

IN THE SUPREME COURT
STATE OF GEORGIA

ATLANTA HUMANE SOCIETY and)
Society for Prevention of)
Cruelty to Animals, Inc., and)
BILL GARRETT,)
)
)
Petitioners,)
)
VS.)
)
KATHI MILLS,)
)
)
Respondent.)

Case No. S04G0685

**RESPONDENT KATHI MILLS' RESPONSE TO PETITIONERS' BRIEF TO
CERTIFIED SUMMARY JUDGMENT QUESTION II**

Introduction

In granting certiorari on the SLAPP issue common to this case and the Harkins case, this Court also asked the parties to address the following question: "Whether the trial court erred in granting summary judgment on the merits to Mills."

The trial court correctly granted summary judgment to Mills on various issues that included what it labeled as a question of first impression. That issue is whether the prohibition on a governmental entity suing for defamation extends to a private, non-profit entity that performs the essential and core governmental functions of animal control, animal shelter operations and enforcement of related ordinances pursuant to a government contract. Respondent asserts that the trial court

correctly held such a bar should and does exist under Georgia law.

Respondent further asserts that the trial court correctly held that Petitioner Bill Garrett is a limited purpose public figure; correctly denied partial summary judgment in favor of the Petitioners; and, did not materially err in setting out what Petitioners have labeled as erroneous findings of facts regarding the Humane Society's contract with Fulton County.

However, this Court need not reach these issues if it agrees with Respondent that the Court of Appeals correctly determined that the SLAPP issue is dispositive in this case.

Petitioners dealt with the summary judgment question posed in this case in a separate brief from their brief addressing the SLAPP issue in Case No. S04G0684. Accordingly, Respondent replies with a separate brief as well. To avoid redundancy, Respondent relies on the substantive and procedural facts set out in her brief on the SLAPP issue in Case No. S04G0684. However, she supplements that statement with additional facts necessary for an understanding of the summary judgment issues and taking issue with various misstatements by Petitioners.

I. Supplemental Statement of Facts

Pursuant to a February 3, 1982, contract with Fulton County and the city of Atlanta, the Atlanta Humane Society and Society for Prevention of Cruelty to Animals, Inc. **performed** the

essential government functions of rabies and animal control for more than 20 years. R-373.

This contract provided in paragraph 6 that the Humane Society shall "enforce the Rabies Control Regulations of Fulton County and shall capture and impound dogs as provided in said regulations." R-375. Paragraph 14 provided that Humane Society employees "who are appointed as Deputy Sheriffs of Fulton County by the Fulton County Sheriff shall issue citations or make arrests, but such employees so authorized shall enforce leash law countywide, including the Fulton County portion of the City of Atlanta." R-378.

The Humane Society was required to issue dog licenses and collect dog license fees and impoundment fees pursuant to Paragraph 8 of the contract. R-376. The license and impoundment fees were "applied to the annual operating budget such that operational costs will be reduced by the income received thereby." R-376. Paragraph 16 further provided for funding, requiring the county to pay the Humane Society "in twelve monthly installments, payable in advance on the first day of each month, a sum in the aggregate which will cover the annual operating cost of the SPCA of providing the service contemplated in this contract. ~~R-378.~~ For each subsequent year, SPCA shall submit an annual operating budget for approval by County and City prior to annual budget, adjustments to the same to be made

on approval by County and City, but such approval to be not unreasonably withheld where increased operating expenses are shown." R-378-79. The contract went on in Paragraph 17 to allocate costs between the county and city. R-379. "At the end of each budget year, actual expenses of the SPCA shall be compared to the amount of the County reimbursement for said year. Any underpayment or overpayment by the City to the County shall be carried forward as an adjustment to the first quarter billing of the ensuing budget year and reflected in the statement presented to the City by the County for payment." R-379.

Paragraph 7 imposed the duty of investigating and maintaining records of persons bitten by animals in Fulton County. R-376. The contract further provided in Paragraph 9 that the Humane Society conduct vaccination clinics. R-376.

The county assigned its animal control facility to the Humane Society, along with equipment that included motor vehicles used as pet ambulances. R-374.

