IN THE SUPREME COURT
STATE OF GEORGIA

ATLANTA HUMANE SOCIETY and Society for Prevention of Cruelty to Animals, Inc., and BILL GARRETT,	)	
Petitioners,	)	
v.	)	Case Nos. S04G0684
KATHI MILLS,	)	
Respondent.	)	

RESPONDENT KATHI MILLS' RESPONSE TO PETITIONER'S BRIEF TO CERTIFIED SLAPP QUESTIONS

I. Introduction

At issue in this case is the level of protection Georgia's anti-SLAPP law, O.C.G.A. §9-11-11.1, and the companion defamation privilege it references, O.C.G.A. §51-5-7 (4), provide to citizens who speak out on matters of public interest or concern. This Court should affirm the correct decisions of the Georgia Court of Appeals that require a trial court to take a "substantive look" at a plaintiff's *pro forma* verification to determine whether the suit has in fact been brought for an improper purpose and thus must be dismissed. Harkins v. Atlanta Humane Society, 264 Ga. App. 356, 360-61 (2003), and Atlanta Humane Society v. Mills, 264 Ga. App. 597 (2003).

The Georgia Court of Appeals correctly applied Harkins in this case to hold that the trial court should have dismissed the defamation action that Petitioners improperly initiated against Respondent Kathi Mills because they brought it in response to protected statements that she made in a good-faith exercise of her constitutional right of free speech about a matter of public concern. Mills at 597.

Both the Harkins and Mills decisions rejected Petitioners' contention that the timely filing of a *pro forma* affidavit mirroring the statutory language requiring verification that the claims were not brought for "any improper purpose" was sufficient to avert dismissal under the anti-SLAPP statute. Harkins at 359 and Mills at 597.

This Court should rule that the mere filing of a verification does not exempt a baseless lawsuit from dismissal under the anti-SLAPP statute and that the Court of Appeals correctly determined that the action brought against Respondent Mills in this case must be dismissed because it arose from her exercise of her constitutionally and statutorily protected right to free speech about a matter of public concern and thus she was protected by O.C.G.A. §9-11-11.1 and O.C.G.A. §51-5-7 (4).

II. Statement of Proceedings Below

1. Substantive Facts

Respondent Kathi Mills is an independent cat rescuer and an animal welfare advocate who finds homes for cats through an Internet web site called "Kitty Village." R-636; 638; 670.

In November of 2001, Mills watched a series of reports on WSB-TV that disparaged the efforts of the Atlanta Humane Society and Fulton County Animal Control in assisting authorities in the prosecution of animal cruelty cases, and the Humane Society's poor record for adopting out pets instead of inducing euthanasia. R-Videotape. In highlighting the entities' ineffective history, the reports pointed out that the Atlanta Humane Society, which at that time operated the Fulton County Animal Shelter, had amassed enormous resources. R-Videotape. The television exposés confronted Executive Director Bill Garrett for an explanation of the organization's failure to assist in the prosecution of animal cruelty cases. R-Videotape.

After viewing the first broadcast on November 1, 2001, Mills posted a summary of it, along with her opinions and commentary, to a members-only, Internet-based animal welfare discussion group called Atlanta Rescue. R-453. On November 7, 2001, Mills posted more of her opinions to that group, R-454.

On December 21, 2001, the Atlanta Humane Society and Garrett filed their Complaint in this case against Mills, R-5-

10, alleging that that the following statements, quoted from the November 1, 2001, and November 7, 2001, posts to the Atlanta Rescue discussion group, defamed them:

(1) ". . . Mr. Kill is also the figurehead president of the Humane Association of Georgia . . ." R-7.

(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." R-7-8.

(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 comingin [sic].
(3) Refuse to hold animals for either cruelty investigations or for rescuegroups [sic]
(4) Overcrowd the kennels at the non-public facility. R-8.

(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." R-8.

(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." R-8.

(6) "But it seems to me that he doesn't bother because they're just going to be killed in three days anyway." R-8.

