252 Ga.App. 284-285.

Mr. Garrett is a public official. He is more like the school superintendent in *Purvis*, and less like the school principal in *Ellerbee* and the company executive in *Mathis*. Mr. Garrett is the Executive Director of a non-profit organization which controls and administers the essential public governmental functions relating to animal control and essential public health services, under a contract with Fulton County. As mentioned above, Fulton County, through its contract with AHS, has ‘appoint[ed] and delegate[ed]’ to the AHS the “management and control” of establishing the County animal control facility, administration of Rabies Control and County leash law – all of which are essential public health services. Exhibit E. Mr. Garrett does not operate a for-profit company which merely has a contract with the Fulton County, like the plaintiff in *Mathis*. Rather, Mr. Garrett operates a non-profit organization which has contracted to act “as agent for Fulton County” – to “be” Fulton County with regard to these essential services. Exhibit E, at ¶ 8. Like the Superintendent-Plaintiff in *Ellerbee*, Mr. Garrett is the Executive Director of a public organization that makes and enforces government policy – with

regard to animal control and essential public health services, as opposed to education. Mr. Garrett makes the budgetary determinations, Exhibit F, G, and he is the public face of Fulton County with regard to issues of animal control. When WSB television’s producers created their “Whistle Blower 2” report they sought comments from the man in charge – Mr. Garrett – the man who makes and enforces Fulton County’s policies concerning animal control and related health issues. Exhibit A. When the State Attorney General’s office investigated its opinion as to whether the Atlanta Human Society was a public organization for purposes of the Georgia Open Records Act it communicated with Executive Director Mr. Garrett. Exhibit G. The Attorney General’s Office found that the Atlanta Human Society is a public entity, and Mr. Garrett, as the Executive Director of a public entity is a public official for purposes of the *New York Times v. Sullivan* actual malice inquiry. See *Murray v. Williams*, 166 Ga.App. 865 (1983) (MARTA board member is a public official.).

b. Ms. Mills’ Comments:

- “. . . Mr. Kill is also the figurehead president of the Humane Association of Georgia . . .” Exhibit C.
- “I am personally withdrawing my support from that group until they get a leader who does not delight in slaughtering pets for fun and profit.” Exhibit C.
- “I am pretty sure that Fulton County pays the Atlanta House of Slaughter on a per-animal basis. So what would be the best way to maximize profits under this system?
 - (1) Kill the animals in three days or less (legally shown to be less in some cases)
 - (2) Refuse to spay or neuter the animals to make sure a new crop keep coming in [sic].
 - (3) Refuse to hold animals for either cruelty investigations or for rescue groups [sic]
 - (4) Overcrowd the kennels at the non-public facility. Exhibit C.

- “Bill Garrett is not worthy to lick the dog or cat poop off our shoes. He is evil and it is time for the Atlanta rescue community to unite in ending his long and tragic career not only at AHS, but in every pet-related capacity.” Exhibit C.
- “It would be more effective for us to target AHS’ corporate sponsors than the government good ol’ boys. We need to let them know that by subsidizing one of the largest and most disreputable pet slaughter houses in the Southeast, they are alienating the rest of the Atlanta welfare community.” Exhibit C.
- “But it seems to me that he doesn’t bother because they’re just going to be killed in three days anyway.” Exhibit B.

i. **Ms. Mills’ Comments are Not Defamatory.**

A defendant can only be held to pay damages for libel if the statements published are defamatory. That is, the statements must tend to injure the reputation of the person or entity and expose them to public hatred, contempt, or ridicule. O.C.G.A. § 51-5-1. “The expression of opinion on matters about which reasonable people might differ is not libelous.” *Davis v. Sherwin-Williams Company et al.*, 242 Ga.App. 907 (2000) (Evaluation of workmanship by painting contractor). “An assertion”, such as a person’s subjective opinion of a another person’s professional performance, “that cannot be proved false cannot be held libelous.” *Bergen v. Matindale-Hubbell, Inc.*, 176 Ga.App. 745 (1985) (The relative abilities of different lawyers is whole subject, not capable of proof or disproof, and cannot be held as libel.). **“A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperative the expressing of it may be.”** *Id.* Some of the comments identified by Plaintiffs in their Complaint simply do not inflict injury, hatred, contempt, or ridicule upon Plaintiffs. Other comments are simply Ms. Mills’ subjective opinions of Plaintiffs’ performances in administering public functions.

The comment “. . . Mr. Kill is also the figurehead president of the Humane Association of Georgia . . .” does not state or imply anything which injures Mr. Garrett’s reputation or subjects

him to public hatred, contempt or ridicule. O.C.G.A. § 51-5-1. The comment only refers to him, impliedly, as “Mr. Kill.” This “title” does not accuse Mr. Garrett of any crime, nor does it comment upon his profession at all.