These contract provisions show that the Humane Society performed essential governmental services, despite Petitioners' focus in its brief on the charitable aspects of the Atlanta Humane Society and Society for Prevention of Cruelty to Animals, Inc.

Respondent disagrees with Petitioners' characterization of her remarks as false, malicious and defamatory, causing injury to reputation and other damages. Petitioners' brief at 2, 25-26.

Respondent further disagrees with Petitioners' characterization of excerpts from her deposition listed on Page 26 of Petitioners' Brief as follows. Petitioners state Respondent based her statements "on speculation" without basis in fact and, on pages 17 and 26 of their brief, state that she did not dispute that she intended to injure Petitioners. A check of Petitioners' record citations reveals that they are to statements in Respondent's deposition to issues taken out of context in the brief and to Petitioners own statement of material facts, which Respondent disputes. R-849.

Petitioners continue to take issue with the videotape of the WSB-TV program at issue in this case that Respondent attached as Exhibit A to her Motion for Summary Judgment. Petitioners' brief at 18. The Court of Appeals directed separate briefing on this issue in Case No. A03A2481, but did not address the issue in its decision. Accordingly, Respondent directs this Court's attention to the extensive briefing of the videotape issue in the briefs requested by the Court of Appeals if it determines this issue may be germane to any portion of this case.

Petitioners' contention on page 17 of their brief that there are material issues of fact in dispute in this case because Respondent "filed no response to Petitioners' Statement as required by Uniform Superior Court Ruled 6.5" is in error, particularly to the extent that statement suggests that no response was filed. Respondent points out that she filed "Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment." R-848-50. In that pleading, Respondent asked the trial court to strike Petitioners' motion as untimely filed. R-849. In the alternative, the response stated, "Defendant hereby adopts the facts and arguments contained in her Motion for Summary Judgment and Brief in Support as her response to Plaintiffs' Motion for Partial Summary Judgment." R-849.

II. Argument and Citation of Authority

A. Trial Court Correctly Granted Summary Judgment to Respondent Because Humane Society Is Quasi-Governmental Entity

The Atlanta Humane Society performed the essential and core governmental functions of animal control, animal shelter operations and enforcement of related ordinances for Fulton County and the municipalities within its borders for more than 20 years. R-373. These were not charitable services, but rather were functions provided pursuant to taxpayer dollars allocated

according to a government contract. R-373, 378-79. The trial court correctly recognized that the Humane Society and Fulton County Animal Control were one and the same. R-892. As a result, the Humane Society is subject to the longstanding legal principle, enunciated in Cox Enterprises, Inc. v. Carroll City/County Hospital Authority, 247 Ga. 39 (1981), that governmental entities cannot maintain an action for libel.

The trial court correctly relied on the Cox Enterprises decision, which involved a libel action brought by a hospital authority against a newspaper. 247 Ga. at 39. The Georgia Supreme Court found that while the hospital authority lacked some government attributes, such as the power to tax, it nonetheless was a government entity barred by the First Amendment from maintaining a libel action. Id. at 46.

Among the factors leading the Supreme Court to determine the hospital authority was governmental in nature were that it exercised public and essential government functions and it had the powers required to achieve its public purposes. Id. at 44. In addition, the hospital authority received tax dollars to carry out its functions. Id.

Petitioners list other factors considered by the Court in Cox Enterprises in concluding the hospital authority was a governmental entity. The Court did not hold that all of these factors must be achieved in order to be determined a

governmental entity. As a result, factors listed in Cox Enterprises that do not fully square with this case, such as the power of eminent domain and the appointment of the board by local politicians, should be disregarded.

Petitioners find inapplicable or downplay Cox Enterprises factors that do square with the facts of this case. For example, Petitioners dispute that the receipt of tax revenues is a factor in this case, when in fact Fulton County and its municipalities appropriated tax dollars each year to cover animal control costs not offset by fees charged for licenses issued pursuant to governmental authority. In addition, pursuant to two other Cox Enterprises factors, Petitioners assert that the Humane Society is not a creature of statute and that the local governing body plays no role in the dissolution of the entity. However, this assertion overlooks the fact that the Humane Society performed an essential government function pursuant to authority tantamount to statute—a governmental contract—and that this contractual relationship can be dissolved by the local governing body.