At the time the television series was aired and the suit was filed, the Atlanta Humane Society, under a contract with Fulton County, had performed essential public and governmental services for more than twenty years. R-165-172. 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 **r**abies **c**ontrol and County leash law. R-166. The AHS was 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[.]" R-168.

Under the contract, the Atlanta Humane Society received approximately $281,000 from Fulton County. R-459; 483. The City of Atlanta paid $472,000. R-459.

After the WSB-TV reports aired, the Fulton County Commission discussed the award of the county animal control contract to AHS and began to consider terminating the contract. R-457-464; 466-476; 478-486; 488-493.

During these discussions at the Fulton County Commission, the Humane Society filed this action against Mills and filed a similar SLAPP suit against Barbara L. Harkins, **a former AHS employee** interviewed in the WSB-TV series. R-5-10; 392.

2. Procedural Facts

Petitioners filed suit against Mills on December 21, 2001. R-5-10. Mills was served on January 7, 2002. R-29. Although there was a verification attached to the complaint when it was filed, it was not the type of verification required by O.C.G.A. §9-11-11.1. R-11. Before Mills filed her Answer, Petitioners filed an amended complaint with verifications tracking the language of O.C.G.A. §9-11-11.1. R-22-27.

In her February 7, 2002, Answer, Mills raised O.C.G.A. §9-11-11.1 as an affirmative defense. R-60-61. On September 3, 2002, Mills filed a Motion to Dismiss this action against her pursuant to O.C.G.A. §9-11-11.1 and a Motion for Summary Judgment. R-442-494; 317-396. In addition, Petitioners filed a Motion for Partial Summary Judgment on October 3, 2002. R-533-549. The trial court heard the summary judgment motions and the Motion to Dismiss on November 6, 2002. R-Volume 3.

In a December 10, 2002, order, the trial court denied Mills' SLAPP Motion to Dismiss and denied the Petitioners' Motion for Partial Summary Judgment. R-883-898. Although the trial court granted much of Mills' Motion for Summary Judgment, it held that factual issues remain as to Petitioner Bill Garrett's claims that must be decided in a trial. R-893.

Petitioners appealed the trial court's determination that the Atlanta Humane Society is a governmental entity and that

Garrett is a limited-purpose public figure. (Petitioners have addressed those issues in a separate brief in Case No. S04G0685 and Respondent will reply with a separate brief.)

Mills cross-appealed the denial of her motion to dismiss under the anti-SLAPP statute and the portion of the trial court ruling finding issues of fact remained as to Garrett's claims.

As stated at the outset of this brief, the Court of Appeals held that the trial court should have dismissed the complaint against Mills under O.C.G.A. §9-11-11.1. Mills at 597. After finding that Mills' cross-appeal on the SLAPP issue was dispositive, the Court of Appeals dismissed as moot Petitioners' appeal on the remaining issues. Mills at 598.

On March 29, 2004, this Court granted Petitioners' request for a writ of certiorari and posed the following question regarding the anti-SLAPP issue:

> Whether compliance with the verification requirements of the anti-SLAPP statute, O.C.G.A. §9-11-11.1 (b), prevents a potential SLAPP suit from being dismissed, or whether, notwithstanding compliance with the procedural verification requirements, a claim may be dismissed based upon the substantive protection the anti-SLAPP statute provides for persons who exercise their right to free speech.

III. Argument and Citation of Authorities

In a decision in accordance with the plain language of the statute and prior appellate decisions, the Court of Appeals correctly recognized that the verification provision of

Georgia's anti-SLAPP law, O.C.G.A. §9-11-11.1, affords substantive protections for citizens who speak out on matters of public interest or concern. Accordingly, this Court should affirm the Court of Appeals and rule that a claim may be dismissed based upon the substantive protection the anti-SLAPP statute provides for persons who exercise their right to free speech, notwithstanding a plaintiff's procedural compliance with the verification requirements.

