

IN THE SUPREME COURT

STATE OF GEORGIA

ATLANTA HUMANE SOCIETY and )  
BILL GARRETT, )  
 )  
Appellants, )  
 )  
vs. ) Case No.: S04G0613  
 )  
BARBARA L. HARKINS, )  
 )  
Appellee. )

**APPELLEE BARBARA HARKINS' BRIEF**

This case, which garnered affidavits from former and current State Senators who both authored and sponsored the anti-SLAPP statute as well as multiple amicus briefs, addresses whether the anti-SLAPP statute and its companion privilege protect citizens who speak out on issues "of public interest or concern" by empowering courts to dismiss baseless lawsuits that they determine to be SLAPPs within the meaning of O.C.G.A. § 9-11-11.1. Because the Court of Appeals properly found that courts may review the sufficiency of anti-SLAPP verifications and that AHS' verifications fail, this Court should affirm.

Appellants argue that the anti-SLAPP statute requires only the mere pro forma filing of a verification, and that courts are powerless to reject the filed verification even if a lawsuit is in fact a SLAPP. AHS Brief at 1, 3. We disagree. The mere filing of

the verification is a necessary first procedural step, but in a second step the court should evaluate whether the lawsuit is in fact a SLAPP under the test set forth in O.C.G.A. § 9-11-11.1. As the Court of Appeals correctly concluded, and as this Court already stated in *Denton v. Browns Mill Development*, "verification does not end the matter" and "the Court can ultimately reject the verification, to the plaintiff's expense. See O.C.G.A. § 9-11-11.1(b) & (d)." 275 Ga. 2, 7 (2002). Whether this second step is phrased as "procedural" or "substantive," the language and purpose of the anti-SLAPP statute are clear. O.C.G.A. § 9-11-11.1(b) ("If a claim is verified in violation of this code section, the court ... shall impose ... an appropriate sanction which may include dismissal and an order to pay [fees and costs]."). The Bill's sponsor notes:

The anti-SLAPP statute, and the new privilege created at the same time for statements of "public interest or concern" are intended to provide additional substantive grounds for dismissal and additional remedies, about and beyond those available from the summary judgment and motion to dismiss mechanisms. The are designed to afford special protection for speech about issues "of public interest or concern." The anti-SLAPP statute intends to create a new substantive right; it is intended to encourage participation by citizens in matters of public significance and to encourage the valid exercise of free speech and the right to petition government.

**R-63** (Senator Oliver Affidavit, para 7).

AHS inaccurately claims that the courts below required a plaintiff to immediately prove "as a matter of law" at an anti-SLAPP hearing "that the plaintiff will, with certainty, prevail."

AHS Brief at 5, 6. They also boldly state that the decisions below “repealed a plaintiff’s right to bring a defamation claim” and provide “absolute immunity” for defamatory statements. *Id.* at 16, 21, 24. Not so. The Court of Appeals simply found that despite AHS’ verifications, this lawsuit (and another filed by AHS) were simply baseless and ungrounded SLAPPs within the meaning of the anti-SLAPP statute. While a plaintiff need not prove his case at the outset, the **mere filing of a verification does not exempt a baseless lawsuit from dismissal** under the anti-SLAPP statute:

If the protection of the anti-SLAPP statute could be undermined by the mere 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 v. Atlanta Humane Society*, 264 Ga. App. 356, 360 (2003)

A well-grounded defamation or other lawsuit that meets the anti-SLAPP statute’s requirements can move forward into discovery. But the factually baseless and legally groundless defamation claims here fail under anti-SLAPP review.

### **I. Statement of Facts and Proceedings Below**

Barbara Harkins (Harkins), a long-time volunteer of the Atlanta Humane Society (AHS), is being sued because she joined with others to voice public concerns about serious problems regarding proper treatment of animals at AHS.

For over a decade, during the 1980s and 1990s, Harkins volunteered her services for AHS. **R-37, 268** (Harkins Aff.). And

after retiring from the corporate world, she joined the paid staff of AHS in 1998. **R-37, 268** (Harkins Aff.).

Harkins served as an adoption counselor, taking animals to PetSmart for adoptions and coordinating adoptions at AHS. **R-37, 268** (Harkins Aff.). She also worked in the AHS clinic, meeting with animals and their owners. **R-37, 268** (Harkins Aff.).

Over time, Harkins' began to notice significant problems at AHS: lack of animal cruelty investigations, problematic spay/neuter policies, and animal adoption statistical issues. **R-37, 268** (Harkins Aff.). In 1999, she met with Plaintiff Bill Garrett, AHS Executive Director, to discuss those concerns. **R-37, 268** (Harkins Aff.). However, Garrett abruptly declined to institute any changes. **R-37, 268** (Harkins Aff.). Then, after Garrett fired a promising new assistant executive director, Harkins wrote to the AHS board outlining why she believed the animals were suffering, and suggesting policy changes that could alleviate suffering. **R-37, 211** (letter), **R-37, 268-69** (Harkins Aff.). The AHS board never responded. Garrett met with Harkins again later that month but only repeated his refusal to correct problems at AHS. Despite Garrett's explicit request that she stay, Harkins resigned in September 2001. **R-37, 268-69** (Harkins Aff.).