The following comments,

- “I am pretty sure that Fulton County pays the Atlanta House of Slaughter on a per-animal basis. So what would be the best way to maximize profits under this system?
 - (1) Kill the animals in three days or less (legally shown to be less in some cases)
 - (2) Refuse to spay or neuter the animals to make sure a new crop keep coming in [sic].
 - (3) Refuse to hold animals for either cruelty investigations or for rescue groups [sic]
 - (4) Overcrowd the kennels at the non-public facility. Exhibit C.
- “Bill Garrett is not worthy to lick the dog or cat poop off our shoes. He is evil and it is time for the Atlanta rescue community to unite in ending his long and tragic career not only at AHS, but in every pet-related capacity.” Exhibit C.
- “It would be more effective for us to target AHS’ corporate sponsors than the government good ol’ boys. We need to let them know that by subsidizing one of the largest and most disreputable pet slaughter houses in the Southeast, they are alienating the rest of the Atlanta welfare community.” Exhibit C.
- “But it seems to me that he doesn’t bother because they’re just going to be killed in three days anyway.” Exhibit B.

are all Ms. Mills’ opinions as to the AHS’s and Mr. Garrett’s ineffectiveness with regard to their responsibilities concerning animal control and related public health issues. Ms. Mills believes that Mr. Garrett and the AHS are more concerned with fundraising and amassing resources than they are with animal welfare, adopting-out pets, and assisting with the prosecution of animal cruelty cases. Ms. Mills further develops this opinion, in the first comment printed above, by

explaining, hypothetically, what she believes would be the best ways for AHS to maximize profits.

Ms. Mills' fourth comment above, read in the proper context ("why does AHS not submit these cruelty cases to the Atlanta Police Department for prosecution?" (Exhibit B)), is Ms. Mills' opinion as to why AHS and Mr. Garrett do not do more to assist cruelty prosecutions. Ms. Mills also believes that Mr. Garrett should resign or be fired from his positions of leadership in the animal welfare community, and that an effective plan to achieve this goal is to petition corporate AHS's corporate benefactors. These opinions are the basis of the second and third comments above. "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Bergen v. Matindale-Hubbell, Inc.*, 176 Ga.App. 745 (1985) quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). All of this is the expression of opinions in which Ms. Mills is entitled to engage – so long as she makes no false statements of fact which injure Plaintiffs, *and which are published with knowledge that such statements are false, or with reckless disregard for whether the statements are false.*

Ms. Mills comment, "Bill Garrett is not worthy to lick the dog or cat poop off our shoes. He is evil and it is time for the Atlanta rescue community to unite in ending his long and tragic career not only at AHS, but in every pet-related capacity", is simply not capable of proof or disproof, and cannot be held as libel. Clearly, Ms. Mills believes that Mr. Garrett's performance as a leader of the animal welfare community has been poor, and this comment is intended as a figurative expression of this opinion, see below. Mr. Garrett's qualifications for removing pet excrement from footwear with his tongue, however, are simply not subject to objective analysis. Likewise, an evaluation of Mr. Garrett's capacity for metaphysical "good" or "evil" and the

appropriate time for Mr. Garrett to “retire” are purely matters of opinion. Ms. Mills is simply saying that she believes Mr. Garrett is no good at performing his public functions and that she believes the animal welfare community should work together to replace him.

ii. **Ms. Mills’ Comments are Non-literal, Figurative Speech, or Rhetorical Hyperbole, Intended not to Accuse Mr. Garrett of a Crime, but to Suggest that Mr. Garrett is Morally Responsible for the Deaths of Thousands of Animals Through His Ineffective Leadership of AHS and Fulton County Animal Control.**

The Constitution provides protection for “rhetorical hyperbole” that “cannot reasonably be interpreted as stating actual facts about an individual.” *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002). “This provides assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation” . . . “This protection ‘reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse.’” *Id.*, quoting *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997). In his classic 1729 essay “A Modest Proposal” author and satirist Jonathan Swift did not literally intend to suggest that the Irish eat their own children to relieve hunger. Rather, Swift’s essay is a pointed literary trope intended to, in part, highlight the folly of government inaction in a manner that will attract attention.

Ms. Mills’ comments are constitutionally protected because they are literary tropes intended to dramatically emphasize the AHS’s or Mr. Garrett’s faults rather than to actually accuse them of a crime or some other impropriety or fault. The “title” Ms. Mills employs for Mr. Garrett, “Mr. Kill”, does not accuse Mr. Garrett of killing animals through his position with the Humane Association of Georgia (which is not a Plaintiff in this lawsuit). Ms. Mills’ comment that Mr. Garrett “delight[s] in slaughtering pets for fun and profit”, and her reference to

the AHS as the “Atlanta House of Slaughter”, do not accuse Mr. Garrett or the AHS of actually enjoying the killing of animals. These are rhetorical expressions intended to place Plaintiffs’ performances of their public functions in relief for emphasis.