1. Anti-SLAPP Law Protects Against Abusive Litigation and Creates Tort Privilege

In 1996, the Georgia General Assembly adopted legislation to protect citizens against SLAPP (**S**trategic **L**awsuits **A**gainst **P**ublic **P**articipation) actions. Ga. Laws 1996, p. 260. The purpose was to encourage citizen participation in "matters of public significance" and to protect those who do speak out from being the targets of abusive litigation aimed at their exercise of free speech. O.C.G.A. §9-11-11.1 (a).

To achieve that goal, the anti-SLAPP law requires plaintiffs to submit a sworn verification along with their complaint if the claim asserted arises from an act that "could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances." O.C.G.A. §9-11-11.1 (b).

Unlike the verifications used in some civil pleadings, the anti-SLAPP law contains a verification requirement patterned after Rule 11 of the Federal Rules of Civil Procedure aimed at frivolous lawsuits. See, "Civil Practice, Courts," 13 Ga. State Law Rev. 23, 25-26, n. 26 (1996).

Thus, Georgia's anti-SLAPP statute requires both the party asserting the claim and the party's attorney to certify when the complaint is filed that the claim "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the act forming the basis for the claim is not a privileged communication under paragraph (4) of Code Section 51-5-7; and that the claim is not interposed for any improper purpose such as to suppress a person's or entity's right to free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation." O.C.G.A. §9-11-11.1 (b).

If a litigant fails to file such a verification, the claim must be stricken unless it is verified within ten days of the omission being called to a party's attention. O.C.G.A. §9-11-11.1 (b). Subsection (b) further provides that where "a claim is verified in violation of this Code Section, the court, upon motion or upon its own initiative, shall impose . . . an

appropriate sanction which may include dismissal of the claim" and payment of expenses and attorney's fees.

Petitioners ask rhetorically on page 18 of their brief, "If the SLAPP verification is not wholly procedural, why have a verification at all? If the purpose of O.C.G.A. §9-11-11.1 is to dismiss possible SLAPP actions at the outset, then the verification is rendered meaningless." This assertion misses the point of the anti-SLAPP statute. The purpose of the statute is to allow for early dismissal of a baseless suit. Thus, the purpose of the verification is to provide a mechanism for holding not just the plaintiffs, but also their lawyers, accountable for bringing a baseless lawsuit.

Petitioners on page 8 of their brief also compare the verification to the affidavit attached to malpractice complaints under O.C.G.A. §9-11-9.1. This comparison misses the mark because the malpractice affidavit is a review by an outside expert who determines that there is "at least one negligent act or omission claimed to exist and the factual basis for each such claim." The verification under the anti-SLAPP statute is made by the party and counsel, whose lack of objectivity might cause them to be unable to recognize that the action they are verifying ~~**is not a SLAPP**~~ is in fact a SLAPP action.

In such a case, the verification requirement allows "a defendant to object to a claimant's improper motives almost from

the start." <u>See</u>, "Civil Practice, Courts," 13 Ga. State Law Rev. 23, 27 (1996). Thus, O.C.G.A. §9-11-11.1 (d) stays discovery and pending hearings or motions upon the filing of a motion to dismiss pursuant to subsection (b). Subsection (d) also requires a hearing on the motion to dismiss be held within 30 days, unless emergency matters force a later hearing. Quick resolution of SLAPP suits is imperative because every day that a citizen's "right to participate in government decision making" is silenced "is cause for concern." 13 Ga. State Law. Rev. at 27.

At the same time it enacted the anti-SLAPP law, the General Assembly created a new conditional privilege, O.C.G.A. §51-5-7 (4), which deems privileged "[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."

O.C.G.A. §9-11-11.1 (c) provides an expansive definition of acts furthering rights of free speech and to petition the government on matters of public interest or concern. These acts include "any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,

or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." O.C.G.A. §9-11-11.1 (c).[1]

The Court of Appeals held in Metzler v. Rowell, 248 Ga. App. 596, 598 (2001), that these "interlocking Code sections" protect not only a statement made to an "official proceeding authorized by law," but also "any statement made *in connection with an issue under consideration* by an official proceeding." (Emphasis in original). The anti-SLAPP law also applies to statements made prior to the initiation of a judicial, legislative or executive inquiry. See, Hawks v. Hinley, 252 Ga. App. 510, 513 (2001) (holding that the anti-SLAPP law applies to statements in a recall application which "initiates a 'proceeding' to address matters of public concern").