Atlanta's WSB-TV Channel 2 initiated an investigation of AHS during the summer of 2001. **R-37, 269-70** (Harkins Aff.). Harkins

was one of several employees and volunteers interviewed and featured in a three-part WSB-TV spotlight series which ran on November 1, 2, and 9, 2001. **R-37, 277** (Murphy Aff.), **R-37, 269-70** (Harkins Aff.), **R-37, 281** (Liles Aff.), **R-37, 285-86** (Harley Aff.), **R-37, 258** (Feingold Aff.).

In interviews, Harkins made the following statements contained in that whistleblower report (that are now at issue in this case):

1. Responding to a TV reporter's statement that AHS "claims its clinic is open twenty-four hours a day, seven days a week, 365 days a year" - Harkins, concurring in the premise, said: "No. There's no one there at night." **R-3, 8.**
2. Prior to leaving, I [Harkins] asked, "Why do we not investigate cruelty?" - "He [Garrett] said, 'we don't - we lose money on every cruelty investigation.'" **R-3, 9.**
3. "And, I'm passionate to a cause. And things are not right, and they need to change. And the people of Atlanta need to know. Things are desperately wrong." **R-3, 9.**
4. Responding to her stated observation that AHS ambulances are not used - Harkins said "That's my experience, yes." **R-3, 9.**
5. Referring to AHS "formal" cruelty investigations, over a period of three-years, Harkins said "I know of just one." **R-3, 9.**

The Fulton County Commission provided over \$281,000 in taxpayer funds to AHS for animal control pursuant to a contract, the City of Atlanta's provides \$472,000 of taxpayer funds, and other municipalities contribute as well. **R-37, 212** (contract), **R-37, 226** (12/05/02 Fulton County Commission minutes at 241).

Within days of the WSB-TV report, Fulton County Commissioner Karen Webster expressed significant interest in the animal control problems. **R-37, 258** (Feingold Aff.). At their November 21, 2001 meeting, Fulton County Commissioners requested a report regarding the claims and charges against animal control, and requested that staff give a report on animal control problems. **R-37, 261** (Andrews Aff.), **R-37, 226** (12/05/01 minutes at 241, 240).

The following week, Harkins and others met with the staff of the Fulton County Commission to discuss the award of the county animal control contract to AHS. **R-37, 258** (Feingold Aff.), **R-37, 272** (Harkins Aff.), **R-37, 281** (Liles Aff.), **R-37, 285-86** (Harley Aff.). Then, at its December 5, 2001 meeting, the Commission discussed adoption policies and cruelty cases.<sup>1</sup> **R-37, 226** (12/05/01 minutes at 241-243). Again, on December 19, 2001, the Fulton County Commission heard public comment about these issues, and whether AHS should continue to receive the animal control contract.<sup>2</sup> **R-37, 226** (12/19/01 minutes at 73-78). Garrett chimed

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<sup>1</sup> The Commission was extremely interested in these issues. **R-37, 226** (12/05/01 minutes at 244), **R-37, 261-62** (Andrews Aff.). In fact, in response to Dr. Fason's answers to the Commission's questions, Vice Chair Emma Darnell asked, "Is there some reason why we don't have anything today to act on since **this is an issue which is of great concern to many, many citizens of Fulton County?**" **R-37, 226** (12/05/01 minutes at 244 (emphasis added)).

<sup>2</sup> Despite AHS assertions to the contrary, see AHS brief at 4, Ms. Harkins attended both of these meetings of the Fulton County

in and by letter explained why he thought AHS should remain the recipient of the Fulton County contract. **R-37, 297-98** (letter).

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Commission. **R-37, 272.**

Only two days later, as the Commission considered the termination of its contract with AHS, Plaintiffs filed suit against Harkins.<sup>3</sup> **R-3.** Plaintiffs also filed a similar SLAPP suit against Kathi Mills containing similar allegations on December 21, 2001. **R-37, 299.** Plaintiffs also threatened litigation against counsel for Harkins and threatened to assert frivolous litigation claims. **R-18.**

Since the initiation of both of these lawsuits, Fulton County has now terminated its contract with AHS. Harkins' Appellate Brief, filed April 7, 2003, Ex. A (03/21/03 *AJC* article), Harkins' Appellate Brief, filed April 7, 2003, Ex. B (02/04/03 *AJC* article), Harkins' Appellate Brief, filed April 7, 2003, Ex. C (03/20/03 *AJC* article).