Likewise, if Ms. Mills’ comment is read to suggest that Mr. Garrett is an animal killer then it is a figurative title meant to highlight the enormous percentage of animals kills by organizations under Mr. Garrett’s authority. Of the 22,805 animals taken in or impounded by the Atlanta Humane Society and Fulton County Animal Control in 2001, approximately 15,000 of them were euthanized, or killed, by Mr. Garrett’s organizations. Exhibit H. And that’s only one year – Mr. Garrett has been Executive Director of the AHS for more than twenty years. Regardless of whether or not these animals killings were justified as euthanasia or not, 15,000 animals carcasses are a lot – and they certainly accumulate after twenty years. This particular statement by Ms. Mills does not necessarily state or imply that these killings were not justified. Ms. Mills’ use of the title “Mr. Kill” is meant to highlight that Mr. Garrett, the leader of the Humane Association of Georgia, is the leader of organizations that kills thousands of animals each year.

Ms. Mills’ reference to Mr. Garrett as “Mr. Kill” is similar to those at issue in *Greenbelt v. Bresler*, 398 U.S. 6 (1970) (A legislator’s negotiating position was characterized as “blackmail”), *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (A Television talk show host calls operator of anti-abortion activist an accomplice to the murder of a doctor who performed abortions.), and *United States Steel, LLC v. Tieceo, Inc.*, 261 F.3d 1275, 1293, 1294 (11th Cir. 2001) (Holding that a statement made by counsel representing a steel company that a vendor’s conduct was “the equivalent of Jeffrey Dahmer complaining his victims got blood on the carpet, could not reasonably be construed as defamatory in the sense that the vendor and its

principal were comparable in some fashion to a convicted mass murderer.”). Each of the holdings in these opinions is based upon the same idea – that “non-literal, figurative language” is used to express the speaker’s view that the plaintiff is not actually guilty of having committed such acts, but is morally responsible for such conduct. *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). Each of these cases notes that no reader or listener to the comments at issue would have actually thought the respective plaintiffs were guilty of blackmail or murder. The *Greenbelt* Court explained that, “On the contrary, even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler’s negotiating position as extremely unreasonable.” *Greenbelt v. Bresler*, 398 U.S. 6, at 15. Ms. Mills employs the same trope when she refers to Mr. Garrett as “Mr. Kill.” Ms. Mills is not contending that Mr. Garrett is literally himself a killer of animals. Rather, Ms. Mills refers to Mr. Garrett as “Mr. Kill” to suggest that he is morally responsible for the deaths of thousands of animals through his poor operation of the Atlanta Humane Society and Fulton County Animal Control.

Ms. Mills’ comment that Mr. Garrett “delight[s] in slaughtering pets for fun and profit” and her comment that “he doesn’t bother because they’re just going to be killed in three days anyway” are also rhetorical hyperbole. These comments are the type of “exaggeration and non-literal commentary” which the Eleventh Circuit explained have “become an integral part of social discourse.” *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002), quoting *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997). *See also, Jailett v. Georgia Television Co.*, 238 Ga.App. 885 (1999) (Where WSB television was sued for explaining that the plaintiff-contractor could be a “rip-off.” The Court explained that “To say that a person has been “ripped off” could mean simply that the person has gotten a bad deal, or it could mean that he

has been the victim of dishonest or shady practices by another”, and WSB’s anchor was not necessarily stating that the contractor was a thief.).

Obviously, the context within which a statement is made is essential to examining its meaning and intent. These comments appeared in two emails which were published to a members-only, Internet-based animal welfare discussion group after Ms. Mills watched the WSB news reports which were so critical of the Atlanta Humane Society, its Executive Director Bill Garrett, and Fulton County Animal Control. These comments are exaggerated and non-literal commentary employed to highlight the poor job Mr. Garrett and the AHS do in running organizations which kill thousands of animals each year and their ineffectiveness in assisting animal cruelty prosecutions. The reference to “profit” is meant to highlight Mr. Garrett’s failures in light of the huge resources maintained by the AHS -- \$15 million, as reported by WSB. Exhibit A.

iii. Ms. Mills’ Comments Were Not Published with Actual Malice.

As mentioned above, at the summary judgment stage, this Court must determine 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); *New York Time Co. v. Sullivan*, 376 U.S. 254 (1964). Plaintiffs must establish, by clear and convincing evidence, a standard higher than “by a preponderance”, that Ms. Mills comments are not constitutionally protected, that the comments are false, and that Ms. Mills published them with either knowledge that the comments were false, or that she published them with reckless disregard for whether they were false. *Id.* As detailed above, many of Ms. Mills’ comments are either not defamatory, constitutionally protected opinions, or non-literal, rhetorical hyperbole which is also constitutionally protected. Each of Ms. Mills’ opinions is also protected because

they are commentary based upon the truth, or they were not published with reckless disregard for the truth.