The statements at issue in this case fall within the ambit of the anti-SLAPP statute and the privileged communications law because they address matters of public concern that were

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[1] On pages 19 and 20 of their brief, Petitioners discuss the case of Condit v. National Enquirer, 248 F. Supp. 2d 945 (E.D. Calif., 2002), which they say "recognized a danger of too much SLAPP protection." In fact, Condit held that the California anti-SLAPP law, which apparently has a more narrow public forum definition than Georgia law, did not bar a suit against a tabloid that did not concern the performance of a congressman's duties and was not brought to gain advantage or to silence desirable political or public speech. Accordingly, Condit is inapposite to this case.

discussed at multiple Fulton County Commission meetings. R-457-464; 466-476; 478-486; 488-493. Indeed, Fulton County Commissioner Emma Darnell, during a December 5, 2001, board meeting, declared that "this is an issue which is of great concern to many, many citizens of Fulton County." R-462.

Petitioners filed this suit and the similar action in Cobb Superior Court on December 21, 2001, while the Fulton County Commission was actively considering during official proceedings the provision of animal control services in Fulton County and renewal of the contract with AHS. R-457-464; 466-476; 478-486; 488-493. Accordingly, Petitioners' actions can only be viewed as an effort to chill a "valid exercise of free speech" about a matter of public concern. Hawks, 252 Ga. App. at 512.

Furthermore, there has been no showing of bad faith or malice in this case that would negate Respondent's reliance on the protections of the anti-SLAPP law and the companion conditional privilege. See Section 3 of this brief *infra.*

2. Anti-SLAPP Law Provides Substantive Protection

O.C.G.A. §9-11-11.1 provides substantive protection against a SLAPP suit that cannot be cured simply by the filing of a verification parroting magic language from the statute.

The Court of Appeals correctly recognized in Harkins that Petitioners seek to eviscerate O.C.G.A. §9-11-11.1 through their contention that the law provides merely a procedural protection.

"If the protection offered by the anti-SLAPP statute could be undermined by the mere timely filing of a *pro forma* affidavit (such as in situations where the underlying lawsuit was advanced to have a chilling effect on free speech), the statute itself would be rendered virtually meaningless." Harkins at 360.

Petitioners assert that Denton v. Browns Mill, 275 Ga. 2 (2002), limits the scope of the anti-SLAPP law to mere procedural device. Petitioners reach this erroneous conclusion by ignoring the plain language of Denton and by overlooking long-standing Georgia law that holds that a statute may have procedural, as well as substantive, properties.

In addition, in footnote 5 on page 5 of their brief, Petitioners cite, without any analysis, to a recent Court of Appeals decision, Land v. Boone, Case No. A04A0646 (decided Feb. 11, 2004), 2004 WL 242940, that they claim is contrary to Harkins. Had Petitioners analyzed the Land decision, they would have realized that the Court of Appeals is indicating what Respondent argues here—that a baseless SLAPP suit must be dismissed.[2]

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[2] Land v. Boone is third-generation litigation that began with a baseless SLAPP action brought by a developer against members of a neighborhood committee. See, Nairon v. Land, 242 Ga. App. 259 (2000), which describes the underlying SLAPP action. Upon finding the original suit was a SLAPP action, the trial court granted summary judgment to the defendants and awarded attorneys fees. Id. The plaintiff ultimately withdrew an appeal of the summary judgment finding and the Court of Appeals upheld the

a. Denton Does Not Limit Anti-SLAPP Law to Procedural Protection

Much of this Court's discussion in Denton focuses on the procedural aspects of O.C.G.A. §9-11-11.1 because there had been no verification of any kind filed in that case. Thus, there was no reason to make an inquiry into the legitimacy of the verification because there was no verification to examine. Nonetheless, the language used in Denton in no way precludes a substantive inquiry and in fact supports Respondent's assertion that the anti-SLAPP statute provides substantive protections.