Harkins first moved to dismiss the Complaint on January 25, 2002, pursuant to Georgia's anti-SLAPP statute. **R-12.** On the day of the hearing, Plaintiffs verified their Complaint, causing the court to deny Harkins' motion. **R-14.** Harkins subsequently sought a ruling that the verification of the Complaint violated the anti-SLAPP statute, and therefore filed her second SLAPP motion. **R-37,**

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<sup>3</sup>Discussion of the issues continued into the 2002 year and additional public comment was heard at the January 16, 2002 Fulton County Commission meeting. **R-37, 316** (01/16/02 Fulton County Commission meeting minutes at 50-55).

**R-63.** Believing itself incapable of dismissing a verified Complaint, the court denied the motion on July 25, 2002 (**R-65**). Harkins moved for reconsideration. **R-66.** The court denied the motion for reconsideration on August 23, 2002 (**R-72**), and certified it for interlocutory appeal (**R-74**) (questioning whether anti-SLAPP statute provides "substantive" protection). The Court of Appeals granted interlocutory review, and reversed the decision of the trial court. *Harkins v. Atlanta Humane Society*, 264 Ga. App. 356, 590 S.E.2d 737 (2003). This Court granted the petition for certiorari on March 29, 2004 along with the companion case. See *Mills v. Atlanta Humane Society*, 264 Ga. App. 597, 591 S.E.2d 423 (2003).

## II. Argument and Citation of Authorities

The Court of Appeals correctly concluded that this case fell within the parameters of the anti-SLAPP statute and that the Complaint was verified in violation of the anti-SLAPP statute. O.C.G.A. § 9-11-11.1(b). Therefore, this Court should affirm.

### A. This case falls within the ambit of Georgia's Anti-SLAPP statute, O.C.G.A. § 9-11-11.1.

O.C.G.A. § 9-11-11.1 was designed prevent SLAPPs (Strategic Lawsuits Against Public Participation) and to "protect Georgia citizens who participate in 'matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances' from 'abuse of the judicial process.'" *Metzler v. Rowell*, 248 Ga. App. 596, 597, 547 S.E.2d 311 (2001); *Providence Construction Co. v. Bauer*, 229 Ga. App. 679, 494 S.E.2d 527, 528 (1997); *Hawks v. Hinely*, 252 Ga. App. 510, 512, 556 S.E.2d 547 (2001)

("With the anti-SLAPP statute, the General Assembly sought to prevent the chilling effect that abusive lawsuits would have on the valid exercise of those rights").

As this Court noted in *Denton*, Georgia's anti-SLAPP statute identifies its purposes as follows:

The General Assembly of Georgia finds and declares that **it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance** through the exercise of their constitutional rights of **freedom of speech and the right to petition government for redress of grievances**. The General Assembly of Georgia further finds and declares that **the valid exercise of the constitutional rights of freedom of speech and the right to petition the government for a redress of grievances should not be chilled through abuse of the judicial process**.

*Denton v. Brown's Mill Dev. Co.*, 275 Ga. 2, 6-7 (2002) (quoting O.C.G.A. § 9-11-11.1(a)) (emphasis added).

Under the anti-SLAPP statute, "act[s] in furtherance of the right of free speech or the right to petition government for a redress of grievances under the [constitutions] in connection with an issue of public interest of concern" include:

[A]ny written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceedings, 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 proceeding authorized by law.

O.C.G.A. § 9-11-11.1(c); see *Metzler*, 248 Ga. App. at 598.<sup>4</sup>

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<sup>4</sup> In *Hawks*, the Plaintiffs argued that the anti-SLAPP statute encompassed only statement made to an "existing

"Subsection (b) of this Code section also references the privilege statute, O.C.G.A. § 51-5-7, specifically subsection (4), and the privilege statute in its turn incorporates the free speech and petition definition set out in O.C.G.A. § 9-11-11.1(c)." These interlocking Code sections protect:

- Any statement made to any 'official proceeding authorized by law;' or
- Any statement made in connection with an issue under consideration by any official proceeding.

*Metzler*, 248 Ga. App. at 598.

In the instant case, Harkins' speech clearly falls within the scope of the anti-SLAPP statute.

First, despite AHS protestations to the contrary, AHS Brief at 4 n. 4, Harkins' speech, and the speech of the others interviewed by WSB-TV, constitute matters of public concern. Commissioner Emma

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'proceeding.'" *Id.* The Court explicitly held that the anti-SLAPP statute encompassed statements made prior to any existing proceedings -- rejecting a "myopic construction" that would produce "undesirable and illogical results and consequences" such as denying protection to speech which leads to government investigations. *Hawks*, 252 Ga. App. at 513. Statements to the media also similarly fall within the definition of the anti-SLAPP statute. See *Browns Mill Dev. Co. v. Denton*, 247 Ga. App. 232, 543 S.E.2d 65 affd. in part reversed in part 275 Ga. 2 (2002).