Respondent disagrees with Petitioners' characterization on page 4 of their brief of the other Cox Enterprises factors as follows:

The factor of whether the entity is defined as a "public body corporate and politic" applies in this case to the extent

that the Atlanta Humane Society was operating Fulton County Animal Control, a core governmental function, under contract with Fulton County;

The factor of whether the board is appointed by a local political governing body applies to this case in the analogous sense that, while the county commission didn't choose members of the Atlanta Humane Society board, it in fact chose the Atlanta Humane Society, an entity that claims to be operated by a board of volunteers, to operate the core governmental function of animal control; and,

The factor of whether public, essential governmental functions are performed is squarely met because the Atlanta Humane Society was performing the core governmental function of animal control.

"Criticism of government is at the very center of the constitutionally protected area of free discussion," this Court asserted in Cox Enterprises, quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). 247 Ga. at 40. This Court added that it had found no case allowing a government to recover for libel. Id. Quoting New York Times Co. v. Sullivan, 376 U.S. 254, 291 (1964), which itself quoted City of Chicago v. Tribune Co., 139 N.E. 86, 88 (1923), the Court stated that it was for "good reason" that no court of last resort has ever approved a prosecution for libeling a government. 247 Ga. at 40.

"Open discussion of governmental practices and policies requires that untrammelled criticism of government be protected; if critics of government, be they citizens or the press, speak only at the risk of being prosecuted for libel or slander, few will criticize government at all. Even where the critic is certain that his defense of truth would carry the day, the expense and inconvenience of defending the litigation could deter all but the most determined gadfly." Id. at 41.

Ironically, in a December 17, 2001, letter to the Fulton County Board of Commissioners on behalf of the Atlanta Humane Society, Petitioner Bill Garrett seems to acknowledge that criticism of its operation in a "public/private partnership" is the type of distraction it must tolerate "especially when aligned with a government body as visible as that of Fulton County, its various departments and Board of Commissioners." R-381.

B. The Trial Court Did Not Mischaracterize Material Facts and Did Not Rely On Disputed Facts

1. Trial Court's Order Focused on Animal Control Functions At Issue in Public Debate

Petitioners contend that a portion of the trial court's order may have attributed duties to the AHS that do not appear in the plain language of the contract. Petitioners' brief at 10. The trial court listed the following as among the animal control

functions performed by the Humane Society: "receiving abandoned pets, facilitating pet adoptions, disposing of unwanted pets, performing rabies vaccination and promoting rabies prevention, and investigating and pursuing animal cruelty complaints." R-892. The Humane Society asserts that the contract did not impose upon it a duty to investigate and prosecute animal cruelty cases and abuse. Petitioners' brief at 12. However, Petitioner Bill Garrett's affidavit of June 14, 2002, states that animal control, a service he acknowledges was provided by the Humane Society under the contract with Fulton County, "is responsible for issuing citations for misdemeanor animal offenses such as leash law, licensing and dangerous dog violations as well as misdemeanor animal cruelty. Only sworn police officers can initially charge for felony cruelty of animals. Prosecutors may, on occasion, upgrade misdemeanor animal cruelty to felony status. In Georgia, the felony animal cruelty code (section 16-12-4) became effective May 2000." R-591. Thus, it appears Petitioners' quarrel is with the trial court's attribution of animal cruelty investigations as a contractual duty rather than one that it in fact carried out apparently under statutory authority.

Petitioners further quarrel with the trial court that the contract did not require them to avoid euthanasia, hold or place pets for adoption, receive abandoned pets, facilitate adoptions

or provide rabies vaccines more than once a year. Appellants' brief at 13.

Assuming without conceding that the trial court may have assigned to the Humane Society duties not required by the contract, the plain language of the contract shows that Fulton County and the city of Atlanta turned over operation of an essential governmental function, Fulton County Animal Control, to the Humane Society. R-373. It is the Atlanta Humane Society's operation of Fulton County Animal Control that was of public concern and was the subject of the debate giving rise to the statements at issue in this case.