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award of attorneys fees without opinion. Id. The neighborhood committee defendant then sued the developer and his attorneys for abusive litigation. Id. That suit led to the decision in Nairon v. Land, 242 Ga. App. 259 (2000), holding that the underlying SLAPP action terminated when the appeal was withdrawn and that the subsequent abusive litigation action had been brought outside the one-year statute of limitations. In Land v. Boone, the attorney who had been sued in Nairon v. Land brought a frivolous litigation action against Nairon's attorney and Nairon for having brought the unsuccessful abusive litigation action. In Land v. Boone, the trial court granted summary judgment to Nairon and his attorney, finding that there was no showing that the previous suit had been brought with malice. In addition, the trial court found there was no lack of substantial justification because the issue of final termination of the original suit had been a question of first impression. It is in this context and in dicta, that the Court of Appeals states in Land v. Boone that the trial court should have dismissed the original SLAPP action, rather than granting summary judgment, and thus likely would have been reversed had the appeal not been withdrawn. In the context of this discussion and in dicta, the Court of Appeals states in Land v. Boone that when a SLAPP suit is dismissed, there is no adjudication on the merits and it can be re-filed. This Court should clarify this nonsensical dicta. If an action is dismissed as an improper, baseless~~,~~ SLAPP action, it should not be subject to being re-filed because it still would be an improper, baseless SLAPP action.

In Denton, a real estate developer brought suit against a citizens' group for trespass, defamation and intentional interference with business relations claims. Denton at 3. The plaintiff did not file the verification required by O.C.G.A. §9-11-11.1. Id. The trial court granted the defendant's motion to dismiss the complaint for failure to attach the verification. Id. The Court of Appeals upheld the dismissal of most of the causes of action, but found dismissal of the trespass claim was improper because it was not covered by O.C.G.A. §9-11-11.1. Browns Mill Dev. Co. v. Denton, 247 Ga. App. 232 (2000). As a result, the Court of Appeals held no verification was required for that cause of action. Id. In a 4-3 decision, this Court affirmed, finding that an alleged trespass does not fall within the ambit of O.C.G.A. §9-11-11.1. Denton, 275 Ga. at 7.

In their brief, Petitioners assert that this Court has not interpreted the anti-SLAPP statute as creating more than a procedural requirement and, citing Denton, state that this Court will not impose a requirement beyond that found in the statute.

However, Petitioners ignore this Court's statement in Denton that the Court of Appeals seized upon in Harkins to reject the argument that inquiry should end when the procedural requirement of filing a verification is met. Harkins at 359-60. In Denton, this Court stated "that verification does not end the matter; progress of the case is stayed while any verification

dispute is pending and the court can ultimately reject the verification to the plaintiffs' expense." Denton at 7.

Moreover, in Denton at 6, this Court cites with approval to division (1) of Metzler v. Rowell, 248 Ga. App. 596, 597-99 (2001), which states: "Even if a verification is filed with the complaint, the trial court may nevertheless impose sanctions, including dismissal, '[i]f a claim is verified in violation of this code section.' O.C.G.A. §9-11-11.1 (b). The mechanical filing of a verification with the complaint, therefore, does not preclude dismissal if the claim is found by the trial court to infringe on the rights of free speech or petition as defined by the statute." Metzler at 598.

In Metzler, the Court of Appeals found that the anti-SLAPP statute applied to a property owner's tortious interference action against local residents and an environmental group following threats to seek an injunction to stop the use of heavy equipment without a permit. Metzler at 598-99. The Court of Appeals found that the trial court correctly held that the statements at issue were privileged under O.C.G.A. §9-11-11.1 and O.C.G.A. §51-5-7 (4). Id.

Furthermore, if the Court examines the record in Metzler, it will find that its verifications tracked the statutory language, and thus are similar to those filed in this case. Nonetheless, even with the verifications containing the

statutory language, the Metzler court held that the complaint was improperly verified and affirmed the trial court's dismissal of the complaint. Metzler at 599.