Darnell stated as much in the December 5, 2001 meeting of the Fulton County Commission, "this is an issue which is of great concern to many, many citizens of Fulton County." **R-37, 232.** In a letter to Fulton County, AHS agreed that animal control services were "vital services" to the community. **R-37, 297.**

Second, Harkins' speech was in connection with an issue under consideration by an official proceeding of the Fulton County Commission. As a result of the WSB-TV series, Fulton County Commissioner Karen Webster expressed significant concern about animal control. **R-37,258, 271.** The Commissioners then requested that their staff prepare a report on animal control, **R-37, 228, 229, 261, 264,** and the staff developed a report based in part on subsequent meetings with Harkins and others suggesting changes to the animal control contract regarding animal cruelty and adoption policies. **R-37, 248-49, 261, 265-266.** On December 5, 2001 and December 19, 2001 and January 2, 2002, AHS and animal control were discussed and public comment was heard about renewal of their contract. **R-37, 227, 250.** Ultimately, AHS lost its contract.

Plaintiffs have filed chilling lawsuits in violation of O.C.G.A § 9-11-11.1 with claims here arising out of Harkins' advocacy in furtherance of free speech and in connection with an issue of public interest or concern before the Fulton County Commission. There is no question that this lawsuit falls within the parameters of the anti-SLAPP statute. Therefore, as discussed below, first a verification must be filed and second a court must evaluate whether the lawsuit and verification fail under the anti-SLAPP statute. The trial court looked only to the first issue, but the Court of Appeals found the second step necessary and fatal to

AHS claims.

B. A Court can ultimately reject a verification, to the plaintiff's expense -- i.e., the verification, even if filed, may fail.

Georgia's anti-SLAPP statute employs a two step system by which to evaluate the validity of a lawsuit. First, in order to "encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech," the anti-SLAPP statute employs verification requirements "to discourage cavalier and unfounded lawsuits filed against someone exercising his right[s]." See *Hawks*, 252 Ga. App. at 510, 515-16. Thus, before a claim can be

brought against a person or entity "arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for redress of grievances in connection with an issue of public interest of concern," the party asserting the claim must file a written verification under oath "contemporaneously" with the Complaint. O.C.G.A. § 9-11-11.1(b)(emphasis added).

But the trial court, not the party, ultimately determines whether or not any verification of the Complaint is sufficient. *Denton*, 275 Ga. at 7 ("verification does not end the matter" -- "the court can ultimately reject the verification"). Thus, the second stage addresses the sufficiency of the verification and whether the lawsuit is in fact a SLAPP.<sup>5</sup>

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<sup>5</sup> O.C.G.A. § 9-11-11.1(b) requires dismissal of Complaint due to any of the following four conditions:

- 1.If statements are made in "good faith as part of an act in furtherance of the right of free speech," pursuant to O.C.G.A. § 51-5-7(4).
- 2.If statements made to "petition the government for redress

Many appellate decisions have involved plaintiffs who refused to file a verification (first stage), while others tested the whether the lawsuit was a SLAPP despite the verification (second stage). See *Hawks*, 252 Ga. App. at 515.<sup>6</sup> At this second stage:

[i]f a claim is verified in violation of this Code section [that is, if the verified claim does not meet any one of the statute's enumerated requirement,] the court,

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of grievances under the Constitution of the United States of America or the Constitution of the State of Georgia in connection with an issue of public interest or concern," pursuant to O.C.G.A. § 51-5-7(4).

3. If claims are "interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition the government, or harass, or to cause unnecessary delay or needless increase in the cost of litigation."
4. If claims are not "well grounded in fact" or not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

<sup>6</sup>*Denton*, the only SLAPP opinion from this Court, involved plaintiffs who refused to even file a verification.

upon motion or upon its own initiative, shall impose...an appropriate sanction which may include dismissal of the claim and an order to pay [fees and expenses].

O.C.G.A. § 9-11-11.1(b). Courts are "bound to follow the express language of O.C.G.A. § 9-11-11.1(b), which requires that claims 'not verified as required by this subsection' must be stricken." *Id.*

This Court and other appellate decisions agree: "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 and petition as defined by the statute." *Metzler*, 248 Ga. App. at 598.