**2. Petitioners Mischaracterize Respondent's
Statements and the Record**

Respondent disagrees with Petitioners' characterization of her remarks as false, malicious and defamatory, causing injury to reputation and other damages. Petitioners' brief at 2, 25-26.

Respondent further disagrees with Petitioners' characterization of excerpts from her deposition listed on Page 26 of Petitioners' Brief as follows. Petitioners state Respondent based her statements "on speculation" without basis in fact and, on pages 17 and 26 of their brief, state that she did not dispute that she intended to injure Petitioners. A check of Petitioners' record citations regarding alleged "speculation"

reveals that they are to statements in Respondent's deposition to issues taken out of context in the brief.

The citation on page 26 to R-615 is to the first page of Respondent's deposition. Petitioners next cite to R-668-69. Respondent's deposition at that cite was preceded at R-667 by a discussion of the difference between animal welfare advocates in the "no-kill" movement who take steps to ensure that animals are spayed or neutered before they are placed with families and the AHS, which was not spaying and neutering animals before placing them. Respondent went on to say that she had not seen any information in the AHS newsletter or other marketing materials to inform her or the rest of the public of any changes in that policy and thus she did not call the AHS after seeing the WSB-TV program to ask whether it was true that the AHS did not spay or neuter pets before placing them. R-668-69.

Petitioners cite to R-725-26. These citations are to a discussion of the statement made in the Internet chatroom that Mills was "pretty sure" that the AHS was paid on a per animal basis. In the deposition, when asked why she was "pretty sure," Respondent stated that she based her statement on speculation that Fulton County paid animal control expenses based on the number of animals impounded. She then explained that she went on hypothetically to ask and answer the rhetorical question of how to best maximize profits if that is the method of payment.

Petitioners cite to R-728 in which Respondent says that she did not call the AHS to find out their policy on euthanasia and the time period animals are held because she understood the period to be three-days based on her knowledge of a lawsuit in which the time period was at issue.

The citation to R-71 is to Respondent's refusal to retract her remarks in response to AHS's demand that she do so.

Thus, these citations to the record show that Respondent had a factual basis for her claims or that she was merely expressing her opinion or using hyperbole. (These issues are further discussed in Respondent's brief in Case No. S04G0684.)

As for Petitioners' assertion on pages 17 and 26 that Respondent did not dispute that she intended to injure Petitioners with her statements, Respondent points out that Petitioners cite to R-551, which is the second page of their own Statement of Undisputed Material Facts. Respondent did in fact object to these in pleadings filed with the trial court. R-849.

Petitioners' erroneously contend on page 17 of their brief that there are material issues of fact in dispute in this case because Respondent "filed no response to Petitioners' Statement as required by Uniform Superior Court Ruled 6.5." This is erroneous because Respondent filed "Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment." R-848-50. In that pleading, Respondent asked the trial court to strike

Petitioners' motion as untimely filed. R-849. In the alternative, the response stated, "Defendant hereby adopts the facts and arguments contained in her Motion for Summary Judgment and Brief in Support as her response to Plaintiffs' Motion for Partial Summary Judgment." R-849.

3. Trial Court Correctly Relied on Open-Records Law

The trial court also was correct in finding persuasive letters from the Georgia Attorney General asserting that the Petitioners were subject to the Open Records Act because they performed a service, pursuant to a government contract, which is the function of a public agency. R-383-86. The attorney general explained that under Northwest Georgia Health System, Inc. v. Times Journal, Inc., 218 Ga. App. 336 (1995), that private entities performing a delegated public duty must comply with the Open Records Act. R-384, 385.