In this case, Petitioners mechanically filed a verification with their amended complaint that tracks the language of O.C.G.A. §9-11-11.1 even though the suit seeks to infringe on Mills' free speech and petition rights. Accordingly, the Court of Appeals correctly recognized that the trial court should have dismissed the complaint, just as the trial court did in Metzler.

b. Anti-SLAPP Law Substantive As Well As Procedural

"Substantive law is that which creates rights, duties and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties and obligations." Polito v. Holland, 258 Ga. 54 (1988).

At issue in Polito was the "tort reform" statute abrogating the collateral source rule giving a "party the right to recover damages undiminished by collateral benefits." Id. at 55. The Supreme Court found the statute created a substantive change to the collateral source rule even though it worked a "procedural (evidentiary) change in the law because evidence of collateral benefits becomes admissible whereas it was formerly considered immaterial." Id. at 57. The Supreme Court held that the law was also substantive because it "works a substantive change in the law since damages *may*, under the statute, be reduced by

collateral benefits, contrary to prior law." Id. at 58. (Emphasis in original).

Polito demonstrates that a law can be substantive, even though some aspects merely address procedure. O.C.G.A. §9-11-11.1 is just such a law.

The statute is procedural in that it requires that a verification be attached to the complaint and gives a party 10 days to remedy a failure to so file.

However, just like the "tort reform" statute abrogating the collateral source rule, the anti-SLAPP statute works a substantive change in the law because it limits the circumstances under which a defamation case can be brought, contrary to prior law.

First, in conjunction with O.C.G.A. §51-5-7 (4), the anti-SLAPP law creates a new category of privileged communications under tort law that cannot give rise to a defamation action.

Black's Law Dictionary explains that substantive law, "which creates, defines and regulates rights and duties of parties," involves "contract law, criminal law, tort law, law or wills, etc." Procedural law, according to Black's Law Dictionary, prescribes the methods of enforcing rights or obtaining redress for their invasion.

Although there are procedural aspects to the anti-SLAPP law's requirement that a verification be filed, the statute is

primarily substantive in that it helps carve out a new exception to defamation law and dictates the limited circumstances under which a defamation action may be brought where the allegations arise from issues of public interest or concern.

Second, O.C.G.A. §51-5-7 (4), by creating a new type of defamation privilege, in essence creates a right, i.e., an advantage, because it creates an exemption from liability for the speaking or publishing of what otherwise would be considered defamation based on the fact that the statement was made in good faith in connection with a public interest or concern.

Petitioners complain on page 16 of their brief that the Court of Appeals finding of a substantive privilege in O.C.G.A. §9-11-11.1 "eviscerates the historically recognized right of action for defamation." However, if Petitioners 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 the **R**espondent who seeks to rely on them or the Court of Appeals which correctly interpreted them. Petitioners fail to grasp that the Legislature also carved out a new conditional defamation privilege in O.C.G.A. §51-5-7 (4) when it enacted the anti-SLAPP law.

Because Petitioners cannot simply parrot the language of the anti-SLAPP statute in their verifications, the Court of Appeals correctly determined that the suit must be dismissed.

3. Ms. Mills' Good-Faith Comments are Not Defamatory and Therefore Not Actionable for Libel

The Court of Appeals correctly held that this case was a baseless action against Mills that the trial court should have dismissed. The record reflects not only that Respondent's comments were made in good faith about a matter of public concern, and thus are not actionable under O.C.G.A. §9-11-11.1 and O.C.G.A. §51-5-7 (4), but also that they were not defamatory as a matter of law and therefore are not actionable for libel.

A defendant can only be held to pay damages for libel if the statements published are defamatory. 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 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 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. See also, Gast v. Brittain, 277 Ga. 340 (2003) (holding statements regarding "immorality" and an alleged implication that plaintiff condoned child abuse could not be reasonably interpreted as stating or implying defamatory facts that were capable of being proved false).

Some of the comments identified by Petitioners in their Complaint simply do not inflict injury, hatred, contempt, or ridicule upon Petitioners. Other comments are simply Mills' subjective opinions of Petitioners' 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, given that Georgia law provides for the euthanasia of animals, nor does it comment upon his profession at all.