In *Denton*, this Court confirmed the language of the anti-SLAPP statute (and the decisions in *Hawks*, *Metzler*, *Harkins* and *Mills*) finding in the second stage of analysis:

**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 plaintiff's expense. See O.C.G.A. § 9-11-11.1(b) & (d). *Denton*, 275 Ga. at 7.**

"Whether the verification is completely omitted or merely deficient upon filing, the claimant must remedy the situation within the statutory ten-day period or the complaint 'shall be stricken.'" *Hawks*, 252 Ga. App. at 515-16. Mere verification that the factual statements contained in the complaint are true is insufficient where the Complaint is factually or legally baseless

and fails review under the anti-SLAPP statute's requirements. *Id.*

For the first time in this litigation, even AHS now apparently concedes that "heightened pleading" requirements attach to SLAPP verifications and Complaints. AHS Brief at 8-9.<sup>7</sup> But, by the end of the next page of their brief, AHS returns to the position that a court is powerless to dismiss a baseless complaint. AHS Brief at 9 ("If a proper verification is filed [a case] can proceed forward into the fact-finding stage"). *Id.* at 9.

In the instant case, the trial court made no evaluation at all as to the sufficiency of the verifications. **R-14, 15, 20.** It denied the motion to dismiss simply because AHS at the last moment

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<sup>7</sup>AHS argues by analogy that the SLAPP statute verification is similar to the medical malpractice statute affidavit. AHS Brief at 8, 11. That very well may be true. The medical malpractice affidavit requires a substantive recitation of at least one specific statement of negligence; otherwise is it fatally defective. See § 9-11-9.2; *Edwards v. Vanstrom*, 206 Ga. App. 21, 424 S.E.2d 326 (1992). To the extent this Court opts to consider the anti-SLAPP statute like the medical malpractice statute, AHS verification fails because it is devoid of any substance and only a "pro forma" recitation parroting back the language of the statute which is insufficient. See *Hawks*, 252 Ga. App at 515-16.

(at the first hearing) appeared with affidavits. **R-14, R-15.**

It appears Plaintiff(s) have timely filed requisite Affidavit(s), if required, with respect to provisions of O.C.G.A § 9-11-11.1. Accordingly, Defendant's Motion to Dismiss be and is hereby denied.

**R-15; see also R-20.**

Harkins then filed a second anti-SLAPP motion, asking the Court to evaluate whether the Complaint and verification met the anti-SLAPP statute's requirements -- whether the verification failed. Normally, "[a]ll discovery and any pending hearings or motions in the action shall be stayed upon the filing of a motion to dismiss... made pursuant to subsection (b) of this Code Section." O.C.G.A. § 9-11-11.1(d). But the trial court here allowed discovery<sup>8</sup> and did not evaluate whether the Complaint and verification, when filed, were sufficient to meet the requirements of the anti-SLAPP statute. **R-20.**

By requiring an affirmative statement on the part of claimants indicating that they are not initiating a SLAPP action, the Act allows a defendant to object to a claimant's improper motives almost from the start and allows the court to take action when defendants do not object... Because any delay might benefit the SLAPP plaintiff, **the Committee attempted to propose a solution that would relieve actual and potential SLAPP defendants from meritless lawsuits with little or no delay.**

**R-24;** 13 GA. STATE UNIV. L. REV. 23, 27 (Nov. 1996). Permitting

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<sup>8</sup>"When the statutory scheme provides for limited discovery in conjunction with the filing of a motion to dismiss or motion to strike, the introduction of evidence produced by that discovery should not convert the motion to one for summary judgment." Metzler, 248 Ga. App. at 600.

discovery defeated one of the objectives of the anti-SLAPP statute: to prevent the SLAPP victim from falling prey to delay and expense.

*See generally* R-24, 168.

But worse, **even after discovery (where AHS never even deposed Harkins), the trial court still failed again to evaluate whether the verification was faulty, or, in other words, whether the Complaint failed the requirements of the anti-SLAPP statute. The trial court believed that it was powerless to test the sufficiency of the verification. R-72, R-74. The Court of Appeals correctly found this to be error:**

The plain language of O.C.G.A. § 9-11-11.1(b) authorizes dismissal of a claim that is not "well grounded in fact," not "warranted by ... a good faith argument" or "existing law," or if the statements are "privileged." Determining whether any of the aforementioned grounds applies requires more than a simple determination as to whether an affidavit was filed within a specified time.

*Harkins*, 265 Ga. App. at 360. Consistent with the purposes of the anti-SLAPP statute, rather than remand and shoulder Harkins with further delay and expense, the Court of Appeals then evaluated the verification, found that it failed and that the lawsuit was in fact a baseless SLAPP. *Id.* at 360-361 ("Since the undisputed facts in the record here indicate that the statements made by Harkins were protected statements under the anti-SLAPP statute, [AHS] lawsuit should have been dismissed."). While this portion of the Court of Appeals analysis could have been more elaborate, it was plainly correct as discussed below. Significantly, AHS Brief to this Court

presents no statement of facts, does not discuss or describe the alleged defamatory statements, and appears to nearly totally avoid discussion of the factual and legal basis for claims and defenses including evidence and claims of privilege, malice, opinion or the truth defense.