Each of Ms. Mills' comments concern her opinion that the Atlanta Humane Society, Fulton County Animal Control, and Mr. Garrett poorly perform their responsibilities with respect to animal welfare. Although this is clearly a matter of opinion, it is also clear that the facts upon which Ms. Mills' statements are based are in fact true. Under the "leadership" of Mr. Garrett, the AHS and Fulton County Animal Control kill thousands and thousands of animals each year. This is absolutely undisputed. These facts are taken from the AHS' promotional material. Exhibit H. Barbara Harkins, in an affidavit filed in connection with similar litigation in Cobb County swears that, while working at AHS, she "began to notice significant problems: the lack of animal cruelty investigations, the problematic spay/neuter policy, the animal adoption statistical problem." Exhibit I. The WSB television news reports confirm the same failures. Documents identified in discovery but not yet provided by Plaintiffs confirm the same failures. Ms. Mills' opinions are not only constitutionally protected but they are accurate:

"Bill Garrett is not worthy to lick the dog or cat poop off our shoes. He is evil and it is time for the Atlanta rescue community to unite in ending his long and tragic career not only at AHS, but in every pet-related capacity." Exhibit C.

Ms. Mills' language is very critical and extremely candid but she is entitled to offer her comments. Although these words may hurt Mr. Garrett's feelings, it is part of the social contract he signed onto as a public official charged with the responsibilities of carrying out the public's business. Criticism of public officials is a "fundamental principle of our constitutional system" that includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." This is how we, as Americans, guarantee that our government officials carry out the responsibilities that we entrust to them. *Id. New York Times Co.*, at 270.

The First Amendment protects Ms. Mills, even to the extent that any of the facts upon which her opinions are based are not wholly accurate:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 271, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). *See also, Swindall v. Cox Enterprises, Inc.*, 253 Ga.App. 235, 236 (2002) (“In determining whether a statement is false, defamation law overlooks minor inaccuracies and concentrates on substantial truth . . . 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.”). Justice Brennan’s historic *New York Times v. Sullivan* opinion explains that the “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 272.

Ms. Mills’ opinions, to the extent they state any facts at all, are protected speech because they are true, and at the very least, any inaccuracies were not published with knowledge of falsity or a reckless disregard for the truth. As such, she is entitled to summary judgment.

III. Conclusion

As mentioned throughout this brief, our nation has a profound historical commitment to protecting citizens from censorship when they criticize government and government officials concerning matters of public interest. This commitment is rooted in the very nature of our form of government – a representative democracy where we demand that our representatives govern the nation and our communities as we see fit. When government and public officials fail to

govern as we wish, we are more than entitled to criticize them – we are *required* to criticize them – loudly, publicly, and sharply. If we do not voice our opinions, then our government officials do not know they are representing us ineffectively. For this reason, our Constitution and courts have made clear that government cannot silence citizens who criticize them:

For Good reason, ‘no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.’ The few cases which have considered this point have unanimously concluded that a governmental entity, by reason of its nature as a governmental entity, cannot maintain an action for defamation in its own right, even if the defendant maliciously publishes the defamatory statements, knowing them to be false, and with intent to injure.

Cox Enterprises, Inc. v. Carroll City/County Hospital Authority, 247 Ga. 39 (1981). The Atlanta Humane Society and Fulton County Animal Control cannot prosecute a libel action because they are governmental entities. Likewise, Mr. Garrett, as a public official, cannot maintain the above-styled libel action against Ms. Mills. While Mr. Garrett’s feelings may be hurt by WSB’s reports and by Ms. Mills’ opinions, such criticism is “at the very center of the constitutionally protected area of free discussion.” *Id.* “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Bergen v. Matindale-Hubbell, Inc.*, 176 Ga.App. 745 (1985) quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

WHEREFORE, based upon the foregoing, Defendant KATHI MILLS, requests that this Court issue an order granting her summary judgment on all claims asserted in Plaintiffs’ Complaint.

This _____ day of September, 2002.

Respectfully submitted,

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IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

ATLANTA HUMANE SOCIETY,)
)
SOCIETY OF PREVENTION OF CRUELTY)
TO ANIMALS, INC., and)
)
BILL GARRETT,) Case No. 01-A-13269-1
)
Plaintiffs,)
)
v.)
)
KATHI MILLS,)
)
Defendant.)
_____)

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing *Defendant's Motion for Summary Judgment and Brief in Support*, by United States Mail, with sufficient postage, to:

Edward L. Greenblatt
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This ____ day of September 2002.

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