Mills' statements are all her opinions as to the AHS's and Garrett's ineffectiveness with regard to their responsibilities concerning animal control and related public health issues. Mills believes that Garrett and the AHS were more concerned with fundraising and amassing resources than they were with animal welfare, adopting-out pets, and assisting with the prosecution

of animal cruelty cases. Mills further develops this opinion by explaining, hypothetically, what she believes would be the best ways for AHS to maximize profits.

Mills' comment--"why does AHS not submit these cruelty cases to the Atlanta Police Department for prosecution?"--is her opinion as to why AHS and Garrett did not do more to assist cruelty prosecutions. Mills also believes that 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 AHS's corporate benefactors. These opinions are partly the basis of this litigation. "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 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.*

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 under Gast v. Brittain, 277 Ga. 340 (2003). Clearly, Mills believes that 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. Garrett's qualifications for removing pet excrement from footwear with his tongue, however, are simply not subject to objective analysis. Likewise, an evaluation of Garrett's capacity for metaphysical "good" or "evil" and the appropriate time for Garrett to "retire" are purely matters of opinion. Mills is simply saying that she believes Garrett is no good at performing his public functions and that she believes the animal welfare community should work together to replace him.

a. **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 was 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).

Mills' comments are constitutionally protected because they are hyperbole intended to dramatically emphasize the AHS's or Garrett's faults rather than to actually accuse them of a crime or some other impropriety or fault. The "title" Mills employs for Garrett, "Mr. Kill", does not accuse Garrett of killing animals through his position with the **Atlanta Humane Society**. 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 Garrett or the AHS of actually enjoying the killing of animals. These are rhetorical expressions intended to place Petitioners' performances of their public functions in relief for emphasis.

Likewise, if Mills' comment is read to suggest that Garrett is an animal killer then it is a figurative title meant to highlight the enormous percentage of animals legally euthanized by organizations under Garrett's authority. This particular statement by Mills does not necessarily state or imply that these killings were not justified. Mills' use of the title "Mr. Kill" is meant to highlight that Garrett **is** the leader of the

organization that operated Fulton County Animal Control, which killed thousands of animals each year.

Mills' reference to 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. Tieco, Inc., 261 F.3d 1275, 1293, 1294 (11th Cir. 2001) (Holding that the statement 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 decisions 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. Mills employs the same trope when she refers to Garrett as "Mr. Kill" to suggest that he is morally responsible for the deaths of thousands of animals through poor operation of the Atlanta Humane Society and Fulton County Animal Control.

Mills' comment that 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.)

b. Ms. Mills' Comments Were Made in Good Faith In Connection With a Matter of Public Concern and Were Not Published with Actual Malice.

Petitioners have made no showing that Mills' comments are not constitutionally or statutorily 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. Barber v. Perdue, 194 Ga.App. 287, 288 (1989); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

As detailed above, many of Mills' comments are not defamatory, but rather are constitutionally protected opinions or non-literal, rhetorical hyperbole, which is also constitutionally protected. Each of Mills' opinions is also protected because they are commentary based upon the truth, or they were not published with reckless disregard for the truth.

Mills' language is very critical and extremely candid but she is entitled to offer her comments. Although these words may hurt Garrett's feelings, it is part of the social contract he signed onto as the head of an agency that was charged with the responsibility of carrying out the public's business. Criticism of such officials is a "fundamental principle of our constitutional system" that includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. at 270.

"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."~~).~~ Swindall v. Cox Enterprises, Inc., 253 Ga.App. 235, 236 (2002). 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.

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.

IV. Conclusion

All of the evidence presented in this case shows that Respondent Kathi Mills made statements in good faith on a matter of public concern. Respondent is precisely the type of citizen that the anti-SLAPP law was enacted to protect. Accordingly, for all of the foregoing reasons, Respondent Mills respectfully asks this Court to affirm the Court of Appeals and remand this case to the trial court for entry of dismissal and assessment of reasonable fees and costs under O.C.G.A. §9-11-11.1.

Respectfully submitted this _____ day of May, 2004.

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