**C. The Complaint must be dismissed under the anti-SLAPP statute because Harkins' statements are protected and not actionable for libel.**

The Court of Appeals correctly held, based upon "undisputed facts in the record," that although a verification was filed, this baseless lawsuit failed under the anti-SLAPP statute. This this conclusion was wholly consistent with settled case law.

**1. Harkins' statements were made in good faith, and in connection with an issue of public concern under 51-5-7(4).**

The companion defamation privilege, passed in conjunction with Georgia's anti-SLAPP statute, creates a privilege for:

Statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for 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. § 51-5-7(4).

Harkins' statements to WSB-TV about animal welfare are just such statutorily protected speech. The Court of Appeals correctly held that O.C.G.A. § 51-5-7(4) applied because:

After Harkins's statements were aired on WSB-TV, the Fulton County Commission initiated proceedings to investigate the allegations against AHS and even requested a report on the allegations. In addition, AHS received over \$750,000 in taxpayer funds to sustain its operations in Atlanta and Fulton County, thereby making AHS accountable to the public for effective animal control or inefficient

use of taxpayer funds. The Fulton County Commission itself even stated in its December 5 meeting that AHS's services or alleged lack thereof presented "an issue which is of great concern to many, many citizens of Fulton County." **The evidence here shows that Harkins's statements were clearly acts in furtherance of her free speech in connection with an issue of public concern as defined by the anti-SLAPP statute and existing case law.** *Harkins*, 264 Ga. App. at 361 (emphasis added).

The anti-SLAPP statute explicitly states that a lawsuit must be dismissed for any of four reasons -- one of which is if it is grounded in "a privileged communication under paragraph (4) of Code Section 51-5-7." O.C.G.A. § 9-11-11.1(b). The Court of Appeals correctly held that such was the case here based upon the "undisputed facts in the record" and the absence of "heightened pleading" allegations or evidence of malice to pierce the privilege. *Id.* at 360.

**2. AHS' claims should be dismissed because they are not well grounded in fact or warranted by existing law.**

Additionally, because Harkins' statements are privileged under Georgia law and the Constitution, Georgia's anti-SLAPP statute mandates dismissal of claims not "well grounded in fact" or "well grounded in law."

**a. Georgia's statutory defamation privileges**

Beyond O.C.G.A. § 51-5-7(4), Georgia's privileges for statements made pursuant to a moral duty or protection of interest apply here. O.C.G.A. § 51-5-7(2)(3)(9). Harkins' lifelong commitment to animal welfare underscores her legitimate interest in the effective operation of AHS. (**R37, 267-274**) (Harkins Aff.). In the WSB broadcast, Harkins spoke in performance of a private, moral duty by referring to animal welfare issues as her "cause" and declaring herself "passionate" about animals. See **R3, 4** (WSB Broadcast). Her comments are thus privileged. See *Auer v. Black*, 163 Ga. App. 787, 789 (1982). She critiqued specific aspects of the operation of the AHS, and sought to effect change within the primary animal care-giving institution in her community. *Morton v. Stewart*, 153 Ga. App. 636, 234 (1980).

**b. Public figure privilege**

Beyond Georgia's statutory privileges, Plaintiffs' status as public figures renders Harkins' statements about them subject to a higher level of constitutional protection.

Georgia case law, in accordance with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1975), finds that one may become a public figure by position alone or by commanding a substantial amount of public interest. See *Mathis v. Cannon*, 276 Ga. 16, 21-25 (2002);

*Williams v. Trust Co. of Georgia*, 140 Ga. App. 49, 52 (1976).<sup>9</sup> A person does not have to consent to be a public figure. See *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 814 (2001).

Plaintiffs are public figures because:

- Garrett serves as Executive Director of AHS, "an old and venerable institution well-established in the community," and has so for over 25 years. **R37, 297** (Garrett letter).
- Until very recently, AHS received substantial public funding, approximately 1.4-2 million dollars per year, via contract with Fulton County and the City of Atlanta. **R37, 212-225** (Contract).
- Plaintiffs have positioned themselves as public figures, and have been quoted extensively in the media. **R3, 1-7** (WSB/TV Broadcast).
- Plaintiffs are considered public agencies under the Georgia Open Records Law. See **R43, 3-7** (Br. of Amicus

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<sup>9</sup>. In particular, Georgia courts readily conclude persons are public figures when they enjoy a close relationship to the law and enforcement of the law due expressly to their involvement with the law and the fact that they are "charged with the public interest" and their actions are "governmental in character." *Pierce v. Pacific & Southern Co.*, 166 Ga. App. 114, 116 (1983). Plaintiffs, who were charged with the public interest of enforcing leash law per dictates of their governmental contract, should be deemed public figures. **R37, 212-225** (Contract).