Furthermore, the trial court correctly found persuasive a case, cited by the attorney general, from our neighboring state of Florida, Putnam County Humane Society, Inc. v. Woodward, 740 So.2d 1238 (1999), which held that a county humane society was an "agency" of the state and subject to open records requirements with respect to its investigations of animal abuse

and seizures of animals because it was performing a public function.¹

These two open records decisions are analogous to this case because they show that when a private agency takes on the responsibility of performing government functions it gives up privacy benefits and becomes subject to public interests. Other open government decisions applying public standards to private entities include: Macon Telegraph Publishing Co. v. Board of Regents of the University System of Georgia, 256 Ga. 443 (1986) (holding that various University of Georgia Athletic Association documents were public records subject to the Open Records Act even though they were prepared by employees of a private association); Red & Black Publishing, Inc. v. Board of Regents, 262 Ga. 848 (1993) (holding sessions of student court were subject to open meetings act, in part, because it derived

¹ Amicus Curiae American Humane Association states in its brief that it is unaware of any other court decision treating a humane society as a "quasi-governmental entity." Although that term is not used in the Putnam County case, the holding that the humane society was an agency of the state counters the American Humane Association brief's inference that the trial court decision in this case is unique. See also, State of Tennessee v. Adkisson, 2001 WL 121850 (Tenn. Crim. App. October 12, 2001) (holding county humane society president and vice-president were state actors performing a law enforcement function when they carried out a warrantless search of defendant's property in response to an anonymous animal cruelty complaint); Studer v. Seneca County Humane Society, 2000 WL 566738 (Ohio Ct. App. May 4, 2000) (holding county humane society whose agents executed search warrant in animal cruelty case was political subdivision of Ohio and thus immune from animal owner's suit for conversion).

authority from the Board of Regents and was financed with university funds); and, Hackworth v. Board of Education for the City of Atlanta, 214 Ga. App. 17 (1994) (holding that school bus records created and in the control of a private company were subject to the Open Records Act because they were received or maintained on behalf of a public officer or agency and thus the private company was performing a public function).

The Humane Society on page 20 of its brief refers to an attorney general's opinion that contains the following quotation: "No 'authority [is found] that would allow the Corporation (a private, nonprofit entity) to be considered a 'governmental entity.'" See Official Opinion 93-10. In that opinion, the attorney general stated that a private, nonprofit corporation that is leasing and operating health care facilities on behalf of a hospital may not self-insure its workers' compensation liability as an 'entity' of the authority. The quote, when placed in context, is completely inapposite to this case.

At issue in that opinion was a requirement of the Workers' Compensation Act for self-insurance that the employer become a member of the Self-Insurers Guaranty Trust Fund. As to exemptions from that fund, the attorney general stated:

Ironically, since the courts have found that hospital authorities are "governmental entities," they **are** exempt from belonging to the Self-Insurers Guaranty Trust Fund.

This contradictory result is based on the difference between a "governmental entity" and "political subdivision": while the two are often related, they are not synonymous. However, I could find no authority that would allow the Corporation (a private, nonprofit entity) to be considered a "governmental entity." Therefore, the Authority's exemption from membership in the Trust Fund would not apply to the Corporation.

When the quote is placed in context, it clearly does not support Petitioners' assertions.

Instead, Cox Enterprises and a long line of open government cases show that when a private corporation performs a public duty at taxpayers' expense, it becomes subject to the same requirements placed on government. Thus, the trial court was correct to find that the prohibition on a governmental entity suing for defamation extends to the Humane Society as a private, non-profit entity that performs the essential and core governmental functions of animal control, animal shelter operations and enforcement of related ordinances pursuant to a government contract.

C. The Trial Court Correctly Determined Petitioner Bill

Garrett Is a Limited Purpose Public Figure

The trial court found that Petitioner Bill Garrett is a limited purpose public figure and thus is required to prove his defamation case by clear and convincing evidence of actual malice on the part of the defendant. Atlanta Journal Constitution v. Jewell, 251 Ga. App. 808 (2002).

In making this determination, the trial court applied the three-pronged test adopted by the 11th U.S. Circuit Court of Appeals in Sylvester v. American Broadcasting Company, 839 F.2d 1491, 1494 (11th Cir. 1988), and employed by the Georgia Court of Appeals in Jewell, 251 Ga. App. at 817, and Sparks v. Peaster, 260 Ga. App. 232, 235 (2003), and by this Court in Mathis v. Cannon, 276 Ga. 16, 23 (2002). The test requires that the court isolate the public controversy, examine the plaintiff's involvement in that controversy, and determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. Id.