Curiae). See *Mathis*, 276 Ga. at 22; *Jewell*, 251 Ga. App. at 817; *Sparks v. Peaster*, 260 Ga. App. 232 (2003).

**C. AHS fails to present evidence of actual malice.**

Because Harkins' statements are privileged under any one or all of the above statutory and constitutional privileges, those statements are protected unless AHS shows actual malice.<sup>10</sup> But at the dispositive time for the anti-SLAPP statute, the filing of the Complaint, AHS provided no evidence whatsoever of malice -- only one conclusory statement. **R3, 2**(Complaint). And even after the trial court allowed discovery, AHS still had no evidence of malice, much less the required clear and convincing evidence. By baldly alleging "malice" in their Complaint and in discovery, without ever offering support or even an alleged factual predicate for the charge, AHS' claims fail.

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<sup>10</sup> Actual malice is defined as "defamatory matter . . . uttered with knowledge that it was false or reckless disregard for whether it was true or false." *Hammer v. Slater*, 20 F.3d 1137,1142 (11<sup>th</sup> Cir. 1994); See *Sullivan*, 376 U.S. at 279. The Plaintiff must meet a stringent burden of proof, offering "clear and convincing proof that a defamatory falsehood alleged as libel was uttered with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Hemenway v. Blanchard*, 163 Ga. App. 668, 672 (1982) ("high degree of awareness of its probably falsity" required). If not, the defense of privilege remains intact.

In contrast to those conclusory statements, the record is replete with evidence directly supporting Harkins' good faith. Harkins' lifelong passion for animal welfare, fifteen years of direct involvement with the AHS as a volunteer and employee, and the sworn testimonies of numerous witnesses indicate a complete lack of malice. **R37, 267-274**(Harkins' Aff.).

In assessing actual malice, Georgia courts have stringently applied the "heavy burden" of clear and convincing evidence.<sup>11</sup> Here, Harkins has furnished an affidavit avowing to her good faith, and AHS has failed to point to or present contrary evidence of malice. **R37, 267-274** (Harkins Aff.). AHS' complete failure to provide any factual predicate of malice does not even approach the rigorous clear and convincing standard required. In this case, AHS has presented even less evidence than is Court's most recent decision. *Sparks*, 260 Ga. App. at 238 (not even a jury issue where plaintiff alleged statements were "false," "intentionally made" with "absolutely no knowledge"

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<sup>11</sup> *In Purvis v. Ballantine*, 14 Ga. App. 246, 250 (1997), for example, the Georgia Court of Appeals found insufficient evidence of actual malice where a defendant presented "affidavits which said that the statements made by them were made in good faith, and with a good faith belief that the statements were true and correct when spoken" and the plaintiff failed to point to contrary clear and convincing evidence of malice. Harkins has introduced just such a defendant's good faith affidavit. **R-37.**

and "made up [to] discredit Plaintiff's character and credibility"). Georgia's anti-SLAPP law mandates early dismissal of these claims not well grounded in fact or law.

3. Regardless of statutory privilege, Harkins' statements are not actionable because they are either opinion or they are true.

a. Harkins' statements of opinions are protected speech.

Harkins' allegedly defamatory statements #3 and #4, concerning the functioning of AHS, should be legally classified as opinion, incapable of being proven true or false, and cannot support a defamation claim:

1. Harkins' comments on animal welfare and the Atlanta Humane Society, generally: "And I'm passionate to a cause. And things are not right, and they need to change. And the people of Atlanta need to know. Things are desperately wrong."
2. Harkins' statement that she, personally and in her own experience, had not witnessed legitimate use of Atlanta Humane Society ambulances: "Yes, that's my experience." [emphasis added]

Statements of opinion are protected: "First, this Court must determine whether a reasonable fact finder could conclude that a statement implied a defamatory assertion. If the answer is 'yes', then the . . . court must determine whether the defamatory assertion is factual enough to be proved true or false." *Brewer v. Purvis*, 816 F. Supp. 1560, 1580 (M.D. Ga. 1993) (citations omitted); *Gast v. Brittain*, 277 Ga. 340, 589 S.E.2d 63 (2003) (rejecting defamation claims about statements regarding "immorality" and alleged implication that plaintiff condoned child abuse).

A writer cannot be sued for "simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be)." *Collins v. Cox Enterprises, Inc.*, 215 Ga. App. 679, 680 (1994); *Mathis*, 276 Ga. at 22 ("late night rhetorical outburst of an angry and frustrated person" opinion). Only where an expression can both "reasonably be interpreted as stating or implying defamatory facts," and is "capable of being proved false," is it actionable. *Eidson v. Berry*, 202 Ga. App. 587, 588 (1992).

Whether the AHS performs its duties "wrong[ly]," as stated by Harkins, is a matter over which "reasonable men might entertain differing opinions." *Elder*, 205 Ga. App. at 144 (quoting *Bergen*, 176 Ga. App. at 747). Moreover, the relative abilities of the Executive Director are "wholly subjective [matters] and not capable of proof or disproof." *Id.* Assertions that AHS has not measured up to the standards desired by the community cannot be held libelous. *Kendrick*, 210 Ga. App. at 377; *Collins*, 215 Ga. App. at 680.

Similarly, when Harkins speaks from her own experience regarding the lack of use of ambulances by AHS, her own subjective experience is opinion, incapable of being proven true or false. Harkins "[was] free to express to [others] [her] own opinions concerning [Plaintiffs'] professional abilities and the quality of

[animal care] that [Plaintiffs] . . . afford[ed]." 205 Ga. App. at 144 (emphasis added).

b. Certain of Harkins' statements are true or not defamatory, as admitted by AHS, and thus not actionable.

Harkins' three other statements are not actionable because the broadcast, AHS' own admissions, and the entire record shows that they are both true and not defamatory. See Harkins' Appellate Brief, filed April 7, 2003, Ex. D (summary of evidence), attached hereto.

Truth is an absolute defense against libel claims. Ga. Const. 1983, Art. I, Sec. I. Par. VI; O.C.G.A. § 51-5-6. "Georgia law puts the burden of proving falsity on the plaintiff," and statements need only be "substantially accurate." *Straw v. Chase Revel, Inc.*, 484 U.S. 856, 361 (1987); *S & W Seafoods Co. v. Jacor Broadcasting*, 194 Ga. App. 223, 235 (1989). If a statement is not defamatory, it also cannot support a defamation action even if false. *Cox Enterprises v. Nix*, 274 Ga. 801, 803 (2002). If the record is clear, the truth and lack of defamatory nature are questions of law.

AHS admits in the very broadcast claimed to be defamatory, and in AHS' own affidavits, the substantial truth of Harkins' comments.

**See Ex. D.** First, AHS admits the precise fact that it does not operate a 24 hour clinic. See **R52, 432** (Garrett Aff.); WSB/TV

Broadcast transcript. **R37, 275-278** (Murphy Aff.); **R37, 279-283** (Liles Aff.). Statement #1 is both true and not defamatory.

Also, AHS admits that it did not operate an ambulance service providing medical care in transit as advertised. See **R52, 432** (Garrett Aff.); **R37, 275-278** (Murphy Aff.). Gwen Harley, former veterinary clinic manager at AHS, testified that the clinic was not open 24 hours a day, animal cruelty investigation rarely occurred, and that the ambulance service was only used "three times" during her tenure and only after she grudgingly "convince[d] colleagues to provide ambulatory services" when the kennel supervisor was on vacation. **R37, 284-288** (Harley Aff.). Another staff member testified that she only saw the ambulance used to "carry mulch." **R37, 279-283** (Liles Aff.). Statement #4 is substantially true and not defamatory.

On the final issue, "formal" animal cruelty investigations, affidavits confirm that despite seeing such evidence of abuses as "dog's ears cut with a pair of sheers," AHS failed to conduct consistent "formal" investigations of animal cruelty. **R37, 275-278** (Murphy Aff.). In other shelters, "such instances are routinely investigated with great thoroughness and often end with convictions." **R37, 283** (Liles Aff.). These allegations of AHS' failure to instigate animal cruelty investigations stem from eyewitnesses' specific knowledge of such events.

Eyewitness testimonies, and often AHS' very own concessions, speak to the essential truth of Harkins' statements and, accordingly, require dismissal of AHS' allegations of defamation.

Therefore, the Court of Appeals was correct that "undisputed facts of record here indicate that the statements made by Harkins were protected statements under the anti-SLAPP statute, [and AHS'] lawsuit should have been dismissed." *Harkins*, 264 Ga. App. at 360.

Harkins statements were privileged, there was no showing of malice, some were protected opinions and others were admittedly true based upon AHS own affidavits and documents.

#### **CONCLUSION**

If AHS defamation suit were well-grounded, it could move forward. But the record here shows that AHS baseless lawsuit must fail under the anti-SLAPP statute. Harkins has had to defend against a SLAPP suit for years. All she did was speak out to help the helpless animals that are our friends, companions, and sometimes our cast-aways. It's high time for the anti-SLAPP statute to protect her.

For all the foregoing reasons, Ms. Harkins respectfully asks this Court to affirm the Court of Appeals and remand to the trial court for entry of dismissal and assessment of reasonable fees and costs under O.C.G.A. §9-11-11.1.

Dated: This the \_\_\_ day of May, 2004

Respectfully submitted,

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