Petitioners quarrel with the trial court's definition of the controversy because it contains elements not specifically contained in the Humane Society's contract.

The trial court defined the public controversy in this case as

whether the Atlanta Humane Society, acting by and through the leadership of Plaintiff Garrett, adequately performed the services which was required of it under its Contract with Fulton County, or whether such Contract should be terminated by Fulton County due to the alleged failure of Plaintiff Atlanta Humane Society to investigate instances of animal cruelty and abuse, avoid the euthanasia of animals, successfully place abandoned pets for adoption, and provide other related services to the public as required. Indeed, the reports on WSB directly challenged Plaintiff Garrett's role in such alleged deficiencies, with some former employees implying that it was his policies and directives which were at fault, i.e., his alleged policy that the Atlanta Humane Society would not investigate

claims of animal abuse because the organization "lost money on every investigation." R-895.

It is immaterial whether or not these elements of the public controversy are specifically covered in the Humane Society contract. What is key is that they were indeed elements of the public controversy, which involved the Atlanta Humane Society's operation of Fulton County Animal Control under a county contract for which public funds were allocated. See, e.g., Mathis at 23 (identifying public controversy involving county authority's financially unsuccessful operation of a waste recovery facility); Sparks at 236 (identifying public controversy as a city's administration and allocation of municipal funds).

As for the second prong, a plaintiff may be "deemed a public figure if he purposely tries to influence the outcome of a public controversy or, because of his position in a controversy, could realistically be expected to have an impact on its resolution." Jewell, 251 Ga. at 817. The trial court correctly found that Petitioner Bill Garrett in fact did give an on-camera interview. That the interview was not edited to Garrett's liking, and that Petitioners did not court media attention matters not under Jewell. Id. at 818. In addition, the trial court correctly noted as few as one media appearance or interview may be sufficient to make a plaintiff a limited

purpose public figure under Finkelstein v. Albany Herald Publishing Company, 195 Ga. App. 95, 97 (1990).

Indeed, under Jewell's either/or standard that a person may be a public figure if "because of his position in a controversy, [he] could realistically be expected to have an impact on its resolution," the trial court was otherwise authorized to find Garrett a limited purpose public figure. As head of the agency that was at the center of the public controversy, Garrett would be expected to have an impact on its resolution. R-381-82.

The trial court also correctly applied the third prong of Sylvester to determine that the alleged defamatory statements were germane to Petitioner Bill Garrett's participation in the controversy because they were criticisms of decisions he allegedly made on behalf of the Humane Society. R-389.

Petitioner Bill Garrett was not a private person working for a private charity. Instead, he was the head of an agency performing an essential government service at taxpayers' expense whose performance of those duties was at the center of controversy, which resulted in him granting a media interview. R-Video tape.

Thus, the trial court correctly found that Appellant Bill Garrett is a limited purpose public figure who must prove actual malice to succeed with his defamation claim.

III. Conclusion

For all the foregoing reasons, Respondent respectfully asks this Court to find that the trial court: correctly held that the prohibition on a governmental entity suing for defamation extends to a private, non-profit entity that performs the essential and core governmental functions of animal control, animal shelter operations and enforcement of related ordinances pursuant to a government contract; correctly held that Petitioner Bill Garrett is a limited purpose public figure; correctly denied partial summary judgment in favor of the Petitioners; and, did not materially err in setting out what Petitioners have labeled as erroneous findings of facts regarding the Humane Society's contract with Fulton County. This Court should further find that the trial court erred in finding genuine issues of material fact require a trial on Plaintiff Garrett's defamation claims.

Respectfully submitted this _____ day of May, 2004.

ALAN I. BEGNER
GA BAR NO. 046975

KATIE WOOD
GA BAR NO. 801030

BEGNER & BEGNER, P.C.
1280 West Peachtree Street
Suite 230
Atlanta, GA 30309
(404) 872-5727